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Die Wettbewerbspolitik der neuen Kommission

von Karel VAN MIERT, Kommissar für Wettbewerb

EG-KARTELLRECHTSFORUM DER
STUDIENVEREINIGUNG KARTELLRECHT
BRUESSEL, 11 MAI 1995

EINLEITUNG

Es ist mir eine besondere Freude, den Eröffnungsvortrag zu dem diesjährigen EG-Kartellrechtsforum der Studienvereinigung Kartellrecht halten zu dürfen. Die Studienvereinigung hat sich in über 25 Jahren zu einem bedeutenden Forum für die Diskussion wettbewerbspolitischer und kartellrechtlicher Fragen entwickelt. Sie liefert damit einen wichtigen Beitrag zum Dialog allerer, die an dieser Diskussion beteiligt sind: Politik, Verwaltung, Wirtschaft, Rechtssprechung, Kartellrechtswissenschaft und, last but not least, der Anwaltschaft. Von deutschen Anwälten Ende der sechziger Jahre gegründet, hat die Studienvereinigung schon früh die Bedeutung des europäischen Wettbewerbsrechts erkannt und das Gespräch nicht nur mit dem Bundeskartellamt sondern auch mit der Kommission gesucht. Ein Beleg für diese "gemeinschaftsweite Dimension" der Studienvereinigung sind die Arbeitssitzungen in Brüssel und insbesondere auch das von ihr veranstaltete EG-Kartellrechtsforum.

Das diesjährige Forum erscheint mir von besonderem Interesse zu sein. Dies kommt unter anderem darin zum Ausdruck, daß die Leiter der Wettbewerbsbehörden von vier

großen Mitgliedstaaten teilnehmen und über die Harmonisierung von nationalem und europäischem Wettbewerbsrecht diskutieren werden. Daß auch die Antitrust Division des US Department of Justice vertreten ist, verdeutlicht einen weiteren wichtigen Aspekt der Wettbewerbspolitik: die zunehmende internationale Dimension der Kartellrechtspraxis. Und schließlich stehen wir am Beginn einer neuen Kommission, die zum ersten Mal in einem Zeitraum von fünf Jahren ihre Politik umsetzen kann. Es scheint mir daher ein guter Moment zu sein, zur Eröffnung des diesjährigen Kartellrechtsforums einige wesentliche Problemfelder und Ziele dieser Politik auf dem Gebiet des Wettbewerbs zu umreißen.

WETTBEWERBSPOLITIK IM KONTEXT DER GESAMTPOLITIK DER KOMMISSION

Die neue Kommission steht vor einer Fülle von Herausforderungen, die sich aus den Aufgaben ergeben, die die Europäische Union in den nächsten Jahren zu bewältigen hat. Die wichtigste Aufgabe ist bereits im Weißbuch "Wachstum, Wettbewerbsfähigkeit, Beschäftigung" vom Dezember 1993 formuliert: die Überwindung der strukturellen Arbeitslosigkeit und die Stärkung der Wettbewerbsfähigkeit der europäischen Wirtschaft auf den Weltmärkten und insbesondere auf den Wachstumsmärkten der Zukunft.

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In diesem Kontext hat die Wettbewerbspolitik der Kommission eine aktive Rolle zu spielen. Dies nicht nur, weil Wettbewerb einer der wenigen Bereiche ist, in denen die Kommission weitgehende eigene exekutive Befugnisse hat. Von entscheidender Bedeutung ist vielmehr, daß eine aktive Wettbewerbspolitik eine der Voraussetzungen für die Ausschöpfung der Wachstumspotentiale der europäischen Wirtschaft ist. Dies gilt im Hinblick auf die optimale Nutzung des bereits bestehenden Binnenmarktes. Dies gilt nicht minder im Hinblick auf die Öffnung von Märkten, die bisher noch weitgehend dem Wettbewerb verschlossen sind. Und dies gilt vor allem auch im Hinblick auf die freie und ungehemmte Entwicklung der Zukunftsmärkte.

Dabei darf ich gleich eines klarstellen: die Durchsetzung wettbewerblicher Prinzipien ist nicht ein Zweck an sich. Wettbewerbspolitik ist vielmehr ein Instrument, das zur Erreichung der grundlegenden Ziele der Gemeinschaft beiträgt. Die Wettbewerbspolitik der Kommission findet nicht in einem Vakuum statt. Sie hat stets auch ihre Auswirkungen in anderen Politikbereichen der Kommission mit in Betracht zu ziehen, wie etwa Industrie-, Regional-, Sozial- und Umweltpolitik. Diese Gesamtbetrachtung ist allerdings keine Einbahnstraße. Die Wettbewerbspolitik wirkt ihrerseits bei der Formulierung und Verwirklichung der Politik in den anderen Bereichen mit. Ein Umstand, der von den Kritikern des institutionellen Rahmens der europäischen Wettbewerbspolitik, etwa den Befürwortern eines Europäischen Kartellamtes, manchmal übersehen wird.

Eine zweite grundsätzliche Bemerkung erscheint mir angezeigt. Bei dem Begriff Wettbewerbspolitik wird häufig in erster Linie an Kartelle, Mißbrauchsaufsicht und Fusionskontrolle gedacht, also an die Wettbewerbsregeln gegenüber Unternehmen. Die Wettbewerbspolitik der Kommission geht jedoch weit über diese

klassischen Antitrust-Bereiche hinaus und umfaßt insbesondere auch Wettbewerbsregeln gegenüber den Mitgliedstaaten. Ich nenne hier nur die Stichworte Liberalisierung und Deregulierung sowie Staatsbeihilfen. Zudem spielt auch die Entwicklung der internationalen Beziehungen im Wettbewerbsbereich eine immer größere Rolle.

Es geht auch um weit mehr als die Entscheidung von Einzelfällen. Wettbewerbsregeln müssen nicht nur angewendet sondern auch ständig fortentwickelt werden. Das heißt: die Kommission hat nicht nur die Einhaltung der Spielregeln zu überwachen, nach denen Marktwirtschaft in der Gemeinschaft stattfindet. Sie hat diese Spielregeln auch fortzuentwickeln, um sie der Dynamik der wirtschaftlichen Entwicklung anzupassen. Zugleich hat sie die Rahmenbedingungen zu schaffen, die diese Dynamik erst ermöglichen.

Nach diesen mehr grundsätzlichen Bemerkungen möchte ich im folgenden auf die Schwerpunkte und Prioritäten der nächsten Jahre in den einzelnen Bereichen der europäischen Wettbewerbspolitik eingehen.

LIBERALISIERUNG

Eine der wichtigsten wettbewerbspolitischen Aufgaben der kommenden Jahre ist die Liberalisierung bisher noch regulierter Wirtschaftsbereiche. Liberalisierung und Deregulierung sind eine wesentliche Voraussetzung zur Stärkung der Wettbewerbsfähigkeit der europäischen Wirtschaft. Sie gewährleisten zugleich bessere Auswahlmöglichkeiten der Verbraucher zu wettbewerbsfähigen Preisen. Allerdings müssen die entsprechenden Maßnahmen gerade auch im Interesse der Verbraucher mit Augenmaß erfolgen. Deregulierung bedeutet nicht Regellosigkeit. Sie

erfordert Rahmenbedingungen, die unter anderem den fundamentalen Interessen der Verbraucher gerecht werden. Dies bedeutet etwa, daß dort, wo dies notwendig ist, das Prinzip des universellen Dienstes, des diskriminierungsfreien Zugangs zu flächendeckenden Leistungen, gewährleistet sein muß.

Im Vordergrund unserer Bemühungen um Liberalisierung stehen derzeit Telekommunikation und Energie. In diesen beiden Bereichen besteht allerdings eine sehr unterschiedliche Situation.

Telekommunikation

Im Bereich der Telekommunikation sind bereits gute Fortschritte erzielt worden, und dies vor allem auf der Grundlage von Richtlinien der Kommission nach Artikel 90 Absatz 3. Ich erinnere kurz an einige wesentliche Etappen:

- 1988 Richtlinie zur Öffnung des Marktes für Endgeräte;
- 1990 Richtlinie zur Liberalisierung der Mehrwertdienste;
- 1994 Ausdehnung dieser Richtlinie auf Satellitendienste;
- ebenfalls 1994 Grünbuch der Kommission über mobile Kommunikation mit der Zielsetzung, die Ausschließlichkeitsrechte im Mobilfunk ab 1996 zu beseitigen.

Ein entscheidender Schritt war schließlich die 1993 gefaßte Entschließung des Rates, auch die Basisdienste bis zum 1. Januar 1998 aus dem Monopolbereich zu entlassen. Die Umsetzung dieser Entschließung ist jetzt die wichtigste Maßnahme zur umfassenden Liberalisierung des gesamten öffentlichen Telefonverkehrs.

Angesichts der geschilderten Fortschritte bei den Telekommunikationsdienstleistungen war das entscheidende noch zu lösende Problem die Liberalisierung der Infrastruktur. Hier erfolgte der Durchbruch im November 1994 mit der Entschließung des Rates, alle



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Telekommunikationsnetze bis zum Jahre 1998 zu liberalisieren. Damit besteht jetzt auch im Bereich der Infrastruktur Planungssicherheit. Die wichtigsten Punkte, die bei der nunmehr anstehenden Umsetzung dieser EntschlieÙung zu regeln sind, umfassen die Komplexe universeller Dienst, Zusammenschaltung der verschiedenen Netze, Modalitäten der Vergabe von Lizenzen und Zugang zu Drittländern.

Ein offenes Problem in der nächsten Zukunft ist die vorgezogene Freigabe des Wettbewerbs auf den bestehenden alternativen Netzen für jene Dienste, die bereits liberalisiert sind. Die jüngste Initiative zu diesem Punkt ist der Ende 1994 verabschiedete Entwurf einer Richtlinie der Kommission zur Liberalisierung der Kabelfernsehnetze. Ähnlich der Satellitenrichtlinie sieht der Entwurf vor, für bereits liberalisierte Dienste die Nutzungsbeschränkungen der Kabelnetze aufzuheben.

Diese legislatorischen Maßnahmen, die bereits erfolgt sind oder in den nächsten Jahren verwirklicht werden, sind eine wesentliche Voraussetzung zur Erreichung der Ziele, die unter dem Stichwort "Informationsgesellschaft" verfolgt werden. Gesetzgebung allein genügt jedoch nicht. Die Kommission hat vielmehr auch wachsam zu sein, daß die Liberalisierung, also die Beseitigung staatlicher Wettbewerbsbeschränkungen, nicht bereits im Ansatz durch private Wettbewerbsbeschränkungen konterkariert wird. Dieser Gesichtspunkt ist besonders wichtig bei der Bewertung von strategischen Allianzen und Zusammenschlüssen.

Die Globalisierung der Telekommunikationsdienste und die rasche Entwicklung der Technologie führen in verstärktem Umfang zu strategischen Allianzen von Telekom-Betreibern. Dies ist sicher positiv zu bewerten, soweit diese Allianzen die Erbringung internationaler Dienste und die Teilnahme der europäischen Telekom-Betreiber am

globalen Wettbewerb ermöglichen. Wir müssen jedoch kritisch mögliche negative Auswirkungen auf den europäischen Heimatmärkten prüfen. Dies insbesondere dann, wenn an den Allianzen Telekom-Betreiber beteiligt sind, die auf ihren Heimatmärkten noch eine Monopolstellung innehaben. Hier kann sich die Frage stellen, in welchem Ausmaß eine vorherige Liberalisierung erforderlich ist, ehe ein Vorhaben akzeptiert werden kann. Instruktiv ist in diesem Zusammenhang die positive Entscheidung der Kommission im Fall BT/MCI. Andererseits sei auf die bekannte kritische Haltung der Kommission gegenüber dem Projekt Atlas von Deutscher Telekom und France Telecom in seiner derzeitigen Form hingewiesen. Aber etwa auch auf die unlängst eingeleiteten Ermittlungen im Fall Unisource/Telefonica/AT&T.

Wie strategische Allianzen können auch Zusammenschlüsse positiv zur Entwicklung des Telekom- oder auch Multi-Media-Bereichs beitragen. Sie dürfen aber nicht zur frühzeitigen Abschottung von Zukunftsmärkten führen. Insoweit ist die Untersagung der MSG Media Service vom November letzten Jahres geradezu ein Lehrbuchfall. Wir werden gerade diesen Sektor weiterhin sorgfältig im Auge behalten.

Energie

Im Gegensatz zur Telekommunikation konnte im Bereich der leitungsgebundenen Energien bisher noch kein Durchbruch erzielt werden. Ein Grund ist sicher, daß sich bei Elektrizität und Gas die Ausgangslage ungleich schwieriger darstellt.

Bei der Telekommunikation wurde die Liberalisierung durch die Fortschritte der Technik und die progressive Globalisierung von Diensten begünstigt, wenn nicht gar erzwungen. Diese dynamischen Triebkräfte sind im Energiesektor nicht gegeben. Erschwert

wird hier die Liberalisierung zudem durch die unterschiedliche Struktur der Energiewirtschaft in der Gemeinschaft. So gibt es zum Beispiel in Deutschland eine Vielzahl privater oder kommunaler Energieversorgungsunternehmen auf den verschiedenen Verteilerstufen; allerdings jeweils mit vertraglich abgesicherten Versorgungsmonopolen. Dagegen gibt es in Frankreich derzeit die staatseigene EdF oder Gaz de France.

Die Schwierigkeiten dürfen jedoch kein Grund sein, alles beim alten zu lassen. Die Richtlinienvorschläge der Kommission sind in der Vergangenheit gerade bei dem wichtigsten Punkt zur Öffnung der Märkte auf Widerstand gestoßen: dem sogenannten "Third Party Access", also dem Durchleitungsrecht Dritter. Die Kommission hat gleichwohl ihre Arbeiten für die Elektrizitäts-Richtlinie vorangetrieben und im März dieses Jahres einen neuen Vorschlag verabschiedet. Das von der Kommission vorgeschlagene Konzept will den Gegensatz zwischen den Befürwortern eines Durchleitungsrechtes Dritter und denen eines "Single Buyer", also eines Alleinabnehmersystems, überbrücken. Auch letzteres soll unter bestimmten Bedingungen zulässig sein.

Die Kommission ist mit diesem Vorschlag bis an die Grenze dessen gegangen, was nach den grundlegenden Prinzipien des EG-Vertrages noch hinnehmbar ist. Sollte es auf der Grundlage dieser Kompromißbemühungen im Laufe dieses Jahres nicht zu einer einvernehmlichen Lösung im Rat kommen, so wird die Kommission kaum eine andere Wahl haben, als durch Anwendung der Wettbewerbsregeln eine Liberalisierung zu forcieren. Dies würde vor allem den Erlaß eigener Richtlinien nach Artikel 90 (3) bedeuten.

Trotz aller Schwierigkeiten bin ich jedoch zuversichtlich, daß letztlich auch im Energiesektor der Durchbruch gelingen wird. Und dies aus einem einfachen Grund. Wir können uns im Binnenmarkt die verkrusteten Strukturen der Vergangenheit, gerade im Interesse der



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Wettbewerbsfähigkeit unserer Wirtschaft, einfach nicht mehr leisten.

Richtlinien nach Artikel 90 (3)

Die Diskussion der Situation im Energiebereich veranlaßt mich zu einer generellen Bemerkung. Die Liberalisierung von Schlüsselbereichen der Wirtschaft sollte in der Gemeinschaft auf der Grundlage eines breiten politischen Konsens stattfinden. Die Rahmenbedingungen sind daher durch Richtlinien des Rates abzustecken. Für wettbewerbsspezifische Probleme ist jedoch auch die eigene Richtlinienbefugnis der Kommission nach Artikel 90 (3) unerläßlich.

Wie das Beispiel Telekommunikation zeigt, können Richtlinien nach Artikel 90 (3) erfolgreich zur Liberalisierung beitragen, wenn die Kommission dieses Instrument mit Augenmaß anwendet. Der anzustrebende Konsens ist insoweit durch das Konsultationsverfahren mit Rat und Parlament zu erreichen. Angesichts der Bedeutung dieses Instruments möchte ich daher hier unmißverständlich erklären: Die Kommission wird ihre Richtlinienbefugnis nach Artikel 90 (3) energisch gegen jeden Versuch einer Beeinträchtigung verteidigen.

STAATSBEIHILFEN

Zu dem zweiten großen Bereich der Wettbewerbspolitik gegenüber Mitgliedstaaten, den Staatsbeihilfen, möchte ich nur eine kurze Anmerkung machen. Ich möchte insoweit nicht Herrn Ehlermann vorgreifen, der in den vergangenen fünf Jahren als Generaldirektor der GD IV die Beihilfenpolitik der Kommission mitgestaltet hat und der heute nachmittag die Position der Kommission darlegen wird.

