

Swiss Commercial Law Series

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Volume 14

Arbitrating Antitrust and Merger Control Issues

Marc Blessing

Featuring:

- An Inventory of Salient Issues in Antitrust Arbitrations
- Flash-lights on the New EC Regulation 1/2003
- The Current 2002/2003 Reform of the EC Merger Regulation in the Light of the Most Recent Cases
- A Review of 30 Commission Decisions Providing for Arbitration for the Purpose of Monitoring Behavioural Commitments
- Critical Analysis of Solutions Adopted so Far
- Reflection on Best Practices and Draft Standard Models for the Commitment to Arbitrate Behavioural Undertakings as well as for the Arbitrator's Mandate
- Improving the Process: The MTF and the Arbitrator Working as a Unique and Complementary Tandem

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Preface of the Author

It appears that, for decades, the approach of the European Commission towards private arbitration has been characterised by a certain mistrust or suspicion. Initially, this attitude may somehow have been linked to the uncertainty, in the 1970s, as to the arbitrability of competition law issues, in view of the fact that – in competition law matters generally – public interests are heavily at stake. Moreover, it appears that the Commission had (and to some extent may still today have) a somehow limited confidence in the capability and professional knowledge of private arbitrators. In any event, as early as in the 1973 decision in the matter of the *Transocean Marine Paint Association*, the Commission ruled that the individual exemption is granted on condition that the parties shall comply with the duty to inform the Commission immediately in respect of the outcome of any arbitration dealing with specific provisions of the relevant agreement.¹ Similar explicit obligations can also be found in some of the most recent decisions hereinafter discussed. Such commitments will allow the Commission to control the compliance, by the parties, with respect to commitments imposed on them by the EU Commission.

Has the European Commission somehow **“re-discovered” the virtues of and advantages offered by the arbitral process** as an effective means of monitoring compliance with ongoing and future commitments imposed on the parties? Does the Commission appropriately make use of the complementary function as may be assumed by arbitral tribunals? Do we see a new era emerging in the field of international arbitration? And to what extent is this an arbitration *sui generis*, or a regulatory arbitration?

In fact, the tandem **“EU Commission – Arbitral Tribunal”** offers new perspectives and an entirely new quality for monitoring any kind of structural or behavioural commitments, be it (i) in the framework of **Article 81 (3) EC**, or (ii) under the scope of **Article 82 EC**, or (iii) under the merger control regime of the **ECMR**.

However: What are the perspectives of this new era of arbitral practice? How should an arbitral tribunal deal with these multiple new challenges? And: what will be the requirements for a new generation of highly qualified legal counsel and arbitrators, equally familiar with matters of international arbitration as well as with competition laws?

¹ OJ [1974] L 19/18, Dec. 1974/16/EEC; see also the appellate decision of the ECJ, Case 17/74, reported [1974] ECR 1063, 1080. The ECJ particularly confirmed that *„since Article 85 (3) constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article 85 (1), the Commission must be in a position at any moment to check whether the conditions justifying the exemption are still present”*. See hereto Assimakis P. KOMNINOS, Arbitration and the Modernisation of European Competition Law Enforcement, World Competition, 2001, 215.

Table of Contents

I.	Introduction: Europe Is Catching Up	9
II.	Inventory of 42 Antitrust Scenarios Arising in International Arbitration	13
	A. Jurisdictional Issues: Ex officio Examination?	13
	B. Suspension?	15
	C. Parallel Proceedings	17
	D. Interim Measures	18
	E. Legal Privilege and the Production of Documents	18
	F. Specific Evidence Rules	20
	G. Extraterritorial Application	20
	H. Can Sanctions Under Competition Laws Be Avoided?	22
	I. Extension to the Parent Co: May Tribunals Apply Standards Similar to Those Applied by Competition Authorities?	23
	J. Quid Under the New Regulation 1/2003?	24
	K. The Trouble of Article 81 (2) EC; the Restitution Issue	25
	L. Abuse of Dominant Position: Practical Issues Regarding the Market	25
	M. The Overall Contractual Network – and the Consequence for the Procedure and the Examination	26
	N. Dominant Position and Pricing Issues	28
	O. Dominant Position and Refusal to Deal; Essential Facility	29
	P. Sanctions	30
	Q. US Class Actions	30
	R. State Aid Issues	30
	S. Most Antitrust Arbitrations – Sooner or Later – Lead to a Negotiated Settlement; What Does that Mean for the Tribunal?	31
	T. Consent Award	31
	U. “Post-fine” Mediation Procedure	32
III.	The Current Reform Process: Changing Regulatory Frameworks for the Enforcement of Articles 81/82 EC and for the Merger Control under the ECMR	33
	1. New Procedural Rules Implementing Articles 81/82 EC Treaty	33
	2. New Regulatory Framework of Merger Control: From the ECMR 1989 to the ECMR 2003	36
	3. The Green Paper and Discussions in 2002: A Brief Overview	38
	4. Commission Decisions Annulled by the CFI: A Healthy Blow?	40
	5. The December 2002 Reform Package	43
	6. New Draft Guidelines on Best Practices, on Horizontal Mergers and Efficiencies and on Vertical and Conglomerate Mergers	46
IV.	Review of the Basic Elements of EC Merger Control	49
	1. Concentrations	49
	2. Change of Control	50
	3. Community Dimension	51
	4. Relevant Market	52
	5. Collective Dominance	53
	6. Conglomerate Mergers	57
	7. Ancillary Restraints	58
	8. Notification Requirement	58
	9. Pre-Notification and Confidential Guidance	59
	10. Sanctions	60
	11. Dawn-Raids and Other Investigative Powers (and Duties)	61
	12. Legally Binding Timetable	62
	13. Phase I Investigation: Four to Six Weeks	63
	14. The Simplified Procedure	64
	15. Serious Doubts: Phase II Investigation – Four Months	64
	16. Statement of Objections of the Commission and Phase II Commitments by the Parties	65
	17. Article 8 (2)-Clearance and Scope of Review	66

18. Significance of Remedies and Commitments	67
19. Structural Remedies – So Far Preferred	70
20. Best Practice Guidelines for Divestiture Commitments, of 2 May 2003	72
21. Behavioural Remedies	75
22. Different Requirements for Commitments	78
23. Commitments Offered – Or Imposed?	79
24. Failure to Honour Commitments, and Consequences	80
25. Soft Commitments Monitored by Arbitration	81
26. A caveat: Special Knowledge Will Be Required	82
27. Table of 30 Commission Decisions Reviewed	83
V. Five Article 81 (3) EC Cases Referring to Arbitration	84
1. Campari-Milano SpA (1977)	84
2. United International Pictures (UIP) (1989)	85
3. European Broadcasting Union (EBU) (1993)	88
4. Protection and Indemnity Clubs (P&I Clubs) (1999)	89
5. British Interactive Broadcasting/Open (1999)	90
VI. 13 Phase I Merger Review Cases Where the Commission Accepted “arbitration” as a Remedy	91
6. Elf Aquitaine – Thyssen/Minol	91
7. British Airways/TAT (1992)	92
8. Swissair/Sabena (II) (1995)	93
9. Alcatel/Thomson CSF – SCS (1998)	94
10. Carrefour/Promodès (2000)	97
11. BSkyB/Kirch Pay TV (2000)	99
12. Shell/BASF/JV-Project Nicole (2000)	102
13. Vodafone Airtouch/Mannesmann (2000)	104
14. Glaxo Wellcome/SmithKline Beecham (2000)	110
15. Vivendi/Canal +/Seagram (2000)	111
16. Pernod Ricard/Diageo/Seagram Spirits (2001)	113
17. SEB/Moulinex (2001)	114
18. Telia/Sonera (2002)	116
VII. 12 Phase II Merger Review Cases Under Art. 8(2) ECMR – The Commission Accepted “arbitration” as a Remedy	122
19. Du Pont/ICI (1992)	122
20. Kimberley-Clark/Scott (1996)	124
21. Boeing/McDonnell Douglas (1997)	125
22. Guinness/Grand Metropolitan (1997)	133
23. Danish Crown/Vestjyske Slagterier (1999)	134
24. Sanitec/Sphinx (1999)	136
25. Allied Signal/Honeywell (1999)	137
26. Dow Chemical/Union Carbide (2000)	142
27. Shell/DEA (2001)	146
28. BP/E.ON (2001)	150
29. Südzucker/Saint Louis Sucre (2001)	152
30. General Electric/Honeywell (2001)	153
VIII. Other Examples: The New Commission Regulation No.1400/2002, and a Recent Decision of the Swiss Competition Authority	157
1. The Commission Regulation (EC) No. 1400/2002, of 31 July 2002, for the Motor Vehicle Sector	157
2. The Decision of the Swiss Competition Authority of 18 November 2002 in the ETA [Swatch]-Case	158
IX. 27 Observations on the 30 Reviewed Cases	161
1. Hard And Soft Commitments Imposed By The Commission	161
2. Independent Arbitration to Serve as a Kind of Guarantee: Neutral Body “With A Fresh Pair of Eyes”	162
3. Neutral Venue	162
4. No Language Problem	163
5. Caveat: Expert or Arbitrator – These Are Different “Animals”!	163
6. The Arbitration-Commitment as an <i>erga omnes</i> -Offer	164
7. Caveat: Correct Appointment Procedure Is Important	166

8. Sole Arbitrator, or an Arbitral Tribunal of Three Persons?	167
9. Ad hoc Arbitration, or Institutional Arbitration?	167
10. The Assistance By an Experienced Arbitral Institution Such As the ICC Would Be Very Important	169
11. Specificity: An Arbitration sui generis	170
12. The Arbitral Process Must Guarantee a Speedy Resolution	170
13. Importance of Interim Measures	171
14. The Arbitral Process is Clearly and Narrowly Focused	172
15. Regulatory and Non-Regulatory Review	172
16. Bifurcation of the Proceedings	173
17. Applicable Law	174
18. Establishing a prima facie Case Only: The Arbitral Process is Attractive for the Weaker Party	175
19. "Pendulum Arbitration" or: "Russian Roulette"	176
20. Arbitration Maintains the Confidentiality	176
21. Is the Arbitrator Bound by the "Yardsticks" Set by the Commission?	177
22. Are the Commission's "Yardsticks" Binding Upon Third Parties?	178
23. Quid About the Commission Monitoring the Process and the Award?	180
24. The Commissioner as amicus curiae Before the Arbitral Tribunal?	180
25. Consequences of an Arbitral "Verdict"	181
26. Outcome: Civil-Law Sanctions and Potentially Administrative Sanctions	181
27. Waiver of setting Aside Procedures; Sanction in Case the Award Would Not be Honoured	182
X. Proposals and Recommendations	183
1. Some Observations Regarding the Cases Decided So Far	183
2. Best Practice Guidelines and Model Texts for the Commission and the Merging Parties	185
3. Draft Model Commitment Submitted to the Commission for Arbitrating Behavioural Undertakings	186
4. Draft Model Acceptance of the Arbitrator(s) Mandate	192
5. Best Practice Guidelines for Arbitral Institutions	193
6. Improving the Commission Notice on Remedies	194
7. Final Conclusions: The EU Commission and the Arbitrator Working as a Unique and Complementary Tandem	194
Annexes	199
Annex 1: Summary Regarding the Commission's Reference to "arbitration" as a Remedy	200
Annex 2: Case Scenarios of Antitrust Arbitrations	209
About the Author	216

I. Introduction: Europe Is Catching Up

While **private law enforcement** of antitrust matters has always been a cornerstone of the US approach – an approach facilitated by various means and tools which as such are unknown over here² – Europe now appears to catch up, in that, during the past decade, a significant number of disputes involving issues under Articles 81/82 and the EC Merger Control Regulation has been **submitted to private arbitration**.

While this is not the place to provide a detailed general account of these arbitrations, it nevertheless seems appropriate to at least provide an account of the multifold issues that have arisen (and will continue to arise) in antitrust arbitration. Herein below **Part II**. The idea in Part II is – for the purpose of this study – to only set the scene, identifying the numerous problem areas and case scenarios, identifying the more particular questions that arise thereunder and which had to be dealt with by arbitral tribunals. However, this will not be the place to discuss the answers to these case scenarios; such answers, due to the complexity of many of the issues, would double the volume of this booklet. Nevertheless, the author has flagged out many answers as had been given in arbitral practice in an earlier writing.³ Suffice it to add that practi-

² Such particular tools which are available in the United States, are for example: The availability of **treble damages** for a plaintiff invoking an antitrust injury to business or property (which is not only a very serious threat, but also operates as a strong incentive for any party to denounce anti-competitive behaviour and to start proceedings). The availability of **discovery** based on the Federal Rules of Civil Procedure. The possibility of a party to demand the adjudication by a **jury trial** in any civil action which may result in treble damages (and the *war stories* regarding jury trial verdicts promise to be a never ending subject and indeed concern). The availability of a **class action** is another “Damocles sword”, and the recent vitamin case of Hoffmann-LaRoche may come to mind, as well as the class action proceedings concerning the price fixing reproached to Sotheby’s). A further significant element is the availability of a **summary judgement** (mostly after a pre-trial discovery). A further tool and indeed threat is the US approach to the so-called **passing-on defence**, for instance discussed in the case *Hannover Shoe Inc. v/United Shoe Machinery Corp.*, 392 US 481 (1968), in that an injured party may claim the entire quantum of damage notwithstanding the fact that it may have had a possibility to recover a significant part of the damage by, for instance, increasing its prices (whereas in most civil law countries the passing-on would indeed reduce the injured party’s entitlement to recover damages). A further significant aspect is the frequency and availability of **preliminary injunctions** based on Section 16 of the Clayton Act, and the *ex parte* availability of TROs (temporary restraining orders). A further feature is that, based on the Freedom of Information Act, documents and files generated in proceedings before the DOJ or FTC may also be **filed in a parallel or subsequent arbitration** (see for instance in *Solar Sources, Inc. v/US* 142 F. 3d 1033, 7th Cir. 1998). Finally, a particular aspect (which may also find its inroads in the EU) is the wide practice and availability of **plea bargainings** and **plea agreements** for the purpose of privately settling a matter with the State authorities.

³ The author discussed the various types of arbitration cases and their salient issues in a recent publication, written in the German language, analysing 77 practical questions that have arisen in arbitral practice: Marc BLESSING, EG/US Kartellrecht in internationalen Schiedsverfahren – 77 Aktuelle Fragen aus der Praxis, Helbing & Lichtenhahn, 2002 [ISBN 3-7190-2133-5]. The publication is also available in PDF format on the website of Bär & Karrer at www.baerkarrer.ch.

cally **all types of horizontal and vertical agreements** have given rise to disputes before private arbitral tribunals under the perspectives of Article 81 EC, and that many of these cases (particularly in the framework of licence agreements) involved Article 82 issues (by one party invoking that it had been victimised because of an abuse of the other party's dominant market power). Brief case summaries are described in the Annex 2.

A most significant reform in the implementation and enforcement of Articles 81/82 EC has been completed after a most extensive consultation process, resulting in **Regulation 1/2003** (entering into force as of 1 May 2004 when it will replace Regulation 17/1962); we will portray the most characteristic elements in the **Part III**, under Chapter 1.

The further chapters of **Part III** will then highlight the other most radical reform that has taken place: that of the **Merger Regulation**. The Reform Package will be put into the perspectives of the most recent merger cases and four significant annulments in 2002/2003 of Commission decisions by the Court of First Instance (CFI).

Merger control is indeed a fascinating process. In **Part IV**, we will take a closer look at the most significant elements of EC merger control, and discuss some of its most pertinent features in some detail, taking into account the most recent developments up until April 2003. **Arbitrators** dealing with merger review matters will need to have a thorough understanding of all of these elements (procedural and substantive) of the EC Merger Review. Most particularly, the "mechanics" of remedies/undertakings (in the sense of structural and behavioural commitments conceded by the parties to a proposed concentration) need to be understood, as well as the Commission's practice and its Notice on Remedies and other guidelines.

Thereafter, the **main focus** of the present study will be to analyse how the Commission, in past decisions, has dealt with the burden of monitoring commitments, by making reference to **arbitration**. Indeed, it is a relatively **recent phenomenon** that the EU Commission, in a significant number of recent decisions, has accepted commitments whereby parties will have to refer to international arbitration **as a means to police behavioural (and less frequently structural) commitments** which had to be conceded in order to obtain the "green light" under **Article 81 (3) EC**, or for clearing a proposed **concentration** in the framework of the **Merger Review** Procedure. However, a critical analysis of these references to arbitral procedures (so far envisaged or approved by the Commission) reveals some **surprising solutions**, at least in the eyes of the "traditional arbitrator". And some of these solutions indeed risk not to work out in real life and practice.

In this context, we will first review 5 cases of commitments in relation to Article 81 (3) EC – **Part V** – followed by a review of 13 Phase I merger cases under the ECMR 1989 – **Part VI** – and followed by a review of 12 Phase II merger cases – **Part VII**.

As we will see, the "journey" will carry us away from traditional perceptions of arbitration (or related methods of dispute resolution) into a different field of an **arbitra-**

tion *sui generis*, into a hybrid mixture combining essentially **two different functions** which the arbitrator will have to assume:

- being in one sense merely a kind of “*prolonged arm and instrument*” of the EU Commission, and
- being on the other hand vested with the ordinary judicial powers of an arbitrator, having the authority to finally adjudicate the claims of the parties.

A fundamental premise to be understood and accepted in this context is the fact that the EU Commission is **the guardian** as far as the monitoring of the EU competition policy is concerned, and that the Commission, therefore, can not as such delegate that authority, function and responsibility, not even to the most qualified and independent arbitral tribunal. For that matter, therefore, the Commission will require to have “**the last word**”, even over and above the finding of an arbitral tribunal. This, however, is not a totally new phenomenon: it similarly exists in other fields of – what we may term – “**regulatory arbitration**”, for instance in the area of the regulatory supervisions over financial markets and stock exchanges entrusted to arbitral tribunals. For this matter, arbitral tribunals will have a kind of an **advisory function**, or a function similar to that of an **expert**.

Within the same context of arbitral scrutiny over commitments, there is a significant likelihood that, moreover – and **in addition** to mere scrutiny of compliance under the terms of the Commission’s decision – contractual or quasi-contractual claims may arise, and for those matters the arbitral tribunal will be habilitated to exercise its **adjudicatory function** with the *imperium* provided to it on the basis of the relevant Arbitration Act at the seat of the arbitral tribunal, coupled with the strength of the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards.

Hence, arbitral tribunals are likely to have a dual function: advisory and adjudicatory, and it will be quite important for arbitrators to clearly know and understand on which page they are acting.

We will side-step in **Part VIII**, by taking a short look into neighbouring areas, one being the recent EC Block Exemption Regulation (BER) in the **motor vehicle sector**, the other being a recent decision of the **Swiss Competition Authority** (*Wettbewerbskommission*) in the ETA (Swatch) case.

What then are solutions so far adopted? Are some of the clauses adopted by the parties (and approved by the Commission) “**pathological**”? Or are they going to work in practice and “real life”? And: what are the most significant parameters of the tasks arbitrators may have to fulfil in the framework of the monitoring of antitrust commitments? This is the topic in **Part IX**.

The analysis will be rounded up in **Part X** by a number of proposals and recommendations, to some extent in the sense of “do’s and don’ts”. These should call for further reflection in view of establishing some “**Best Practices for the Monitoring of Commitments by Way of Arbitration**”.

Finally, a Chart will summarise the solutions so far adopted under the 30 Commission decisions. **Annex 1.**

Case scenarios which had been earlier described by the author, in addition to the issues referred to in Part II, are reflected in **Annex 2.**

* * *

II. Inventory of 42 Antitrust Scenarios Arising in International Arbitration

The purpose of this Part is to give a brief account and update of the most salient and almost typical issues which have arisen, and continue to arise, in the framework of international arbitration proceedings. The author had given an earlier account of **22 case scenarios**, taken from the practice during the 1990s, in one of his earlier publications.⁴ These case scenarios are reflected in **Annex 2** at the end of this book. Many of those issues have prompted very extensive debate in arbitral proceedings, and thousands of pages of legal opinions (and opinions of economists) have been filed on some of these issues.

It may be illustrative to highlight, in addition to those case scenarios of Annex 2, some of the practical questions with which arbitral tribunals are confronted. It is beyond the scope of the present book to provide the answers to these questions, and indeed, each of the 40 or more topics involves aspects which may have to be examined in greatest detail.

A. Jurisdictional Issues: *Ex officio* Examination?

1. The arbitral tribunal has convened an organisational meeting with the parties right at the start of the arbitration. In preparing for the meeting, the arbitrators study the disputed contract, and their "sense" tells them that the contract might contain various anti-competitive provisions, although no allegations to any antitrust issues were made, neither in the Request for Arbitration, or in the Answer and Counterclaim so far on file. The chairperson nevertheless had expected respondent to raise such issues at least at the meeting, but it did not.

What should the chairperson do?

Should such antitrust concerns, which the arbitrators may have sensed while studying the files, be raised *proprio motu* and *ex officio*?

Or would this be an inappropriate "assistance" and hint given to respondent whose counsel might not even be aware of any such problem areas?

Or else: would the tribunal be under a legal (or moral) obligation to raise the issue?

⁴ Marc BLESSING, Introduction to Arbitration – Swiss and International Perspectives, Swiss Commercial Law Series Vol. 10, Helbing & Lichtenhahn, 1999, p. 250 ss. [ISBN 3-7190-1838-5], in PDF-format available on the website of Bär & Karrer: www.baerkarrer.ch. See also the subsequent publication by Marc BLESSING, EG/US Kartellrecht in internationalen Schiedsverfahren – 77 Aktuelle Fragen aus der Praxis, Helbing & Lichtenhahn, 2002, [ISBN 3-7190-2133-5], equally available on the website.

Does the answer depend on a characterisation and assessment of the perceived infringement as being hard-core or "soft-core"?

2. Assume the Arbitrators, despite the silence of both parties, had voiced their concern regarding some anti-competitive provisions in the underlying contracts which seemingly had quite some effect on the behaviour of the parties.

One party (or both) then respond by arguing that the Tribunal should **not** deal with matters (or defences) **not** invoked by the parties, and should confine its mission to adjudicate what is put before them. Respondent confirms that it does not plead its case by invoking defences under Articles 81/82 or US antitrust laws (or other national competition laws).

Should the arbitrators accept such limited mandate, for instance based on the argument that arbitration is a **consensual** matter and that, therefore, the arbitrators would lack authority to expand their investigations into a (mine-)field which both parties may have reasons of their own to avoid?

Or should the tribunal not accept such a limited mandate, for instance considering that a tribunal – after all vested with a delegated **imperium** backed up by the relevant arbitration act prevailing at the seat of arbitration, and backed up by the 1958 New York Convention – is not solely the "servant" of the parties, but also owes its duties to the State providing the *imperium*, and towards deeply routed notions of legality, public policy and the like?

More particularly, should the arbitrators also be minded to make sure that the resultant award would be upheld in subsequent proceedings before State courts (for instance in the case of a challenge of the award in the country of its origin, or in the framework of enforcement proceedings in any State of secondary jurisdiction)?

3. The chairperson then nevertheless decided to raise the antitrust issue *sua sponte*, suggesting to the parties that the tribunal should be briefed, in the subsequent exchange of memorials, in respect of certain aspects of the underlying contract and their compatibility with relevant competition laws.

The lawyers found themselves in a dilemma. They then asked the tribunal to bifurcate the arbitral proceedings in a **Phase I** where the arbitrators would examine the case without at all raising or examining antitrust issues, concluding that Phase I with a considered/reasoned opinion of the arbitrators to be submitted to the parties. Thereafter, each party may request the arbitrators to open **Phase II** which would then put the matter into the perspective of Articles 81/82 or other antitrust laws.

How should an arbitral tribunal react to such a proposal?

Should it accept the proposal under certain precautions or disclaimers put on record?

B. Suspension?

4. A different situation: Respondent invokes that a provision under a technology transfer agreement violates the TT-BER of 1996⁵ (arguing that some provisions fall into the grey category, or even the black category), or argues that some provisions would be incompatible with the US Antitrust Guidelines for the licensing of intellectual property.

Claimant, however, maintains that those provisions would not be violative, that – if the contract had been submitted – the EU Commission would not have objected, or would “certainly” have issued a comfort letter.

Similarly, US counsel to Claimant argued that, in any event, the FTC (US Federal Trade Commission) or DOJ (US Department of Justice) would have applied a rule of reason test, and not the *per se* sanction, on the argument that, for that particular matter, the parties were not competitors and that, therefore, the relationship was vertical and not a horizontal one.

How should a tribunal react in respect of such issues?

Should the tribunal determine itself whether, under the prevailing perspectives, an exemption under Article 81 (3) EC would most likely have been granted by the Commission?

Should it determine, under a different scenario, that the scope of a block exemption has been transgressed, such that the agreement was no longer covered by Article 81 (3) EC?

Should it speculate itself how the FTC or DOJ might have assessed the situation?

Is it conceivable (or wise?) that the arbitral tribunal would ask a party to submit the matter to the relevant competition authority (such as the EU Commission or the FTC or DOJ)?

And that, in the meantime, the arbitration proceedings would be suspended?

Or else, assume Respondent requests the arbitral tribunal to stay the proceedings and to submit the matter to the Commission or other competition authority: Should the tribunal accommodate such request, even if resisted by the other party?

5. Six months into the arbitration, one party decided to submit the matter (debated in front of the arbitral tribunal) also to the EU Commission (or the FTC or DOJ). It requests the arbitral tribunal to immediately stay the proceedings until after the determination of the matter by the competition authority. The other party objects and argues that, in any event, the opinion or determination of the competition authority

⁵ Technology Transfer Block Exemption Regulation 240/96; this Regulation is also currently under review.

(EU Commission, FTC, DOJ), being only administrative bodies, would not as such be binding upon the arbitral tribunal.

Different views are expressed among the arbitrators. One argues that the arbitral tribunal has a judicial function which is independent from that of an administrative body. The other arbitrator recalls the 1991 *Delimitis v/Henninger Bräu* Decision and, more recently, the *Masterfoods* Decision of 14 December 2000,⁶ and draws the attention to the very explicit new Article 16 (2) of **EC Regulation 1/2003** (which will enter into force as of 1 May 2004).⁷

What kind of opinion should the arbitral tribunal adopt?

⁶ Case C-344/98 [2000] ECR I-11369.

⁷ **EC Regulation 1/2003** will replace Regulation 17/1962, implementing Articles 81–82 EC. The new Regulation marks a "**legal and cultural revolution**"; it marks a fundamental change abandoning the traditional approach of European institutions concerning the enforcement of EC Competition Law. The policy of a centralized enforcement through the Commission will be abandoned as from 1 May 2004, in favour of a directly applicable exemption system. The prior notification, so far required under Regulation 17/1962, will be replaced by an *ex post* examination through national competition authorities and national courts. The new system of a decentralized enforcement of the EU competition policy will require a much closer co-operation between national authorities, including the exchange of information and consultations, so as to ensure **uniformity** in the application of the EC Competition Rules. The Member States will have to enact implementing legislations necessary to ensure a coherent application of EC Competition Law (Article 12 EC), and Article 35 of Regulation 1/2003 requires Member States to designate the competition authority in such a way that the provisions of the Regulation are effectively complied with. In exceptional circumstances only, i.e. where public interest is at stake, the Commission will retain its prerogative to itself apply Articles 81 and 82 EC. The new Regulation provides for increased powers of the Commission and the national competition authorities to carry out investigations and inspections (including searches in the private homes of staff of the undertakings). The Commission will have to be informed by national competition authorities prior to adopting a decision requiring an infringement to be brought to an end, or a decision accepting commitments or withdrawing the benefit of a block exemption regulation (Article 11 (1)). The Commission may submit written or oral observations to courts of Member States, and Article 27 introduces a novelty in the sense of a right for complainants to be closely associated with the proceedings, hence giving them a "voice" once an infringement procedure is opened. As is obvious, quite a number of elements contained in Regulation 1/2003 are tailored around the new concept of an emerging **European Competition Network ("ECN")**. – While, up until now, the "music" of EC Competition Law was essentially played by the Commission as a "soloist", there will soon be an "orchestra" of 15–25 players to play that "music" composed by the EC Treaty, "arranged" by the Commission, with some "lyrics" by the European Court of Justice and the Court of First Instance. Not surprisingly, the "conductor" of this new "orchestra" will also be the EU Commission, and the Commission has also reserved its right to play the "first violin" where public interest so requests. However, whether this new orchestra – with musicians from Portugal to Poland, Malta and Cyprus – will be able to play "in tune" and according to same measures, will be something to be watched. Arbitral tribunals, although basically playing the same kind of music, do not seem to form part of this new orchestra. They play "chamber music", without a conductor, and with special soloists who will have studied their part with greatest care.

C. Parallel Proceedings

6. Parallel to an investigation before the competition authority, the arbitration case is also moving forward. Its focus is different, the first focusing on administrative sanctions and fines, the second focusing on the civil law consequences, damages etc. One party had to submit thousands of documents to the competition authority. The adverse party, in the framework of the arbitral proceedings, now requests the production of these documents as had to be submitted to the competition authority. Possibly, many of these documents might be relevant for the tribunal's determination of the relevant product markets, the geographic market, the assessment of entry-barriers, the assessment of vertical integration and foreclosure effects and the like.

Should the arbitral tribunal issue a Procedural Order or Interim Award, ordering the production of documents? Should it impose particular sanctions such as a daily penalty in case of non-compliance?

What about particularly confidential documents?

Should the arbitral tribunal consider issuing Protective Orders under which the documents would have to be submitted?

Should the arbitral tribunal have the authority to address itself directly to the competition authority so as to either obtain particular documents, or else, to obtain information on particular issues, or an opinion of the competition authority – as this is foreseen in respect of proceedings before national courts under EC Regulation 1/2003, Article 15?

Quid, if the Commission, knowing about the pending arbitration running in parallel to its own investigation, addresses itself to the tribunal, in analogy to Article 15 (3)(2) of EC Regulation 1/2003, asking it to keep the Commission informed on the developments, or asking it to provide a summary of the case, or for documents, or for a copy of any arbitral awards?⁸

And *quid*, if the Commission, on its own initiative, files an *amicus curiae* brief to the tribunal in the sense of Article 15 (3) of Regulation 1/2003? Should it be accepted in the files?

7. Proceedings are still pending in parallel: One party asks that a particular case-handler at the competition authority be requested, by the Tribunal, to testify as a witness. The other party opposes.

How does the arbitral tribunal determine the issue? Should this be permitted, or refused, and on what grounds?

Does the answer to such or similar questions depend on the question whether there are sufficient public interests involved, or would this not be a criterion?

⁸ All of such requests are contemplated in EC Regulation 1/2003 and will apply to national competition authorities including national courts.

D. Interim Measures

8. The availability of interim relief is particularly important in the framework of antitrust arbitration. It allows the tribunal to maintain a *status quo*, or to rule on such behavioural undertakings as may be most appropriate during the pendency of the reference. Good cause, irreparable harm and urgency will normally have to be shown by the claiming party.

Should security be required? How should it be determined?

Would it be appropriate for the tribunal to threaten periodic penalty payments in case of non-compliance? Is there authority for that? If unpaid, would it be appropriate that such daily or other penalties be added to any amount adjudicated in the framework of the arbitration?

E. Legal Privilege and the Production of Documents

9. One party has requested the production of documents. The other party opposes, invoking legal privilege in respect of a number of documents which are claimed to be attorney work products. The lawyers which were involved are US, German, Swiss and Turkish.

The requesting party invokes: First, that the opposing party should waive legal privilege, and if it does not, negative inferences should be drawn by the arbitral tribunal. Second, that under EU practice, only lawyers admitted in member-States of the European community would be protected, excluding US, Swiss and Turkish lawyers and third, that privilege would not extend to in-house counsel. The opposing party rejects all of these arguments.

How should the arbitral tribunal decide?

Should the arbitral tribunal apply different standards to protections afforded to documents of outside counsel and in-house counsel, having regard to the different jurisdiction areas and applicable standards?

Is it appropriate to draw negative inferences in case legal privilege is not waived?

10. Under Regulation No. 17/1962, parties have a duty to actively participate in the framework of an enquiry. They have to attend to requests for information under Article 11, and they may be investigated under Article 14. EC Regulation 1/2003 strengthens those provisions, in its Articles 18–22. No similar duty of pro-activity may exist in private arbitration.

How does an arbitral tribunal cope with this situation?

Does it simply draw negative inferences?

The Commission may place enquiries with Member States, third parties and competitors. An arbitral tribunal has limited tools in that regard. What strategies

can be developed and used by an arbitral tribunal such that, nevertheless, the tribunal will be enabled to reach a highly informed opinion on the matter?

11. The Commission's enquiry proceeds. A request for information directed against one of the arbitrating parties was answered unsatisfactorily and, as a consequence, the party was "dawn-raided" pursuant to Article 14 of Regulation 17/1962 (in future: pursuant to Article 21 of EC Regulation 1/2003). In that context, senior executives were examined with the assistance of local police. The other party obtains copies of several protocols through its access to the local police department and files these to the arbitral tribunal.

Are these protocols admissible as evidence?

Should the tribunal order the dawn-raided party to submit copies of such documents also to the tribunal?

12. The 1999 IBA Rules of Evidence suggest that each party should substantiate its case. Quite customarily, a party having a closer access to files will be expected to produce relevant documents (and the EU Commission has confirmed this view in several cases).

How should this be handled by arbitral tribunals in antitrust disputes?

What is the conclusion to be drawn from decisions such as the 2001 *Mannesmannröhren Werke* Decision⁹ (and the earlier 1989 *Orkem* Decision, followed by *Société Générale* in 1995) where human rights under Article 6 (1) HRC were discussed, and the notion that, therefore, a party does not have to incriminate itself (sometimes referred to as the "right to silence")?

How *relevant* is the Commission practice regarding a party's right to refuse the disclosure of information?

13. Antitrust cases typically include a large number of truly confidential documents.

How should confidentiality be protected? Should the tribunal take some guidance from the criteria discussed in the EC Commission Notice OJ 1997 C23/3 regarding Requests for Access to Files?

How should legitimate secrecy interests be protected, without violating rules of due process? Restricting access to documents which have to be submitted? Protective orders? Confidentiality undertakings?

⁹ CFI, Case T-112/98 [2001] ECR II-729; the ECJ upheld that the privilege against self-incrimination does not afford an absolute protection to the undertakings concerned; it does not apply in relation to information provided pursuant to a request for information under Article 11 (2) of Regulation 17/1962, but applies where the Commission makes requests under Article 11 (5), and where a penalty might be at stake.

Should the tribunal use an independent confidentiality adviser who will render a sanitized report?

F. Specific Evidence Rules

14. In several merger review decisions, the EU Commission has approved commitments which boil down to changing the burden of proof in favour of the weaker party, in the sense that it will only have to provide *prima facie evidence*. Unless the other party thereupon succeeds in proving the contrary, the tribunal would have to find against the merged party as the stronger party (also being the party closer to relevant information and documents).

To what extent should the *prima facie rule* also be applied to antitrust cases?

G. Extraterritorial Application

15. The contract is between two Panamanian companies and is governed by a non-EU substantive law (e.g. Swiss law or Panamanian law). The contract divides up the markets worldwide and restricts quantities.

Should the tribunal, over and above the chosen law, apply Article 81 EC, or the US Sherman Act, Clayton Act?

16. Long-term gas supply contracts between the Russian Gasprom and a European buyer provide for the applicability of German substantive law. Five years into the contract, the Russian supplier alleges that the long-term supply contract violates the 1991 Russian Anti-Monopoly Law (as revised 1995) and requests that the sales price be periodically adjusted to world market levels, threatening the immediate termination of the long-term supply contract.

Should the arbitral tribunal, beyond the German substantive law, moreover have regard to, or apply, the new Russian legislation?

17. Two European competitors are offering supplies of military products to the US government. It is alleged that they had internally divided up market shares and agreed on certain pricing structures and delivery terms which might be in violation of US procurement laws. The contract between the two European suppliers is governed by German law.

Should the arbitral tribunal request the parties on its own motion to be instructed on US regulations applying to procurement of military equipment?

18. Supply contracts made between a Turkish supplier and a Spanish purchaser. The Turkish company is said to be almost the sole producer of certain minerals, holding 90% plus of the world market share. The Spanish buyer refused to pay for the last

deliveries, alleging that the selling price is exorbitant. Turkish law governs the contract.

The Spanish buyer alleges an abuse of the Turkish company's "paramount position" under Article 82 EC.

How should the tribunal rule on such issue?

19. The extraterritorial application of competition laws and the effects doctrine have been a matter of very intensive debate in Europe as well as in the United States, and numerous landmark decisions have been rendered, for instance by the EU Commission, by the Court of First Instance, the European Court of Justice and by American courts. The *Eco Swiss/Benetton* Decision of the ECJ¹⁰ affirmed the public policy nature of the European competition law.

Does this suggest that there should be a general consensus that competition laws (such as those applicable in the EU, the USA, Canada, China, Japan, for naming but a few) should be applied by arbitral tribunals, or taken into account by them, **over and above** the particular national law chosen by the parties in the framework of their contract?

If the answer to the above is a NO, how could an arbitral tribunal justify that, for instance, US antitrust laws should be applied, and Articles 81/82 and the ECHR, but not similar laws and regulations enacted by, for instance, the Chinese government or the Ukrainian government?

20. Competition rules, in general, are considered to be mandatory by the legislator who enacted the same. They of course bind the local State court judge. However: to what extent do they also bind international arbitrators supposed to apply a yet different law (i.e. the substantive law governing a particular contract)? Arbitrators, when determining this question, normally take guidance from Article IV (2) of the 1980 Rome Convention, and many private international laws around the globe have, by and large, adopted the criteria proclaimed there. All of this is basic, and is not the issue, but:

The issue is whether, and if so, to what extent, competition laws, e.g. the Brazilian competition law, or the Chinese, or the Canadian, are not only intended to be of a mandatory nature, but in fact truly considered to form part of the much more restrictive notion of **public policy**.

Possibly, there is a distinction to be made between the basic competition policy, which as such is of a fundamental nature, and the nature of individual norms (which may "only" be mandatory, but not more, i.e. not forming part of public policy).

¹⁰ Case C-126/97 [1999] ECR I-3055.

In several cases, arbitral tribunals had to reflect on this characterisation, but it seems difficult to draw a dividing line.

H. Can Sanctions Under Competition Laws Be Avoided?

21. The parties, in their contract, have made a provision within their contractual re-negotiation clause in case the contract, or some of its provisions, should be held inapplicable by a relevant competition authority. In that provision, they unanimously stated that, irrespective of any determination made by the competition authority, there should be no civil law sanctions and, basically, no effects on the contractual parameters.

The question arises whether the parties – if they cannot escape the administrative (or public law) sanctions of an anti-competitive arrangement – are nevertheless free to themselves contractually determine any civil law repercussions or, as in this example, explicitly exclude these. One party argues for it. The other maintains that an effective competition law will always have to be based on two pillars, one being the administrative sanction (resulting in fines) and the other in civil law sanctions, resulting in the nullity, partial nullity of the agreement and civil law damages.

How should an arbitral tribunal decide?

22. In the same context, one party argues that an arbitral tribunal must apply the civil law sanctions in the same way as a local State court would do, arguing that this duty of an arbitral tribunal is a corollary and, so to speak, an implied term flowing from the affirmation of the arbitrability of competition law issues. In fact, as it is argued, arbitrability of competition law issues is only justified on the ground and premise that arbitral tribunals will sanction anti-competitive behaviour quite in the same way as State courts would do. The other party opposes and argues that arbitral tribunals are in no way the “slave” of any competition authorities and, in any event, should take a very liberal approach.

The “truth” may lay in between, but where? How should an arbitral tribunal define the “correct approach” to be taken?

In the same context: One party has submitted very extensive opinions on competition law aspects and several lever-arch files of materials, requesting the arbitral tribunal to follow up exactly that line. The other party argues that competition policy is not static, is constantly evolving and requires a dynamic reflection on new approaches. It referred to the significant changes in the perception, for instance, of the European Commission towards placing the essential focus on the economic effect of contractual provisions, as opposed to the previous scrutiny under more formal aspects.

Which orientation should an arbitral tribunal take, and what are, *inter alia*, the consequences on the arbitral procedure and, lastly, the conclusions to be drawn

as regards one of the most important decisions to be made upfront in the framework of an antitrust arbitration: the criteria for selecting competent arbitrators?

I. Extension to the Parent Co: May Tribunals Apply Standards Similar to Those Applied by Competition Authorities?

23. The contract is between a subsidiary S and X. X alleges that there are anti-competitive provisions and files a counterclaim not only against S but also against the parent company P, referring to numerous Decisions of the European Commission where the parent company was held responsible for acts done, or even for omissions, of its subsidiary.

More particularly, Respondent argues that P is liable not only under *alter ego* doctrines, piercing the corporate veil and similar notions (frequently discussed, and which need not be reviewed in this context), but also under the standards applied by the EU Commission which suggests that it would be sufficient for P to derive some benefit from anti-competitive contracts of S, for instance by cashing an increased dividend.

Moreover, P's liability would also be sufficiently established if P had financed operations of S and, in any event, if P had (or could have had) knowledge of contractual arrangements entered into by S.

In sum, Respondent argues that P can avoid its own liability as the parent company only if and when P succeeds to furnish tangible proof (i) that P had no knowledge of the contracts entered into by its subsidiary S, and (ii) that the subsidiary runs its own business, acting as an independent undertaking. Respondent's counsel made references to numerous cases, including the 1974 *Commercial Solvents*-decision and the recent *Stora Koparsbergslags* case, decided by the ECJ on 16 November 2000.

Obviously, as it is well known, competition authorities and courts have been very "sporty" in holding a parent company responsible, not only for acts but even for omissions vis-à-vis third parties.

The question is whether an arbitral tribunal is, can be or should be equally "sporty".

Should an arbitral tribunal take guidance from leading cases such as *Viho Europe* and others?¹¹

¹¹ *Viho Europe v/Commission*, [1996] ECR I – 5457.

J. *Quid* Under the New Regulation 1/2003?

24. Under the new Regulation 1/2003, parties will have to determine themselves whether agreements falling under Article 81 (1) EC might qualify for exemption under Article 81 (3) EC; no *ex ante* notification will be required, and will indeed not be possible anymore, except under Article 10 which however requires a public interest. Hence, the monopoly of the EU Commission will fall, and national courts and competition authorities will in future determine matters of exemptions, and indeed all matters under Article 81/82 EC, in an *ex post* examination. Decentralisation is the "magic" code word (which of course must not be taken to mean a re-nationalisation).

What are the consequences for arbitral tribunals?

25. It is quite obvious that the an examination of the four substantive conditions for applying Article 81 (3) EC are difficult matters. The two negative conditions require economic analyses in the market, and the two positive conditions will require active cooperation by the parties, and they will have to be asked to be forthcoming in their duty to substantiate the relevant elements, quite in the sense of the IBA Rules on Evidence and, by the way, in line with the allocation of the burden of proof under Regulation 1/2003, Article 2.¹²

Will arbitral tribunals have a function and authority similar to that of the national courts?

Fact is that they are not named in the Regulation, and they do not form part of the network which is being built up these days with the national competition authorities and the national courts. Would it be correct to conclude that arbitral tribunals will operate outside the ECN (European Competition Network), and will not be or become the "peers" of the Commission?¹³

26. The "landscape" of the enforcement of competition laws will significantly change as from 1 May 2004. The reference to national courts in Regulation 1/2003 does not seem to include arbitral tribunals, and arbitral tribunals most probably remain outside the ECN. Nevertheless, arbitral tribunals are likely to continue to play a pivotal role, and may gain an even more significant responsibility when adjudicating the most important antitrust disputes.

¹² Very basically, each party has to substantiate its case and, if necessary, bear the burden to prove facts favourable for its own position. The attacking party (mostly respondent, invoking the nullity of a contractual provision) will normally have to prove the elements falling under Article 81 (1), and the defending party (mostly the claimant) will have to prove the grounds for an exemption under Article 81 (3) EC.

¹³ At the occasion of the competition forum in Brussels on 10 April 2003, Professor Günther HIRSCH, President of the German Supreme Court in Karlsruhe, raised the question whether, under the Regulation 1/2003, national courts will be degraded to become the "*Erfüllungsgehilfen der Kommission*".

How should arbitrators get better prepared for their ever increasing responsibilities? How should they face the “challenge”?

The EU Commission, for instance, has announced the funding of training programmes for instructing national judges in matters of competition law. Should similar programmes be lined up, for instance by leading arbitral institutions, such as the ICC/LCIA?

Should there be a **Note on Best Practices** describing the functioning, the authority and the responsibility of arbitral tribunals when dealing with competition law issues?¹⁴

K. The Trouble of Article 81 (2) EC; the Restitution Issue

27. Anti-competitive provisions contained in a contract are null and void; see e.g. Article 81 (2) EC. This is a very severe sanction, since it applies *ex lege* (i.e. without a constituting act such as a judgment of a court), and *ab initio*. Whether the sanction can be reduced to a partial nullity of those provisions only, will be a crucial issue depending on the circumstances.

What is the experience in applying this sanction?

When considering nullity of the entire contract versus partial nullity, do you place a weight on boiler-plate clauses as may be contained in the contract suggesting that the validity of the contract should be maintained?

Do you place a particular significance to contractual renegotiation clauses, and what is their value?

How do you deal with the trouble of restitution: Assume one party has already expensed significant money in reliance on the validity of the contract or some of its clauses which, subsequently, are declared null and void: A claim for restitution would normally not seem to be available as a matter of civil law. However, should an arbitral tribunal “soften” this sanction, for instance taking guidance from the *Courage/Crehan* Decision of the ECJ of 20 September 2001?

L. Abuse of Dominant Position: Practical Issues Regarding the Market

28. The alleged abuse of a dominant position is one of the most frequently pleaded arguments in international arbitration.

¹⁴ These questions – and those more amply discussed below in the framework of monitoring behavioural commitments by way of arbitration – are going to be examined by the recently created **ICC Taskforce on Arbitrating Competition Law Issues**; the author was mandated to chair that Taskforce. Moreover, the “iai” has set up a working group to study similar issues.

How does an arbitral tribunal determine whether or not there exists a dominant position, or even a monopoly, or a collective dominance?

What are the practical means and tools for an arbitral tribunal to determine the geographic market? Even the availability of Commission Notices and of numerous decisions which the tribunal may have to scrutinise may not provide a reliable answer.

How does the arbitral tribunal determine the relevant product market. How does it, for instance, determine whether it should distinguish between a primary market and a secondary market (second-hand market) for hardware products?

How should it determine the product market in respect of pharmaceutical products, thereby having to examine entry-barriers due to IP-portfolios, having to consider disputed substitutability of products as a function of certain active or non-active ingredients contained in a particular drug?

29. Once the geographic market and the product market are determined, difficult questions are likely to arise when, thereafter, determining the market share.

What are the tools available to an arbitral tribunal to be assisted in this respect?

Again the question will arise whether the tribunal could seek assistance from economists of a competition authority.

30. Many more aspects will have to be considered by an arbitral tribunal, and the parties might not be very forthcoming in providing relevant information and in producing the relevant documents.

How does an arbitral tribunal assess entry barriers, exit barriers?

How does an arbitral tribunal assess the effects of, e.g. long term supply contracts, or of an IP-portfolio, of rebate schemes, of information systems, of certain doorkeeper effects?

How does it determine whether or not predatory pricing practices are used?

How does it determine whether or not there is unlawful bundling or tying?

M. The Overall Contractual Network – and the Consequence for the Procedure and the Examination

31. As indicated in preceding questions, there may be many more aspects which an arbitral tribunal may have to consider so as to determine whether a party in fact enjoys a dominant position. This examination may have to include the party's **entire contractual network**, for instance through exclusive supply contracts which may have **foreclosure** effects to the detriment of competitors. Moreover, there may be **spill-over effects** resulting from a party's positioning in the market. Finally, the de-

gree of vertical integration may have to be valued as a further factor strengthening its dominant position.

Many of these aspects are situated beyond the narrow ambit of the contractual relationship between a dominant undertaking and its contract party X, and X may not have materials or evidence at hand enabling it to prove an alleged dominance.

What should the arbitral tribunal do in order to make sure that it gets the issue of dominance “right”?

What kind of inquiries can/should an arbitral tribunal make?

Should the arbitral tribunal reverse the burden of substantiation and proof and place all such burden on the dominant undertaking (as the undertaking which is closest to the relevant documentation)?

What practical help can be sought, for instance through examinations of economists, experts?

The Commission has the possibility to make inquiries with Member States and, most particularly, with competitors, other suppliers etc., i.e. with third parties, and a wide range of consultation can take place. Such tools are hardly available to arbitral tribunals. What tools can be used so as to make sure that arbitral tribunals can nevertheless render a highly informed decision?

32. The achieving of the dominant position as such is not a problem, but the abuse of that position is. The obvious difficulty is to determine what is “abusive” and what is not. Under the 1968 *Parke Davis* Decision and the 1983 *Michelin* Decision, the ECJ made clear that a dominant undertaking has an obligation to see to it that, despite its position in the market, an effective competition will be maintained.

Competition law, therefore, is likely to interfere with contractual rights and, in particular, with the exercising of intellectual property rights. In this difficult situation, arbitral tribunals had to deploy (and apply) **escalating ways and means** to remedy the situation, according to the following scale:

Scale 1: The arbitral tribunal simply applies or interprets the contract so that it can be considered legitimate (for instance under Articles 81/82 EC).

Scale 2: Where Scale 1 is not sufficient or not possible, an arbitral tribunal may have to rule that particular contractual provisions are inapplicable or cannot be relied on.

Scale 3: An arbitral tribunal may even have to sanction a particular omission of the dominant party (for instance in a sense as applied by the ECJ in the commercial solvents case).

Scale 4: The arbitral tribunal may have to consider a refusal to supply and may have to rule that the dominant party will have to continue supplies on reasonable commercial terms or on a non-discriminatory basis.

Scale 5: An arbitral tribunal may have to go so far as to impose the prolongation of a license agreement, or may have to impose a forced license. Or, else, an arbitral tribunal may have to rule on the opening up of a network under the essential facility doctrine. Furthermore, it may sanction predatory pricing.

All of the above measures are rather drastic and may heavily interfere with contractual freedom wherever one party enjoys a dominant position which, on allegation, it may abuse by its “power over the price”.

Such scenarios may suggest that the arbitral tribunal will be pushed in a role quite distinctive from that of an “ordinary” arbitral tribunal. And in fact, these scenarios have led arbitral tribunals to run the arbitral proceedings quite significantly different from others, and may inevitably lead to negotiations, to bargaining on necessary remedies, sometimes of a structural nature, but mostly on a behavioural nature.

How do arbitral tribunals cope with this change of role, as it is likely to occur, and what precautions do they take?

Why is it that arbitral tribunals are in fact **almost ideally placed** to deal with this kind of complications, and will be able to provide very substantial benefit to the parties unavailable in local court proceedings?

N. Dominant Position and Pricing Issues

33. Nevertheless, there are extremely difficult issues which may arise, for instance for the pricing of a product. While the pricing of bananas to be sold on the Danish market was a relatively easy case in the well-known *United Brands* Decision, the pricing of a pharmaceutical product (and the pricing of royalties) will always be much more difficult. In order to launch one **pharmaceutical product** on the market, the undertaking may have invested in hundreds of different research projects. Out of these hundreds of research projects, only a hand-full will reach the development stage and ultimately come on the market. And out of those latter ones, only one may generate significant income. What then is the appropriate “pricing” for that latter product.

What methods should be applied by an arbitral tribunal?

To what extent are those hundreds of R&D projects to be factored in as **sunk costs**?

Or should the arbitral tribunal only apply the **cost plus method**, as the licensee may argue?

34. Similar questions arise in the framework of the pricing for **access to networks**. The pricing of such access may be an extremely complex matter (unless there exist other competitive schemes which could provide comparative figures) and the amounts at stake are very significant. Discounted cash flow calculations are based on a number of hypotheticals, and review procedures over the years to come, carried out

in intervals, might have to be considered so as to provide for adjustments to changing circumstances and varying economies of scale.

How can arbitrators best be helped when analysing such economic issues.

And how best should economic experts be examined on such issues?

O. Dominant Position and Refusal to Deal; Essential Facility

35. In some recent cases, arbitral tribunals – in application of Article 82 EC – had to impose a forced license against a dominant party, quite in the sense of the well-known *IMS Health* case,¹⁵ or had to prolong a license contract for a certain period of time, or had to re-determine the royalty payable under a license, or had to force a dominant party to continue sales/supplies to a party (competitor) on a non-discriminatory basis for a certain period of time, or had to require the opening-up of a network in the telecommunications' sector, or gas, electricity etc.

How does an arbitral tribunal examine such difficult commercial and legal issues?

How does it assess **substitutability**, or other alternatives as might be available (although possibly for higher costs)?

When is a facility **essential**?

How should the degree of dependence between the two parties be rated/evaluated?

How should the tribunal determine "**discrimination**"?

How does the tribunal value or evaluate **justifying reasons**, as are regularly invoked by the dominant party? What about the (often alleged) lack of production capacity?

And lastly: is a **public interest** required, for justifying an arbitral tribunal's interference with the contractual freedom; or is that not required?

¹⁵ Case COMP/38.044, *IMS Health/NDC*, Decision of 3.7.2001 on interim measures (OJ L 59, 28.2.2002). The Decision on interim measures was suspended by the Courts pending a final judgment in the proceedings for its annulment, and these latter proceedings are also suspended at this time (April 2003) pending the outcome of a reference for a preliminary ruling from the Landgericht Frankfurt on questions related to the Commission's Decision, and oral hearings were held recently, i.e. on 6 March 2003. The first Commission decision had been widely commented; see e.g. Matthias CASPER, Die wettbewerbsrechtliche Begründung von Zwangslizenzen, ZHR (Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht), 166. Band, Dezember 2002, 685–707. See also Sven NORBERG, Developments in EU Competition Policy (commenting on Decisions during 2002), for publication in C. BAUDENBACHER, Neueste Entwicklungen im Europäischen und Internationalen Kartellrecht, 2003 (being published towards the end of 2003).

36. More particularly: When is it justified for an arbitral tribunal to interfere with the exercising of intellectual property rights?

When and under what circumstances would the exercising of IP-rights have to be considered as being "**abusive**", although the IP-right, under the applicable national law, might validly exist?

P. Sanctions

37. What are the civil law sanctions in case of an abuse of a dominant position? Under Article 82, there is no provision similar to Article 81 (2). Hence, national law will apply.

The arbitral tribunal might have to determine **partial nullity** or invalidity of certain contractual provisions.

It may have to impose certain **undertakings** so as to restore an effective competition? How can this be bargained for in the framework of arbitral proceedings? Is this then likely to become a **mediated procedure**, with **caucus** sessions typical for ADR methods? Would the arbitrators have to change their "hats" and assume a quite distinct function from that of a "traditional" arbitrator?

The tribunal may have to determine **damages**. How does it determine the **illegitimate gain**?

Q. US Class Actions

38. Several major antitrust class actions are pending in the USA that are potentially subject to arbitration clauses.

Are arbitration clauses enforceable in the context of a class action?

Does an arbitral tribunal have jurisdiction to deal with class action issues?

How does an arbitral tribunal deal with the logistics that are required?

R. State Aid Issues

39. Several arbitrations had to deal with State aid. For instance, in arbitrations in respect of M&A transactions, particularly in respect of certain representations and warranties, it was discovered by one party that the acquired entity – undiscovered in the framework of due diligence and undisclosed by the seller prior to closing the transaction – had received certain State aid (for instance, in one case, through a special rate for electricity, or in another case through a negotiated deal regarding land rehabilitation after closing a production mine, or in yet another case, the acquired company had, time ago, been able to negotiate a special tax scheme against a com-

mitment to employ 4'000 local workers). None of these schemes had been notified to the EU Commission as State aid under Article 88 EC. They therefore carry with them a considerable hidden liability.

How does an arbitral tribunal assess such matters? Should it ignore these altogether?

Should it somehow calculate the potential risks involved, including the risk of notification to the Commission through a competitor?

Should it make an award with a contingency provision in case the State aid would be declared incompatible with Article 87 (1) and 88 (2) EC?

Should an arbitral tribunal itself aim to assess (or speculate) whether or not the State aid would have been declared compatible with Article 87 (2) or Article 88 (3) EC?

Should it restore the economical in-balance, by evaluating the competitive effects of State aid?

S. Most Antitrust Arbitrations – Sooner or Later – Lead to a Negotiated Settlement; What Does that Mean for the Tribunal?

40. Wherever competition law interferes with contractual disputes, public law interests require to be taken into account, sometimes over and above the interests of the parties. Such new and extraneous perspectives may suggest that arbitral tribunals that follow traditional routes of arbitral practice may not provide satisfactory results. Often times, for instance, it will not be sufficient for an arbitral tribunal to only deal with the past, but rather, parties may need guidance and solutions for their future. However, arbitrators are not normally known to be the most creative *species* of mankind, and State court judges perhaps even less.

What then are the novel requirements for arbitrators being confronted with competition law issues? What special knowledge is required of them?

What kind of abilities, or special talents, should they have so as to “fit the bill”?

If it is no longer sufficient to “only be a good lawyer”, and if a sound understanding of economics has become much more important than but a few years ago: What should legal advisers, counsel and arbitrators do so as to become capable “*antitrust-disputologists*”?

T. Consent Award

41. The parties have negotiated their own settlement agreement. They then require the arbitral tribunal to incorporate the settlement agreement in an “Award on Agreed Terms” (“consent award”), so as to provide for enforceability under the New York

Convention of 1958. In particular, they agree that in future they will cooperate in some of their activities.

Quid, if your reading of the settlement agreement tells you that the new arrangement worked out between the parties might (again) have anti-competitive provisions?

Should the arbitrators refuse to incorporate the settlement in a document bearing their signatures?

What is the circle of persons that might be or become liable for antitrust violations? Would an arbitrator be protected by some immunity provisions as are contained in some institutional arbitration rules, such as Article 31 of the 1998 LCIA Rules?

U. "Post-fine" Mediation Procedure

42. Several parties to a cartel have been fined by the Commission. The fine was staggered on the basis of the leniency rules; the "whistle-blower" was able to avoid the fine almost entirely. [Hence, the fines as such are not a measurement for the civil law liability!] Of course, the administrative procedure before the Commission does not solve the internal matter between the members of the cartel. They, therefore, may agree to have the matter reviewed on the basis of a **mediation process**. The civil law implications are very considerable, and may be a multiple of the actual fines; there will also be repercussions on contracts made by the parties with third-party suppliers which now have become out of step.

You were asked to serve as mediator, and the expectation is a mediated settlement to be reached within 90 days. How do you proceed to make this work?

What are the different "stages" of the "play" up to the final "curtain"?

* * *

III. The Current Reform Process: Changing Regulatory Frameworks for the Enforcement of Articles 81/82 EC and for the Merger Control under the ECMR

1. New Procedural Rules Implementing Articles 81/82 EC Treaty

On 16 December 2002, the Council unanimously adopted the new **Regulation 1/2003** on the Implementation of the Rules on Competition. Certainly, this new Regulation marks the most comprehensive antitrust reform package undertaken since 1962. Regulation 1/2003, which will enter into force as of **1 May 2004**,¹⁶ will replace Regulation 17/1962.

