

## EC COMPETITION LAW – MATERIALS

### Handouts in addition to this one:

- Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
- Commission Notice on the definition of relevant market for the purposes of Community competition law of December 1997
- Introduction to Article 81 EC
- Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)
- Key points on the commission's enforcement priorities in applying article 82 to abusive exclusionary conduct
- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864 final

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### Recommended Books

For an introduction to the law:

Bellamy & Child, *European Community Law of Competition*, Oxford University Press, Oxford 2008. This is the sixth edition and has been edited by the now Mr Justice Peter Roth and Vivien Rose

Complemented by its companion volume, a useful compendium of the relevant texts:

Bellamy & Child, *Materials on European Community Law of Competition*, Oxford University Press, Oxford 2009

For a good introduction to the economics:

Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, Cambridge, 2004

## **Web Sites**

EC legislative texts can be downloaded from [eur-lex.europa.eu](http://eur-lex.europa.eu). There are other useful web sites and links are provided from that of the UK Competition Appeal Tribunal ([www.catribunal.org.uk](http://www.catribunal.org.uk)); links of particular interest are those to:

### ***European Commission (Competition)***

This provides comprehensive access to:

- Legislation in the competition sphere including block exemptions, notices and guidance, and procedural rules
- Cases on Articles 81 and 82 filed according to case number, date of decision or name of addressee
- Cases under the Merger Regulation
- Press releases signaling new developments
- On line versions of the three-times yearly competition newsletter and the annual competition review
- Updates on special projects such as consultations on revisions of legislation, actions for damages, special sectors such as motor vehicle distribution, energy, postal services etc

### ***The European Courts***

- The Court of Justice of the European Communities whose web site incorporates material from the Court of First Instance
- Cases are listed by the C- or T- number of the appeal or the Commission lists all developments in the appeals involving competition law issues in chronological order
- European Court of Human Rights

### ***Some National Competition Authorities:***

- Bundeskartellamt
- Conseil de la Concurrence
- Italian Competition Authority
- Office of Fair Trading

And you may also find it useful to access the British and Irish Legal Information Institute.

## **Treaties**

The ECSC Treaty, now expired, provided a foundation for European competition law. Article 67 of that treaty envisaged actions that would impair competition being notified to the then High Authority and either a State being authorized to do something or being recommended to remedy distortions effects by such measures as that State deemed most compatible with its own economic equilibrium.

The Treaty of Rome included Article 85 with its qualified prohibition on anti-competitive arrangements, and Article 86 prohibiting abuse of dominant positions. Enforcement was in the hands of the Commission who administered a notification regime and block exemptions.

The Treaty of Amsterdam renumbered these and other Articles – see overleaf. Notification is no longer used and Article 81(3) is directly applied. In other words parties and subsequently courts have to exercise their own judgment.

Those with which we are concerned now are Articles 81 and 82 of the Treaty of Amsterdam. There was some debate about sustaining the emphasis on competition in the Lisbon Treaty. However Protocol (No 27), On the Internal Market and Competition, reiterated the view that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted and reflected agreement on action under the provisions of the Treaties. Now that *Lisbon* ratification has been completed, we shall shortly be using new numbers from *the Treaty on the functioning of the European Union*. However for our purposes we are sticking with the current numbering.

## **Article 81**

1. *The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:*

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

2. *Any agreements or decisions prohibited pursuant to this article shall be automatically void.*

3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

- any agreement or category of agreements between undertakings,*
- any decision or category of decisions by associations of undertakings,*
- any concerted practice or category of concerted practices,*

*which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

## **Article 82**

*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.*

*Such abuse may, in particular, consist in:*

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

Article 83 deals with appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82. Article 84 deals with the transitional situation before appropriate regulations or directives are in place. Article 85 deals with the Commission's responsibilities. Article 86 is included because Member States do grant special or even exclusive rights and the intersection of competition law and such rights need to be handled.