Es sei daher hier nur folgendes gesagt. Die Kontrolle staatlicher Beihilfen wird auch weiterhin eine der wichtigsten

Aufgaben der europäischen Wettbewerbspolitik bleiben. Es ist dies ein Bereich, in dem aus Gründen der Sachlogik eine umfassende Kompetenz der Kommission bestehen muß. Die Mitgliedstaaten können schließlich nicht ihre eigenen Beihilfen kontrollieren. Wohin die Verlagerung von Beihilfekompetenzen auf den Rat führt, zeigen die wenig erfreulichen Erfahrungen im Stahlbereich. Jeder Versuch, ihre Kompetenz in der Beihilfenkontrolle zu verwässern, wird daher auf den entschiedensten Widerstand der Kommission treffen.

FUSIONSKONTROLLE

Lassen Sie mich nun zur Wettbewerbspolitik gegenüber Unternehmen kommen und mit der Fusionskontrolle beginnen. Nach demnächst fast fünfjähriger erfolgreicher Anwendung ist die europäische Fusionskontrolle aus der Innovationsphase in die Konsolidierungsphase gekommen. Dies kommt in der reichen Fallpraxis mit weit über 300 abschließenden Entscheidungen zum Ausdruck. Dies wird auch durch das im vergangenen Jahr von der Kommission verabschiedete Maßnahmenpaket belegt, das auf den bis dahin gemachten Erfahrungen beruht. Mit diesem Paket haben wir die Verfahrensregeln der Durchführungsverordnung verbessert und vier Bekanntmachungen veröffentlicht, die sämtliche Problemfelder jurisdiktioneller Fragen abdecken.

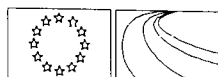
Die wichtigste politische Aufgabe in der nächsten Zeit ist die erneute Überprüfung der Schwellenwerte. Die grundlegenden Argumente für eine Herabsetzung, vereinfacht mit "one-stop shop" und "level playing field" umschrieben, sind mit der weiteren Vollendung des Binnenmarktes heute noch überzeugender als bei der letzten Überprüfung. Das 1993 vorgebrachte Gegenargument, es seien noch nicht hinreichende Erfahrungen mit der EG-Fusionskontrolle gemacht, ist

offensichtlich immer weniger haltbar. Die Chancen, eine Herabsetzung der Schwellenwerte herbeizuführen, hängen sicher auch davon ab, inwieweit ein solches Projekt von den europäischen Unternehmen unterstützt wird.

Im Zusammenhang mit der Überprüfung der Schwellenwerte steht auch die Ausgestaltung der Verweisung von Fällen an die Mitgliedstaaten nach Artikel 9 der Verordnung. Hier könnte möglicherweise eine flexiblere Lösung gefunden werden. Ebenso könnte an eine ausdrückliche Regelung für Zusagen in der ersten Prüfungsphase gedacht werden.

Unabhängig von der Revision der Verordnung streben wir auch an, in absehbarer Zeit "guidelines" zu materiellen Problembereichen zu erarbeiten. Zu denken ist hier an die Themen Marktabgrenzung, Marktbeherrschung und Zusagenpraxis. Anders als bei jurisdiktionellen Fragen besteht für "guidelines" zu materiellen Themen allerdings ein wesentliches Problem. Es gilt einen Weg zu finden, um den prinzipiellen Ansatz der Kommission zu verdeutlichen, ohne gleichzeitig zu enge Vorgaben zu machen, die einer sachgerechten Lösung im Einzelfall im Wege stehen könnten. Wir müssen die Gefahr vermeiden, die komplexe Realität der Wirtschaft in das "Prokrustesbett" abstrakter Regeln zu zwingen.

Im Zentrum der Fusionskontrolle steht nach wie vor die Entscheidung von Einzelfällen. Seit 1994 registrieren wir eine erhebliche Zunahme in der Zahl der Anmeldungen. Es ist auch nicht auszuschließen, daß die Zahl kritischer Fälle über dem Niveau der Anfangsjahre liegen wird. Die anhaltende Restrukturierung der europäischen Wirtschaft führt zu einer zunehmenden Konzentration diversifizierter Unternehmen auf ihr jeweiliges "core business". Die daraus resultierenden Verkäufe von Unternehmensteilen führen häufig zu einer Marktberingung, die in bestimmten Fällen wettbewerblich bedenklich sein kann.



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Um die zunehmende Arbeit zu bewältigen, ohne daß die Qualität der Entscheidungen leidet, gilt es, das Verfahren und die Ermittlungstechniken in der Fusionskontrolle noch effizienter als bisher schon zu gestalten. Dies sollte auf der Grundlage der bisherigen positiven Erfahrungen möglich sein.

ARTIKEL 85 UND 86

Ich sagte, daß die Fusionskontrolle aus der Innovations- in die Konsolidierungsphase gekommen ist. Demgegenüber ist der Bereich der Artikel 85 und 86 bereits zu lange im Zustand der Konsolidierung und bedarf einer neuen Innovationsphase.

Das System und die Praxis der europäischen Fusionskontrolle sind ein Kind der neunziger Jahre. Die noch heute geltenden Grundlagen für die Anwendung der Artikel 85 und 86 wurden demgegenüber in den sechziger Jahren gelegt. Sie müssen jetzt den veränderten Wirtschaftsbedingungen angepaßt werden. Nicht umsonst ist die Anwendungspraxis insbesondere von Artikel 85 der Bereich der Wettbewerbsregeln, in dem die Kommission am meisten kritisiert wird.

Dies macht zwei generelle Zielsetzungen unabweislich:

- eine Reform des Verfahrens in Fällen von Artikel 85 mit dem Ziel einer Straffung. Ein Anfang wurde bereits gemacht mit den internen Fristsetzungen für die Behandlung struktureller kooperativer Gemeinschaftsunternehmen.

- und zweitens, eine klare Setzung von Prioritäten, das heißt eine Konzentration der knappen personellen Ressourcen auf die Fälle, die wirklich eine wettbewerbliche Bedeutung haben.

Auch die Neufassung von Gruppenfreistellungsverordnungen kann

einen Beitrag dazu leisten, die Fallarbeit auf die wesentlichen Fälle zu konzentrieren. Ende 1997 werden eine Reihe von Gruppenfreistellungsverordnungen auslaufen. Bei der Neufassung solcher Verordnungen sind die Texte zu vereinfachen und ist möglicherweise auch ihr Anwendungsbereich auszudehnen. Ebenso sollte die Möglichkeit einer "Rahmenverordnung" mit generellen Regeln für alle Gruppenfreistellungen geprüft werden.

Ein wesentlicher Teil der auslaufenden Verordnungen bezieht sich auf vertikale Wettbewerbsbeschränkungen. Dies gibt Anlaß, den Ansatz der Kommission bei der Anwendung von Artikel 85 auf vertikale Beschränkungen zu überprüfen. Die Kommission wird hierzu ein Grünbuch erarbeiten, das den veränderten Wirtschaftsbedingungen Rechnung tragen soll.

In dem Maß, in dem der Binnenmarkt Wirklichkeit wird, verschieben sich die Akzente im Bereich von Artikel 85. In der Vergangenheit war dieser Bereich stärker geprägt durch die Beschäftigung mit der juristischen Prüfung von Vertragsklauseln, die durch die Beschränkung der Handlungsfreiheit der Entstehung des Binnenmarktes entgegenwirken konnten. Hieraus erklärte sich die große Bedeutung, die vertikalen Beschränkungen zugemessen wurde. Jetzt tritt mehr und mehr eine strukturelle Betrachtungsweise in den Vordergrund.

Dies gilt insbesondere für die Prüfung von Kooperationen und strategischen Allianzen. Wie bereits erwähnt, nehmen diese Formen der Zusammenarbeit zu, in Folge der Globalisierung der Märkte, beschleunigter technologischer Entwicklung und wachsendem Kapitalbedarf. In vielen Fällen mögen derartige Kooperationen begrüßenswert sein. Wir müssen jedoch im Einzelfall darauf achten, daß die wettbewerbliche Struktur der Märkte nicht beeinträchtigt wird. Und dies erfordert ökonomisch

bestimmte Prüfungsmethoden, eher als vorrangig juristische Analysen.

Die angestrebten Reformen in der Anwendungspraxis von Artikel 85 sind um so wichtiger, als dieser Vorschrift nach wie vor eine Schlüsselfunktion im europäischen Wettbewerbsrecht zukommt.

INTERNATIONALE BEZIEHUNGEN

Ich habe bereits mehrfach die zunehmende Globalisierung der Märkte erwähnt. Dies kann natürlich in bestimmten Fällen auch eine Globalisierung der Wettbewerbsprobleme bedeuten. Die geeignete Antwort darauf ist eine verstärkte Kooperation im Wettbewerbsbereich mit unseren wichtigsten Handelspartnern. Der Fall Microsoft ist insoweit ein instruktives Beispiel.

Das Kooperationsabkommen mit den Vereinigten Staaten ist nunmehr vom Rat bestätigt worden. Ähnliche Abkommen mit anderen Handelspartnern, zunächst Kanada, werden angestrebt. Zugleich ist die Kommission aktiv an dem Versuch beteiligt, im Rahmen der Welthandelsorganisation multilaterale Wettbewerbsregeln zu erarbeiten. Sie kann sich dabei auf ihre Erfahrungen bei der Ausarbeitung multilateraler und bilateraler Handelsabkommen stützen.

Von herausragender Bedeutung wird in den nächsten Jahren die Unterstützung der mittel- und osteuropäischen Länder bei der Entwicklung von Wettbewerbsrecht und Anwendungspraxis sein. Der Europäische Rat in Essen hat die Kommission mit der Erstellung eines entsprechenden Schulungsprogramms beauftragt.

Schließlich sind auch mit den Mittelmeerländern Abkommen anzustreben, die ähnlich den Abkommen mit den mittel- und osteuropäischen Ländern materielle Wettbewerbsregeln enthalten.



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INSTITUTIONELLER RAHMEN DER EUROPÄISCHEN WETTBEWERBSPOLITIK

Innerhalb der Europäischen Union, insbesondere in Deutschland, gibt es derzeit eine Debatte über die Harmonisierung von nationalem und europäischem Wettbewerbsrecht. In diesem Zusammenhang ist zunächst von Bedeutung, daß mittlerweile alle Mitgliedstaaten über Wettbewerbsgesetze verfügen. Diejenigen Länder, die diese Gesetze in den letzten Jahren eingeführt haben, orientierten sich dabei weitgehend an dem Modell der Wettbewerbsregeln der Gemeinschaft. Eine Angleichung der anderen Wettbewerbsgesetze an die europäischen Wettbewerbsregeln ist sicher begrüßenswert. Dies fällt jedoch naturgemäß in die Zuständigkeit der jeweiligen Mitgliedstaaten.

Harmonisierung kann auch erreicht werden, wenn nationale Wettbewerbsbehörden Gemeinschaftsrecht anwenden. Hier eröffnet das bestehende System einen großen Spielraum für eine dezentrale Anwendung der Artikel 85 und 86. Einen Spielraum, der bei weitem

noch nicht ausgeschöpft ist. Die Mitgliedstaaten sollten davon in Fällen Gebrauch machen, in denen der Schwerpunkt eindeutig in einem einzigen Land liegt. Die Kommission wird solche Fälle nur dann an sich ziehen, wenn eine - der Kommission vorbehaltene - Einzelfreistellung nach Artikel 85 (3) tatsächlich in Betracht kommt. Auf der anderen Seite muß natürlich gewährleistet sein, daß Fälle, an denen ein Gemeinschaftsinteresse besteht, von der Kommission behandelt werden.

Harmonisierung bedeutet nicht völlige Gleichheit. Sie bedeutet insbesondere auch nicht, daß der institutionelle Rahmen, der sich in einem Mitgliedstaat bewährt hat, auch auf der Ebene der Gemeinschaft geeignet wäre. Dies ist gerade auch bei der deutschen Forderung nach einem europäischen Kartellamt zu berücksichtigen.

Die Argumente für und gegen eine solche Behörde sind hinreichend bekannt und ich möchte sie hier nicht im einzelnen wiederholen. Im Rahmen dieses Vortrags möchte ich jedoch einen Aspekt besonders hervorheben. Ich denke, meine bisherigen Ausführungen haben gezeigt,

daß europäische Wettbewerbspolitik weit mehr ist als die Entscheidung von Einzelfällen in der Fusionskontrolle oder nach Artikel 85 und 86. Ein europäisches Kartellamt wäre jedoch auf diesen Bereich beschränkt und liefe Gefahr, von der Entwicklung der übrigen Wettbewerbspolitik isoliert zu werden. Ein Auseinanderreißen des bisher einheitlichen Konzepts würde aber letztlich wohl zu einer Schwächung der europäischen Wettbewerbspolitik führen.

TRANSPARENZ

Die Kommission ist entschlossen, die Entwicklung der in diesem Vortrag umrissenen Wettbewerbspolitik in größtmöglicher Transparenz zu vollziehen. Ein Beispiel für diese Transparenz sind die umfassenden Konsultationen von Wirtschaft und Anwaltschaft bei der Erarbeitung der legislatorischen Maßnahmen auf dem Gebiet der Fusionskontrolle und im Bereich von Artikel 85 im Laufe des vergangenen Jahres. Die Kommission wird auch weiterhin ihre Wettbewerbspolitik in offener und konstruktiver Diskussion mit den Adressaten dieser Politik entwickeln.

SPEECH/95/95

A copy of this speech is available in English. Those wishing a copy should fax their request to the DG IV-Cellule Information, indicating the language version they require; fax. +32-2-295.54.37.

Ce discours est disponible en Français. Les personnes désirant une copie peuvent adresser une télécopie à la Cellule Information de la DG IV; No +32-2-295.54.37.



OPINIONS AND COMMENTS

In this section DG IV officials outline developments in Community competition procedures. It is important to recognise that the opinions put forward in this section are the **personal views** of the officials concerned. They have not been adopted or in any way approved by the Commission and should not be relied upon as a statement of the Commission's or DG IV's views

The First European Competition Forum: Vertical restraints

by *Laraine L. LAUDATI, Consultant to DG IV*

On 3 and 4 April, 1995, the Commission organised the First European Competition Forum at the Palais du Congrès in Brussels. In his opening comments, DG IV Director General C. D. Ehlermann observed that the more than 260 participants consisted of competition authorities and judges from 35 countries, including all 15 Member States of the European Union, and 20 other countries which have signed treaties with the Union incorporating, to varying degrees, EU Competition laws.

The Forum was organized in three panels: exclusive distribution, selective distribution, and suppliers' economic dependence on large distribution groups. Presentations were made by panel members, followed by discussion open to all participants. The substantive areas selected for coverage at the Forum are especially timely in light of the expiration of block exemptions 1983/83 (Exclusive Distribution) and 1984/83 (Exclusive Purchase) at end of year 1997. The views expressed at the Forum will be taken into account with respect to the Green Book on Distribution, currently under preparation by a group of officials within DG IV, with anticipated publication in the spring of 1996.

Forum participants were invited to submit short papers on each of the three subjects. A volume containing transcripts of oral presentations and written submissions is

currently under preparation for publication later this year.

Both the Green Book and the volume of Forum proceedings will be available in due course through the Office of Official Publications, which may be contacted at any of the addresses listed at the end of this Newsletter. An announcement of their availability will be made in a future issue of this Newsletter.

INTRODUCTORY COMMENTS OF COMMISSIONER VAN MIERT

Commissioner Karel Van Miert welcomed the participants, observing that this was the first conference which brought together on a European Union level community and national competition officials and specialized judges from the Member States. He explained the Commission's objectives in organizing the forum: to allow a congenial exchange of experience and discussion among Community and Member State officials whose job is to enforce competition law; and to encourage decentralized application of Art. 85(1) and 86, which is needed for reasons of efficiency.

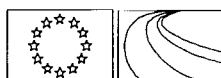
The Commission is in the process of preparing a communication on cooperation with national authorities, he explained, similar to that issued on 13 February 1993 with respect to national

courts. However, he noted that the text alone is not enough, and national authorities must make a sufficient commitment of enforcement resources. The Commission is not prepared, at this time, to give up its exclusive competence with respect to granting exemptions under Art. 85(3), he noted. The reason is that one of the necessary preconditions is not yet satisfied: that the rules of the Member States, as well as the general ideas behind them and the way of applying them, must be sufficiently close to Community rules. Accordingly, Commissioner Van Miert encouraged voluntary harmonization of national competition rules based on the Community model.

The Commissioner observed that the issues being discussed at the forum are highly topical, and must be examined in depth. Thus, he announced that work would begin on a Green Book concerning vertical links, the purpose of which would be to collect information on the commercial environment, producer-distributor links and the relative importance of the various forms of distribution, as well as the policy implications of any changes. Consultations would be held, he stated, on as broad a basis as possible, of all the social and economic partners, the European Parliament, the Member State producers, distributors and consumers, before drawing any conclusions. The Commissioner remarked: "I think this forum will be able already to make a very important contribution to the green paper on vertical restraints, which, as you've understood, I feel is very important."