By the new Regulation, there will be a shift from a **system of authorization** (under which all agreements had to be notified to the Commission in order to obtain antitrust approval) towards a **legal exception system**. The **monopoly** of the EU Commission will fall, and **NCA**s (National Competition Authorities) will take over together with National Courts to enforce the rules governing restrictive practices.

In short, the most essential features of the reform can be summarized as follows:

- The EU Commission's monopoly to apply Article 81 (3) EC will be abolished. Article 81 (3) will instead be directly applied by NCAs and Courts.
- The Commission will no longer issue exemption decisions; hence, DG Competition will mainly be involved with cases that may result in **negative decisions** under Article 81 (1) EC. In the absence of notifications, the Commission will have to deal more with complaints.
- The notification system will be abolished. Hence DG Competition will be relieved from this burdensome task, allowing it to concentrate on the investigation of serious antitrust infringements.
- For the companies, quite some bureaucracy will fall away, as they no longer will have to notify agreements to the Commission; with that, they will no longer be able to ask the Commission for an **ex ante** assessment of their transactions.

¹⁶ Hence on the day on which ten candidate Countries are likely to accede the European Union; and on the same day the new ECMR 2003 will enter into force. For comments in German on the new Regulation, see Silke HOSSENFELD/Martin LUTZ, Die neue Durchführungsverordnung zu den Artikeln 81 und 82 EG-Vertrag, Wirtschaft und Wettbewerb WuW 2/2003, 118–129, as well as the report by Karsten SCHMIDT, Die neue VO 1/2003 (Art. 81/82) – Eine kritische Analyse, presented at the Competition Law Conference in Brussels on 10/11 April 2003.

- On the other hand, they will have to assume full responsibility (and the risk) for the compatibility of agreements or practices with Articles 81/82, in view of the possibility of **ex post review** by national competition authorities or Courts. Self-assessment will be required.
- NCAs will be obliged to participate in the new **ECN** (European Competition Network) with the Commission for dealing with questions arising under Articles 81/82. This marks a **quite radical change** in the cooperation between the Commission and the NCAs. The allocation of cases will be made according to the individual situation, charging the best placed authority to investigate the matter.
- There will be an exchange of information and administrative assistance among all competition authorities within the ECN, and an **intranet** is being set up for the purpose.
- The co-operation between the EU Commission and National Courts will be strengthened in order to ensure a uniform interpretation and application.
- Where national authorities have started proceedings, the Commission may intervene and may even relieve a national authority of its competence, exercising its power to de-seize the NCA. Nevertheless, the Commission stresses the notion that NCAs shall be treated on the basis of equality, respect and solidarity.¹⁷
- There will be closer cooperation with national Courts applying the EC competition law. It is intended that the existing Notice on the Co-operation between the Commission and National Courts¹⁸ will be replaced by a new Notice.
- National courts may ask the Commission to transmit **information**, or request the Commission's **opinion**¹⁹ on questions concerning the application of EC competition law.
- The EU Commission and NCAs will have the possibility to submit **amicus curiae briefs** to National Courts applying Articles 81/82 EC.
- DG competition will nevertheless continue to advise companies where cases give rise to uncertainty, or where questions appear to be unresolved, and companies may thus wish to seek informal guidance from the Commission. If Community interest so suggests, the Commission may issue written opinions.²⁰
- The Commission intends to issue a number of **Notices** on the Application of Article 81 (3) EC, explaining therein the methodology as well as the relevant case law.
- An **Implementing Commission Regulation** will deal with the modalities for hearing the parties, complainants and other third parties in those cases where the Commission intends to issue a prohibition decision and/or impose fines.

¹⁷ Speech by Commissioner Mario MONTI at the St. Galler Kartellrechtsforum of 24/25 April 2003.

¹⁸ OJ 93/C39/05, of 13.2.1993.

¹⁹ The Commission has announced the issuance of a Notice on Opinions.

²⁰ The Commission intends to publish a Notice on the Issuing of Opinions.

- NCAs and National Courts will have to respect the **primacy** of Community Rules in matters of competition (Article 3 of Regulation 1/2003).
- The new Regulation should provide convergence of the rules applicable to transactions falling under Article 81 EC and should facilitate the completion of the internal market and a coherent application of EC competition laws even after the abolition of the Commission's monopoly.²¹

Recently, three landmark judgments of extraordinary importance for the application of Articles 81/82 were rendered by the **ECJ** (European Court of Justice). All of them were delivered upon references from National Courts for a preliminary ruling by the ECJ under Article 234 EC. In *ECO Swiss China Time v/Benetton*,²² the ECJ stated clearly that Articles 81/82 form part of the **public policy** and must be respected and **applied ex officio**.

In a further judgment rendered on 14 December 2000 in the case *Masterfoods*,²³ the ECJ confirmed that the Commission's Decisions applying Articles 81/82 are binding upon all legal bodies within the Community (national competition authorities and National Courts), subject only to the judicial review exercised by the European Courts in Luxembourg. Hence, a National Court cannot give a judgment which would contradict a decision by the Commission, and it may have to suspend the case and wait for a judicial review of the Commission Decision by the CFI, or to make a reference for a preliminary ruling for the ECJ. The gist of the Masterfoods judgment is now laid down in Article 16 of Regulation 1/2003.

The third judgment was pronounced on 20 September 2001 in the case *Courage v/Crehan*²⁴ where the ECJ clarified that an individual party can invoke the injury suffered due to an infringement against Article 81 (1) EC. It also clarified the effects of the nullity sanction under Article 81 (2) EC.

In future, NCAs may on their own initiative submit written opinions to a National Court and may even, if the Court so accepts, present an oral opinion on the case. Moreover, the EU Commission may, upon its own initiative, issue written opinions to National Courts and, likewise, may make oral statements.²⁵

The investigative powers of the Commission will be further strengthened, as can be seen from Articles 20/21 of Regulation 1/2003.²⁶ Among the extended powers is the possibility for the Commission to interview any person who may be in possession of useful information in the framework of a specific investigation. The Commission may

²¹ To facilitate the application of Articles 81/82, the Commission intends to issue a further Notice on the Affectation of Trade Between Member States.

²² Case C-126/97 [1999] ECR I-3055.

²³ Case C-344/98 [2000] ECR I-11369.

²⁴ Case C-453/99 [2001] ECR I-6297.

²⁵ Regulation 1/2003, Article 15.

²⁶ These provisions specifically take into account the ECJ case law as most recently expressed in the Roquette judgment of 22 October 2002 (C-94/00, Roquette Frères).

affix seals for the period of the inspection and may enter any premises where business records may be kept, including private homes. The latter power, however, requires the existence of a reasonable suspicion that incriminating information is likely to be found there, and the authorization of a national judge will be required. A proportionality of such investigative powers (in particular home searches) will be required, having regard to the seriousness of the suspected infringement and the importance of the evidence sought.

2. New Regulatory Framework of Merger Control: From the ECMR 1989 to the ECMR 2003

The Merger Regulation had been a product of some 17 years of discussion and development until it became enacted in 1989, entering into force on 21 September 1990 (hereinafter referred to as "**ECMR**" or "**ECMR 1989**").²⁷ The merger control regime is applicable in the entire EEA,²⁸ and provides the power to the Merger Task Force (**MTF**) of the Directorate-General for Competition of the European Commission in Brussels to review the major cross-border mergers, acquisitions and certain types of joint-ventures.²⁹ Important amendments to the ECMR 1989 were adopted on 30 June 1997 (which came into force as of 1 March 1998). The ECMR is undoubtedly a success story. In rounded figures, more than 2'200 concentrations were examined since 1990, whereof 90% had been cleared unconditionally, another 9% were cleared after the submittal of commitments, and only 1% had to be declared incompatible with the common market.³⁰

A number of **Notices** were published by the European Commission for the purpose of assisting in the interpretation of a number of important issues:

- the Commission Notice on **Remedies** acceptable under Council Regulation EEC No. 4064/89 and under Commission Regulation EC No. 447/98 (OJ 2001 C68/3),

²⁷ OJ 1990 L257/13, as amended by Regulation 1310/97, OJ 1997 L180/1, corrected by OJ 1998 L40/17. For the consolidated text see for instance BELLAMY & CHILD, European Community Law of Competition, 5th ed. 2001, Appendices-Volume, Appendix 33, 313 ss.; see also the Notes on Council Regulation 4064/89, reproduced at pp. 333 ss. Further regulations include the Regulation 447/98 (OJ 1998 L61/1) on Notifications, Time-Limits and Hearings; the most important Annex to Regulation 4064/89 is the Form CO, with accompanying Guidance Notes I-III.

²⁸ Comprising all EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK) as well as in the three EFTA countries Iceland, Norway and Liechtenstein.

²⁹ The Annual Report on Competition Policy is available on the internet at http://europa.eu.int/comm/competition/annual_reports/. The e-mail address for general queries (not for case-related matters) is comp-mergers@cec.eu.int.

³⁰ As of end of March 2003, 2'231 cases had been notified under the ECMR, whereof 1'871 were declared compatible under Article 6(1)(b), 98 with Article 6(2) commitments; further 22 were cleared compatible under Article 8(2), 62 under Article 8(2) with commitments, and only 18 prohibitions had to be pronounced. The statistics are currently updated at <http://europa.eu.int/comm/competition/mergers/cases/stats.html>.

- the Commission Notice on the **Concept of a Concentration** (OJ 1998 C66/5),
- the Commission Notice on the **Concept of Full-Function Joint Ventures** (OJ 1998 C66/1),
- the Commission Notice on the Distinction between **Concentrative and Co-operative Joint-Ventures** (OJ 1994 C385/1),
- the Commission Notice on the **Concept of Undertakings** (OJ 1998 C66/14),
- the Commission Notice on the **Calculation of Turnover** (OJ 1998 C66/25),
- the Commission Notice regarding **Restrictions Ancillary to Concentrations** (OJ 2001 C188/5),
- the Commission Notice on the Definition of the **Relevant Market** for the Purposes of Community Competition Law (OJ 1997 C372/5),
- the Commission Notice on **Restrictions** Directly Related and Necessary to Concentrations (OJ 2001 C188/5),
- the Commission Notice on Alignment of Procedures for Mergers (OJ 1998 L66/36),
- the Commission Notice on a **Simplified Procedure** for Treatment of Certain Concentrations, and Explanatory Note thereto (OJ 2000 C217/32),
- the Commission Notice on **Access to Files** (OJ 1997 C23/3), and
- the Merger Control **Best Practices Guidelines**.³¹
- Moreover, the website of DG COMP offers a very helpful 20-page **“Merger Notification and Procedures Template”**.³²

At the present times, the ECMR 1989 is subjected to a **thorough review**:

- The reform process was initiated by the **Green Paper on Review of the EC Merger Regulation**,³³ presented on 11 December 2001.
- Exactly one year later, on 11 December 2002, the Commission launched its **Proposal** for a **new ECMR** (Council Regulation on the Control of Concentrations Between Undertakings; hereinafter **“ECMR 2003”**), containing significant amendments to jurisdictional issues in its Section II.A., to substantive issues in Section II.B., procedural issues in Section II.C. and a number of other amendments in Section II.D.

³¹ Published on the DG Competition Website at http://europa.eu.int/comm/dg04/merger/en/best_practice_gl.htm.

³² Accessible at <http://europa.eu.int/comm/competition/mergers/others/20020826template.pdf>.

³³ COM (2001) 745 final. See Götz DRAUZ, Reform der Fusionskontrollverordnung, *Wirtschaft und Wettbewerb WuW* 2002, 444–449. A summary of the feedback in respect of the Green Paper can be found on DG Competition’s website at <http://europa.eu.int/comm/competition/mergers/review/comments.html>.

- On the same day, 11 December 2002, the Commission published its draft **Notice on Horizontal Mergers and Efficiencies**, inviting comments by 31 March 2003, announcing further a draft Commission **Notice on Vertical and Conglomerate Mergers**, still being under preparation, but due to come out during 2003.
- Moreover, the Commission presented a new **draft of Best Practices Guidelines** which was published on **19 December 2002** (with an invitation to file comments by 28 February 2003).
- Finally, on 13 December 2002, the Commission has published its new Regulation No. 17/1962 in draft form, i.e. **Council Regulation No. 1/2003** on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Doc. 14858/02, available on the website), *inter alia* abandoning the centralised scheme of Regulation No. 17/62; the new Regulation will enter into force as of **1 May 2004**.

3. The Green Paper and Discussions in 2002: A Brief Overview

The **Green Paper** of 11 December 2001 was followed by a wide-ranging consultation process within the business and legal communities. Essentially, the focus was (i) on proposals to modify the jurisdictional thresholds, (ii) on the procedural rules for the review,³⁴ and (iii) on the substantive test (dominance or SLC) to be applied. Moreover, (iv) it was expected that there should be more **recognition on merger-specific efficiencies** which ultimately are to the consumers' advantage.

A slightly different topic (which nevertheless gave rise to extensive debate during 2002) was the concern regarding the length of time required by the judicial review procedure at the level of the Court of First Instance (**CFI**).

For instance, the Commission's decision in *Airtours/First Choice* was reversed by the CFI,³⁵ but the judgment by the CFI came **33 months later**, hence at a time where

³⁴ For instance the introduction of a **"stop the clock" request** for three or four weeks in connection with the offering of remedies in Phase I or Phase II of the investigation. Other matters deal with the parties' right of defence and access to judicial review. Moreover, the **DG's economic capabilities** will need to be improved, having regard to the ever increasing complexities of merger cases, and a **peer review "Panel" system** in Phase II investigations should be introduced. The Panel, composed of experienced officials, should monitor all in-depth investigations and scrutinize the case-handlers' work with fresh eyes. Other reform proposals deal with a **earlier access to files** by the merging parties, particularly to critical or opposing third party submissions, and the possibility for a confrontation at a meeting is discussed. A consumer liaison function is being considered, thus giving the consumers a voice in the process. Also the Hearing Officers role should be strengthened so as to guarantee adequate protection of the merging parties' rights of defence and an appropriate conduct of the procedures.

³⁵ Judgment CFI of 6 June 2002, Case T-342/99 [2002] ECR II-2585. The judgment prompted numerous writings; see for instance Ken MÜLLER-TAUTPHEAUS, *Erstmalige Aufhebung eines Fusionsverbotes durch das EuG*, European Law Reporter ELR 9/2002, 328 ss.

the momentum for the merger was gone a long time ago; the CFI decisions in other cases took a similar amount of time, such as 33 months in *Gencor*, 35 months in *Kesko*, 41 months in *Endemol*. The **expedited procedure (fast track procedure)** was applied by the CFT in the two public bid cases *Schneider/Legrand* and in *Tetra Laval/Sidel*, and the judgments were rendered within 10½, respectively 9½) months. The latter two cases are also good examples showing that the CFI does not at all restrict its review to the legal issues only, but will carry out critical review on the evidentiary basis on which the Commission had rendered its decision, in the sense of examining whether the Commission has shown to the requisite legal standard that the concentration creates or strengthens a dominant position. However, a further appeal from the CFI to the European Court of Justice (**ECJ**) can be made, on points of law only, and the EU Commission filed such appeal to the ECJ in January 2003, essentially attacking the disproportionately high standard of evidence imposed by the CFI.³⁶

One of the heatedly debated issues during 2002 was the issue whether the Commission should stick to its criterion of the "**Dominance-test**" ("*creation or strengthening of a dominant position*"), or else, whether it should rather adopt the US concept³⁷ of the "**SLC-test**", i.e. the "*substantial lessening of competition-test*". Most commentators have, during 2002, expressed the opinion against adopting the US concept.³⁸ The

³⁶ It may also be noted in this context that the CFI is rather **reluctant** to grant the parties' application for organizing an **expedited procedure**. Nevertheless, out of some 40 applications made until April 2003, 16 cases were admitted to benefit from the fast track procedure, whereof 13 challenged merger decisions. The CFI is moreover reluctant to grant **interim relief**; all application but one (in *Kali und Salz*) were rejected so far. On the expedited procedure, see the Article by Kyriakos FOUNTOUKAKOS, *Judicial Review and Merger Control: The CFI's Expedited Procedure*, *Competition Policy Newsletter* 3/2002, p. 7–12.

³⁷ Since recently also adopted by the UK and Ireland.

³⁸ For instance, in respect of the *Boeing/McDonnell Douglas* case (IV./M.877, of 30 July 1997), one may say – in perhaps an overly simplistic analysis – that the US authorities (FTC) were lead to approve the concentration on the basis of the SLC-Test (and a notion close to the failing company doctrine, see the remarkably short opinion by Chairman Roger PITOFSKY), whereas the European Commission, applying the dominance test, was lead to reach the opposite conclusion, such that – at the eleventh hour of the Phase II review – a heavy package of structural and behavioural commitments had to be negotiated and conceded by Boeing. See the detailed report on that decision below. More recently, authors take the view that the two tests do not differ significantly, and in particular do not leave a gap. See e.g. Ulf BÖGE, *Muss die EU zum SLC-Test wechseln? Wirtschaft und Wettbewerb WuW* 2002, 825; also Mario MONTI in his address to the 7 November Merger Review Conference ("*Indeed, I believe that the dominance test, if properly interpreted, is capable of dealing with the full range of anti-competitive scenarios which mergers may engender*"); nevertheless, he indicated that he will propose a clarification regarding the notion of dominance in the current substantive test, to be inserted in a paragraph within Article 2 of the preambles to the Regulation, so as to make it clear that the so-called "**unilateral effects**" in situations of oligopoly will also be covered. See also the extensive reports presented at the 7/8 November 2002 Conference by Nicholas Levy, *Dominance vs. SLC: A Subtle Distinction?* and by Kevin R. SULLIVAN/Brian R. MEINERS, *Merger Analysis: SLC vs. Dominance* (on information, these reports will soon be published). – It is sometimes argued that the enforcement authorities both sides of the Atlantic ocean do not seem to operate on the same level; this characterization is however not accepted by Mario

ECMR 2003, as discussed below, reflects this discussion in its Explanatory Memorandum, Paragraphs 52 to 58.

As was announced by Commissioner Mario Monti in his opening address at the European Commission/IBA Conference in Brussels held on 7 November 2002, the reform package consists of (i) a new EC Merger Regulation, (ii) a new Commission Notice containing comprehensive Guidelines on the assessment of dominance in horizontal mergers (the draft is expected to be published for wider public consultations), (iii) a draft set of (new) Best Practice Guidelines on the conduct of merger investigations (for discussion with the legal and business community), describing *inter alia* the relationship between the Commission and the merging parties and interested third parties, as well as the timing of meetings, transparency and due process in merger proceedings, and (iv) certain proposed measures relating to the staffing and resources of DG Competition.

4. Commission Decisions Annulled by the CFI: A Healthy Blow?

Hardly have we seen ever before a more heated debate than that surrounding the CFI's annulments of three prohibition Decisions issued by the Commission in the cases *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*.³⁹ Moreover, the most recent judgments in *Largardère v/Commission*, *BaByliss v/Commission* and *Philips v/Commission*⁴⁰ have attracted very significant interest. Is the Commission shipwrecked? Is the Commission's reputation seriously damaged? Was its approach, factual analysis and legal assessment fundamentally flawed?

For our purpose, it is less important to join in the chorus of the critics. Rather, the question is whether the CFI's verdict over the fact-finding and legal assessment by the Commission has prompted the Commission to work on appropriate remedies and improvements. Fortunately, as we can say already now, this is the case. The review

Monti, who stressed the good cooperation between the US and European authorities in hundreds of cases (his speech at the Brussel XXth Forum of the *Studienvereinigung Kartellrecht*, of 10/11 April 2003). We may note in this context that there exists a US-EU Merger Working Group which has published its Best Practices on Cooperation in Merger Investigations, available on the website at http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf.

³⁹ *Airtours v/Commission*, Case T-342/99 [2002] ECR II-2585. *Schneider v/Commission*, Case T-310/01, CFI Judgment of 22 October 2002, not yet published in the ECR (as of April 2003); *Tetra Laval v/Commission*, CFI Judgment of 25 October 2002, not yet published in the ECR (as of April 2003). See also the comments to the *Airtours*-judgments in the European Law Reporter (ELR) by Ken MÜLLER-TAUTPHAEUS, *Erstmalige Aufhebung eines Fusionsverbotes durch das EuG*, ELR 9/2002, 328 ss.; on the *Schneider* case, see Lars Volck MADSEN, *Commission's Second Defeat in Merger Cases*, ELR 2/2003, 55 ss., and on the *Tetra/Sidel* case, see the article yet to be published in ELR 5/2003.

⁴⁰ *Largardère SCA, Canal+ SA v/Commission*, Case T-251/00, Judgment of 20 November 2002 (not yet published in the ECR); *BaByliss v/Commission*, Case T-114/02, Judgment of 3 April 2003 (not yet published) and *Philips v/Commission*, Case T-119/02, Judgment of 3 April 2003 (not yet published).

of the Reform Package (as described below) shows that the Commission has “learned its lesson”, that it has taken the criticism very seriously (even though the Commission does not agree with some of the statements made by the CFI, and has brought an appeal to the ECJ). Hence, the CFI verdict came indeed at an almost ideal moment in time when the Reform Package was being worked out by the Commission.

In *Airtours/First Choice*, the Commission based its prohibition on its assessment that a collective dominance will be created and that the parties will have an incentive to co-ordinate their market strategy through tacit collusion within the oligopoly. However, the Commission’s Decision was based on a mere assumption which did not meet the requirements pronounced by the CFI. The discussions regarding the *Airtours* Judgment prompted reflections on the issue whether or not Article 2 ECMR 1989 would be sufficiently wide to cover not only co-ordinated effects within an oligopoly, but also unilateral effects, and some commentators argued that the dominance test would be too narrow to cover unilateral effects.⁴¹ Basically, the dominance test under Article 2 (2) ECMR requires cumulatively a creation or strengthening of a dominant position as well as a resulting significant impediment of effective competition in the Common Market (or in a substantial part thereof), whereas under the SLC Test under the Clayton Act would seem to set a lower threshold in that only the requirement of a lessening of competition would have to be satisfied.⁴²

The scholarly debate has found its way into the ECMR 2003, in the recitals as well as in Article 2, by adding a new sub-paragraph 2. The new sub-paragraph reads as follows:

For the purpose of this Regulation, one or more undertakings shall be deemed to be in a dominant position if, with or without co-ordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition.

The wording “with or without co-ordinating” will catch the unilateral effects. Moreover, the new wording must be appreciated as a clarification reflecting the practice of the ECJ established in *Gencor*.⁴³ It also has the advantage of now reflecting an independent notion of “dominance” which is distinct from the concept of dominance under Article 82 EC. The assessment of oligopolies is now further explained in a new Paragraph 21 of the Recitals within the ECMR 2003:

In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under cer-

⁴¹ Compare e.g. the Report by John FINGLETON, Does Collective Dominance Provide Suitable Housing For All Anti-Competitive Oligopolistic Mergers?, IBA-EC Merger Control Conference, Brussels 7/8 November 2002, See also Nicholas LEVY, Dominance vs SLC – A Subtle Distinction? IBA-EC Merger Control Conference, Brussels 7/8 November 2002.

⁴² Clayton Act, 323 § 7, 38 Stat. 730, 731–732 (1914), Version 15 U.S.C. § 18 (1994).

⁴³ Case T-102/96, *Gencor v/Commission*, T-102/96, [1999] ECR II-753, Paragraph 200.

tain circumstances, the elimination of important competitive constraints that the merging parties exerted on each other, as well as the reduction of competitive pressure on the remaining competitors, may, particularly in these markets, be detrimental to competition unless these effects would be constrained by the reaction of competitors, customers or consumers. For that purpose, the notion of dominance within the meaning of this Regulation should, therefore, encompass situations in which, because of the oligopolistic structure of the relevant market and the resulting interdependence of the various undertakings active on that market, one or more undertakings would hold the economic power to influence appreciably and sustainably the parameters of competition, in particular prices, production, quality of output, distribution or innovation, even without co-ordination by the members of the oligopoly. In making this appraisal, account should be taken of the specific features of the markets under examination, such as the level of capacity constraints, the degree of product differentiation, or the functioning of the bidding process. Consideration should also be given to, inter alia, the likely reactions of actual and potential competitors, as well as of customers, and any efficiencies brought about by the merger.

In *Schneider/Legrand* and in *SEB/Moulinex*, portfolio effects triggered by a conglomerate merger had to be appreciated by the Commission. The CFI, however, voiced stark criticism in that, essentially, it would not be sufficient for the Commission to voice presumed portfolio effects. A more tangible evidence and proof would be required, and the Commission failed to examine closely the effects in relation to the various products sold in each affected national market.

In the recent Decision *BaByliss v/Commission*,⁴⁴ the CFI broadened its position taken on the requirement to analyse portfolio effects,⁴⁵ in that it voiced the opinion that the Commission should have extended its analysis to neighbouring markets.

In *GE/Honeywell* and in *Tetra Laval/Sidel*, the Commission essentially had to consider that the merged entity could possibly strengthen its dominance through bundling in that, post-merger, GE might offer package discounts to customers who buy both GE engines and Honeywell products. The Commission's concern was based on a theoretical economic model provided by a competitor, predicting that there would be an incentive for such behaviour after the merger.⁴⁶ In September 2001, both GE and Honeywell filed a complaint against the Commission's Decision to the CFI, arguing specifically that the Commission's Decision lacks substantiation and proof. The matter is still pending at the CFI.⁴⁷

⁴⁴ T-114/02, *BaByliss v/Commission*, Judgment of 3.4.2003 (not yet published in the ECR), Paragraphs 342, 353.

⁴⁵ See the comments to the CFI judgment of 3 April 2003 by Lars Volck MADSEN, Accepting the "Portfolio Effect Theory" in European Competition Law, European Law Reporter ELR 4/2003, 151 ss.

⁴⁶ Commission Decision of 3.7.2001, *General Electric/Honeywell*, COMP/M.2220, Paragraph 349; see also the economic analysis by Matthias PFLANZ and Cristina CAFFARRA, The Economics of GE/Honeywell [2002] ECOMR, 115; see further William J. KOLASKY, Conglomerate Mergers and Range Effects: It is A Long Way From Chicago to Brussels, speech of 9 November 2001, available on the internet: <http://www.usdoj.gov/atr/public/speeches/9563.pdf>.

⁴⁷ T-209/01, *Honeywell v/Commission*, OJ 2001, C331/23, and Case T-210/01, *General Electric v/Commission*, OJ 2001, C331/24.

In *Tetra Laval/Sidel*,⁴⁸ the Commission also analysed potential bundling effects and leveraging potentials, resulting in the Commission's prohibition of the transaction. The CFI annulled the Commission's Decision, whereupon the Commission had to conduct a second investigation, examining the impact of the transaction on the wider stretch blow-moulding machines market, rather than the narrower markets for these machines by end-users. Re-evaluating the results of the investigation within the terms of the CFI's Judgment, the Commission could no longer maintain its finding that the operation would create a dominant position. However, with regard to a certain new technology ("Tetra Fast"), which had not been considered in its first Decision, the Commission expressed serious concerns as to the possible creation of a dominant position, which concern was ultimately removed by Tetra's commitment to license the new technology. Nevertheless, the Commission appealed the CFI Judgment to the European Court of Justice.

All of the above cases which we depicted with only a few characteristics, attracted very wide echoes almost around the globe. And the echoes came "just in time" to allow the Commission to digest the CFI's verdict and to reflect on any improvements which could find their way into ECOMR 2003. In fact, as we will see, the proposed ECOMR 2003 promises to bring substantial improvements to the thoroughness and quality in the handling of future investigations. We will now take a look at the most essential elements of the Reform Package.

5. The December 2002 Reform Package

Hence, a White Paper was expected to come out by the end of 2002, and indeed, on 11 December 2002, exactly one year after the publication of the Green Paper, the European Commission then adopted **the most far-reaching reform package of its merger control regime** since the entry into force of the ECOMR in 1990. The package is intended "*to deliver a world-class regulatory system for firms seeking approval for their mergers and acquisitions*" and should combine a predictable review time-table with an improved decision-making process based on economic analysis and enhanced opportunities for merging firms' views to be taken into account.

The package⁴⁹ consists of (i) a proposal for a revision of the Merger Regulation⁵⁰ with Explanatory Memorandum (ii) draft Guidelines on the appraisal of horizontal mergers, i.e. mergers between competitors, and (iii) a series of non-legislative measures intended to improve the decision-making process, some of which are contained in a set of Best Practices.

The changes which the Commission proposes to be made to the ECOMR will yet require the approval by the EU Ministers. Such approval is expected to be forthcoming during

⁴⁸ Commission Decision of 30.10.2001, COMP. 2416, *Tetra Laval/Sidel*.

⁴⁹ Available on the Commission's website at http://europa.eu.int/comm/competition/index_en.html.

⁵⁰ OJ 28.1.2003, C20/4, with black-lined text highlighting the deletions and insertions.

2003, and the revised ECMR should then **enter into force as of 1 May 2004**, i.e. at the same time when new States will become members of the EU.

The most essential elements of the proposed new ECMR are the following:

- The proposal seeks to clarify the substantive standard for the analysis of mergers on competition grounds, by making it clear that the Regulation can also be applied to situations of **oligopoly** which may give rise to competition problems.
- The proposed new Merger Regulation moreover seeks to rationalise the timing of the notification of proposed mergers to the Commission, by introducing the possibility for a **notification prior to the conclusion** of a binding agreement, and by abolishing the requirement that transactions be notified within a week of the conclusion of such an agreement. Hence, these measures are intended to remove some of the criticised regulatory rigidities, and should facilitate the co-ordination where multi-jurisdictional merger filings have to be made to different national competition agencies.
- The system for the **referral** of merger cases from the Commission to Member State competition authorities for investigation, and *vice versa*, is addressed in the proposal, and the reform aims to ensure that the best placed authority should examine a particular transaction (while at the same time seeking to reduce the burden of multiple filings).
- While the clearly restricted **time-table** of the EC merger review has significant advantages, the time constraints must not be such as to impair the quality and thoroughness of the review. This is, however, what parties have often so complained about.
- Hence, a greater degree of flexibility is proposed in the time-frame for the conduct of merger investigations, in particular for complex cases. **More time** should be allowed for proper consideration of remedies offered by the Parties, as well as for consultation with Member States. In Phase I, the period during which parties may offer commitments should be extended from three to four weeks. In Phase II, up to four extra weeks should be available on the time-table. Extra time could also be added at the request of the Commission, subject to the agreement of the merging parties, so as to ensure a thorough investigation. This proposal was also made in view of the high evidentiary burden that is incumbent on the Commission following the three recent decisions of the Court of First Instance (CFI) in *Airtours*, *Schneider* and *Tetra Laval*. – Whether *ad hoc* extensions would provide the best solution will have to be seen in practice.
- Moreover, the Commission's fact-finding powers should be strengthened, enabling it to more easily obtain information for the purposes of an investigation, with **higher fines** being contemplated for a failure to comply with requests to supply information. Currently, the maximum is set at € 50'000 whereas, in future, an increase of **up to 1%** of the aggregate turnover of the companies may be fixed for supplying incorrect or misleading information.⁵¹

⁵¹ See Paragraph 82 of the Explanatory Memorandum of the proposed ECMR 2003.

Apart from the above, the **decision-making process of the Commission** should be improved and, on 11 December 2002, the following measures were announced:

- The creation of a post of the **Chief Competition Economist** within the Directorate-General for Competition, headed by Philip Lowe. The Chief Economist and his team will be involved in merger and other competition investigations and should enhance DG COMP's economic competence. Moreover, industrial economists should be recruited.⁵²
- The Commission also intends to make a more frequent use of **outside consultants** for the purpose of conducting economic studies.
- A **peer review panel** (or: devil's advocates' panel) composed of experienced officials will be appointed for all Phase II merger investigations. The task of the panel is to scrutinise the investigating team's conclusions with a "**fresh pair of eyes**" at key-points of the enquiry. According to Philip Lowe, such a review panel has already been used as from the beginning of 2003, and has proved to provide a very useful tool.⁵³
- Moreover, additional support staff should be allocated to the Commission's **Hearing Officers**; their role should be strengthened.
- Similarly, the role of the Advisory Committee (composed of Member States experts) should be enhanced. A rapporteur should be more closely involved in the investigations, particularly in Phase II.
- A **Consumer Liaison Officer** should be appointed within the Competition department so that the "consumer voice" would be better heard.
- The parties whose proposed merger is being investigated should have **improved rights of defence**, for instance by an earlier opportunity to **access the Commission's file**, notably following the opening of an in-depth investigation.
- In addition, the opportunity should be created for the parties to **meet** with "complaining" third parties in order to address and discuss the concerns they may have.⁵⁴
- Moreover, **triangular meetings** may take place.⁵⁵

⁵² Is this a clear indication that, in future, the economists will prevail over the lawyers? One is tempted to affirm this. Frank MONTAG, at the occasion of the Competition Conference organised by the Studienvereinigung Kartellrecht e.V. in Brussels on 10/11 April 2003 reported the anecdote of a brief argument between Cornelis CANENBLEY (a senior Freshfields competition lawyer) and the economist Christian VON WEIZSÄCKER: Canenbley: "*The most important thing is that the lawyer will always be in the driver's seat!*" Von Weizsäcker replied: "*Fine with me, I fully agree: I always wanted to have a driver!*"

⁵³ Philip LOWE, speech at the Brussels XXth Forum of the *Studienvereinigung Kartellrecht*, of 10/11 April 2003.

⁵⁴ See the Best Practice Guidelines of 19 December 2002, Paragraphs 32 ss.

⁵⁵ Best Practice Guidelines, Paragraphs 35 ss.

- And in addition, the Commission intends systematically to offer to hold so-called **“state-of-play” meetings** between the Commission and the merging parties at decisive points in the procedure, thereby guaranteeing that the merging parties are kept constantly apprised of progress and that they are given the opportunity to discuss the case with senior Commission Management.⁵⁶
- *Quid*, where a concentration has been implemented although it is declared incompatible with the common market, or in case a condition attached to a decision is **not honoured**? Articles 8.4 and 8.5. have been re-phrased in the draft, spelling out the **sanctions**.
- Finally, the internal case management and the handling of investigations should be improved, particularly in view of the high evidentiary burden now incumbent on the Commission after the four recent CFI annulments in *Airtours*, *Schneider Legrand*, *Tetra Laval* and *Lagardère/Canal+*.

Moreover, under the date of 12 July 2002, the Commission published its draft **Explanatory Note on Divestiture Commitments** and the **Trustee Mandate** under the ECMR, as well as pertaining model texts. These drafts came out in final form on 2 May 2003 and provide highly useful guidance to parties and their advisers; we will revert to these below.⁵⁷

Assessment

All in all, these new elements are very **impressive**. While the EU Merger Review has never been a “flight by night”, its upcoming much **enhanced transparency** (earlier access to files, state-of-the-play meetings, possibilities of hearings with concerned competitors), its **enhanced professionalism** and scrutiny (through more consultations, fresh-eyes’ approach, better staffing, the review by the chief economist, the more significant role assigned to the Hearing Officers and the Advisory Committee⁵⁸) and the increased flexibility (e.g. more time particularly in Phase II), are all measures which constitute an adequate response to criticisms voiced by practitioners in recent years, as they also very adequately address the recent criticism of the CFI in the three cases mentioned above.

6. New Draft Guidelines on Best Practices, on Horizontal Mergers and Efficiencies and on Vertical and Conglomerate Mergers

Some of the non-legislative measures are detailed in a set of **draft Best Practices Guidelines** (which are also subject to a further consultation process prior to becoming final). The draft Guidelines on Best Practices, published on 19 December 2002,

⁵⁶ Best Practice Guidelines, Paragraphs 23 ss.

⁵⁷ The texts are published on DG COMP’s website at http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments. See Paragraph 20 below.

⁵⁸ Their reports are also published in the Official Journal.

solicited comments that had to reach the Commission by 28 February 2003. The draft is significantly more elaborate than the current Best Practices Guidelines.

Furthermore, the Commission has also adopted a draft **Commission Notice on Horizontal Mergers and Efficiencies**. The guidelines contained therein explain the analysis made by the Commission, particularly with respect to the **notion of dominance in oligopolistic markets**. They provide an insight into the criteria upheld by the Commission, and the experience made, having scrutinised over 2230 merger notifications. They discuss the basic concerns of anti-competitive effects of horizontal mergers, the market characteristics and the factors to be taken into account in order to determine the extent of the merged entity's economic power.⁵⁹ Moreover, the Guidelines explain the **impact of oligopolies** on competition and the criteria of markets where firms primarily compete over output/capacity as opposed to competition primarily over prices. Oligopolistic markets bear the risk of increased co-ordination, including deterrent mechanisms, and the Commission has explained these concerns in great detail in the framework of the Guidelines. The Commission moreover takes into consideration **countervailing buyer power** as a factor which may prevent the creation or strengthening of a dominant position.

An extensive chapter is now devoted to consider and appreciate **merger-related efficiencies**.⁶⁰ In the past, the Commission has never so far specifically taken into account, in order to approve a notified concentration, merger-specific efficiencies as a ground for clearing a merger, in contrast to practices of the antitrust agencies in the US and in Canada.⁶¹

⁵⁹ Such as economies of scale and scope, privileged access to supply, developed distribution at sales network with established distribution logistics or wide geographic coverage, access to important facilities or to leading technologies, privileged access to specific inputs (physical or financial), taking into account significant financial asymmetries between competitors and other strategic advantages (such as ownership over important brands, well-established reputation, knowledge of specific preferences of customers and the like).

⁶⁰ An excellent economic study was recently presented by C. Christian VON WEIZSÄCKER, Abuse of a Dominant Position and Economic Efficiency, published in the first issue of the new Journal on Competition Law "ZWeR" (Zeitschrift für Wettbewerbsrecht), 1/2003, 58–72.

⁶¹ An excellent report on the topic was presented at the 7/8 November 2002 Merger Review Conference by James S VENIT, The Role of Efficiencies in Merger Control; he distinguished *inter alia* between productive efficiencies, economies of scope and of scale, dynamic or innovative efficiencies, synergies, transactional efficiencies, distribution and promotional efficiencies, capital and managerial savings. Nevertheless, the author referred to various decisions where indeed efficiency arguments had been used, for instance in the CFI judgment in the *Vittel v/Commission* case of 27 April 1995 (ECR [1995] II-1247), in *Aérospatiale-Alénia/de Havilland* (Case No. IV/M.53), in *Nordic Satellite Distribution* (Case No. IV/M.490), in *Bertelsmann/Kirch/Premiere* (Case No. IV/M.993), in *Gencor/Lonrho* (Case No. IV/M.619) and in the frequently commented decision *Danish Crown/Vestjyske Slagterier* (Case No. COMP/M.1313), also reviewed more extensively below. Particular criticism had been voiced against the Commission's application of questionable theories of competitive harm, and for its treatment of efficiencies in the *GE/Honeywell* case (Case No. COMP/M.2220, decision of 3 July 2001). A shifting to rather adopt the US position on efficiencies was also advocated from an economist's view; see the report by David WALTON, In Defence of Efficiencies in Merger (presented at the 7/8 November 2002 Conference).

Commissioner Mario Monti, in his address at the St. Galler Kartellrechtsforum of 24/25 April 2003, stressed that efficiency claims should be accepted by the Commission only where it is *"in a position to conclude with sufficient confidence that the efficiencies generated by the merger will enhance the incentive of the merged entity to act pro-competitively for the benefit of consumers. Therefore, the efficiencies will have to be of direct benefit to consumers, as well as being merger-specific, substantial, timely and verifiable. The burden of proof should rest on the parties."*

At a later stage, the Commission plans to adopt further guidance, by way of a further **Notice on Vertical and Conglomerate Mergers**.

In the following, we will discuss the major aspects of the merger review procedure.

* * *

IV. Review of the Basic Elements of EC Merger Control

1. Concentrations

The ECMR applies to **concentrations** in the sense of a merger of two or more previously independent enterprises, or the acquisition of direct or indirect control of the whole or part of another undertaking⁶² (whether by way of share-deal or an asset-deal) which creates a durable (not only transitory) change in the structure of the enterprises concerned. An essential factor is the criterion whether or not the transaction will lead to a **lasting change in the control** (direct or indirect) over one or more undertakings.

Since 1 March 1998, the ECMR also regulates **full-function joint-ventures**⁶³ (whether concentrative or co-operative)⁶⁴, whereas non-full function joint-ventures

⁶² Mostly, the term "*undertaking*" is used to denote an enterprise; "*undertaking*", however, also means a commitment, and is frequently used in that sense by the Commission; hereinafter, in order to distinguish the two terms, I may use the term "*undertaking*" or "*enterprise*" when referring to a company or party, and to use the term "*commitment*" in the framework of remedies offered to address competition concerns.

⁶³ A **full-function joint-venture** is one that qualifies as an autonomous economic entity resulting in a lasting (and not only temporary) structural change on the market (regardless of any coordination of the competitive behaviour of the parent companies). Compare Article 3 (2) ECMR. **Autonomy** in this sense will require that the joint venture disposes of sufficient assets, personnel and financial resources so as to enable it to operate its business activity independently; it also requires that the joint venture be allowed to pursue its own commercial policy. Moreover, the joint venture must not be tied to significant purchase or supply arrangements with its parent companies which, as such, would restrict its commercial autonomy. And finally, the contemplated duration of the joint venture must be such as to bring about a **lasting change** in the structure of the parties concerned. Where a joint venture is confined to take over only certain specific tasks within the scope of business activities of the parent companies (for instance a joint venture confined to engage in R&D or confined to produce certain goods without having direct access to the market or where a joint venture company does not engage in R&D and production but simply acts as a sales agent for the parent companies), will not qualify under the "*full-function-test*". Hence, it will be caught by Articles 81/82 EC. Thus, wherever a joint venture is tied to contractual arrangements with their parents, those will have to be reviewed very carefully so as to determine whether the joint venture's full-function-character, and its autonomy, would not be affected thereby. – Since March 1998, more than 65 Commission decisions assessed joint ventures under Article 2 (4) ECMR. A particularly remarkable decision was the first Phase II investigation of a joint venture in the *BT/AT&T* case, where the possible co-ordinating effects of the proposed joint venture (particularly in the UK) had to be examined.

⁶⁴ It should be noted that, however, those full-function joint ventures that give rise to a **co-ordination** of the competitive behaviour of their **parent companies** will not only be examined under the ECMR, but also under the Article 81/82 test, in order to assess their compatibility

(such as strategic alliances) will remain to be governed by the provisions of Articles 81/82 EC.⁶⁵

2. Change of Control

The New ECMR amends the definition in Article 1 (3) ECMR so as to now explicitly include the criterion according to which a concentration requires a change in control and that this control has to take place on a lasting basis. The definition of change is a broad one, in that it suffices that one party acquires "**the possibility of exercising decisive influence**" over another undertaking. Such "*decisive influence*" may be exercised on a *de facto* or on a legal basis, quite irrespective of the size of the shareholding concerned (for instance by way ownership of shares, or assets, or rights that confer a decisive influence).

A change of control also arises if there is a change **from sole control to joint control**, or *vice versa*. Depending on the more particular circumstances, even an option to acquire sole or joint control will be caught by the ECMR; likewise management buy-outs and venture capital type of transactions fall within the scope of the ECMR.

with the common market. Hence, a dual test will be applied: the ECMR test to the joint venture itself, and the Article 81/82 test with respect to the coordinating effects. An exemption may be granted on the basis of Article 81(3) EC, where the advantages of the joint venture, in balance, outweigh the anti-competitive impact of the co-ordination on the level of the parent companies.

⁶⁵ **Non full-functional joint-ventures** which are caught by Articles 81/82 EC are subject to different jurisdictional criteria, different substantive tests and procedures different from those under the ECMR. For instance, a cooperative joint-venture falling under Art. 81 EC and which falls outside any relevant block exemption may entail serious consequences, in that any restrictive provisions might be void and unenforceable, entailing the risk of fines. Such joint-ventures can (still at this time) be notified to the Commission applying for an individual exemption under Article 81 (3) EC. In contrast to procedures under the ECMR, such notification can be made after implementation of the transaction, and vertical structures may benefit from an exemption (retroactive from the date of its implementation) under Regulation 1216/1999. The yardsticks applied by the Commission in its substantive test to clear a non full-functional joint-venture is more onerous than the dominance test under the ECMR: parties will essentially have to show that the economic benefits of the agreement outweigh any anti-competitive effects. Moreover, the timeframe for obtaining clearance is not fixed, in contrast to the milestones applicable under the ECMR, and parties might have to wait a long time for a response; however, the Commission aims at providing at least a preliminary response within two months. Another difference to the procedures under the ECMR is that exemptions will be limited in time, typically for a period of some seven to ten years. And finally, non full-function joint-ventures will not benefit from the one-stop review afforded to notifications under the ECMR, and therefore may have to be cleared under national competition laws as well. – However, it does appear that, as from 2004, the possibility of a notification to the Commission will be abolished, pursuant to the Commission's White Paper proposals regarding the reform of the competition enforcement rules.

In respect of the control over **joint ventures**, the "*decisive influence-test*" will examine the power to block actions which determine the strategic commercial behaviour of the joint venture. A joint control exists not only in the framework of a 50/50 joint venture but also in cases where a minority will be conferred the power to exercise a veto in respect of strategic decisions relating to the business policy and other important matters such as the business plan, the budget, the major investments to be made and the appointment of the senior executives. Other veto-rights, however, which do not go beyond investors' rights normally conceded to minority shareholders, would not be considered as conferring a joint control; hence the minority shareholder who may be able to block changes in the statutes of the joint venture company (such as e.g. an increase or decrease of its capital or its liquidation) would not as such confer joint control.

Issues regarding the control over a joint venture are also **fact-related** since, for instance, two minority shareholders may exercise joint control over a joint venture where, as a matter of fact, they have strong common interests, as may be evidenced by their past voting behaviours. On the other hand, if various minority shareholders are shifting their alliances over the time, and assumption of joint control would normally be excluded.

However, there are a number of **exceptions** which may be noted. For instance, certain acquisitions by credit institutions which are holding securities on a purely temporary basis, and certain acquisitions by financial holding companies as well as intra-group restructurings, will not be caught. Likewise, certain acquisitions in the context of insolvency proceedings are outside the scope of the ECMR.

3. Community Dimension

For mergers of a community-dimension, as per the thresholds stated in the ECMR,⁶⁶ the European Commission will be the **one-stop authority** to clear the transaction,

⁶⁶ The **threshold** of a Community dimension is met when all of the following parameters are fulfilled: (i) the combined aggregate world-wide turnover of all the companies concerned is more than € 5 billion; (ii) the aggregate community-wide turnover of each of at least two of the companies concerned is more than € 250 million, and (iii) the companies concerned do not achieve more than two thirds of each company's aggregate Community-wide turnover within one and the same Member State. Basically, the first threshold intends to exclude mergers between small and medium-sized companies; the second threshold intends to exclude relatively minor acquisitions by large companies, or acquisitions with only a minor Community dimension, and the third threshold intends to exclude those concentrations where the effects of the merger are primarily materialising in a single Member State (in which latter case it would appear to be more appropriate for the national competition authorities to deal with that kind of concentration). However, as the one-stop merger review is a significant advantage for companies contemplating a concentration, the ECMR, according to Article 1 (3) ECMR, also applies where (a) the combined aggregate world-wide turnover of all companies concerned is more than € 2.5 billion, and (b) where the aggregate combined turnover in each of at least three member States is more than € 100 million, and (c) where the aggregate turnover of each of at

dispensing the parties from making parallel filings to national competition authorities. Where the relevant turnover⁶⁷ thresholds as per the ECMR (and as reduced on the basis of the amendment effective as of 1 March 1998) are met, a notification to the European Commission has to be made within not more than **one week**⁶⁸ after the earlier of the conclusion of the underlying agreement, or the announcement of a public bid, or the acquisition of a controlling interest. The notification, in the case of a merger, is to be made jointly by the merging parties or, in the case of the acquisition of a joint control, by all of the parties exercising such control. In the case of a takeover, the notification must be made by the acquirer.

Even absent a Community dimension, several Member States acting together may request the EU Commission to investigate a concentration. This is a particularly welcome possibility in cases where multiple filings to the national competition authorities in several Member States would otherwise be required. The first Article 22 ECMR-referral was made in the case *Promatech/Sulzer* where filings to national competition authorities had been filed in Germany, Italy, Spain and the UK. Another case was *GE Aircraft Engines/Unison*, upon referral by France, Germany, Greece, Italy, Spain and the UK (Commission decision of 17 April 2002). In order to deal with the problem of multiple filings, the **Green Paper** on the Review of Council Regulation No. 4064/89 of 11 December 2001 proposes that the EU Commission should automatically deal with any concentrations that require notification in more than three Member States. However, it is yet uncertain at this time whether this solution will be adopted.

Referrals occasionally also operate in the reverse direction, in that the EU Commission would refer a matter to national competition authorities. For instance, in *Lafarge/Redland*, the Commission partly referred the concentration to the authorities in France and in the UK. Likewise, in *Carrefour/Promodès* (a case more specifically reviewed below) the Commission referred part of the review of the concentration to the French and Spanish competition authorities.

4. Relevant Market

Concentrations have to be assessed in relation to the relevant **product markets** and the relevant **geographic markets** affected by it. The relevant product market not only includes the products of the concentrated business or businesses, but also any other products which generally may be regarded as substitutable from the demand side perspective, having regard to the characteristics of the products such as price and usage. Supply side substitutability may also be taken into account.

least two undertakings in those three Member States is more than € 25 million, and (d) where the aggregate Community-wide turnover of each of at least two undertakings is more than € 100 million, and where (e) each of the companies concerned does not achieve more than two thirds of its aggregate Community-wide turnover within one and the same Member State.

⁶⁷ The relevant turnover is the amount net of sales rebates and taxes derived from the sale of products or the provision of services derived during the last financial year.

⁶⁸ However, in practice, the Commission will often grant an extension of the time-limit.

The Commission, in determining the relevant product market, tends to opt for a rather narrow market definition, which means that the merging parties run a significant risk that the combined market share will step up into a critical region of 50% or more.

Regarding the relevant geographic market, the Commission will define the area within which the merged companies will operate by supplying the relevant products or services, and in which area the conditions of competition are sufficiently homogenous and distinguishable from neighbouring areas (where market conditions might be appreciably different, for instance due to significant price differences, different transportation costs, different customer habits and preferences, trade barriers, particular licensing requirements and the like).

In sum, it may be said that a market share of **below 25%** is generally not considered as impeding competition. But on the other hand, very high market shares (which generally may trigger a Phase II investigation) will not necessarily lead to a prohibition; see hereto as an example, the *Danish Crown/Vestjyske Slagterier* case reported below, where a market share of 80% was cleared by the Commission.

As the discussion of the various cases reported below will also show, the Commission will take into account quite a number of **different factors**, such as for instance the factor whether or not there is an evidence that new entrants will come on the market. It will take into account low (or high) entry barriers; it will consider the availability of alternative products (even if they cannot as such be considered as being substitutable products); it will moreover consider the balance of the economic effects of the concentration.

A magic word has become the so-called "**portfolio effect**" which may operate as an important factor to strengthen the market position. Moreover, the Commission may consider "**gate-keeper effects**" in the sense of a company's ability to control an emerging market through proprietary technology, voicing the opinion (for instance in *Microsoft/Liberty Media/Telewest*) that any such gate-keeper effects should be eliminated.

On the other hand, the Commission has also paid tribute to the failing company doctrine, in the sense of approving a "**rescue merger**" in the case *BASF/Pantochim/Eurodiol*, by approving the acquisition, by BASF, of Pantochim and Eurodiol despite the resultant high market share of some 45%. In the case, the Commission concluded that, absent the acquisition by BASF, Pantochim and Eurodiol would be bankrupt, and the disappearance of these two players on the market would cause more damage to consumers than the proposed merger.

5. Collective Dominance

One of the critiques voiced against the dominance test is the remark that it does not address coordinated conduct, whereas the SLC test addresses both, single firm mar-

ket dominance as well as coordinated or collective dominance by two or more firms.⁶⁹ The ECMR is silent on this matter, but – for the first time in the well-known *Kali & Salz* case⁷⁰ – the Commission took the view that it had jurisdiction to prohibit concentrations which create or strengthen **oligopolistic** market structures, even though the merged entity on its own would not hold a dominant position. The ECJ confirmed the Commission's view, and the CFI, in its judgment in respect of the *Gencor/Lonrho* case,⁷¹ endorsed that view. It also did so in its *Airtours/First Choice* decision, referred to above, where it circumscribed collective dominance as follows:

A collective dominant position significantly impeding effective competition in the Common Market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of EC Article 81 ... and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

In its further analysis, the CFI emphasised that the Commission must scrutinise *"whether the concentration would have the direct and immediate effect of creating or strengthening a (collective dominant position) which is such as significantly and lastingly to impede competition in the relevant market"*. For so doing, the Commission has to use a prospective analysis.

Hence, basically, the CFI in principle agreed with the Commission's approach in its *Airtours/First Choice* decision of 22 September 1999, but disagreed on the evaluation of the probative value of the evidence gathered by the Commission. According to the CFI, the Commission should have examined more carefully the level of competition existing on the markets before the concentration so as to determine whether the transaction would be likely to reduce that level of competition. The CFI also argued that any tacit co-ordination between companies would have to be sustainable in order to back up a finding of collective dominance. In effect, this means that some deterrents must exist which would make it unprofitable for any of the collectively dominant entities to depart from a common course of conduct. This, however, was not self-evident in the eyes of the CFI.

Moreover, the CFI criticised that the Commission had failed to adequately assess the likely impact of the reaction of smaller tour operators, potential competitors and consumers as a countervailing force, should a common policy be maintained over time.

⁶⁹ Compare hereto the US Horizontal Merger Guidelines of 2 April 1992 (available at <http://www.usdoj.gov>), which specifically refer to *"actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in itself"*.

⁷⁰ Joined cases C-68/94 and C-30/95 *France and Others (Kali & Salz)* [1998] ECR I-1375.

⁷¹ Case T-102/96, *Gencor v/Commission* [1999] ECR II-753.

In sum, the CFI criticised the Commission for having conducted an incomplete analysis, for its arguments not being sufficiently “*specific*” or “*persuasive*”, and it re-proached a certain lack of evidence backing up the Commission’s decision. The *Airtour/First Choice* matter (as well as the two other decisions annulled by the CFI in the *Schneider/Legrand* case and the *Tetra Laval/Sidel* case⁷²) has significantly changed the Commission’s burden to prove its case⁷³ and to improve the gathering of evidence and its assessment of the weight to be given to it. In the *Tetra Laval* case, the Commission, under the date of 13 January 2003, brought an **appeal** against the CFI’s verdict before the ECJ, alleging an error of law regarding the standards of proof and of judicial review.⁷⁴

In the *BP/E.On* case⁷⁵, the Commission again re-stated the **seven basic elements** which **characterise a collective dominance**, when it said:

⁷² On *Schneider/Legrand*, see the case report in *Wirtschaft und Wettbewerb WuW* 3/2003, 299–314 and Gerrit SCHOHE, *Das Verbot des Zusammenschlusses von Schneider und Legrand ist nichtig: Ein weiteres “Menetekel” für die Kommission, Wirtschaft und Wettbewerb WuW* 4/2003, 359 ss.; Lars Volck MADSEN, *Commission’s Second Defeat in Merger Cases – The CFI’s Schneider Judgment*, *European Law Reporter ELR* 2/2003, 55 ss.; on *Tetra Laval/Sidel*, see the case report in *Wirtschaft und Wettbewerb WuW* 4/2002, 411–422.

⁷³ At the merger review Conference of 7/8 November 2002 in Brussels, the opinion was voiced from the audience that it is **for the Commission** to meet the burden of proof that a concentration is incompatible under the perspectives of the ECMR, and not for the parties to prove the compatibility. However, in his oral response to the audience, Mr. Francisco Enrique GONZALES DIAZ of the MTF seems to have voiced the opposite opinion, in the sense that it would be for the merging parties to show that clearance under the ECMR is appropriate. – Quite surprisingly, this very basic issue still seems to be heavily debated. The Commission’s position is also expressed in the Notice on Remedies; see below.

⁷⁴ OJ of 22.3.2003/C70/07 and C70/08. The Commission’s most essential concern seems to be the **burden of proof in leveraging cases**. Leveraging in this context means the possibility which an acquiring company might use to leverage the merged company into a dominant position in neighbouring markets. The high degree of evidence which the CFI’s ruling imposes in leveraging cases would require more exacting investigations into a merged company’s capabilities and incentives to use its economic strength across the markets. In the framework of the several conferences at which the Commission’s burden of proof after *Tetra* was discussed, it became obvious that the Commission may have significant difficulty to rely on hard and fast evidence which the CFI now seems to require (whereas before *Tetra*, the Commission simply had to take the care to avoid manifest errors in its analysis). But there seems to be even more at stake behind the scene: The Commission firmly objects against an erosion of its powers as the regulator in enforcing the EC competition policy and merger control, and the Commission certainly does not want to see that the CFI is supplanting its own view and assessment over that of the Commission except in cases of manifest errors. In other words, the CFI should not engage in making a *de novo* assessment on the effects on the market following the proposed merger. The outcome at the ECJ is at this time still awaited with great interest. The author is rather sceptic that the Commission will succeed to convince the ECJ to annul the CFI’s *Tetra* decision. The outcome will in any event set a significant flag: It will indicate whether the Commission is right in claiming the vast powers as the watch-dog over the EC competition policy, or whether the CFI succeeded to usurp a slice of these powers.

⁷⁵ COMP/M. 2533, of 20 December 2001; see discussion below in Part VII. Compare hereto also the *Exxon/Mobil* decision of 29 September 1999, IV/M. 1383.

The Commission considers that following the proposed concentration and if the transaction between Shell and DEA is implemented, a collective dominance of the two new entities on the ARG+ market for ethylene will arise. In former collective dominance cases, the Commission has referred to the following elements to establish the existence or not of a collective dominant position: (i) supply concentrations, (ii) homogeneity of the product, (iii), symmetry of market shares, costs and interests, (iv) price transparency, (v) retaliation possibilities, (vi) high entry barriers and absence of potential competition and (vii) inelastic demand without countervailing buying power.

In *Schneider Electric v/Commission*, the CFI had to deal with the Commission's Decision of 10 October 2001 prohibiting the Schneider/Legrand merger, i.e. the merger of two manufacturers of low voltage electrical equipment. The Commission argued that the merger would create a dominant position on certain sectoral markets in seven Member States and would strengthen a dominant position on some sectoral markets in France. The CFI, however, found that the Commission's economic analysis contained errors and omissions which lead the Commission to over-estimate the economic power of the merged entity, leading to an exaggeration of the impact of the concentration on the affected national sectoral markets. More particularly, the CFI considered that transnational effects of the concentration had **not been established to the requisite legal standard of proof**. It moreover identified certain errors in the Commission's analysis of the distribution structure, in that it had not been sufficiently established that the merged entity would be an unavoidable trading partner for wholesalers, or that the latter would be incapable of exercising any competitive restraints. And finally, the CFI held that the Commission's analysis of the merged entity's economic power on national sectoral markets was incorrect.