**Article 86**

1. *In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.*

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.*

3. *The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*

### **Materials that complement the Treaty Provisions**

The Articles of successive treaties have been supplemented by a variety of materials that a national court either must follow or may take into account:

- ❖ Regulations that have direct effect – for example - *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*; this Regulation means that the prohibitions and exceptions apply without the need for a prior decision;<sup>1</sup>
- ❖ Directives that require member states to transpose EU law into national law
- ❖ Preliminary Rulings of the ECJ – these are provided in response to a request under Article 234 and bind the national court
- ❖ Opinions of the Advocates General of the ECJ
- ❖ Other decisions of the CFI and of the ECJ – whilst these apply to specific factual matrices they also provide interpretations of existing legislation and develop the associated jurisprudence
- ❖ Decisions of the Commission – like CFI/ECJ decisions these apply to specific factual matrices they also provide interpretations of existing legislation and of the Commission's own guidelines and may explain the practice of the Commission as, for example, on penalties and leniency
- ❖ Opinions from the Commission - these are provided in response to a request about economic, factual and legal matters but they do not bind the national court – see below
- ❖ Notices & Guidelines from the Commission – for example - *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (2004/C 101/04) and *Guidelines on the application of Article 81(3)* OJ C 101, 27.4.2004, p. 97–118
- ❖ Discussion Papers, Green Papers and White Papers together with complementary Commission Staff Working Papers – for example - *White Paper on Damages Actions for Breach of the EC antitrust rules*, COM(2008) 165, 2.4.2008
- ❖ Annual Reviews – for example – *Report on Competition Policy 2008 [SEC(2009) 1004]*

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<sup>1</sup> Article 1 of Regulation 1/2003

## **Fines (see penalties and leniency below)**

Article 23 of Regulation 1/2003 provides both for procedural fines and substantive fines. In this extract the Regulation addresses the latter:

*2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:*

- (a) they infringe Article 81 or Article 82 of the Treaty; or*
- (b) they contravene a decision ordering interim measures under Article 8; or*
- (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.*

*For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.*

*Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.*

*3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.*

*4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.*

*Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.*

*After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.*

*However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.*

*The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.*

*5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.*

Article 24 provides for periodic penalty payments.

## Modernization and National Application of EC Competition Law after Council Regulation (EC) 1/2003

Modernisation means that national competition authorities designated under Article 35 of the Regulation can apply Articles 81 and 82. Article 5 on *Powers of the competition authorities of the Member States* provides:

*The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:*

- *requiring that an infringement be brought to an end,*
- *ordering interim measures,*
- *accepting commitments,*
- *imposing fines, periodic penalty payments or any other penalty provided for in their national law.*

*Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.*

National courts are empowered to enforce Articles 81 and 82 in full.<sup>2</sup> Furthermore, if national courts apply national competition law, they also have to apply EC competition law where there is an effect on trade. In order to assist national courts in the application of Articles 81 and 82 EC, the Commission is committed to help courts to find whatever help is necessary or useful to decide on a case. This builds on the mutual duty of loyal cooperation provided for by Article 10 EC.

Article 15 of Council Regulation (EC) 1/2003 expressly provides for the most frequent means of assistance:

- the transmission by the Commission of information in its possession (Article 15(1); in practice the Commission should provide: documents in its possession; information of a procedural nature to enable a court to discover whether a case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken position; and when the Commission is likely to take a decision so as to be able to determine whether to stay proceedings or whether interim measures should be adopted. The Commission endeavours to provide the national court with the requested information within **one month** from the date it receives the request.
- the giving of opinions by the Commission on questions concerning the application of the Community competition rules (Article 15(1); in practice, the Commission will endeavour to provide a national court with an opinion within **four months** from the date it receives the request; and
- the possibility for the Commission to submit observations to national courts as *amicus curiae* (Article 15(3); in practice, the Commission, acting on its own initiative, may submit written observations where the coherent application of

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<sup>2</sup> Article 6 of Regulation 1/2003

Article 81 or 82 EC so requires. With the permission of a national court, the Commission may also make oral observations.

The Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04) provides fuller detail.

Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written judgment of national Courts deciding on whether Articles 81 or 82 of the EC Treaty are applicable. These judgments must be sent "without delay after the full written judgment is notified to the parties". □□The non-confidential versions of these judgments in the original language are published in DGComp's database as a source of case practice, as well as providing a useful overview of national courts activities as EC competition law enforcers. However the database seems patchy at the moment.

*“Competition Policy is basically applying rules to make sure that companies compete with each other and, in order to sell their products, innovate and offer good prices to consumers.”<sup>3</sup>*

### **Human nature and economics**

There is an expectation that players in any market place will act in their own self-interest rather than that of their suppliers, their customers and, ultimately, not have uppermost the interests of consumers. In competitive markets the argument goes that suppliers, customers and consumers can *vote with their feet*.

A monopoly or a dominant firm can exercise power in a market place. Firms that don't have such power individually, can band together in cartels to exercise such power. Already we are using terms like market, market power, dominance and cartel that are addressed in greater detail in Community jurisprudence. Avoiding over-mighty monopolies or cartels with the interests of the market powerful placed ahead of their customers, suppliers and consumers. Economists argue that choice of price and quality between competitors is likely to promote both productive and allocative efficiency as well as innovation.

*Productive efficiency* is about not using more resources than necessary to provide products and services – it may include considering inputs, processing and distribution, staffing levels, capital investment, and working capital – it focuses upon the costs of production.

*Allocative efficiency* is a concept of welfare economics in which one looks to see whether any reallocation of resources would increase the overall welfare of a society. If a monopoly, or a cartel, is able to attract disproportionate resources then there is a welfare loss. It includes considering pricing.

Economists think about market *rents* as applying not simply to land and buildings but to the exploitation of other rights (such as a mobile telephone franchise) or market positions. Such rents can be important in attracting investment but barriers to entry can mean that, on a short or longer term basis, they can become excessive.

A cartel can enable participants to:

- ❖ Shield themselves from competition;
- ❖ To price excessively (or sometimes in a predatory way to block entry);
- ❖ To restrict output in quantity or in variety (see, for example, OPEC); and
- ❖ To divide markets.<sup>4</sup>

Recent examples of action by the Commission include *Bananas* and *Car Glass* where lack of competition at the wholesale level has implications for the retail level.

Courts may be presented with evidence from economists and from accountants about markets and about the relationship between actual and efficient costs and prices. Evaluating such evidence and then utilizing it in decision making certainly involves common sense and expert help may sometimes be sensible.

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<sup>3</sup> DGComp website accessed 21 October 2009

<sup>4</sup> See, for example, the Commission's Report on Competition Policy 2008, SEC(2009) 10004 §5

## **Policy and Administrative Priorities**

The Commission and national competition authorities have a variety of functions – they engage in policy work and in communication as well as in investigation and quasi-judicial decision making.

Their work has elements that are *ex ante* and elements that are *ex post*. They may punish specific anti-competitive behaviour but they also encourage compliance both by informing markets and by deterrence. Deterrence involves market participants' expectations of being caught and of penalties being effective. Some participants seem, from behaviour involving repeated infringement, to see competition law as a game to be played that may involve paying a *rent* if one gets caught.

Priorities therefore can involve finding evidence for high profile cases, like *Microsoft* and *Intel*, and imposing stiff fines – for example the *Car Glass* case at € 1.383 billion.

Neither the Commission nor national competition authorities can do everything so administrative priorities are established and decisions on what get attention are taken. Obtaining a settlement<sup>5</sup> helps an authority to move on and is therefore attractive. Analysis that identifies significant damage to consumers is behind an *effect-based* approach to prioritisation.<sup>6</sup>

Bananas, glass for motor cars, mobile telephone calls between Member States, semiconductor chips and software for PCs have all got obvious connections to consumers. In some instances the Commission goes for forward looking remedies and these may include whole regulatory frameworks that complement competition law, as in the case of electronic communications.

One impact of prioritization is that complaints that present or lead to *prima facie* evidence of infringement may not lead to a full investigation and then to decision that satisfies the complainant(s). National courts can be asked to intervene and handling such cases can present significant difficulties where administrative priorities are pleaded by a national competition authority.