PANEL DISCUSSIONS

In general, the participants called into question current Commission practices for handling vertical restraints as overly formalistic, and suggested various reforms of both substance and procedure. They



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were consistent in urging that market analysis should be made as the initial step in analyzing vertical restraints, in order to determine whether a restriction of competition exists under Art. 85(1), and before determining whether an individual or block exemption would be appropriate under Art. 85(3).

Some participants were also critical of the Community's notification system for restrictive agreements. For instance, one speaker argued that up to two years may be needed to respond to notifications, which leaves businesses in a state of uncertainty during this period of delay. Another speaker questioned whether the Community's notification system for vertical agreements is really necessary.

Exclusive Distribution

The exclusive distribution panel was chaired by Prof. Franco Capotorti, Università La Sapienza di Roma, già Avvocato Generale, Corte di Giustizia Europea; an introduction was made by Herr Jürgen Mensching, Abteilungsleiter, Europäische Kommission. Members of the panel were M. Guy Charrier, Conseil de la Concurrence, France; Dr. Martin Howe, Director of Competition Policy, Office of Fair Trading, United Kingdom; Frau Brigitte Krause-Sigle, Ministerialdirigentin, Bundesministerium für Wirtschaft, Deutschland; M. Jean-Louis Lesquins, Administrateur civil, Direction Général de la Concurrence, de la Consommation et de la Répression des Fraudes, France; Mr. Patrick Massey, Irish Competition Authority, Ireland; Dr. Luis Miguel Pais Antunes, Director-Geral, Direcção-Geral de Concorrência e Preços, Portugal; Dr. Alberto Pera, Segretario Generale, Autorità Garante della Concorrenza e del Mercato, Italia; and Prof. Ivan Verougstraete, Raadsheer bij het Hof van Cassatie, Belgie. The national authorities sitting on the panel were generally of the opinion that such restraints are not in themselves

anticompetitive, and in most cases improve distribution and efficiency and thus enhance competition. They favored allowing the manufacturer freedom to choose its own commercial policy, such as using such restraints to penetrate new markets or introduce new goods or services.

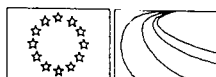
Panel members questioned the Community's current system splitting analysis under Article 85(1) and (3) and placing heavy reliance on block exemptions. Several authorities suggested that the block exemption approach should be abolished and replaced with economic analysis on a case-by-case basis. For instance, Dr. Howe remarked that current economic thinking recognizes that vertical restraints may be efficiency or welfare enhancing, but regard must be had for imperfections such as the free rider problem or the concentration of buyer power. Thus, use of a rule of reason approach to analyze vertical restraints is "of the essence." He contrasted the Community system to the British system, noting that the latter does not subject vertical agreements to a general prohibition, but instead limits the prohibition to cases in which at least 25% of the market is reached by one firm or a group of firms through the network of vertical agreements. The facts of each such case are evaluated, placing heavy reliance on economic analysis and taking into account effects on interbrand and intrabrand competition, market position, and foreclosure. Similarly, Mr. Lesquins argued that exclusive distribution agreements must be evaluated in terms of the degree of restriction imposed balanced against their purpose and economic effects. Several aspects should be considered: maintaining free access to markets (which requires consideration of effect on interbrand and intrabrand competition and market position of the manufacturer); duration of the contract in conjunction with the network of agreements; and setting prices. Resale price maintenance or absolute territorial protection should not be allowed. Dr. Pera stated that to assess properly the

effect of an exclusive distribution network, a number of factors should be considered, including the market conditions (market access, market position), duration of the agreement, and cumulative effect of the network of agreements, which are the elements considered by the Italian authority.

Several participants remarked that the caselaw of the Court of Justice in *DeLimitis* [*Delimitis v. Henninger Bräu AG*, [1991] ECR I-935], and more recently in *Danish Furs* [*Dansk Pelsdyravlforening v. Royaume de Belgique*, Court of First Instance, 2 July 1992], requires that the economic context be considered in determining whether an agreement constitutes a restriction of competition under Art. 85(1).

One group of officials queried whether the notification system should be modified to take account of market share thresholds. For instance, Dr. Antunes remarked that the main competition problem presented by exclusive distribution agreements is their potential cumulative foreclosure effect. Accordingly, he advocated replacement of the block exemption system with a system requiring notification only when the cumulative effect of a series of exclusive distribution agreements goes beyond a certain level, such as 25 or 30% of the market. Mr. Lesquins agreed that the thresholds should be used to decide when notification is required, rather than the substantive decision as to whether the agreement constitutes a restriction. Ms. Krause-Sigle acknowledged that exclusive agreements only present a threat to competition when substantial market power exists, and suggested that a market share threshold for notification might be helpful.

Other officials advocated various modifications to the block exemption system. For instance, several panelists suggested that a regulation specifying black-listed clauses should replace existing block exemptions. Ms. Krause-Sigle suggested that such black-listed clauses



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should include export bans and market sharing agreements between competitors. Other panelists called for the issuance of guidelines on exclusive distribution. For instance, Dr. Pera suggested that guidelines would be useful to national authorities and private enterprises if it were eventually decided that the competition balance should be made under Art. 85(1) and the economic balance under Art. 85(3). Dr. Antunes suggested that a Commission communication would be useful stating what should not be permitted regarding barriers to market access in order to further the market integration goal. Finally, Ms. Krause-Sigle suggested that the block exemptions should be simplified, and Dr. Pera suggested that they should be made more sensitive to market realities.

Some authorities also questioned the effectiveness of the Community system. Mr. Massey described a study which had been undertaken by the Irish authority regarding the large number of exclusive distribution agreements notified to them involving a domestic distributor but a foreign supplier (thus subject also to Community law). The study found that close to 40% of them did not satisfy the conditions of the block exemption, providing for absolute territorial protection, restrictions on the distributor in setting prices or choosing customers, or imposing non-compete provisions or export bans. Thus, he suggested that a system of spot checks should be instituted.

Selective Distribution

The selective distribution panel was chaired by R.H. Lord Slynn of Hadley, Lord of Appeal in Ordinary, Former Advocate General and Judge, European Court of Justice; introductory remarks were made by M. Jean Dubois, Conseiller spécial, Commission Européenne. Panel members were M. Christian Babusiaux, Directeur Général de la Concurrence, de

la Consommation et de la Répression des Fraudes, Ministère de l'Economie, France; Mevr. Henriette Akyürek, Ministerie van Economische Zaken, Nederland; Dr. Martin Howe, Director of Competition Policy, Office of Fair Trading, United Kingdom; Mr. Ioannis Katrakazis, Ministry of Commerce, Greece; M. Fernando Lanzas, Subdirector General de Estudios y Relaciones Internacionales de Competencia, Ministerio de Economía y Hacienda, España; Dr. Luis Miguel Pais Antunes, Director-Geral, Direcção-Geral de Concorrência e Preços, Portugal; Mr. Lars Skov Madsen, Direktor, Konkurrencerådet, Denmark; M. François Vaissette, Conseil de la Concurrence, France; Juan Manuel Fernandez Lopez, Magistrado y Professor de Derecho Mercantil, Madrid, España. This panel also was critical of the Community's current approach (which focuses on the nature of the product and qualitative criteria) as overly formalistic, notwithstanding the fact that no block exemption exists in this area.

Mr. Babusiaux criticized the Commission's approach as being at times overly severe, at times insufficiently severe. This situation has evolved because significant economic changes have occurred over time which affect how competition authorities should handle selective distribution systems. On the one hand, the nature of goods and services is in a process of change. Products once considered luxuries or hi-tech are now available to a wider public, which suggests that a more restrictive policy towards selective distribution systems is warranted. On the other hand, the balance of power between manufacturer and distributor has changed. It is now more legitimate for the manufacturer to protect itself against the retailer's power, and to be more sensitive to the image of its products, such as ensuring the provision of quality service after sales. This suggests that a more lenient policy towards selective distribution is warranted. He concluded that competition officials should focus

less on the nature of the product and more on marketing strategies, such as those responding to concentration of buyer power.

Several panelists suggested that the Commission should adopt a structural market analysis approach. Dr. Antunes remarked that there is no reason for treating selective distribution differently from exclusive distribution: in both, competition problems may arise only as a result of the cumulative foreclosure effect of a network of agreements. Thus, he argued that the Community's use of qualitative criteria to judge the lawfulness of selective distribution systems are no longer appropriate. Dr. Howe and Mr. Vaissette suggested that selective distribution is likely to be efficiency-enhancing and beneficial to competition, since businesspersons are rational and would not otherwise wish to limit distribution to a finite, small number of distributors. However, they, too, acknowledged that selective distribution can have harmful effects if it impedes new entry.

The cumulative effect of a series of contracts should be analyzed by the Commission according to Mr. Babusiaux. He reported that in France, companies had organized networks so that the clauses of various contracts interlock and foreclose competitors from the market.

Judge Fernandez-Lopez criticized the Commission's handling of selective distribution cases; it seems to view almost all selective distribution systems as violative of Art 85(1), creating legal uncertainty by the lack of uniformity in its decision-making practice. Moreover, he noted that the Commission's decisions fail to make a full economic analysis of the market, which the Court of Justice has required in several decisions, including *Société Technique Minière [Société Technique Minière v. Maschinenbau Ulm GmbH, [1966] ECR 235.]*, *De Limitis* [See supra] and *Metro II* [Metro SB Grossmarkte GmbH & Co. v. Comm'n, [1986] ECR 3021]. This approach has



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impeded the possibility for efficient inter-brand competition to occur. He stated that the Commission should be more permissive towards intra-brand restrictions, which do not jeopardize competition but do increase efficiency and promote inter-brand competition.

Some suggested that a Commission communication on selective distribution would be useful. However, a number of panelists (Antunes, Babusiaux, Fernandez, Howe) expressed the view that it would be a mistake to adopt a block exemption for selective distribution. Mr. Babusiaux stated that a block exemption regulation would be very complex, because it would have to take account of national specificities, which vary considerably. He questioned the division of labor between the Commission and national authorities in reviewing selective distribution systems, and argued that based on the principle of subsidiarity, selective distribution systems should be handled by national authorities.

Finally, several panelists suggested that selective distribution presents a problem only when a refusal to sell occurs. However, Dr. Antunes argued that this is not a problem to be rectified by competition law, but maybe instead consumer protection or other commercial law.

Concentration of Buyer Power

More diversity of opinion was evident among the economic dependence panel members. This panel was chaired by Prof. Walter Van Gerven, Katholieke Universiteit Leuven, Oud Advocaat Generaal, Europees Hof van Justitie; introductory remarks were made by M. Christian Babusiaux, Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes, Ministère de l'Économie, France. Panel members were Herr Christian Dobler, Bundeskartellamt, Germany; Mr. David Elliot, Office of Fair

Trading, United Kingdom; M. Olivier Guersent, Fonctionnaire national détaché, Commission Européenne; Dr. Heinz Handler, Sektionsleiter, Bundesministerium für Wirtschaft, Austria; M. Frédéric Jenny, Vice-Président, Conseil de la Concurrence, France; and Dr. Luis Miguel Pais Antunes, Director-Geral, Direcção-Geral de Concorrência e Preços, Portugal. Several speakers expressed doubts as to whether a problem exists in this area. Mr. Babusiaux observed that the difference of opinion reflects market reality in the different Member States. For example, in the food industry, supermarkets make up a smaller percentage of the market in Italy and Spain than they do in France, Germany and Portugal. Thus, the latter view economic dependence as a problem in this industry, while the former do not. He noted that in France, concentration of purchasing power has been growing since the 1960s. However, given the high level of dependence of the manufacturers who are victims of this power, they do not complain, and it is up to the authorities to take action.

Both Germany and France have laws in force for abuse of dominance in bilateral vertical relations, which apply to situations where a manufacturer or distributor with a concentration of power abuses that power and the abuse has a harmful effect on the market. This law has been applied in two cases in France, but no violation was found in either.

Mr. Babusiaux noted that economic dependence is not purely a competition problem, and may be primarily a problem of contract law. Nonetheless, he suggested three possible approaches which should be considered at the national level to address this problem through the use of competition law: application of laws which prohibit abusive horizontal agreements; application of laws which prohibit abuses of a dominant position; or enactment of laws dealing with abusive bilateral vertical relations, similar to those in Germany and France.

Mr. Babusiaux questioned whether a law is needed at the Community level to harmonize national law in this area.

Mr Elliot countered that the economic dependency concept does not raise competition concerns unless there are issues of horizontal market power either upstream or downstream. Taking a hypothetical example of a market in which both suppliers and distributors had market power, he suggested that consumers may benefit from the concentration of buying power of the distributor provide there is horizontal competition at the retail level. In any event, he suggested that it would be difficult to formulate legislation, given the considerable problems in defining and measuring buyer power. ■



ANTI-TRUST RULES

Application of Articles 85 & 86 EC and 65 ECSC

Main developments between 1st April and 31st July 1995

Summary of the most important recent developments

by Joos STRAGIER, DG IV-A-3

AGREEMENT PREVENTING PARALLEL TRADE

In line with its well-established policy of vigorously combatting agreements or practices which artificially divide the common market and thereby prejudice the basic aims of the European Union, the Commission adopted on 12 July 1995 a negative decision under Article 85(1) in a case regarding restraints on parallel trade between Member States. The Commission thereby imposed a fine of ECU 2.7 million on the German car refinish producer BASF Lacke+Farben, a subsidiary of the BASF group, and a fine of ECU 10,000 on BASF L+F's exclusive distributor in Belgium and Luxembourg, Accinauto S.A.

This case originated with a complaint by two English parallel importers of Glasurit car refinish paint products. They alleged that Accinauto, from whom they bought the Glasurit products, had stopped delivering them in the summer of 1990 upon the instructions of BASF L+F. The Commission carried out investigations on the premises of BASF and Accinauto and found out that Accinauto was bound by a contractual obligation to transfer to BASF L+F all orders from customers from outside its exclusive distribution territory. The Commission concluded that this obligation constitutes a restriction of competition as it hinders the export by Accinauto of the relevant products from Belgium to the United Kingdom. In fact, as a result of this obligation, not the exclusive distributor, but BASF itself decides and controls the supply to parallel importers from other Member States. (see IP/95/746)

SELECTIVE DISTRIBUTION

On 19 February 1993 Sony notified the "Sony Pan European Dealer Agreement" (PEDA) consisting of a set of standard agreements intended to create a selective distribution system throughout Europe for its consumer electronics products. The products covered by the PEDA are high quality, high-value and technically complex so that consumers need specialized advice prior to purchase and full after-sales service. Following publication of a Notice in the Official Journal [OJ of 27 November 1993, No C 321/11-12], the Commission received a number of observations from third interested parties and three official complaints. On the basis hereof, the Commission found that the agreements in the form as they were notified could not be cleared under Article 85. However, Sony agreed, following discussions with the Commission, to introduce four major changes to its PEDA, as a result of which the Commission issued a negative clearance comfort letter.

The first modification is to maintain the authorized wholesaler network in the PEDA system. In fact, the Commission felt that the absence of wholesalers in the distribution network could be detrimental to parallel trade and lead to higher prices to consumers. In order also to secure parallel trade, an additional protection has been provided for all authorized dealers, wholesalers and retailers, to which Sony can not any longer refuse to supply the contract products without written justification. Sony also accepted the possibility of appeal for a dealer who was refused authorization through the

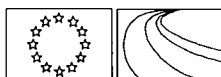
introduction of an arbitration procedure. Finally, in order to justify the selectivity of sales by mail, two clauses were introduced into the Mail Order Dealer Agreement, one providing for a home delivery service and the other providing for a trial period free of charge in favor of mail order customers. (see IP/95/736).

EXCLUSIVE DEALING

In a case concerning a notification of a purchasing agreement between the largest Danish dairy producer, MD Foods a.m.b.a, and the retail chain, Forenede Danske Brugsforeninger (FDB), the Commission issued a negative clearance comfort letter, but only after the agreement had been substantially amended to allow competition from third parties.

The original agreement contained an exclusive purchasing obligation on FDB as concerns fresh milk, and a minimum purchasing obligation for other dairy products. The minimum purchasing obligation represented 98 % of FDB's total requirement in year one, 95 % in years two and three, and 90 % in years four and five.

The Commission found that this agreement infringed Article 85(1). It created a barrier to entry for third parties, including dairy producers from other Member States. The agreement could further not be exempted under Article 85(3). The Commission also concluded that through this agreement MD Foods abused its dominant position on the market. Following negotiations, the parties accepted to amend their agreement. The purchasing obligation was annulled as concerns UHT-milk and reduced for the remainder of the contract period as concerns fresh milk products. From 1 October 1994 to 1 October 1995 it now represents 70 % of FDB's total requirements, till 1 October 1996 50 % and till 1 October 1997 30 %.