The effect of the CFI's Decision in respect of the investigative powers and duties of the Commission are **significant**. The CFI takes the Commission to a high standard of proof and evidence, as it also did so in the aforementioned *Tetra Laval/Sidel* case which the Commission had blocked in October 2001. Likewise, in the latter case, the CFI considered that the Commission had insufficient evidence regarding the application of the leveraging theory, i.e. the theory that an acquiring company might use a dominant position in its own market to leverage the merged company into a dominant position also in neighbouring markets.

Prior to the *Tetra*, the Commission simply needed to avoid manifest errors in its analysis, but the new CFI ruling lays down a more onerous burden of proof which, as the Commission fears, is hardly possible to be discharged in practice. Hence, the Commission filed an appeal to the ECJ, essentially accusing the CFI of usurping the Commission's powers by substituting its own views of the case for that of the Commission's. In the Commission's view, the CFI should stick to reviewing administrative and procedural aspects, without embarking on a full review on the merits.⁷⁶

⁷⁶ The outcome of this appeal to the ECJ is awaited with greatest interest. Essentially, the issue appears to be of a rather fundamental nature, as it may, if the appeal succeeds, confirm the Commission's powers as "the merger watch-dog". However, if the appeal fails, the Commission will have a new accountability in respect of its fact-gathering burden and its scope of appreciation.

6. Conglomerate Mergers

The aforementioned case *Tetra Laval v/Commission* was the first case where the CFI had to deal with a conglomerate merger, i.e. a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers. The Commission, in its Decision of 30 October 2001, had declared the acquisition of Sidel by Tetra Laval incompatible with the Common Market. Tetra Laval holds a dominant position on the markets for aseptic carton packaging and for the corresponding packaging machines, whereas Sidel has a leading position on the markets for certain types of PET packaging machines.

In its Decision, the Commission essentially took the view that the concentration would have harmful effects on competition. However, the CFI annulled that Decision on 25 November 2002, **holding that the Commission had erred in its assessment of the effects of the merger**. The CFI examined closely the Commission's assessment on certain anti-competitive conglomerate effects in the future which may either be of a structural or of a behavioural nature. Since conglomerate effects might be neutral or even beneficial for the competition on the markets concerned, the proof of anti-competitive conglomerate effects calls for a precise examination, supported by **"convincing evidence"** of the circumstances which allegedly produce those effects. In this regard, the Commission should have weighed economic incentives to engage in anti-competitive practices against the deterrent of a detection of such illegal conduct, actions taken by competition authorities on the community and national levels, and the deterrent of the financial penalties which could ensue. The CFI noted that, for instance, Tetra Pak, following the Commission's earlier Tetra Pak II Decision taken in 1992, had committed itself not to engage in anti-competitive behaviour.

Moreover, the CFI examined whether the Commission had **proved, to the requisite legal standard**, that the merger would enable the merged entity to use its dominant position on the global carton packaging market as a **"lever"** in order to achieve a dominant position on the PET packaging equipment markets, whether the merger would reinforce the current dominant position of Tetra on the markets for aseptic carton packaging equipment by eliminating the competitive constraints so far maintained by Sidel, and whether the merger would generally strengthen the overall position of the merged entity on the markets for packaging of "sensitive" products. The CFI answered these questions in the negative. The CFI agreed, in principle, that the merged entity would have a possibility for engaging in leveraging practices, but at the same time reached the conclusion that the Commission had not shown that the merged entity would indeed exploit that opportunity.⁷⁷

⁷⁷ Paragraphs 201–309 of the Decision.

7. Ancillary Restraints

As we will see in the cases discussed below, the Commission also has to consider whether certain restrictive agreements or practices related to a concentration (but without being an integral part of the concentration as such) may be characterised as ancillary restraints. Such ancillary restraints would typically include licences for technology between the parent companies and the joint venture, the conclusion of purchase and supply agreements between the parent companies and the joint venture, for instance during a start-up phase, and certain non-compete obligations. In order for such restrictions to be qualified as being “ancillary” they must be directly linked to the concentration, and must be necessary for its implementation and proportionate in scope as to their duration, subject matter, geographical field of application, and reasonable as to what the concentration may require. See hereto the guidance in the Commission Notice on Ancillary Restraints of 2001 (replacing the earlier Notice of 1990). Moreover, the Explanatory Memorandum to the ECMR 2003 specifically addresses ancillary restraints.⁷⁸

8. Notification Requirement

Merger notifications⁷⁹ must be made jointly by the parties or, in the case of an acquisition, by the acquiror. The filing is to be made on **Form CO**⁸⁰ together with all supporting documents (in one original and 23 copies) and can be made in any of the official EU languages. The filing must be complete, otherwise the notification will be rejected (and the “clock” for the clearance procedure will not start to run). There are no filing fees payable. Notifications of a concentration are published in the Official Journal, and interested third parties are invited to submit their observations on the proposed concentration.

Concentrations/mergers taking place outside the EU (where neither the parties nor the businesses concerned are EU-based, sometimes called “foreign-to-foreign mergers”⁸¹) are equally caught by the ECMR. For instance, the mergers between the US companies reviewed in *Boeing/McDonnell Douglas*, in *United Airlines/US Airways* and

⁷⁸ See Paragraphs 101 to 104.

⁷⁹ Since 1990, the Commission received over 2’230 notifications, whereof about 95 percent were cleared on the basis of a Phase I inquiry, and only some one hundred (plus) concentrations had to undergo a Phase II investigation. In Phase II, only 18 transactions (as of March 2003) were prohibited (the majority of them were “domestic” mergers of companies based in the same country, such as *Schneider/Legrand* and *SEB/Foreningssparbanken* etc.), which is **less than 1 percent** of the total of the Commission decisions, five of them were prohibited in 2001. About 60 were cleared on the basis of undertakings (commitments).

⁸⁰ Completing the Form CO is a major task and may absorb weeks or even months of research in respect of the relevant markets, market shares, information on markets and customers in respect of each EU Member State. Parties may be helped in their task by the confidential guidance offered by the Commission (see below) and by consulting the Best Practice Guidelines.

⁸¹ They account for approximately ten percent of the total of concentrations reviewed by the Commission.

in *WorldCom/MCI* had to be cleared by the Commission which imposed significant conditions in the sense of structural commitments as well as behavioural commitments, and in the much debated *GE/Honeywell* case,⁸² the concentration was prohibited. Hence, a concentration must not be completed until it has been declared compatible with the common market.

In the famous cases *Gencor/Lonrho* and *GE/Honeywell*, the concentrations were blocked by the EU Commission. The cases gave rise to significant debate. The *Gencor/Lonrho* decision was appealed before the Court of First Instance of the European Community (CFI). Basically, Gencor argued against an extra-territorial application of the EU merger review to a transaction which was carried out in a non-member State, i.e. relating to mining activities in South Africa. However, the CFI rejected the appeal, arguing that the ECMR applies wherever a concentration comes within a Community dimension, irrespective of the place where the undertakings are established, or where the production facilities are located. Moreover, the Commission emphasised that a main market for the sale of platinum was in the Community.

Under the ECMR 1989, the notification is required to be filed within one week from the conclusion of a binding agreement. The reform package for the ECMR 2003 now provides for more flexibility regarding the timing of notifications, in that a notification should become possible even prior to the conclusion of a binding agreement, and the one week time-limit may be removed after an agreement with the Commission has been reached. An international coordination of merger filings – a nightmare altogether due to the variety of systems around the globe – should thereby also be facilitated.

9. Pre-Notification and Confidential Guidance

In the past, the MTF (Merger Task Force) of the European Commission had ever so often encouraged the parties to get in touch with the Commission as early as possible so as to discuss the parameters of the intended concentration.⁸³ The interactive process is understood as being a “**confidential guidance**”.⁸⁴ The proposal, well meant by the Commission, should assist the parties in putting the necessary information together for the filing of the **Form CO**.⁸⁵ In fact, parties may obtain exemptions from some of the information otherwise required by Form CO and, even more essentially, the discussion may reduce the risk for the notifying parties to have their notification being declared incomplete (with the effect that the sharp time-limits for clearance will

⁸² See e.g. David J. GERBER, The European Commission’s *GE/Honeywell* Decision: US Responses and Their Implications, *Zeitschrift für Wettbewerbsrecht ZWeR* 1/2003, 87–95. Many other articles have been published on this landmark case.

⁸³ Informal pre-notification discussions are also strongly proposed by several national competition authorities of EU Member States and, notably, by the Swiss competition authority (*Wettbewerbskommission* and its secretariat).

⁸⁴ See also the Best Practice Guideline and Regulation 447/98, recital 10 and the introduction to the Form CO.

⁸⁵ Published by the Commission (OJ L61, 2.3.1998, p.11).

not start to run).⁸⁶ Such pre-notification discussions may also help to avoid a Phase II investigation.

More recently, the Commission has expected the parties to provide a **Briefing Memorandum**⁸⁷ at least three days prior to the pre-notification discussion, or even a draft Form CO, as a pre-condition for entering into a meaningful dialogue. The Briefing Memorandum will help the DG Competition to form its case-team and to prepare the pre-notification meeting. Such meeting is indeed not only very useful but necessary for the purpose of determining how **Form CO** should be completed, and frequently the Commission has waived certain requirements which did not appear to be of a crucial relevance.

10. Sanctions

A **failure to apply** for clearance, whether intentionally or negligently, may result in a **fine** between € 1'000 and € 50'000. Fines are also triggered in the case of late notification, or in case of submission of false or misleading information provided to the Commission, and in case of a breach of commitments required by the Commission to clear a concentration.

For instance, when *Samsung*, in February 1998, failed to properly notify its intention to acquire AST Research (a transaction taking place outside the EU, and manifesting very little effect on the market within the Community), a fine, though modest, was imposed on Samsung. A more significant fine was imposed on *A.P. Moeller* for its failure to notify three concentrative transactions in 1997/98. Moreover, *Deutsche Post* was fined for failure to notify the acquisition of a minority shareholding in Trans-o-Flex, and where the minority stake was coupled with a significant influence as far as voting powers were concerned.

Cases of incomplete information include KLM in the *KLM/Martinair* case, where KLM was fined for having submitted incorrect information relating to its subsidiary which had certain overlapping activities with Martinair. Deutsche BP was fined for providing incorrect and misleading information in the *Deutsche BP/Erdölchemie* case⁸⁸; Deutsche BP was reproached to have failed to disclose relevant co-operation agreements between the BP Group and its competitors.

Even more drastically, a fine can also be imposed on a third party. For instance, in July 2000, the Commission fined *Mitsubishi* for having furnished incomplete information relating to the Commission's investigation of the *Ahlström/Kvaerner* case. In addition, Mitsubishi was penalised by a periodic penalty totalling € 900'000. Apparently, this had been the first case where the Commission made use of such broad powers.

⁸⁶ See the various cases more extensively discussed below; quite a number of them were considered incomplete by the Commission.

⁸⁷ Draft Best Practice Guidelines of 19 December 2002, Paragraphs 5–18.

⁸⁸ See also in *Wirtschaft und Wettbewerb WuW* 2002, 1127ss.

Another significant case was the joint venture formed by the *Elf-Aquitaine Group* and the *L'Oréal Group*. As the information by *Sanofi-Synthélabo* was considered inadequate, the Commission, for the first time, withdrew its earlier approval of the concentration, on the basis that it had not been correctly notified. The matter was discovered essentially through information which the Commission gathered from third parties. Hence, both Sanofi and Synthélabo were fined € 50'000 for providing incorrect and incomplete information. The effect was that, thereafter, a division of Synthélabo's activities had to be divested, removing an overlapping activity.

Drastic fines (up to ten percent of the aggregate turnover of the companies concerned) may be imposed in case parties fail to honour the suspension rules. Hence, parties are well advised not to close a deal before a final decision has been issued,⁸⁹ unless a derogation has been obtained.

Further sanctions apply under Articles 8.4 and 8.5 ECMR 1900 and 2004.

11. Dawn-Raids and Other Investigative Powers (and Duties)

The Commission's powers are not limited to imposing fines but, even more essentially, include wide investigative powers (see Article 13 (3) ECMR).

For instance, in *Skanska/Scancem*, the Commission launched a dawn raid at the premises of Skanska and Scancem for the purpose of investigating the notifiability of the acquisition of control by Skanska over the Swedish concrete and cement producer Scancem. Previously, in 1995, the Swedish Skanska and the Norwegian company Aker had each acquired 1/3 of the share capital in Scancem. Skanska and Aker considered that this transaction would not provide Skanska with a joint control over Scancem and, therefore, concluded that the transaction would not be notifiable to the EU Commission. The Commission, however, was not convinced by that view and monitored Scancem carefully, when in October 1997, Skanska increased its shareholding to 48%, the Commission – indeed for the first time, launched a dawn raid which then resulted in a merger review procedure several months later which ultimately was cleared against significant commitments.

On the other hand, the proposed ECMR 2003 does not provide for home searches. The Explanatory Memorandum⁹⁰ comments that such far reaching powers would not seem appropriate in merger review, in contrast to the "*area of antitrust policy where the detection and prosecution of infringements pursuant to Articles 81 and 82 of the Treaty are central.*" – This is certainly a very reasonable differentiation.⁹¹

⁸⁹ This also applies in foreign-to-foreign mergers.

⁹⁰ Explanatory Memorandum of the proposed ECMR 2003, Paragraph 85.

⁹¹ See in contrast hereto the powers of the Commission laid down in Regulation 1/2003, Article 21, governing investigations in the framework of Articles 81/82 EC. There are, however, several restrictive requirements to be satisfied in that respect.

12. Legally Binding Timetable

Merger notifications are **time-critical**, both for the enterprises as well as for the (always over-loaded) Commission. Once a notification is filed, the one month time-limit for the Phase I review by the Commission will start to run. However, as indicated above, this time-limit does not even start if the Commission considers that the notification and its pertaining documentation is incomplete. In a significant number of the 30 cases more closely examined below, the Commission had rejected the notification for its incompleteness, hence triggering the negative effects on the time-line.

Exceptionally, the Commission may grant a **derogation** from the otherwise applicable obligation to suspend an intended concentration pending the clearance procedure. See Article 7 (4) ECMR. However, the practice shows a considerable reluctance in that, for instance in 2001, only five derogations were granted (out of 335 notified transactions). Derogation requests were rejected in *Bertelsmann/Kirch/Première*, in *Rhodia/Donau Chemie/Albright & Wilson* and in *France Télécom/Global One*, but granted in *Mannesmann/Olivetti/Infostrada*.

Three recent cases in 2002, already referred to above in various contexts, gave rise to intensive discussions also under the aspect of timing: *Airtours/First Choice*, *Schneider/Legrand* and in the conglomerate merger case *Tetra Laval/Sidel*; the *Lagardère/Canal+* case of April 2003 followed. The cases *Schneider* and *Tetra* involved public bids (for French companies) which had to be submitted on an unconditional basis and which then closed, by the companies acquiring majority shareholdings in their targets,⁹² long before the decision of the Commission was available. In all cases the Commission prohibited the concentration. However, the Commission decisions, in all four cases, were successfully appealed to the CFI (a matter that triggered very intensive debate).⁹³ Hence, the parties won a victory over the Commission, but in fact these victories, years after the proposed concentrations, are mere **Pyrrus victories**, since the **momentum** for the concentration had been lost long ago (although the CFI is proud to stress that it had adjudicated the *Schneider* and the *Tetra Laval* cases in less than 10 months⁹⁴). Fact is that the prohibition caused immense costs and damage (running into billions of Euros in the *Schneider/Legrand* case). As a consequence, the Commission had to face "*unprecedented criticism*".⁹⁵

⁹² See the public bid exception in Article 7 (3) ECMR.

⁹³ As discussed above, the parties invoked that the Commission decisions were vitiated by serious errors, and that the Commission failed to prove that the concentration would result in a (collective) dominance of the remaining players.

⁹⁴ CFI President Bo VESTERDORF, in his report delivered at the 10th St. Gallen Kartellrechtsforum of 24/25 April 2003.

⁹⁵ Mario MONTI, in his opening address at the 7 November 2002 European Commission/IBA Conference in Brussels on the "Review of the EC Merger Regulation – the Reform Package". He stated that it is by now clear that the CFI is "*holding the Commission to a very high standard of proof*".

As we have seen above, the merger review before the Commission will – under the ECMR 2003 – provide for some more flexibility on the time axis, including a “**stop-the-clock**” possibility in Phase II where remedies need to be negotiated. However, equally important is the **swift adjudication, by the CFI**, of complaints against Commission decisions.

13. Phase I Investigation: Four to Six Weeks

Following the notification, the Commission will **publish** a notice of the fact of the notification (with a summary) in the Official Journal of the European Communities, and third parties are thereby invited to comment on the proposed concentration; they may thus express their opinions, concerns or objections. Moreover, the Commission does send out **questionnaires** to customers, suppliers and competitors, soliciting their views on the proposed transaction. Third parties may moreover apply to the Commission to be heard by way of giving **oral evidence**, and a hearing may take place in the presence of the notifying parties.

And of course the **EU Member States**, throughout the Commission’s investigation, have an opportunity to express themselves on the concentration. Member States may even ask the Commission to refer the matter (or a part of it) back to the national competition authority for review where competition on a distinct market of the Member State would appear to be significantly impeded. Member States may also intervene where it would appear necessary to take parallel action so as to protect legitimate national interests (such as public security interests, plurality of media, supervision of financial institutions, national defence-related matters and the like).

Within one month from the effective date of the (complete) notification, the Commission has to reach its decision (so-called first-stage clearance decision, or **Phase I-decision**), and a press release will be issued. A failure of the Commission to take a decision within the time-limit will lead to the concentration being deemed to be declared compatible (see Article 10 (6) ECMR). Since 1 March 1998, this deadline is extended to 6 weeks where the parties, following a discussion with the Commission, submit (within three weeks from the date of the notification) **commitments** (or remedies) intended to address concerns voiced by the Commission.⁹⁶ The ECMR 2003 will allow one further week on the time-table.

Such *Phase I commitments* are typically conceded by the parties so as to avoid the launching, by the Commission, of a Phase II investigation. Hence, a good deal of negotiations may then have to take place between the parties and the Commission so as to finally ease out anti-competitive concerns voiced by the Commission, allowing it to render an Article 6 (1)(b)-decision. The acceptance, by the Commission, of Phase I-commitments is appropriate “**where the competition problem is readily identifi-**

⁹⁶ See Article 10 (1) ECMR 1989.

able and can easily be remedied⁹⁷. Hence, the remedies should be straight forward and not too complex; in most cases, they provide for divestments of overlapping businesses.

Nevertheless, these Phase I commitments may involve very substantial concessions: in *Unilever/Bestfoods*, the divestiture package was estimated at € 500 million of annual retail sales. Apart from divestiture, the Commission may accept an undertaking to grant licenses to third parties; see for instance below in *GlaxoWellcome/SmithKline Beecham*, or Nestlé in *Nestlé/Ralston Purina* (offering as one alternative the licensing of Nestlé's *Friskies* and *Felix* brands, coupled with a second alternative of a "crown jewel remedy" in the sense of a divestment by Ralston Purina of its 50% shareholding in its Spanish joint venture with Agrolimen S.A.). The report below will describe particular Phase I commitments in more detail.

14. The Simplified Procedure

A simplified procedure was introduced in September 2000 for concentrations which do not involve significant competition issues. Up to mid-2002, the procedure had been used in more than 300 non-opposition decisions assessed on the basis of the simplified procedure. This procedure is available for instance for concentrations between parties that are not operating on the same product and geographical market, or in markets which are upstream or downstream; it will also be available for merger where two or more of the merging companies have a combined market share of 15% or less in a horizontal relationship, or 25% or less in a vertical relationship. Moreover, joint ventures with little foreseen activities within the EEA can be cleared on the basis of the simplified procedure, i.e. where a joint venture has a turn over of less than € 100 million and where the assets transferred are of a value less than € 100 million. Again, notifications need to be made on Form CO, but the pre-notification discussions with the MTF may significantly alleviate the burden.

15. Serious Doubts: Phase II Investigation – Four Months

However, where the Commission reaches the conclusion that a concentration raises serious doubts about market dominance, it will render a "**serious doubts**"-decision as per Article 6 (1)(c), **launching Phase II investigation** ("second stage investigation") with an in-depth analysis of the effects on the market in order to decide whether the concentration is compatible or not with the Common Market. The overall time-frame for the second stage investigation is **four months** (subject to some time-outs and extensions in case the Commission requires additional information) and will in most cases involve a very considerable workload for the lawyers, the parties (including managers) and the Commission itself. As discussed above, the ECMR 2003 will introduce **stop-the-clock provisions** allowing time extensions up to four weeks, al-

⁹⁷ Regulation 1319/97, recital 8, and the Notice on Remedies, Paragraph 32.

lowing the Commission and the parties to deal with remedies.⁹⁸ At the end of the investigation, the Commission may either (i) approve the concentration, or (ii) approve it against certain structural and/or behavioural commitments, or (iii) prohibit it.⁹⁹

16. Statement of Objections of the Commission and Phase II Commitments by the Parties

About six weeks into this second phase, the Commission will normally have prepared a detailed **Statement of Objections**, and the parties – who will have access to the Commission’s file – will then have a short period of some two weeks within which to reply.¹⁰⁰ Hence, the parties will have ample opportunity (but within tough time constraints) to voice their views and observations; they may propose hearings and, most importantly, they may put forward **alternative proposals or commitments**.¹⁰¹ In the recent years, the tactic and approach of negotiating such commitments has become very common and avoids the highly undesirable outcome of an outright blocking of the transaction by the Commission by a negative decision.

Furthermore, **third parties** and competitors may be consulted, and they have a right to be heard on their own motion if they demonstrate a sufficient interest. Moreover,

⁹⁸ The importance (and draw-back) of the stringent time limits were particularly felt in the *Schneider/Legrand* case where the Commission warned in its press release of 10 October 2001 announcing the prohibition that Schneider Electric “*did not put forward in good time adequate undertakings to ensure that, following the merger, the conditions of effective competition would be restored*”, and after expiry of the time limit, the Commission could no longer accept any “last minute” undertakings, unless it was able to establish immediately and without any possible doubt that they would restore the conditions of competition. The trouble here is that, as the CEOs of Tetra Laval (Goran Grosskopf) and Schneider Electric (Henri Lachmann) criticised, the Commission may well have failed to early on making its competition concerns sufficiently clear to the parties; understandably, parties do not wish to engage in painful divestiture discussions, unless they clearly understand what will be required in order to clear the transaction. Moreover, the counsel advising the parties may not have sufficiently used the Commission’s open door to understand and discuss the concerns. Likewise, in *GE/Honeywell*, modified remedies were offered late and did not allow the Commission to resubmit them to a market testing.

⁹⁹ Where a transaction already completed prior to the Commission’s decision, the parties run the risk that they may have to “unscramble the egg”. The method is as simple as it may be painful: the Commission is likely to require a divestiture of a business division, or indeed of the major part of the concentrated business, so as to restore “*effective Competition*”. This happened to Tuko Oy, where the *Kesko/Tuko* transaction had already been implemented when the Commission issued its prohibition. We will come across some other cases in the detailed analysis below.

¹⁰⁰ In the *Schneider/Legrand* case, for instance, the Commission sent the parties a request for information containing 322 questions to which they had to reply within 5 working days, a time-limit which the parties were unable to keep.

¹⁰¹ The parties will have to take all precautions to submit their commitments within the required time-frame. In *Airtours/First Choice*, for instance, the Commission refused to accept a revised package of commitments on the ground that it had been submitted out of time.

the **Member States** are sent a copy of the proposed commitments, and the Advisory Committee on Concentrations will have to be consulted by the Commission.

In the sense of a very rough rule, concentrations leading to the control over 35–40% of the market share will likely to be reviewed closely and hence lead to a second stage investigation. A concentration will, in essence, be prohibited and result in an **Article 8 (3)-prohibition**, if it creates a dominant position, or if an already existing dominant position would be strengthened and if, as a result, the effective (remaining) competition would be significantly impeded in the Common Market or in a substantial part thereof.

A statement of objections may also prompt the parties to **withdraw** their notification.¹⁰² They may then either abandon the contemplated concentration altogether, or re-structure the deal and re-notify it to the Commission for clearance. Parties may elect the latter avenue also on the basis of a Phase I investigation: the withdrawal, followed by a re-structuring of the deal and the re-notification thereafter may give them a better chance to avoid the endurance of a Phase II investigation.¹⁰³

17. Article 8 (2)-Clearance and Scope of Review

Otherwise, if the serious doubts could be removed, for instance by **commitments** of the parties which the Commission deems satisfactory, the Commission will issue an **Article 8 (2)-clearance** of the concentration (which, however, will in most cases be subjected to the condition that the promised **commitments** will be honoured by the parties). These decisions are taken by the entire College of Commissioners.

Within this Phase II investigation, the Commission examines primarily the market position of the companies, considering *inter alia*:

- the structure of the relevant product and geographic markets;
- the actual and potential competition on these markets;
- the particular market position of the enterprises involved and their economic and financial power;
- the alternatives available to suppliers, competitors and users, and their access to supplies on the market;
- any legal or other entry-barriers and/or exit barriers;

¹⁰² Even in the case of a withdrawal, the Commission will nevertheless most likely publish the reasons which would have led it to prohibit the concentration, had it not been abandoned; see *Alcan/Péchiney* and *Ahlström/Kvaerner*. In *WorldCom/Sprint*, the withdrawal was notified just one day before the prohibition was adopted; nevertheless, the Commission issued a formal decision on the matter.

¹⁰³ See for instance *BP/Amoco* and *Industri Kapital/Perstorp*.

- the supply and demand trends;
- the interests of the intermediate and the ultimate customer or consumer;
- the development of the technical and economic progress;
- the **Phase II commitments** offered by the parties in order to address the concerns of the Commission, such as **structural remedies** directed at maintaining a competitive market structure (for instance the divestiture of an entire business division as an on-going/viable entity to be transferred to a third party/competitor, or the termination of an exclusive vertical agreement, the termination of exclusive supply – or purchasing contracts, the opening-up of access to essential networks, the withdrawal from a particular activity, the divestiture or licensing of specific assets, the removal of a non-competition clause) and **behavioural commitments** (for instance continued supplies to competitors on a non-discriminatory basis, ensuring the access to essential facilities and the like);¹⁰⁴
- the **guarantees** and other **means of control** available to the Commission to make sure that commitments be faithfully kept, including the appointment of an independent **divestiture-trustee**, of an **expert** or of an **arbitrator**.

It is the two last bullet-points that deserve our very particular attention in the framework of the present study.

18. Significance of Remedies and Commitments

We have seen the important role that remedies¹⁰⁵ play in the framework of the merger review process. Recital 8 of the Regulation 1310/97 has now been adapted in the draft ECMR 2003, recital 25, reading as follows:

Where the undertakings concerned modify a notified concentration in particular by offering commitments with a view to rendering the concentration compatible with the Common Market, the Commission should be able to declare the concentration, as modified, compatible with the Common Market. Such commitments should be proportionate

¹⁰⁴ In respect of such commitments to be given by the notifying parties, the Commission has a preference for structural remedies. However, the Commission's Notice on Remedies made it quite clear that the Commission will also accept behavioural commitments where deemed appropriate or satisfactory.

¹⁰⁵ The Commission has drawn on the experience of the US FTC in remedies cases for developing its policy in this area, particularly the FTC's 1999 report on the divestiture process. On 15 March 2002, the FTC moreover presented its "Best Practices Analysis for the Merger Review Process". DG COMP borrowed some of the practices, including the increased use of **monitoring trustees, divestiture trustees, upfront buyers** ("*fix-it-first*" remedies whereby the parties must first find a suitable purchaser for their proposed divestment package and sign a purchase agreement prior to obtaining approval for their concentration) and **crown jewel provisions** (that is a fall-back offer in the sense of a more extensive divestment, should the preferred divestiture package fail, for instance because no suitable buyer could be attracted).

to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its Decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the Common Market. The Commission should have at its disposal appropriate instruments to ensure the enforcement of these commitments and to deal with situations where they are not fulfilled.

These **commitments**, by way of their incorporation within a decision of the Commission (or by the reference made within the decision to the commitment letter of the enterprise concerned), become themselves part of the "*acte communautaire*".¹⁰⁶ Consequently, the Commission has recently formed a **special enforcement unit** of some ten case handlers of the Merger Task Force (lead by Wolfgang Mederer) to monitor the compliance with the commitments given. A failure to adhere to the commitments may cause the Commission to revoke its clearance decision (whether issued in Phase I or in Phase II), a matter which obviously will entail most serious consequences.¹⁰⁷

The Notice on Remedies¹⁰⁸ sets out the details regarding the Commission's assessment of the **burden of proof**. Paragraph 6 of the Notice reads as follows:

It is the responsibility of the Commission to show that a concentration creates or strengthens market structures which are liable to impede significantly effective competition in the Common Market. It is the responsibility of the parties to show that the proposed remedies, once implemented, eliminate the creation or strengthening of such a dominant position identified by the Commission. To this end, the parties are required to show clearly, to the Commission's satisfaction in accordance with its obligations under the Merger Regulation that the remedy restores conditions of effective competition in the Common Market on a permanent basis.

In the cases more closely reviewed below, we will see how this allocation of the burden of proof was handled in practice. The negotiation of remedies/commitments typ-

¹⁰⁶ See hereto also Article 9 of the Council Regulation entering into force as of 1 May 2004 (replacing Regulation No. 17/62), which now makes specific reference that the Commission may accept commitments in respect of its review under Articles 81/82, and "*may by decision make those commitments binding on the undertakings*". In contrast to the preferred practice in merger review cases, where the preferred remedy are of a structural nature, behavioural remedies are preferred in the framework of a review under Articles 81/82 ("*structural remedies should only be imposed either where there is no equally effective behavioural remedy, or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy*"; see recital 12).

¹⁰⁷ For instance, the Commission may require a divestiture, or may take any other action deemed appropriate so as to restore an effective competition.

¹⁰⁸ OJ 2001 C68/3.

ically takes place under significant time-pressure,¹⁰⁹ and this is an impact which the Commission is now addressing in its draft for the New ECMR which, when entering into force, will provide more flexibility for the benefit of both, the Commission and the parties. A most far-reaching remedy package, for instance, had to be negotiated in the *Exxon/Mobil* case.¹¹⁰

Another substantial remedy package was negotiated in the *Boeing/McDonnell Douglas* case, but in some cases the tight time-frames did not allow the parties to come up with commitment packages which satisfied the Commission. Hence, the Commission blocked the *Airtours/First Choice* case, as it blocked the *WorldCom/Sprint* deal and the acquisition of *Metsä Tissue by SCA Mölnlycke* as well as the acquisition of *Honeywell by General Electric*. Some merger proposals were withdrawn by the parties as a consequence of the antitrust concerns voiced by the Commission where the parties found no possibility to offer remedies which would have satisfied the Commission's requests.

It is *noticeable* that the remedy packages which had to be offered by the parties became more and more complex. This may have to do with the development of more exacting economic theories applied to assess the potential danger for creating or strengthening a dominant position. For instance, oligopoly and collective dominance theories have become an integrated part of merger control, and have given the Commission an additional tool to cause the parties to offer commitments.

¹⁰⁹ In the *Telia/Telenor* case (Case COMP/M. 1439, of 13 October 1999) commitments submitted one week after the expiry of the legal deadlines were still accepted by the Commission on the quite exceptional ground that the Swedish and the Norwegian parliaments had to be consulted before the proposed commitments could be formally submitted. However, in the *Airtours/First Choice* case, the Commission rejected a second set of commitments which had been submitted shortly after the expiry of the deadline. Also in the *Volvo/Scania* case (case COMP/M. 1672 of 14 March 2000) the Commission rejected late commitments offered by Volvo. However, the late submittal of these commitments may not have been the only ground for their rejection. It appears that in both cases, *Airtours/First Choice* and *Volvo/Scania*, the packages of commitments were rather complex or to some extent unclear and would have required further market testing and more detailed examination, and when such packages are submitted as late as two weeks into the last months of the Commission's investigation, then there will simply not be enough time for the Commission to consider them and to be satisfied by their effects. In contrast, in the *Telia/Telonor* case, the package offered late was sufficiently clear-cut and thus could be accepted by the Commission. Moreover, in *Schneider/Legrand* the Commission warned in its press release announcing the prohibition: "*Despite the scale and seriousness of the problems posed by the merger, Schneider Electric did not put forward in good time adequate undertakings to ensure that, following the merger, the conditions of effective competition would be restored.*" In fact, after the expiry of the deadline, the Commission was not prepared to accept "*last minute*" undertakings, unless the parties had been in a position to establish immediately and without any possible doubt that they would restore the conditions of competition. – As indicated above, however, these time-constraints will, under the New ECMR, be significantly alleviated, as a stop-the-clock provision will be introduced in Phase I and in Phase II.

¹¹⁰ Case IV/N.1383, 29 September 1999.

How should commitments be structured so as to make them acceptable to the Commission? The Notice on Remedies, in Paragraph 9, makes reference to the *Gencor* case where the Court of First Instance:

... established the principle that the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments that would amount merely to a promise to behave in a certain way, for example a commitment not to abuse a dominant position created or strengthened by the proposed concentration, are as such not considered suitable to render the concentration compatible with the Common Market.

19. Structural Remedies – So Far Preferred

Based on *Gencor/Lonrho*, the Commission stated that commitments which are structural in nature would be preferable and would have the advantage that they would not require medium or long-term monitoring measures. The CFI then held as follows:¹¹¹

The categorisation of a proposed commitment as behavioural or structural is therefore immaterial. It is true that commitments which are structural in nature, such as a commitment to reduce the market share of the entity arising from a concentration by the sale of a subsidiary, are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that commitments which *prima facie* are behavioural, for instance not to use a trademark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors, or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position.

Hence, the emphasis will lie on structural remedies which may consist of divestiture commitments, the termination of exclusive agreements and licensing arrangements providing for access to core technology, infrastructures and networks.

For this purpose, commitments

- should be clear-cut and capable of unambiguously remedying the potential concerns regarding the maintenance of a workable competition,
- should be such as to eliminate the creation or strengthening of a dominant position,
- should be capable of being implemented effectively and within a short period of time, and, ideally,

¹¹¹ T 25.3.1999, *Gencor/Lonrho*, [1999] ECR II-753, 319.

- should not require additional monitoring once they have been implemented.¹¹²

The last element is a particular problem and concern, and the reason why, in most cases **the Commission has, wherever feasible, favoured (hard) structural commitments over merely (soft) behavioural commitments.** For instance, the Commission is not likely to accept the mere promise of a dominant enterprise that it will “*behave well*” and will not use its dominant market powers; instead, the Commission will normally prefer to nail this down by way of a “hard” commitment in the sense of a divestiture requirement, wherever possible.

Among the structural remedies, a divestiture promises to offer the most effective way to restore effective competition. Such divestiture should pave the way for the emergence of a new competitive entity and, therefore, for the strengthening of existing competition. This being the *idée de manoeuvre*, the divested activities obviously will have to consist of a viable business which, if operated by a suitable purchaser, can effectively compete with the merged entity on a lasting basis.

For instance, in respect of the joint-venture (further reviewed below) between *Shell and BASF*,¹¹³ the parties had to undertake to divest the polypropylenes resin production plants with very significant capacities, and to divest BASF’s technology business in the polypropylenes production and catalyst market (where Shell was considered to be a leading player), and the parties had to ensure that the joint-venture would license its metallocene patent rights to all interested third parties. This is one of the most fascinating cases, and we will take a closer look at this below.

Equally fascinating was the *Alcoa/Reynolds* merger¹¹⁴ where clearance to form the largest integrated aluminum producer worldwide was obtained against the parties’ undertaking to divest quite a number of businesses in order to remove overlaps as well as to secure supplies of raw materials to Alcoa’s only competitor. In the *TotalFina/Elf Aquitaine* case, the merged entity had almost absolute control over the national market for refined products, and the only way for the Commission to impose an effective opening-up of the market was seen by strengthening imports. For that purpose, overlaps had to be removed and the parties had to give up their controlling position, for instance by TotalFina selling 70 service stations, by divestiture of the parties LPG business, and by a divestiture of 50% in the single fuel supply pool operating in respect of the airports in Lion and Toulouse (where Elf held the other 50%).

A “naked” divestiture, however, would not as such be sufficient, unless it would go along and would be accompanied by the requisite infrastructures, logistics, customer contracts and technology enabling it to be operated. Thus, a divestment proposal offered in the *Alcan/Pechiney/Aluisse* case was rejected by the Commission because

¹¹² For instance, the Notice on Remedies makes reference to the *Boeing/McDonnell Douglas* case (Commission Decision 97/816/EC, IV/M. 877; OJ 1997 L336/16) where, quite reluctantly, the Commission considered and accepted commitments which required further monitoring.

¹¹³ Case COMP/M. 1751, project Nicole, Decision of 29 March 2000.

¹¹⁴ Case COMP/M. 1693, Decision of 3 May 2000.

it had not been accompanied by customer contracts, whereas in *Air Liquide/BOC* the divestiture offered included divestments of plants accompanied by the related distribution infrastructure, all of the necessary technology licenses, all relevant customer information and current purchase orders.

Hence, the divestiture commitment must relate to a business which is suitable for divestment which means that it will have to be a viable business which can be operated by a competitor who is totally independent from the merging parties. For instance, in the aforementioned *Exxon/Mobil* case, the Commission had rejected a suggested divestment of Mobil's business in aviation lubricants, because this business decision was too heavily integrated within Mobil and would not have been capable to be operated as a stand-alone business. Hence, it will also be important that the buyer for the divested business is a "suitable" buyer who will be able to create an effective competitive pressure on the merged entity.

As we will see in the cases reported below, the Commission has set the widely accepted standard of requiring the appointment of an **independent trustee** who will be in charge to monitor or implement the structural commitment as per the yardsticks set by the Commission. For instance, a **Monitoring Trustee** was to be appointed in the *BP/E.ON* case, discussed in detail in Part VII below. And in case the parties would not reach consensus on a final agreement regarding certain divestiture shares, a **Divestiture Trustee** was to be appointed. Both were subject to Commission-approval.

This pattern is also used in **US merger review proceedings**; compare e.g. the extensive FTC Decision in *Glaxo Wellcome plc and SmithKline Beecham plc*; the tasks to be accomplished by the **Monitor Trustee** (as he is called in the USA) are defined in great detail in Title X of that Decision, and those of the **Divestiture Trustee** in Title XI.¹¹⁵ Typically, these trustees are appointed by the FTC itself, and not by the parties, whereas the EU Commission leaves the designation of the trustees to the parties, but will reserve its right to approve the candidate, or to object.

Normally, structural remedies are to be implemented within a **very short period of time** (a few weeks or months). They are typically labelled as a **condition** on which the Commission's decision is based, and if not implemented, the decision as such falls without a remedy, with of course very serious consequences.

20. Best Practice Guidelines for Divestiture Commitments, of 2 May 2003

On 12 July 2002, the Commission submitted, for consultation with the Member States and the interested public, two model texts relating to divestiture commitments submitted by notifying parties under the ECMR. These texts have by now been finalized and are accessible on DG COMP's website.¹¹⁶ The Guidelines and the models assemble

¹¹⁵ FTC Decision of 26 January 2001, p. 39 ss. and 42 ss.

¹¹⁶ See FN 57 above.

the experience the Commission has gained in shaping remedies and tie in with the remedies policy set out in the Commission's Notice on Remedies.¹¹⁷

The standard model texts are not intended to provide exhaustive coverage of all issues, and are not legally binding upon the parties; nevertheless, they contain the essential elements that should be included in commitments and trustee mandates relating to divestitures. The standard models are designed to apply to all remedy proceedings in both Phase I and Phase II. The Commission also indicates that it intends to keep these model texts updated based on ongoing practice, taking into consideration the developments of the commission's remedies policy and the experience gained from working with the merging parties and trustees in future matters.

Recognising that the timing is crucial under the legally-binding timetable set in the ECMR, the model texts will relieve the parties from the burden of structuring rather standard terms and provisions for commitments and trustee mandates under tight time constraints. Hence, the proceedings will be expedited and will allow the merging parties more time to concentrate on the actual substance and implementation of the commitments. Moreover, the standard models will ensure some consistency across different cases and will contribute, as the Commission states, to increasing the level of transparency and legal certainty for merging parties offering commitments to the Commission.

The Standard Model for Divestiture Commitments sets out all the requirements for achieving full and effective compliance with divestiture commitments offered by the merging parties so as to obtain a clearance decision. The model, after a definitions section, describes the divestiture procedure, the divestiture period and the extended period; it describes the procedure where the equipment (?) takes the special form sometimes used where an **up-front buyer** will have to be identified and where the parties commit themselves not to implement the proposed concentration unless and until they have entered into a binding agreement with such buyer for the Divestment Business. The commission reserves its right to approve the proposed buyer.

Moreover, in some cases, alternative divestitures, in particular "Crown Jewels" structures have to be contemplated in case the originally proposed business cannot be divested.¹¹⁸

The model text provides for a prohibition to re-acquire direct or indirect influence over the Divestment Business. Such Divestment Business will have to be identified very precisely; it must be an existing entity that can operate as a stand-alone business. In particular, it must comprise all the assets and personnel necessary to ensure the viability of the divested activities. Moreover, the Divestment Business must be enti-

¹¹⁷ Notice on Remedies Acceptable Under Regulation EEC No. 4064/89 and Regulation EC No. 447/98, at OJ C68, 2.3.2001, pages 3–11; published at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

¹¹⁸ See hereto also the Notice on Remedies, Paragraphs 22 and 23.

tled to benefit from products or services provided by the merging parties for a transitional period of time, such period to be determined on a case-by-case basis.

Section C of the model contains a number of related commitments designed to maintain, pending the divestiture, the viability, marketability and competitiveness of the Divestment Business, mostly in the form of hold-separate and ring-fencing obligations. There is provision for a Hold Separate Manager, to be appointed by the parties, and he will be responsible for the management of the Divestment Business as a distinct entity; he will be supervised by the Monitoring Trustee. The ring-fencing will also specifically apply to sensitive information, and the parties will have an obligation to make sure that any central information technology network will be severed.

Related commitments will further contain a non-solicitation clause for key personnel of the Divestment Business. In addition to that, the Commission may request the inclusion of non-compete clauses protecting the customers of the Divestment Business for a start-up period.

An important element is the obligation of the parties to submit regular reports on the the divestiture process to the Commission and the Monitoring Trustee.

The Section D sets out the requirements to be met by the purchaser. The aim is to ensure that the Divestment Business will be sold to a suitable buyer who is independent of and unconnected to the parties, and who possesses the financial resources, proven experience and incentive to maintain and development the Divestment Business as a viable and active competitive force in the market place.

The approval process consists of submitting a fully documented and reasoned proposal to the Commission; the Commission will verify all of the significant elements and, in particular, will examine the report to be submitted by the Monitoring Trustee.

Section E then deals with both legal monitoring and Divestiture Trustees. Terms of their appointment are identified, as well as the content of these mandates, the conditions for replacement of the trustees and the like. The parties will owe the trustees significant duties and obligations, including the obligation to provide to them all managerial and administrative support necessary for the Divestment Business.

Section F contains a review clause which allows the Commission to extend the periods of time and to waive or modify the undertakings. The parties must show good cause in order to be able to benefit from the exercise of the review clause.

The second model is the **Standard Model for Trustee Mandates**, which sets out the duties and responsibilities of both, the Monitoring Trustee and the Divestiture Trustee. The Commission does not have a preference for the appointment of a single person to serve in the dual role; rather, the decision as to whether one or more trustees are appointed should be determined on a case-by-case basis by the parties. The Standard Trustee Mandate consists of a number of main elements which may be summarized as follows:

Section A again contains definitions; Section B and C deal with the appointment of the trustee, or the Trustee Team and the general duties.

Section D devotes rather detailed provisions on the duties and obligations of a monitoring trustee, whereas Section E deals with the duties and obligations of a divestiture trustee.

Section F contains detailed provisions on the reporting obligations; essentially, monthly written reports submitted to the Commission will be required, dealing with the operational and financial performance, the issues or problems that have arisen in the frame work of the execution of the obligations, the current monitoring of the preservation of the economic viability, marketability and competitiveness of the Divestment Business, the review and assessment of the progress made, particulars as to the work-plan and proposals for any revisions and the estimated future timetable.

Section G deals with the duties of the parties in respect of their co-operation, assistants and all managerial and administrative support. Sections H to J cover additional trustee-related provisions, including those on conflicts of interest, remuneration, indemnity, confidentiality, ... mination of the mandate, any amendments, governing law and the like.

No doubt, merging parties will find these models extremely useful; basically, they apply to "hard" commitments only. What now needs to be further discussed are – what we may term – "soft commitments" in the sense of behavioural commitments which, ultimately, may be monitored by arbitrators or arbitral tribunals.

21. Behavioural Remedies

However, how to proceed where structural remedies are inadequate or not available for practical and other reasons? More particularly: Would behavioural remedies be sufficient, and what are the yardsticks under which they could be considered suitable? Moreover: how to deal with the problem of monitoring behavioural remedies?

Where hard and fast divestments are not the answer, the Commission as well as the merging parties will have to look at other methods, in terms of soft behavioural commitments, to address competitive concerns. In the past, the Commission has shown quite some **reluctance**, and the CFI judgment in the Gencor case issued on 25 March 1999¹¹⁹ may have corroborated that attitude.

This hesitation and obvious scepticism, however, is not as such justified.

We will see that adequate solutions can be found, essentially by way of charging an arbitral tribunal to monitor such kind of behavioural commitments, and we will see

¹¹⁹ Case T-102/96, *Gencor v/Commission* [1999] ECR II-753, at Paragraph 316; see above.

that this tool – so far hardly used in practice – promises to provide an ideal solution to deal with the problem, to guarantee compliance through a carefully administered monitoring process, and with a flexibility as may be required due to changed circumstances. However, let us examine these issues step by step.

In the *Gencor* judgment, the CFI established the principle and requirement that commitments must ensure competitive market structures. Accordingly, commitments that would merely amount to a promise to behave in a certain way, for example a commitment not to abuse a dominant position created or strengthened by the proposed concentration, would not as such be considered suitable to render the concentration compatible with the Common Market. Hence, according to the CFI, commitments which are structural in nature are, as a rule, preferable from the point of view of the Regulation's objective, and will moreover have the advantage that they do not require medium or long-term monitoring measures. This reasoning in the *Gencor* judgment of the CFI was almost literally reflected in Paragraph 9 of the Commission's Notice on Remedies.

However, the Notice does recognise that there may be situations where a divestiture of a business is impossible. The Notice makes reference to the *Boeing/McDonnell Douglas* case where the investigations revealed that no existing aircraft manufacturer was interested in acquiring Douglas' aircraft company from Boeing, nor was it possible to find a potential entrant to the commercial jet aircraft market who might achieve entry through the acquisition of McDonnell Douglas. Furthermore, the Notice acknowledges that there are other circumstances it would not be feasible to impose a hard commitment in the sense of a divestiture. For instance, control over networks cannot be broken up, and a required divestiture might ruin such infrastructures.

Foreclosure effects resulting from a concentration are likely to create higher entry barriers or other impediments for potential new entrants on the relevant market. The control over infrastructures, networks, essential facilities (such as for instance access to port facilities in the shipping industry, slots at airports, railway infrastructures and the control over key-technologies including patents and other intellectual property rights) are factual and legal parameters which need to be considered with greatest care in the framework of the competitive assessments. These are situations where hard structural remedies might be unavailable, or unrealistic, or otherwise ineffective, whereas behavioural commitments would appear to be much more appropriate and conducive to maintain an effective competition. For good reasons, the Notice on Remedies, in Paragraph 29, refers to the example stated by the Commission in the *Glaxo/Welcome* case which will be reviewed in more detail further below, and where the Commission considered that an imposed divestiture (in contrast to the imposition of a merely behavioural commitment in terms of requiring the granting of licences) would have impeded efficient and ongoing pharmaceutical research, ultimately at the detriment of the consumer.

Similar situations may arise where there exists a combination of **networks**, such as a combination of key-patents which, as such, cannot be broken up although the (so-called) "**network effects**" may result in a foreclosure through existing exclusive

agreements and, thereby, may lead to a dominant position or strengthen the same. In such situations, therefore, the adequate response would seem to require a termination of foreclosing exclusive agreements, or the forced opening up of exclusive networks requiring the merging parties to grant access to all qualifying interested third parties which access would have to be granted on a commercially viable and non-discriminatory basis. Several of the cases which we will analyse below in quite some detail are of this nature, and it is impressive that the Commission placed confidence in the crucial problem which arises in all of these situations, i.e. in the problem of monitoring compliance over a medium or even long-term period of time.

As we will see, although the MTF has a highly qualified taskforce for monitoring commitments, the Commission has accepted the parties' commitments to refer matters of the policing to independent arbitrators (or experts), and the purpose of this writing is to highlight the circumstances, the solutions adopted and the problems that may be associated therewith.

Hence, this writing

- intends to stimulate a further discussion,
- intends to discuss some ideas how this important process can be lined up in a reliable and professional manner,
- so as to satisfy the policing requirements and ultimately the responsibility of the Commission to monitor compliance with the Common Market, and
- at the same time, to serve, in the best possible manner, the needs and legitimate interests of the merging parties and, even beyond,
- to serve the legitimate interests of third parties, suppliers, purchasers, licensees and consumers.

We will reflect on these elements in the last Part of this writing and, possibly, the ultimate work-product which might flow from the present reflections, might be

- either a *"Note on Best Practices for the Use of arbitral tribunals Monitoring Behavioural and Structural Commitments"*, or
- an *"Explanatory Note"* followed by a *"Model Text for the Use of an Arbitrator or arbitral tribunal for Monitoring Commitments Under the EC Treaty"*.¹²⁰

¹²⁰ The idea would be to establish something similar to the **"Explanatory Note on the Commissions's Model Texts for Divestiture Commitments and the Trustee Mandate Under the EC Merger Regulation"**, which was presented on 12 July 2002.

22. Different Requirements for Commitments

The Notice on Remedies flags out slightly different requirements and procedures for commitments submitted in a Phase I investigation as opposed to Phase II investigations. **In Phase I**, it will be particularly important that commitments be submitted in due time, with a sufficient degree of detail to enable a full assessment to be carried out by the Commission within a very short period of time, and moreover must explain in what way the commitments offered will solve the competition concerns identified by the Commission.

The Commission may consult authorities of the Member States on the proposed commitments and, where appropriate, also third parties in the form of a market test. Where the assessment of these commitments confirms that the proposed commitments remove the grounds for serious doubts, the Commission will clear the merger in Phase I. However, where the assessment shows that the commitments offered are not sufficient to remove the competitive concerns raised by the concentration, the parties will be informed accordingly. Possibly, the Commission may be prepared to accept modifications to the commitments but, in any event, such modifications would have to present an immediate and satisfactory response to the Commission's concerns regarding the maintenance of a workable and effective competition. Should the parties fail to remove the serious doubts, the Commission will issue an Article 6 (1)(c) decision and open the further proceedings.

In the framework of the **Phase II** investigation, the Commission – pursuant to Article 8 (2) ECMR – must declare a concentration compatible with the Common Market where, following modifications, a notified concentration no longer creates or strengthens a dominant position within the meaning of Article 2 (3) of the ECMR.

Extensions of the time-limit, under the current practice, were available only in exceptional circumstances and where sufficient time was left for the Commission to make a proper assessment by the Commission and to allow it to consult with Member States and third parties. Phase II commitments, therefore, have to be submitted in due time, at the latest on the last day of the three months period and shall have to address all competition issues raised in the Statement of Objections (unless subsequently abandoned). The commitments must specify the substantive and implementing terms entered into by the parties in sufficient detail to enable the Commission to make a full assessment. Moreover, the parties shall have to explain how the commitments offered will solve the competition concerns. The parties will also have to supply a non-confidential version of the commitments for purposes of market testing.

If the assessment confirms that the proposed commitments remove the competition concerns, following consultation with the authorities of the Member States, discussions with non Member States authorities and, where considered appropriate, with third parties in the form of a market test, a clearance decision will be submitted for Commission approval.

However, where the assessment leads to the conclusion that the proposed commitments do not sufficiently resolve the competition concerns, the parties will be in-

formed accordingly. They may then subsequently modify the proposed commitments, and the Commission may accept those where it can clearly determine in a straight forward fashion that such commitments, once implemented, will resolve the competition problems.

23. Commitments Offered – Or Imposed?

The Notice on Remedies typically refers to the commitments “offered” by the parties, but it would be more realistic to characterise these commitments as being imposed by the Commission, or conceded on the Commission’s request. The Notice on Remedies further provides quite detailed guidance regarding divestment commitments, with detailed suggestions how a divestiture should be engineered, what the divestiture package will have to consist of in terms of tangible assets (R&D, production, distribution, sales and marketing activities) and intangible assets (intellectual property rights, goodwill), personnel, supply and sales agreements (with guarantees as to their transferability), customer lists, third party service agreements, technical assistance etc. Moreover, the Notice contains guidelines on the procedure and on the appointment of a divestiture trustee and the role and function to be accomplished by that person, including possibly the function of a hold-separate trustee. Such divestiture trustee must be independent of the parties and possess the necessary qualifications to carry out that function and shall have to make sure that he will not expose himself to any conflict of interest. The Commission reserves the right to verify whether the proposed trustee fulfils these requirements, and the Commission will review and approve the terms of the trustee’s appointment. The mission of the trustee is defined in Paragraph 56 of the Notice on Remedies as follows:

The trustee will assume specified duties designed to ensure compliance in good faith with the commitments on behalf of the Commission, and these duties will be defined in the trustee’s mandate. The mandate must include all provisions necessary to enable the trustee to fulfil its duties under the commitments accepted by the Commission. It is subject to the Commission’s approval.

Moreover, when the “job” is done, the trustee’s mandate

... will provide for the trustee to request the Commission for a discharge from further responsibilities. Even after the discharge has been given, the Commission has the discretion to require the re-appointment of the trustee, if subsequently it appears to the Commission that the relevant commitments might not have been fully and properly implemented.¹²¹

While divestments (as structural remedies) are not the prime focus of this writing, two observations – which may be quite significant – can be made:

- First, it is quite significant how the position, function and responsibility of the divestiture trustee is characterised in the Notice. While the trustee is independent

¹²¹ Paragraph 57 of the Notice.

from the Commission and must be independent from the parties, it is nevertheless clear, by the terms cited above, that the divestiture trustee will be closely held to the chest of the Commission, will derive its terms of reference after approval by the Commission and will only be able to discharge its function with the consent of the Commission. Hence, the divestiture trustee is a kind of prolonged arm of the Commission.

- Second, the Notice on Remedies only contains this kind of detailed parameters for structural commitments (in the sense of divestments) but nothing comparable regarding behavioural commitments. This is surprising, and possibly the answer may lie in the fact that the Commission (quite in the sense of the Gencor judgment) has had significant hesitations to at all impose (or accept) behavioural commitments, unless there had really been no other solution.
- Third, this *lacuna* is the more surprising since, as the following discussion of quite a number of decisions will show, the Commission nevertheless, in more than two dozens of cases, considered and accepted behavioural commitments tied to the imposition of an independent arbitral tribunal to monitor these.
- Hence, one would have expected the Notice on Remedies to also contain a full chapter (similar to the one on structural remedies) devoted to behavioural commitments and the methods, requirements and possibly best practices for their policing.

It is the purpose of this writing to provoke further discussion on behavioural remedies and their monitoring through arbitration, and the author would hope to see, in any future (amending or replacing) Notice on Remedies a separate chapter devoted to behavioural commitments, and setting some of the basic standards as to their effective monitoring through arbitration.

24. Failure to Honour Commitments, and Consequences

Legal consequences in case parties fail to honour their commitments: Where commitments had to be conceded by the parties, the Commission's clearance of the concentration will be based on the premise that the commitments will be honoured by the parties. However, the question is what consequences would follow in case commitments would not be honoured. In this respect, a distinction must be made between conditions and obligations:

- Structural commitments (i.e. the requirement for achieving a measure that gives rise to the structural change of the market, such as a requirement to divest) will typically be qualified as conditions.
- However, the implementing steps which are necessary to achieve such a result will generally constitute obligations of the parties (for instance the appointment of a divestiture trustee) with an irrevocable mandate to sell the business.
- Moreover, behavioural commitments will in most cases qualify as obligations, not as conditions for the clearance.

Where the parties concerned commit a breach of an obligation, the Commission may revoke clearance decisions issued either under Article 6 (2) or Article 8 (2) ECMR, acting pursuant to Article 6 (3) or Article 8 (5)(b), respectively.¹²²

The parties may also be subject to fines and periodic penalty payments as provided for in Articles 14 (2)(a) and 15 (2)(a) of the ECMR.

However, where a condition is not fulfilled, the Commission's compatibility decision would not longer stand as such. In such circumstances, the Commission may (pursuant to Article 8 (4) of the ECMR) order any appropriate action necessary to restore conditions of effective competition. The measures available to the Commission will include periodic penalty payments under Article 15 (2)(b) ECMR. In addition, the parties may be subject to fines as provided for in Article 14 (2)(c) ECMR.

25. Soft Commitments Monitored by Arbitration

The "trouble" with behavioural commitments, as we have seen, is the **long-term perspective** and the difficulties of policing these commitments over the period of time. It is exactly in this area where **arbitration**, initially looked upon by the Commission with great suspicion, has an important function, in the eyes of the Commission, and it will be for the arbitrator to see to it that the commitments given by the notifying parties will be kept faithfully. Hence, **arbitration** would appear to be the adequate answer, fulfilling an important monitoring function which the Commission itself can not fulfil. The Commission itself has followed this route when scrutinizing the cases reported below.

Moreover, arbitration would seem to be **the natural solution** to deal with the significant problem of the **ex ante-determination** which the Commission has to make in all of these cases. In fact, the Commission has the most difficult task of assessing and indeed **predicting the future**, i.e. predicting the potential or likely anti-competitive effects of an intended concentration yet to be carried out, and thus may **ex ante** have to impose behavioural remedies over years to come under a **forecast** of expected or predicted scenarios which, as such, may not materialise, **or may materialise under slightly or even significantly different fact patterns**.

All of this calls for a **mechanism capable of dealing with such a situation on a "rule of reason" basis**, and it cannot be doubted that the concept of a neutral **arbitration** holds the best key to provide the solution.

Indeed, as the following discussion will show, arbitration can provide this function and can, in a quite novel form of focused procedures, almost ideally respond to this monitoring task, and serve the needs of (i) the Commission

¹²² Notice on Remedies, Paragraph 12.

which must monitor compliance, of (ii) the dominant enterprises, as well as (iii) the needs of the “small” competitor or the “weak customer”.

We will examine below a number of **Phase I decisions**, followed by a review in respect of **the most recent Phase II decisions**, and we will analyse briefly the nature of the Commission’s concerns and then take a **look at the commitments which had to be conceded by the parties**.