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<sup>5</sup> See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases

<sup>6</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 3 December 2008; the legal text came out as C(2009) 864 final

## **Punishment, Deterrence, Leniency and Compensation**

The Commission sees fining companies as both a punishment and a deterrent.

The Commission has been paying special attention to *parental liability* to encourage holding companies to ensure that compliance structures and processes are in place. There have been several appeals on this liability.<sup>7</sup>

Fines may be related to the turnover of a whole *undertaking* – rather than simply the turnover of an infringing subsidiary. The highest aggregate fines for a single cartel case amounted to € 1.383 billion in the *Car Glass* case. As yet there is no EC wide criminal offence with which individuals can be charged. Increasing fines for repeat offences, for example Saint-Gobain in the *Car Glass* case, is designed to deter recidivism but hasn't proved wholly effective.

Since 2006, there has been a Commission Leniency Programme<sup>8</sup> designed to encourage whistle-blowing and co-operation by cartel members and national competition authorities may have their own guidance on how they handle applications for leniency. The first cartel member to provide evidence can obtain full immunity; others may qualify for a reduction.

Compensation is rare!<sup>9</sup> It may be negotiated as part of a settlement or it may require a private action in one or more Member States with or without a prior infringement decision by the Commission or by a national competition authority.

In the absence of a European court to which a multi-State private action may be taken, a national court may be asked to take jurisdiction over defendants in more than one Member State under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Before the CAT, *Emerson*<sup>10</sup> is an instance where there are prospective defendants from other Member States. There are also appeals outstanding before the ECJ and the CAT has stayed proceedings until 21 days from the handing down of the judgments by that Court.

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<sup>7</sup> See Stephen Hurley & Adam Scott, 'The Concept of an Undertaking and the Responsibility of Parent Companies for the Actions of Subsidiaries in the EU and UK', *Competition Law Journal*, [2008] Comp Law 301-323; and the *Akzo Nobel* case

<sup>8</sup> *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, OJ C 298, 8.12.2006, p. 17–22

<sup>9</sup> See *White Paper on Damages Actions for Breach of the EC antitrust rules* COM(2008) 165, 2.4.2008. In the UK, the CAT is allowed to hear *follow on* damages actions; infringement is evidenced by a public law decision so that what is left to be argued is *quantum*.

<sup>10</sup> The *Emerson Case* is CAT Case No. 1077/5/7/07 and the appeals currently before the ECJ are Cases C-554/08 P and C-564/08 P.

### **Some other useful links**

❖ **ECJ/CFI recent cases**

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=&domaine=CONC&mots=&resmax=1000> accessed 21 October 2009

❖ **DGComp**

[http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html) accessed 21 October 2009

❖ **UK OFT**

[www.of.gov.uk/](http://www.of.gov.uk/) accessed 21 October 2009

❖ **UK Competition Commission**

[www.competition-commission.org.uk](http://www.competition-commission.org.uk) accessed 21 October 2009

❖ **UK Competition Appeal Tribunal**

[www.catribunal.org.uk](http://www.catribunal.org.uk) accessed 21 October 2009

❖ **Council Regulation (EC) No 1/2003 consolidated version**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003R0001:20061018:EN:PDF> accessed 21 October 2009

❖ **Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings**

[http://ec.europa.eu/competition/antitrust/art82/guidance\\_en.pdf](http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf) accessed 21 October 2009

❖ **Guidelines on the application of Article 81(3) of the Treaty**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF> accessed on 28 October 2009

❖ **Notice on the definition of relevant market**

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML) accessed 28 October 2009

❖ **Report on Competition Policy 2008**

[http://ec.europa.eu/competition/publications/annual\\_report/2008/en.pdf](http://ec.europa.eu/competition/publications/annual_report/2008/en.pdf) accessed 28 October 2009

❖ Emily Clark, Mat Hughes and David Wirth, 'Study on the conditions of claims for damages in case of infringement of EC competition rules', Ashurst, Brussels, 31 August 2004;

[http://ec.europa.eu/competition/antitrust/actionsdamages/economic\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf) accessed 21 October 2009