▷ ANTI-TRUST RULES

JOINT VENTURE ARRANGEMENT

On 17 May 1995 the Commission issued a comfort letter to clear a joint venture arrangement between nine leading European gas companies for the construction and operation of a UK-Belgium subsea gas interconnection, in particular a high pressure gas pipeline which will be the first connection between the UK and the Continent gas markets.

Ownership of the joint venture company, Interconnector (UK) Ltd, and transport capacity in the facility is shared between the nine members of the consortium in defined ratios. While the JV company will coordinate the activities of the constituent companies in the construction and operation of the interconnector, yet the marketing and use of capacity of the pipeline will remain substantially within the individual companies' control. Each of the companies will be free to provide transport capacity to third parties. Given the possibility for third parties to acquire, on freely negotiated terms, access to transport capacity through the interconnector, and in view of the fact that this project will create opportunities for competition between markets which so far are quite isolated, the Commission found that the pro-competitive effects of the JV clearly outweigh the restrictions of competition which fall under Article 85(1), in particular certain provisions allowing the JV company Interconnector UK Ltd in limited circumstances to market transport capacity, thereby leading to joint selling by the JV partners.

TRANSPORT

Interim measures for access to the port of Roscoff

Acting on a complaint from the Irish ferry operator, Irish Continental Group (ICG), the Commission ordered interim measures on 16 May 1995, against the Chambre de Commerce et d'Industrie de Morlaix, Brittany, France.

ICG applied to CCI Morlaix for access to the port of Roscoff in November 1994 for the purpose of commencing a ferry service between Ireland and Brittany in the summer of 1995. The port of Roscoff is the only port capable of providing adequate port facilities in France for ferry services between Brittany and Ireland. Brittany Ferries was at that time the only ferry company operating between Ireland and Brittany. Following negotiations between the parties, an agreement in principle was reached in December 1994 on the question of access and ICG started the marketing and bookings of its new ferry service. However, negotiations were suspended in January 1995 and no final agreement could be reached between CCI Morlaix and ICG after ICG had complained to the Commission and further negotiations had taken place.

The Commission found that, prima facie, CCI Morlaix had abused its dominant position as the operator of the port of Roscoff in Brittany by its unjustified refusal to give ICG access to the port facilities of Roscoff. The interim measures obliged CCI Morlaix to take the necessary steps to allow ICG access to the port of Roscoff from 10 June 1995 (or any other date to be agreed by the parties) until the end of the summer season, pending a final decision of the Commission on the substance of the case.

The interim measures were found to be justified in this case by the fact that ICG had been led to believe that it could begin operations, and that CCI Morlaix was largely responsible for the situation which developed as a result.

The parties subsequently agreed on a 5 year contract beginning from 14 June 1995, and ICG withdrew its complaint.

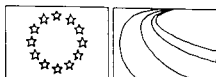
New block exemption for liner shipping consortia

On 20 April 1995 the Commission adopted a regulation granting block exemption to liner shipping consortia

[Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council regulation (EEC) No 479/92, OJ L 89/7 of 21 April 1995]. This is the second block exemption which is adopted in the liner shipping sector. In fact, Regulation 4056/86 [Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ L 378/4 of 31 December 1986] which lays down rules for the application of Articles 85 and 86 to maritime transport, already contains a block exemption for liner conferences.

The new block exemption regulation entered into force on 22 April 1995 and applies for a period of five years. Liner shipping consortia are agreements between two or more shipping companies relating to the joint operation of liner transport services through cooperation in the technical, operational and/or commercial field, with the exception of price fixing. The group exemption only relates to international liner shipping services from or to one or more Community ports exclusively for the carriage of cargo, chiefly by container. It further covers both consortia operating within a liner conference and consortia operating outside such conferences, except that it does not cover the joint fixing of freight rates. Consortium members that wish to fix rates jointly and do not satisfy the conditions of Regulation No 4056/86 must apply for individual exemption.

The block exemption covers the following activities : the coordination and/or joint fixing of sailing timetables and the determination of ports of call; the exchange, sale or cross-chartering of space or slots on vessels; the pooling of vessels and/or port installations; the use of one or more joint operations offices; the provision of containers, chassis and other equipment and/or rental, leasing or purchase contracts for such equipment; the



▷ ANTI-TRUST RULES

use of a computerized data exchange system and/or joint documentation system; temporary capacity adjustments [this does not include arrangements concerning the non-utilization of existing capacity whereby shipping line members of the consortium refrain from using a certain percentage of the capacity of vessels operated within the framework of the consortium; see also Decision of the Commission of 19 October 1994 concerning the Trans-Atlantic Agreement in which the Commission condemned an agreement on non-utilization of capacity (OJ of 31 December 1994, L 376)]; the joint operation or use of port terminals and related services; the participation in tonnage, revenue or net revenue pools; the joint exercise of voting rights in liner conferences; a joint marketing structure; and any other activity ancillary to any of these and necessary for its implementation.

The Commission considers that consortia generally help to improve the productivity and quality of available liner shipping services by reason of the rationalization they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilization of port facilities. Transport users generally obtain a fair share of the benefits resulting from consortia if there is sufficient competition in the trades in which the consortia operate.

In order to take account of the constant fluctuations in the maritime transport market and the frequent changes made by the parties to their agreement, the block exemption regulation limits itself to clarify the conditions and obligations to be met by consortia in order to benefit from the block exemption it grants.

The basic condition for the grant of the exemption relates to the requirement that a fair share of the benefits are passed on to transport users. This requirement is met when a consortium is in one or more of the three following situations : (i) there is effective price competition

between the members of the conference within which the consortium operates as a result of independent rate action; (ii) there exists within the conference within which the consortium operates a sufficient degree of effective competition in terms of services provided between consortium members and other conference members; (iii) consortium members are subject to effective, actual or potential competition from non-consortium lines, whether or not a conference operates in the trade in question.

In order to benefit from the block exemption, a consortium must possess, in respect of the ranges of ports it serves, a share of direct trade of under 30 % when it operates within a conference, and under 35 % when it operates outside a conference. A simplified opposition procedure applies to consortia whose share of the trade exceeds the above limit but does not exceed 50 % of the direct trade.

Other conditions for the grant of the block exemption concern the possibility for the individual members of the consortium to offer its own service arrangements aimed at promoting individual competition as to quality of service; the prohibition to apply rates and conditions of carriage which are differentiated solely by reference to the country of origin or destination of the goods carried; the possibility for each member to withdraw from the consortium without financial or other penalty provided it gives reasonable notice; where the consortium operates a joint marketing structure, the possibility for each member to engage in independent marketing provided it gives reasonable notice.

The following obligations shall be attached to the block exemption. First, there should be real and effective consultations in accordance with certain procedural rules between users or their representative organizations, on the one hand, and the consortium, on the other

hand, concerning the conditions and quality of scheduled maritime transport services offered by the consortium or its members. The second obligation concerns the easy access by transport users to the conditions concerning the services offered by the consortium. Thirdly, the consortium should notify to the Commission arbitration awards and recommendations of conciliators concerning practices of the consortium. Finally, the consortium has an obligation to inform the Commission at its request on the conditions and obligations imposed by this regulation.

XXIVth ANNUAL REPORT ON COMPETITION POLICY

On 24 May 1995 Commissioner VAN MIERT has presented the XXIVth Annual Report on Competition Policy which gives a complete overview of the Commission's activities in 1994 in the different areas of competition policy. In order to increase transparency, the Commission has at the same time published a brochure which summarizes in a reader-friendly language the main developments of the year.

The year 1994 has been particularly rich both in the number of cases dealt with by the Commission and its competition department and in the effectiveness with which they were handled. Also legislative activity increased considerably.

A short overview of the Commission's main activities in the year 1994 is given in the Commission's press release IP/95/523 of 24 May 1995.

(see IP/95/523)



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Press releases issued on the most important developments

COMPETITION POLICY IN 1994: MR VAN MIERT PRESENTS THE ANNUAL REPORT

At the initiative of Mr Van Miert, the Commission has just published the Report on Competition policy which gives a complete overview of the Commission's activities in 1994 in the areas covered by Union competition policy: restrictive practices; the abuse of dominant positions; merger control; the control of state aid; the liberalization of areas such as posts, telecommunications and energy, where States have given special or exclusive rights to certain bodies; and international aspects of competition policy.

The Report is addressed primarily to other Union institutions - Parliament, the Council, and the Economic and Social Committee - and to Member States, and is intended to provide them with an account of what the Commission has been doing and an explanation of the competition policy objectives which the Commission has been pursuing and proposes to pursue in the future. But it also seeks to provide information on competition policy for businesses and industry, and more generally for the public at large, and thus to improve transparency. Competition law specialists also need to be able to use it as a reference work.

The year 1994 saw a considerable increase both in the number of cases dealt with by the Commission departments and in the effectiveness with which they were handled; legislative activity increased at the same time.

Restrictive practices and abuse of dominant positions (Articles 85 and 86 of the Rome Treaty)

The Commission adopted an unprecedented number of formal decisions in 1994: there were 33 of them. At the end of the year there were 1 058 cases pending, which meant that the backlog had been reduced once again.

Detecting and prosecuting cartels remains one of the Commission's priorities. The year under review was particularly noteworthy in this respect: no fewer than three "hard core cartels", involving large numbers of firms, were prohibited in decisions which also imposed substantial fines. The decisions related to key sectors of the economy, namely steel (steel beams), cartonboard and cement. In another decision, concerning sporting goods, the Commission severely penalized restrictions on parallel trade between Member States. The Commission took the same severe stance in cases where a firm exploited a strong position on the market in order unlawfully to prevent competition on the part of other firms. A case which showed the importance of a strict competition policy in the establishment of a genuine single market was that of rail transport in Germany (Deutsche Bahn), which was the first in this sector where the Commission imposed a fine for the abuse of a dominant position.

In applying the competition rules, however, the Commission bore in mind the need to support the restructuring of Community industry so as to increase competitiveness. It took a much more sympathetic approach in cases where

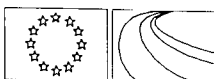
firms, rather than protecting themselves artificially against outside competition, preferred to step up cooperation by means of technology transfer licenses, joint ventures, what were termed "strategic alliances", or mergers. Such cases were particularly numerous in 1994; the Commission authorized arrangements of this kind by means of a formal decision in 19 cases and by means of a comfort letter in even more. One of these cases, BT/MCI, provided a good illustration of the Commission's pragmatic approach here: the Commission found that the market was one which was opening up to worldwide competition as a result of trade liberalization and technological progress, and that firms were accordingly obliged to adapt to the new environment.

Merger control

The number of merger transactions notified was higher than in previous years, going up from 58 in 1993 to 95 in 1994. There was also an increase in the number of cases in which the Commission expressed serious doubts as to the compatibility with the common market of the transaction proposed, and authorized it only after the parties had undertaken to make changes, which in Proctor & Gamble for example included the divestment of certain sections of the acquiror's business. In the MSG Media Service case, which concerned pay TV in Germany, the Commission prohibited the transaction: this was the second case of prohibition since merger control arrangements were established at Union level. In the Commission's view the breaking down of borders facilitates more intense competition, in which only the more efficient will survive, but it has to go hand in hand with strict control of mergers to ensure that they do not endanger the development of effective competition on the relevant markets.

State aid

There were several spectacular state aid decisions, notably those concerning the



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reorganization of the steel industry and the publicly-owned companies Air France and Bull. But the Commission took more than 500 other decisions on individual measures or general schemes of aid to firms. In most cases it decided to raise no objection. It initiated proceedings in 40 cases, and in these it ultimately took 15 positive decisions, 3 negative decisions and 2 conditional decisions.

The Commission believes it must intensify supervision of state aid in order to maintain undistorted competition and to facilitate the convergence of the economies of the Member States. But it is prepared to take account of the situation of the firm, its employees and the region. In 1994 it adopted guidelines on state aid for rescuing and restructuring firms in difficulty. The Commission is prepared to allow such aid, especially on social or regional grounds, if it is linked to a restructuring plan that will make it possible to restore the long-term viability of the firm, and if it is limited to the strict minimum needed to enable that plan to be implemented. The Commission began consultations on draft guidelines on aid to employment and a revised version of guidelines on aid for research and development, particularly in order to take account of the thinking in the White Paper on Growth, Competitiveness and Employment. It sought to reduce the level of aid granted in the economically more advantaged central regions of the Union, where aid could work against the policy of cohesion.

Liberalizing monopolies

Fresh progress was made towards liberalizing sectors in which competition was restricted or indeed eliminated entirely by special or exclusive rights granted to enterprises entrusted with the operation of particular services; this is especially common in posts, telecommunications, energy and the like. Without wishing to call the public service function into question, and bearing in mind the specific features of each sector,

the Commission takes the view that there should be demonopolization wherever possible. A lack of sufficient competition makes these services a burden on consumers and entails a loss of productivity throughout Community industry.

The Commission continued to pursue the liberalization of telecommunications in accordance with the timetable laid down by the Council, which calls for full competition by 1988.

In the energy sector the Commission worked against the background of the need to complete the single market in energy and to ensure that the gas and electricity markets and the interconnected networks were safe, open, transparent, efficient, competitive and respectful of the environment. Legislative dialogue between the Commission, Parliament and the Council continued in a search for agreement on the proposals for directives which would establish a single market in gas and electricity.

The international dimension

There were several events over the course of the year which illustrated the fact that the process of globalization of the economy is accelerating and that competition policy must take account of this new dimension.

The BT/MCI case clearly showed that in dealing with individual cases the Commission would take greater account of trade with non-Member countries and of the worldwide competition which existed in some industries. The Microsoft case provided an example of the necessity and usefulness of genuine collaboration between the competition authorities of the Union and non-Member countries. The Commission continued its efforts to develop a real body of competition rules at international level, and even more important to establish effective mechanisms to police them. A working party composed of independent

experts and Commission staff began examining these questions in 1994.

The economic integration of neighbouring countries, especially the countries of Central Europe, has been benefiting as a result of a systematic effort to apply competition rules on a bilateral basis in accordance with the Union model.

IP/95/523 Date : 95/05/24

COMMISSION LAUNCHES INVESTIGATIONS INTO GLOBAL MOBILE SATELLITE SYSTEMS

By the year 2000 millions of subscribers worldwide are expected to be offered satellite personal communications services.

In this sector global consortia start are being set up involving major American and European companies. This new phenomenon which is set to become a dominant feature of the international satellite market in the second half of this decade has attracted the attention of the European Commission, among others as far as competition policy is concerned.

Hence, Mr. Karel Van Miert, the European Commissioner in charge of competition matters has recently asked his services to send out requests for information regarding two mobile satellite systems (MSS), Globalstar (led by the US companies Loral and Qualcomm) and Iridium (led by the US company Motorola). Inmarsat-P, another major MSS, has already notified its system and partnership agreements to the Commission's competition services. Since Iridium and Globalstar have not yet followed suit, the Commission has commenced investigations at its own initiative.

Although MSS systems are inherently global and the establishment of such systems, in principle procompetitive, it is important that they are screened from the outset under the EC competition rules.



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The aim of the investigation is to ensure level playing fields in the EU and, in particular, to assess the impact of the consortia and their partnership and related agreements on future competition in the relevant more localised markets within the European Union.

As part of its examination of these ventures, the two consortia have been asked to provide a comprehensive description of their systems from the technical, financial and commercial point of view. Moreover, the investigation also addresses the major areas of potential concern which these projects present from the point of view of the competition rules of the EC Treaty; in particular the nature, terms and conditions of the distribution policies chosen by the consortia, the nature of links with cellular terrestrial networks and the access by competing MSS to infrastructure owned by partners in one of them. Most of these areas of concern have also been identified with regard to Inmarsat-P.

Satellite-based, global mobile communications using hand-held terminals represent a market which is expected to result in revenues of 10 to 20 Billion ECU during the next decade. The indirect effects which will ripple through related markets will be much greater. Due to the scarcity of frequencies, the very heavy financial implications involved in launching and operating the large number of satellites needed for such systems, and a high level of market uncertainty, however, it is unlikely that there will be more than a few major players. Given this small number of alternatives and the potential market power of these global satellite system operators, it is particularly important that competition is maximised in the European Union for the other, "downstream", elements of the market involving local service provision, distribution and equipment supply. Open, non-discriminatory and fair conditions regarding partnerships and agreements will need to be maximised.

The Mobile Satellite Systems Services Market

The general service to be offered involves the full coverage of a roaming satellite system, using LEO (low earth orbit) or MEO (medium earth orbit) satellites, which will also support full user mobility, as well as offering the user a light hand-held portable terminal and identification by a single number anywhere in the world. Entering the global age, it is clear that global service is becoming the most appropriate solution to solving an increasing number of communication needs. It is expected that mobile voice service will be the primary application for these networks, but two other significant segments will involve so-called mobile personal digital assistants, data transmission and paging.