26. A caveat: Special Knowledge Will Be Required

There are, however, aspects which need further review and thinking and, most of all, it will be important to have an educated class of highly experienced arbitrators, knowledgeable in an **efficient case management** and knowledgeable in competition law matters who fully understand what the process is about, and realise that this kind of arbitration, necessarily, shows significantly different features from any other proceedings or ordinary arbitration cases.

Hence, it would be quite wrong to try to assimilate the procedures (as may result from the cases discussed below) with the typical paths used in, for instance, an ordinary ICC arbitration on some contractual issues.

In the above context, **third parties** play an important role because, in most cases, the behavioural commitments indeed aim to protect those third parties. As we will see, most commitments to arbitrate work in their favour, and they would seem to be well advised to use the system offered, rather than to address themselves to the ordinary State courts. The advantages, as we will see, are multifold and substantial.

27. Table of 30 Commission Decisions Reviewed

Commission Decisions regarding Art. 81 (3) EC			
1	23.12.1977	Decision 78/253/EEC	Campari Case, OJ [1978] L 70/69
2	12.7.1989	Decision 89/467/EEC	UIP, OJ [1989] L 226/25
3	11.6.1993	Decision 93/403/EEC	EBU/Eurovision OJ [1993] L 179/23
4	12.4.1999	Decision 99/329 EC	P & I Clubs, OJ [1999] L 125/12
5	15.9.1999	Decision 99/781/EC	British Interactive Broadcasting/Open, OJ [1999] L 312/1

Phase I Decisions according to Art. 6(1)(b) Merger Regulation (Reg. 4064/89)			
6	4.9.1992	Case No. IV/M.235	Elf Aquitaine-Thyssen/ Minol
7	27.11.1992	Case No. IV/M. 259	British Airways/TAT
8	20.7.1995	Case No. IV/M. 616	Swissair/Sabena (II)
9	4.6.1998	Case No. IV/M.1185	Alcatel/Thomson CSF-SCS
10	25.1.2000	Case No. Comp/M.1684	Carrefour/Promodès
11	21.3.2000	Case No. Comp/JV.37	BSkyB/Kirch Pay TV
12	29.3.2000	Case No. Comp/M.1751	Shell/BASF/JV – Project Nicole
13	12.4.2000	Case No. Comp./M.1795	Vodafone Airtouch/Mannesmann
14	8.5.2000	Case No. Comp/M.1846	Glaxo Wellcome/Smithkline Beecham

Phase I Decision according to Art. 6(2) Merger Regulation (Reg. 4064/89)			
15	13.10.2000	Case No. Comp/M 2050	Vivendi/Canal+/Seagram
16	8.5.2001	Case No. Comp./M.2268	Pernod Ricard/Diageo/Seagram Spirits
17	8.1.2002	Case No. Comp/M.2621	SEB/Moulinex
18	10.7.2002	Case No. Comp/M.2803	Telia/Sonera

Phase II Decisions according to Art. 8(2) Merger Regulation (Reg. 4064/89)			
19	30.9.1992	Case No. IV/M.214	Du Pont/ICI
20	16.1.1996	Case No. IV/M.623	Kimberley- Clark/Scott
21	30.7.1997	Case No. IV./M.877	Boeing/McDonnell Douglas
22	15.10.1997	Case No. IV/M.938	Guinness/Grand Metropolitan
23	9.3.1999	Case No. IV/M 1313	Danish Crown/Vesjyske Slagterier
24	1.12.1999	Case No. IV/M. 1578	Sanitec/Sphinx
25	1.12.1999	Case No. Comp/M.1601	Allied Signal/Honeywell
26	3.5.2000	Case No. Comp/M.1671	Dow Chemical/Union Carbide
27	20.12.2001	Case No. Comp/M.2389	Shell/DEA
28	20.12.2001	Case No. Comp/M.2533	BP/E.ON
39	20.12.2001	Case No. Comp/M.2530	Südzucker/Saint Louis Sucre
30	3.7.2001	Case No. Comp/M.2220	General Electric/Honeywell

* * *

V. Five Article 81 (3) EC Cases Referring to Arbitration

In respect of the cases below, I will aim to provide a very sketchy description of the background of the transaction, for the purpose of setting the scene within which the commitment to arbitrate is situated.

1. Campari-Milano SpA (1977)

Campari notified certain trademark licensing agreements and ancillary agreements entered into with manufacturers and sellers of Campari products in Holland, Belgium, Germany and France. The agreements were based on an exclusive licence against an undertaking that the licensees will not handle competing products, with an assignment of specific territories and a corresponding undertaking of the licensees not to carry on active sales outside the territory. The notified agreements contained an arbitration clause providing for arbitration in Milan and, in one case, providing for arbitration in Switzerland, under a provision which was reported by the European Commission as follows:

All disputes as to the interpretation and performance of the Agreements are to be settled by three **arbitrators**¹²³, whose function is to produce an amicable settlement.¹²⁴

This arbitration clause, as reported, would have been a marvellous example for late Frédéric Eisemann's famous Article on the pathological arbitration clause,¹²⁵ in that it would appear to be quite unclear whether the arbitrators have an authority to decide or whether they are simply expected to serve as facilitators to bring about an amicable settlement. However, this is a side-issue.

More interestingly is what the European Commission added and required in the framework of its Decision. The Commission required

- that it be **informed** of any awards made under the arbitration clause;
- because of the Commission's **fear that the arbitrators might interpret the agreements without paying due regard for the Commission's Decisions**;
- that the Commission might, therefore, have to **amend** the arbitrators' decision, and in particular;

¹²³ All emphasis in the quotations cited in this text are added by the author.

¹²⁴ Commission Decision of 23 December 1977, Paragraph 10.

¹²⁵ Frédéric EISEMANN: La clause d'arbitrage pathologique, in: Arbitrage Commercial, Essays *in memoriam* Eugenio Minoli, Torino 1974, 129 ss.

- that the arbitral awards may **need to be reviewed as to their compatibility** with Article 81 and 82 EC (at that time Articles 85/86).

The text reads as follows:

Arrangements should also be made to ensure that the Commission is **informed of any awards** made under the arbitration clause, as there is a risk that the agreements might be interpreted without regard for this Decision, so that the Commission might have to amend it. There is a greater risk at arbitration than in the ordinary courts that interpretation of the Agreement may go beyond the limits imposed by the exemption, particularly where the arbitrators, whose function, as in this case, is to produce an amicable settlement, are not bound by the substantive law. Furthermore, review of arbitral awards for their compatibility with Articles 85 and 86 (now 81/82), inasmuch as these fail to be regarded as part of EEC public policy is not necessarily available in non-member States.

Moreover, Article 3 of the Decision required:

The above mentioned undertakings shall **inform the Commission immediately** of all awards made under the arbitration clause.

What we see here reflects the **scepticism** of the Commission vis-à-vis arbitration, as it prevailed in the 1970s and 1980s. In fact, the Commission took all the precautions to keep the “driver’s seat”, and to retain the power to overrule arbitral awards – indeed a surprising concept under “normal” circumstances; however, as we will further discuss, this concept is almost – or at least to some extent – inherent in the delegated functions which the arbitrators have to accomplish.

2. United International Pictures (UIP) (1989)

In 1982, UIP notified to the Commission, on behalf of Paramount Pictures Corporation (MCA Inc. and Metro-Goldwyn-Mayer Film Co.) a series of joint-venture agreements and related agreements concerning the production and distribution of motion pictures. The Commission considered that the agreements contained a number of clauses that could not be exempted pursuant to Article 81 (3) EC and, therefore, opened an investigation, followed by sending out a statement of objections. Following discussions with the Commission, UIP then offered several commitments. One of those commitments was for UIP to **agree to arbitrate disputes**, applying the **Rules of the ICC**, such arbitration taking place in the country of the claiming exhibitor. In other words, UIP made the commitment to offer almost *erga omnes* that the exhibitors may sue UIP in the exhibitor’s country before an arbitral tribunal organised under the ICC Rules.

Hence, the exhibitor who of course is **not bound** by the Commission Decision or the commitment made by UIP, in fact will have the choice of either submitting a claim to any competent State court, or to initiate arbitration (in which case the commitment made by UIP will serve as evidence for UIP’s commitment to arbitrate). It thus ap-

pears that a commitment of this nature has a similar effect like the arbitration clauses which, for instance, we can find in some 2000 or more **Bilateral Investment Agreements**, and where the states do consent that any investor who bases his cause of action on discrimination or expropriation, may take the host State to arbitration.

The clause, however, seems to be **defective** in that it provides for a default appointment in respect of the presiding arbitrator by the court of appeals at the place of arbitration, whereas, under the ICC Rules, that prerogative would exclusively vest with the ICC Court. Moreover, the provision regarding the determination of the deposits for arbitration costs is not compatible with the ICC procedure.

The UIP undertaking reads as follows:

UIP undertakes in good faith that:

(a) UIP will support cinema industry efforts to establish **arbitration** or comparable procedures for the resolution of disputes relating to product allocation or access to exhibitor screenspace.¹²⁶

(b) When a dispute arises with an exhibitor regarding product allocation in those Member States where exhibitors currently cannot compel UIP to submit disputes to arbitration under existing industry arbitration procedures, UIP will advise that exhibitor that it can register with UIP to arbitrate this and all future disputes regarding the allocation of films for which UIP holds the distribution rights which may arise before, during or after any contractual relationship concerning a particular film is entered into between UIP and the exhibitor.

Whenever existing mandatory systems do not foresee arbitration of disputes regarding product allocation arising before, during or after any contractual relationship concerning a particular film is entered into between UIP and the exhibitor concerned, UIP will also advise that exhibitor that it can register with UIP to arbitrate such disputes.

(c) **Any such arbitration shall respect the following principles:**

1. The party who intends to bring a dispute before an arbitrator or arbitral tribunal shall give written notice (registered letter) to the other party, stating the nature of the dispute to be resolved, the basis of the claimant's position and the relief requested.

2. The proceeding shall be conducted by one arbitrator nominated jointly by the parties within fifteen (15) days after receipt of the written notice, or by three arbitrators. In the latter case, the parties to the dispute shall appoint one arbitrator each within fifteen (15) days after the period to jointly nominate one arbitrator has elapsed. The arbitrators appointed by the parties shall appoint another arbitrator to be president of the arbitral tribunal within fifteen (15) days after the both of them have been nominated. If the

¹²⁶ The renewal of the exemption granted by the Commission provided for the following: UIP and the Partners have agreed to provide an undertaking to establish a new **conciliation procedure** in addition to the already established arbitration procedure to resolve disputes between UIP and exhibitors relating to the supply of prints. Moreover, the arbitration procedure has been improved by being designed to operate more quickly. The new mechanisms are to be applied in Member States where no industry arbitration procedures exist.

In the Commission's view the new conciliation and the amended arbitration procedures are useful instruments in ensuring that UIP deals with exhibitors on a fair and equitable basis (see Case No IV/C.2/30.566 – UIP Cinema, OJ [1999] C 205/6 at 4.2.9).

arbitrators do not agree, the third arbitrator shall be **appointed by the President of the Court of Appeals** having jurisdiction in commercial matters in the capital city of the exhibitor's country.

3. The **law applicable** to the substance of the case shall be the law of the country of the exhibitor.

4. The internal arbitration procedure shall follow the Rules of the Arbitral Court of the International Chamber of Commerce (**ICC Rules**). The law of the country of the exhibitor shall regulate general procedural issues.

5. The **place** of arbitration shall be the country of the exhibitor.

6. The arbitration shall be conducted in the **language** of the exhibitor.

7. Unless otherwise agreed by the parties the arbitral award is to be **made within five months** after the date on which all the arbitrators accepted office. Arbitrators should be aware of the urgency derived from the specific features of the cinema distribution industry.

8. To the extent permitted by national law, an application to the competent judicial authority for preservation or **interim measures** shall not be incompatible with the arbitration agreement and shall not imply a renunciation of the agreement.

9. The arbitrator or arbitral tribunal shall **fix the on account payment** which shall be made by either or both parties towards the costs of arbitration.

10. If an exhibitor elects to arbitrate a product allocation dispute with UIP, that exhibitor thereby agrees to arbitrate any dispute UIP may then or thereafter have relating to access to that exhibitor's screenspace.

11. The arbitration award shall, in addition to dealing with the merits of the case, fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties.

(d) This undertaking shall become effective upon the grant of an exemption to UIP and shall remain effective throughout the period of the exemption.

In the subsequent notice, pursuant to Article 19 (3) of the Council Regulation No. 17, concerning an application for a renewal of the Commission Decision, the arbitration provision was amended to include a conciliation procedure.

4.2.9. **Arbitration:** UIP and the Partners have agreed to provide an undertaking to establish a new conciliation procedure in addition to the already established arbitration procedure to resolve disputes between UIP and exhibitors relating to the supply of prints.

Moreover, the arbitration procedure has been improved by being designed to operate more quickly. The new mechanisms are to be applied in Member States where no industry arbitration procedures exist.

In the Commission's view, the new conciliation and the amended arbitration procedures are useful instruments in ensuring that UIP deals with exhibitors on a fair and equitable basis.

This notice, published in July 1999, certainly **evidences more confidence** of the European Commission towards arbitration (if compared to the Campari case reported above).

What appears noteworthy is the fact that, on the one side, the ICC Rules should be followed but that, on the other hand, some of the provisions would stand in contradiction to the ICC philosophy, for instance regarding the appointment of the third arbitrator and the determination of the arbitrators' fees.

Moreover, what we see here is a designing of the arbitration mechanism **clearly in favour of the weaker party**, i.e. of the exhibitor: **his substantive law is to be applied, even his procedural law, and his language!**

3. European Broadcasting Union (EBU) (1993)

EBU submitted, in 1989, an application for negative clearance or for exemption pursuant to Article 81 (3) EC in respect of its internal provisions ("statutes") and other regulations governing the acquisition of television rights to sports events, the exchange of sports programmes within the framework of Eurovision and contractual access to such programmes for third parties. EBU is an association of Radio and Television Organisations which had been set up in 1950 with headquarters in Geneva. The EBU Organisation has an active membership which is open to broadcasting organisations of national character and importance. Hence, active membership was limited to broadcasters which fulfil a particular public mission. However, there was also a large number of associate members (over 50). The deregulation of television broadcasting in Member States during the 1990s led to the establishment of numerous other commercial broadcasters operating on a regional, national or transnational level. A major concern of the Commission was to investigate the access scheme for non-members, in that the EBU (and its members) had to grant non-member broadcasters extensive access to Eurovision sports programmes. The terms and conditions for such access are to be freely negotiated between the EBU or its members and the non-members.

Since the scheme as such was likely to give rise to disputes over access fees, EBU, in the framework of commitments made, offered "arbitration by independent expert(s)" – another interesting (and rather pathological concept, as Frédéric Eisemann would remark) as follows:

In the event of a **dispute** over the access fee where all other conditions of access have been agreed at the request of the non-member the matter will be **submitted to arbitration by independent expert(s)**. The expert(s) will be nominated jointly by the parties. Failing agreement, nomination will be by the president of the competent Court of Appeal in the case of national arbitration (concerning access for national channels) and by the president of the International Chamber of Commerce in the case of international arbitration (concerning access for pan-European channels). The expert(s) shall fix the access fee. The decision shall be final and binding.¹²⁷

The use of the term "**expert**" is certainly misleading. However, the commitment will probably have to be understood as an agreement to arbitration (and not only an

¹²⁷ Decision 93/403/EEC, at Paragraph 40.

agreement to expert determination or expertise, which would be a different process not leading to a *res iudicata* decision).

The Commission, in its reasoning, particularly referred to the offered arbitration process stating the following:

As regards the financial conditions, it is also important that any disputes will be determined by **arbitration**, which will ensure reasonable prices.¹²⁸

In the body of the Decision, the Commission stated in Article 2 that the exemption shall be subject to the obligation that

EBU shall inform the Commission of any amendments and additions to the rules notified, of all arbitration procedures concerning disputes under the access scheme, and of all decisions regarding applications for membership by third parties.

Hence, once again, the Commission did require that arbitration proceedings must be notified (without however threatening that resulting arbitral awards would be reviewed by the Commission).

4. Protection and Indemnity Clubs (P&I Clubs) (1999)

The International Group of P&I Clubs notified a certain International Group Pooling Agreement and a separate International Group Agreement in 1981 which received an exemption for 10 years ending in February 1995. Thereupon, the International Group of P&I Clubs requested a renewal of the exemption. However, the Commission, in 1997, addressed a statement of objections due to a complaint by the Greek Shipping Co. Operation Committee, whereupon the International Group of P&I Clubs had to amend a number of contractual provisions as well as the parameters for including an applicant within the re-insurance scheme.

In this context, the application of an insurer for being included in the re-insurance scheme must be submitted to a sub-committee of the International Group of P&I Clubs which will issue a recommendation. If the recommendation is negative, the refused insurer will have the right to take the International Group of P&I Clubs to arbitration in the sense of an "appeal" (as this was stated in the respective provision, see below). The chairman of the arbitral tribunal has to have a special qualification, as being "a senior lawyer experienced in commercial and insurance matters". The entire provision reads as follows:

As to the procedure, a subcommittee of the IG will have to make a recommendation on the application within 30 days of receipt of all the relevant information (this period may be extended by a further 30 days during the renewal period). The clubs will then vote

¹²⁸ Decision 99/329 EC, at Paragraph 71.

on the basis of the recommendation. If the decision is negative, the insurer who is refused re-insurance should be given a written notice to that effect within 10 days of the vote being taken, such notice stating the reasons for the refusal. The insurer will have the right to appeal against any such refusal. **The appeal will be considered by three arbitrators, who will decide whether the clubs have applied the conditions listed above in a reasonable manner.** The parties will designate one arbitrator each within 14 days of the request for arbitration being submitted, and the third, to be designated by the two others within 10 days of their appointment, must be a senior lawyer experienced in commercial and insurance matters. The arbitrators will determine their own procedures and will act with due expedition. They have to give their decision in writing, stating their reasons. Their decision has a binding character.¹²⁹

5. British Interactive Broadcasting/Open (1999)

In 1997, British Interactive Broadcasting (BiB), subsequently renamed "Open", notified the formation of the BiB joint venture formed by BSkyB Ltd., BT Holdings Limited, Midland Bank Plc and Matsushita Electric Europe (Headquarters) Limited. The purpose of BiB was to provide a new service of inter-active television which then could be used by undertakings (enterprises) such as banks, supermarkets, travel agencies etc., enabling them to directly contact their own clients and users. The scheme is complicated and does not need to be described in more detail. The European Commission considered that there was a substantial risk of co-ordination among the founding members of the joint venture and identified the anti-competitive effects of the joint venture in a detailed legal appreciation.¹³⁰ However, the Commission reached the conclusion that nevertheless an individual exemption can be granted under 10 detailed conditions. Condition No. 7 B (iii) (c) required that BiB must provide third parties the possibility to submit disputes to independent arbitration. The reference reads as follows:

Condition No. 7 B iii (c) as determined in the resolution of any dispute: under an appropriate and **independent arbitration procedure** which the BiB Parties will procure is made available to third parties.

* * *

¹²⁹ Decision 99/329 EC, at Paragraph 28.

¹³⁰ Commission Decision of 15 September 1999, Paragraphs 138–157.

VI. 13 Phase I Merger Review Cases Where the Commission Accepted “*arbitration*” as a Remedy

The first 9 cases refer to decisions taken in Phase I under Article 6 (1)(b) ECMR; thereafter, we will review 4 decisions taken under Article 6 (2) ECMR.

6. Elf Aquitaine – Thyssen/Minol

On 3 August 1992 the Commission received the notification concerning the acquisition by Elf Mineralöl GmbH (a subsidiary of Elf Aquitaine) of Minol Mineralöl Handel AG and further assets held in trust by the Treuhandanstalt. The operation formed part of the privatisation of the Eastern German industry, in the framework of which Elf Aquitaine intended to invest DEM 4.5 billion in the construction of a new refinery and planned to acquire Minol’s distribution network of petroleum products in East Germany. Thyssen was involved as the purchaser of a minority shareholding in the capital of Minol.

The community dimension was established. However, it was not necessary to define the relevant geographic markets since even under the narrowest market definition no dominant position would be created or reinforced as a result of the concentration. In fact, Elf’s share of the total German refining capacity was estimated at about 1.5% which, due to the concentration, would increase to 5–8%.

Hence, this case is not about serious doubts under the ECMR. Nevertheless, competitors voiced the concern that Elf’s right to manage the existing refineries at Leuna and Zeitz would give Elf access to the products of the refineries on most favourable terms and, as a result, would create an unfair competitive advantage. This concern had to be addressed through safeguards exercised by the Treuhandanstalt when exercising its inspection rights under the current management agreement which, *inter alia*, had to make sure that the products of the refineries will be priced according to market conditions.

Moreover, it was argued that, over the next few years, Elf’s competitors in East Germany would depend to a certain extent on Minol’s 50 depots for their supplies. However, the Commission requested that Elf had to send out to competitors (which operate service stations in the new Bundesländer) legally binding offers to enter into agreements for using Minol’s depot facilities. Hence, Elf had to commit itself to provide its competitors through-put rights and supplies from the Minol depots on commercially acceptable terms based on the local conditions. The Commission’s Decision in Paragraph 13 then states:

Arbitration by mutually agreed independent experts will be provided in case of disputes relating to the application of the agreement.

No further details are given. The wording of the Commission's decision is somehow scarce; nevertheless, in the overall context, the concern to be addressed by the commitment appears to be sufficiently clearly spelt out. Again, the context allows a conclusion that the arbitration commitment is meant to represent an *erga omnes offer* to arbitrate, instead of litigating before ordinary State courts.

And once again, the Commission quite indistinctively refers to "different animals", by referring to arbitration and to expertise in one and the same phrase – almost a master-piece of confusion! Nevertheless, as we may remark, a capable arbitrator and/or expert would certainly be in a position to clarify the mission together with the parties and to implement the rather imperfect requirement of the Commission.

It is one of the goals of the present study to provoke a more careful reflection on the use of either arbitration, or the use of an expert determination procedure.

7. British Airways/TAT (1992)

British Airways notified the Commission of the intended acquisition of a 49.9% interest in TAT European Airlines (owned by TAT SA). The Commission concluded that the notified concentration falls within the scope of the Merger Regulation No. 4064/89, but does not raise serious doubts as to its compatibility with the common market. The latter decision was reached based on certain commitments given by British Airways in several letters addressed to the European Commission under the date of 27 November 1992 and, in particular, on the basis of an undertaking by British Airways for a number of slot transfers so as to facilitate the introduction of services by competing airlines on certain important routes such as London–Paris and London–Lyon. The commitment included an undertaking by British Airways to accept dispute resolution by way of arbitration.

An interesting feature of the commitment is that, in the event the parties do not reach an agreement on the independent arbitrator, the nomination will be made by British Airways alone, whose appointment will have to be confirmed by the Director General for Competition of the European Commission. Again a remarkable feature, and its validity might raise concerns. The full text of the undertaking reads as follows:

A carrier wishing to avail itself of the benefits of these undertakings shall write to British Airways ("BA") requesting it to make slots available in accordance with the undertakings. Providing: the undertaking in respect of the route in question has not already been fulfilled; the request has been made within the time required; the carrier making the request has made very normal effort to obtain the slots necessary for its planned operation on the route which, save in respect of the season Summer 1993, must include a application to the co-ordinator for slots by the due date prior to the slot meeting for the season concerned; and, if the request is in respect of Gatwick–Lyon, the number of passengers carried by scheduled services on the route in the most recent twelve month period for which data is available was at least 40'000; then BA will make slots available as necessary. Should there be two or more requests made during the same period which could not all be met within the limits of the slots which BA will enter into discussions

with the carriers with a view to reaching agreement as to how the available slots shall be distributed. Should it be impossible to reach agreement, then an independent arbitrator, whose appointment will be agreed by the parties concerned, shall resolve the issue. **In the event that no agreement is reached within a reasonable time, BA will nominate an arbitrator, whose appointment will fall to be confirmed by or on behalf of the Director General for Competition of the European Commission.**¹³¹

The last sentence of the clause reflects an old English method of default appointment by the more diligent party, a solution which is not as such recommended under perspectives of neutrality; it would seem preferable, in such situations, to provide for an independent appointing authority, in order for it to make the appointment.

8. Swissair/Sabena (II) (1995)

Swissair/Sabena notified the Commission of the Shareholders' and Master Agreement between the Belgian State and Swissair of 4 May 1994 and a Cooperation Agreement between Sabena and Swissair in connection with the acquisition by (late) Swissair of a 49.5% equity stake in Sabena. The concentration plan of the Belgian State and Swissair providing for the joint control over Sabena was notified to the Commission in 1995. After examination, the Commission concluded that the proposed operation does not give rise to serious doubts under the Council Regulation No. 4064/89 and the yardsticks imposed regarding the compatibility with the Common Market. This Decision was reached on the basis of several commitments by Swissair and Sabena for opening up slots to other carriers wishing to commence or increase their services on particular airtraffic routes. The commitments are fairly detailed and need not be recited here. They basically aim to make sure that a workable competition by other carriers will remain or may even be enhanced.

Again, quite identical to the British Airways case discussed above, Swissair and Sabena offered to any such claiming competitor the availability of an independent arbitration process. The commitment is almost identical to the BA commitment and reads as follows:

A carrier wishing to avail itself of the benefits of these undertakings shall write to SWISSAIR or SABENA respectively requesting it to make slots available in accordance with the undertakings. Providing: the undertaking in respect of the route in question has not already been fulfilled; the request has been made within the time required, the carrier making the request has made every normal effort to obtain the slots necessary for its planned operation on the route which save in respect of the Winter 1995/96 traffic period, must include an application to the co-ordinator for slots by the due date prior to the slot meeting for the season concerned; then SWISSAIR and/or SABENA will make slots available as necessary. Should there be two or more requests made during the same period which could not all be met within the limits of the slots which SWISSAIR or SABENA is making available in accordance with its undertakings, then SWISSAIR or SABENA will enter into discussions with the carriers with a view to reaching agreement

¹³¹ Letter annexed to Case No. IV/M.259, p.4.

as to how the available slots shall be distributed. Should it be impossible to reach agreement, then the issue shall be **resolved by an independent arbitrator**, whose appointment will be agreed by the parties concerned. In the event that no agreement is reached within a reasonable time, SWISSAIR or SABENA will nominate an arbitrator, whose appointment will fall to be confirmed by or on behalf of the Director General for Competition of the European Commission.¹³²

9. Alcatel/Thomson CSF – SCS (1998)

In April 1998, the Commission was notified by Alcatel Alsthom (“Alcatel”) and Thomson CSF (“Thomson”) of their joint control over a newly established company Société Commune de Satellites (SCS). The notification raised no serious concern regarding the compatibility with the Common Market. An essential element in the Commission’s consideration was the aspect that the parties will continue to furnish basic components which are necessary in the satellite industry to third parties and customers. The Commission examined the vertical and horizontal effects of the joint venture, reaching the conclusion that SCS will at best become the world’s third major player after Lockheed Martin and Hughes.

A particularly important concern for the Commission was to make sure that the parties will continue to supply their own competitors with some particularly important devices, one of them being certain *tubes à ondes progressives hyperfréquences* (“TOP”). In order to make sure that the parties will continue the supplies of TOP to third parties, Alcatel and Thomson “guaranteed” their commitment by accepting arbitration, indeed arbitration on a fast track basis since the arbitrator was required to pronounce the award within two months, whereupon Thomson was required to execute the award within the shortest period of time.

The parties also committed themselves to insert the arbitration provision in their General Conditions of Sale.

And, as seen in the above referred examples, the Commission was to be notified of any such proceedings, and further means of control during a term of five years were offered to the Commission.

The full text reads as follows:

Afin de garantir leur volonté déclarée à la Commission, de fournir sans restriction à tout tiers des TOP dans les mêmes conditions que celles offertes à SCS, les parties se sont engagées auprès de la Commission à créer, sur la base de la clause compromissoire prévue par le Nouveau Code de Procédure Civile français, **une instance d’arbitrage indépendante et compétente** (“l’Arbitre”). L’Arbitre jugera en dernier ressort de tout litige en matière de TOP qui lui serait soumis par un client direct ou indirect. L’European Space Agency, prise en la qualité de son Directeur de l’Administration, est désignée à cet effet. Aux termes de l’engagement, l’Arbitre disposera de pouvoirs étendus d’injonc-

¹³² Letter annexed to Case Comp/M.616, at Paragraph 4.5.

tion et d'investigation, et pourra prendre toutes mesures, notamment conservatoires nécessaires à l'accomplissement de sa mission. La sentence de l'Arbitre devra intervenir rapidement (dans les deux mois au plus après réception de la saisine) et sera exécutée dans les plus brefs délais par Thomson. Cette clause de recours et la procédure afférente seront insérés dans les conditions générales de vente de TTE. En outre, les saisines de l'Arbitre et les sentences rendues seront communiquées sans délai à la Commission, qui sera également destinataire d'un rapport annuel sur l'activité de l'Arbitre.¹³³

The Commission appreciated the above commitment favourably, in that it concluded that any interested third party will, at all times, have the possibility to initiate an arbitration procedure that will offer all the guarantees regarding neutrality and an efficient process. The Commission highly approved that the parties were amenable, even beyond a simple behavioural remedy, to delegate the decision making over claims and grieves of a third party to a neutral arbitrator who will finally decide the matter. The text reads as follows:

En vertu de l'engagement proposé, tout concurrent de SCS qui s'estimerait lésé ou menacé dans sa relation commerciale avec TTE aura la possibilité, à tout moment, de soumettre sa plainte à l'**arbitrage** d'une instance offrant toutes les garanties de neutralité et de compétences pour juger de son bien-fondé. Les pouvoirs étendus de cet arbitre offrent la garantie d'un traitement effectif et diligent des litiges qui pourraient survenir. Cet engagement va au-delà d'une simple obligation de nature comportementale puisque les parties s'engagent, a priori, à abdiquer, au profit de l'arbitre qui jugera en dernier ressort, de leur pouvoir normal de décision dans le traitement de telles plaintes. Les pouvoirs étendus et la compétence de l'Arbitre, ainsi que la rapidité de la procédure, confèrent à la clause un effet dissuasif supérieur au simple recours judiciaire normalement accessible. – En outre, en s'interdisant, pour une durée suffisante, d'intégrer sans l'accord de la Commission l'activité TOP de TTE au sein de l'entreprise commune, et en communiquant à cette dernière les rapports d'un comité *ad hoc* ayant vocation à connaître la politique commerciale de TTE en matière de TOP à l'égard de tiers concurrents de SCS, les parties éliminent de manière préventive les risques résiduels d'effets verticaux, dont l'appréciation échapperait aux entreprises concernées par la clause d'arbitrage, ou qui pourraient résulter d'une tentative de contournement de cette clause.¹³⁴

The commitment was further spelled out in a commitment letter of Thomson-CSF which is fairly detailed and shows the weight that had been given to this kind of commitment. The significance must be understood against the Commission's investigations which led to a finding that a subsidiary, i.e. Thomson Tubes Electroniques ("TTE") had a dominant position on the market for so-called "Travelling Waves Tubes" ("TWT"). TWT are, as explained in a press-release of 6 May 1998, a component of transponders, i.e. complex devices installed in all satellites, and are also used for terrestrial communications. The world-wide TWT market was considered to be strongly concentrated and characterised by a relative saturation of production capacities. Therefore, the vertical link between SCS and TTE, created by the concentration, gave rise to a concern and risk that TTE would favour SCS or would offer discriminatory commercial conditions to competing satellite manufacturers. This, however, would

¹³³ Case IV/M.1185, at Paragraph 38.

¹³⁴ *Ibid.* at Paragraphs 40 and 41.

confer to SCS a competitive advantage which could be decisive in the allocation of contracts for satellites.

One needs to understand this kind of background to properly appreciate the relevance, weight and significance of the commitment to submit disputes to an independent arbitration with guaranteed neutrality and qualification.

It is on this basis that the Commission considered the commitments as being appropriate to remove the concerns regarding the anti-competitive effects of the concentration, and on this basis the European Commission decided not to oppose to the notified transaction.

Hence, we are tempted to conclude that **the arbitration commitment had been the single most important element** which led to this Article 6 (1) (b) Decision.

Annexe:

1) Thomson-CSF/TTE propose dès à présent d'attirer tout litige relatif à la négociation et à la vente de TOP à un **arbitre unique**.

Le recours à l'**Arbitre** pourra être exercé tant par un client direct de TTE que par un client indirect qui serait en concurrence avec SCS et serait susceptible de supporter un dommage d'un traitement inéquitable appliqué par TTE à son fournisseur.

2) Cet Arbitre devant avoir l'expérience, la compétence et l'indépendance requises, Thomson-CSF propose que l'European Space Agency (ESA) prise en la qualité de son Directeur de l'Administration soit désigné comme Arbitre.

Les signataires s'engagent à nommer comme Arbitre, le Directeur de l'Administration de l'ESA ou toute autre personne compétente au sein de l'ESA et n'ayant pas ou n'ayant pas eu dans les 5 ans précédant sa nomination, d'intérêt direct ou indirect avec le groupe Thomson-CSF et ses filiales, ou l'un des autres groupes signataires du présent engagement.

Thomson s'engage à nommer, en même temps que l'Arbitre titulaire, un arbitre suppléant au sein de l'ESA, lequel remplira les mêmes conditions d'impartialité que le titulaire et pourra agir en cas d'absence ou d'empêchement de l'Arbitre titulaire.

3) Thomson-CSF s'engage à exécuter dans les plus brefs délais la sentence rendue par l'Arbitre, dans le délai qu'il fixera. Cette sentence sera rendue de façon définitive et en dernier ressort. En tout état de cause, l'Arbitre rendra sa sentence dans un délai maximum de **deux mois** après la réception éventuelle de la saisine. En outre, TTE s'engage à exécuter sans délai toute obligation telle que le respect de délais de livraison ou toute autre mesure d'équité qui pourrait lui être imposée par l'Arbitre.

L'arbitrage se tiendra à **Paris**.

L'Arbitre agira dans le cadre prévu aux Articles 1442 et suivants du Nouveau Code de Procédure Civile en application du droit français et pourra prendre toute mesure conservatoire.

La procédure d'Arbitrage sera équitable, transparente, objective et les règles de procédure seront appliquées.

L'Arbitre pourra accéder à **toute information de nature confidentielle**, procéder à toute investigation ou expertise auprès de TTE, et ordonner **toutes mesures** y compris des mesures conservatoires nécessaires à l'accomplissement de sa mission.

Parmi ces mesures conservatoires, l'Arbitre pourra imposer à TTE l'obligation de réserver une partie de sa production aux concurrents de SCS, moyennant une information préalable sur leur prévision de besoins.

L'Arbitre sera saisi par tout plaignant par lettre recommandée avec accusé de réception. L'objet du litige et la prétention du plaignant devront être joints à ce courrier.

Thomson-CSF recevra copie de cette demande dans les plus brefs délais par l'Arbitre.

Les Parties et l'Arbitre s'entendront dans les 15 jours à compter de la réception par Thomson-CSF de ladite copie, sur **l'acte de mission** de l'Arbitre, ce dernier ayant compétence pour décider des limites de sa saisine en cas de désaccord. A compter de la signature dudit acte de mission, Thomson-CSF aura 15 jours pour faire valoir ses arguments.

L'Arbitre devra rendre sa sentence au plus tard **dans un mois** à compter de la signature de l'acte de mission. Ce délai d'un mois pourra être réduit le cas échéant par l'Arbitre.

Il fixera le montant de ses honoraires dans ladite sentence.

Le recours et la procédure décrits ci-dessus seront insérés dans les conditions générales de vente relatives aux TOP, pour information préalable du client.

4) Les signataires de l'Engagement s'engagent à faire parvenir sans délai à la Commission Européenne copie de toute saisine de l'Arbitre au titre du présent engagement, ainsi que de la sentence rendue.

En outre Thomson remettra à la Commission, pendant les trois ans à venir, un rapport annuel synthétisant l'activité de l'Arbitre qu'il aura nommé, et précisant notamment les mesures prises par TTE pour répondre à d'éventuelles sentences que l'Arbitre aura pu prononcer à son encontre.

5) Les signataires s'engagent à ne conférer à SCS aucun droit ou pouvoir dans l'activité TOP de TTE, et, pendant une période de 5 ans, à ne pas transférer cette activité à la SCS sans l'autorisation de la Commission.

10. Carrefour/Promodès (2000)

In October 1999, Carrefour notified its project to acquire the Promodès Group on the basis of a public offer. As is frequently the case, the notification was rejected by the Commission twice as being incomplete. However, when completed, the Commission investigated the market of distributing food and non-food products within the Community, in view of Carrefour's intention to acquire a controlling stake in the Promodès Group.

The Commission was particularly concerned about the effects of the concentration for the distribution market on the national and international level, breaking up the products in 23 different categories and determining the market share held by Carrefour and Promodès before and after the intended concentration, and further breaking up the market shares for supplies to so-called *hypermarchés*, *supermarchés*, *Maxi dis-compte*, and *petits commerces de proximité*. More particularly, the Commission was concerned that smaller suppliers might be pushed out of the market that Carrefour/Promodès would be the only players that will effectuate supplies to all of the aforementioned types of doors, that they would hold the strongest position regarding the widely circulated *cartes de fidélité*, that they would strongly benefit from a more

integrated market structure, that the concentrated group would gain advantage over competitors through its combined financial strength, with a world-wide turnover in 1998 of more than € 52 billion etc. However, there were competitive advantages for the customers to be considered and valued against the collective dominance of Carrefour/Promodès.

The entire Decision is very carefully worded and cannot adequately be summarised. However, again, the Commission approved the concentration essentially against two particular commitments, one being the divestiture in respect of Carrefour's participation in respect of the Cora Group and the second being Carrefour's commitment to maintain the contracts with the suppliers on a non-discriminatory basis. We may recall here that similar concerns were voiced by the Commission in other cases where the concentration leads to a dominant position or to a joint dominance, for instance in **Boeing/McDonnell Douglas**, the concern being that the dominant group will be tempted to use its supreme market power at the disadvantage of suppliers, or may select suppliers on a discriminatory basis, or use them on the basis of terms and conditions which cannot be fulfilled by some of the suppliers.

And here again, as in cases reported above, Carrefour committed itself to be taken to justice before an independent arbitrator, jointly designated by the parties.

Absent an agreement on the arbitrator, he or she would have to be designated by the President of the Chamber of Commerce of Paris, or of Madrid, depending on whether the dispute arises in connection with the French territory or the Spanish territory.

Once again, speed is of essence, wherefore the arbitrator is given a short time-limit of three months to render an award.

Moreover, Carrefour undertook to inform all suppliers of its commitment to arbitrate, and to set out the functioning of the arbitral procedure in detail, with a copy to the European Commission. The undertaking, in Annex 2 to the Commission Decision, reads as follows:

(Annexe 2)

1. Carrefour s'engage à proposer à tous les fournisseurs, tels que définis par les présents engagements, de soumettre les litiges qui porteraient sur l'interprétation, l'application ou l'exécution des engagements de Carrefour à **un arbitre unique** désigné d'un commun accord par les parties, étant entendu que l'arbitre sera un expert indépendant.

Si Carrefour et le fournisseur concerné ne parviennent pas à s'entendre sur la personne de l'arbitre au terme d'une période de 30 jours, à compter de la décision prise par l'une ou l'autre partie de soumettre le litige à l'arbitrage conformément au point B.7, l'arbitre sera désigné par le Président de la Chambre de Commerce de Paris ou de Madrid, suivant qu'il s'agit d'un litige né sur le territoire français ou espagnol.

2. L'arbitre statuera **dans un délai de trois mois** à compter du jour où il aura accepté sa mission.

3. L'arbitre établira ses propres règles de procédure et statuera au fond, guidé par les principes d'impartialité, d'équité et de justice.
4. Les sentences rendues par l'arbitre **ne feront l'objet ni d'appel, ni de révision.**
5. Carrefour s'engage à fournir à l'arbitre **tous les renseignements** qu'il juge nécessaire à l'accomplissement de sa mission.
6. Les frais de procédure seront avancés par Carrefour et supportés en dernier ressort par la partie qui n'aura pas obtenu gain de cause.
7. Le fournisseur fera connaître sa volonté de recourir à l'arbitrage, par lettre recommandée, adressée à Carrefour.
8. La saisine de l'arbitre ne suspendra pas les relations commerciales entre les parties sauf s'il devait y avoir de justes motifs relevant de la santé ou de la sécurité des consommateurs.
9. Dans un délai de deux mois à compter de la Décision de la Commission, **Carrefour s'engage à distribuer à tous les fournisseurs visés au point A.2 une note décrivant les principes et le fonctionnement de la procédure d'arbitrage des différends. Carrefour soumettra la note précitée à l'attention de la Commission européenne.**

We see some interesting points: Again, we have an *erga omnes offer* to arbitrate disputes. A useful provision is the explicit authority of the arbitrator to require **all information** deemed necessary; we will see similar references in cases discussed below; if interpreted broadly, the authority might even go beyond the yardsticks set in the **1999 IBA Rules on the Taking of Evidence** (however, the scope and extent of the authority will have to be interpreted having regard to the particular circumstances). The time for rendering the award is again short: three months. An application for an appeal or revision is explicitly excluded, but national law will have to determine whether such exclusion could validly be imposed or agreed.

11. BSKyB/Kirch Pay TV (2000)

In December 1999, the Commission received a notification (yet again incomplete when first filed) of a proposed concentration by which the British Sky Broadcasting Group Plc (BSkyB) notified its intention to acquire 40% of Kirch Pay TV from Kirch Vermögensverwaltungs-GmbH & Co. KG. The Commission voiced concerns and in fact had **serious doubts** about the compatibility of the concentration with the Common Market. Those doubts related to the strengthening of a dominant position in the pay-TV market in Germany, resulting from an influx of financial resources from BSKyB and the creation of a dominant position on the market for digital interactive television services. The concern rose *inter alia* due to the Commission's characterisation of the relevant geographic market for pay-TV as being a national market only.

Hence, once again the proposed commitments offered by the parties played an important role for allowing the Commission to render an Article 6 (1)(b) Decision. Such commitments were given in respect of the market for the acquisition of broadcasting rights as well as in connection with the technological platform for pay-TV and inter-

active services. In essence, those commitments promised to lower the entry-barriers on the pay-TV market and promised to prevent Kirch Pay TV from leveraging its dominance on that market for penetrating into the market for digital interactive television services. Hence, the commitments eliminated the serious doubts which otherwise existed in view of the obvious creation or strengthening of a dominant position resulting from the concentration. The Decision of the Commission explicitly refers to the commitments offered by the parties attached to the Decision as Annex 1 which was characterised as forming an integral part of the Decision itself. The following passages are mere extracts of the much more detailed commitments:

Each of the relevant Kirch company, News and/or BSkyB, as the case may be, will submit to **arbitration** before the "Arbitrator" in relation to any dispute with a third party regarding the implementation of the commitments.

The **burden of proof** for any refusal to meet a request by a third party pursuant to these commitments rests with Kirch, News and/or BSkyB, as the case may be. The proof must be provided to the Arbitrator within the time limits set by the Arbitrator.

The parties **will propose an arbitration process to the Commission** within two weeks of the Decision. The arbitration process shall comprise the process to be used and the appointment of the Arbitrator(s). The **Commission** shall decide within one month **whether they approve the proposed arbitral process**. If the Commission does not approve the arbitral process, the parties shall have a further fourteen days to propose alternatives and the Commission a further month to give its final approval. If the Commission does not approve any process proposed by the parties it may lay down the arbitral process itself.

The Arbitrator may decide all matters relating to these commitments arising between the parties or any of them and a third party. The arbitral process shall be for the benefit of third parties for the purpose of procuring that the parties achieve full compliance, and make good any non-compliance, with the commitments vis-à-vis third parties. In reaching a decision the Arbitrator shall take full account of any prior decision by any other arbitrator, court or regulatory body on matters covered by these commitments relevant to the dispute before him.

Decisions of the Arbitrator shall be **final and binding** on all persons submitting to arbitration. **Nothing in the arbitral process shall affect the powers of the Commission to take decisions in relation to the undertakings in accordance with its powers under the Merger Regulation and the Treaty.**

A quite significant (if not striking) feature is the provision that the Commission has been given the **power to approve the arbitral process**, and if not, the parties will have to submit improvements to satisfy the Commission's concerns. Moreover, the last paragraph cited above is significant; it in fact reflects (and corresponds to) the unalienable duty of the Commission to safeguard treaty-compliance.

The subject matter of the arbitral process will be:

- In regard to technology:
"Kirch agrees that the relevant Kirch company will keep separate financial accounts regarding its activities as a provider of technical services for each technical service separately, which shall be audited on an annual basis as part of its annual audit by an audit firm of international standing. Kirch will deliver copies of such accounts to the **Arbitra-**

tor and the Commission if and when either of them so requests. Kirch will make available at its premises said accounts for inspection by interested third parties within two weeks of receipt of a written request. The Arbitrator shall be entitled to call for and the relevant Kirch parties will **submit all necessary information**, including the transfer pricing and other terms of supply for each technical service separately within Kirch Group to enable the Arbitrator to evaluate any claim that the terms offered by the Kirch party are discriminatory. The Arbitrator may at its discretion make available said transfer pricing for technical services to any third party in an arbitration instituted pursuant to these undertakings subject to such third party entering into an appropriate confidentiality undertaking, which if not agreed, shall be determined by the Arbitrator.”

- Regarding third party access to Kirch’s d-box system:

“If the third party submits its application to testing by the relevant Kirch company and if the testing shows that the application is compatible with and does not interfere with any functionality of the d-box, then the application shall be permitted to run on Kirch’s d-box base without further liability. Testing shall be to no higher standards than those applied to the testing of other applications, including Kirch’s own. The testing shall be undertaken on reasonable commercial terms and within a reasonable time scale, such time scale to be agreed between the relevant Kirch company and the third party within 1 month of receipt of a written request together with the necessary information to evaluate a realistic time-scale for testing and in the absence of agreement within such month, within such time-scale as is determined by the Arbitrator. Kirch undertakes to provide adequate resources to perform such testing and to permit it to be done in the same timeframe as provided for other equivalent applications, including Kirsch’s own.”
- Regarding interoperability of competing technical platforms:

“Kirch agrees to procure that the relevant Kirch company will offer to develop and to operate Simulcrypt arrangements (including the provision of the necessary coding information) with all digital conditional access providers in the German speaking territories who request the same, on reasonable commercial terms. Kirch will use all reasonable endeavours to procure that Simulcrypt arrangements are operational as soon as possible, or within such time-scale as is agreed by the parties to the Simulcrypt arrangement, such time scale to be agreed within 1 month of receipt of a written request together with the necessary information to evaluate a realistic time-scale, and in the absence of agreement within such month, within such time-scale as is determined by the Arbitrator. To this end the relevant Kirch company will co-operate fully with the conditional access provider (and its technology provider, if different).”
- Regarding Production of “multiple system” boxes:

“Kirch agrees to procure that the relevant Kirch company will grant manufacturing licenses for the production of the d-box to interested manufacturers of IRDs or comparable hardware in a non-discriminatory manner and under terms and conditions which are customary in and normally applied by the industry. It shall do so within 1 (one) month after receiving a written request for a license together with the information necessary to enable the relevant Kirch company to grant such a licence or, if the granting of the manufacturing license objectively requires more than 1 (one) month, within such timeframe as to be agreed within 1 (one) month after the receipt of the request between the relevant Kirch company and the interested party or, in the absence of an agreement, within such timeframe as to be determined by the Arbitrator. Kirch undertakes that it will not, in licensing manufacturers to manufacture d-box decoders which include Kirch’s conditional access system, preclude the manufacturers from including in such decoders a third party’s conditional access system, or capability for a third party’s conditional access system to be attached to such decoder, and furthermore Kirch undertakes that it

will not refuse to supply subscribers with its Pay TV services based solely on the fact that they wish to subscribe using a d-box which contains such capability.”¹³⁵

12. Shell/BASF/JV-Project Nicole (2000)

Shell and BASF notified the Commission of a proposed concentration in February 2000. At the time, BASF's polypropylene (PP) business was undertaken by its subsidiary Targor, and BASF's European polyethylene (PE) business by Elenac, the latter being an existing full function joint venture with Shell.

Shell's PP business was undertaken by Montell, and its European PE business by Elenac.

The proposed concentration provided for the creation of a jointly controlled full function joint venture between Shell and BASF (named: Nicole) to which the parties would contribute their world-wide PP and PE interests (i.e. Montell, Targor and Elenac). Hence, Nicole was designed to become an autonomous economic entity performing on a lasting basis all of the functions normally carried out by undertakings operating on the market. Nicole was intended to be independent of the two parent companies.

In its analysis, the Commission voiced concerns regarding certain product markets, in particular the PP resins market. Because the Commission rejected the parties' reasoning that, geographically, the global market should be looked at, reaching instead the conclusion that the relevant geographic market was only the Western Europe Market, Nicole's combined market shares reached the bracket of 35–45% (with the nearest competitor reaching only about 1/3 of Nicole's size). Nicole's market position would further be strengthened by its upstream integration into PP technology and would make Nicole become a significant supplier of technology to other PP resins producers, whereby enabling it to control, at least to a certain degree, the technologies and the developments available to competitors. In addition, Nicole would also benefit from its downstream integration into the market of compounds. Hence, in the eyes of the Commission, the transaction raised serious doubts as to its compatibility with the Common Market in that it may lead to the creation of a dominant position in Western Europe for PP resin products. Moreover, the Commission reached a similar conclusion regarding PP compounds (i.e. PP resins which had been blended with other materials to change the characteristics of the product).

In order to address these and other concerns voiced by the Commission, the parties had to offer a number of **commitments**, including the **divestment** of PP resins plants, PP compounds plants, the divestment of the BASF/Targor's Novolen PP technology business and to license the BASF/Targor Methallocene patent rights on a non-discriminating, arm's length basis, to all interested third parties, with the right for such licensees to grant sub-licensees, and without the requirement that licensees

¹³⁵ Annex 1 to Case No. Comp/JV.37.

grant reciprocal rights. In addition, the parties committed themselves not to assert the BASF/Targor Methallocene patent rights.

The latter commitment obviously was a **commitment in favour of third parties** spelled out in the detailed commitment letter. For the resolution of disputes as may arise thereunder, BASF and Shell committed themselves to submit disagreements regarding the licence or non-assert obligation to what they termed as a **"pendulum arbitration"**, which could be more conveniently characterised as being a base-ball arbitration or, as Americans might be tempted to say, a **"Russian roulette"**, or the Russians would call a "Texas auction". The commitment letter reads as follows:

If no agreement can be reached on the consideration for a License or Non-Assert, such disagreement will be resolved by "pendulum arbitration". **Pursuant to such arbitration each party will submit a single proposal for the consideration for such License or Non-Assert to the arbitration panel which can only decide in favour of one of the two submitted proposals in its entirety. Pending such arbitration, if requested by the relevant interested party, the License or Non-Assert will become effective immediately.**

The solution used here is of course frequently discussed in connection with various business scenarios, one being the situation of a 50:50 joint venture where, in case of a dispute, each party will have to name a price for which it either buys or sells its participation, leaving the choice either to the other party or to a third party (and in this context the term of "Russian roulette" is most frequently used). The idea as such, however, has also found its way into mediation procedures or arbitration procedures where, during the process, the parties reach a point where they may submit a final offer for the settlement of the dispute, leaving the determination to the arbitrator to choose the more convincing proposal, the trigger being that the choice is an **either/or choice**, and not anywhere between the last proposals submitted by the parties. The inspiration comes from the U.S. baseball arbitrations, and in commercial arbitration terms such as **MEDALOA** or **LOA** are used for this quite well known process (meaning **mediation and last offer arbitration**, or simply **last offer arbitration**).¹³⁶

While a **lawyer** may have many reservations to such a process, **business people** and executives (CEOs) may see this differently and indeed much more pragmatically. In any event, the clause requires a very careful thinking of each of the parties and has the advantage of producing a final result in a very succinct process and in a short period of time.

The question, however, is whether a third party will indeed accept such a procedure, and we would not be surprised if a third party would successfully argue that such an arbitration clause does not provide the "bells and whistles" of a full-fledged arbitration process and its guarantees as to the right to be heard, such that the third party might

¹³⁶ The process is discussed in Marc BLESSING, Introduction to Arbitration – Swiss and International Perspectives (Swiss Commercial Law Series, Vol. 10), 1999, p. 312 ss.

be well founded to resort to the ordinary courts to seek appropriate judicial relief in the conventional form.

In the present case as well as in others, the **Commission was to be kept informed** on any matters arising under the commitments, including notification of disputes and notification of arbitral awards. It would be most interesting to know whether this concept of a "pendulum arbitration" has given rise to concerns, and whether the concept had been accepted by third parties as a pragmatic solution to resolve disputes.

13. Vodafone Airtouch/Mannesmann (2000)

Vodafone notified the intended acquisition of all of the shares in Mannesmann in January 2000 and, after examination, the acquisition was cleared by the Commission. While the community dimension was obvious, the relevant product markets for the various sectors were distinguished in three categories, and the geographical market were determined to be partly national and partly Pan-European.

In the framework of its competitive assessment, the Commission reached the conclusion that the merged entity (Vodafone including Mannesmann) would hold a market share of 53.6% in the United Kingdom and nearly 70% in Belgium in respect of mobile telecommunications services. In respect of providing a seamless Pan-European mobile telecommunication service, third parties (competitors) argued that the merged entity would be in a unique position with its sole control over 8 operators, an argument – although rejected by Vodafone – which created concern to the Commission. Hence, the Commission anticipated **a significant strengthening of Vodafone's market position** as a result of its increased ability to eliminate actual and/or potential competitors. Through its structural integration of mobile networks across Europe into an integrated network, the merged entity would be the only mobile operator able to meet in the short to medium term the demand for advanced Pan-European services. Hence, the Commission reasoned, third parties need to be afforded access to the merged entity's network so as to be able to locate their own customers in order to provide their services to the subscribers also when they are travelling in Vodafone/Mannesmann's network.

Furthermore, we again read another (rather typical) concern – often voiced by the Commission – in the sense that Vodafone would be in an unrivalled position to provide Pan-European services on the basis of its "**unique bargaining power vis-à-vis handset manufacturers to negotiate design functionalities which will not be available to competing operators**".¹³⁷ Therefore, the Commission concluded that the notified concentration would thus lead to the creation of a dominant position on the market for the provision of seamless Pan-European mobile telecommunications services.

¹³⁷ Decision, Paragraph 47.

In order to address the Commission's concerns, Vodafone had to submit a number of **commitments** in connection with the intended transaction. The Decision refers to these commitments in Paragraph 58 as follows:

In order to respond to the Commission's serious doubts regarding the market for the provision of advanced mobile telecommunications services to internationally mobile customers, Vodafone Airtouch has submitted undertakings aiming at enabling third party non-discriminatory access to the merged entity's integrated network so as to provide advanced mobile services to their customers. These undertakings cover exclusive roaming agreements, third parties' access to roaming arrangements, third parties' access to wholesale arrangements, standards and SIM-cards and a set of implementing measures aimed at ensuring their effectiveness. In particular, Vodafone Airtouch has proposed to set up a **fast track dispute resolution procedure** in order to solve disagreements between the merged entity's group and third parties on third parties' access to roaming arrangements, third parties' access to wholesale arrangements, standards and SIM-cards.

The commitments submitted by Vodafone were extensively negotiated and found their way in a detailed "**Divestment Undertaking**" including five annexes. Therein, Vodafone had to agree to divest itself of all shareholdings in Orange held by Mannesmann.

A second important focus of the commitments which had to be conceded by Vodafone related to its covenant not to enter into roaming agreements on an exclusive basis. This covenant operates, as we may characterise it, as a limitation or a bar to the use of the strengthened market power of Vodafone.

A third important tear of the commitments (which indeed quite obviously had to be expected under the circumstances) was the commitment which had to be offered by Vodafone **to grant (competing) third parties access to Vodafone's network** (Clause 21 of the undertaking) and to open up its interconnecting facilities to third parties (Clause 22 of the undertaking) observing a strict non-discrimination principle (Clause 23 of the undertaking).

Clause 24 then provides for a fast track dispute resolution which will be available to third parties intending to challenge an act or decision of Vodafone. According to Clause 24, the "Fast Track Procedure" shall apply if:

- **any member** of the Divestor's Group rejects a request under Clause 21 or under Clause 22 to make available wholesale services; or
- **a third party operator disputes the non discriminatory nature of the terms offered** by the members of the Divestor's Group or any of the mobile telecommunications operators in which any one of the members of the Divestor's Group has an interest pursuant to a request under Clause 21 or 22; or
- a third party operator disputes **the manner in which standards are made available** under Clause 26; or
- a requesting party disputes the manner in which SIM cards are made available under Clause 27.

The **Fast Track Procedure** itself is regulated in Clause 25 and, essentially, consists of an obligation **by Vodafone to provide detailed written reasons** for the decision that had been challenged by the third party (claimant), supported by detailed data on network capacity, technical feasibility, accounting and technical quality details etc.

Clause 19 of the Undertaking requires the Parties to provide separate accounts on a confidential basis to the arbitral tribunal, which shall not be used for other purposes (a provision of this nature has given rise to different interpretations in other contexts); literally:

The Divestor, Mannesmann and each of their respective EEA mobile operating subsidiaries (except Orange) shall keep separate accounts pursuant to the principles set out in Annex 4 to this Undertaking which shall be provided on a confidential basis to the arbitration tribunal referred to in Clause 25 for the purposes of any **Fast Track Procedure** under that Clause and for no other purpose.¹³⁸

The parties are to name their arbitrators, and the two arbitrators are to nominate a third arbitrator within one week. The arbitral tribunal will have to then render its **award within one month**, pronouncing therein whether or not Vodafone (in the undertaking referred to as “the Divestor’s Group”) complied with the obligations under its undertaking.

In addition, there is a specific provision in respect of the requirement to provide **any relevant information** to the tribunal, which implies a negative inference if such documentation is not produced.

Even more significant is a further paragraph regarding the burden of proof. In that paragraph, Vodafone indeed accepted to bear the major **burden of proof**, and if it fails, the matter is to be decided on the basis of a *prima-facie* case presented by the third party. We will term this “**The Prima facie Evidence Rule**”. While the reading of this paragraph may indeed strike our attention, there is certainly a good logic behind in that, in those cases, most of the relevant material will be in the hands of Vodafone and it is, therefore, quite justified that it is rather for Vodafone to prove the appropriateness of its decision (and not for the claiming third party who may not have any access to relevant materials). We will come across the same or similar provisions in cases reported below.

Clause 25 reads as follows:

Any third party operator who wishes to avail itself of the Fast Track Procedure must (a “requesting party”) notify the members of the Divestor’s Group in writing specifying the decision challenged and nominating an arbitrator.

The members of the Divestor’s Group shall within two weeks of receiving a notification in writing from a requesting party nominate its arbitrator and provide to the requesting party in writing detailed reasons for its challenged decision(s). Such reasons will be jus-

¹³⁸ *Ibid.* at Paragraph 19.

tified by the data and information on network capacity, technical feasibility, accounting and technical quality which the members of the Divestor's Group are required to keep pursuant to this Undertaking. The arbitrators nominated by the Divestor and the requesting party shall, within one week from the nomination of the former, agree to appoint a third arbitrator. The arbitrators shall be instructed to establish an arbitration tribunal and to make a decision within one month of the appointment of the third arbitrator as to the compliance by the members of the Divestor's Group with their obligations under this Undertaking.

Any of the arbitrators will be entitled to request any relevant information from the members of the Divestor's Group or the requesting party. If the information required to be kept by the members of the Divestor's Group pursuant to this Undertaking is not available, the arbitrators shall decide in favour of the requesting party having taken account of the significance of the information which is unavailable.

The burden of proof in any dispute under the Fast Track Procedure set out in this Clause is as follows: (i) the requesting party must produce evidence of a *prima facie* case, and (ii) if the requesting party produces evidence of a *prima facie* case, the arbitrator must find in favour of the requesting party unless the Divestor's Group can produce evidence to the contrary.

The arbitrators shall be instructed not to disclose confidential information. Throughout this undertaking the standard attributed to confidential information and business secrets are those as set out in accordance with European Community competition law. The arbitration shall be in English and shall be conducted in accordance with the **Rules of the London Court of Arbitration** and the Rules of the London Court of Arbitration will be amended accordingly.

Further details on this interesting procedure are contained in Annexes 1, 3 and 5. They read as follows:

(Annex 1)

"When required under the terms of the Fast Track Procedure, the members of the Divestor's Group must be able to demonstrate that across its constituent parts it has:

- offered to third parties equivalent Inter-Operator Tariff;
- offered non-discriminatory discounts against the standard Inter-Operator Tariff;
- been able to make at least a reasonable return at the inter-operator tariff level with discounts;
- been able to make at least a reasonable return at the retail level with the Inter-Operator Tariff as input costs."

(Annex 3) Unavailability of adequate network capacity:

"The members of the Divestor's Group will be entitled to rely on the exception of unavailability of network capacity only if the following procedure is complied with and it is demonstrated under the Fast Track Dispute Resolution on the basis of this procedure that the requested capacity is unavailable.

Within one month of the date of approval of the concentration by the Commission, the members of the Divestor's Group will establish an inventory of the available capacity in the networks solely controlled by the members of the Divestor's Group and shall use its Best Endeavours to establish an inventory of the available capacity in those networks in

which the members of the Divestor's Group have an economic interest from time to time falling short of sole control.

A copy of such inventory will be made available to the Commission. The inventory will be updated by the members of the Divestor's Group or any mobile telecommunications operator in which any of the members of the Divestor's Group has an economic interest from time to time on a quarterly basis.

Any request of third party operators pursuant to Clauses 21 and/or 22 will be made to the Commission within one month of the approval of the concentration and subsequently within one month of the end of each quarter.

If the members of the Divestor's Group demonstrate that the requested capacity exceeds the available capacity in any given period, the available capacity will be allocated on a non-discriminatory basis between the requesting third party operators and the members of the Divestor's Group."

(Annex 4) Technical unfeasibility

"The members of the Divestor's Group will be entitled to rely on the exception of technical unfeasibility only if it is demonstrated under the Fast Track Dispute Resolution that (i) the request from a third party operator presents technical characteristics which are different from those of the operators solely controlled by, or within which an economic interest is owned by the members of the Divestor's Group from time to time and (ii) such difference prevents the provision of roaming and/or wholesale services to a third party operator and (iii) the technical problem cannot reasonably be solved."

(Annex 5):

"The members of the Divestor's Group will keep and provide upon the request of any of the arbitrators appointed pursuant to the Fast Track Dispute Resolution Clause the information listed below for the month immediately prior to the request. The information will be presented as ratios of the mobile operators of the members of the Divestor's Group/other mobile operators.

In relation to circuit switched performance:

- dropped calls;

and if technically available at reasonable cost:

- call set up delay;
- refused calls;
- data calls blocked;
- fax calls blocked.

In addition, the members of the Divestor's Group will submit to an audit upon request by any of the arbitrators in order to demonstrate that it has not discriminated against third party operators in relation to the technical quality of services offered, for example by providing evidence of call routing for third party calls and members of the Divestor's Group's calls.

As and when the following services are launched and the technology is available at reasonable cost to allow monitoring of such services, the members of the Divestor's Group shall provide information in relation to packet data services performance (for example, but not exclusively GPRS, CDPD, EDGE, IMT20000 and UMTS) over the air interface, including, where possible:

- ratio of requested QoS parameters/granted QoS parameters;
- percentage of performance contracts met;
- average through put;
- average dropped packets;
- average packet delays on the worst 1% of packet delays;
- packet delay variance.

In relation to IP telephony, all the parameters in (ii) above in addition to dropped calls, refused calls and calls set up time.

The above criteria and the addition or deletion of criteria for measuring the technical quality of service in accordance with this Annex 5 may be amended by the arbitrators pursuant to any development of technical products in the mobile telecommunications sector.¹³⁹

The amount of detail for the fast track arbitral process is indeed surprising and shows the level of concern and the substantial amount of thinking that went into the shaping of the process.

The example also shows, quite obviously, that a “normal” arbitration clause would not adequately deal with the quite specific issues as may arise under such disputes.

While similar questions come to mind in respect of all of the cases referred to above, this seems to be the moment to ask ourselves the following questions:

- Commitments such as for instance the above referred detailed provisions laying out a fast track arbitral process are the product of a unilateral commitment, hence, not the product of a negotiation with third parties and, at best, a product of discussions and negotiations with the Commission (who must be satisfied as to the reasonableness of the proposal).
- However: What is the practical level of experience of the Commission to form an opinion of whether or not a certain procedural proposal will work in real life and will satisfy and achieve the aim, i.e. the aim to make sure that claims of third parties against the notifying entity will be dealt with in a reliable arbitral procedure with its guarantees of independence and due process?
- Does the Commission consult with outside specialists in arbitration?
- Are these procedural proposals relating to arbitration or fast track arbitration normally negotiated and critically reviewed by the Commission, or are they largely accepted as proposed in the framework of an undertaking?
- Would the Commission derive benefits or guidance if, for instance, a leading arbitral institution (such as for instance the ICC) would study the kind of issues as may arise in the framework of such clauses and commitments (i.e. unilateral

¹³⁹ Case No. Comp/M.1795, at Paragraph 58.

commitments to submit to arbitration and, thereby, invitations to third parties to use the process instead of resorting to State court litigation)?

- Would the Commission be helped if, for instance, a Working Party of an institution would establish some kind of "**dos and don'ts**" in respect of methods and provisions which could be used in the framework of such commitments?

We will take up this preliminary question in **Parts IX and X** below, when discussing our reflexions on "Best Practices" in this particular field of arbitrations.

14. Glaxo Wellcome/SmithKline Beecham (2000)

In March 2000, Glaxo Wellcome and SmithKline Beecham notified their intention to enter into a full merger within the meaning of Article 3 (1)(a) of the Merger Regulation. Once again the Commission, in view of the commitments submitted by the parties, was able to approve the merger.

The Commission Decision is impressing by the very detailed in-depth analysis in respect of the products and the competitive effect of the merger. The analysis showed "**serious doubts**" so that the approval of the merger depended on the commitments which had to be conceded by the parties. The compliance of the parties with their undertaking was to be supervised by an independent Trustee (who had to be approved by the Commission). Particular commitments referred to certain products such as monocid and COPD-products (chronic obstructive pulmonary disease).

More specifically, Glaxo Wellcome has two leading (standard) products for the treatment of acute migraine, whilst SmithKline Beecham has no existing migraine treatment. Smithkline Beecham has, however, a compound in the pipeline. The parties have given a formal commitment to outlicence the compound: the Parties continue to have exclusive rights to the compound outside the EEA and with respect to any use other than migraine within EEA. Within the EEA, SmithKline Beecham, Glaxo Wellcome and, after the closing date, Glaxo SmithKline undertake to grant on arm's length commercial terms and conditions, the licence¹⁴⁰ to any third party who was willing to in-license the compound for migraine. In this context, the parties had to agree to arbitrate disputes on the basis of the following commitment:

Any dispute arising under or in connection with [this undertaking] shall be determined by arbitration in London pursuant to the rules of the **London Court of International Arbitration** by a single arbitrator chosen by agreement between the parties, failing which the arbitrator shall be chosen by President of the Law Society of England and Wales. The arbitration shall be conducted and the award shall be made in the English language.

¹⁴⁰ For the purposes of this undertaking, "Licence" means an irrevocable exclusive licence granting the proposed licensee the exclusive right to develop, manufacture, market, sell and distribute compound SB220453 for migraine within the EEA and the right to grant sub-licences or distribution rights to third parties.

Obviously, the default nomination as provided for in the clause is **hardly consistent** with the LCIA Rules; we have seen similar “defects” above!

The following 4 Phase I decisions were taken under Article 6 (2) ECMR.

15. Vivendi/Canal +/Seagram (2000)

In July 2000, Vivendi notified its intention to acquire control over Seagram. However, the Commission reached the conclusion that the operation does raise **serious doubts** as to its compatibility with the Common Market and with the EEA Agreement.

A major concern was the strengthening of a dominant position in the provision of pay-TV services. In particular, the post-merger bargaining power vis-à-vis the US studios for financing film projects was a concern. A further concern was the access to Universal’s music libraries and catalogues for third parties, and it was feared that Vizzavi (controlled by Vivendi and Vodafone) would foster a dominant market position enabling it to provide the only portal for “music must-stock products”.

Quite a number of other serious concerns were identified by the Commission with which Vivendi had to deal by offering an elaborate package of commitments. One of these related to the undertaking, by Vivendi, not to restrict the availability of music content controlled by Vizzavi and its portal for third party music content providers, and Vivendi had to undertake to make sure that Vizzavi shall maintain the availability of such products at fair market prices.

The Decision spelled out a particular concern in respect of the emerging market for online music and criticised that Vivendi’s proposed commitments had not provided for an arbitration mechanism in case of dispute. Literally:

On the emerging market for portals and on the emerging market for online music, the result of the market test reveals that third parties considered the undertaking to be insufficient. The undertaking was considered to be behavioural with no structural effect and the undertaking did not provide any elements to determine the content of the non-discrimination principle of the undertaking. The two-year duration of the undertaking was too short as Vizzavi’s customer base will increase substantially after the first two years. Finally, the undertaking did not provide for any **arbitration** mechanism in case of a dispute.

For these reasons, the Commission reached the conclusion that the undertaking was inadequate to remove serious doubts identified on the emerging market for portals and on the emerging market for online music. In order to respond to the above comments, the notifying party has submitted a substantially amended undertaking which provides for access to Universal’s music content on a non-discriminatory basis regarding the pricing and terms and conditions. Furthermore, the undertaking provides for an arbitration procedure in case of a dispute concerning the access conditions of the undertaking. The undertaking is limited to five years with the possibility of revision after three years.¹⁴¹

¹⁴¹ Case No./M.2050, at Paragraph 78.

Therefore, in order to address the Commission's concern, Vivendi had to improve on its commitments and to agree to a fairly detailed arbitration mechanism based on the ICC Rules, for the arbitral tribunal to have its seat in London.

What again is particularly interesting is the ***Prima facie Evidence Rule*** (similar to what we have seen above in the commitments that had to be provided by Vodafone), again based on the concept that the complaining party only has to produce *prima facie* evidence, whereupon the tribunal will have to find in favour of the complaining party, unless Universal can produce evidence to the contrary.

The entire dispute resolution provision reads as follows:

Dispute Resolution

In the event that a dispute arises between Universal and a competitor of Vizzavi as to whether the material terms, taken as a whole, upon which Universal's music is being offered to that competitor are discriminatory within the meaning of this Undertaking, the complaining party shall have the right to arbitrate that dispute, provided that both the complaining party and Universal have used their best efforts to resolve the dispute through negotiation.

To initiate arbitration, the complaining party shall give written notice to Universal nominating an arbitrator and stating the specific nature of the claimed discrimination, the factual basis of its position and the relief requested. In such case, Universal shall appoint an arbitrator within 14 days after receipt of the written notice. The arbitrators so appointed shall appoint another arbitrator to be president of the arbitral tribunal within 7 days after both have been nominated.

The arbitration procedure shall follow the Rules of the Arbitral Court of the International Chamber of Commerce (**ICC Rules**). The arbitration shall be conducted in London. The language of the arbitration shall be English.

Any of the arbitrators will be entitled to request any relevant information from Universal or the complaining party. If information required to be kept by Universal pursuant to this Undertaking is not available, the arbitrators shall decide in favour of the complaining party having taken into account the significance of the information, which is unavailable. The arbitrators shall be instructed not to disclose confidential information. The standard attributed to confidential information and business secrets are those as set out in accordance with European Community competition law.

The burden of proof in any dispute under this Undertaking shall be as follows: (i) the complaining party must produce evidence of a *prima facie* case, and (ii) if the complaining party produces evidence of a *prima facie* case, the arbitrator must find in favour of the complaining party unless Universal can produce evidence to the contrary.

The parties, in appointing the arbitrators, shall instruct the arbitrators to use their best efforts to make a decision concerning what relief, if any, is warranted in compliance with this Undertaking within one month of the appointment of the president of the arbitration panel. The arbitral tribunal shall fix the on account payment which shall be made by either or both parties towards the costs of arbitration. The arbitration award shall, in addition to dealing with the merits of the claim, impose the fees and costs of the prevailing party upon the party that is unsuccessful in the proceeding.¹⁴²

¹⁴² Case No. Comp/M.1846, at Paragraph 77.

The provision regarding the fixing of the deposits is, however, not compatible with the ICC Rules, as the determination of the deposits is a prerogative solely exercised by the ICC Court of Arbitration.

16. Pernod Ricard/Diageo/Seagram Spirits (2001)

In March 2001, Pernod Ricard and Diageo Plc notified their intention to acquire joint control of the world-wide spirits business of Seagram (belonging to the Vivendi Universal Group, France). The notification was cleared by the Commission without having given rise to **serious doubts** as to its compatibility with the Common Market and the functioning of the EEA Agreement.

All three companies were **vertically integrated companies**, thus controlling the chain from production of spirits through the marketing up to the whole sale distribution of their products. Essentially, the product range was intended to be split up between Diageo and Pernod Ricard in a way such as to avoid competition concerns. The Commission further reached the conclusion that the operation would not create or strengthen a collective dominant position. Nevertheless, it voiced concerns regarding the **portfolio effects** in that a wider portfolio diversity would reduce the opportunities for competing suppliers. Such portfolio effects could even be reinforced by substantial entry-barriers at the marketing level (which were characterised as being particularly high for parties aiming to penetrate the leading brands segment). Moreover, were either Pernod Ricard or Diageo to acquire the "Four Roses" bourbon whisky brand portfolio, particular concerns would arise. The Commission Decision then analyses in detail the market in various European countries, reaching the conclusion that, in various respects, market dominance would be reinforced by the transaction.

The Parties, therefore, **had to offer a number of commitments so as to remove the competition concerns identified by the Commission**. The commitments had to be improved during the procedure and are referred to in the Decision as forming an integral part of the same. *Inter alia*, the Parties had to propose specific commitments in order to remove the competition concerns regarding a possible acquisition of "Bourbon Four Roses" by either Diageo or Pernod Ricard. A purchaser of "Bourbon Four Roses" had to be subject to the Commission's prior written approval. The modalities of sale regarding the Seagram venture assets require the appointment of a Divestment Trustee, unless an arbitration procedure is started.¹⁴³

More particularly, in connection with the commitment relating to the disposal of the Seagram Venture Assets and certain Pernod Ricard on-sale assets, an **arbitration** procedure was envisaged on the basis of the following provision:

In the event that one or several Seagram venture assets remain unsold [...] before the end date, the parties will meet as often as necessary in order to agree a final allocation between them of these remaining assets (other than [...]). In the absence of agreement

¹⁴³ Decision, at Paragraph 53.

between the parties on this final allocation before the end date, the parties undertake, either to give the divestment trustee an irrevocable authority to sell such assets within [...] of such instruction at no minimum price, or to **refer the matter to arbitration**, giving the arbitrator an irrevocable instruction to conclude such arbitration proceedings within [...] of the end date.¹⁴⁴

17. SEB/Moulinex (2001)

In November 2001, SEB (a French company engaged in the development and manufacturing of electrical consumer goods, particularly those known under the trademark “Tefal” and “Rowenta”), notified its intention to acquire a part of the assets of the French company Moulinex. Moulinex commercialises a similar range of products under the international trademarks “Moulinex” and “Krupps”.

The Moulinex Group was in financial difficulties and came under the control of court-appointed administrators whose tasks were, *inter alia*, to find interested buyers to take over the totality or a part of the activities of Moulinex. SEB submitted a bid to acquire all rights for the exportation of the trademarks Moulinex, Krups and Swan, including a part of the production facilities and certain trading companies in Germany and Spain.

The Commission’s analysis identified **11 categories** of products for appliances used in the kitchen, and some further general household appliances. The Decision reached the conclusion that, particularly in France, the operation would substantially strengthen SEB’s position. However, the Commission accepted a request by the French competition authorities to examine the effects on their own market. A further strengthening was identified in respect of markets in Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway. The Commission, therefore, voiced serious concerns regarding the compatibility of the acquisition with the Common Market, in that SEB’s market share would raise into a range of 40% or more.

Hence, SEB was requested to concede **substantial commitments** the effect of which were evaluated by the Commission in detail¹⁴⁵; they finally removed the concerns. In the framework of its analysis, the Commission identified 8 particular requirements and conditions which had to be satisfied by SEB, including the obligation to concede an exclusive licence in respect of the trademark Moulinex for a term of 5 years, and reference is made to an **arbitration** procedure which is necessary in order to supervise the compliance with the commitments and the restoring of an effective competition. The Decision states:

Les autres engagements, notamment ceux concernant la nomination et les missions du mandataire et la procédure d’arbitrage, constituent des charges car elles portent sur des

¹⁴⁴ *Ibid.* at Paragraph 6 of the Annex.

¹⁴⁵ Decision, Paragraphs 135 ss.

étapes de mise en œuvre des remèdes qui sont nécessaires pour réaliser le rétablissement d'une concurrence effective.¹⁴⁶

Within the commitments made by SEB, the following reference to arbitration proceedings is made:

Dans l'hypothèse où le Groupe SEB considérerait soit qu'une représentation de la marque MOULINEX ne respecte pas les éléments du logotype, soit qu'un produit mis sur le marché et portant la marque MOULINEX n'est pas conforme aux normes annexées au contrat, il en informerait immédiatement le licencié par courrier recommandé avec accusé de réception, pour qu'il y remédie. Il en informerait également le Mandataire.

Si le Groupe SEB et le licencié, sous la supervision du Mandataire, ne trouvaient pas une solution à cette difficulté dans les 15 jours suivant l'information donnée par le Groupe SEB, la question serait alors soumise à la **procédure d'arbitrage** prévue au paragraphe (f) ci-dessous: ...

Paragraph (f) then contains a detailed arbitration provision, providing for default appointments of the sole arbitrator by the President of the Commercial Court of Lyon. The Sole Arbitrator will have to set up **Terms of Reference within one month** or, failing an agreement of the parties to such Terms of Reference, organise a Hearing drawing up a Protocol which will stand in lieu of agreed Terms of Reference. Thereafter, **within 4 months**, the arbitral award is to be rendered, with however a **somehow strange reservation to remit the matter to the President of the Commercial Court of Lyon** who may be seized by a party as a *référé*. The Arbitrator's Award was to be motivated, final and definitive, and the parties were taken to have explicitly waived any means of recourse or setting-aside procedures for annulling the Award.

The literal text of the commitment is as follows:

A défaut de règlement amiable, tout différend se rapportant au contrat de licence ou, le cas échéant, au contrat d'approvisionnement ou au contrat de licence de modèle, sera définitivement **tranché par voie d'arbitrage**, par un arbitre unique, selon les dispositions suivantes.

La ou les parties désirant avoir recours à l'arbitrage notifieront la requête d'arbitrage par lettre recommandée avec accusé de réception à l'autre partie ou, le cas échéant, aux autres parties. Cette requête d'arbitrage précisera l'objet de la demande, sera accompagnée des pièces justificatives et proposera le nom d'un arbitre unique.

Dans les trente jours de la réception de la requête, l'autre partie ou, le cas échéant, les autres parties, adresseront à la ou aux demandesses par lettre recommandée avec accusé de réception une réponse à la requête d'arbitrage avec les pièces justificatives, formulant une éventuelle demande reconventionnelle, et se prononcera sur le nom de l'arbitre unique, et le cas échéant fera une nouvelle proposition.

Si les parties ne s'entendent pas sur le nom de l'arbitre unique dans les 15 jours de la réception de la réponse à la requête d'arbitrage, l'arbitre unique sera désigné par le Président du Tribunal de commerce de **Lyon**, saisi comme en matière de *référé* par la partie la plus diligente.

¹⁴⁶ Comp/M.2621, at Paragraph 148.

L'arbitre unique dans le mois de sa désignation dressera un acte de mission avec l'aide des parties. A défaut d'accord des parties sur l'acte de mission dans ledit délai, l'arbitre organisera une réunion avec les parties dans un nouveau délai d'un mois et dressera un procès-verbal de cette réunion qui tiendra lieu d'acte de mission.

Une sentence finale sera rendue dans un délai de **quatre mois** à compter de la signature de l'acte de mission ou à défaut de l'établissement du procès verbal susmentionné, **le tout sous réserve de prorogation décidée en accord avec les parties ou par le Président du Tribunal de commerce de Lyon**, saisi comme en matière de référé par la partie la plus diligente.

Le siège de l'arbitrage sera à Lyon. La langue de l'arbitrage sera le français. Le tribunal tranchera le litige en droit.

La sentence du tribunal arbitral sera **motivée, finale et définitive**. Les parties renoncent expressément à tout recours auquel elles sont en droit de renoncer. La sentence sera notifiée aux parties par lettre recommandée avec accusé de réception dans le mois de son prononcé.

Les provisions pour frais d'arbitrage seront dues à parts égales par les parties, et le cas échéant par la ou les parties demanderesse, d'une part et la ou les parties défenderesses, d'autre part. Dans sa sentence finale, le tribunal déterminera celle des parties à laquelle/auxquelles il incombera de supporter les frais d'arbitrage ou la proportion dans laquelle ces frais seront supportés par les parties.

Once again, this clause raises several questions as to whether SEB's unilateral commitment and unilateral lining-up of the arbitration procedure will indeed be accepted by, or acceptable to, the opposing party or claiming party. For instance, the other party might object to the notion of a sole arbitrator (instead of an arbitral tribunal consisting of three arbitrators). Moreover, the reference to the President of the Commercial Court of Lyon and his function to serve as a *référé* may give rise to doubts. And finally, the exclusion of any kind of setting-aside procedures might as such be ineffective.

18. Telia/Sonera (2002)

In May 2002, the Commission received a notification of a proposed concentration by which Telia AB of Sweden would acquire the control over the whole of Sonera Corporation (Finland) by way of an exchange of shares. The transaction was cleared without raising serious doubts as to its compatibility with the Common Market and with the EEA Agreement. However, once again, this clearance came about on the basis of a number of commitments.

Telia is the largest telecommunications and cable TV operator in Sweden, with activity in all Nordic countries and the Baltic States. It provides wireless telecommunications services and maintains and owns the largest international carrier network in Europe (leasing out capacity to other communications providers). Telia is a 70% Swedish Government owned company.

Sonera's activities are primarily based in Finland where it is the largest mobile telephone operator and the largest provider of long distance national and international network services and operates the local loop infrastructure and cable TV networks in Finland. Under the "*Combination Agreement*", Telia agreed to acquire the whole of Sonera's business and assets. On completion, Telia shareholders will account for 64% of the combined company, and Sonera shareholders for 36%. The proposed operation, therefore, falls within the meaning of a concentration under Article 3 (1)(b) of the Merger Regulation. The Community Dimension of the concentration was established, having regard to the turnover figures.

The Commission's Decision analysed the various product markets for mobile telephone services, wholesale international roaming, wireless local area network services (WLAN), operator access to networks interconnection, corporate communications services and internet access services. The relevant geographic markets were identified as largely being national markets, due to the legal and regulatory systems. However, the definition of the geographic market had no significance in the framework of the Decision. The Commission's assessment then distinguished between the horizontal issues and the vertical issues.

In respect of the horizontal issues, the market shares of the various providers were analysed. Since both Telia and Sonera were active as providers of mobile communications services in Finland, the proposed transaction would lead to an overlap. Sonera itself held a market share of 50–65% and, therefore, was already in a dominant position. Moreover, entry-barriers were considered to be high. The proposed transaction would result in a merged entity controlling a combined market share of between 55–70%, i.e. a market share more than twice the size of its closest competitor in the Finnish market. Hence, the Commission concludes that the proposed transaction does raise serious doubts as to its compatibility with the Common Market in relation to mobile communications services in Finland. Also in respect of WLAN Services, Sonera was considered to be almost dominant, and the combination with Telia would raise serious doubts also in this respect. The same was stated in respect of wholesale international roaming services, where the combined market share would again be in the bracket of 55–70%.

Hence, the Commission concluded that the merger will allow Telia to **exercise competitive pressures**, and a comparison was made to similar effects that were produced by Telecom Italia's entry into France, British Telecom's entry into Germany and Spain etc.

Even more serious competitive concerns were voiced in respect of **vertical issues**. For instance, the Commission suspected that the merged entity will have new incentives to **foreclose** vertically related downstream-markets, such as the markets for wholesale calls to Telia and Sonera's fixed and mobile communications networks, and the provision of wholesale international roaming.

Moreover, the Commission's investigation showed that the proposed transaction would increase the merged entity's ability to **leverage its strong positions** in the

mobile communications services market. The concept of bundled service offerings would generally create a risk that providers of essential parts of the package might be able to foreclose providers of other parts and, hence, the Commission also raised serious doubts in that respect, more precisely in the sense that the merged entity would be enabled to foreclose competitors in the provision of corporate communications services within the Nordic and Baltic States, and the effect would be suffered by other competitors in the EEA offering their services to customers with significant Finnish, Swedish and Baltic needs.¹⁴⁷

Therefore, in order to address these concerns, detailed negotiations took place resulting in Telia working out (and improving on) the commitments it had to concede in order to satisfy and remove the Commission's concerns. *Inter alia*, Telia had to commit itself **to divest its mobile communications business in Finland** in order to remove the Commission's concern regarding the horizontal overlap in the area of mobile communications services and in respect of WLAN services and the provision of wholesale international roaming services in Finland.

Moreover, a second divestiture commitment had to remedy and remove the Commission's concern regarding the likelihood of a foreclosure by eliminating potential competition in the downstream-markets, i.e. in the markets of providing corporate communications services and mobile communications services.

Instead of simply referring to the commitments of Telia, the Commission reflected a summary of these in the body of its Decision, reflecting therein various references to **arbitration** which we will now study in more detail.

First of all, Telia had to commit itself to divest its mobile communications services business in Finland and, in this context, had to procure that a purchaser of its business shall have the right to be granted a national roaming agreement with Sonera on non-discriminatory commercial terms. More particularly, Telia had to commit itself to establish separate accounts for the interim period and to keep those available to the arbitration panel. Furthermore, Telia had to **accept a non-discrimination obligation for access by third party operators (and competitors) and offer a fast track dispute resolution procedure** in the event of disputes regarding the application of the non-discrimination obligations. The text reads as follows:

Telia additionally commits to:

c) ensure that its fixed and mobile (NMT, GSM and UMTS) network businesses in Sweden and Finland are held in separate legal entities ("Network Companies"), which are distinct from related retail activities. Such Network Companies shall have a Board of Directors, and each such Board shall include an external director not related to Telia or to Sonera, appointed in accordance with applicable governance principles.

Telia commits to achieve this legal separation within a period of 9 months from the effective date, unless it shows good cause and applies to the Commission for a reasonable

¹⁴⁷ Decision, Paragraph 112.

extension. Until the legal separation has been achieved, as an interim solution, Telia commits to cause separate accounts to be kept and to be available to the **arbitration panel**, for the fixed and mobile network businesses;

d) apply: (a) a **non-discrimination obligation in relation to the provision of regulated wholesale fixed and mobile network services** as between the Telia Group and specified third party operators in Sweden and Finland, and (b) a non-discrimination obligation in relation to making available of access to international wholesale roaming in its GSM networks in Sweden and Finland, between the Telia Group and third party mobile network operators in Sweden and Finland;

e) offer a **fast track dispute resolution procedure** in the event of disputes regarding the application of the non-discrimination obligations described above.¹⁴⁸

Furthermore, Telia was required to remedy a certain lack of transparency in connection with its network businesses held in separate legal entities, and was required to establish separate accounts to be kept and to be made available to the arbitration panel in case of disputes.¹⁴⁹

To remedy the existing lack of transparency and the particular competition concerns, Telia has committed to ensure that its fixed and mobile (NMT, GSM and UMTS) network businesses in Sweden and Finland are held in separate legal entities ("Network Companies"), which are distinct from related retail activities. Furthermore, Telia has committed itself to appoint an external director to each of the Boards of Directors. The duration of this commitment is not as such limited in time. As an interim solution, until the full legal separation has been achieved, Telia has committed to cause separate accounts to be kept for the entities to be legally separated. These accounts shall also be made available to the **arbitration panel** for the purposes of the Fast track dispute resolution procedures.¹⁵⁰

The arbitration procedure itself, as reflected in the Commission's Decision, is explained under the heading "**Fast Track Dispute Resolution**". The commitment was termed to be effective during three years. The Commission opined on the scheme and considered that the commitments would sufficiently contribute in eliminating serious doubts as regards the likelihood of foreclosure in specified upstream markets. The Commission Decision reads as follows:

Fast Track Dispute Resolution:¹⁵¹

Telia's commitment provides third parties with specific means to dispute in an arbitration procedure whether the non-discrimination obligations described above have been correctly applied. This arbitration also provides for a faster alternative to the procedure provided by the national regulatory authorities. The duration of this commitment is limited to three years from the effective date.

The Commission considers that the application of a non-discrimination obligation supported by a Fast track dispute resolution and backed by greater transparency, will provide third parties with sufficient means to detect discriminatory practices and to react

¹⁴⁸ Case No. Comp/M.2803, at Paragraph 119.

¹⁴⁹ Decision, Paragraph 136.

¹⁵⁰ *Ibid.* at Paragraph 136.

¹⁵¹ *Ibid.* at Paragraph 143 *et seq.*

to them. As above, this commitment also forms an essential element of the proposed package of additional commitments, which are partly behavioural in nature. These commitments are together considered to sufficiently contribute to eliminating serious doubts as regards the likelihood of foreclosure in the specified upstream markets.

The whole process is further described in **Telia's commitment letter** addressed to the European Commission under the date of 9 July 2002, Paragraphs 21–31. It first contains the details regarding the separate accounts to be established, then addresses the commitment of non-discrimination (Paragraphs 23/24) and the commitment to grant access on a non-discriminatory basis (Paragraph 25), and finally establishes the terms of the fast track dispute resolution. Literally:

Fast Track Procedure:¹⁵²

In the event that a third party telecommunications operator to whom rights have been granted disputes the non-discriminatory nature of terms offered to it, the following Fast Track Procedure shall be available to such third party operator.

A third party operator who wishes to avail itself of the Fast Track Procedure (a "requesting party") must notify Telia and – where the facts at issue relate to Sweden – the Stockholm Chamber of Commerce or – where the facts at issue relate to Finland – the Helsinki Chamber of Commerce in writing specifying the offer challenged, establishing its entitlement to benefit from rights under this commitment, and nominating an arbitrator.

Telia shall within two weeks of receiving a notification in writing from a requesting party nominate its arbitrator and provide to the requesting party in writing justification for its offer. The arbitrators nominated by Telia and the requesting party shall, within one week from the nomination of the former, agree to appoint a third arbitrator. Unless otherwise agreed by the parties, the arbitrators shall be instructed to establish an arbitration tribunal and to make a decision within one month of the appointment of the third arbitrator as to the compliance by Telia with its obligations under paragraphs 23 and 25 above.

The Tribunal will be entitled to request any relevant information or documentation from Telia or the requesting party.

The burden of proof in any dispute under the **Fast Track Procedure** set out in this Clause is as follows: **(i) the requesting party must produce evidence of a prima facie case, and (ii) if the requesting party produces evidence of a prima facie case, the arbitrator must find in favour of the requesting party unless Telia, having had an opportunity to comment on evidence so produced, can produce evidence to the contrary.**

The arbitrators shall be instructed not to disclose confidential information. Throughout this Undertaking the standards attributed to confidential information and business secrets are those as set out in accordance with European Community competition law. The arbitration shall be in Swedish where the facts at issue relate to Sweden and shall be conducted in Stockholm in accordance with the rules of the Stockholm Chamber of Commerce whose rules shall be amended accordingly. The arbitration shall be in Finnish where the facts at issue relate to Finland and shall be conducted in Helsinki in accordance with the rules of the Helsinki Chamber of Commerce whose rules shall be amended accordingly. The losing party shall compensate the other party in relation to its reasonable costs and expenses for presenting its case.

¹⁵² *Ibid.* at Paragraph 26 *et seq.* of the Annex.

What is interesting is the requirement that the third party operator (claimant) will have to notify Telia and at the same time either the Stockholm Chamber of Commerce or the Helsinki Chamber of Commerce.

Moreover, the arbitrators will have to render a Decision **within one month** from the appointment of the third arbitrator, and the Decision will have to express an opinion whether or not Telia complied with its obligations under Paragraphs 23 and 25 of the commitment letter.

And here again we do see the ***Prima facie Evidence Rule*** discussed above, in the sense that the requesting party only has to make a *prima facie* case, and the arbitrators will have to find in favour of the requesting party unless Telia will be able to provide evidence to the contrary.

It may further be noted that the language of the proceedings are either Swedish or Finnish, and that the Stockholm or the Helsinki Chamber will be the institutions to supervise the process.

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VII. 12 Phase II Merger Review Cases Under Art. 8(2) ECMR – The Commission Accepted “arbitration” as a Remedy

19. Du Pont/ICI (1992)

On 3 June 1992, the Commission initiated proceedings under the ECMR. The concentration concerned the proposed acquisition, by E.I. Du Pont de Nemours & Co. (Du Pont), of the world-wide nylon operations of Imperial Chemical Industries Plc (ICI). The turnover thresholds for affirming a community dimension were met.

The Commission analysed in detail the structure of the nylon (polyamide) industry, identifying that, essentially, there are three integrated companies operating on the European market, i.e. ICI, Du Pont, and Rhône-Poulenc, all three having large petrochemical facilities. As far as the relevant product markets are concerned, the Commission distinguished three major groups of end-use applications for nylon fibre: fibres for textile applications, fibres for carpets, and fibres for industrial applications. In the framework of which the Commission issued a statement of objections.

The major concern arose in respect of nylon fibres for carpets where ICI and Du Pont held substantial market shares. Du Pont did not succeed on its argument that polypropylene carpet fibres should be considered as substitutable for nylon carpet fibres, due to the distinct inherent characteristics of nylon fibres, giving them specific advantages both for manufacturers in terms of processing and for the final consumer in terms of performance. Unlike polypropylene fibre, nylon carpet fibres can be dyed and printed, whereas polypropylene carpet fibre is capable of use only in a pre-dyed form since colour can only be added to the molten polymer during fibre production. Once produced, polypropylene cannot accept further colour processing because of its chemical make-up.

Hence, the Commission, in quite some detail, characterised the significant advantages of nylon having regard to its dyeability, coupled with its particular appearance retention, its resilience and abrasion resistance and its safe flammability. On this basis, substitutability between nylon and polypropylene fibres was denied.

Regarding the impact of the concentration, the Commission focused on the European market, reaching the conclusion that Du Pont would increase its market share within the EC from around 20–25% (the exact percentage had been redacted in the public version of the decision) to about 43%, being twice that of the next competitor, Rhône-Poulenc/Snia. Both, Du Pont and ICI, were described as being integrated nylon fibre producers, both leading in terms of quality of products and technological development. Du Pont was characterised as the lowest-cost producer in the world, due to the scale of its production particularly in the US. The concentration, as the Commis-

sion argued, would strengthen Du Pont's already strong market position within the EC by acquiring ICI's nylon business.

The Commission then analysed the concentration under the view point of the customers, being the European carpet manufacturers, foremost Beaulieu, identified as the largest manufacturer, based in Belgium. Moreover, the Commission analysed the effects of the concentration on the retail level where there is a significant indirect competitive pressure due to overlapping segments between polypropylene carpets and nylon carpets.

In its overall assessment, the Commission acknowledged that, for the time being, the EC nylon carpet fibre market was a competitive market. However, the concentration would make Du Pont the strongest player. Although other competitors of Du Pont were said to have the possibilities to switch suppliers over time, the Commission feared a "*considerable reduction of competition*", leading the Commission to assume "*that the position of Du Pont would be such as to enable it to act independently of its competitors and of its customers*".

Due to the above concerns, Du Pont was forced to modify its original concentration plan by submitting substantial undertakings (in the sense of behavioural commitments) vis-à-vis the Commission.

The **behavioural commitments** are stated in the Commission's decision as follows:

Du Pont undertakes that, as soon as practicable after the completion of the notified transaction and in any event not later than 30 days after the completion of the notified transaction, Du Pont will take necessary steps to enter into good faith negotiations with interested third parties with regard to the following arrangement and will conclude such arrangement as soon as practicable but no later than [...] after the completion of the notified transaction. These periods may be extended with the agreement of the Commission.

- (1) Du Pont will reserve capacity to produce up to 12 Kt per annum of nylon staple fibre representing a cross-section of ICI's current product range for the benefit of an independent third party. So as to ensure improved competition, such a third party must be a supplier of nylon fibres and not a carpet producer.
- (2) Du Pont will manufacture up to 12 Kt per annum of such nylon staple fibre as may be specified by such third party for a period of five years renewable by the selected candidate. Such products will be sourced from the facility best suited to meeting such third party's requirements. The fee to be paid for such fibre products will be based on a polymer pricing formula plus a fibre conversion fee as agreed between Du Pont and the third party. Such fee will be based on take or pay principles common in similar manufacturing arrangements.
- (3) Du Pont will, on terms and conditions as agreed between Du Pont and the third party, agree to transfer to such third party a free-standing carpet research and development facility comparable in terms of quality to those currently existing in Oestringen and Geneva and appropriate to the business transferred. Such facility, which will be staffed with competent technical personnel at least half of whom should be from ICI's Oestringen facilities, will be at a location chosen by the third

party. Du Pont will, on terms and conditions as agreed between Du Pont and the third party, take all reasonable steps to encourage the relevant ICI personnel to take up employment with the third party.

- (4) Du Pont will, on terms and conditions as agreed between Du Pont and the third party, take all reasonable steps to encourage the competent sales personnel familiar with the business being transferred to take up employment with the third party.
- (5) Du Pont will, on terms and conditions as agreed between Du Pont and the third party license exclusively or assign to the selected third party ICI's "Timbrelle" trademark.

Any dispute between Du Pont and the selected third party arising out of the implementation of these undertakings will be submitted to **independent arbitration** to be mutually agreed between Du Pont and such third party.

Again, what we see here are typical behavioural commitments which the Commission qualified as satisfactory. Indeed, the commitments will enable a third party to partially replace ICI as a supplier of high-quality fibres. The commitments will, as the Commission stated, significantly improve the competitiveness of the third party, in particular as regards its product range and future product development and, thereby, will reduce substantially the likelihood that Du Pont could be able to determine the degree of product development and innovation in the market.

Moreover, the living up to the commitments is to be monitored by independent **arbitration** and, on this basis, the Commission was able to conclude that the proposed concentration (amended by the inclusion of the above commitments) would no longer create a dominant position on the EC nylon carpet fibre market as a result of which effective competition would be significantly impeded in the common market within the meaning of Article 2 (3) ECMR; therefore, the proposed acquisition by Du Pont of ICI's nylon business was declared compatible with the common market, however "*subject to the obligation that Du Pont fulfils the undertakings which it has entered into vis-à-vis the Commission*".

Once again, the Commission decision has quite clearly set the scene in respect of the commitments which had to be conceded by Du Pont and would, in our view, provide sufficient yardsticks to an arbitral tribunal to decide on issues submitted to it when invoking the **erga omnes offer** of the parties to settle any disputes by way of arbitration.

20. Kimberley-Clark/Scott (1996)

Kimberly-Clark is a US corporation based in Dallas, engaged in the production and sale of a wide range of paper and related products for personal, business and industrial use, and a leading supplier of a variety of consumer products such as disposable nappies, feminine protection products and sanitary tissues. In August 1995, it notified the Commission of its intention to merge its world-wide activities with Scott Paper Company of Philadelphia. The Commission initiated proceedings in application of Article 6 (1)(c) of the Merger Regulation.

The Commission considered that both companies are large and fully integrated multinational operators, both having production facilities in the EEA. The Commission, after a careful and detailed examination of the various operators on this particular market, the different product ranges, the geographical markets, the supply-side substitutability, the demand-side substitutability and the consumers' behavioural patterns for each of the products, reached the conclusion that KC/S will become by far the largest supplier of tissue paper, kitchen towels etc. and would, therefore, enjoy a dominant position in various markets, in particular U.K. and the Republic of Ireland.

The intended concentration, therefore, **required quite substantial commitments** by KC/S, in terms of divestments of certain brands and businesses. For instance, KC's Double Velvet and other brands had to be divested, and an initial 3-year royalty-free exclusive licence for the purchaser to use in the U.K. and Ireland the Kleenex trademark etc. had to be conceded. In the same context, KC's tissue producing facility had to be divested, including warehousing, offices and distribution centres. The commercial viability of the entire package had to include the transfer of sales staff, the transfer of production and administrative personnel, personnel for technical assistance, the assignment of existing pulp and other supply contracts and services, and a best efforts' obligation by KC to procure the assignment to the purchaser of this package of existing contracts or businesses with retailers.

The divestiture was to be handled by a **trustee** appointed with the approval by the Commission who was to be given an irrevocable mandate to find a valid purchaser for the divested business. The trustee was required to recurrently report to the Commission in respect of bidders, and offerors could proceed to the final stage only absent an objection by the Commission.

The Decision then states in a very short paragraph that any kind of disputes between KC/S and a third party purchasing the divested business shall be submitted to independent **arbitration**. Hence, a reference *tout court* as follows:

Any dispute between the parties and the third party purchasing the divested business arising out of or in connection with the implementation of the undertakings by the parties will be submitted to **independent arbitration**.¹⁵³

The Decision does not give any further indications. This is understandable, as we may assume that the divestment contract with the purchaser would certainly contain all the required details.

21. Boeing/McDonnell Douglas (1997)

On 18 February 1997, a proposed concentration was notified to the European Commission (pursuant to Article 4 ECMR) by which The Boeing Company ("Boeing") acquires control, within the meaning of Article 3 (1) (b) ECMR, of the whole of McDonnell

¹⁵³ Case No.IV/M.623, Paragraph 233, Undertaking 9 sub-paragraph 11.

Douglas Corporation (MDC), with reference to an agreement entered into by the parties on 14 December 1996. The Commission concluded that the proposed concentration does raise serious doubts as to its compatibility with the Common Market and, by Decision of 19 March 1997, initiated proceedings pursuant to Article 6(1)(c) ECMR.

The Decision is highly interesting and deserves to be analysed in more detail:

In the opening paragraphs, the Decision notes that Boeing is active in two principal areas, i.e. in the area of commercial aircraft and in the area of defence and space. In contrast, MDC operates in four principal areas: military aircraft, missiles, space and electronic systems, commercial aircrafts and financial services. The community dimension of the proposed concentration was easily established, the world-wide turnover being in excess of € 17 billion for Boeing and € 11 billion for MDC, and each of them had a community-wide turnover in excess of € 250 million. In addition, neither of them achieved more than 2/3 of their aggregate community-wide turnover within one and the same Member State.

The Commission stated that the concentration will have an important economic impact on the large commercial jet aircraft market. The relevant geographic market was determined to be the world market, and average market shares of Boeing and MDC in the EEA over the last 10 years had been 54% and 12%. As far as existing fleet in service is concerned, Boeing's share was in the region of 58%, MDC about 20% and Airbus about 21%.

Relatively late on the time-line, i.e. on 13 July 1997, the European Commission received information from the US Government, almost in the sense of a "warning", that a decision by the EU Commission which would prohibit the proposed merger "could harm important US defense interests". The Commission took note, indicating that those concerns will be taken "into consideration to the extent consistent with community law".

The Commission's competitive assessment analyses the demand side for several types of aircrafts, according to different technical characteristics including range, capacity, performance, fleet commonality, maintenance and service networks. In so doing, it looked at Western-built aircrafts since, in the Commission's view, non-Western aircrafts cannot compete on technical grounds, reliability, after-sales service and public image. The Commission made a distinction between narrow-body aircrafts and wide-body commercial jet aircrafts. While Boeing tried to widen the market to incorporate the quite significant second-hand aircraft market, the Commission disagreed on that point and determined that the second-hand aircraft market is a distinct market which shall not be taken into account. This, obviously, played quite a role in determining the dominance of Boeing.

The Commission then analysed the effects of the concentration, focusing first on the current market structure. On the supply-side, Boeing was described as being the world's leading company in large commercial jet aircrafts, followed by Airbus Industries as second largest producer, and followed by MDC as the number three. On the

demand side, the Commission looked at 561 airlines operating Western aircrafts and concluded at that time that the market is in the process of expansion, with a strong growth in demand predicted. Boeing's forecast was that, over the next 10 years, the total market potential will be 7'330 aircrafts for an equivalent of USD 490 billion. Obviously, Boeing was unable to really predict the future, and so was the Commission! The Decision then contains a very detailed analysis of the then existing market shares, with Boeing and MDC holding a combined world-wide market-share around 70%. They would thus hold an oligopolistic position, with a market power allowing Boeing "*to behave to an appreciable extent independently of its competitors*".¹⁵⁴

On the market segments, the Commission noted that Boeing had a whole family of aircrafts from narrow-body to wide-body, with a monopoly position in the 400+ segment, whereas Airbus had no competitive products in two out of five segments. This element was quite significant for the Commission, because Airbus, in contrast to Boeing, was therefore not in a position to offer a "*family of aircrafts*".

In the framework of the actual market structure, the Commission also analysed in significant detail certain exclusive deals which – as one may note with quite considerable surprise – had been entered into by Boeing only recently, i.e. at a time when merger filings in the United States were already under preparation. For instance, Boeing entered into exclusive arrangements for the supply of large commercial jet aircrafts with American Airlines, Delta Airlines, Continental Airlines and, in November 1996, moreover concluded a long-term partnership with American Airlines, making Boeing the exclusive supplier of jet aircrafts to American until the year 2018. In addition, American was granted price-protected "*purchase rights*" for 527 additional jets.

Even more surprisingly, during the pendency of the US merger filing and the EU investigation, i.e. on 20 March 1997, Boeing concluded a further long-term exclusive arrangement with Delta for the next 20 years. And, on 10 June 1997, Continental placed 35 firm orders and further purchase options with Boeing.

Of course, the Commission focused on these deals because of their **obvious foreclosure effects** for the next 20 years. Hence, a significant portion of 14'400 new aircrafts which were estimated to be delivered within the next 20 years were already blocked on firm orders placed with Boeing.

Regarding the future market growth, the Commission expected the demand for aircrafts over the next 20 years to grow by more than 80%. On the potential competition situation, the Commission stated that there are potential new entrants to the commercial jet aircraft market, particularly situated in Russia, India and the Far East. However, there exist massive entry-barriers. Initial development and investment costs were estimated in the magnitude of USD 10 billion to develop a new wide-body jet. The Commission concludes its analysis on the current market by stating that Boe-

¹⁵⁴ With reference to the *Michelin* Decision, Case 322/81 [1983] ECR 3461.

ing clearly enjoys a dominant position on the overall market for large commercial aircrafts as well as on the markets for narrow-body and wide-body aircrafts.

Regarding the **effects of the concentration**, the Commission concluded that Boeing would increase its market share from about 64% to 70% on the overall market for large commercial aircrafts, and would be enabled to increase its customer base from 60% to 84% of the current fleet in service. Moreover, it could increase its ability to induce airlines to enter into exclusivity deals, foreclosing the market for other competitors. Over time, Boeing would obtain a monopoly in the 100–120 seat segments, and a near monopoly in the freight segment.

The analysis then continues by dealing with the question as to the **competitive potential of MDC**. While MDC's importance in the market was declining rather dramatically since 1996, the Commission nevertheless stated that the impact of MDC being a competitor on the market was higher than reflected by its market share. In fact, as long as MDC is a player on the market, it will be able to bid against Boeing, with corresponding effects on the price. While MDC's image was suffering, the Commission also valued that, if MDC will be merged into Boeing, the existing negative perception of MDC would be removed.

The Commission also considered, as a quite significant aspect, that Boeing only (but not Airbus) will have the ability to induce airlines to enter into further exclusive deals, since Airbus *"is unable to offer a full family of aircrafts"*. The potential effect of exclusive deals would be to block over 40% of the world-wide market.

Another significant element for the Commission was to look at the overall effects resulting from MDC's defence and space business. The concentration, in fact, will have the effect for Boeing to become the largest integrated aerospace company and, due to MDC's position in the space and defence sector, will have significant access to **publicly funded R&D**. Hence, the possibility for Boeing to receive funding in the area of military technology was significant and was seen as another advantage over Airbus.

A further significant element for the Commission to look at was the **portfolio of intellectual property**. The Commission stated that the concentration would combine the world's largest portfolios of IP which, obviously, will have the effect to strengthen Boeing's dominant position. The Commission then concludes that Boeing will have a very significant bargaining power vis-à-vis suppliers, and would be *"able to exert pressure on numerous suppliers to discourage them from working with its only competitor, Airbus, or to induce them to favour Boeing over Airbus in terms of resource allocation"*.

On the basis of this analysis, the EU Commission reached the conclusion,¹⁵⁵ that the proposed concentration would lead to the strengthening of a dominant position through which effective competition would be significantly impeded in the Common

¹⁵⁵ Paragraph 113 of the Decision.

Market within the meaning of Article 2 (3) ECMR. Hence, on the basis of this analysis, the Commission would have had to prohibit the concentration.

However, as late as in the last week of the four months period, and hence only a few days before the Decision had to be released, quite some political steps were taken, on information and belief by the then US President William Clinton, to impress upon European political leaders the importance which the United States attach to the clearance of the concentration. During those last days, under very considerable time-pressure, **remedies** had to be negotiated.

For instance, as a structural remedy, Boeing undertook to maintain MDC (respectively DAC) as a separate legal entity for a period of ten years. Moreover, Boeing had to commit itself to provide customer support for MDC's aircrafts. As a behavioural remedy, Boeing had to agree that it will not withhold or threaten to withhold support for MDC (DAC) aircrafts, or penalize or threaten to penalize an operator with respect to the support for DAC aircrafts.

Moreover, Boeing had to commit itself not to use its privileged access to the fleet in service of DAC aircrafts in order to leverage its opportunities for persuading current DAC operators to, instead, purchase Boeing aircrafts. In this context, Boeing had to commit itself not to provide spare parts and product support on more favourable terms to some DAC operators rather than others, in order to persuade them to purchase Boeing aircrafts.

We had mentioned above the several exclusive agreements. It is not surprising that, in that respect, the Commission required that Boeing will not enforce its exclusivity rights under those Agreements with American, Delta and Continental, and Boeing had to commit itself not to enter into any additional exclusive Agreements until 1 August 2007.

Regarding government funded R&D projects, Boeing had to commit itself to supply to the EU Commission an annual report for the next 10 years so as to provide transparency.

Boeing had to undertake not to exert or attempt to exert any undue or improper influence on its suppliers, leveraging its bargaining powers, in case such suppliers would maintain relationships with other competing manufacturers.

Moreover, in respect of government-funded patents, Boeing had to undertake to **grant licenses** on a non-exclusive, reasonable royalty-bearing basis which could be used to manufacture or sell commercial jet aircrafts. Furthermore, Boeing had to commit itself to license its know-how in that field, as well as any blocking patent. Hence, any third party commercial aircraft manufacturer could request Boeing to grant such licenses in respect of those patents and related know-how. Any difference, dispute or disagreement between such a third party and Boeing had to be subjected to an **independent arbitration** under terms and procedures to be agreed, and Boe-

ing has to submit annual reports for a period of 10 years in respect of its current unexpired patents, supplying those to the EU Commission.

The text¹⁵⁶ reads as follows:

If Boeing and the other commercial aircraft manufacturer cannot agree on the royalty or whether the patent is a "government-funded patent" which could be used in the manufacture or sale of commercial jet aircraft or whether the patent is blocking, such disagreement shall be submitted to independent arbitration under terms and procedures to be mutually agreed between Boeing and the other manufacturer.

Based on the foregoing commitments, partly backed up by a continuing scrutiny through independent arbitration, the Commission was able to reach a positive conclusion in the sense that Boeing's enhanced capability to enter into exclusive agreements "*will become irrelevant*" and its competitive advantages in respect of access to DC's fleet will become reduced by the commitments not to leverage the product support. Regarding the strengthening of Boeing's dominant position resulting from its large increase in the defence and space business, the requirement to provide access to other aircraft manufacturers to intellectual property will adequately meet the concern about Boeing's increased patents' portfolio, and the commitment on transparency will contribute to more discipline in publicly funded R&D and will make the spill over from defence and space R&D to the civil sector more transparent and will reduce the risk that Boeing may abuse its increased bargaining power.

The Commission then also considered that, post-concentration, there will only two operators on the market for large commercial aircrafts, i.e. Boeing and Airbus. It then stated, quite convincingly, that apart from Boeing there would have been no buyer which showed an interest to take over MDC/DAC. Finally, the Commission also stated in its Decision that it had taken into consideration "*the important interests of the United States of which the Commission was informed by the US Department of Defense and Department of Justice, on behalf of the US Government*".

In the sense of a final conclusion, the Commission stated that the combination of structural and behavioural elements, on balance, adequately addresses the competition concerns which the Commission had to identify, and removes those concerns about a strengthening of Boeing's dominant position. To ensure full compliance by Boeing with its commitments, in application of Article 8 (2) ECMR, second sub-paragraph, the Commission indicated that it shall monitor the compliance, and Boeing will have to allow the Commission, or any expert appointed by the Commission, access to internal data relevant to the implementation of that monitoring and, whenever requested by the Commission, to be prepared to discuss compliance with the commitments. Consequently, the Commission concluded that, subject to full compliance with the commitments, the proposed concentration would not create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the Common Market, or in a substantial part of it.

¹⁵⁶ Paragraph 117 of the Decision.

As a footnote to the above, a brief reference to the statement of **Chairman Robert Pitofsky**, Commissioners Janet Steiger, Roscoe and Starek and Christine Varney of the FTC (in File No. 971-0051) may be made, as it significantly contrasts to the very detailed Decision taken by the EU Commission.

That statement is a very short document of only five pages (in wide spacing) which says that the United States, in order to compete on the aircraft market, *"needs a single powerful firm to serve as its national champion. A powerful US firm is all the more important ... because that firm's success contributes much to improving the US' balance of trade and to providing jobs for US workers"*.

Quite clearly, these are atypical statements to be read in a Decision of a competition authority. Nevertheless, it may set out a **rationale** which may well have inspired the competitive analysis which follows these opening statements. Paying credit to a word of a learned judge who, in a quite impressive clarity, expressed a half century ago the underlying competition policy prevailing in the United States, when stating:

Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy. That immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress. That the spur of constant stress is necessary to counter-act inevitable disposition to let well enough alone.¹⁵⁷

Chairman Pitofsky said that, on its face, the proposed merger appears to raise serious antitrust concerns since there is only one significant rival, Airbus Industries, and extremely high entry-barriers. Moreover, the merger would combine two firms in the US defence industry that develop fighter aircrafts and other defence products. Nevertheless, he found that the merger would not in fact substantially lessen competition in any relevant market.

We may note at this juncture that, as is typical, the US focus is on the SLC-Test, while the EU Commission's focus is on the Dominance Test.

The key argument of Chairman Pitofsky is then explained on a very simple basis. The argument is that MDC *"looking to the future, no longer constitutes a meaningful competitive force in the commercial aircraft market and there is no economically plausible strategy that McDonnell Douglas could follow, either as a stand-alone concern or as part of another concern that would change that grim prospect"*. Chairman Pitofsky reached that conclusion on the basis that MDC had a limited product line only which *"lacks the state of art technology and performance characteristics that Boeing and Airbus have developed"*. Moreover, Douglas aircrafts do not have the advantage of commonalities wherefore *"the vast majority of airlines will no longer consider purchasing Douglas aircraft and (that) the company is no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market"*.

¹⁵⁷ *United States v/Aluminium Company of America*, 148F.2d 416, 427 (2d Cir. 1945).

Chairman Pitofsky then slightly softens the "verdict" over MDC by saying that McDonnell Douglas is not as such a failing company, and Douglas Aircraft is not as such a failing division. However he said that "*Douglas' prospects for future commercial aircraft sales are virtually non-existent*". Hence, MDC is no longer seen as a competitive factor of any significance for the future, wherefore Chairman Pitofsky was able to conclude that the merger does not pose a threat to the competitive landscape. Nevertheless, Chairman Pitofsky was troubled (as was the European Commission) by the 20 year exclusive contracts which Boeing had recently entered into and expressed concern about the foreclosure effects, indicating that "*we intend to monitor the potential anti-competitive effects of these, and any future long-term exclusive contracts*".

A **Dissenting Opinion** was filed by Commissioner Mary L. Azcuenaga. She said that she would not join in the discussion of the majority in that, although Douglas had a small share of the commercial aircraft market, it nevertheless was able to exercise competitive constraints. She explained that, quite in the sense of the much more detailed reasoning of the EU Commission "*Douglas has added an element of competition at the stage at which commercial aircraft producers bid for the business of airlines, and it has continued to win some business*". She then voiced her disagreement with the view that Douglas would be a "*failing firm*" or "*exiting asset*" and fears that such arguments might create an incentive for strategic action to avoid competitive overlaps and government challenge under Section 7 of the Clayton Act. The door would be open to invite self-serving statements, manipulation and strategic behaviour. She then concludes her opinion by stating that, in her view, the combination "*creates a classic case for challenge under Section 7 of the Clayton Act and in accordance with the Merger Guidelines. What is less clear on the existing information is the availability of an adequate remedy*".

Certainly, the Boeing concentration is one of the most fascinating cases and has prompted wide reactions. We also realize to what extent politics are involved in some of these Decisions. We note the difference of approaches of various competition authorities, and we see the very significant care and measure of detail which the EU Commission applies in motivating its decision. After Boeing/McDonnell Douglas, other cases followed, in particular the very heatedly debated refusal, by the EU Commission, in the *General Electric/Honeywell* case which we will briefly discuss below.

Despite the manifest differences of approach, it would probably be wrong to conclude that the SLC-Test (as used by the US authorities) and the Dominance Test (as applied by the EU Commission) would as such lead to different conclusions. While it may be true to say that the SLC-Test rather considers the demand side perspective, whereas the Dominance Test would take its view-point from the supply side, they nevertheless, in most cases, result in putting together the same kind of mosaic of numerous factors and their competitive inter-play.