In essence, MSS represent the ability to maximise mobility of users, by providing global roaming and coverage in remote areas where terrestrial services may be uneconomic. "Global coverage" means not only that the user can move anywhere, but also that the communications system can "move" to serve new fixed or "stationary" users. Thus, these systems are not aimed only at the international business traveller. In fact Commission studies predict that by far the greatest potential (in terms of numbers of subscribers) in the MSS market will be for communities in less developed regions of the world as a substitute for "fixed service" where fixed networks have yet to be rolled out or are very poor. Central and Eastern Europe represent an important customer base in this context, which could be accessed from gateways within the EU. A third important use of MSS will be as a substitute for cellular mobile telephony in areas where the cellular network has failed to penetrate (i.e. rural parts of the developed world and both urban and rural parts of lower income countries).

MSS is expected to act as complement to both GSM and DECT wireless technologies as well as the public

telephone network, enhancing universal service coverage since it is uniquely well suited to areas of low population density.

Iridium

Motorola, a major US telecommunications equipment manufacturer, plays the leading role in the Iridium consortium. A number of European companies are participating by way of partnership agreements and/or investment. This includes companies such as STET (the Italian state holding company, majority owner of Telecom Italia) and Vebacom (subsidiary of the major German telecom corporation VEBA AG).

Motorola Satellite Communications is in charge of spacecraft construction but Iridium itself will own and operate the system once in place. Lockheed Corp. (USA) is contracted to actually build 125 satellites for Iridium by the year 2003. Other partners/investors include Krunichev Enterprise (CIS) who will launch the satellites with Proton rockets, Scientific Atlanta Inc (USA) who will develop and manufacture the hand-held units as well as the satellite earth terminals, and Sprint, the third US long-distance telecommunication carrier. The total cost of the system is estimated at US\$ 3.8 billion.

In 1990 Motorola filed its application to operate a global satellite personal communications system with the US Federal Communications Commission (FCC). Approval was given and frequencies allocated by the FCC in January 1995. Iridium plans to be operational with a limited number of satellites by 1997-98, and expects 1.5 million subscribers by the year 2000. It will offer voice, paging and data services.

GlobalStar

The Globalstar consortium is led and sponsored by the Loral Corporation, a leading US defence electronics company



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which acquired Ford Aerospace in 1990. Loral Qualcomm Satellite Service has bypassed many funding problems experienced by other players in the satellite industry by use of existing, in orbit, satellites. Partners/contractors include the European companies Alcatel (France), Aerospatiale (F), Alenia (I) and Deutsche Aerospace (D). The total cost of the system is estimated at US\$800 million.

Like Iridium, Globalstar has been approved in the US by the FCC in January 1995. It expects to be operational in the US around 1999-2000 and globally, around five years later. Globalstar will also be offering voice and data, as well as tracking services

Inmarsat-P

Inmarsat-P is a MSS system sponsored by the International Maritime Satellite Organization (Inmarsat) and a large number of its signatories, including the European companies Telefónica de España (E), Telecom Finland (SF), OTE (Gr), Swiss Telecom (Swt), CPRM (P), PTT Telecom (NI) and Detemobil (D). The Inmarsat-P system which will consist of 12 satellites in intermediate circular orbit, will be operational around the turn of the century. IP/95/549 Date 95/06/07

COMMISSION FINES BASF AND ITS BELGIAN EXCLUSIVE DISTRIBUTOR OF GLASURIT CAR REFINISH PAINT FOR HINDERING THE EXPORT OF THIS PRODUCT TO THE UNITED KINGDOM

In a decision which finds that they have infringed the competition rules enshrined in Article 85(1) of the EC Treaty, the Commission has imposed a fine of ECU 2.7 million on the German car refinish paint producer BASF Lacke+Farben (BASF L+F), a subsidiary of the BASF

group, and a fine of ECU 10.000 on BASF L+F's exclusive distributor in Belgium and Luxembourg, Accinauto S.A.

This case originated with a complaint by two English parallel importers of Glasurit car refinish paint and associated products. These companies alleged that the Belgian exclusive distributor, from whom both bought Glasurit products, had stopped delivering to them in the summer of 1990 upon the instructions of BASF L+F.

Moreover there have been important price differentials for Glasurit products between Belgium and the UK. According to an internal analysis of BASF, the price differential in 1991 amounted to at least 20% net, and for both the trade prices and retail prices, the United Kingdom is for the period 1988- 1989 40% to 70% above the level in Belgium, the Netherlands or Germany for two of the main Glasurit products. Also the selling prices of BASF L+F to its UK subsidiary were higher than the selling prices to Accinauto.

Following an investigation carried out on the premises of BASF L+F, BASF Coatings & Inks (BASF L+F's UK subsidiary) and the Belgian distributor by Commission officials, the Commission has concluded that the contractual obligation on the exclusive distributor to "transfer to BASF L+F all orders from customers from outside the exclusive distribution territory" constitutes a restriction of competition. This obligation has as its consequence the fact that it is not the exclusive distributor but BASF L+F which decides on the supply to, in particular, parallel importers from other Member States.

This interpretation of the contractual obligation is also confirmed by the manner in which the parties have continuously applied it in their commercial relations:

- in March 1986 the exclusive distributor obtained an "exceptional

permission" from BASF L+F to supply the complainant; - in June 1989 BASF L+F instructed its exclusive distributor to stop supplying parallel exporters; - the exclusive distributor continued to supply the complainants between July 1989 and May 1990. But since the latter date, it has respected its contractual obligations in full.

In setting the amount of the fine, the Commission has taken into account the fact that there has been a serious breach of Community law.

The amount of the fine imposed on the Belgian exclusive distributor reflects the fact that the company is economically dependent on BASF L+F and that this dependence was used by BASF L+F to enforce its economic interests.

IP/95/746 Date : 95/07/12

THE COMMISSION APPROVES A MODIFIED SONY PAN-EUROPEAN DEALER AGREEMENT

With Mr Karel Van Miert's approval, the competition services have put the light on green for Sony's substantially modified Pan-European Dealer Agreement (PEDA) which creates a selective distribution system for Sony consumer electronics in Europe (EC and EFTA countries) products which was first notified to the Commission on 19 February 1993.

The products covered under the agreement are high-value and complex products which require pre- and after-sales service. Mass market products are not part of the PEDA system. Dealers who wish to sell Sony products covered by the PEDA must satisfy certain objective criteria. They must also respect the selectivity of the network, only buying from Sony or other authorized dealers and only selling to consumers or other authorized dealers.



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Details of the notification were published in the Official Journal of the European Community on 27 November 1993. Following notification the Commission received a number of comments from interested parties as well as three official complaints.

The Commission has been involved in negotiations with Sony with a view to resolving the aspects of the agreement which were deemed to be anti-competitive and four important changes have been made.

- The most significant change is the preservation of the wholesaler level of supply which was not provided for in the original notification. The Commission was concerned that the effect of cutting wholesalers out completely would be to restrict parallel trade and this could lead to higher prices.
- A clause has been added to the agreement to the effect that Sony may not refuse to supply the product to an authorised retailer or wholesaler without written justification. This again is designed to encourage parallel trade.
- The PEDAs system in its original form did not provide any remedy for a dealer who was refused authorisation to sell Sony products. At the Commission's request, Sony has established an independent arbitration procedure to which any retailer or wholesaler refused authorisation may appeal.
- The fourth major change concerns the mail order service set up under the PEDAs system. Following discussions with the Commission, Sony has agreed to introduce home delivery and a "without obligation" trial period for goods bought by its mail order customers. This improvement in the level of service justifies the extension of the selective distribution system to the mail order system.

IP/95/736 Date : 95/07/11

COMMISSION APPROVES THE CREATION OF ASPEN JOINT VENTURE BETWEEN ELF ATOCHEM AND UNION CARBIDE CORPORATION

The European Commission's services have approved the creation of a joint venture, Aspen, between Union Carbide Corporation and Elf Atochem in the field of specialty polyethylene resins and compounds.

By the operation, the parties transfer some of their interests in the European specialty polyethylene products sector to the joint venture.

For Union Carbide, this operation will replace imports to the European market of specialty polyethylene products destined for wire and cables applications. For Elf Atochem, its wire and cables activities will be transferred to Aspen. The joint venture will become a full-line supplier of these specialty products.

Elf Atochem will also transfer some of its facilities at Gonfreville, France, which will subsequently benefit from the introduction of "Unipol" technology and "wire and cable" product technology licensed by Union Carbide. The joint venture will also be licensed by Elf Atochem to use its technologies for certain polyethylene specialties.

The marketing of these products will be split between the parents who will act as agents. Union Carbide will market those products relating to the wire and cables sector, whereas Elf Atochem will market all other products including some bulk grade polyethylene produced by the joint venture, but not required for specialties.

The Commission's services consider that the agreement falls within the general prohibition of Art. 85(1) of the Treaty of Rome, since both partners will remain important suppliers of polyethylene in the Community and having regard to

provisions concerning the supply of raw materials to the joint venture.

However, the agreements meet the conditions for exemption under Article 85(3) of the Treaty. The joint venture promotes the introduction of new technologies and allows for greater levels of competition in the specialty polyethylene market. For this reason, the Directorate-General for Competition has issued a comfort letter regarding the notified agreements.

IP/95/515 Date : 95/05/29

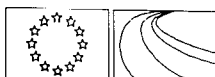
DISTRIBUTION OF MOTOR VEHICLES: THE COMMISSION ADOPTS A NEW REGULATION WHICH ASSURES MORE INDEPENDENCE FOR DEALERS

At the initiative of Mr Karel Van Miert, responsible for competition policy, the Commission has today adopted a new Regulation relating to the distribution and servicing of motor vehicles, which will remain in force until 30 September 2002.

The text approved by the Commission comprises adjustments aimed at intensifying competition at the stage of distributing cars by re-balancing the diverse interests in question. They aim in particular to:

- give dealers, the great majority of whom are SMEs, greater commercial independence vis-à-vis manufacturers;
- give independent spare-part manufacturers and distributors easier access to the various markets, notably the outlets provided by the car manufacturers' networks;
- improve the position of consumers in accordance with the principles underlying the internal market;
- make the dividing line between acceptable and unacceptable agreements / behaviour clearer.

The new Regulation will enter into force on 1 July but will only take effect on 1



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October 1995, so as to enable the undertakings concerned to study the new rules in depth during a sufficiently long period between their publication in the Official Journal and when they take effect [Regulation 1475/95 of 21 June 1995, OJ L 145, 29 June 1995).

It should be underlined that for existing contracts the new Regulation will apply from 1 October 1996.

Moreover, the Commission will regularly monitor the implementation of the regulation, notably as to its effects on car price differences between Member States.

In any event, the Commission is required to produce a report on the functioning of the Regulation at the latest by 31 December 2000.

The main changes

Strengthening the competitiveness of dealers

So as to give dealers (most of whom are SMEs) greater independence vis-à-vis manufacturers, the new Regulation:

- grants to the dealer the right to sell the cars of other manufacturers provided that this is done on separate premises, under separate management and that there can be no possible confusion between the makes. The maintenance and repair of vehicles of different makes can be performed in one and the same workshop. Allowing multidealerships should give dealers greater independence vis-à-vis manufacturers;

- establishes a list of anti-competitive "black" clauses which are forbidden. It is a question of provisions by which the parties apply their agreement to products or services not covered by the Regulation, conclude restrictions of competition not expressly exempted, exclude the freedom to deliver within the network or reserve to the supplier the right to modify, during the duration of

the agreement, the status of the dealer or the allotted territory;

- grants to the dealer the right to engage in any type of transaction (sale, leasing, hire purchase) of new vehicles, whilst excluding the supply of resellers who are not part of the network;

- permits the joint setting by the manufacturer and the dealer of annual sales targets, whereas previously they could be unilaterally determined by the manufacturer. In future, in the event of disagreement between the parties, an independent third party will decide the dispute;

- extends the minimum duration of distribution agreements from 4 to 5 years and the period of notice for termination from 1 to 2 years, so as to ensure better protection of dealers' investments.

Improved market access for spare parts manufacturers and for independent repairers.

- The new Regulation will provide better protection for the right of independent suppliers of spare parts that match the quality of the contract products to supply resellers of their choice, including those who belong to the networks of car manufacturers, together with the right of these suppliers to place their trade mark or logo on the products.

- The draft Regulation provides that the manufacturer must supply to independent repairers the technical information necessary to allow them to carry out repairs or maintenance of cars unless this information is covered by an intellectual property right or constitutes identified, substantial, secret know-how; however, even in this last case the technical information necessary must not be refused in an abusive manner.

Increasing consumers' choice in accordance with the principles of the single market.

A number of the changes mentioned above also have the result of increasing

greater choice for consumers: multidealerships, opening of the market in spare parts, greater competition in the field of repairs. Other provisions have the same object:

- Certain typical practices designed to prevent parallel imports, such as differences in the manufacturers' remuneration of dealers depending on the place of destination of the vehicle, will in future be prohibited.

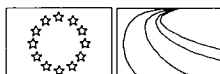
- Dealers within a distribution network are required to perform guarantee work as well as free servicing, whatever the place where the vehicle was purchased in the Common Market.

- The dealer may in future advertise outside his allotted territory, subject to certain limitations which ensure respect for the principle of exclusivity; this is why the admissible means of advertising do not include direct personal contact with the customer, whether by door step sales, by telephone call or by computer network, or by individual letter.

Clarification of the distinction between admissible and non admissible agreements / behaviour.

The new Regulation establishes the principle that the presence of a "black" clause in the distribution agreement renders the exemption inapplicable with respect to both parties. It clarifies also that certain anti-competitive practices which appear in the "black" list (such as obstacles to parallel imports, interventions in the freedom of dealers to determine prices and discounts at the time of resale, restrictions on the freedom of offerors of spare parts and refusal to supply technical information to independent repairers) lead to automatic loss of the exemption when committed systematically or repeatedly.

Due to its specificity, the new Regulation excludes the applicability of the block exemption Regulation concerning franchise agreements to the distribution of



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motor vehicles. Undertakings in the automobile sector who are interested in concluding franchise agreement can, however, ask for an individual exemption.

Price differentials: the Commission stays vigilant

The adoption of the new Regulation does not change at all the substance of the two Commission Notices which the Commission had adopted with regard to the Regulation of 1985:

- The first Notice of 1985 explains, notably, the thresholds for price differentials above which the Commission could withdraw the benefit of the exemption in order to avoid that motor vehicle distribution and servicing agreements lead to closing of the markets.

- The second Notice of 1991 explains the scope of action of intermediaries acting on behalf of a final user. It is also meant to clarify the conditions in which a final user may charge an intermediary with the purchase of a car within the Common Market.

End of a long discussion

The adoption of this Regulation comes at the end of a long discussion with interested parties, the Member States and the other institutions. A first preliminary draft had been approved by the Commission on 5 October 1994 (see Press Release IP/94/54) and was then submitted to the Member States for a first exchange of views. The Commission published this preliminary draft in the Official Journal of 31 December 1994 and invited all interested parties to send in their comments before 28 February 1995.

The services of the Commission received numerous submissions emanating from European associations, national associations, large or small undertakings and from other interested parties

(lawyers, advisers). The European Parliament and the Economic and Social Committee communicated their positions, supporting the main elements of the Commission's draft. The different submissions by car manufacturers, dealers, manufacturers and distributors of spare parts, resellers and independent repairers and consumer associations have led the Commission in the decision of 26 April (see Press Release IP/95/420) to modify the initial proposal for the Regulation without altering the basic approach.

The second consultation of the national experts took place on 22 May 1995. All Member States agreed in principle with the draft of 26 April 1995. The text which has been adopted today takes into account the results of all the consultations effected by the Commission.

IP/95/648 Date : 95/06/21

IRISH FERRIES ACCESS TO THE PORT OF ROSCOFF IN BRITTANY: COMMISSION DECIDES INTERIM MEASURES AGAINST THE MORLAIX CHAMBER OF COMMERCE

Acting on a complaint from the Irish ferry operator, Irish Continental Group, the Commission has decided interim measures against the Chambre de Commerce et d'Industrie de Morlaix, Brittany, France. The Commission decided, *prima facie*, that the Chamber of Commerce had abused its dominant position as the operator of the port of Roscoff in Brittany by refusing at this stage ICG access to the port facilities there, in violation of Article 86 of the EC Treaty. The Commission has decided that the CCI must grant ICG access to the port of Roscoff by June 10th 1995.

ICG applied to CCI Morlaix for access to Roscoff in November 1994 for the purpose of commencing a ferry service between Ireland and Brittany this

Summer. Following negotiations, the parties had agreed in principle on the question of access to Roscoff by 16 December 1994, for the season beginning 27 May 1995, and sailing schedules and a number of technical issues had been agreed.

Following the agreement in principle of December 1994, ICG announced its services to Roscoff and began to take bookings. However, in January 1995 CCI Morlaix indicated its wish to suspend negotiations.