22. Guinness/Grand Metropolitan (1997)

In May 1997, Guinness Plc and Grand Metropolitan Plc notified their intention to create a new company, to be called GMG Brands Plc in which they will merge all their business activities. Shortly thereafter, the Commission ordered the suspension of the notified concentration until a final decision would be taken, since the concentration raised serious doubts as to its compatibility with the Common Market. Hence, the Commission decided to initiate proceedings pursuant to Article 6 (1)(c) of the Merger Regulation.

The Commission argued that the operation will combine the activities of the world's two largest spirits suppliers, creating a company approximately twice the size of its nearest rival, Allied Domecq. While the Commission had no concern on the level of the manufacturing, it observed – in relation to the branding – the vertical integration (from manufacturing to distribution), allowing the brand owners to retain full control of product development, promotion and marketing, leaving only a marginal role to the retailers. Distribution takes place via networks of exclusive agreements, a phenomenon which reduces the scope for competition and increases the entry-barriers for a potential new supplier of a brand which would have to compete directly with one owned by the vertically-integrated supplier. In quite some detail, the Commission examined the **portfolio effects** which, as such, increase the entry-barrier.

After a detailed analysis of the various national markets, the Commission reached the conclusion that the merger will create dominance in the markets for whisky, gin and vodka.

Hence, as seen in the cases discussed above, the merger could only be cleared by the Commission on the basis of substantial commitments submitted by the parties. In fact, they had to undertake to divest all their rights in all EU/EEA/EFTA Member States and 9 Eastern European States for certain brands of Scotch whisky, together with such confidential information, copyright and know-how specific to those brands as is necessary for their satisfactory production.

Moreover, to the extent that a blending is necessary with products produced by Guinness and Grand Metropolitan, the latter had to undertake to continue supplying them on request and on reasonable arm's length commercial terms. In the event of dispute concerning the supply of such whisky, the parties were required to refer the matter to **arbitration** under the LCIA Rules, applying the law of England and Wales. The clause reads as follows:

Parties will **divest**, within a period of 15 months from the date of the Decision or within such extended period as may be approved by the Commission (together "the divestment period") the rights in all EU/EEA/EFTA Member States, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Croatia, Bosnia, Serbia, and Macedonia ("the territory") to the Dewar's and Ainslie's Scotch whisky brands ("the brands") together with such confidential information, and related copyright and know-how specific to those brands as is necessary for their satisfactory production. In addition, the parties will undertake, in so far as whisky indispensable to the blending of the Brands can only be sourced from dis-

tilleries under their ownership, to continue to supply such whisky to the purchaser, if requested, on reasonable arms' length commercial terms. In the event of any dispute concerning the supply of such whisky, the parties shall refer the matter to be **resolved by arbitration** under the Rules of the **London Court of International Arbitration** applying the law of England and Wales.¹⁵⁸

23. Danish Crown/Vestjyske Slagterier (1999)

In October 1998, the Commission received a notification of a concentration consisting of the merger of the Danish Co-operatives Danish Crown and Vestjyske Slagterier, being the largest and second largest Danish co-operatives of slaughterhouses with, in total, some 30'000 members (farmers) supplying raw-materials (pigs and cattle) to the Co-operatives. Both parties had major activities in several countries including Denmark, the U.K., Germany, France, Italy.

In its Decision, the Commission concluded that the merger would lead to the creation of a dominant position on the Danish market for the purchase of live pigs for slaughtering and a **duopolistically dominant position** for fresh pork sold through supermarkets. Therefore, the Commission required specific commitments, for instance in the sense that each member of the Co-operatives will be permitted to supply up to 15% to competitors of the merged entity. Furthermore, the Commission required several amendments to the Constitution of the Co-operatives, and corporate resolutions required qualified majorities of the members. Moreover, members were given the right to submit disputed matters to **arbitration** before a sole arbitrator. Unless the parties agree on the arbitrator, the current President for Maritime and Commercial Court in Copenhagen shall assume such function. The losing members may then resign from Danske Slagterier and they will be paid out as if the Co-operative was to be dissolved. The clause reads as follows:

No later than 3 months after the Commission's adoption of a positive decision, the parties will propose and vote in favour of a resolution to amend clause 7.10 of the Constitution of Danske Slagterier. According to the amended provision all matters shall be decided by simple majority. No resolution shall, however, be valid unless board members from at least two Section 3.1.1. members (currently the parties, Steff-Houlberg and Tican) have accepted the resolution. If a resolution on (a) the increase or decrease of membership fees by more than a percentage warranted by the inflation, (b) the adoption of business plan, (c) the adoption of yearly budget, (d) essential changes in the equity capital, (e) approval of new Section 3.1.1. members, (f) any resolution to be taken pursuant to clauses 4.1, 4.2 and 4.3, (g) recommendation to the Ministry of Agriculture and Fisheries of members of the board of directors of the "Pig Levy Reserve", (h) recommendation or appointment of members of other external Board of Directors to which Danske Slagterier has a right to recommend or appoint board members, (i) appointment of members of the independently acting companies, or (j) any resolution that has significant financial and/or commercial implications for at least one of the Section 3.1.1. members, has been blocked twice within three months by the parties solely or

¹⁵⁸ Case No. IV/M.938, at Paragraph 183 (i).

the other Section 3.1.1. members in common, the member who has put forward the proposal shall be entitled to submit the matter to **arbitration**.

If the parties have not within 14 days after the last of the two votes agreed on the choice of a sole arbitrator, the President for Maritime and Commercial Court in Copenhagen shall act as sole arbitrator. The arbitrator shall give the parties a fair hearing but is entitled to conduct the arbitration in such manner, as he thinks fit. The arbitration award shall be final. The Section 3.1.1 member(s) whom the arbitration award has decided against may resign from Danske Slagterier provided notice in writing is given no later than 30 days after the arbitrator's decision is taken. The resigning members' Special Accounts I and II shall be paid out with the entire balance as if the membership was ceased upon the dissolution of Danske Slagterier. Furthermore, the resigning members' share of The Catastrophe and Activity Reserve of Danske Slagterier shall be paid out as provided for in the statutes governing the Reserve.¹⁵⁹

The Commission also required an undertaking that the parties enter into certain negotiations for the purpose of dissolving the joint ownership in ESS-Food. A **trustee** was to be appointed for the purpose, who will also have to make sure that ESS-Food will be maintained as a going concern to the extent as commercially viable, and to ensure that the merged entity will not abuse its sole control to the disadvantage of the minority members. The purchase price had to be fair and reasonable and its determination made by an independent expert acting under the supervision of the trustee. In case of dispute regarding the valuation, the latter should be "*settled finally and binding by a **court of arbitration** consisting of one arbitrator who must be a chartered accountant*". The clause reads as follows:

The purchase price shall be a fair and reasonable price, based on an evaluation of ESS-Food as a going concern – except for [...]. The evaluation of ESS-Food shall be carried out by an independent expert to be agreed upon by all owners of ESS-Food. The expert shall act under the supervision of the Trustee in accordance with the mandate of the Trustee. The evaluation of the parts of ESS-Food which shall be evaluated as a going concern shall be based upon the price-earning principle applied according to generally accepted international evaluation practice and if this evaluation principle is impossible to apply, then the evaluation shall be based upon the net book value as set out in accounts prepared at the time of transfer of ownership. The expert may be the Trustee, provided all owners can agree to this. The parties and/or Steff-Houlberg and/or Tican will each have the right to have a second opinion on the evaluation of ESS-Food by an expert Danish chartered account. If the evaluation of this/these expert(s) deviates from the first evaluation by more than 10%, the evaluation shall be settled finally and binding by a court of **arbitration** consisting of one arbitrator who must be a chartered accountant independent of and unconnected to any owner of ESS-Food and member of and appointed by Foreningen af Statsautoriserede Revisorer in Denmark.¹⁶⁰

Hence, the above is a provision for typical expert determination, coupled with a review by an independent arbitrator who, however, has to be a qualified chartered accountant. The procedure as such is not further determined and would most likely be governed by the statutory rules applicable to domestic arbitration in Denmark.

¹⁵⁹ Case No. IV/M.1313, at Paragraph 213.

¹⁶⁰ *Ibid.* at Paragraphs 223 and 212.

24. Sanitec/Sphinx (1999)

In July 1999, the Finnish enterprise Sanitec Ltd. notified its intention to acquire control over the Dutch enterprise N.V. Koninklijke Sphinx Gustavsberg ("Sphinx") by way of a public bid. The Commission raised serious doubts and, therefore, decided to initiate proceedings pursuant to Article 6 (1)(c) of the Merger Regulation.

Sanitec's core business is in the field of bathroom ceramics, bath- and shower-related products and toilet systems, operating under various brands in Scandinavia, France, Germany, Italy and the U.K. Sphinx operates in similar markets, i.e. in the design, production and marketing of bathroom products, ceramics, shower enclosures, bathtubs and taps.

The Commission investigated in detail the relevant product markets, the demand-side substitutability, the supply-side substitutability, the geographical market in respect of the various brands and product lines and the impact of national standards, considering also the high entry-barriers due to national references and the growing level of restructuring and concentration. The Commission then estimated that the combined market shares of Sanitec/Sphinx within the Member States of the EU, reaching levels between 40% and 90% for ceramic sanitary ware, between 30–90% for wash basins and between 40–90% for toilets, with the high percentages reached in the Nordic countries (Scandinavia and Iceland).

Consequently, the Commission reached the conclusion that the notified transaction is incompatible with the Common Market since it would lead to the strengthening of a dominant position which, as a result, would significantly impede competition in the Scandinavian countries. Hence, Sanitec had to offer substantial **commitments**, including the divestment of the Gustavsberg bathroom products business in the Scandinavian countries including Russia and the Baltic States and had to make sure that the divested business will be a viable single business undertaking together with other activities of the purchaser so as to maintain competition in the product markets and geographical markets. Hence, the undertaking had to include the offer by Sanitec to enter into sub-contracting agreements, supply agreements, agreements on the transfer of relevant sales staff, of production and administrative personnel, and had to include a best effort's obligation by Sanitec to procure the assignment to the prospective purchaser of the existing commercial arrangements with customers. The divestment had to be implemented under the guidance and control of an independent trustee who had to be approved by the European Commission.

Moreover, disputes between Sanitec and the prospective purchaser were to be submitted to an **independent arbitrator**. The reference is short, as per the published text quoted below. The further details of the arbitration clause were redacted for the purpose of maintaining the confidentiality. Hence, the published text does not provide details of the mechanism that should be lined up for settling disputes, nor the parameters under which the arbitrator should render his decision:

An **independent arbitrator** jointly proposed by Sanitec and the prospective purchaser and approved of by the Commission, shall, in the case of a dispute between Sanitec and the prospective purchaser and within the time limits set out in Paragraph 9, decide [...].¹⁶¹

25. Allied Signal/Honeywell (1999)

On 15 July 1999, the Commission received a notification of a proposed concentration pursuant to Article 4 ECMR by which Allied Signal Inc. (USA) and Honeywell Inc. (USA) proposed to enter into a full merger within the meaning of Article 3 (1) (a) EC-MR. The relevant agreement of 4 June 1999 provided that Honeywell and Allied Signal will merge into Allied Signal, but the latter's name was then to change into Honeywell International Inc.

Allied Signal is a manufacturing company with operations in the businesses of aerospace, automotive products and engineered materials (polymers, specialty chemicals and electronic materials); Honeywell is an international controls company which develops and supplies advanced technology products, systems and services to homes and buildings, industry, aviation, and space. The community dimension was established, given Allied Signal's world-wide turnover of more than € 14 billion and Honeywell's turnover being in excess of € 7.5 billion. Each of them had a community-wide turnover in excess of € 250 million without achieving more than two-thirds of their aggregate community-wide turnover within one and the same Member State.

The merged entity will have an activity in several different sectors, such as aerospace, automotive products, engineered materials. The area of concern was the overlapping activities in the area of avionics (equipment and controls installed in cockpits of aircraft, navigation and communication equipment, including accessory equipment such as auxiliary power units, environmental control systems, aircraft lighting, landing systems etc).

The avionics sector is divided into six demand segments, including the segment of air transport (with the main customers being Airbus Industries and Boeing), regional transport and business aviation (with customers such as Aerospatiale Matra, Bombardier, Embraer, Dassault, Raytheon, Gulfstream, British Aerospace, Fairchild, Dornier), general aviation, helicopters and military/space applications. The merger would particularly affect the product markets for Airborne Collision Avoidance Systems, the market of Processors and Mode S Transponders and the market for Communication Management Units and Aircraft Communication Addressing and Reporting Systems. The merger, as the Commission concluded, will lead to the combination of the first- and third-largest world-wide suppliers of commercial avionics, accounting for a market share of 40% to 50% (with Rockwell Collins controlling a share of 20% to 30% and Sextant of 10% to 20%.

¹⁶¹ Case No. IV/M.1578, at Paragraph 20.

Among the several product markets very carefully examined by the Commission, the market of TAWS (Terrain Avoidance Warning Systems) was identified as being particularly critical, in that a dominant position would be strengthened. While Allied Signal had a 100% market share for its Enhanced Ground Proximity Warning System (EGPWS), the parties referred to some five other companies who have developed similar systems and may attempt to enter the market in years to come. The market for TAWS was identified as a growth market, due to new requirements of the FAA which would make TAWS mandatory for new aircraft coming on the market in 2002/2003, and for existing aircraft by 2005.

The Commission recognised that the new entrants will, in any event, have to overcome quite a number of hurdles to enter into this market against the established position of Allied Signal. Such hurdles would, however, be increased as a result of the merger, due to linking capabilities of the merged entity with their other range of proprietary products. Therefore, the Commission in Paragraph 103 of the Decision, stated that "*in the absence of alternative TAWS suppliers, the merged entity will be in a position to **foreclose competition** on the future market for IHASS (Integrated Hazard Awareness Surveillance System)*". The Commission also considered that the technology controlled by Allied Signal's EGPWS products is protected by several hundreds of patents, some of which being considered as "key patents".

Moreover, the Commission argued that, prior to the merger, Allied Signal had shown some willingness to provide the EGPWS to third parties with a system integration capacity; however, after the merger, the new (merged) entity would have no incentive to supply such an essential input to its competitors.

For these reasons, the Commission considered, in Paragraph 109 of its Decision, that there are serious doubts as to the compatibility of the operation with the common market and the EEA Agreement, on grounds that the merger will lead to the strengthening of a dominant position for TAWS, and to the creation of a dominant position on the future market for IHASS. However, as the Commission reasoned, the parties had submitted certain undertakings which, as the Commission considered, would provide an "adequate remedy".

The Commission further considered complaints of third parties (in particular competitors) alleging that the merger would harm competition because of **foreclosure effects** that would occur, essentially due to the fact that the new merged entity would be in a position to offer a broader product range of avionics as well as non-avionics products than any other competitor. That broader product range would give the new entity an increased ability to technically **integrate products** and to offer **packages** of avionics products. The Commission investigated these complaints of alleged competitive advantages in three areas:

First, in the area of technical integration, the Commission remarked that there is a competitive advantage for the company to be able to supply a larger range of products; however, as long as such technical integration does not lead to foreclosure effects, improved technical inter-operability may generally be considered to be in the

interest of the customer. The investigation revealed that the technical bundling of products would not as such significantly impede competition, due to a considerable engineering capability of OEMs (Original Equipment Manufacturers), the facility to bid on the basis of a wide-spread standardisation of interface technology and, in broad terms, the availability of substitutes for the range of products, except for the TAWS.

In this latter respect, i.e. in the area of TAWS and surveillance equipment, the Commission, however, reached the conclusion that foreclosure effects might occur as a result of **technical bundling practices**, both in the Air Transport and in the Regional/Business segments. Therefore, as the Commission stated in Paragraph 114 of the Decision, remedies had to be offered by the parties so as to prevent such foreclosure effects.

The second area investigated by the Commission is the so-called **range-effect** in relation to airlines. In this regard, the Commission was satisfied that, while the new entity will have a larger product range than its competitors, an anti-competitive effect would not have to be feared. Other manufacturers would have similar product ranges; moreover, they could extend their product ranges by teaming up; and finally, customers were said to have developed a practice of negotiating packages of avionics products, breaking up bundled packages of one particular supplier by mixing and matching products from various suppliers. Hence, in this regard, the Commission had no concern regarding the creation or strengthening of a dominant position.

The third area investigated was that of Regional/Business Aviation. Here, the Commission concluded that Honeywell's product range, extended by the TAWS supplied by Allied Signal, will provide a commercial advantage over Rockwell Collins and Sextant (the only two competitors supplying integrated avionics suites). Indeed, as the Commission stated in Paragraph 124, the latter will be dependent on supplies of Allied Signal/Honeywell products in order to be able to supply an avionics suite which includes TAWS. Hence, that competitive concern of the Commission had to be removed by way of undertakings/remedies offered by the parties.

Based on the foregoing concerns, Allied Signal and Honeywell had submitted, on 15 October 1999, a proposal for modification of the operation pursuant to the terms of Article 8(2) ECMR. This proposal involved undertakings related to the world-wide markets for certain ACAS Processors and Mode S Transponders and TAWS. The parties had also submitted similar undertakings to the US Department of Justice, except that, with regard to TAWS, the parties proposed a divestiture of overlapping activities as far as their space and military activities was concerned.

In respect of TAWS, the parties undertook to provide any supplier of TAWS (seeking to make its TAWS product interphase with any of the parties' other avionics products) with all licences and interface specification data necessary to enable the TAWS product to interphase with the parties' avionics products. The details of these undertakings are reflected in Paragraph 128 of the Decision and, in much more detail, in Annexe 1 to the Decision, reflecting the wording of the parties' undertakings of

27 October 1999, Paragraphs 21 to 31. The Commission then stated in its decision, Paragraph 128:

To ensure compliance with the undertakings relating to TAWS, an independent expert will be nominated and an arbitration procedure will be established.

The **arbitration** procedure was also flagged out in the undertakings of the parties as per Annexe I to the Decision, Paragraph 27 and the behavioural undertakings were to be monitored by way of arbitration under the following provisions:

Enforcement

32. To ensure full compliance with the undertakings in Paragraphs 21–31, the Parties will establish, within one month of the Decision, an independent and competent **arbitration** procedure under a single Arbitrator approved by the Commission. The arbitration procedure will be efficient, fair, transparent and objective, and will have appropriate procedural rules ensuring this procedure will be applied.

- (a) The Arbitrator will have the experience, competence and independence necessary for his mission and will have had no direct or indirect employment, consultancy, or other relationship with the Parties during the past five years.
- (b) The Arbitrator will decide, with no possibility of appeal, all disputes brought to him by any existing or potential supplier of avionics products, aircraft manufacturer or the Parties.
- (c) The Arbitrator will have broad powers of investigation and injunction, and will be able to order all measures, including protective and interim measures, necessary to the accomplishment of his mission. In particular, the Arbitrator will be allowed to have access to all confidential information needed to carry out any investigation or evaluation missions within the Parties and to order all measures, including protective and interim measures, necessary to the realisation of his mission.
- (d) Any existing or potential supplier of avionics products, aircraft manufacturer or the Parties may initiate an arbitration proceeding by a registered letter with acknowledgement of receipt. The object of the dispute and the complainant's request must be set forth in the letter. The respondent will receive from the Arbitrator a copy of the letter with no delay. The parties to the dispute and the Arbitrator will agree, within 15 days from the receipt by the respondent of the complainant's letter, on the scope of the Arbitrator's mission. In case of disagreement on the mission's scope, the Arbitrator ultimately decides. The parties to the arbitration will have 15 days to present their arguments. The Arbitrator must issue his decision at the latest within one month from the submission of the arguments. The Arbitrator will set the amount of his fees in the decision, which will be shared equally by the parties.
- (e) The Parties undertake to comply without any delay with any decision of the Arbitrator.
- (f) The documents initiating any arbitration and the Arbitrators' decision will be communicated to the Commission without delay. In addition, the Parties will communicate to the Commission, for the period that the undertakings remain in effect, an annual report summarising the activities of the Arbitrator, and indicating in particular the measures taken by the Parties to comply with any decision of the Arbitrator.

33. In addition to the above, within one month from the date of the Decision, the Parties undertake to appoint an independent expert acceptable to the Commission to monitor compliance with Paragraphs 21–31 above. Such expert shall be mandated to monitor

and advise the Commission as to the adequacy of the arrangements adopted in compliance with Paragraphs 21–31 above, and to provide the Commission annually with written reports on the efficacy of the arrangements. The expert shall notify the commission promptly if the expert at any time determines that the Parties are not in compliance. The Parties undertake to provide the expert with all such assistance and information as the expert may require in carrying out his or her mandate and to pay reasonable remuneration for the expert's services.

E. General Provisions

34. With respect to the undertakings in Paragraphs 23–29 and Paragraphs 31 and 32 as they relate thereto, the obligations of the Parties shall remain in effect for a period of eight years from the date of the Decision.

35. With respect to the undertakings in Paragraphs 23–29, the Parties agree to provide to the existing or potential suppliers of avionics products and aircraft manufacturers that purchased an EGPWS box, an EGPWS module or other implementation of TAWS functionality pursuant to these undertakings such relevant products, as well as interface data, for as long as an aircraft and/or platform in which that product is installed or designed to be installed remains in production.

36. With respect to the undertakings in Paragraph 30 and Paragraphs 31 and 32 as they relate thereto, the obligations of the Parties shall be of **unlimited duration**.

Again, the arbitration commitment reflects elements which we have seen and discussed in other cases, such as

- the single arbitrator had to be approved by the Commission;
- the procedure had to be efficient, fair, transparent and objective;
- the arbitrator had to be experienced, competent and independent from the parties;
- his decision should not be subject to any appeal;
- the arbitrator to have broad powers of investigation and injunction, including the authority to rule on interim measures;
- moreover, the arbitrator will have broad access to all confidential information;
- the arbitration commitment is an *erga omnes* offer which may be accepted/triggered by any third party;
- the procedure is on a fast-track basis: 15 days allowed for the parties to present their arguments, and the arbitrator must issue his decision within one month from the submission of those arguments;
- the parties undertake to comply without any delay with any decision of the arbitrator;
- the Commission is to be kept informed on the procedure.

A novel aspect of this case is the concurrent appointment of an independent expert who, again, had to be a person acceptable to the Commission. The function of that

expert was to monitor compliance with the behavioural undertakings and to advise the Commission as to the adequacy of the arrangements adopted in compliance with Paragraphs 21 until 31 of the commitment letter. The expert had to notify the Commission promptly if the expert at any time determines that the parties are not in compliance.

Hence, what we see here is another refinement of the solutions so far adopted by the Commission, in that the Commission does not only keep an eye on the arbitral process at the beginning (i.e. in the stage of nominating an arbitrator or an arbitral tribunal) and at the end (when the Commission requires to be informed on the arbitral tribunal's decision), but, under the Commission's decision, will have a very efficient tool of constantly monitoring the process and the keeping of the commitments through an independent expert. Presumably, the expert will keep his function during the pendency of any arbitration and would most probably be enabled to take part in the proceedings as a **silent listener/observer** so as to keep the Commission informed. This solution provides the Commission almost with an ***amicus curiae*-position**.

Probably, this combination of establishing an arbitral tribunal so as to monitor the commitment to provide supplies to third parties on a non-discriminatory basis and, in parallel, the appointment of an expert, provides an **almost water-tight control of the Commission to police compliance with behavioural undertakings**. The policing is, so to speak, **outsourced to an arbitral tribunal** and (with a different function) to an expert who will do the possibly time-consuming legwork of supervision, with the Commission being fully appraised of the results without however absorbing the Commission's own human and other resources.

26. Dow Chemical/Union Carbide (2000)

In October 1999, the Commission received a notification of an intended concentration whereby Dow Chemical would acquire the sole control over the whole of Union Carbide Corporation. The examination **raised serious doubts** so that proceedings pursuant to Article 6 (1)(c) were initiated.

Dow is a global science and technology based company and integrated producer of chemicals. It develops and manufactures a portfolio of chemicals, plastics, agricultural chemicals and other specialised products, with annual sales in the region of USD 18.4 billion in 1998, maintaining 123 manufacturing sites in 32 countries, and supplying a range of more than 3500 products.

Union Carbide is a global integrated producer of chemicals and advanced process technology, with annual sales in the magnitude of USD 5.7 billion in 1998.

The concentration was lined up as a stock-for-stock merger, to be effected through a special purpose vehicle (Transition Sub Inc.), a wholly owned subsidiary of Dow created for the sole purpose of the merger, which would acquire the shares in Union Car-

bide. The vehicle would then be merged with and into Union Carbide, whereby the separate corporate entity of Transition Sub Inc. would cease to exist, and Union Carbide would become a wholly owned subsidiary of Dow. Each share of the common stock of Transition Sub Inc. would be converted into one share of the common stock of the surviving Union Carbide. Upon completion of the transaction, Union Carbide would (as a wholly owned subsidiary of Dow) continue to operate as a New York corporation.

The contemplated transaction clearly had a community dimension. The Commission's investigation identified **11 affected markets**, whereof 3 areas were particularly critical in that a dominant position held by the merging parties would be either created or strengthened. As a result, the Commission was concerned about significant impeding effects on competition. The critical areas were the areas of polyethylene resins (PE resins), PE technology and ethylenamines.

After carefully considering the market structures, the Commission specifically focused on the considerable entry-barriers, due to the very considerable capital investment necessary to install the PE technology. The investment of a new entrant, or of a licensee, would have to be a viable investment for a life-span of 30 years, during which period the PE technology will most likely be constantly evolving. Hence, a potential licensee will require assurance that its licensor has the research and development facilities to improve and upgrade the licensed technology over the life of the PE plant. Moreover, a multitude of patents cover the processing technology, and a licensee will need assurances that the licensor has the right to grant the licences and will act vigorously to protect those.

Considering all elements, the Commission, in its **Statement of Objections**, argued that the operation would **result in a strengthening of a dominant position** in the markets for gas phase PE technology packages. The parties had argued to refute those objections (Paragraphs 129 ss. of the Decision), but the Commission rejected those in its overall conclusion on the PE technology (Paragraph 145). Moreover, the Commission reached a similar conclusion with respect to the market of ethylenamines (Paragraph 171).

The parties, therefore, offered commitments (undertakings) to remove the competition concerns identified by the Commission. Those commitments were subsequently **sent to the members of the Advisory Committee**, and they were tested in the market. The results of the Commission's consultations were that the commitments required further clarifications and modifications in order to clearly eliminate the competition problems.

The commitments which the parties had to offer were of a **structural nature**, by a divestiture of a business-line (C8 LLDPE Resins) and of a behavioural undertaking, by Dow, to grant any interested third party a non-exclusive licence (with the right to grant sub-licenses) under certain patents owned and controlled by Dow for use in the PE technology. Moreover, Dow had to undertake to sell to BP all of its assets which are dedicated to gas phase metallocene PE technology and, for the purpose, had to

commit itself to enter into a R&D Service Agreement with BP for a number of years to enable the transfer of the know-how from Dow to BP.

Furthermore, Dow had to undertake to entirely divest its world-wide ethyleneamines business with production plants in Texas. The Commission carefully assessed the offered commitments and the **arbitration mechanism offered** and was able to then reach the conclusion that, by the proposed commitments, all concerns which had been identified by the Commission in the area of the PE technology could be removed. The reference which the Commission made regarding arbitration reads as follows:

The granting of open licences, the divestiture to BP of dedicated gas phase technology, the licence of background patents and the service agreement with BP are subject to payment. The commitments provide for an arbitration mechanism (**pendulum arbitration**) to resolve any disputes regarding the terms of the necessary agreements. In particular, either party may initiate the arbitration procedure at any time. Upon request by the prospective licensee under the open license, that licence will take immediate effect. These provisions will contribute to the effectiveness of the remedial measures concerned.¹⁶²

The commitments by Dow (which are annexed to the Decision) spell out in detail the **erga omnes offer** by Dow **to grant a license to any interested third party** under Dow's Metallocene Background Patents, and further patents, on arm's length terms and under non-discriminating, reasonable commercial terms.

In case a third party is dissatisfied by the terms offered, it is granted the right to initiate arbitration under the Rules of Arbitration of the Netherlands Arbitration Institute, in the sense of a "**pendulum arbitration**", quite in the sense of the provision we have discussed above in respect of the Shell/BASF/JV project Nicole.

The clause to which Dow had committed itself is, however, more detailed and contains provisions regarding the constitution of the arbitral tribunal (which will have to be constituted within an overall time-frame of 15 days only), with the Netherlands Arbitration Institute to serve as appointing authority.

The arbitrators have to decide on whether to endorse the proposal of the claiming third party, or else the proposal of Dow. The clause also provides that, in the absence of a majority, the chairman of the arbitral tribunal would decide alone.

Moreover, there are **further teeth** in the provision, in that, if a licensee would not abide by the arbitral award within the period of one month following the notification of the award, Dow would be entitled to request the Commission to reconsider whether Dow may be relieved from the relevant undertaking with regard to such licensee. The provision reads as follows:

Consideration due to DOW for the license granted [see Paragraph 27] will be on arm's length, non-discriminating, reasonable commercial terms and conditions. If either DOW

¹⁶² Case No. IV/M.1671, at Paragraph 186.

or a licensee determines that no agreement can be reached on the terms of the license, either party shall be free to move to resolve such disagreement by arbitration. The Rules of Arbitration of the Netherlands Arbitration Institute shall apply to such arbitration, to the extent they are not in conflict with the provisions of this paragraph. Each party shall submit a single proposal for the terms of the license to an arbitration panel. The arbitration panel will consist of three individuals; one arbitrator selected by each of the parties and the chair selected jointly by these two arbitrators. This arbitration panel must select one of the two submitted proposals in its entirety. This selection must be made by majority decision or, if there is no majority, by the chair alone. If for any reason the parties are unable to select an arbitration panel within 15 (fifteen) days, either of the parties may ask the Netherlands Arbitration Institute to appoint or approve arbitrators. Exclusive place of the arbitration shall be Amsterdam, The Netherlands, and the arbitration shall be conducted in the English language. **If a licensee does not abide by the arbitral award within a period of 1 (one) month following the notification of the arbitral award to DOW and such licensee, DOW may request the Commission to reconsider whether DOW may be relieved from this undertaking in regard to such licensee.** If requested by the prospective licensee, the license will take immediate effect, subject to binding arbitration of license terms in the event negotiations are not concluded.¹⁶³

Furthermore, Dow had to undertake to **sell and transfer all assets** dedicated to gas phase Metallocene PE technology to BP Amoco **under reasonable commercial terms** which were further defined in the commitment. Again, in case of dispute, Dow and BP Amoco will have to accept resolution by way of a similar scheme of **"pendulum arbitration"**, for which purpose each party has to submit a detailed proposal, and the arbitrators' task would then be to select one of the proposals in their entirety. Again three arbitrators, and again reference to the Rules of Arbitration of the Netherlands Arbitration Institute, with a short time-frame for constituting the arbitral tribunal of 15 days. And again, in case BP Amoco would not abide by the award within a period of one month following the notification of the award, Dow would be entitled to request the Commission to reconsider whether Dow may be relieved from its undertaking. The clause reads as follows:

If either DOW or BP Amoco determines that no agreement can be reached on the proposed terms for the sale of the assets in Paragraph 32(i) and/or (iii) above and/or the grant of the license in Paragraph 33 above and/or the research and development service agreement in Paragraph 34 above in the time period mentioned in Paragraph 35 above or within the time period as extended by the Commission, either DOW or BP Amoco shall be free to move to resolve such disagreement by **arbitration**. The Rules of Arbitration of the **Netherlands Arbitration Institute** shall apply to such arbitration, to the extent they are not in conflict with the provisions of this paragraph. **Each party shall submit a single proposal for the terms of the sale of the assets and/or, as the case may be, for the grant of the license, and/or for the terms of the research and development service agreement, to an arbitration panel. The arbitration panel will consist of three individuals; one arbitrator selected by each of the parties and the chair selected jointly by these two arbitrators. This arbitration panel must in each case (i.e., sale of the assets, grant of the license, or conclusion of the research and development service agreement) select one of the two submitted proposals in its entirety.** This selection must be made by major-

¹⁶³ *Ibid.* at Paragraph 28 of commitments.

ity decision or, if there is no majority, by the chair alone. If for any reason the parties are unable to select an arbitration panel within 15 (fifteen) days, either of the parties may ask the Netherlands Arbitration Institute to appoint or approve arbitrators. Exclusive place of the arbitration shall be Amsterdam, The Netherlands, and the arbitration shall be conducted in the English language. **If BP Amoco does not abide by the arbitral award within a period of 1 (one) month following the notification of the arbitral award to DOW and BP Amoco, DOW may request the Commission to reconsider whether DOW may be relieved from this undertaking.** If requested by BP Amoco, the transfer of assets in Paragraph 32 and the license in Paragraph 33 shall take immediate effect, subject to binding arbitration of agreement terms in the event that negotiations are not concluded.¹⁶⁴

27. Shell/DEA (2001)

In July 2001, Deutsche Shell and RWE AG notified the Commission of a proposed concentration whereby Deutsche Shell and RWE would acquire joint control over a newly created joint-venture styled "Shell/DEA" that would combine their respective downstream oil and petrochemicals businesses. The intention was that, after an interim period ending on 1 July 2004 at the latest, Shell would acquire sole control of the combined businesses. The Commission voiced serious doubts and initiated proceedings under Article 6 (1)(c) of the Merger Regulation.

Deutsche Shell is a wholly owned subsidiary of the Dutch-British Royal Dutch/Shell Group of Companies. RWE is the ultimate parent company of a group of companies focussing on a multi-utility strategy with activities in energy, water distribution and water treatment, mining and raw-materials, environmental services, petroleum and chemicals, industrial systems and construction. The up- and down-stream oil and petrochemicals business of RWE is operated via its subsidiary RWE-DEA AG für Mineralöl und Chemie, the down-stream oil and chemicals activities are operated via DEA Mineralöl AG, a 100% subsidiary of RWE-DEA.

The intention of the parties is to use the existing DEA Mineralöl AG as the joint-venture vehicle (to be renamed as "Shell/DEA"). The transaction consists of two subsequent steps, with an initial period ending either with the exercise of a put-option by RWE-DEA or, latest, with the purchase of an additional percentage of shares in Shell/DEA, by Shell, effective 1 July 2004. Nevertheless, the Commission found that the transaction may be considered as one single concentration consisting of the acquisition of sole control over Shell/DEA by Shell. The community dimension was affirmed. In its Decision, the Commission investigated the market situation for the most important products.

Regarding ethylene (one of the most important basic chemical products belonging to the olefin group consisting of ethylene, propylene and butadiene), which is a hazardous gas highly flammable and therefore not suitable for transport over land, by road or rail, the Commission considered that the proposed concentration would lead to a

¹⁶⁴ *Ibid.* at Paragraph 36 of commitments.

collective dominance in that Shell and BP would have together a market share of around 55–65% for ethylene, and would not be exposed to comparably strong competitors.

In reaching this conclusion, the Commission referred to its decision in *Exxon/Mobil*¹⁶⁵, where the following elements for affirming a collective dominant position were, on a non-exhaustive basis, identified: (i) supply concentration, (ii) homogeneity of the product, (iii) symmetry of market shares, costs and interests, (iv) price transparency, (v) vitalisation possibilities, (vi) high entry-barriers and absence of potential competition and (vii) inelastic demand without counter-veiling buying power.¹⁶⁶ The Commission also considered that Shell/DEA would acquire a privileged access to import infrastructure and control over important pipeline links.

The Commission further analysed the polyethylene market, the market for ethylene oxide and derivatives and ethanol. The relevant geographic market was partly determined to be a function of the extent of the available pipeline network, since highly flammable hazardous gas could, for practical and cost reasons, hardly be transported overland by road or rail.

The Commission expressed concern that the parties may have means for tacitly allocating contracts and for dividing the markets due to the difficulties in transporting ethylene products. Moreover, the parties would dispose of sufficient means of **retaliations** to deter others from deviating from parallel behaviour, and expressed particular concerns about the high entry-barriers given the limited possibilities of imports and the limited possibilities for establishing storage and other facilities.

Hence, the extremely high investment costs operate in a way to leave only very little competitive pressure. Hence, the Commission concluded that the proposed concentration would result in the creation of a collective dominant position for Shell/DEA and for BP/E.ON on the market for the supply of ethylene. Hence, the concentration could only be cleared by the Commission against substantial commitments offered by the parties. In particular, Shell and DEA had to commit to make available access to third party users of Shell's terminal facilities for a total aggregate ethylene volume of up to 250'000 m/t per annum. The commitment, therefore, contained a model Ethylene Terminalling Agreement, providing for access as from 1 January 2003 until at least 31 December 2012 **on fair and non-discriminatory terms** to any one or more existing or prospective competitors or customers for ethylene. Similar commitment had to be offered by BP/E.ON.

The Commission, evaluating the commitment offered, reasoned that the underlying infrastructure (namely import terminals and pipelines) was a key-factor for any competitor inter-acting on the ethylene market, and the openness of such essential infrastructure was therefore critical. The opening-up of the terminal facilities would

¹⁶⁵ *Exxon/Mobil*, 29.9.1999, Case IV/M.1383.

¹⁶⁶ Commission Decision, Paragraph 52.

strongly enhance the availability of ethylene on the market, since several third parties had declared their interest in importing ethylene on a long-term basis in volumes sufficient to create a competitive environment. The Commission also said that a divestiture of the import terminal to third parties would not appear to be a viable option, for a number of reasons. *Inter alia*, terminal facilities are workable only if inter-linked with storage facilities, and the tanks themselves are integrated in the cracker facilities and operations.

In sum, the Commission concluded in respect of ethylene that the commitments offered would create sufficient new competitive constraints counter-balancing the new entities' market position, would deprive them of their possibility to refrain from competing actively on the market and, further, would eliminate the possibility of tacit market sharing.

The Commission, therefore, spelled out that its clearance of the concentration is subject to the conditions and obligations as stated in the Decision which included compliance with the commitments given by the concentrating parties. The legal nature of such a condition was also clearly expressed within the Decision, in particular in Paragraph 174:

The achievement of each measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's Decision declaring the concentration compatible with the Common Market no longer stands; where the undertakings concerned commit a breach of an obligation, the Commission may revoke its clearance decision, acting pursuant to Article 8(5)(b) of the Merger Regulation, and the parties may also be subject to fines and periodic penalty payments in accordance with Articles 14(2)(a) of the Merger Regulation.

In view of the foregoing, this Decision must be conditional upon full compliance by Shell with **the commitment to grant access to its terminal for third parties** as provided in paragraphs 1 and 3 of the commitments in the Annex. These commitments are given in order to remedy the collective dominance of Shell/DEA and BP/E.ON on the ethylene market on the ARG+ and to provide for competition on this market. The terms of use of the terminal as set out in paragraphs 2 and 4–7 of the Annex as well as in the draft Terminalling Agreement shall be obligations upon Shell, as they aim at implementing the structural change of the market.

The commitments which had been offered by Shell, RWE AG and DEA (including affiliates) included a commitment to make available access to certain terminal facilities **on a fair and non-discriminatory basis for a period of 10 years**, and Shell had to invite third parties to apply to it for entering into an Ethylene Terminalling Agreement. The European Commission had to be offered the possibility to request the appointment of an **independent expert**, experienced in the ethylene industry to oversee the operation and performance of the commitments.

Moreover, the model Ethylene Terminalling Agreement, as it had been submitted to the Commission and had been approved by it as a basis for the Commission's Decision, contained an **ICC arbitration clause** for an arbitral tribunal to have its seat in London.

The clause also contained particular provisions to protect confidential information, and also contained a paragraph in the sense – as used in decisions cited above – regarding the *prima facie* evidence to be submitted by the claiming user, and the quite significant shifting of the burden of proof against Shell (***Prima facie Evidence Rule***).

Quite ambitiously, the arbitration clause requires the parties to instruct the arbitrators to render their decision “within one month of the appointment of the president of the arbitration panel”, hence providing not only for a “fast track arbitration” but for an **“even faster track arbitration”**.

A further provision states that the arbitral tribunal shall fix the deposits payable by the parties towards the costs of the arbitration which, obviously, is a **provision ignoring the ICC mechanism** (as it is known, in ICC arbitration, the deposits are fixed by the ICC Court and indeed cannot be fixed by the arbitrators). This defect, however, would of course not in any respect vitiate the validity of the arbitration clause.

Article 16 of the ETA provides as follows:

16(1): All disputes arising out or relating to this agreement that cannot be resolved between the contracting parties themselves, shall be finally settled by **arbitration** in accordance with the Rules of the Arbitral Court of the International Chamber of Commerce (**ICC Rules**) by one or more arbitrators appointed under such rules.

16(2): In the event that a dispute arises between SHELL and User as to whether Articles 6–9 of this Agreement are correctly applied, the User shall have the right to arbitrate that dispute, provided that both parties have used their best efforts to resolve the dispute through negotiation.

To initiate arbitration, User shall give written notice to SHELL nominating an arbitrator and stating the specific nature of the claimed incorrect application, the factual basis of its position and the relief requested. In such case, SHELL shall appoint an arbitrator within 14 days after receipt of the written notice. The arbitrators so appointed shall appoint another arbitrator to be president of the arbitral tribunal within 7 days after both have been nominated.

The arbitration procedure shall follow the Rules of the Arbitral Court of the International Chamber of Commerce (ICC Rules). The arbitration shall be conducted in London. The language of the arbitration shall be English.

Any of the arbitrators will be entitled to request any relevant information from SHELL or User. The arbitrators shall be instructed **not to disclose confidential information**. The standards attributed to confidential information and business secrets are those as set out in accordance with European Community competition law.

The burden of proof in any dispute under this Undertaking shall be as follows: (i) the User must produce evidence of a *prima facie* case, and (ii) if the User produces evidence of a *prima facie* case, the arbitrator must find in favour of User unless SHELL can produce evidence to the contrary.

The parties, in appointing the arbitrators, shall instruct the arbitrators to use their best efforts to make a decision concerning what relief, if any, is warranted in compliance with this Agreement within one month of the appointment of the president of the arbitration panel. The arbitral tribunal shall fix the on account payment which shall be made by

either or both parties towards the costs of arbitration. The arbitration award shall, in addition to dealing with the merits of the claim, impose the fees and costs of the prevailing party upon the party that is unsuccessful in the proceeding.

28. BP/E.ON (2001)

On 27 July 2001, BP and E.ON notified the Commission of a proposed concentration by which BP and E.ON acquire, within the meaning of Article 3 (1)(b) ECMR, the joint control of Veba Oel AG which was at that time under the sole control of E.ON. By Decision of 6 September 2001, the Commission concluded that the notified operation raised serious doubts as to its compatibility with the Common Market, and therefore initiated proceedings pursuant to Article 6 (1)(c) ECMR. The community dimension was established. In respect of the procedure, the German Bundeskartellamt requested the Commission to partly refer the case, due to the concern voiced by the Bundeskartellamt that downstream mineral oil product markets in Germany could be affected.

On 24 October 2001 the Commission issued its Statement of Objections, whereupon BP and E.ON sent a combined reply on 5 November 2001, and Hearings were held two days later.

The relevant product market considered was the market of ethylene, one of the most important basic chemical products which, as such, was not substitutable by other products or raw materials. Hence, ethylene was considered to constitute a separate product market.

Regarding the relevant geographic market, the parties considered that the market should at least be Western Europe. However, the Commission disagreed and considered that the relevant geographic market for the supply of ethylene is a function of the extent of the available pipeline network since ethylene is a hazardous gas which is highly flammable. As a consequence, it is neither profitable nor practical to transport ethylene overland by road or rail. The available pipeline network thus delineated the geographic market.

Regarding the market structure, the Commission considered that it already showed a high degree of concentration. On that market, DEA and Veba were considered to be the main price settlers. Following the proposed concentration, and if the transaction between Shell and DEA was implemented, a **collective dominance** of the two new entities on the market for ethylene will arise. The market leaders will have a privileged position in controlling the essential infrastructure and, in particular, the pipeline links. The merged entities BP/Veba and Shell/DEA will hold similarly high market shares in the range of 25–35%.¹⁶⁷ Moreover, both groups were vertically integrated.

¹⁶⁷ The exact figures were redacted for the public version of the Decision.

In addition, high entry barriers limit the possibilities for competitors or new entrants. Purchasers will not have a sufficient countervailing buying power. Hence, the proposed concentration results in the creation of a collective position of the two new entities Shell/DEA and BP/E.ON on the market for the supply of ethylene on the ARG+ pipeline network. A substantial package of commitments, therefore, had to be negotiated, with extensive **structural commitments** and equally extensive **behavioural commitments**.

During a divestment period, numerous structural undertakings had to be complied with under the supervision of a **Monitoring Trustee**. Regarding the appointment of the Monitoring Trustee, the parties had to propose a candidate, or a list of candidates and the terms of the mandate, for approval by the Commission. The appointment process is described in detail in Annex 1 to the Decision. Moreover, the Trustee's duties and Terms of Reference were laid down in the Annex 1.

Should the parties, under the supervision of the Monitoring Trustee, not be able to enter into a final binding agreement for the sale of the Divestiture Shareholdings within the Divestment Period, BP and E.ON were to appoint a **Divestment Trustee**, such as an investment bank or consultant or auditor, whose appointment was again subject to the approval by the Commission. The Divestment Trustee was to be independent of the parties, and was to possess the requisite qualifications to carry out the task. His remuneration package will not contain a success premium for selling the Divestiture Shareholdings. Regarding his duties, the Divestment Trustee had to sell the Divestiture Shareholdings to purchasers independent of the parties, and such sales were again subjected to the approval by the Commission. The Trustee had to report to the Commission in writing on the developments of negotiations with potential purchasers within 10 days after the end of each month following the expiration of the Divestment Period, or otherwise at the request of the Commission.

In addition to the foregoing, a number of **behavioural commitments** had to be made, such as the commitment not to exercise blocking minority rights during the Divestment Period. Moreover, BP/E.ON had to undertake to guarantee to a particular ethylene customer (the identity was redacted in the public Decision) that ethylene will be delivered via the pipeline, which undertaking had to last for a certain period of time (redacted in the Decision), with an option exercisable by that customer to renew for a further period of time.

The purpose of these undertakings was to eliminate BP/Veba's strong foothold in infrastructure and the re-constitution of the ARG as a common carrier so as to make sure that a competitive market structure can be maintained. The **open access to the pipeline at competitive costs** should allow suppliers to actively compete for customers over the whole of the ARG-serviced area, should increase the customers' choice between suppliers and remove the ability of the two new entities to share customers in the sense of tacitly dividing the market according to the two most significant criteria, first the continuity in long-term contracts, and second the geographical proximity.¹⁶⁸ Moreover, BP/Veba's commitment to provide access to ARG suppliers for

¹⁶⁸ See in particular paragraph 146 of the Decision, and paragraph 95.

the ethylene customers will remove the remaining bottleneck infrastructure which is under control of BP/Veba. In this context, and in case of any disputes, reference was made to an **independent arbitrator** whose task would be to determine the terms and conditions for the delivery of ethylene via the ARG pipeline.

The arbitrator was to be appointed by agreement between BP/E.ON and the customer, and failing their agreement, by the President of the Düsseldorf Chamber of Commerce. The provision in Annex 2 (with redacted square-brackets) reads as follows:

As no direct link exists between the ARG pipeline in Gelsenkirchen and the pipeline between Gelsenkirchen and [a site in the Rhine/Ruhr area], BP and (for as long as E.ON has a controlling interest in Veba Oel) E.ON hereby undertake to the European Commission that they will guarantee to [an ethylene customer] that ethylene delivered via the ARG pipeline to Gelsenkirchen will be made available at [that customer's] plant ([...]) on reasonable terms and conditions to be agreed with [that customer] (and in the absence of such agreement, on such terms and conditions as may be determined by an **independent third party arbitrator** appointed by agreement with [that customer] or, in the absence of such agreement, by the President of the Düsseldorf Chamber of Commerce), in the event of the supply contract between [...] being terminated with effect from [...] or thereafter.

29. Südzucker/Saint Louis Sucre (2001)

In July 2001, Südzucker AG (Mannheim/Ochsenfurt) notified its intention to acquire the sole control over Saint Louis Sucre S.A. (Paris) ("SLS"). The concentration gave rise to serious concerns regarding its compatibility with the Common Market.

Südzucker was described as one of the world's largest producers of sugar, with main activities in Germany, Belgium, Austria and Eastern Europe, whereas SLS was described as being the second largest French producer (and number 7 in Europe). The community dimension was affirmed.

In a detailed analysis, the Commission reached the conclusion that the dominant position of Südzucker would be strengthened in certain regions and in several market sectors. Südzucker substantially disagreed with the Commission, as is apparent from the detailed discussion, but the Commission remained unimpressed and, therefore, required substantial commitments from Südzucker so as to allow a clearance of the concentration.

For instance, Südzucker had to agree to divest itself of its equity-stake in the Belgian company Suikerfabriek van Veurne S.A. and, regarding the Southern part of Germany, had to commit itself to sell to an independent enterprise or competing sugar manufacturer interested in making supplies to the Southern part of Germany a quantity of up to 90'000 tons of sugar per year. Südzucker was required to conclude a framework agreement for a fixed period of time which, upon the request of the Commission, could be prolonged. In the latter respect, the Commission reasoned that the sale of such quantity would be sufficient so as to maintain competition and to balance the dominant position of Südzucker in that geographical market (Southern part of

Germany). The details of the parameters under which Südzucker would sell the yearly quantity of 90'000 t were submitted to the Commission, and their honouring by Südzucker constitutes a binding obligation on it.

The delivery obligation was a structural commitment and, hence, steps up to the level of constituting a condition on which the clearance by the Commission is based, whereas the other commitments given for the purpose of implementing the undertaking would qualify as simple obligations. In the latter context, Südzucker committed itself to provide for an arbitration clause within its framework agreement which would enable the third party to initiate arbitration proceedings against Südzucker, particularly in respect of the pricing. The clause reads as follows:

Südzucker wird mit dem Händler einen Rahmenlieferungsvertrag abschliessen, der diesen berechtigt, eine Menge von bis zu 90'000 t pro Jahr zu beziehen. In dem Rahmenlieferungsvertrag ist eine **Schiedsklausel** vorzusehen, auf Grund derer der Händler im Streitfall die vorherige oder nachträgliche Entscheidung eines Schiedsgerichts darüber herbeiführen kann, ob die von Südzucker über den Interventionspreis hinaus berechneten Kosten unter Beachtung der Ziffer 16 dieser Zusage gerechtfertigt sind. Südzucker wird den Händler nach einem von diesem jährlich zum 15. September zu erstellenden Abrufplan beliefern, in dem die voraussichtlichen Mengen, Qualitäten, Verpackungstypen und Lieferwerke aufgeführt sind.¹⁶⁹

30. General Electric/Honeywell (2001)

On 5 February 2001, the Commission received the notification of a proposed concentration by which General Electric ("GE") had agreed to acquire the entire share capital of Honeywell International Inc. ("Honeywell"), USA. On 1 March 2001, the Commission decided to initiate proceedings in accordance with Article 6 (1)(c) ECMR.

GE is a diversified industrial corporation with activity in the fields of aircraft engines, appliances, information services, power systems, medical systems, transportation systems and financial services. Honeywell is a technology and manufacturing company serving customers worldwide with aerospace products, automotive products, electronics, speciality chemicals, transportation and power systems and building controls. By virtue of an Agreement dated 22 October 2000, Honeywell was to become a wholly owned subsidiary of GE.

The community dimension was established on the basis of the substantial turnover figures. In the analysis of the compatibility with the Common Market, the Commission identified significant horizontal, vertical and conglomerate effects in the area of aerospace and power systems. In particular, the aerospace market had to be analyzed in respect of the segments of aircraft engines and related markets, avionics and engine controls. The Decision is much more detailed than the Boeing/McDonnell Douglas Decision (commented above), and the competitive assessment of the proposed concen-

¹⁶⁹ See Appendix II to the Decision, Paragraph 13.

tration fills more than 100 pages within the Decision. In respect of the jet engines market, the Commission concluded that there exist high barriers to entry and to expansion and that GE's relation with many airlines, its incentive to use GE Capital's financial power, its ability to leverage its vertical integration through GECAS, the limited countervailing power of customers and the weakening or marginalization of its direct competitors, GE appears to be in a position to **behave independently** of its competitors, customers and ultimately consumers, and can thus be characterized as a dominant undertaking on the markets for large commercial jet aircraft engines and for large regional jet aircraft engines.¹⁷⁰

In respect of the market of avionics and non-avionics products, Honeywell is described as being the world-wide largest supplier, benefiting from a significant competitive advantage in that it offers a complete range of equipment. Rockwell Collins was described as being a major challenger, but lacking capability in certain areas. Likewise, Thales as the third major player was described as being strongly focused on Airbus but weak in radio and surveillance areas. Honeywell also enjoys particular strength in services, product integration and package deals such that other competitors, in case of a further concentration, would suffer rapidly and intensively from **foreclosure effects**. The Commission therefore concluded that Honeywell was the leading supplier of a range of avionics and that no competitor was independently able to replicate its extensive range of products.

In respect of the market of engine controls and engine accessories, Honeywell was described as holding an important market position, and again the merger was assessed as leading to a further strengthening of a dominant position, stemming from the elimination of Honeywell as an independent supplier. Hence, in the post-merger market structure, the merged entity would be able to offer a package of products that has never been put together on the market prior to the merger, and which will be such as to remain **unchallengeable** by any other competitor.

GE and Honeywell have advanced numerous arguments to counter the objections of the Commission, for instance arguing that competitors can offer counter-bundles, but the Commission was not impressed and reached the conclusion that, also in the markets of avionics and non-avionics, the merger would create and/or strengthen a dominant position. The parties' arguments that customers would have significant countervailing powers was equally not supported by the Commission.

In respect of power systems, the Commission determined a significant horizontal overlap, and the vertical integration would have the effect to leave competitors "*with no realistic chance of winning*".

In response to the Commission's Statement of Objections of 8 May 2001, GE submitted, on 14 June 2001, a proposal for a package of undertakings notably comprising structural undertakings relating to avionics and non-avionics products, engine start-

¹⁷⁰ Paragraph 229 of the Decision.

ers, small marine gas turbines, large regional jet engines as well as behavioural undertakings concerning corporate jet engines, and the commitment not to engage in bundling practices. These undertakings were analysed by the Commission in detail in paragraphs 485 ss. of the Decision.

In respect of avionics and non-avionics products, engine starters, small marine gas turbines and large regional jet engines, the parties had to commit themselves to **divest** these businesses. In addition to that, a number of behavioural commitments had to be conceded such as a non-compete agreement in respect of certain corporate jet engines, and a commitment to keep GECAS as a separate legal entity, with the undertaking to conduct its dealings with Honeywell on an arm's length basis, such compliance to be monitored by an **independent expert**.

Moreover, the parties had to commit themselves not to bundle any GE products with any Honeywell products when making offers to customers. In order to ensure compliance with this commitment, the parties proposed to set up an **arbitration scheme** whereby any affected interested third party may initiate arbitration, and the parties specifically undertook to comply with any resultant arbitration decision within an indicated period of time.¹⁷¹

In its assessment of the offered undertakings, the Commission voiced doubts regarding the commitment to corporate jet engines. The Commission feared that an acceptance of that offer would be tantamount to a reduction of output and would thus reduce supply to the detriment of customers. Moreover, as the Commission feared, *"it may be difficult for any approved Trustee or Arbitrator to make the distinction between so-called speculative purchases and financing in the form of purchases. The dominant position of the combined entity will thus remain on the market for corporate jet engines"*.

Regarding the commitment not to engage in bundling practices, the Commission was not convinced by the offer to keep GECAS as a legally separate business. The separation as such would not, in the Commission's view, prevent GECAS from exercising GE's commercial strategy, and for the rest, the commitment regarding GECAS remained *"a pure promise not to act in a certain manner; such a promise is in contrast with the Commission's stated policy on remedies and with the purpose of the merger regulation itself"*.

The Commission also expressed the concern that the independent Expert's or Arbitrator's intervention would occur ex post only, and **"the arbitration mechanism will give rise to endless litigation in which the Commission will have to participate in its capacity as the recipient of the undertakings"**.¹⁷²

¹⁷¹ The period of time is redacted in Paragraph 499 of the Decision.

¹⁷² Paragraph 531 of the Decision.

Realizing that the Commission was not sufficiently convinced by the commitments offered, the parties tried to improve on them by offering virtually last minute undertakings. However, these came too late for the Commission, having regard to the explicit requirement in 43 of the Commission Notice on Remedies. It therefore stated that the commitments offered *"should allow sufficient time for proper consultation of Member States and need no further market tests"*. However, the new package offered by GE/Honeywell did not, in the Commission's view, fully and unambiguously and in a straight forward manner address the competition concerns identified by the investigation which means that the commitments that had been proposed on 27 June 2001 failed to comply with the requirements of the Merger Regulation.

Hence, the Commission reached the conclusion that the proposed merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products as well as small marine gas turbines, as a result of which effective competition in the Common Market would be significantly impeded. The proposed merger, therefore, had to be declared incompatible with the Common Market pursuant to Article 8(3) ECMR.¹⁷³

* * *

¹⁷³ Page 128 of the Decision, Paragraphs 5, 6, 7, and Decision Article 1.

VIII. Other Examples: The New Commission Regulation No. 1400/2002, and a Recent Decision of the Swiss Competition Authority

1. The Commission Regulation (EC) No. 1400/2002, of 31 July 2002, for the Motor Vehicle Sector

This new sector-specific block exemption¹⁷⁴ is particularly interesting regarding its reference to arbitration in Recital 11:

In order to favour the quick resolution of disputes which arise between the parties to a distribution agreement and which might otherwise hamper effective competition, agreements should only benefit from exemption if they provide for each party to have a right of recourse to an independent expert or **arbitrator**, in particular where notice is given to terminate an agreement.

Accordingly, Art. 3(6) of Regulation 1400/2002 reads:

The exemption shall apply on condition that the vertical agreement provides for each of the parties right to refer disputes concerning the fulfilment of their contractual obligations to an **independent expert or arbitrator**. Such disputes may relate, *inter alia*, to any of the following:

- (a) supply obligations;
- (b) the setting or attainment of sales targets;
- (c) the implementation of stock requirements;
- (d) the implementation of an obligation to provide or use demonstration vehicles;
- (e) the conditions for the sales of different brands;
- (f) the issue whether the prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles to expand its business, or
- (g) the issue whether the termination of an agreement is justified by the reasons given in notice.

The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court.

As a short comment, we may remark that the Regulation, by referring to "expert or arbitrator", creates a somehow undesirable uncertainty. Is it an **expert**, providing a mere expert determination or *bindend advies* (in the Dutch sense), or *Schiedsgutachten* (in the German and Swiss sense), without a *res judicata* effect, or should it be an **arbitrator**, accomplishing a significantly different task? – We will discuss these distinctions in **Part IX** below.

¹⁷⁴ OJ [2002] L 203/30; it entered into force as of 1 October 2002.

2. The Decision of the Swiss Competition Authority of 18 November 2002 in the ETA [Swatch]-Case

In July 2002, ETA SA Fabriques d'Ébauches ("ETA"), a subsidiary of the Swatch Group AG, Biel/Switzerland, informed some of its customers that it intends to reduce the supply of its *ébauches* as from 1 January 2003 and that it will altogether discontinue any supplies as from 1 January 2006. The phasing out was explained by reasons of improving internal logistics as well as the quality of finished products. *Ébauches* are the key-part of watches which are sold to other manufacturers and distributors who will customize these *ébauches* for the particular purpose.

On 13 August 2002, one of those customers notified the Secretariat of the Swiss Competition Authority, requesting the opening of a preliminary investigation or a full investigation and the issuance of interim measures. A similar request was filed by another manufacturer of intermediary parts.

A preliminary investigation was opened on 3 October 2002 in accordance with Art. 21 of the Swiss Competition Act of 6 October 1995. 51 undertakings (mostly producers of intermediary products and finished watches using Swatch *ébauches*) were consulted by the Secretariat on the basis of a questionnaire, and within one month 36 answers were delivered. The preliminary investigation strengthened the concern that ETA may have abused its dominant position in the market wherefore a full investigation was opened on 4 November 2002 in accordance with Article 27 of the Act.

In the framework of the investigation, ETA offered several undertakings, in the sense of **remedies** which it would be prepared to observe during the pendency of the investigation. *Inter alia*, ETA committed itself to continue supplies of mechanical *ébauches* to its existing customers in a quantity of 85% of the average quantities delivered during the past 3 years, and it would offer deliveries of remaining 15% in the form of finished products of the same calibre.

Furthermore, the commitments by ETA included provisions regarding the pricing, quantities, deliveries of products and the like. And finally, ETA agreed to subject itself to an **arbitral tribunal** in case of any dispute with one of its customers arising out of or in connection with ETA's commitments. The commitments were termed to be valid during the pendency of the investigation, or 25 months as a maximum.

The Competition Commission, in its Decision of 18 November 2002 taken in respect of the requests for interim relief, had to assess the urgency of the request, the alleged irreparable harm as well as the likelihood of success regarding the complaint alleging an abuse of ETA's dominant position. In the latter respect, the Commission examined the relevant product market, the geographic market and the market share held by ETA. The Commission reached the conclusion that ETA indeed seems to enjoy a market strength allowing it to act independently of other competitors. None of ETA's customers had production facilities or supply channels, which would have allowed it to substitute ETA *ébauches*, and the probability for new entrants as suppliers of *ébauches* was considered to be remote during the next 2–3 years.

The Commission then dealt with the complaints voiced by ETA's customers under Article 7 of the Swiss Act, alleging unfair trading conditions, unlawful tying, refusal to supply, discrimination vis-à-vis other customers and abusive behaviour. The Commission, however, argued that, in view of the remedies offered by ETA, it need not form a view on these grievances in the framework of its decision on interim measures. The danger of an irreparable harm as well as urgency of interim measures were affirmed.

The Commission, within the operative part of its Decision, then reflected the remedies offered by ETA, in terms of its continuing commitment to effectuate deliveries to its customers and competitors, quoting therein the following **arbitration provision**:

6. ETA verpflichtet sich, bei allfälligen Streitigkeiten aus dem Verhältnis zu ihren Kunden in Ausführung der einvernehmlichen Regelung betreffend vorsorgliche Massnahmen (Verpflichtungserklärung) dem Entscheid eines Schiedsgerichts zu unterziehen. Für die Bestimmungen über die Bestellung des Schiedsgerichtes und über die Modalitäten seines Verfahrens gelten folgende Vorgaben:
 - a. Als Schiedsgericht gilt ein ständiges einzelrichterliches Schiedsgericht nach den Regeln des "Reglements über die Schiedsgerichtsbarkeit der Berner Handelskammer". Sitz des Schiedsgerichts ist Bern. Die Schiedskommission der Berner Handelskammer ernannt das Schiedsgericht innerhalb von 30 Tagen ab der von der Weko genehmigten einvernehmlichen Regelung betreffend vorsorgliche Massnahmen.
 - b. Das Schiedsgericht erlässt innerhalb von 30 Tagen seit Ernennung die für einen raschen Verfahrensablauf notwendigen Bestimmungen und macht diese den interessierten Parteien über das Sekretariat der Berner Handelskammer sowie über das Sekretariat der Weko zugänglich.
 - c. Ist innert der gemäss Bst. a genannten Frist kein Schiedsgericht bestimmt, legt Prof. Walter A. Stoffel, Vizepräsident der Weko, oder sein Stellvertreter die Bestimmungen über die Bestellung des Schiedsgerichtes fest, nötigenfalls nach Anhörung von ETA und anderer Personen oder Unternehmen.
 - d. ETA leistet die für die Bestellung (Konstituierung) des funktionsfähigen Schiedsgerichts erforderlichen Kostenvorschüsse.

As can be seen from the above arbitration provision, **a permanent arbitrator** had to be appointed within 30 days by the Bern Chamber of Commerce (Paragraph 6 (a)), whereupon the arbitrator had to establish the procedural rules within a further time-limit of 30 days, communicating these to the interested parties via the Secretariat of the Bern Chamber of Commerce and the Secretariat of the Competition Commission. Should the Bern Chamber of Commerce fail to make a timely appointment, the Vice-President of the Swiss Competition Commission (now its President Professor Walter A. Stoffel), would determine the modalities for nominating the arbitrator, to the extent necessary after consultation with ETA and other persons and enterprises (Paragraph 6 (c)). ETA was to advance the costs.

The Bern Chamber of Commerce, on 6 December 2002, appointed an arbitrator, and the latter, under the date of 19 December 2002, established a fairly **detailed set of rules** which will be applied for any upcoming arbitral proceedings.

Hence, the Swiss Competition Commission has followed a pattern well established through the numerous decisions discussed above rendered by the European Commission. It has avoided any kind of critical issues and entrusted the nomination of the arbitrator to a neutral body, i.e. the Bern Chamber of Commerce who, in turn, has mandated one of the foremost Bern lawyers to serve as the arbitrator. Certainly, it was also a wise decision to request the arbitrator to craft himself the appropriate procedural rules within an appropriate time-limit, and the arbitrator did so in a carefully considered document.

* * *

IX. 27 Observations on the 30 Reviewed Cases

1. Hard And Soft Commitments Imposed By The Commission

In its earlier Decisions in respect of notified concentrations, the Commission had essentially imposed hard commitments in the sense of **structural remedies** such as, for instance, the commitment imposed on the notifying party to **divest** itself of a particular business so as to maintain an acceptable level of competition.¹⁷⁵ Some of the examples have been discussed above. In all cases, the structural remedies have to be implemented within a very short period of time and, for the purpose, it has become customary for the Commission to require the appointment of an **independent trustee** (a Monitoring Trustee and/or a Divestiture Trustee¹⁷⁶) who will have the obligation to see to it that the divestiture is organised and carried out swiftly and pursuant to the terms as specified by the Commission. Typically, the compliance with such structural remedies is a **condition** ("*Bedingung*") on which the clearance by the Commission is based, and non-compliance would **remove the basis for the decision**, with all consequences for the enterprises concerned.

However, a divestiture cannot always be the answer. Certain operations cannot be divested in whole or in part, such as e.g. networks. In other cases, structural remedies may not be sufficient to remove concerns, or would not offer the required measure of flexibility. Hence, other – and more creative – remedies must be devised and, in recent years, the European Commission has gone quite far in requiring and **imposing carefully fine-tuned behavioural commitments** which will have to be observed by the notifying party (or the parties to a concentration) over a period of time (sometimes, as we have seen above, three years, sometimes up to ten years). Landmark decisions of the Commission, such as **Boeing/McDonnell Douglas**, come to mind. Such commitments are mere **obligations** ("*Auflagen*").

Quite obviously, such behavioural commitments create a considerable difficulty for the Commission, in that it may not have at its disposal the means, nor the resources, to **control and police such kind of long-term commitments**. While the Commission's recently formed **enforcement unit**¹⁷⁷ may accomplish certain monitoring tasks, it may not have the requisite time to engage in in-depth proceedings as may be required under the circumstances, and it may not be well placed to fulfil an independent adjudicatory function in respect of civil law aspects.

It is in this context that the European Commission has, in some sense, **re-discovered** and **re-invented arbitration**: An independent arbitral tribunal (or sole arbitra-

¹⁷⁵ See hereto the basics established in the *Michelin* Decision, Case 322/81 [1983] ECR 3461.

¹⁷⁶ See hereto above, Part IV, Paragraph 20 and the Best Practice Guidelines of 2 May 2003; see also FN 57.

¹⁷⁷ Under the lead of Wolfgang Mederer.

tor, as the case may be) will serve **as the prolonged arm** and as "*Buddha's watching eye*", for monitoring compliance with and adherence to the obligations imposed by the Commission, as well as for determining the civil law implications of any shortcomings. As Commission Decisions are publicly available, any interested third party, in particular any business partner, will be aware of the mechanism imposed by the European Commission on the notifying parties.

Of course, the European Commission cannot bind any third parties imposing on them to accept arbitration. However, as the discussion below will show, this is by no means necessary and does not as such question the "wisdom" of using and imposing an arbitral process.

2. Independent Arbitration to Serve as a Kind of Guarantee: Neutral Body "With A Fresh Pair of Eyes"

The European Commission's approach is indeed wise, for a quite convincing reason: An arbitrator (or arbitral tribunal) will be a totally neutral person or body, truly independent and hence capable of making a sound determination. It will be **another "fresh pair of eyes"** examining the matter – a concept which has for good reasons been well accepted by the Commission in the framework of the modernisation of the ECMR.¹⁷⁸

The concept also brings back, at least to some extent, "old" Montesquieu's *esprit des lois*,¹⁷⁹ with the Commission setting the standards, and a judicial body applying them, thereby separating the powers.¹⁸⁰

3. Neutral Venue

A third party relying on the commitment to arbitrate will not be left to struggle against the merged entity in the latter's local court (where there might be some quite justified fears that the local court might take a more favourable attitude, rather being minded to protect the position of the predominant local industry).

Hence, it is also important to see to it that, in all of these scenarios, the dispute will be adjudicated by an independent arbitrator **at a truly neutral venue**. Unless the merging parties are situated in Belgium, Brussels might serve as an appropriate venue, as an alternative to Switzerland.¹⁸¹ The place of arbitration will provide the "*rat-*

¹⁷⁸ See above, Part III, Paragraph 5, regarding the new tool – in ECMR 2003 – of the "peer review".

¹⁷⁹ Published 1748.

¹⁸⁰ To quite some degree, the Commission is an "all-in-one" – body: Legislative, administrative, and judicial.

¹⁸¹ It is the author's impression – although no statistics are available – that, in the past decade, Switzerland has been the number one choice within Europe for antitrust arbitrations, with a significant percentage of *ad hoc* procedures.

tachement” (in the French sense of the term) to that country’s Arbitration Act, i.e. to the most basic provisions governing international arbitral proceedings.¹⁸² This, however, by no means should be taken as a reference to the local Civil Procedural Codes applicable at the place of arbitration for proceedings before ordinary State courts. Regrettably, uninformed lawyers have sometimes handled international arbitration in the same way as local Court procedures, importing into the arbitration all of the “bag and baggage” of those proceedings. This is wrong. Arbitration should be more focused, more efficient, more tailored to the purpose and the needs of the parties, more cost-effective, and it is the challenge for professional arbitrators and their duty to achieve right this.

4. No Language Problem

Choosing arbitration also allows the parties to use the language of their free choice. If English were to be the most logical choice, avoiding translations of voluminous documents, it would be difficult (or in most countries impossible) to have a local State court accept filings without translations into the official local language. Where time and money plays no role, this would not seem to be tragic; however, these commodities have become scarce in the 21st century. Hence, also for this reason, State courts would not fit the bill.

5. **Caveat: Expert or Arbitrator – These Are Different “Animals”!**

In some cases, the Commission has required (or the parties had conceded) to submit a matter either to “*arbitration by mutually agreed independent experts*”; see *EBU, Elf Aquitaine-Thyssen/Minol*, and *Danish Crown/Vesjske Slagterier*. It seems, in this context, that the Commission is not sufficiently aware of the **clear distinction** which is to be drawn between the two functions, that of an expert on the one hand, and that of an arbitrator on the other hand. Clauses which refer at the same time to an expert or an arbitrator fall into the category of “pathological” clauses, because there is an imminent danger that one party may simply seek an expert determination, whereas the other party may seek arbitration.

Indeed, mere expert determination is a “different animal” and does not provide for the guarantees regarding due process in a manner similar to what is required for an arbitration.¹⁸³ The procedure for expert determination is a wide field of controversy and has given rise to difficult issues regarding the parties’ right to be afforded an equal treatment, the parties’ right to have access to the information gathered by the expert, their right to be heard under some rule of due process (a requirement often not sufficiently satisfied by experts), the binding or non-binding nature of the expert

¹⁸² Many European countries have reformed their Arbitration Acts to reflect the UNCITRAL Model Law, with more or less adaptations.

¹⁸³ For details regarding expert determination and its particular features distinguishing it from arbitration, see Marc BLESSING, *Introduction to Arbitration – Swiss and International Perspectives*, 1999, p. 308 ss.

opinion and, lastly, the controversial grounds on which, possibly, a party can attack an expert's opinion if he "got it all wrong". Moreover, expert opinions are not recognisable in any way similar to that of arbitral awards.

In contrast, arbitration is a well **recognized process** with deeply rooted notions and with an immense field of use and practice, with restrictive standards for court review, and with the possibility for recognition and enforcement of the arbitral award, if need be, through the New York Convention on the Recognition and Enforcement of Arbitral Awards, of 1958.

Except in particular situations where only a state of facts is to be analysed, expert determination would therefore not seem to be the best suited avenue.

Moreover, even in those cases where it may appear that the arbitrator will essentially have to carry out a fact-finding mission, the arbitrator's determination will most likely not stop there, but may almost inevitably involve a legal appreciation, and the determination of the legal consequences in case of any violation; this, however, is a judicial process, not only fact finding. However, the arbitrator may, for the purpose of his own investigation, consider the appointment of an expert, after consultations with the parties and possibly the Commission.

We therefore need to recommend that the European Commission should **strike out the notion of an expert**, and only maintain a clear reference to arbitration. In particular cases, the Commission might spell out the concept that the arbitrator shall be free to appoint, if deemed necessary, an independent expert (for instance an economic expert) for the purpose of ascertaining and evaluating the facts.

6. The Arbitration-Commitment as an *erga omnes*-Offer

As we have seen in the cases reviewed above, many of them contain behavioural commitments in the sense that the parties or the merged enterprise are required to continue supplies to third parties on a non-discriminatory basis. And it is in this context that the European Commission has required commitments by the notifying party that it will agree to arbitration to sort out and determine disputes or claims as may be made by third parties.

Hence, the commitment is a unilateral *erga omnes* offer of the notifying party (or the merged entity) to accept arbitration, and any third party may, therefore, initiate the arbitral process as a claimant and, by so doing, perfect the so far unilateral arbitration commitment.

What we see here is another type of "**arbitration without privity**",¹⁸⁴ i.e. a valid submission to arbitration without the existence of an arbitration clause or arbitration

¹⁸⁴ Regarding this term, see Ian PAULSSON, Arbitration Without Privity, ICSID Review Vol. 10 No. 2, 1995, 232-257.

agreement. The situation here is similar to the situation as we know it from some 2000 **Bilateral Investment Treaties** which also contain a commitment, by the contracting States, to accept arbitration in relation to any claims as may be raised by third party investors.

Therefore, whenever a third party wishes to complain and raise a claim against the merged party, it may make use of and trigger the arbitral process as per the commitment letter which had been submitted to the European Commission, or as per the terms of the Commission decision. As we have seen above, the Commission's Decision does make reference to these commitment letters and, in quite a few cases, has reflected the basic terms (including the obligation to arbitrate) in the body of the Commission's Decision; they form part of the *acte communautaire*.

Notably, the third party will be able to avail itself of the arbitration commitment even in cases where such a third party has not concluded any contract with the notifying party or the merged entity. And yet, the arbitral tribunal will have the authority to deal with the issue and, for instance, determine whether access to a telecommunication network has been granted pursuant to the terms imposed by the European Commission and, in particular, decide on any civil law remedies including damages.¹⁸⁵

While, in our view, the *erga omnes* offer by the notifying party and, thereupon, a request for arbitration submitted by a third party, will clearly establish arbitral jurisdiction despite the absence of a signed arbitration agreement or arbitration clause, it would nevertheless help the process and the transparency if the notifying party would be required by the European Commission to include an explicit reference to arbitration in future supply contracts with third parties (as in *Alcatel*) or to inform suppliers of the possibility to initiate arbitration (as in *Carrefour*). Laurence Idot¹⁸⁶ criticised that the obligation to arbitrate might not be effective due to a lack of consent and the absence of an arbitration agreement. However, we do not necessarily share that concern. Of course, the third party is not as such bound. As we have seen and will further discuss below, the arbitral process has significant advantages for the third party, and the alternative to initiate ordinary court proceedings would seem to be highly unattractive. Indeed, the arbitration commitments (as required by the Commission) are designed to avoid many of the difficulties and complications as might be involved in ordinary court proceedings (let alone the fact that ordinary court proceedings would not be accomplished within the time-frames as may be required in this context). Nevertheless, once a third party initiates the proceedings, it will be prudent for the arbitrator or arbitral tribunal to formalise the submission to arbitration, for instance in

¹⁸⁵ With much justification, Professor Laurence IDOT has raised the question whether the arbitrator will serve as the prolonged arm of the Commission, because he will essentially be asked to consider whether there is an anti-competitive behaviour and, if so, to impose an injunction. Hence, his mission is akin to the administrative task accomplished by the Commission and, in any event, is not limited to the task of simply determining civil law remedies.

¹⁸⁶ Laurence IDOT, Une innovation surprenante: L'introduction de l'arbitrage dans le control communautaire des concentrations, *Revue de l'Arbitrage*, 2000, p. 598.

drawing up short terms of reference to be signed by the parties involved and the arbitrator(s).

7. Caveat: Correct Appointment Procedure Is Important

It appears to be extremely important to see to it that an impeccable mechanism for appointing the arbitrator is lined up or, at least, to provide for a reliable and experienced appointing authority for making default appointments.

We would not be surprised if, in actual cases, the selection process for determining an arbitrator, or for determining the presiding arbitrator in case of a three-person arbitral tribunal, is likely to give rise to substantial difficulties and disagreement, and quite some time might be lost in that process. For instance, it is quite incompatible to provide for ICC or LCIA arbitration and, at the same time, provide for a default appointment of the presiding arbitrator by a local judge. It is also not advisable to use the *BA/BAT* solution which would certainly not live up to the standards of the French Cour de cassation.

Hence, in this context, we would recommend to use a well-established and highly respected arbitral institution for the purpose, such as the **ICC or the LCIA**. Indeed, both institutions have a very considerable amount of expertise in making appointments, based on their own internal network and, in the case of the ICC, through its national committees. The reference to an institution will best ensure neutrality of the venue (where such venue had not been determined as yet) and professional experience of the candidate as may have to be selected by such institution.

To the address of the two institutions (ICC and LCIA), we would recommend to constitute a list of candidates with impeccable credentials (substantial experience in the field of competition law as well as in the field of international arbitration, personal integrity and reputation) who might be considered for such appointments.¹⁸⁷ In any event, it would be quite frustrating for the parties if they had to plead their case in front of, for instance, an arbitrator who may have excellent credentials in arbitrating construction disputes, but may be a total “novice” in the field of competition laws.

Moreover, the candidate will have to realise and indeed accept that the procedure to be lined up is not one of the usual type of procedures, but consists of **very specific parameters**, essentially the parameter of scrutinising the fulfilment and adherence of a party to the commitments endorsed vis-à-vis the European Commission, and the obligations imposed by the latter. We will discuss this further under the heading “Specificity”.

¹⁸⁷ The ICC has set up a Taskforce on Arbitrating Competition Law Issues, chaired by the author. Whether there should be such a list of candidates, will be one of the many aspects to be considered.

Lastly, the candidate must have sufficient **professional time** to administer the process within the very short time-periods. In some cases this may mean that the candidate must be able to carve out, during the process of 1–6 months, most of his professional time in order to accomplish the mission.

8. Sole Arbitrator, or an Arbitral Tribunal of Three Persons?

In most cases, a Sole Arbitrator, jointly designated by the parties or, failing an agreement, designated by an appointing authority such as an arbitral institution, seems to be the preferable solution. It allows a swift appointment, and will avoid organisational difficulties of scheduling the proceedings on a fast track basis.

However, where a matter is less time-critical, a three person Arbitral Tribunal may have its advantages and may enhance the parties' confidence in the process. In normal ICC arbitrations, for instance, the ICC – in the absence of a determination by the parties – will normally decide in favour of a three person Tribunal where the amount in dispute exceeds USD 4 million. On the other hand, Sole Arbitrators have adjudicated claims in the area of 9 digit and even 10 digit USD figures.

9. *Ad hoc* Arbitration, or Institutional Arbitration?

The pros and cons of either *ad hoc* or institutional arbitration have ever so often been discussed during the past 50 years and the author, having handled a significant number of arbitrations of both types, sees no point in expressing any kind of a strong preference.¹⁸⁸ Both types work well, and the prime criterion – whether or not, in the end, the process will meet the expectations of the parties – will definitely be the personality, experience and case management skills of the arbitrator (or of the chairman in the case of a three person arbitral tribunal). However, without going into detail, a few remarks seem appropriate to highlight the main characteristics of *ad hoc* arbitration versus institutional arbitration.

In *ad hoc* arbitration, there will be no administrative body organising the proceedings. Therefore, *ad hoc* arbitrations will essentially be governed by the Arbitration Act applicable at the place of arbitration chosen by the parties, or determined in the commitments of the parties, or reflected in the Commission decision. The place of arbitration establishes the juridical link to of that country's national Arbitration Act. Very frequently, a neutral place is chosen, distinct of the nationalities of the parties or even that of the arbitrator(s). The Arbitration Act applicable at the place of arbitration (in the sense of the juridical seat of the arbitrator or arbitral tribunal) contains the most essential basic rules, making sure that an arbitration can validly proceed from its inception to its conclusion. It will, for that purpose, provide the most essential judicial safeguards for the arbitral process.

¹⁸⁸ In the framework of arbitrations dealing with anti-competitive contracts falling under Article 81/82 EC, it appears that, for reasons of confidentiality, parties have so far had a strong preference for *ad hoc* arbitration.

The Arbitration Act should not be confused with the local Code of Civil Procedure as is applicable to proceedings before local State Courts. Such local Codes of Civil Procedure should in fact play no role in the framework of international arbitration, for good reasons explained elsewhere.¹⁸⁹ A significant number of modern Arbitration Acts basically follow the philosophy of the 1985 UNCITRAL Model Law on International Commercial Arbitration. They will contain clearly limited remedies for challenging an arbitral award by means of setting aside proceedings addressed to the competent High Court or, for instance in the case of Switzerland, to the Swiss Federal Supreme Court as the one-stop court instance.

A variant to *ad hoc* arbitration are arbitrations governed by the **1976 UNCITRAL Arbitration Rules**. These Rules do not as such provide for an institution and, therefore, basically, provide for *ad hoc* arbitration. Nevertheless, they contain provisions for an appointing authority which will provide assistance wherever needed. UNCITRAL Arbitrations are frequent, due to the fact that the UNCITRAL Arbitration Rules have established themselves very well around the globe and have been used in thousands of arbitral proceedings.

Institutional arbitration, in contrast, means an arbitration which is governed by the Arbitration Rules of a particular institution. There are some two hundred international arbitral institutions established around the globe. However, only very few of them have earned a world-wide recognition and acceptance in international disputes. The most pre-eminent institution is certainly the ICC (International Chamber of Commerce, headquartered in Paris) followed by the LCIA established in London. Numerous other institutions would deserve to be mentioned, such as WIPO (World Intellectual Property Organization) in Geneva, the DIS in Germany, the CEPANI in Belgium, the Vienna Center, or the Chambers of Commerce administering international arbitrations, such as the Chambers in Stockholm, Zurich and Geneva.¹⁹⁰ Arbitral institutions have established their own Arbitration Rules which will then basically govern the arbitral proceedings.¹⁹¹

¹⁸⁹ See e.g. Marc BLESSING, Introduction to Arbitration – Swiss and International Perspectives, op.cit, p. 154 ss., 159, 170, 194 ss. (on the procedural autonomy).

¹⁹⁰ All Swiss Chambers of Commerce administering international arbitrations are in the process of uniting their institutional rules and are about to promulgate the "*Swiss Rules of International Arbitration Rules*" which, with but a few additions, follow the well-known 1976 UNCITRAL Arbitration Rules. Where the seat of the Arbitrator or the Arbitral Tribunal is to be in Zurich, these Rules will be administered by the Zurich Chamber of Commerce, if in Geneva, by the Geneva Chamber of Commerce. They are likely to enter into force as of January 2004.

¹⁹¹ However, the Arbitrator or Arbitral Tribunal will also have to respect any mandatory rules (or norms forming part of public policy) under the Arbitration Act prevailing at the juridical seat of the Arbitrator or the Arbitral Tribunal. In Switzerland, Article 182 (3) of the Swiss Private International Law requiring equal treatment of the parties is the only truly mandatory provision to be respected in any event. Under the 1996 English Arbitration Act, there are, however, quite a few mandatory provisions which may require to be observed. Nevertheless, in practice, most arbitrations proceed without any party realising the "presence" of any such mandatory rules.

The question now is whether these institutional Arbitration Rules are well adapted for the present purpose, i.e. for the purpose of governing arbitrations initiated in the framework of merger control commitments. We may answer this questions positively, yet with certain reservations and provisos:

- The arbitral institution and their case handlers will clearly have to understand the specific needs and parameters of this kind of arbitrations. In other words, they will need to understand the *sui generis nature* of such arbitrations.
- The time constraints are entirely different, if compared to ordinary arbitrations, and it may be required that an arbitration be accomplished within two or three months only. Hence, an institution that needs one or more weeks to formally establish an Arbitral Tribunal will not be suitable for the purpose.¹⁹²

10. The Assistance By an Experienced Arbitral Institution Such As the ICC Would Be Very Important

The assistance by an arbitral institution in making a default appointment has been discussed above. However, there is more what an arbitral institution may provide for the purpose, for instance by setting out certain recommendations or **best practices** as might be kept in mind by the arbitrator (as well as by the institution when administering such a process). On purpose, we prefer to avoid the term of "guidelines" or the French term of "*directives*"; we may wish to term such a product "**Notes on Best Practices for Arbitrations under the ECMR**", or similar (the modest term "notes" being borrowed from the well-known UNCITRAL Notes on Organizing Arbitral Proceedings, of 1996).

The **ICC Taskforce on Arbitrating Competition Law Issues** is in the process of studying this proposal in the framework of a worldwide consultation among its members, possibly with the assistance of those in charge at the EU Commission. Moreover, the ICC Taskforce will reflect on drafting model clauses which could be used by the European Commission, or by notifying parties, in the framework of their commitments and obligations assumed so as to obtain clearance of a particular transaction. This would avoid the "last minute creations" of some of the rather "exotic" provisions we have discussed above under Parts V to VII which, manifestly, had been devised under great time pressure and without a careful thinking as to their suitability and workability.

¹⁹² For instance, the ICC has a well tested experience to handle fast-track arbitrations, and the author is confident that, particularly the ICC, will wish to establish itself as one of the foremost institutions which may be considered for the purpose of monitoring merger control commitments. The ICC specific Terms of Reference under Article 18 of the ICC Rules should, as a consequence of the 1998 revision of the ICC Rules, no longer operate as a delaying factor. Moreover, the ICC specific scrutiny of the Award is also a task which, as practice has shown, can be accomplished within a matter of a few days, if indeed so required. Nevertheless, it is necessary that the ICC will fully understand the needs of this process, and this will be one of the goals to be achieved by the **ICC Taskforce** set-up for studying all of these issues.

11. Specificity: An Arbitration *sui generis*

The element discussed above, i.e. the particular function and responsibility of the arbitrator to determine whether or not there has been an anti-competitive (or discriminatory) behaviour, is one aspect of the **particular specificity** of this process, and makes it distinct from the usual type of arbitrations.

In fact, the arbitrators are to accomplish the role, function and duty of supervising whether commitments (obligations, rarely conditions) imposed by the Commission are kept and fulfilled by the notifying party or the merged entity. Hence, there is clearly a **public law interest** in the process, and the arbitrator in fact has to fulfil a **double role: a public law function and a civil law function**.

The specificity – apart from the *erga omnes* submission and the public law function – is also apparent in further characteristic elements, such as the required **speed**, the **scope of the scrutiny**, the particular **repartition of the burden of proof** and the duty imposed on the notifying party to **keep the Commission informed** on any arbitral proceedings and their outcome.

Is this then the emergence of a new arbitration *sui generis*? – We tend to affirm this question. In fact, we may characterise it as a **kind of regulatory arbitration**, similar to those arbitral tribunals set up to police compliance with listing and stock exchange requirements. We will discuss these elements below.

12. The Arbitral Process Must Guarantee a Speedy Resolution

As we have seen in the cases reported above, many arbitration commitments require a determination by the arbitrator within an extremely short period of time, on a fast track basis (or even faster track, or almost supersonic): **one month** (for instance in *Shell/DEA*, *Vodafone/Mannesmann*, *Allied/Honeywell* and, most recently, in *Telia/Sonera*), **two months** (*Alcatel/Thomson*), three months or five months in other cases, calculated from the day of appointment of the arbitrator, or from the constitution of the arbitral tribunal. One may wonder whether an arbitration procedure can really be accomplished *lege artis* and observing the rules of due process within as short a time.

In this context, we fear that the European Commission does not always have a realistic view on the requirements of the procedure, and the requirements of due process in arbitral proceedings.

Of course, a speedy resolution is required. In fact, a third party complaining about a discriminatory behaviour (for instance the refusal by the merged party to continue any kind of supplies) requires a fast track arbitration. However, we suggest that the European Commission should be more flexible and should not impose (or make a notifying party agree to) a time-frame which is hardly realistic and might jeopardise the integrity of the entire process. Certainly, the Commission is inspired by its own strin-

gent timetable, i.e. by the extremely short periods within which the European Commission has to consider a notified concentration under Articles 6 and 8.¹⁹³

Depending on the matter, a particular speed (as imposed or at least endorsed by the Commission) may not always be necessary having regard to the interests of the parties involved. Exaggerated speed seems dangerous, and really urgent requests could be accommodated by way of **interim measures** or interim relief granted by the arbitrator.¹⁹⁴

And: what happens if the arbitrator would not be able to render his decision within one month? Would he then be **functus officio**? Could this be argued by one of the parties? Or, if the decision would be rendered late, would the decision be subject to a challenge, or even be considered a *nullum*? All sorts of questions could arise, quite unnecessarily.

In any event, we do suggest that the given time-limit should be capable of being extended, possibly (and as the case may require) by consent of the parties involved, or upon discretion of the arbitrator or, in case the arbitration is handled under the auspices of an arbitral institution such as the ICC, by the institution itself, applying a rule of reason-test. Moreover, again depending on the circumstances, the Commission will in most cases require to be informed, and its approval might have to be sought.

13. Importance of Interim Measures

What would seem to be particularly important is to provide for an authority of the arbitrator or the arbitral tribunal to rule on and provide for **interim relief**. Such authority would ensure that a third party complaining about a discriminatory behaviour of a dominant undertaking would have the possibility to apply to the arbitrator or arbitral tribunal for determining, on an interim basis, the terms upon which the dominant undertaking will have to maintain its supplies to the third party claimant.¹⁹⁵ Hence, it would be important to determine the venue (place of arbitration) in a country which provides for the authority of an arbitral tribunal to rule on interim measures.¹⁹⁶

¹⁹³ For the time-limits, see Article 10 (1) and Article 10 (3) of the Merger Regulation. Due to the extremely short time-limits, the Commission quite frequently resorts to the "escape" to indicate to the parties that its notification was not complete so as to make the stop-watch running only as from the date when the documentation accompanying the notification is completed.

¹⁹⁴ See below; see also the very wise decision of 18 November 2002 taken by the Swiss Competition authority in the *ETA (Swatch)* case, discussed below in Part VIII.

¹⁹⁵ Not all of the national Arbitration Acts of the Member States do provide for an authority of an arbitral tribunal to rule on interim measures. For instance, the Arbitration Acts of Scandinavian countries and of Italy reserve such an authority to State courts, unless the parties have specifically agreed to such authority. Until recently, the same had applied in Greece, prior to the recent amendment of the Greek Arbitration Act.

¹⁹⁶ Since, under the 1996 English Arbitration Act, the authority depends on an agreement of both arbitrating parties, the authority for the arbitrator to rule on interim relief would have to be specifically provided. Hence, if the notifying party (or the merged entity) has committed itself

Moreover, where interim measures are available, the overall time-frame for the arbitral process could be organised on a slightly more relaxed basis.

14. The Arbitral Process is Clearly and Narrowly Focused

As the analysis of the various cases under Parts V to VII above has shown, the reference to arbitration made by the Commission and/or by the notifying party or parties arises, in most cases, in the framework of **a clearly focused context or circle of concern**. For instance, a party operating an essential facility such as a telecommunication network may be required to grant access to third parties and competitors on a non-discriminatory basis. Hence, it is this aspect which is **subjected to arbitral review**, and this makes the arbitral process on the one hand very **clearly focused**, and on the other hand may as well limit the scope of review and indeed the **jurisdictional authority** of the arbitrator.

Frequently, a careful reading of the Commission's Decision moreover provides the **yardsticks** for the arbitral tribunal to measure and determine whether or not a complaint regarding a discriminating treatment is justified or not. Because of this clear and narrow focussing, it is quite justified and indeed logical to expect that the arbitral review and process – as far as it relates to the regulatory review – will have to be accomplished within a short period of time (see the discussion above).

15. Regulatory and Non-Regulatory Review

The Arbitrator or Arbitral Tribunal will need to clearly understand and indeed distinguish two different tasks: The **first** being the duty owed to the Parties and to the EU Commission to determine whether or not the commitments have been honoured. For this task, the arbitrator has to carry out a regulatory function. He serves as the prolonged arm of the Commission and, to some extent, has to "wear the eye-glasses" of the commissioner.

The **second** task will, depending on the regulatory compliance, focus on civil law claims which may have arisen between the parties. Such civil law claims are not governed by regulatory aspects. In this regard, the arbitrator will have to accomplish the ordinary adjudicatory task, quite in the same way as any other arbitral tribunal. The Arbitrator or Arbitral Tribunal will have to apply his/its own independent judicial appreciation, and the findings will be binding upon the parties, subject to the limited

to accept arbitration, and has accepted that an arbitral tribunal may rule on interim relief, and if the third party claimant (initiating arbitration) is taken to have accepted such offer to arbitrate, the pre-requisite for affirming arbitral jurisdiction to rule on interim relief by an arbitrator sitting for instance in London would in my view have to be clearly affirmed. However, this example shows that an explicit reference to the authority to rule on interim relief is not only helpful but may indeed be necessary.

judicial review as may be available under the provisions of the applicable Arbitration Act.

16. Bifurcation of the Proceedings

The two distinct functions which an arbitral tribunal may have to fulfil might suggest to reflect on a bifurcation of the arbitral proceedings: In **Phase One** of the proceedings, the arbitrator would first accomplish his mission under the terms of the Commission decision and the commitments which had to be conceded by the parties in order to remove the Commission of his concerns. As we have seen, this Phase One has its one **specificity as a regulatory type of arbitration**, largely governed by the parameters set by the Commission decision. Moreover, in the past practice, the Commission had imposed very stringent – possibly too stringent – time-limits for accomplishing the process. The Phase One proceedings will certainly be followed by the EU Commission and more particularly by its Enforcement Unit of DG COMP, and it is quite likely that the two bodies may to some extent interact, possibly on the basis of requests emanating from the Commission to be informed on the process, possibly also in the other direction, by requests of the parties or directly by requests of the arbitrator addressed to the Commission (e.g. for supplying relevant information or, possibly, for submitting comments on a particular matter). Moreover, the Commission might wish to intervene on its own motion, might file **amicus curiae briefs**, or even might **request to be heard** in the framework of Hearings.¹⁹⁷

We therefore need to accept that, in Phase One of the arbitral proceedings, the Commission may wish to exercise its particular prerogatives. Once the determinations are made, it would stand to reason for the arbitrator to **render an interim decision** dealing with the issue whether or not the obliged merging parties have complied with their commitments. Again, it will be no surprise that the Commission, on that decision, may wish to take a **“second look”**.

One might ask critical questions about the integrity and independence of the arbitral process where, in fact, an administrative authority (such as the Commission) reserves its prerogative to intervene, or may even take a “second look” at the arbitrator’s determination. However, the author is not that much concerned about this situation. He is rather convinced that capable arbitrators will be quite able to stir the arbitral proceedings and to render a determination which will significantly add to the thoroughness of the process, and will provide a convincing result for the benefit of the parties and to the satisfaction of the Commission.

¹⁹⁷ Regulation 1/2003 for the implementation of Articles 81/82 provides for all of such tools where **national** courts have to determine matters falling under Articles 81/82. National Courts, when dealing with such cases, are less directly fulfilling a regulatory function than the arbitrator dealing with merger control commitments. From this perspective, it can not be surprising that the Commission, in the framework of arbitrations regarding merger control commitments, might wish to take at least the same kind of influence.

Once the regulatory determination under Phase One is concluded, the arbitrator will, in most cases, have to proceed with a **Phase Two**, for the purpose of determining any civil law claims as may have arisen between the parties. As already remarked above, this Phase is a purely judicial matter, and not a regulatory matter. It is because of this Phase Two that it is of importance that the matter be entrusted to an Arbitrator or Arbitral Tribunal, **and not only to an expert** (whose determination would not lead to an enforceable arbitral award).

17. Applicable Law

It is interesting to note that the law applicable to determine compliance with commitments has never really been an issue of concern, neither to the parties nor to the Commission; for good reasons, we suggest. One reason may be that the terms of the commitments are (or should be) self-explanatory and quasi self-executory, in the sense that they are largely based on facts to be properly established and analysed. Hence, compliance with commitments requires for the most fact-driven exercise, and only the appreciation of those facts in the light of the Commission decision may require a judicial analysis and conclusion.

Such latter legal analysis and conclusion would, however, appear to be quite the same irrespective of any particular national law applicable. It is therefore understandable that, for the purpose of the regulatory determination in Phase One (as above described), the applicable law would seem to be of very little significance.

For the Phase Two decision of the Arbitrator or Arbitral Tribunal, the applicable national law, or the substantive rules of law (in a broader sense) may have more significance. However, in many cases it would seem quite difficult to determine the applicable law (or rules of law) beforehand. If a matter arises between the two merging parties, a choice of law would of course be possible and binding. The question, however, is whether it is useful or advisable to determine a particular law applicable if a dispute could arise between the merged entity and a third party (such as a supplier or competitor). Obviously, in the latter scenario, the merged entity would wish to propose that its own national law be applicable. However, this does not tie in with the more distanced perspective taken by the Commission which clearly aims at avoiding a preferential treatment of the merged entity over the (presumably) weaker third party.

There is, therefore, a certain dilemma in the sense that, on the one side, a determination of the applicable law up-front (i.e. in the framework of the commitment given to the Commission) would provide more certainty and foreseeability and avoid a sometimes difficult determination yet to be made by the Arbitrator. On the other hand, any up-front determination might appear to be unjustified under the circumstances.¹⁹⁸

¹⁹⁸ For instance, if a claimant third party would have to accept the national law of the merged entity as the applicable substantive law (while otherwise under normal conflict rules it would

18. Establishing a *prima facie* Case Only: The Arbitral Process is Attractive for the Weaker Party

A most remarkable element is the Commission's requirement imposed on the notifying party (or the merged entity) that it will be for that entity to essentially carry the burden of proof. Hence, the claiming third party only has to establish a *prima facie* case, and the burden of proof (as it would normally apply) then shifts to the responding merged enterprise. We termed this **the *Prima facie* Evidence Rule**, which was imposed in *Vodafone Airtouch/Mannesmann*, *Vivendi/Canal+/Seagram*, *Shell/DEA* and most recently in *Telia/Sonera*.

Since this indeed **very drastic special provision** has found its way into various commitment letters, it may be assumed that the Commission has in fact required such a provision to be conceded by the notifying party or the merged enterprise.

The allocation of the burden of proof spelled out in the clear terms (as we have seen them in the cases reported above) in any event **operates in favour of a claiming third party** and as such makes the arbitration-avenue particularly **attractive** to it. Hence, we would be quite surprised if a third party would prefer to bring its case before the ordinary States courts, thus foregoing the benefit of having a neutral arbitration, at a neutral place, before a competent arbitrator operating under the *prima facie*-parameters as set out in some of the Commission's Decision.

From our perspective, this shifting of the burden of proof is quite **justified: not** because the dominant enterprise should be treated with specific scepticism, **but rather because** it is the dominant enterprise which will, in most cases, be the only party having access to, and control over, any and all relevant materials and data. Indeed, the required information is available there, and absent the special clause required by the Commission, a third party would seem to be under extreme difficulty to have any means of proving an alleged discriminatory behaviour, unless US-style discovery procedures were to take place. True, a correct application of general substantive and procedural rules regarding the allocation of the burden of proof might result in a similar approach. However, it is quite useful to have this notion expressed in a "hard and fast" provision.

rather be the national law of the third party to control the matter), the third party would possibly reject arbitration altogether and might prefer to initiate legal proceedings in the ordinary courts. While this avenue always remains open, the concept of arbitration should be geared to provide a much better and more efficient dispute resolution mechanism than the avenue resorting to the national courts. It would seem important to make sure that the arbitration avenue will not be opposed due to provisions or constraints which might seem unfair in the eyes of one of the parties.

19. “Pendulum Arbitration” or: “Russian Roulette”

As we have seen in the case *Shell/BASF* and, in effect, also in the *Dow Chemical/Union Carbide* case, the arbitrator’s mission will be to choose between two propositions made by the parties. Hence, the arbitral decision will either be the solution A as proposed by the dominant party, or solution B as proposed by the other party, but not in between.

One may have **academic or other hesitations** to such a process, and yet, we find it suitable, and we have seen it applied in quite a number of disputes which initially had been submitted to arbitration but turned into a mediation or settlement procedure whereby, at the end, each side submitted a last offer and then missioned the arbitral tribunal to decide either in favour of the proposal A or the proposal B (but of course not in between the two proposals, or outside of them).¹⁹⁹

The experience has shown that, in actual business life, parties (and their managers) are quite accustomed to make decisions of a similar kind, and the process may help to bring a clear solution about within a very short period of time (where time might be a particularly crucial element of the process).

20. Arbitration Maintains the Confidentiality

It is obvious that, in most cases, the matters as may be submitted to arbitration are of a **confidential character**. The confidential nature of the data which underlay the Commission’s Decision itself is also easily apparent in that the decisions as available on the Internet are the public versions only where all the confidential data have been redacted or omitted.

Ordinary court proceedings would in most cases destroy the confidentiality. Hence, **arbitration will be better suited**.

It would seem to be advisable that, where confidentiality is particularly critical, this be spelled out in more detail in the arbitration clause offered by the notifying party. In some cases, a reference to confidentiality was made, but without the details as might be necessary.²⁰⁰ Alternatively, the arbitrator may, within his authority to rule on interim measures, determine the ways and means to protect confidentiality, for instance by issuing (what is commonly termed) a **“Protective Order”**. Such Protec-

¹⁹⁹ Regarding this aspect and the MEDALOA (or: LOA) procedures, see above Part III, in connection with the *Shell/BASF* case.

²⁰⁰ Confidentiality has occasionally been criticised in matters where **public interests** are involved, such as for instance in the framework of disputes arising under BITs (Bilateral Investment Treaties). Nevertheless, ICSID arbitral proceedings are still very much confidential, and publications of awards require the consent of the parties. On the other hand, NAFTA arbitral proceedings – as a consequence of NGO criticism – are today most widely publicised; practically all materials, including the submissions of the parties, are available on the internet.

tive Orders would then, frequently in great detail, determine all the issues regarding disclosure of documents, access of listed persons to documents and information, and the limited use which may be made thereof.

21. Is the Arbitrator Bound by the “Yardsticks” Set by the Commission?

As we have seen in the cases discussed, the Commission’s Decision does set the criteria under which the arbitrator (or arbitral tribunal) should exercise its adjudicatory duties.

Quid, however, if the arbitrator disagrees with the parameters set by the Commission’s Decision? **Can he ignore the kind of “yardsticks” set by the Commission and supplant his own “ideas” over those of the Commission?** To what extent, therefore, is the Commission’s Decision binding upon the arbitrator or arbitral tribunal?

These are delicate questions. Is the arbitration “bound or unbound”?

A lot has been written about the functions and authorities of the Commission, in particular its authorities to issue formal decisions which are binding for the courts in the EU Member States.²⁰¹ In our view, a pragmatic answer ought to be given, in the sense that the arbitrator should indeed, and must, honour the implied terms of his mission²⁰² and should thus accept the parameters as they may have been stated by the Commission, applying however a **rule of reason-approach**.

The rule of reason-reservation would express the idea that, nevertheless, the arbitrator is not simply the “slave” or “servant” of the Commission, but has indeed a function, responsibility and authority which goes beyond that. We also need to realise the particularly difficult task which the Commission takes upon it: **the task to predict the future**. In fact, the Commission has to make an **ex ante determination** of what might possibly be the anti-competitive effects of a concentration. And the Commission might err; its concerns and predictions of the future might not always materialise, or might simply fall away through changed circumstances.

Recently, market situations and the parameters of competition have changed quite significantly, as we have seen this happening so drastically for instance in the area of aviation and the market for aircrafts, where the prognosis discussed by the Commission in *Boeing/McDonnell Douglas* (reviewed above in more detail) have proven to be quite wrong. Thus, many of the things the Commission fears will happen may not happen in real life. The error level may increase, proportionate to the time span over

²⁰¹ See hereto KAMANN/KOTTE, *Kommission versus nationale Gerichte – Kooperation oder Konfrontation im Kartellverfahren*, *Wirtschaft und Wettbewerb* WUW 5/2001, 460 s.

²⁰² The implied term is that the arbitrator has the primary duty to determine and adjudicate whether certain commitments, as imposed to remove the Commission’s concerns, have been complied with.

which certain remedies (sometimes, as we have seen, many years) will have to be observed.

It is exactly in such situations that we see a very significant benefit of the arbitral process which will add a significant quality value to the merger review process: It is here where such situations can be thoroughly addressed by a capable arbitrator or arbitral tribunal who, as the case may require, will be able to report back to the Commission with a neutral recommendation and with a view to re-assess the situation. It is here where the arbitrator and the Commission will be able **to work as a tandem**, and to devise a solution which takes into account all relevant perspectives. **Article 8 (4) ECMR** holds the key to adapt a Commission decision to changed circumstances. According to Nadia de Souza of DG COMP's MTF Enforcement Unit, a change of a Commission decision on the basis of that Article so far occurred very rarely. This, however, may well change in the future, taking into account rather drastic economical changes as we see them these days.

22. Are the Commission's "Yardsticks" Binding Upon Third Parties?

An ancillary question arises whether **third parties** would have to accept the standards as spelled out in the Commission's Decision, or whether they could argue, in front of the arbitrator, that those standards are insufficient, and that further remedies should be available against the dominant party.

Our answer to this rather difficult question would have to be twofold:

- If the third party could have checked and **complained** about the inadequacy of the remedies provided, it should have voiced its concern to the Commission during the pending investigation. After all, the Commission publishes a summary of all notifications in the Official Journal of the European Communities, and this provides for the opportunity for third parties to express their opinions on the likely impact of the transaction. Moreover, the Commission does send out requests for further information to third parties such as customers and competitors. And the third parties themselves, showing a sufficient interest, may apply to be heard by the Commission, either orally or in writing. Furthermore, third parties may be given access to parts of the Commission's file. Once a decision is adopted by the Commission, it will issue a press-release at the end of the first stage investigation and of its second stage investigation. The final decision (although redacted by the Commission in order to delete secret information) is available on the Internet, and final decisions following a second stage examination are published in the Official Journal.
- Furthermore, third parties (showing that they are directly and individually concerned by a decision) may file an **appeal** against the Decision to the Court of First Instance.²⁰³

Therefore, it would be **a significant element** for the arbitrator to first check whether or not the third party would have had a possibility to exhaust those remedies, and if,

although available, it failed to do so, the arbitrator may well be extremely hesitant to accommodate the third party.

In general, the *Delimitis*-principle²⁰⁴ must be recalled according to which court decisions of national courts conflicting with decisions of the Commission should be avoided. The principle was explicitly referred to in *Masterfoods/HB Ice Cream*, a decision which will have to be kept in mind by all arbitrators as well.²⁰⁵

However, in those cases where the third party had no possibility to voice its grief, and in cases where new factual elements not considered by the Commission had emerged over the time, the arbitrator may be faced with the issue whether he may need to expand the scope of his review, and whether indeed he would have the authority to do so.

Hence, the question may occur whether the arbitrator is confined, in his review of the matter, to stick to narrow parameters as may result from the Commission's decision, or whether he can deal, or may have to deal, with a broader scope. This is not a question allowing an easy answer because the arbitrator in fact derives his authority from **a particular mission** conferred to him by the Commission, or at least endorsed by it on the basis of approving a particular commitment offered by the merging parties. For this part of his task, the arbitrator (and in most cases the parties as well) may have a reporting obligation to keep the Commission informed.

Probably, as far as the Phase One determination is concerned,²⁰⁶ the solution would have to be the same as that regarding the Monitoring Trustee or the Divestiture Trustee which, in short, says: "the Trustee may propose, and the Commission will decide".

However, where the arbitrator moreover is missioned to accomplish a further quite distinct task of adjudicating civil law claims in Phase Two, he will fulfil a distinct role on behalf of the parties, and for that part a reporting obligation would not seem to exist, unless it touches on the competitive parameters underlying the Commission's decision.

²⁰³ An aggrieved third party might even consider a different avenue, by asking its own State (Member State) to espouse the case, such that the Member State will then appeal the Decision. In the latter case, such appeal would have to be directed to the European Court of Justice, and not to the Court of First Instance.

²⁰⁴ ECJ, C234/89; ECR I-935; [1992] 5 CMLR 210.

²⁰⁵ Case C-344/98 [2000] ECR I-11369. The *Masterfoods*-case received wide coverage in writings; see e.g. KAMANN/KOTTE, *Wirtschaft und Wettbewerb* WuW 5/2001, 464 ss.; Carl BAUDENBACHER, *Einheitlich Anwendung des gemeinschaftlichen Wettbewerbsrechts durch nationale bzw. europäische Gerichte und die Kommission*, *European Law Reporter* (ELR) 01/2001, p. 7 ss. Compare also the Commission decision in *Luganese-Iglo*, C-279/95 P and the Article by KLAUS DE BRONETT, "Speiseeis-Urteil" des EuG in Rechtskraft, *ELR* 11/1998, p. 506 ss. See further Joachim BORNKAMM, *Die Masterfoods-Entscheidung des EuGH, Bindung der Zivilgerichte an Kommissionsentscheidungen – Lehren für das neue Kartellverfahren*, *Zeitschrift für Wettbewerbsrecht*, *ZWeR* 1/2003, 73–86.

²⁰⁶ See Paragraph 16 above "Bifurcation of the Proceedings".

23. *Quid* About the Commission Monitoring the Process and the Award?

We have seen that the Commission, in many cases, requested to be informed on any initiation of arbitral proceedings, that the Commission might wish to approve the choice of the arbitrator(s) and might wish to monitor the arbitral process as such. Moreover, the resulting arbitral award will have to be communicated to the Commission. This is a clear reflection of the situation that the arbitrator, for that purpose, fulfils a public law task, almost **as a prolonged arm of the Commission**.

Could the Commission override the arbitral determination? Would it have an authority to remit the Phase One determination or the arbitral award back to the arbitrators for correction or amendment? The answer will most probably have to be affirmative as far as the regulatory part (Phase One determination) is concerned. However, we are also of the opinion that a capable arbitrator will, at least in most cases, be in a position to run the arbitration in a way so as to avoid any need for the Commission to revisit the award. After all, the communication lines to the Commission are open, and need to be open during the regulatory part of the procedure. Should the Commission get involved in the procedure? See hereto the next heading.

On the other hand, the Commission is of course free to derive its own conclusions when taking cognisance of the arbitral award, and it may ultimately **revoke** its decision under Article 8 (5)(b) ECMR if "*a breach of an obligation attached to the decision*" has occurred.

An arbitral award, as may be rendered particularly also in respect of civil law claims (where the arbitrator has to fulfil **a purely judicial function**, as opposed to the more **regulatory function** when scrutinizing compliance with commitments), will be subject to a setting aside procedure before the national court under the very narrow scope of review pursuant to the Arbitration Act prevailing at the place of arbitration. In most European States, the High Court will be the competent instance; in Switzerland, such challenges against an arbitral award would directly have to be addressed to the Swiss Federal Supreme Court.

24. The Commissioner as *amicus curiae* Before the Arbitral Tribunal?

As the arbitrator is partly fulfilling a **mission on behalf of the Commission**, the question arises whether the commissioner (or his delegate) should have some standing within the arbitral proceedings, for instance as an *amicus curiae*, and have the possibility to make known his view through an **amicus curiae brief**, or even participate in hearings as may be held by the arbitral tribunal or arbitrator, in the function of a witness or otherwise.

From our perspective, such a participation appears to be reasonable and quite logical, given the specific task entrusted to the arbitral tribunal or arbitrator and the supervisory authority given to the Commission on the basis of **Article 211 EC**. Alternatively, the parties may see fit to submit, in the framework of the arbitral proceedings,

questions to the Commission, and the answers will then have to be considered by the arbitral tribunal. Hence, the arbitrator and the Commission may have to fulfil a complementary task and provide assistance with the view of fostering a coherent application of the law.

25. Consequences of an Arbitral “Verdict”

As we have seen in some of the cases discussed above, the Commission will wish to **monitor the arbitral process**, and the parties might be required to deliver the resultant arbitral award to the Commission.

What then may be the consequences if the arbitral award reached the conclusion that a particular obligation had not been honoured by an undertaking (enterprise)? *In extremis*, **the consequences might be very serious** in that the Commission is of course entitled to revoke a decision particularly in the case where an undertaking commits a breach of an obligation attached to the Commission’s Decision, as explicitly stated in Article 6(3)(b) of the Merger Regulation, in the case of a Phase I decision, respectively Article 8(5)(b) Merger Regulation in the case of a Phase II decision. Hence, in the first event, the Commission may proceed to a Phase II investigation or, if such investigation has already been carried out, to take a prohibition decision, without being bound by time-limits otherwise applicable. Thereafter, in the case of a prohibition, the Commission may require the enterprises to take steps to restore conditions for effective competition, for instance by requiring a divestiture pursuant to Article 8 (3) ECMR.²⁰⁷ Hence, the sanction is extremely severe. The further sanctions might include penalties for each day of non-fulfilment, up to € 100’000 for each day, under Article 15 ECMR and, moreover, fines not exceeding 10% of the aggregate turnover of the undertakings concerned, pursuant to Article 14 (2) ECMR.

Parties are, of course, best advised not to risk such drastic sanctions, and this downside-risk will certainly have a **repercussion on the arbitral process** itself, in that it will most probably cause the committed enterprise to take all precautions to properly proceed in the framework of the arbitral process.

26. Outcome: Civil-Law Sanctions and Potentially Administrative Sanctions

It is quite clear that the arbitrator will basically determine the civil law aspects of a dispute. However, his finding might have a repercussion and might moreover trigger administrative sanctions. The latter is because, as we have seen in the textual analysis under Part II, notifying parties may be required to inform the Commission on any pending arbitration, and may have to inform the Commission on the outcome, for in-

²⁰⁷ For instance, in *Blokker/Toys“R”Us*, the Commission required the transfer of the acquired business to a wholly owned subsidiary and to divest at least 80% of that subsidiary’s share capital to a third party by a specified date; a drastic requirement! Case M. 980, OJ 1998 L316/1.

stance by delivering a copy of the Arbitral award. If the Commission, when reading an Arbitral award, realises that a particular commitment or obligation has not been fulfilled, it may trigger the appropriate sanctions.

The effects thereof might indeed be drastic: If a condition is not fulfilled, the Commission's Decision (approving a concentration) will be considered inexistent. Such result would indeed be a **nightmare**. I have not seen a case where, due to such a situation, the Commission had requested to "undo" an already implemented concentration or acquisition, and indeed such a measure would probably be unfeasible or unrealistic. However, the Commission might impose **sanctions** (for instance impose a **divestiture**) and **fines**, and these are most serious threats. In some countries the responsible organ/organs of a party (such as the CEO) might face imprisonment.

27. Waiver of setting Aside Procedures; Sanction in Case the Award Would Not be Honoured

In several cases, parties waived in advance any kind of recourse against the arbitral award. Such a waiver, however, may not be effective under the provisions of the national Arbitration Act prevailing at the place of arbitration.²⁰⁸

Where the arbitral process is taking place on the basis of an *erga omnes*-offer (but without an explicit agreement), the waiver might be somehow questionable. One would then have to argue that the third party, accepting the offer to arbitrate, also accepted the waiver of any recourse against the resulting award.

A rather peculiar (and pathological) solution was adopted in *SEB/Moulinex*, providing for a referral back to the president of the Lyon Commercial Court to act as a *référé*.

In some cases, very short time limits were fixed for the losing party to comply with the terms of the award. This is another specific element which is hardly seen in normal arbitration clauses.

In other cases, there are explicit requirements for the arbitral award to be notified to the European Commission, even with the provision that the Commission's powers will not be affected by such award (see *BSkyB/Kirch*).

The *Dow Chemical/Union Carbide* solution is also quite unique, in that it requires compliance by the third party with the resulting award within one month, failing which Dow may apply to the Commission for the purpose of being relieved from its undertaking in respect of that party. This can be described as a rather clever kind of built-in self-executing mechanism and sanction.

²⁰⁸ In Switzerland, for instance, such a waiver, if explicitly made by all the parties, would be valid under the terms of Article 192 PIL, if all of the parties were non-Swiss. Explicit consent will be required, whilst a consent simply by way of reference to another document, or to institutional rules such as those of the ICC, would not be sufficient.