Following ICG's complaint to the Commission, further negotiations took place but no agreement was reached between the parties, at this stage, in particular as to the date to comments operations.

The Commission has decided that, *prima facie*, the behaviour of CCI Morlaix amounted to a refusal to supply services.

The port of Roscoff is, for the time being, the only port capable of providing adequate port facilities in France for ferry services between Brittany and Ireland, a market which accounted for around 100,000 passengers in 1994. At present, only one ferry company, Brittany Ferries, is operating between Ireland and Brittany.

On the basis of the Commission decision CCI Morlaix must take the necessary steps to allow ICG access to the port of Roscoff by June 10th 1995. In the meantime the Commission hopes that both parties will find a suitable solution to the pending technical problems.

IP/95/492 Date : 95/05/16

COMMISSION APPROVES BLOCK EXEMPTION FOR CONSORTIUM AGREEMENTS IN SHIPPING

On a proposal from Mr Van Miert, the Commission has recently adopted a second block exemption Regulation in the liner shipping sector.



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In this sector, liner conferences - a traditional way of organizing maritime transport - have since 1 July 1987 been covered by such an exemption

The new Regulation grants block exemption to liner shipping consortia. These are agreements aimed at establishing a greater or lesser degree of cooperation with a view to providing, by means of various arrangements, a common liner shipping service.

The exemption

Scope

The exemption is to apply for an initial period of five years; it covers both consortia operating within a liner conference and consortia operating outside such conferences, in so far as they provide international liner shipping services to or from one or more Community ports.

The service must be for the sole carriage of cargo; the exemption does not cover agreements in respect of passenger transport, between ferry companies for example. The regulation forbids price fixing and only covers maritime activities and not inland transport activities of the consortia.

Description

The block exemption covers the following activities: the coordination and/or joint fixing of sailing timetables and the determination of ports of call; the exchange, sale or cross-chartering of space or slots on vessels; the pooling of vessels, port installations or operations offices; the provision of containers, chassis and other equipment; the use of a computerized data exchange system; temporary capacity adjustments; the joint use of port terminals; participation in various other forms of pool; the joint exercise of voting rights in liner conferences; a joint marketing structure; and any other activity ancillary to any of these and necessary for its implementation.

Background

In June 1990 the Commission presented to the Council a communication [COM(90)260 of 18 June 1990] in which it came out in favour of granting block exemption to this modern method of organizing liner shipping, which came into being in the late 1960s with the appearance of containers.

The growth of container services and the amount of investment needed, notably in container ships, to operate such

services meant there was a greater need for cooperation between shipowners. This cooperation usually took the form of consortium agreements. The Commission's favourable attitude towards such agreements is due to the fact that users generally receive a fair share of the resulting benefits. Thanks to the agreements, shipowners can organize jointly the services they supply and thus provide users with a better service while rationalizing their maritime transport activities and securing economies of scale and cost reductions.

Objective

The Regulation seeks to strike a balance between the interests of shipowners and those of transport users. Such a balance can be achieved only if, among other things, consortia operate in trades in which they continue to face effective competition from other shipowners, thereby ensuring that shippers also benefit from the advantages of such agreements. The Commission, in pursuing a policy of promoting consortia, cannot act against the interests of transport users, who are working on behalf of European importers and exporters, for whom the availability of a maritime transport service that is efficient and competitive in terms of both quality and price is essential.

IP/95/409 Date : 95/04/28

Other relevant Press releases

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IP/95/420 : COMMISSION ADOPTS SELECTIVE CAR DISTRIBUTION REGULATION

TELECOMMUNICATIONS VENTURE COULD BE ACCEPTABLE UNDER THE COMPETITION RULES

IP/95/791 : COMMISSIONER VAN MIERT DETAILS CONDITIONS UNDER WHICH ATLAS

IP/95/768 : CAR PRICE DIFFERENTIALS IN THE EUROPEAN UNION ON 1 MAY 1995

IP/95/646 : COMMISSION SAYS IT MAY IMPOSE FINES ON MEMBERS OF THE TRANS-ATLANTIC CONFERENCE AGREEMENT (TACA)

IP/95/524 : ATLAS PROJECT: STATEMENT BY KAREL VAN MIERT

IP/95/849 : COMMISSION DECLARES ATR/BAE REGIONAL AIRCRAFT JOINT VENTURE NOT TO BE A CONCENTRATION AND WILL BE ASSESSED UNDER ARTICLE 85 RULES.



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Court Judgements

These summaries of Court Judgements have been prepared by DG IV officials and represent their personal views on the Judgement. These views have not been adopted or in any way approved by the Commission and should not be relied upon as a statement of the Commission's or DG IV's views. The CELEX document numbers for these Judgements are also included within brackets.

**ORDER OF THE PRESIDENT OF
THE COURT OF FIRST INSTANCE
OF 12 MAY 1995 IN CASES T-
79/95R & T-80/95R, SOCIÉTÉ
NATIONALE DES CHEMINS DE
FER FRANÇAIS (SNCF) &
BRITISH RAILWAYS BOARD (BR)
-V- COMMISSION**

Sector: Competition - Article 85 - Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway - application for interim measures.

Subject: applications for the suspension of operation of article 2A of Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under article 85 of the EC Treaty and article 53 of EEA Agreement (IV/32.490 - Eurotunnel) in so far as it attaches certain conditions to the exemption provided for in article 1 of the Decision.

Procedure

The applicant and the defendant stated that they had no objection to one order disposing of the two applications for interim measures.

Facts and law

The facts may be briefly summarised. On 29 July 1987, BR and SNCF of the first part and Eurotunnel of the second part entered into an agreement (usage contract) defining their reciprocal rights

and obligations concerning the use of the fixed link under the English Channel. Eurotunnel, in agreement with BR and SNCF, notified the usage contract to the Commission with a view to obtaining a declaration of the non-applicability of article 2 of Regulation (EEC) No 1017/68 of the Council applying rules of competition to transport by rail, road and inland waterway. The Commission granted the usage contract an exemption for a period of three years expiring on 15 November 1991. Following requests by Eurotunnel for the renewal of the exemption, the Commission adopted the contested decision by which it granted the usage contract an exemption for a period of 30 years. Conditions and obligations were attached to that exemption. SNCF and BR considered that those conditions were unlawful and harmful to their interests because they are obliged to surrender to third-party railway undertakings one quarter of their rights under the contract to use the tunnel.

The President of the Court found that the flexibility of the conditions imposed which enable BR and SNCF to use "more than 75% of the hourly capacity if the other railway undertakings do not use the 25% of capacity remaining" does not appear to rule out all serious disadvantage to the applicants since it rise to uncertainty as to the extent and the duration of the usage rights granted to them.

However, the President of the Court ruled that only the existence, at least foreseeable or probable, of third parties interested in using the tunnel's capacity would have been capable of

substantiating the risk of serious and irreparable damage which, according to the applicants, would follow from the immediate application of the conditions attached to the decision of exemption. In the absence of such interested parties the risk of damage was too uncertain and speculative to prevail over the interests pursued by the Commission by means of the imposition of the conditions, namely the preservation of effective competition and the principle of the freedom to provide services in the rail transport sector. On those grounds the President dismissed the applications.

Main points

The applicants' submission that in the absence of potential competition, the conditions imposed by the Commission were not necessary, contradicted their claim that the immediate application of these conditions was liable to cause them serious and irreparable damage.

P. ADAMOPOULOS [695B0079]

**ARRÊT DU TRIBUNAL DE
PREMIÈRE INSTANCE DU 6 JUIN
1995 DANS L' AFFAIRE T-14/93
UNION INTERNATIONALE DES
CHEMINS DE FER C/
COMMISSION**

Domaine: Concurrence -Règlement n°1017/68-Agences de voyages- Vente de billets internationaux de chemins de fer.

Objet : Recours en annulation, en vertu de l'article 173 du traité CE, de la décision 92/568/CEE de la Commission, du 25/11/1992, relative à une procédure au titre de l'article 85 du traité CEE (affaire n°IV/33.585 - Distribution des billets de transport ferroviaire par les agences de voyages, JO L336, p.47). Le recours susvisé a été formé par l' Union Internationale des chemins de fer (UIC), association d'entreprises ferroviaires.



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Sur le fond

Le tribunal a rappelé les faits à l'origine de la litige. Le 25/11/1992, la Commission a adopté la décision 92/568/CEE relative à une procédure de l'article 85 par laquelle elle a constaté que l'Union Internationale des chemins de fer (UIC), en adoptant et diffusant à l'attention de ses réseaux membres une fiche relative aux relations entre ceux-ci et les agences de voyages (fiche 130), a enfreint l'article 85 § 1 du traité, et lui a infligé une amende d'un million d'écus.

La fiche 130 constitue une décision d'association d'entreprises par laquelle les réseaux membres de l'UIC ont déterminé ou établi en commun :

- la maîtrise de l'agrément des agences par chaque entreprise ferroviaire nationale,
- la fixation de conditions d'octroi des commissions qui rémunèrent les agences de voyage,
- la fixation d'un taux de commission uniforme,
- l'obligation pour les agences d'établir et de vendre les billets aux prix officiels indiqués dans les tarifs
- l'interdiction faite aux agences de favoriser, dans leurs offres ou conseils à la clientèle, des modes de transport concurrents.

Les règles de procédure

La Commission a adopté la décision litigieuse dans le cadre du règlement n° 17 et non dans celui du règlement n° 1017/68 portant application des règles de concurrence aux secteurs de transports par chemin de fer, par route et par voie navigable. Le tribunal a distingué trois motifs dans le raisonnement de la Commission concernant le choix du règlement de procédure applicable:

i) la prestation de services des agences de voyages ne concerne pas la prestation de transport, fournie exclusivement par le commettant; comme il ressort de l'arrêt

VVR, l'agent de voyages est "un intermédiaire indépendant" qui rend "un service autonome".

Or, le tribunal a estimé que le service fourni par une agence agréée consiste à négocier et conclure des contrats de transport au nom et pour le compte du réseau et à émettre les titres de transport qui en résultent. Même s'il s'agit d'une prestation de services autonome, cette prestation concerne donc la prestation de transport.

ii) la fiche 130 ne concerne pas directement la prestation de transport.

Pour le tribunal, il ne faut attacher trop d'importance au 3e considérant du règlement n° 141 (expiré en 1968), qui précise que l'accord doit concerner directement la prestation de transport. Par contre, les articles 1er et 2 du règlement 1017/68 suggèrent une interprétation de ce dernier plus large que celle défendue par la Commission. L'article 1er s'applique à certains accords, décisions ou pratiques concertées, portant tant sur *le financement ou l'acquisition en commun de matériel ou de fournitures de transport directement liés à la prestation de transport que sur les opérations des auxiliaires de transport*. L'article 2, sous a), se réfère aux accords, décisions ou pratiques concertées qui fixent de façon directe ou indirecte non seulement les prix et conditions de transport, mais également *d'autres conditions de transaction*. L'article 2, sous b), vise de son côté les ententes qui limitent ou contrôlent *l'offre de transport, les débouchés, le développement technique ou les investissements*. Le tribunal considère dès lors que le règlement n° 1017/68 recouvre également les activités qui sont connexes et indispensables à la prestation de service de transport par chemin de fer comme en l'espèce la vente des billets internationaux de train selon de modalités déterminées en commun.

Le tribunal considère en outre que la fiche 130 porte tant sur l'offre du transport que sur le prix du transport, au

sens du règlement n° 1017/68. En ce qui concerne l'offre, la fiche porte sur la détermination des points de vente et, de ce fait, limite les débouchés des réseaux. En ce qui concerne le prix, la détermination concertée des commissions d'agences constitue une fixation indirecte des prix de transport. De plus, l'obligation prescrite aux agences de respecter les tarifs (hors commission) établis par les réseaux a pour objet ou pour effet de fixer le prix du transport. Même l'interdiction éventuelle de la rétrocession des commissions concernerait, selon le tribunal, la fixation du prix du transport, dans la mesure où les réseaux empêcheraient ainsi toute concurrence en matière tarifaire entre les agences accréditées. Le tribunal ajoute enfin que l'interdiction faite aux agences de favoriser les modes de transport concurrents restreint la concurrence entre les différents modes de transport. Cette disposition relève donc du secteur des transports.

Le tribunal ne méconnaît pas l'argument de la Commission, tiré de ce que la fiche aurait des effets anticoncurrentiels sur le marché de la distribution des billets. Néanmoins, ces répercussions sur la concurrence sur des marchés voisins mais accessoires restent sans incidence. Les éventuels effets sur la concurrence sur le marché de la distribution des billets seraient, selon le tribunal, secondaires par rapport aux effets qui relèvent du secteur des transports proprement dit.

iii) l'agence de voyages n'est pas un auxiliaire de transport, au sens de l'article 1er du règlement n° 1017/68.

Le tribunal précise que l'agence, en tant que mandataire, doit être considérée comme l'auxiliaire du réseau puisque les opérations de conclusion de contrats de transport et d'émission de billets sont susceptibles d'être exécutées par un auxiliaire de transport (opérations des auxiliaires de transport au sens de l'article 1er du règlement n° 1017/68).

Le tribunal conclut que la Commission a commis une erreur de droit dans le choix



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du règlement de procédure applicable qui a eu pour effet de priver la requérante de certaines garanties procédurales propres au règlement n° 1017/68. En effet, ce dernier n'impose pas, contrairement au règlement n° 17, la notification préalable d'un accord aux fins de son exemption. D'autre part, la composition du comité consultatif des représentants des Etats Membres diffère dans les deux règlements. Enfin, le règlement n° 1017/68 prévoit seul la faculté pour un Etat Membre de demander une convocation du Conseil dans un délai de 20 jours à compter de la date à laquelle le comité consultatif a rendu son avis, délai pendant lequel la Commission ne peut adopter sa décision. Il en résulte que la mise en oeuvre du règlement n° 17, en lieu et place du règlement n° 1017/68, était constitutive d'une violation des formes substantielles.

Par conséquent, la décision a été annulée.

Points essentiels

1) La Commission doit retenir une interprétation plus large du règlement n° 1017/68 puisque son champ d'application ne se limite pas à celui du règlement n° 141.

2) Une décision d'association d'entreprises ferroviaires régissant les modalités de vente des billets internationaux porte sur des activités qui sont connexes et indispensables à la prestation de transport.

3) Les éventuels effets anticoncurrentiels de cette décision sur le marché de la distribution des billets (marché voisin mais accessoire au marché de prestation de transport) sont secondaires par rapport aux effets sur le secteur des transports proprement dit.

4) La mise en oeuvre du règlement n° 17, en lieu et place du règl. n° 1017/68 prive la requérante de certaines garanties procédurales propres au règl. n° 1017/68.

P. ADAMOPOULOS [693A0014]

ARRÊT DU TRIBUNAL DE PREMIÈRE INSTANCE, DU 6 AVRIL 1995, DANS LES AFFAIRES JOINTES T-80/89 ET SUIVANTES, BASF AG ET AUTRES c/ COMMISSION, AFFAIRES DITES DU POLYÉTHYLÈNE (PEBD).

L'arrêt du Tribunal dans les affaires PEBD (polyéthylène de basse densité) est très semblable à celui rendu par la Cour sur pourvoi de la Commission, le 15 juin 1994, dans les affaires dites PVC (aff. C-137/92 P, Rec. p. I-2555). Ceci s'explique du fait que la décision PEBD a été adoptée le même jour (le 21 décembre 1988) et suivant la même procédure que la décision PVC I. Les faits constatés sont, de plus, similaires et la plupart des destinataires sont les mêmes.

Il n'est donc pas étonnant que cet arrêt concerne les points qui étaient au centre des affaires PVC: la procédure d'habilitation pour la finalisation des décisions de la Commission, ainsi que pour leur adoption dans les langues faisant foi (autres que l'allemand, l'anglais et le français); la procédure d'authentification des décisions adoptées par le Collège des Commissaires. Il n'est pas étonnant non plus que la conclusion de cet arrêt suive celle de la Cour dans l'arrêt PVC, à savoir l'annulation de la décision de la Commission, pour violation de formes substantielles.

L'arrêt PEBD confirme que la Commission ne peut habilitier son Membre chargé des questions de concurrence à adopter, en son nom et sous son contrôle, le texte définitif d'une décision finale en matière de concurrence, sur la base du projet discuté par elle en collège et dont elle a demandé quelques modifications, même mineures. La motivation du Tribunal sur ce point reprend l'observation de la Cour dans l'arrêt PVC suivant laquelle l'élément intellectuel et l'élément formel constituent un tout indissociable, si bien que la mise en forme écrite de l'acte est

l'expression nécessaire de la volonté de l'autorité qui l'adopte (motif 77). Pour la Cour et le Tribunal, le respect du principe de collégialité, ainsi que celui du principe de l'intangibilité de l'acte, impliquent que seules des adaptations purement orthographiques ou grammaticales peuvent encore être apportées au texte d'un acte après son adoption formelle par le collège (motif 76, rappelant les motifs 67 et 68 de l'arrêt PVC de la Cour). La nouvelle version du règlement intérieur de la Commission (tel qu'adopté par celle-ci le 8 mars dernier - doc. SEC (95) 665) avait tiré les conséquences de l'arrêt PVC, en excluant les habilitations dites de mise en oeuvre (ou de finalisation).