X. Proposals and Recommendations

Based on the above *tour d'horizon*, we would like to submit some thoughts, proposals and recommendations:

1. Some Observations Regarding the Cases Decided So Far

Some important matters may be recalled:

- The process in this area is an **arbitration *sui generis***; its specificity must be recognized.
- The parties should carefully select a **neutral venue** in an arbitration-friendly country.
- The **language** of the proceedings is an important matter to be determined or agreed upon.
- An appointing authority or an **arbitral institution** such as the ICC (or LCIA) to assist, if need be, for the purpose of nominating a qualified arbitrator or presiding arbitrator, would seem to be very important.
- While some of the most experienced arbitral institutions may provide excellent services, one nevertheless may need to make sure that the institution will not super-impose its own general rules over and above the particular rules required by this type of a **regulatory arbitration**. Arbitral institutions, such as the ICC, may be in the process of reflecting on special procedures or "**Best Practices**" adapted to serve for the purpose.
- Where reference is made to institutional rules such as the ICC or LCIA, it should be avoided to include provisions which do not match with the philosophy of the named institution; it makes little sense, for instance, to provide that the arbitrators shall fix the deposits for their own fees when, as is widely known, the ICC and the LCIA regard this to fall within their own prerogatives (compare *UIP; Vivendi/Canal+/Seagram; Shell/DEA*).
- Where reference is made to an institution, it should be avoided to provide for a local court to serve as an appointing authority for making default appointments (the solutions in the *UIP-case*, the *EBU-case* is not recommended).
- The appointment of an arbitrator by one party only in case of default by the other party (an old English solution) should clearly be avoided (compare e.g. *BA/TAT* above), as this might be viewed critically under the perspective of neutrality of the process.
- A requirement that the arbitrator needs to be approved by the Commission (see *BA/TAT*) will be a novelty for the "traditional" arbitrators, but must be understood

against the background that the arbitrator is, in actual fact, going to serve **as the prolonged arm** of the Commission.

- The confusion between an **expert** (with a limited fact-finding mission only) and the broader mission of an **arbitrator** (who will not only have to determine factual issues, but also the resulting legal issues and civil law remedies) should clearly be avoided; see the *EBU-case*; the two tasks are different, and have different impacts.
- An **organisational meeting** between the arbitrator and the parties right at the start of the procedure will certainly be required in all cases so as to agree on all matters of timing and procedure.
- The Arbitrator (or Arbitral Tribunal) should be given an explicit authority to rule on **interim relief**.
- It would not seem necessary that the Commission should approve the arbitral process as such (see e.g. *BSkyB/Kirch*); nevertheless, the Commission will have to be **kept updated**, and the arbitrator may have to submit copies of his/her orders or directives, or may have to submit monthly or other **periodic progress reports**, along with a timetable for the current and future proceedings.
- Likewise, we do not think that copies of the parties' submissions/memorials and supporting documents should be submitted to the Commission.
- **"Russian roulette"** provisions (see above in *Shell/BASF* and *Dow/Union Carbide*) are highly interesting and, with all the hesitations one may have, may work well in practice, as they have worked in commercially similar situations such as in joint-ventures.
- Specific provisions regarding the **allocation of the burden of proof** are very helpful; the Commission's approach in this area appears to be quite "tough" vis-à-vis the notifying enterprise, in that the latter will have a very heavy case to meet; there is quite some justification for this approach, as practically all of the relevant information may be under the control of the notifying undertaking.
- Nevertheless, the **prima facie Evidence Rule** is indeed a "serious" matter (see above in re *Vodafone/Mannesmann*; *Vivendi/Canal+/Seagram*; *Telia/Sonera*; *Shell/DEA*) and may have to be applied under a "rule of reason-test".
- The **time-frame** should be realistic, and it is necessary to allow due process to be observed so as to maintain the integrity of the procedure.
- Time-limits should be **adjusted** having due regard to all circumstances; extensions should be possible (not all cases are equally time-critical, and the determination of quantum in respect of civil law claims may not be of any particular urgency); one may wonder how a complicated matter can effectively be resolved within a one month (in *Vodafone/Mannesmann* and in *Telia/Sonera*) or two month (*Alcatel/Thomson*) time period.
- **Open questions:** Could the Commission or a delegation of its case-team **participate** during the proceedings? Could the Commission be asked to provide **specific information**, or to render an **opinion**?

- Should, for instance, members of the Commission's Enforcement Unit be allowed to **take part in hearings**, as silent listeners, or as active participants? Should they be allowed to testify as **witnesses**, or to comment on the matter from the Commission's perspective? – All of these are questions which may arise and will have to be considered on a case by case basis.
- The arbitrator will have to distinguish clearly **two types of decisions**, as discussed above; his determination(s) in Phase One and award(s) in Phase Two will certainly have to be communicated to the Commission.

2. Best Practice Guidelines and Model Texts for the Commission and the Merging Parties

Recognising that the timing is crucial when merging parties reach the remedies stage in merger review procedures, commitments offered to resolve the Commission's competition are negotiated under heavy time pressure. The availability of Best Practice Guidelines and **the use of standardised models** for (i) the commitment to submit behavioural undertakings to arbitration, as well as for (ii) the arbitrator's mandate, would considerably relieve the burden of negotiating rather standard terms under time constraints, would expedite the procedure and allow the merging parties to concentrate more on the actual substance of the commitments.

The use of standard models would also ensure **consistency** across cases and will contribute to increasing the level of transparency and legal certainty for the merging parties offering commitments to the Commission, as well as to third parties which may elect to make use of the commitment to arbitrate disputes.

The standard models, however, would not intend to provide an exhaustive coverage of all issues that may become relevant. Rather, the standard models should contain the elements for some standard provisions only, leaving the flexibility to adapt the text to the specific requirements of the case in question.

The standard model for the arbitrator's mandate should be designed to apply to all remedy proceedings in both Phase One and Phase Two, therefore to all Commission decisions according to Articles 6 (2) and 8 (2) ECMR. It may be expected that any model texts will evolve, based on ongoing practice, taking into consideration both the developments of the Commission's remedies policy as well as the experience gained from working with the merging parties and the appointed arbitrators in matters as may arise in future.

The basic layout and elements of the standard models for "Commitments to Arbitrate Behavioural Undertakings" and for the "Arbitrator's Mandate" could roughly be as lined out in the following Paragraphs.

3. Draft Model Commitment Submitted to the Commission for Arbitrating Behavioural Undertakings

The following is a draft proposal which will require further reflections and adaptations to the particular circumstances:

To Fax No. 0032 2 296 4301

European Commission – Merger Task Force
 DG Competition
 Rue Joseph II 70
 B-1000 Brussels

Case M. [No. ...] [Title ...]

Commitment to Arbitrate Behavioural Undertakings

Ladies, Gentlemen,

Pursuant to [Article 6 (2)] [Article 8 (2)] [Articles 8 (2) and 10 (2), if in Phase II Commitments prior to the sending out of the Statement of Objections] of Council Regulation (EEC) No. 4064/89 as amended (the “**ECMR**”), [name of the enterprises offering the commitments] (“**the Merging Party/Parties**”) hereby provide the following Commitments (“**Commitments to Arbitrate**”) in order to enable the European Commission (“**the Commission**”) to declare [description of the operation ...] compatible with the Common Market and the EEA Agreement by its decision pursuant to [Article 6 (1) (b) ECMR] [Article 8 (2) ECMR] (“**the Decision**”).

The Commitments shall take effect upon the date of adoption of the Decision.

[Note: The following model text shall be interpreted in the light of the Decision to the extent that the Commitments to Arbitrate are attached as conditions and obligations.]

Section A – Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Arbitrating Parties: The parties as may be involved as parties in arbitral proceedings; the term includes third parties such as competitors, suppliers, customers, consumers, licensors and licensees.

Arbitrator(s): A natural person, or if in plural the arbitrators of a three-person Arbitral Tribunal, being independent from the Parties, approved by the Commission, nominated and appointed pursuant to the provisions as hereinafter stated.

Arbitral Tribunal: A tribunal consisting of three arbitrators.

Behavioural Commitments: The behavioural commitments or undertakings as more particularly defined in Section B and further described in any pertaining Schedule.

Merging Party: The Party and Parties as mentioned in the Decision, including the merged entity. For the purpose of this Model, the term shall be used as a singular [to be adjusted as per the circumstances].

Third Party: This term will include any one or more third party/parties, such as competitors, suppliers, customers, consumers, licensors and licensees.

Section B – The Behavioural Commitments

In order to maintain effective competition, the Merging Party commits itself to honour the following Behavioural Commitments: [description of the behavioural commitments to be observed and honoured *inter partes* and/or vis-à-vis the Third Party].

The Behavioural Commitments shall be valid as from the effective date of the Decision for a period of [months/years].

Section C – Providing for a Monitoring of Compliance by Way of Arbitration

The Merging Party accepts that its compliance with the Behavioural Commitments shall be monitored by way of arbitration.

As regards disputes or claims between the Merging Party and another merging party or the merged entity named in the Decision, the commitment to arbitrate shall be valid *inter partes*.

To the extent that the Behavioural Commitments are binding the Merging Party/Parties or the Merged Entity in its/their dealings with a Third Party, the commitment to arbitrate shall be taken as an *erga omnes* commitment and offer to submit any such dispute or claim – arising under or in connection with any of the Behavioural Commitments, or in relation to any contracts existing or entered into in connection with any of the Behavioural Commitments – to arbitration, or to accept a Third Party’s reference to arbitration, to the exclusion of the national courts.

Any third party claimant, intending to bring a case against the Merging Party/Parties or Merged Entity alleging a violation of any of the Behavioural Commitments, may avail itself of the present commitment and offer to arbitrate undertaken by the Merging Party/Parties or Merged Entity, by initiating the proceedings by means of a Notice of Arbitration or a Request for Arbitration. In so doing, the third party claimant will have accepted the offer embodied in the present commitment to arbitrate, and will – also for the purpose of the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 – be taken to have agreed to the terms as herein stated, whether or not a separate written arbitration submission of all of the parties involved in the arbitration will be established at the beginning of the proceedings.

Section D – Selecting *ad hoc* Arbitration or Institutional Arbitration

[Note: There are three different types of arbitrations, and one of the Variants below should be chosen.]

Variant 1: The arbitration shall be an *ad hoc* arbitration, governed by the Arbitration Act applicable at the seat of the Arbitrator or the Arbitral Tribunal.

Variant 2: The arbitration shall be an *ad hoc* arbitration governed by the 1976 UNCITRAL Arbitration Rules and the provisions of the Arbitration Act applicable at the seat of the Arbitrator or Arbitral Tribunal.

Variant 3: Any disputes or claims shall be referred to the following arbitral institution and its Rules as in force as at the date when initiating the arbitral proceedings: [specify e.g. ICC International Chamber of Commerce, headquartered in Paris (ICC Rules of Arbitration of 1998), LCIA London Court of International Arbitration (LCIA Arbitration Rules of 1998), CEPANI (Rules for Conciliation and Arbitration of the Centre Belge pour l’Etude et la Pratique de l’Arbitrage National et International), Zürich Chamber of Commerce (International Arbitration Rules of the Zürich Chamber of Commerce, respectively – as from early 2004 – the Swiss Rules of International Arbitration, administered by the Zürich Chamber of Commerce)].

Section E.1 – Nomination and Appointment of the Arbitrator/Arbitral Tribunal for an ad hoc Arbitration

[Note: The nomination process may be different for *ad hoc* arbitrations and institutional arbitrations; basically, in *ad hoc* arbitrations, the Arbitrators are “appointed” by the Arbitrating Parties, whereas in institutional arbitration, the Arbitrating Parties may only “nominate” or “designate” the Arbitrator or the Chair-Person, making the nomination known to the institution, and it will then be for the institution to make the formal “appointment”; this is so under the ICC Rules as well as under the LCIA Rules; hence, the wording differs on the use of the terms “nomination” and “appointment”.]

Where Section D provides for *ad hoc* arbitration:

[Where a sole Arbitrator is to be chosen:] The claimant party (“the Claimant”) [the Claimant may typically be a Third Party initiating a claim against the Merging Party or Merging Parties or the Merged Entity] and the respondent party (“the Respondent”), [where the claim is initiated by a third party, the respondent will either be the Merging Party/Parties, or the Merged Entity] shall jointly agree upon the appointment of a Sole Arbitrator, within a period of no more than [seven] business days from receipt of the Request.

[Where a three person Arbitral Tribunal is to be constituted:] The Claimant shall appoint its Arbitrator in the Request for Arbitration. The Respondent shall, within [seven] business days from receipt of the Request for Arbitration, appoint its Arbitrator. Thereupon, the two nominated Arbitrators shall – within [seven] business days – jointly appoint the third Arbitrator serving as the Chair-Person.

Should Claimant and Respondent fail to agree on the appointment of a Sole Arbitrator, or – in the case of a three person Arbitral Tribunal – should either party fail to appoint its Arbitrator, or should the two party-nominated Arbitrators fail to agree on the appointment of the Chair-Person, the default appointment shall be made by [... specify a recognised arbitral institution with experience to serve as appointing authority in this particular area, such as the ICC or, if available, an institution at the place of arbitration; many institutions, including the ICC and LCIA, accept such a mandate to serve as appointing authority, even though the arbitration will not as such be administered under the institution’s rules]. Should the default appointment not be made within [ten] days, the Commission may intervene by designating itself an appointing authority.

Section E.2 – Nomination and Appointment of the Arbitrator/Arbitral Tribunal for an Institutional Arbitration

Where Section D provides for institutional arbitration:

Should Claimant and Respondent fail to jointly agree within [seven] business days on the nominee designated for appointment as Sole Arbitrator, or – in the case of a three person Arbitral Tribunal – should either party fail to designate its nominee to serve as Arbitrator, or should the two party-nominated Arbitrators fail to agree on the nomination of the Chair-Person, the default appointment shall be made by [... specify a recognised arbitral institution with experience to serve as appointing authority in this area, such as the ICC or, if available, an institution at the place of arbitration].

Section F – Multiple Parties: Constituting the Arbitral Tribunal

Where an arbitration providing for a three-person Arbitral Tribunal is initiated by more than one party as claimants, or is directed against more than one party as respondents, the multiple parties shall endeavour to agree on one jointly nominated Arbitrator. Should they not agree, the entire

Arbital Tribunal – without regard to any party’s nomination already made – shall be appointed by the arbitral institution or, in case of an *ad hoc* arbitration, by the appointing authority as may be designated by the parties. Should the default appointment not be made within [ten] days, the Commission may intervene by designating itself an appointing authority.

Section G – Independence and Impartiality of the Arbitrator/Arbitrators

The Sole Arbitrator or, as the case may be, the party-nominated Arbitrators and the Chair-Person, shall be independent of any of the Arbitrating Parties and shall be and remain impartial. Upon appointment, each Arbitrator shall sign a Declaration of Independence and Impartiality, and shall disclose any matters which may, in the eyes of the parties, give rise to doubts as to his/her independence or impartiality.

Where, in an *ad hoc* arbitration, an Arbitrator’s Declaration of Independence and Impartiality contains a disclosure or qualifications, the other party may object to that Arbitrator, whereupon another Arbitrator will have to be appointed by the respective party.

In the case of institutional arbitration, an objection against a nominated Arbitrator shall be decided by the designated institution.

As early as possible upon nomination or appointment, each Arbitrator shall submit his/her detailed professional CV.

Section H – Notification of the Appointment of the Arbitrator/Arbital Tribunal to the Commission

In all cases, the parties involved in the arbitration shall inform the Commission on any nomination or appointment of an Arbitrator or Chair-Person, submitting copies of their detailed professional CV (or CVs). In exceptional circumstances, the Commission may object against any appointee, whereupon the nomination process will have to be repeated.

Section I – Place of Arbitration

The place of arbitration shall be [...] specify a convenient, preferably a neutral place of arbitration; the place of arbitration shall mean the juridical seat of the Arbitrator or of the Arbitral Tribunal, creating a legal link to the Arbitration Act applicable at the place of arbitration]. The Arbitrator (or the Arbitral Tribunal) may hold hearings, meetings and deliberations at any convenient geographical place in its discretion.

Section J – Language

The arbitration shall be conducted in the [...] language.

Section K – Phase One and Phase Two Proceedings

The Arbitrating Parties and the Arbitrator(s) recognise that the arbitral scrutiny will have to establish whether the Behavioural Commitments laid down in the Decision have been complied with. In this regard, the Arbitrating Parties and the Arbitrator(s) as well as the arbitral institution (if any) will have to recognise the specificity of this type of a regulatory arbitration.

As a rule, the Arbitrator(s) shall, in a first phase (“Phase One”), determine whether or not the Behavioural Commitments, in the Arbitrator(s) view, have been honoured and complied with. The determination of the Arbitrator(s) thereon shall be submitted to the Arbitrating Parties as well as to the Commission in the form of a determination (“the Phase One Determination”) within the time-frame as may be specified in Section L.

The Commission may submit comments in respect of the Phase One Determination, raise questions or voice objections, whereupon the Arbitrator(s) and the Commission shall consult whether or not further procedural steps or investigations are to be made.

It is understood that the Commission reserves its right and prerogative to draw its own conclusions from the Phase One Determination.

Where civil law claims (such as claims for specific performance, damages, tortious claims) are to be determined, the Arbitrator(s) may, after consultation with the parties, bifurcate the proceedings and determine such issues in Phase Two of the proceedings. The determination of such issues shall be made by rendering an Arbitral Award.

The parties recognise that the Award shall constitute an arbitral award for the purpose of the UN Convention on the Recognition and Enforcement of Arbitral Awards of 1958.

Section L – Provisional Time-Table and Overall Time-Frame

At the beginning of the arbitral proceedings, the Arbitrator(s) shall, upon a preparatory conference with the Arbitrating Parties or after consultation with them, establish a provisional time-table for the purpose of scheduling the subsequent proceedings. In case of bifurcation of the proceedings, a separate provisional time-table shall be established for Phase Two.

The arbitrating parties as well as any appointed Arbitrator(s) shall recognise that an efficient accomplishment of the arbitral proceedings shall be of essence. The Arbitrating Parties recognise that the Commission will expect a determination by the Arbitrator/Arbitral Tribunal on compliance regarding the Commitments within [...] months.

Any prolongation of such time-frame shall require prior consultations between the Arbitrating Parties, the Arbitrator(s) and the Commission.

The determination of monetary claims (under Phase Two) shall be made within a time-frame fixed in consultation with the Arbitrating Parties, the Arbitrator(s) and the Commission.

Section M – Permanent Arbitrator(s)

Where compliance of the Merging Party is to be monitored over a long period of time, such as several years, and where at several moments in time an arbitral monitoring may have to be exercised, a permanent Arbitrator will have to be appointed to assume such function.

Section N – Rules Governing the Proceedings

The proceedings shall be determined by the Arbitrator(s) in consultation with the Arbitrating Parties or, failing an agreement, by the Arbitrator(s), without having regard to the rules of any national Code of Civil Procedure.

In all cases, the Arbitrator(s) shall act fairly and impartially as between the Parties and shall ensure that each Arbitrating Party has a reasonable opportunity to present its case.

Section O – Interim Relief

The Arbitrator(s) shall be authorised, at the request of a party, to issue any provisional orders or take other interim or conservatory measures deemed appropriate, and may make the granting of any such measure subject to appropriate security being furnished by the requesting party.

Section P – Establishing the Facts, Hearings, Evidence

The Arbitrator(s) shall proceed within as short a time as possible to establish, by all appropriate means, the relevant facts for determining compliance with the Commission's Decision and the Behavioural Commitments.

The Arbitrator(s) shall, upon request or upon his/their own initiative, hold one or more hearings for the purpose of oral arguments, examinations of party representatives, fact witnesses or expert witnesses, and shall determine whether, and if so in what form, a record shall be made of any such hearings. If any of the Arbitrating Parties fails to appear without valid excuse, the Arbitrator(s) shall have the power to proceed with the hearing and to render the determination or arbitral award.

The Arbitrator(s) may, if deemed necessary in particular circumstances, allow written or oral comments from third parties such as competitors, customers, consumers, suppliers, licensees.

After consultation with the parties, the Arbitrator(s) may, for the purpose of a Phase One Determination, request information from the Commission, or may consult with the Commission's Case Team, or may allow the Commission to file an *amicus curiae* brief, or allow members or employees of the Commission to provide oral testimony at the occasion of hearings. Likewise, the Commission may be allowed to file any observations on the matter during Phase One of the proceedings.

The Arbitrator(s) may appoint one or more fact-, economic- or legal experts, define their terms of reference and receive their written and/or oral reports.

The Arbitrator(s) may, at the request of a party or on its own motion, order any party to produce such documents or other evidence as it considers necessary or appropriate.

The Arbitrator(s) shall determine the admissibility, relevance, materiality and weight of evidence.

The Arbitrator(s) may, if deemed appropriate under the circumstances such as access to documents, apply a *prima facie* evidence rule in the sense that a third party-claimant may only have to produce *prima facie* evidence of a breach of a behavioural commitment, whereby the Arbitrator(s) will thereupon have to find in favour of the third-party claimant, unless the Merging Party/Parties or Merged Entity can produce evidence to the contrary.

The Arbitrator(s) may take any appropriate measures for protecting trade secrets and confidential information and documents. He/they may issue protective orders for that purpose. He/they may designate a confidentiality advisor (i) for determining access to classified information, and/or (ii) for reporting to it/them as an expert on the basis of confidential information, without disclosing the confidential information to the party from whom the confidential information does not originate, or to the Arbitrator or Arbitral Tribunal.

Section Q – Adapting Behavioural Commitments to Changed Circumstances

The Commission may, where appropriate, in response to a request from one or more Arbitrating Parties showing good cause, and accompanied by a report from the Arbitrator(s):

- grant an extension of the time-periods foreseen in the Commitments, or
- prolong or shorten the term during which Behavioural Commitments must be satisfied, or
- waive, modify or substitute Behavioural Commitments.

Section R – Remuneration of the Arbitrator(s)

In the case of an *ad hoc* arbitration, the Arbitrator(s) may direct the Arbitrating Parties, in such proportions as deemed appropriate, to make one or several interim or final payments on account of costs of the arbitration.

The mode of remuneration of the Arbitrator(s) shall take into account the time spent on the matter, considering all further circumstances such as urgency and importance of the matter.

Section S – Phase One Determination and Arbitral Award

Where the proceedings are bifurcated, the Phase One Determination shall be submitted to the parties and the Commission within the required time-frame or any prolongation thereof. Phase Two shall be adjudicated by way of an arbitral award, unless the parties reach an agreement.

Section T – Decision on Costs

The Arbitrator(s) shall decide on the allocation of costs (costs of the arbitral institution (if any), fees and disbursements of the arbitrator(s), fees and expenses of any experts and the reasonable legal and other costs incurred by the parties).

Section U – General Provision

In all matters not expressly provided for in this Commitment to Arbitrate, the Merging Party as well as any other arbitrating parties are taken to have agreed that the Arbitrator(s) shall have the widest discretion to discharge the duties in the spirit of an efficient and fair case management.

Certainly, this first draft of a model text will need to be re-worked and completed. An ICC Taskforce, headed by the author, has been constituted to study these matters in cooperation with the EU Commission.

4. Draft Model Acceptance of the Arbitrator(s) Mandate

Should the Arbitrator's Mandate be memorialised by a contract signed by the merging party/ies, any third party involved, and the Arbitrator(s)? Certainly, this is a possibility, and would correspond to the model-text for the Trustee Mandate published on 2 May 2003. However, it might also be sufficient for the Arbitrator(s) to confirm his/their acceptance along the lines as roughly sketched hereinafter.

Acceptance of the Arbitrator's Mandate

The undersigned, having been designated by [...] / appointed by [...] to serve as Arbitrator, confirms as follows:

- The Arbitrator has read and studied the Commission Decision in Case M. [No. ...] [title ...] and such other pertaining documents as deemed necessary.
- The Arbitrator has read and studied the remedies offered by the Parties and, in particular, the behavioural commitments imposed by the Commission or conceded by one or more of the merging parties or the merged entity.
- The Arbitrator has moreover read and studied the commitment of the merging party or parties or of the merged entity to accept the monitoring of the behavioural commitments by a sole arbitrator or a three-person arbitral tribunal.

- The Arbitrator has read and studied all further details deemed important for accepting such a mission, including time-parameters and remuneration.
- The Arbitrator declares that he is independent of any of the parties involved in the arbitration and understands his duty to remain so throughout the proceedings and to serve as an impartial arbitrator.
- The Arbitrator acknowledges the specificity of this particular type of a regulatory arbitration and, in particular, recognises that the European Commission retains its powers and prerogatives to monitor the proceedings.
- The Arbitrator, in exercising his/her function, acts on behalf of the European Commission to ensure compliance with the conditions and obligations specified in the Decision, and accepts to assume the duties as implied therewith.
- The Arbitrator, where appropriate, may segregate the regulatory monitoring of the behavioural commitments and may proceed to deliver a Phase One Determination within the time-frame indicated in the commitment; if so, any civil law claims or disputes will have to be determined in a successive Phase Two, by rendering an arbitral award.
- The Arbitrator will keep the European Commission informed on the proceedings as well as on any determinations or arbitral awards.
- The Arbitrator shall establish a provisional time-table for the arbitral review to be made, setting out the various steps to be taken. He/she will periodically keep the Commission informed on the progress of the proceedings.
- The Arbitrator will respond to enquiries of the Commission regarding the fulfilment of the behavioural commitments and any issues or problems as may have arisen in the execution of the commitments, in particular in respect of any issues of non-compliance.
- The Arbitrator may address questions to the Commission and may make proposals where a modification of conditions, obligations (including behavioural commitments) would appear to be justified.
- The Arbitrator shall keep confidential all matters relating to the arbitral proceedings or the arbitral award.

Again, this is not more than a first proposal which will need improvement under the circumstances.

5. Best Practice Guidelines for Arbitral Institutions

Arbitral institutions such as the ICC and others will have to realise the **specificity** of this kind of regulatory arbitration, and will have to adapt their procedures to the circumstances.

- Procedures in respect of commitments in competition law matters are clearly focused.
- In most cases, they are time-sensitive (frequently, there is a need for constituting an arbitral tribunal within a few days, and a determination or award may have to be rendered within 2 or 3 months).

- Hence, parties would not be helped if they, for instance, would have to embark on a full-fledged ICC procedure (with much more generous time-limits, terms of reference etc.).
- Instead, institutions such as the ICC (and the LCIA) should consider establishing the framework for this special kind of arbitration, either in the form of **special rules or guidelines** (or, even more modestly, in the form of “Notes on Best Practices for Arbitrations under the ECMR”, or: “Notes on Best Practices in Arbitrations Reviewing Undertakings under Article 81 (3) EC and the ECMR”).
- Institutions should establish a database of experienced specialists in both areas: international arbitration **and** competition law, to whom cases can be entrusted.
- The arbitrator’s fee may have to be time-related (as for instance under the present LCIA Rules, the AAA IAR Rules (ICDR) and others), asking the proposed arbitrator to submit a quote for his hourly rate which is submitted to the parties for their approval; the ICC tariff may in many cases create difficulties, since the value in dispute may not be quantifiable.

6. Improving the Commission Notice on Remedies

The Commission Notice on Remedies²⁰⁹ contains extensive provisions regarding divestiture undertakings, but is **silent** in respect of behavioural undertakings.

We understand this silence against the Commission’s hesitation to contemplate or suggest a remedy which would put the Commission to the quite demanding task to monitor “good manners and behaviour”. However, the present report suggests a possibly ideal solution, by **outsourcing that task** to competent arbitrators.

It would therefore stand to reason to **revise** the Commission Notice by devoting an additional part to the requirements for behavioural remedies and their monitoring.

Moreover, as proposed above in Paragraphs 3 and 4, **Best Practice Guidelines** should be established, accompanied by **two Model Texts** along the lines as discussed.

7. Final Conclusions: The EU Commission and the Arbitrator Working as a Unique and Complementary Tandem

The use of an arbitrator or arbitral tribunal mandated to monitor behavioural commitments **offers significant advantages and improvements** to the merger control process:

- **Less rigidity:** Structural remedies, as in past practice preferred by the EU Commission (and preferred as well by the US DOJ and FTC), impose rigid and indeed

²⁰⁹ OJ 2001 C68/3.

drastic measures cutting out, almost like a *de-membratio*, operative parts of an enterprise. Hence, less rigid and less drastic solutions need to be devised.

- **More flexibility:** Behavioural commitments, in contrast, will not cut out parts of an enterprise, will not amount to a *de-membratio*, but will require the enterprise to use its market power with respect for the businesses of other or weaker competitors, suppliers, licensees, customers and consumers. As such, **behavioural measures are more flexible and more responsive** to market structures and changes that inevitably will occur over time.
- **More dynamics:** Behavioural commitments, therefore, offer a dynamic approach with a view to ascertaining a workable competition. Where the need occurs, they can be reviewed by the Commission upon a request of the parties, possibly backed up by an opinion submitted by the arbitrator or arbitral tribunal; hence, they allow **an adaptation to changed and changing circumstances**.
- **Less speculation over the future:** The merger review requires the Commission to **predict the future, almost like a fortune-teller**, and we have seen the impressive care the Commission has taken in many of its decisions reviewed above, when making its **ex ante assessment** of the likely impact of a proposed concentration on future competition. A difficult task indeed – and despite all the care, the Commission might get it wrong! For instance, market predictions in the field of commercial air-crafts (as stated in the *Boeing/McDonnell Douglas* Decision) were superseded by the down-turn since 2001. And, more recently, the CFI had to put the Commission to a more exacting and indeed **high standard of proof** not only regarding actual market shares and market dynamics, but – very particularly and explicitly – also regarding its prognosis of future behaviour and effects on the market, for instance in respect of anticipated **co-ordinated effects** (CFI in *Airtours v/Commission*), **unilateral effects or portfolio effects** (CFI in *Schneider v/ Commission* and *BaByliss v/Commission*), **conglomerate effects** (CFI in *Tetra Laval/Commission*), **range effects** (CFI in *BaByliss/Commission*), **estimated economic power** of the merged entity (in *Schneider*), **bundling and leveraging** (in *Tetra Laval*).²¹⁰ – The imposition of behavioural commitments, however, would provide a flexible solution and would remove from the Commission's shoulders the painful duty to speculate over the quite unpredictable future.
- **Uncertain future market developments**, therefore, rather call for a flexible approach in terms of requiring behavioural remedies, instead of imposing "hard and fast" structural remedies in terms of a divestiture.
- **More demanding monitoring tasks:** Behavioural commitments, however, require an effective monitoring over the time, sometimes over a period of 10 or more years, and such a monitoring may be an exacting task which is **best en-**

²¹⁰ The CFI, for instance in *Schneider*, rejected the Commission's mere presumptions of future behaviour and required adequate proof or at least "**convincing evidence**". In *Tetra Laval*, the CFI concluded that the Commission **erred** in its prospective assessment of the effects of the merger. – For the references of these cases, see Parts III and IV above.

trusted to an arbitrator or arbitral tribunal experienced in both, antitrust matters and arbitral case management.

- **More thoroughness:** An arbitrator or arbitral tribunal missioned to examine compliance with behavioural commitments may have to devote significant effort and time to analyse the matter in proceedings which **respect the “rule of law”**, and which will ascertain the requirements of the so-called **“due process”**. While DG COMP has established an Enforcement Unit to oversee compliance with undertakings, an arbitral process may be better suited and will alleviate DG COMP’s burden. Quite in the sense of Commissioner Monti’s explanations regarding Regulation 1/2003, an **outsourcing of this task to competent arbitrators** will set free considerable human resources within the Commission, allowing it to concentrate on its core function as regulator, rather than absorbing significant energies in accomplishing a judicial or quasi-judicial function.
- **Co-operation:** For the purpose of monitoring compliance, the arbitrator will act as the prolonged arm of the regulator and, hence, will monitor the Commission’s requirement in practice and “actual life”.
- **Working as a tandem:** Committed to achieve the same goal, the Commission and the arbitrator carry out **intrinsic co-operative functions**, the Commission setting the pace, and the arbitrator monitoring the direction and the implementation.
- **Keeping control:** The Commission will not lose control over the process, but will be able to oversee the same and will be free to act or to react, for instance under Article 8 (4) and 8 (5) ECFR, drawing its own conclusions from the arbitrator’s findings and determinations.
- **Regulatory function:** For a large part, the arbitrator will have to carry out a regulatory function; nevertheless, he will do so respecting procedural standards and guarantees.
- **Overall solution:** Unlike the task of an **expert**, the mission of the arbitrator will, however, not stop at determining whether or not certain behavioural commitments had been complied with, but will carry the matter further by moreover offering the aggrieved party an **effective remedy**, in that the arbitrator or arbitral tribunal will have the **judicial powers and authority** to determine all civil law claims, such as claims for specific performance (for instance opening up of a network and granting access on non-discriminatory terms, effectuating supplies or granting licenses on non-discriminatory terms and the like) as well as claims for damages.
- **Finality and enforceability:** Hence, the arbitrator or arbitral tribunal – unlike an expert – is accomplishing a **dual function**, although not necessarily at the same time (as explained above when distinguishing the Phase One Determination from Phase Two and the resulting Award): he carries out **a regulatory task and a judicial task**.
- **It is this combination** of the **outsourced regulatory task and the judicial task**, accomplished by a competent arbitrator, which – in future – will hold the

key for an effective and dynamic merger review. **It will be the most efficient tool to review and, if need be, sanction anti-competitive behaviour arising out of a concentration, and to install in business practice the objectives which the Commission aims to achieve through its merger control.**

* * *

The author hopes that these new reflections will provoke much thought in future debates, within the Commission, within the ICC Taskforce established to study these issues, at upcoming conferences such as IBA in San Francisco in September 2003, at the Milano Symposium in October 2003 and others.

* * *

Annexes

- ***Annex 1:***
Summary Regarding the Commission's Reference to "arbitration" as a Remedy
- ***Annex 2:***
Case Scenarios of Antitrust Arbitrations

Annex 1: Summary Regarding the Commission's Reference to "arbitration" as a Remedy

A. Index to Cases

Case	Year	Type of Decision	Subject matter of referred dispute
1. Campari	1977	Art. 81 (3)	Interpretation and performance of agreements
2. UIP	1989	Art. 81 (3)	Product allocation or access to exhibitor screen space, <i>erga omnes</i> offer
3. EBU	1993	Art. 81 (3)	Dispute over the access fee where all other conditions of access have been agreed
4. P&I Clubs	1999	Art. 81(3)	Appeal against a refusal of re-insurance
5. BiB/Open	1999	Art. 81(3)	Any dispute
6. Elf/Minol	1992	Merger	Offers to be extended to competitors; <i>erga omnes</i>
7. British Airways/TAT	1992	Merger	Availability of slots
8. Swissair/Sabena (II)	1995	Merger	Availability of slots
9. Alcatel/Thomson CFS-SCS	1998	Merger	Non-discrimination obligation
10. Carrefour/Promodes	2000	Merger	Application of commitments
11. BSKyB/Kirch Pay TV	2000	Merger	Implementation of undertakings (third party access)
12. Shell/BASF/JV-Project Nicole	2000	Merger	Consideration for a License or Non-Assert
13. Vodafone Airtouch/Mannesmann	2000	Merger	Non-discriminatory access to network
14. Glaxo Wellcome/SmithKline Beecham	2000	Merger	Dispute relating to licensing of a drug
15. Vivendi/Canal+/Seagram	2000	Merger	Access to Universal's music content on a non-discriminatory basis regarding the pricing and terms and conditions
16. Pernod/Diageo/Seagram	2001	Merger	Allocation of Seagram venture assets
17. SEB/Moulinex	2001	Merger	Use of trademark
18. Telia/Sonera	2002	Merger	Application of the non-discrimination obligations
19. Du Pont/ICI	1992	Merger	Third party disputes; <i>erga omnes</i> offer to arbitrate
20. Kimberley-Clark/ Scott	1996	Merger	Any dispute relating to purchase of divested business

Case	Year	Type of Decision	Subject matter of referred dispute
21. Boeing/MDD	1997	Merger	
22. Guinness/ Grand Metropolitan	1997	Merger	Supply of whisky to third party
23. Danish Crown/ Vesjyske Slagterier	1999	Merger	Appointment of board members
24. Sanitec/Sphinx	1999	Merger	Purchase of divested business
25. Allied/Honeywell	1999	Merger	<i>Erga omnes</i> offer to arbitrate; unlimited duration
26. Dow Chemical/ Union Carbide	2000	Merger	Granting of licences / divestiture of technology; <i>erga omnes</i> offer to arbi- trate
27. Shell/DEA	2001	Merger	Access to certain terminal facilities, during a term of 10 years
28. BP/E.ON	2001	Merger	<i>Erga omnes</i> offer
29. Südzucker/ Saint Louis Sucre	2001	Merger	"Intervention price" contained in Framework Supply Agreement
30. General Electric/ Honeywell	2001	Merger: Prohibition under Art. 8 (3) EECMR	Proposed arbitration scheme for any third party (<i>erga omnes</i>); undertaking not to engage in bundling practices.

B. Mechanisms of Arbitration

Case	Notice requirement to initiate arbitration	Number of arbitrators	Method of Appointment of arbitrators
1. Campari		Panel of three arbitrators to produce "an amicable settlement"	
2. UIP	Written letter, giving notice	Sole arbitrator or panel of three	Sole arbitrator appointed jointly or three (one each, and third appointed by arbitrators; If the arbitrators do not agree, the third arbitrator shall be appointed by the President of the Court of Appeals having jurisdiction in commercial matters in the relevant country
3. EBU	Request of the non-member	Arbitration by independent expert(s) (!)	The expert(s) will be nominated jointly by the parties. Failing agreement, nomination will be by the president of the competent Court of Appeal in the case of national arbitration (concerning access for national channels) and by the president of the International Chamber of Commerce in the case of international arbitration (concerning access for pan-European channels).
4. P&I Clubs		Panel of three arbitrators	Parties will designate one arbitrator each within 14 days of the request for arbitration being submitted, and the third, to be designated by the two others within 10 days of their appointment; Personal requirement: the third arbitrator must be a senior lawyer experienced in commercial and insurance matters
5. BiB/Open			
6. Elf/Minol		"Arbitration by mutually agreed experts" (!)	
7. British Airways/ TAT		Sole arbitrator, to be agreed by the parties	By mutual agreement; absent an agreement, BA alone will have the right to nominate an arbitrator, for confirmation by the Commission
8. Swissair/ Sabena (II)		Sole arbitrator	SWISSAIR or SABENA will nominate an arbitrator
9. Alcatel/ Thomson CFS-SCS		European Space Agency – Director	Experienced arbitrator, either a manager of ESA (European Space Agency) or other

<i>Involvement of European Commission</i>	<i>Arbitration procedure (incl. place of arbitration etc.) and Further Remarks</i>	<i>Time period for arbitration</i>	<i>Effect of the arbitral award</i>
Parties are to inform the Commission immediately of all awards made; Commission may amend the Decision	Arbitration in Milan , except for one agreement with arbitration in Switzerland		
	ICC Rules. Note: The default appointment for the third arbitrator would not seem to be compatible with the ICC Rules! Likewise, the provision regarding deposits is not compatible with ICC	Arbitral award is to be made within five months after the date on which all the arbitrators accepted office	
EBU is to inform the Commission of all arbitration procedures concerning disputes under the access scheme and of all decisions regarding applications for membership by third parties	Complete text of the (access) scheme can be obtained by interested third parties from the EBU (including arbitration process)		The expert(s) shall fix the access fee. The decision shall be final and binding
	The arbitrators will determine their own procedures and will act with due expedition		
	Appropriate and independent arbitration procedure		
Appointment of arbitrator will fall to be confirmed by or on behalf of the Director General for Competition of the Commission	Independent arbitration		
Appointment of arbitrator will fall to be confirmed by or on behalf of the Director General for Competition of the Commission	Independent arbitration		
Resort to arbitration and decisions will have to be notified to the Commission. Annual report of arbitrator	Independent arbitration, procedure governed by the French Code de Procédure Civile, in Paris , explicit authority to decide on interim relief	Award to be rendered within 2 months	Award to be honoured within shortest time period

Case	Notice requirement to initiate arbitration	Number of arbitrators	Method of Appointment of arbitrators
10. Carrefour/ Promodes		Sole arbitrator	Jointly appointed. In absence of agreement, either by the president of the Chamber of Commerce of Paris or Madrid
11. BskyB/ Kirch Pay TV			
12. Shell/ BASF/ JV-Project Nicole		Arbitration panel	
13. Vodafone Airtouch/ Mannes- mann	Written notice – within 14 days response by other party		One arbitrator each. The arbitrators so appointed shall appoint another arbitrator to be president of the arbitral tribunal within 7 days after both have been nominated
14. Glaxo Wellcome/ SmithKline Beecham		Sole arbitrator	Chosen by agreement between the parties, failing which the arbitrator shall be chosen by President of the Law Society of England and Wales
15. Vivendi/ Canal+/ Seagram	Written notice	Panel of three	One arbitrator each. The arbitrators so appointed shall appoint another arbitrator to be president of the arbitral tribunal within 7 days after both have been nominated
16. Pernod/ Diageo/ Seagram			
17. SEB/ Moulinex	Written letter (registered), refer dispute within 15 days to arbitration	Sole arbitrator	Joint by parties or, failing them, by Président du Tribunal de commerce de Lyon
18. Telia/ Sonera	Written notice	Panel of three	An arbitrator appointed by each party. Arbitrators shall appoint third arbitrator

<i>Involvement of European Commission</i>	<i>Arbitration procedure (incl. place of arbitration etc.) and Further Remarks</i>	<i>Time period for arbitration</i>	<i>Effect of the arbitral award</i>
	Established by arbitrator guided by principles of impartiality, fairness and justice		
Commission will approve arbitration process or lay down a process itself (!)	Arbitrator shall take full account of any prior decision taken by another arbitrator, court or regulatory body on matters covered by the commitments		Final and binding upon all persons submitting to arbitration; arbitral award does not affect Commission's powers under the Treaty or the ECMR
	Pendulum arbitration (" Russian roulette "): each party will submit a single proposal for consideration to the arbitration panel which can only decide in favour of one of the two submitted proposals in its entirety		
To establish a "fast track dispute resolution procedure"	Rules of the London Court of Arbitration; detailed fast track procedure; Prima facie Evidence Rule Place: in London	Make a decision within one month of the appointment of the third arbitrator	
	Rules of the London Court of International Arbitration		
	ICC Rules , Place: in London Prima facie Evidence Rule . For the arbitrators to fix the deposits.		
	Arbitrator has an irrevocable instruction to conclude arbitration proceedings; no details provided		
	Place: Lyon. Terms of Reference within one month. The president of the Lyon Commercial Court to serve as the référé (!!)	Award within 4 months	Waiver of setting aside remedies, but referral to the president of the Lyon Commercial Court
Fast track dispute resolution procedure' for three years	Rules of the Stockholm Chamber of Commerce/Helsinki Chamber of Commerce . Prima facie Evidence Rule . Confidentiality requirements. Proceedings in either Swedish or Finnish.	Decision within one month of appointment of third arbitrator	

Case	Notice requirement to initiate arbitration	Number of arbitrators	Method of Appointment of arbitrators
19. Du Pont/ICI			
20. Kimberley-Clark/ Scott			
21. Boeing/ MDD			
22. Guinness/ Grand Metropolitan			
23. Danish Crown/ Vesjyske Slagterier		Sole arbitrator, who must be a chartered accountant	If the parties have not within 14 days after the last of the two votes agreed on the choice of a sole arbitrator, the President for Maritime and Commercial Court in Copenhagen shall act as sole arbitrator
24. Sanitec/ Sphinx		Sole arbitrator	Jointly approved
25. Allied/ Honeywell		Sole arbitrator	Experienced, independent arbitrator approved by the Commission
26. Dow Chemical/ Union Carbide		Panel of three	One arbitrator selected by each of the parties and the chair selected jointly by these two arbitrators
27. Shell/DEA	Written notice	Panel of three	An arbitrator appointed by each party. Arbitrators shall appoint third arbitrator to be president
28. BP/E.ON			Arbitrator appointed by agreement, or by the Dusseldorf Chamber of Commerce
29. Südzucker/ Saint Louis Sucre			
30. General Electric/ Honeywell			

Involvement of European Commission	Arbitration procedure (incl. place of arbitration etc.) and Further Remarks	Time period for arbitration	Effect of the arbitral award
	Independent arbitration		
	LCIA Rules		
	First stage will be an expert determination ; second stage an arbitration before a sole arbitrator who is to be an accountant by profession No details on the procedure to be adopted		
The arbitrator is to be approved by the Commission			
	The Commission to be kept informed on the procedure	Decision within one month	No appeal
	Pendulum arbitration (" Russian roulette "). Rules of Arbitration of the Netherlands Arbitration Institute (NAI Rules). Place: Amsterdam . If the licensee does not abide by the decision, Dow may request the Commission to relieve it from its undertaking		Compliance with the Award by the licensee within one month; otherwise Dow may apply to the Commission
	Independent expert to oversee the operation. In case of dispute: ICC arbitration, in London . Prima facie Evidence Rule Provisions re confidentiality The arbitrators to fix the deposits (!)	Award within one month (!)	
	The Commission feared that the arbitration scheme would give rise to endless disputes in which the Commission might have to participate as the recipient of the undertakings. The merger was prohibited.		

Annex 2: Case Scenarios of Antitrust Arbitrations

Types of Competition Law Issues Submitted to Arbitral Tribunals in the 1990s

It may be illustrative to give an account of the manifold competition law and antitrust issues which, within the last five years, were submitted to arbitral tribunals:

(i) Cases and Issues under Article 81 (1) EC

(1) Does an agreement between a **parent company and a subsidiary** fall under the scope of Article 81 (1) EC? In the same context, is the standard practice that the French subsidiary shall not export to Switzerland nor to Germany a violation, having regard to the particular structure of the **concern** or the group of companies? What elements will constitute effective control of the parent company over its subsidiaries under the criteria of Article 81 (1) EC thereby justifying a qualification as a single economic unit?

(2) How should trade practices and **apparent parallelism of behaviour** of the market be evaluated? When is it justified to conclude that the parallelism was triggered as a reaction to the market? When would it have to be qualified as a **conscientious concerted practice**? – This issue requires extensive evidence proceedings, examinations of witnesses and detailed reports in the sense of market surveys.

(3) When is the **trade between the Member States affected** in the framework of a contract between a Japanese producer and a Swiss distributor? Was, under the particular circumstances, a **merely potential impact** sufficient, or should the Arbitral Tribunal be impressed or guided by the allegation that the strong territorial restriction rather had a pro-competitive effect, enhancing trade and competition, and not the opposite?

(4) Should an Arbitral Tribunal be guided by the **de minimis Notice** in a **horizontal** relationship with an involved market share of probably below 5% where, however, **cumulative restraints** were imposed on the free marketing of goods?

(5) Was it a critical provision of the manufacturer to set **clear milestones to its distributor** which could only be achieved through an **aggressive** marketing of the products and through certain measures installed to keep the price at a very high level? Was the additional requirement imposed on the distributor to submit **computerized lists of concluded sales** to the manufacturer of a nature to give him indirectly the control over price? Was such an information system responding to a **legitimate** goal of the manufacturer to monitor the efficiency of its worldwide distributors? Was, in the actual case, the manufacturer **exploiting a particular market power or**

even dominant position, particularly through a vigorous policy to defend trademark infringements? Was it a significant element of the case that the Japanese manufacturer had succeeded, outside the European Union, to **prohibit grey-market imports** by invoking its trademark whereas, as it appears, it did not pursue its threat to initiate court proceedings within EC Member States seeking to avoid parallel imports (possibly on an assessment that it would not succeed, having regard to the strong views as were, in constant practice, expressed by the EC Commission and the European Court of Justice).

(6) In the framework of the same case, the issue as to **discrimination** arose in the sense that the manufacturer sold the goods to distributors **on different price levels**, apparently calculating the different leverage and protecting force of its intellectual property rights. Was such behaviour legitimate, or did it amount to a violation of Art. 81 (1) and 82 EC?

(7) Still in the same case, the legitimacy of the manufacturer's **control** over the distributor's **General Conditions of Sale** was questioned.

(8) Was it legitimate for a **US licensor of know-how** to **restrict** its licensee in one European country to manufacture **no more than a certain number of tons per year** and requiring further that the product shall **not** be sold outside the territory? The licence agreement contained **certain ancillary restraints**, all of which brought the contract very close to Article 81(1) EC. When the European licensee requested the removal of some of the restraints, withholding a significant amount of licence fees, the American licensor initiated arbitral proceedings. However, as a reaction, the European licensee then **threatened to submit** the Licence Agreement to the European Commission. The American licensor, which had so far taken a very strong stand, all of a sudden had to fear heavy fines and had to give up most of its positions in the framework of a negotiated settlement.

(9) **Tying arrangements** seem to cause frequent dissatisfaction. In a recent case, a German licensee, manufacturing products under the grant of a patent licence of an American manufacturer/licensor, was happy, as it seemed, to be able to buy certain required ancillary components from its US licensor, and thus agreed to sign, as an ancillary contract to the licence, a **separate supply contract with a minimum term of 7 years**. After 1¹² years, the German licensee discovered that **substitute products** would be available on the market that would do quite the same job, but for half of the price. It, therefore, started to buy those substitute products on the **grey market** (parallel imports, in particular from France). The US licensor initiated arbitral proceedings against its German licensee under the arbitration clause which was contained in the Licence Agreement only (**but not in the separate Supply Contract**). It claimed performance under both contracts, payment of outstanding licence fees, compensatory and other damages payable by the German licensee, further orchestrated by a request for an injunction and preliminary relief. In its Defence, the German licensee raised the jurisdictional defence that the Supply Contract was not subject to arbitration, because it did not contain an arbitration clause. However, the

Arbitral Tribunal, in a preliminary award, reached the conclusion that both contracts must be seen as forming **one single uniform transaction** (akin to the SOABI decision in ICSID Case No.ARB/82/1, ICCA Yearbook XVII/1992, 42–72, 51), but reserved for an examination on the merits to determine whether the Supply Contract was a **prohibited tying contract**. Subsequent to the jurisdictional decision, the German licensee **threatened** to submit the two contracts to the European Commission, and to request the Commission to examine in particular the following four aspects:

- Was the Licence Agreement imposed on the licensee through the market strength and dominance of the US licensor?
- Was the US licensor abusing its dominance *inter alia* by claiming exorbitant licence fees?
- Was the US licensor abusing its market power when making the German licensee agree to sign up for a seven years Supply Contract?
- Was the American licensor abusing intellectual property rights when requesting the licensee to be paid for the full life of patent protection in Germany, even though the patent was successfully challenged in 1998?

(10) In connection with the claim of a Finnish firm against the German subsidiary of a Swiss firm, the issue arose whether Claimant was entitled to address its request for arbitration not only against the German subsidiary (GmbH), **but also against the Swiss holding company** as the parent. The Swiss holding company raised the plea that it was not party to the agreement and did not sign an arbitration clause. Hence, it could not, as it argued, be sued in arbitration, and any award against it would be wholly unenforceable anywhere in the world and particularly in Switzerland. The Finnish claimant, however, argued in response that the Swiss holding company exercised control over its German subsidiary and engaged its own responsibility and liability when permitting that its German subsidiary **violate territorial and other restrictions** imposed on it. Apart from invoking an *alter ego* – situation (including arguments on the piercing of the corporate veil and under the so-called (and “famous”) “group of companies doctrine”), the Finnish Claimant also argued that the EU Commission and the ECJ, in constant practice, **had held parent companies liable for the behaviour of their subsidiaries** within the common market and, typically, imposed its sanctions and fines against the parent company under its **theory of the economic unity**. The Finnish claimant argued that an arbitral tribunal should be guided by the same notions, and that **Article II of the New York Convention** on the recognition and enforcement of arbitral awards would **not be a bar to it**.

(11) Occasionally, arbitral tribunals had to **determine the relevant market**, to establish **available demand side substitution and supply substitution** as well as potential competition in respect of a particular product. Issues centred around the notion of the existence of a contestable market under the perspective of the so-called **SSNIP Test** (i.e. the test whether the parties, in view of a small but significant non-transitory increase in price) would switch to readily available substitutes or to suppli-

ers located elsewhere. The test was conducted under the perspectives of Art. 81 and Art. 82 and difficult **evidentiary questions** arose to interpret market reports and to distinguish **marginal customers** from others.

(12) A frequent topic is the **permitted use of intellectual property rights and their exhaustion**. While the existence of such IP rights ground in national law, their use and exploitation falls under the scope of the control by Art. 81 EC. Most cases dealt with **parallel imports**, but the writer also had to deal with cases where an abuse of IP rights was alleged **due to its dominant position** according to Article 82 EC. In the context of such dispute, an arbitral tribunal will also have to determine **whether international exhaustion should be applied** (which is more consumer-friendly and is the solution adopted in Switzerland) or whether regional exhaustion (in the sense of an **EC-wide exhaustion** as per the EC Trademark Directive) should be applied.

(13) In one particular case, the writer had to deal with the issue of the **extension of patent protection in the USA due to TRIPS** and the defence by the opposing party that such an extension would be **anti-competitive under US anti-trust laws** and would give rise to treble damages in the framework of a counterclaim.

(ii) Cases and Issues under Article 81 (2) EC

(14) A particularly difficult topic for arbitral tribunals is to apply Article 81(2) EC and to deal with **the strict sanction of nullity**. Under what perspectives would it seem appropriate to determine that the nullity was of a **partial nature only**? *Quid* in the absence of a **rescue clause**? How to deal with a situation where one party, in confidence of the validity of the agreement, had **already delivered or paid**? Is the legal sanction (indeed required by Article 81(2)) and supported by leading scholars appropriate that, even in such a case, **no claim for restitution** can be entertained?

(15) Another particularly critical issue under Article 81(2) has arisen when the parties, after a 212 years arbitration, reached **a private settlement** without the assistance of the Arbitral Tribunal. They then communicated the Settlement Agreement to the Tribunal asking it to **reflect the Settlement Agreement in the framework of a so-called Consent Award** (Award on Agreed Terms). The Chairman, when receiving the Settlement Agreement, immediately realized that the Agreement provided for **an unlawful co-operation violating Article 81(1)**. – In that situation, the Chairman refused to record the Settlement Agreement (even though he thereby jeopardized the readiness of the parties to pay for the arbitrators' fees!).

(iii) Cases and Issues under Article 81 (3) EC

(16) Under the perspectives of Article 81(3) EC, an arbitral tribunal had to determine the **likelihood that a party would have obtained an individual exemption**, had it elected to submit the contract in question to the EU Commission. The par-

ty defended itself for its omission by arguing that the completion of the notification (according to Form A/B) would have involved several months of preparatory work and, in any event, it would have been extremely unlikely that the EU Commission would have rendered a decision. The other party opposed these arguments (even though it had voluntarily performed under the very same contract for more than two years before it decided to unilaterally terminate the contract, and at the same time refused to pay the last instalment of royalties). The opposing party also **requested the Arbitral Tribunal to submit the Contract** to the EU Commission and to stay the proceedings, pending a determination by the Commission on the issue whether the particular contract could have been exempted. – In this case, the Tribunal clearly said that it would **not** submit the Contract to the EU Commission on its own motion nor on the request of one of the parties, but if one of the parties elected to do so itself, the Tribunal could not prevent it and would not (as was requested by the other party) issue an **injunction** prohibiting the interested party to submit the contract. After the second hearing, the parties – assisted by the Tribunal – restructured the contractual terms and the dispute was settled amicably.

(17) **R & D co-operations** between parties are a **frequent** and always present difficult issue. In a recent case, the two “parents” (opposing parties in the arbitration) remained competitors despite the joint R & D venture. Thus, from that perspective, the joint development had no anti-competitive effect. However, they also determined, within the R & D Agreement, the terms of the future manufacturing, marketing and distribution of the product, virtually dividing the world-market and, in particular, **excluding** one of the parties from the EC market. The Agreement became even more critical since one party’s right to continue its own R & D programme was, as one party alleged, forbidden due to the terms of the Agreement. Several aspects of this agreement gave rise to **serious concerns**, for instance the market repartition (and strong market protection), coupled with further restrictions on individual R & D and a non-competition clause (all of which brought the Agreement close to some elements **black-listed** in Article 6 of the Block Exemption No. 418/85). However, in that particular case, the Arbitral Tribunal discarded those concerns.

(18) How should an arbitral tribunal react when realizing that the two arbitrating parties (both leading industrial groups outside the EC), in dispute over their own joint venture company held on a 50:50 basis, had in fact **not** created a **structural and concentrative joint-venture** but, quite to the opposite, a **non-structural co-operative joint-venture** with strong activity on the EC market? While the designated Chairman of the Tribunal reflected on the impact and thereby realized that, if it were a structural co-operative joint-venture, the parties could take advantage of a merger control clearance according to the Regulation No. 1310/97 (which, however, seemed unavailable due to the limited scope of the joint-venture as a mere distribution outlet, thus triggering the control under Article 81, but not under the merger control), the claiming party requested a temporary suspension of the proceedings (and a suspension in respect of the proper constitution of the Arbitral Tribunal). – Shortly thereafter, the claim was withdrawn.

(19) **Selective Distribution** is also an issue submitted to arbitration. In a recent case, a fashion **designer** with a world-wide brand name recognition cancelled the agreement with one of its major distributors operating a dozen or more retail stores on the basis that the looks of those stores was **not sufficiently supportive of the brand name's prestige**, an argument vigorously contested by the distributor (and owner of a chain of retail stores). The Arbitral Tribunal carried out a number of **site visits** to examine the case and to determine whether the criteria of the claiming fashion designer were **applied without discrimination**. A further issue was the legitimacy of the fashion designer's **price policy** which suggested the maintenance of high-priced products. Equally **critical**, under the perspectives of competition law, were requirements regarding **advertising** and **marketing**.

(20) In connection with a dispute over the terms of a licence agreement, a licensee had invoked that the **provision on an exclusive grant-back obligation** was a **violative restraint**, and requested a declaratory award stating that the grant-back obligation in connection with improvements on the technology was valid **only on a non-exclusive basis and against an adequate royalty**. The licensor (claimant in the proceedings) defended the provision on the argument that the Licence Agreement, in its overall context, was favourable to the licensee, particularly through its **most favoured treatment clause**.

(iv) Cases and Issues under Article 82 EC

(21) In several cases, licensees disputed the terms of the Licence Agreement on the basis that the **imposition of minimum royalties and/or the calculation of percentage royalties** (including particular rebate schemes) were invalid because the licensor abusively **exploited its dominant position**. For the Tribunal, the difficult question arose whether it should (or must) sit in judgment over the **"pricing"** of the Licence Agreement which, at the time, appeared to have been quite carefully negotiated between the parties and where, at least at the time of the conclusion of the Licence Agreement, the licensee apparently **had had another option** to obtain the technology from a different source (such that its argument under the notions of the alleged "essential facilities doctrine" appeared to be rather weak). The Arbitral Tribunal indicated orally that, in its preliminary view, the arguments of the licensee were not very conclusive or convincing.

(22) A further aspect of the same case was **the refusal of the licensor to supply updates** to the licensed technology due to licensee's default in respect of the royalties. The Arbitral Tribunal, in this regard, had to deal with a request of the licensee for **preliminary relief**, whereby the Tribunal should order the licensor to make such updates available to the licensee during the arbitral proceedings. The licensee argued that it had made very substantial investments by adapting its production lines to the particular technology and, therefore, would not be able to again change or adapt the production process to the different technology of any other licensor. The Tribunal **analysed** these issues under a number of leading cases discussed in the United States and within the EC dealing with the **"essential facility doctrine"**, including the cases

United States v/ Terminal Rail Road Association, Otter Tail Power Co. v/ United States, MCI v/ AT&T, Magill, European Night Services, British Midland/Air Lingus and others.

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