L'incompatibilité avec le principe de collégialité de l'habilitation au Commissaire responsable de la concurrence de l'adoption des décisions dans les langues faisant foi autres que l'allemand, l'anglais et le français, langues des réunions du collège, n'était pas expressément mentionnée dans l'arrêt PVC (motifs 62 à 71, Rec. pp. I - 2649-2652). Elle en ressortait toutefois clairement, notamment de sa partie relative aux habilitations de finalisation. Si un doute avait pu subsister à cet égard, l'arrêt PEBD le lève absolument. Pour le Tribunal, le collège ne peut donner délégation à l'un de ses membres qu'en vue de l'adoption de la décision dans les langues autres que les langues faisant foi (motif 100). Le Tribunal juge en revanche qu'en raison de ses effets, juridiques et patrimoniaux, à l'égard de ses destinataires, une décision constatant une infraction à l'article 85 et infligeant des sanctions pécuniaires ne saurait être regardée comme une simple mesure d'administration ou de gestion et, par suite, être compétemment adoptée par un seul membre, sans méconnaître directement le principe de collégialité (motif 101). Le nouvel article 11 du nouveau règlement intérieur est également conforme à l'arrêt sur ce point.

En matière d'authentification, le Tribunal, rappelle que cette procédure a le caractère d'une forme substantielle, dont la



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violation peut donner lieu à un recours en annulation (motif 117). Il constate que l'article 12 du règlement intérieur, dans sa version de 1988, exigeait que l'authentification des actes décilés en réunion ait lieu avant la signature du procès-verbal de la réunion à laquelle le collègue a adopté ces actes. Or, tel n'avait pas été le cas (motifs 118 et 119). Sur cet aspect aussi, le règlement intérieur a été modifié. Son article 16 prévoit que ces actes sont joints de façon indissociable, dans la ou les langues dans lesquelles ils font foi, au procès-verbal de la réunion au cours de laquelle ils ont été adoptés. Ils sont authentifiés par les signatures du président et du secrétaire général apposées à la première page de ce procès-verbal.

Un point particulier à l'affaire T-103/89, Shell, mérite d'être signalé. Il découle des motifs 59 à 61 de l'arrêt que les avis de réception postaux ne créent qu'une présomption simple, qui peut être écartée lorsque le destinataire d'une décision fournit des éléments précis, qui mettent en doute les informations contenues dans l'avis. En l'espèce, la Commission avait excipé de l'irrecevabilité du recours pour tardiveté. Cette exception était fondée, si l'on devait prendre comme point de départ la date indiquée sur l'avis de réception postal (il s'agit du formulaire classique "recommandé avec accusé de réception" utilisé par la poste belge, mais souvent ignoré ou mal compris dans l'Etat membre de destination). Toutefois, Shell faisait valoir que cette date était inexacte, dans la mesure où elle correspondait à la date à laquelle la décision à notifier avait été reçue au bureau de poste, alors que le pli n'avait effectivement été remis à Shell que deux jours plus tard. Elle fournissait à l'appui de cette argumentation une déposition sous serment d'un responsable du bureau de poste en question. Le Tribunal a accueilli l'argumentation de Shell, au double motif que l'avis de réception n'était pas signé et que la déposition sous serment pouvait être prise en considération pour établir la date réelle de la remise à son destinataire.

V. JORIS [689A0080]

ARRÊT DU TRIBUNAL DE PREMIÈRE INSTANCE DU 27 JUIN 1995 DANS L'AFFAIRE T-186/94 GUÉRIN AUTOMOBILE C/ COMMISSION

Domaine: Concurrence-Plainte-Communication au titre de l'article 6 du règlement n°99/63/CEE-Recours en carence-Recours en annulation

Objet : Recours en carence au titre de l'article 175 du traité CE contre la prétendue inaction de la Commission à l'égard d'une plainte déposée par la société requérante visant à faire constater, en application de l'article 3, paragraphe 2, du règlement n°17 du Conseil, une infraction de la part de la société Volvo à l'article 85 du traité CE. Subsidièrement, recours en annulation au titre de l'article 173 à l'encontre de deux lettres d'attente des services de la Commission.

Les faits :

Cette affaire concerne une plainte déposée le 3 août 1992 par la société Guérin Automobiles visant à faire constater par la Commission, en application de l'article 3 du règlement n°17, une infraction à l'article 85 du traité CE. Selon la requérante, Volvo France avait résilié abusivement son contrat de concession, sous prétexte qu'elle n'avait pas été en mesure de respecter les objectifs de vente fixés dans le contrat.

Par lettre du 29 octobre 1992, les services de la Commission ont informé la requérante des raisons pour lesquelles ils estimaient difficile de donner une suite favorable à la plainte tout en l'invitant à présenter ses observations dans un délai de quatre semaines.

Par lettre du 29 octobre 1992, la requérante a présenté ce qu'elle même a caractérisé comme une nouvelle plainte.

Par lettre du 21 janvier 1993, les services de la Commission ont écrit de nouveau à la requérante en faisant valoir, d'une part, que les observations contenues dans la lettre constituaient bien une nouvelle plainte et, d'autre part, que le problème posé par la nouvelle plainte faisait l'objet d'autres plaintes soumises à l'examen de la Commission dont le résultat lui serait communiqué à son achèvement.

Le 24 janvier 1994, la requérante a adressé à la Commission une lettre de mise en demeure se référant expressément à l'article 175 du traité CE.

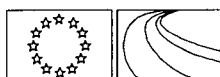
Le 4 février 1994, les services de la Commission ont fait savoir à la requérante que l'examen du dossier était toujours en cours, mais qu'elle serait tenue informée aussitôt qu'aurait été franchie une étape significative du déroulement de cet examen. La requérante a introduit son recours en carence et en annulation le 5 mai 1994.

Le 13 juin 1994, le directeur général de la DG IV a envoyé à la partie requérante une communication au titre de l'article 6 du règlement n°99/63/CEE l'informant des raisons pour lesquelles il ne pouvait être donné une suite favorable à sa plainte et l'invitant à présenter ses observations dans un délai de deux mois.

Sur la recevabilité

Sur le recours en carence

Le Tribunal a rappelé qu'il est de jurisprudence constante que l'article 3 du règlement n°17 ne confère pas à l'auteur d'une demande présentée en vertu dudit article le droit d'obtenir une décision de la Commission, au sens de l'article 189 du traité CE, quant à l'existence ou non d'une infraction à l'article 85 et/ou à l'article 86 du traité (arrêts GEMA/Commission, 125/78, Rec.p.3173, point 17, Automec/Commission, T-24/90, Rec.p II-2223,ci-après "Automec II",



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points 75 et 76, et arrêt du Tribunal du 18 novembre 1992, *Rendo e.a./Commission*, T-16/91, Rec.p.II-2417, point 98). En outre, cette solution ne fait pas obstacle à ce que la partie requérante obtienne, sur sa plainte, une décision de la Commission susceptible de faire l'objet d'un recours en annulation, conformément au principe général du droit à un recours juridictionnel effectif (voir, notamment, arrêts de la Cour du 15 mai 1986, *Johnston*, 222/84, Rec.p.1651, point 18, et du 19 mars 1991, *Commission/Belgique*, C-249/88, Rec.p.I-1275, point 25).

Le tribunal a précisé deux points :

i) Les trois étapes de la procédure des articles 3 et 6 du règlement n°99/63 :

Conformément à son arrêt du 10 juillet 1990, *Automec/Commission* (T-64/89, Rec.p.II-367, ci-après "Automec I", points 45 à 47), le Tribunal rappelle que le déroulement de la procédure régie par les articles 3 et 6 du règlement n°99/63 comporte trois phases successives.

1. Au cours de la première phase, la Commission examine la plainte, en vue de déterminer la suite qu'elle y réservera. Cette phase peut comprendre un échange de vue informel.

2. La deuxième phase est matérialisée par l'envoi au plaignant de la communication prévue à l'article 6 du règlement n°99/63, par laquelle la Commission indique à la partie plaignante les motifs pour lesquels, lorsque tel est le cas, il ne lui paraît pas justifié de donner une suite favorable à sa demande et lui donne l'occasion de présenter, dans un délai qu'elle fixe, ses observations éventuelles.

3. La troisième phase est constituée par le rejet définitif de la plainte. Ce dernier

acte constitue une décision, au sens de l'article 189 du traité, et est susceptible de faire l'objet d'un recours en annulation.

ii) Acte constituant une prise de position

Le Tribunal précise qu'un acte qui n'est pas lui-même susceptible de recours en annulation, peut toutefois constituer une prise de position mettant fin à la carence, s'il constitue le préalable nécessaire au déroulement d'une procédure devant déboucher sur un acte juridique lui-même susceptible de faire l'objet d'un recours en annulation, dans les conditions prévues à l'article 173 du traité.

Le Tribunal a considéré en l'espèce que la lettre de la Commission du 13 juin 1994, dont l'intitulé se réfère explicitement à l'article 6 du règlement n°99/63, satisfaisant à toutes les exigences formelles prévues à cet article, à savoir indication des motifs du rejet de plainte et fixation d'un délai pour présenter les observations éventuelles, et compte tenu du contexte dans lequel elle s'inscrivait, constituait une communication au titre de l'article 6 du règlement n°99/63.

Par conséquent, le Tribunal a constaté qu'en adressant à la plaignante une communication au titre de l'article 6 du règlement n°99/63, la Commission devait être considérée comme ayant pris position sur la plainte, au sens de l'article 175, deuxième alinéa, du traité.

Il résulte de ce qui précède que cette lettre de la Commission, intervenue postérieurement à l'introduction du recours en carence, a privé celui-ci de son objet initial (voir *Asia Motor France e.a./Commission*, T-28/90, Rec.p.II-2285)

Sur le recours en annulation

En l'espèce, le Tribunal a constaté que les lettres des 21 janvier 1993 et 4 février 1994 constituaient de simples lettres d'attente qui relevaient de la première des trois phases de la procédure régie par les articles 3, paragraphe 2, du règlement n°17 et 6 du règlement n°99/63. De telles lettres ne constituent, dès lors, pas des actes produisant des effets juridiques obligatoires, de nature à affecter les intérêts de la requérante, mais des actes préparatoires qui, comme tels, ne sont pas susceptibles de faire l'objet d'un recours juridictionnel.

Toutefois, le Tribunal a ajouté que cette solution ne serait pas remise en cause dans l'hypothèse où, comme le prétend la requérante, les lettres des 21 janvier 1993 et 4 février 1994 devraient être regardées comme des communications au titre de l'article 6 du règlement n°99/63, eu égard au fait qu'une communication au titre de cette disposition, ne peut faire l'objet d'un recours en annulation.

Il a dès lors été jugé que les conclusions en annulation devaient être rejetées comme irrecevables.

Points essentiels

1) Le TPI a encore une fois confirmé la jurisprudence *Automec*.

2) Un acte qui n'est pas lui-même susceptible de recours en annulation, peut toutefois constituer une prise de position mettant fin à la carence, s'il constitue le préalable nécessaire au déroulement d'une procédure devant déboucher sur un acte juridique lui-même susceptible de faire l'objet d'un recours en annulation, dans les conditions prévues à l'article 173 du traité.

P. ADAMOPOULOS [694A0186]



▷ ANTI-TRUST RULES

Other Judgements and Opinions of Advocates-General

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Arret de la Cour du 6 Avril 1995, Aff. jtes C-241/91 P et C-242/91 P; Radio Telefis Eireann (RTE) et Independent Television Publications Ltd (ITP) / Commission des Communautés européennes - Concurrence; Concurrence - Abus de position dominante - Droit d'auteur; (Cour plénière)

Arret de la Cour du 6 Avril 1995, Aff. C-310/93 P; BPB Industries plc et British Gypsum Ltd / Commission des Communautés européennes - Concurrence; Concurrence - Abus de position dominante - Contrat d'achat exclusif - Remise de fidélité - Affectation du commerce entre Etats membres - Imputabilité de l'infraction; (Sixième chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-141/89; Tréfileurope Sales SARL / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-142/89, Usines Gustave Boël SA / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-143/89, Ferriere Nord SpA / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-144/89, Cockerill Sambre / Commission des Communautés européennes; Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-145/89, Baustahlgewebe GmbH / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-147/89, Société métallurgique de Normandie / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-148/89, Tréfilunion SA / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à

l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-149/89, Sotralentz SA / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE, (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-150/89, G.B. Martinelli / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-151/89, Société des treillis et panneaux soudés SA / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 6 Avril 1995, Aff. T-152/89, ILRO SpA / Commission des Communautés européennes - Concurrence; Concurrence - Infraction à l'article 85 du traité CEE; (Première chambre)

Arret du Tribunal du 8/6/95, Aff. T-7/93, Langnese-Iglo GmbH / Commission des Communautés européennes; Concurrence - Contrats d'achat exclusif de glaces de consommation - Marché en cause - Possibilité d'entraves à l'accès des tiers au marché - Commerce entre Etats membres - Lettre administrative de classement - Exemption par catégorie - Légalité du retrait du bénéfice de l'exemption - Interdiction de conclure à l'avenir des contrats d'exclusivité; (Deuxième chambre élargie)



▷ ANTI-TRUST RULES

Arret du Tribunal du 8 Juin 1995, Aff. T-9/93, Schöller Lebensmittel GmbH & Co. KG / Commission des Communautés européennes Concurrence; Concurrence - Contrats d'achat exclusif de glaces de consommation - Marché en cause - Possibilité d'entraves à l'accès des tiers au marché - Lettre administrative de classement - Attestation négative - Durée des contrats - Exemption par catégorie - Interdiction de conclure à l'avenir des contrats d'exclusivité; (Deuxième chambre élargie)

Conclusions de Monsieur l'Avocat général G. Tesauo du 6 juin 1995: Aff. C-91/94, Procureur de la République / Thierry Tranchant; Préjudicielle - Tribunal de Grande Instance de Paris - Interprétation de l'article 6 de la directive 88/301/CEE de la Commission relative à la concurrence dans les marchés des terminaux de télécommunication - Réglementation nationale prévoyant un agrément préalable obligatoire à la commercialisation des équipements terminaux - Indépendance des entités délivrant l'agrément et chargées de contrôler l'application des spécifications techniques

Conclusions de Monsieur l'Avocat général G. Tesauo du 8 juin 1995: Aff. C-70/93, Bayerische Motorenwerke AG / ALD Auto Leasing D GmbH; Préjudicielle - Bundesgerichtshof - Interprétation de l'article 85, paragraphe 1, du traité CEE et du règlement (CEE) 123/85 de la Commission concernant

l'application de l'article 85, paragraphe 3, du traité CEE à des catégories d'accords de distribution et de service de vente et d'après-vente de véhicules automobiles - Système de distribution comportant des restrictions concernant la vente à des entreprises pratiquant le crédit-bail (leasing)

Conclusions de Monsieur l'Avocat général G. Tesauo du 8 juin 1995: Aff. C-266/93, Bundeskartellamt / Volkswagen AG et VAG Leasing GmbH; Préjudicielle - Bundesgerichtshof - Interprétation de l'art. 85, par. 1, du traité CEE et du règlement (CEE) nu 123/85 de la Commission concernant l'application de l'art. 85, par. 3, du traité CEE à des catégories d'accords de distribution et de service de vente et d'après-vente de véhicules automobiles - Système de distribution sélective comportant des restrictions concernant la vente à des entreprises pratiquant le crédit-bail (leasing).

Arret de la Cour du 15 Juin 1995, Aff. C-220/94; Commission des Communautés européennes / Grand-duché de Luxembourg Rapprochement des législations; Manquement - Directive 92/44/CEE - Télécommunications - Fourniture d'un réseau ouvert aux lignes louées; (Cinquième chambre)

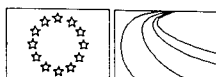
Conclusions de Monsieur l'Avocat général F.G. Jacobs du 15 juin 1995: Aff. jointes C-430/93 et C-431/93; Jeroen van Schijndel e.a. / Stichting Pensioenfonds voor Fysiotherapeuten; Préjudicielle - Hoge Raad der Nederlanden - Interprétation des

art. 3, sous f), 5, 85, 86 et 90 du traité CEE - Législation nationale prévoyant l'affiliation obligatoire à un régime professionnel de pension fixé par les membres de la profession - Notion d'entreprise - Effet utile des règles de concurrence applicables aux entreprises - Rapports entre le droit communautaire et le droit national de la procédure - Applicabilité de la règle interdisant l'invocation de nouveaux moyens en cassation lorsque ceux-ci impliquent le changement de l'objet du litige et un examen des faits

Arret du Tribunal du 29 Juin 1995, Aff. T-30/91, Solvay SA / Commission des Communautés européennes - Concurrence; Concurrence - Pratique concertée - Présomption d'innocence - Procédure administrative - Droits de la défense - Egalité des armes - Accès au dossier, (Première chambre élargie)

Arret du Tribunal du 29 Juin 1995 Aff. T-31/91, Solvay SA / Commission des Communautés européennes - Concurrence; Concurrence - Accord de partage de marché - Règlement intérieur de la Commission - Authentification d'une décision adoptée par le collège des membres de la Commission, (Première chambre élargie)

Arret du Tribunal du 29 Juin 1995, Aff. T-32/91, Solvay SA / Commission des Communautés européennes - Concurrence; Concurrence - Abus de position dominante - Règlement intérieur de la Commission - Authentification d'une décision adoptée par le collège des



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membres de la Commission,
(Première chambre élargie)

Arret du Tribunal du 29 Juin
1995, Aff. T-36/91, Imperial
Chemical Industries plc /
Commission des Communautés
européennes Concurrence;
Concurrence - Pratique
concertée - Présomption
d'innocence - Procédure
administrative - Droits de la
défense - Egalité des armes -
Accès au dossier, (Première
chambre élargie)

Arret du Tribunal du 29 Juin
1995, Aff. T-37/91, Imperial
Chemical Industries plc /
Commission des Communautés
européennes Concurrence;
Concurrence - Abus de
position dominante -
Procédure administrative -
Droits de la défense - Egalité
des armes - Accès au dossier -
Règlement intérieur de la
Commission - Authentification
d'une décision adoptée par le
collège des membres de la
Commission, (Première chambre
élargie)

Conclusions de Monsieur
l'Avocat général M.B. Elmer du
20 juin 1995: Aff. C-387/93,
Pretura circondariale di Genova /
Giorgio Domingo Banchemo;
Préjudicielle - Pretura
circondariale di Genova -
Interprétation des articles 5, 30,
37, 85, 86, 90, 92 et 95 du traité
CEE - Monopole italien des
tabacs manufacturés -

Distribution au détail des
tabacs manufacturés étrangers -
Entreprise nationale détenant
un monopole de vente de ces
produits - Sanctions pénales.

Conclusions de Monsieur
l'Avocat général P. Léger du 6
juillet 1995: Aff. C-96/94, Centro
Servizi Spediporto Srl /
Spedizioni Marittima del Golfo
Srl ; Préjudicielle - Tribunale di
Genova - Interprétation des
articles 3, sous f), 5, 30, 85, 86
et 90 du traité CE -
Réglementation nationale relative
à la fixation des tarifs de
transports de marchandises par
route - Monopole légal des
transports de marchandises par
route pour compte d'autrui

Arret du Tribunal, du 14 Juillet
1995, Aff. T-275/94, Groupement
des cartes bancaires "CB" /
Commission des
Communautés européennes -
Droit institutionnel; Concurrence
- Amende - Intérêts de retard -
Imputation des paiements
(Quatrième chambre élargie)

Ordonnance de la Cour du 19
Juillet 1995, Aff. C-149/95 P(R),
Commission des Communautés
européennes / Atlantic Container
Line AB, e.a. Concurrence;
Pourvoi - Ordonnance du
président du Tribunal de
première instance rendue dans
une procédure de référé -
Concurrence - Transport
multimodal

Conclusions de Monsieur
l'Avocat général G. Tesouro du 11
juillet 1995: Aff. C-19/93 P
Rendo NV e.a. / Commission des
Communautés européennes;
Pourvoi contre l'arrêt du Tribunal
(première chambre), rendu le 18
novembre 1992, dans l'affaire
T-16/91 - Annulation partielle de
la décision 91/50/CEE de la
Commission relative à une
procédure d'application de
l'article 85 du traité CEE
(Ijsselcentrale) - Accord
entravant l'importation et
l'exportation d'électricité aux
Pays-Bas - Constatation d'une
infraction

Conclusions de Monsieur
l'Avocat général G. Tesouro du 13
juillet 1995: Aff. C-244/94,
Fédération française des
sociétés d'assurances e.a. /
Ministère de l'Agriculture et de la
Pêche; Préjudicielle - Conseil
d'Etat français - Interprétation
des articles 85 et suivants du
traité CE - Organisme à but non
lucratif, gérant un régime
d'assurance vieillesse destiné à
compléter un régime de base
obligatoire, institué par la loi à
titre facultatif et fonctionnant
selon le principe de la
capitalisation - Notion
d'entreprise



MERGERS

Application of Council Regulation 4064/89
Main developments between 1st April and 31st July 1995

Summary of the most important recent developments

by Karen WILLIAMS and Jon DENNESS,
DG IV - Merger Task Force

The second quarter of 1995 has seen a sharp increase in the number of decisions taken by the Commission under the Merger Regulation. Between 1 April and 20 July, the Commission took 37 decisions under the Merger Regulation. To this total must be added the 3 decisions taken under the merger provisions of the ECSC Treaty. The Merger Regulation total included a prohibition decision under Article 8(3) of the Regulation (NSD) and three decisions to begin in depth investigations into cases on which the Commission has serious doubts (Orkla/Volvo, ABB/Daimler Benz, RTL/Veronica/Endemol). This brought the total number of Merger Regulation cases on which decisions had been taken in 1995 (to 20 July) to 60.

NORDIC SATELLITE DISTRIBUTION (NSD)

On 19 July 1995 the Commission prohibited the NSD joint venture following a five-month investigation of the case. NSD was intended to transmit satellite TV programmes to cable TV operators and households receiving satellite TV on their own dish ("direct-to-home" market). However, the Commission concluded that the establishment of NSD in its current form would have led in effect to a concentration of the activities of its parents - Norsk Telekom A/S (NT), TeleDanmark A/S (TD) and

Industriförvaltnings AB Kinnevik (Kinnevik), creating a highly vertically integrated operation extending from production of TV programmes (through operation of satellites and cable TV networks) to retail distribution services for pay-TV and other encrypted channels.

NSD's parents are three very strong players in TV transmission and media in the Nordic area. NT is the main cable TV operator in Norway with about 30% of household connections and controls the satellite capacity on the 1° West satellite position (one of the two Nordic positions), and it is an important pay-TV distributor in Norway through its company Telenor CTV. TD is the largest cable TV operator in Denmark with about 50% of household connections, and will retain a privileged position for its cable TV operations possibly until 1 January 1998, the deadline for liberalization of the telecommunications markets. In addition, TD, together with Kinnevik, controls most of the satellite capacity on the 5° East satellite position (the other Nordic position). Kinnevik is a Swedish conglomerate with interests in TV programming, magazines and newspapers as well as in steel, paper, packaging and telecommunications. Kinnevik is the most important provider of Nordic satellite TV programmes including the most popular channels. The company is the largest pay-TV distributor in the Nordic countries through its Viasat companies. Kinnevik also has an important stake in Kabelvision, the second largest cable TV company in

Sweden, as well as in TV4, the largest advertising-financed Swedish channel.

In its investigation the Commission found that the creation of the NSD joint venture would have resulted in the creation or strengthening of a dominant position on three markets:

- the market for provision of satellite TV transponder capacity to the Nordic region (Denmark, Norway, Sweden, and Finland) - creation of a dominant position for NSD itself.
- the Danish market for operation of cable TV networks - strengthening of the dominant position already held by TD.
- the market for distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households - creation of a dominant position for NSD.

The vertically integrated nature of the operation would have meant that the downstream market positions (cable TV operations and pay-TV) would have reinforced those upstream (satellite transponders, provision of programmes) and vice versa. The parties would have achieved such strong positions that they would have been able to foreclose the Nordic satellite TV market for competitors. Essentially NSD would have obtained a "gatekeeper" function for the Nordic market for satellite TV broadcasting.

The affected markets are currently in a transitional phase, since telecommunications markets are about to be liberalized and new technologies and services are currently under development and are about to be introduced. In this situation the decision of the Commission takes on a particular importance, since this is a period during which future market structures are being defined. It is very



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important that the Commission does not allow these future markets to be foreclosed.

However, the Commission also recognizes that joint ventures, particularly transnational joint ventures, can be instrumental in developing the media and telecommunications sectors to their full potential. The policy of the Commission is to take new developments into account and the Commission remains open to examine new proposals from the NSD parties.

The NSD operation to some extent resembles the joint venture MSG Media Service, proposed by Bertelsmann, Kirch Group, and Deutsche Telecom, which was blocked by the Commission in November 1994. MSG would have been able to control its competitors in the pay-TV market through its monopolistic position as a supplier of decoders and administration of the customer base. NSD would have obtained a similar "gate keeper" function vis-à-vis competitors through its dominant position on transponder capacity for the Nordic region. However, an important difference between NSD and MSG is the size and the resources of the parent companies. Bertelsmann and Kirch together as suppliers of pay-TV and Kirch as supplier of films and TV programmes command greater resources than does Kinnevik. Furthermore, the position of Deutsche Telecom in the German cable TV market is stronger than that of the NSD parents in the Nordic countries.

SWISSAIR/SABENA

The Swissair/Sabena concentration was authorised at the end of a phase I investigation on the basis of commitments given by the governments and companies concerned. Swissair purchased 49.5% of the shares with the Belgian State holding the remaining 50.5%. The Commission identified two areas in which Swissair/Sabena would have created a

dominant position: first, the creation of a de facto monopoly on the principal routes between Belgium and Switzerland and, secondly, with regard to the overall network, the combination of the Swissair/Sabena operation and the European Quality Alliance (Swissair, SAS and Austrian Airlines) and the proposed cooperation between SAS and Lufthansa. The commitments given by the parties and the Belgian and Swiss governments seek to ensure that the air routes between Belgium and Switzerland are opened to other operators. These include the opening of the market to an unlimited number of competitors from Belgium and Switzerland and up to four additional EEA carriers on a continuing basis. In addition certain undertakings concerning slot allocation at Zurich, Geneva and Brussels airports have been given and limitations have been agreed on future capacity increases by the parties. Finally, Swissair has been required to withdraw from co-operating with SAS through the EQA.

ORKLA/VOLVO

The Commission is currently conducting an in depth investigation into the proposal of Orkla (Norway) and Volvo (Sweden) to form a joint beverages company operating in the two countries. The joint venture will produce, bottle, distribute and sell beer (including international brands such as Carlsberg), carbonated soft drinks and bottled waters in both Norway and Sweden. Orkla will contribute its Ringnes beverage company and Volvo its subsidiary Hansa, both operating in Norway, to the joint venture as well as Volvo's Swedish brewer Pripps.

The Commission decided, at the end of May, to initiate a detailed investigation in order to ascertain whether the joint venture will give the parties a dominant position in Norway and possibly in Sweden. At this stage of the investigation Ringnes and Hansa appear to have a significant combined market share for the

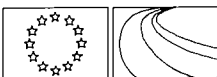
products that the Commission is investigating. A further concern for the Commission will be to determine whether the establishment of the joint venture will lead to the elimination of Orkla as a potential competitor and therefore have an impact on competition in Sweden. The Commission must reach a decision by 2 October 1995.

ABB/DAIMLER BENZ

The Commission initiated an in depth investigation on 23 June 1995 in the ABB/Daimler Benz case. The proposed joint venture (to be called Daimler-Benz Rail Transportation) will cover the worldwide activities of ABB and Daimler-Benz in rail transportation. The Commission is assessing whether the proposed operation creates a dominant duopoly between ABB/AEG and Siemens in the market for rail equipment in Germany or alternatively whether there is strengthening of an existing position of oligopolistic market dominance caused by reducing the number of leading market players to only two. Of particular importance will be an assessment of the extent to which suppliers present in the mechanical area of rail equipment need to cooperate with other suppliers which have electrical expertise. This is a critical issue as it appears that ABB, AEG and Siemens are particularly strong in the electrical segment. The Commission will decide on this case before 30 October 1995.

RTL/VERONICA/ENDEMOL

The Commission's began an examination of the RTL/Veronica/Endemol case following a request from the Dutch government to this effect, in the absence of which the Commission would not have jurisdiction to deal with the case since the turnover thresholds set out in the Merger Regulation were not attained by the parties concerned. In these circumstances jurisdiction normally rests with the Member States. However, a Member State is entitled under Article 22 of the



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Regulation to request the Commission to take up the case and to examine it. The examination thereafter follows the normal procedure except that the usual suspension provisions do not apply. Therefore in this case the parties are entitled to complete their operation.

The case itself concerns a proposed TV joint venture Holland Media Groep (HMG) between RTL4 S.A. (RTL), Vereniging Veronica Omroeporganisatie (Veronica) and Endemol Entertainment Holding BV (Endemol). RTL will transfer its broadcasting activities in the Netherlands to HMG, in particular the two commercial TV channels RTL4 and RTL5, while a third commercial channel will be introduced through Veronica, which will leave the public broadcasting system in the Netherlands in order to participate in the joint venture. HMG intends to begin its broadcasting operations on 1 September 1995. The other main parent, Endemol, is the largest independent producer of TV programmes in the Netherlands.

The Commission opened proceedings in this case on 22 May 1995 since it appeared that the combination of the parties' activities in HMG could lead to high market shares in the Dutch TV market, in particular with respect to TV advertising. In addition the position of Endemol on the market for independent TV productions could be strengthened. These issues are currently the subject of an in-depth investigation with a final decision scheduled by 2 October 1995.

INCREASE IN MEDIA CASES

More generally, the number of media cases dealt with by the Commission under the Merger Regulation has grown considerably in the last couple of years. Until the end of 1993 only 3 decisions had been adopted under the Merger Regulation in the media sector (Matsushita/MCA 1990, ABC/Generale des Eaux/Canal Plus/WH Smith 1991, Thorn EMI/Virgin 1992). By contrast in

1994 5 decisions were adopted (Newspaper Publishing, Kirch/Richemont/Telepiu, Bertelsmann/News International/Vox, Vox(II) and MSG Media Service). In 1995 4 decisions have been adopted to date (NSD, Blockbuster/Burda, Kirch/Multichoice/Telepiu and CLT/Disney/Super RTL) while the RTL/Veronica/Endemol case is pending.

NSD and RTL/Veronica/Endemol have been considered above. Blockbuster/Burda primarily concerned video distribution whilst Kirch/Multichoice/Telepiu was a rearrangement of shareholdings in an existing joint venture. CLT/Disney/Super RTL involved the creation of a new family orientated free access TV channel in Germany. The formation of the channel itself presented no competition problems, but the agreements between Disney and CLT to provide programme material presented more problems. In particular, the Commission considered the programme agreements concerning the licensing of programmes from Disney to CLT (ie from one parent to the other) and not to the joint venture Super RTL as well as the agreements which gave CLT the possibility to use those programme rights on its other channels in Germany instead of or before they were broadcast on Super RTL. The Commission concluded that these agreements could not be considered to be ancillary to the concentration as they went beyond the scope necessary to start up the joint venture.

PERRIER COURT CASES

On 27 April 1995, the Court of First Instance (CFI) ruled on two cases, one brought by the employees of Perrier and the other by the employees of Vittel and Pierval, against the Commission's decision of 22 July 1992 in the case IV/M.190 - Nestlé/Perrier. The Commission had approved the

concentration with conditions and obligations. The principal points of the judgements were as follows:

- while recognising that the Merger Regulation is primarily concerned with questions of competition, the CFI concluded that this does not preclude the Commission from taking into account the social effects of a concentration if these effects affect the level or conditions of employment at the level of the European Community or a substantial part of it;
- the fact that a third party has not directly intervened in the course of the administrative procedure does not exclude that third party from being entitled to challenge the decision;
- the representatives of the workers of a company are not, in principle, directly concerned by a merger procedure. They are not, therefore, entitled to request the annulment of a decision, except to protect their fundamental rights;
- third parties do not have the right to be treated in the same way as the parties to the concentration in the administrative procedure.

REVIEW OF THE MERGER REGULATION

The Commission began its merger regulation review exercise in May. Questionnaires were sent to Member States, advisers, companies and associations seeking their views about the reduction of thresholds and other amendments to the Merger Regulation. The results of this consultation will be included in a technical paper which the Commission services will draft by September. This technical paper will be submitted to the Member States before the Commission drafts its proposals in a Green Paper to be published by the end of 1995. ■



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Press releases

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SABENA/SWISSAIR : COMMISSION APPROVES ALL ASPECTS OF THE DOSSIER

La Commission a approuvé aujourd'hui tous les aspects liés à la fusion entre la Sabena et Swissair. Les aspects liés à des éventuelles aides d'état et au contrôle effectif de la nouvelle entreprise ont été examinés par les services de M. Neil Kinnock, responsable de la politique de transport. Quant aux aspects liés à la politique de concurrence, ce sont les services de M. Karel van Miert qui s'en sont chargés. La Commission est arrivée à la conclusion que toutes les conditions ont été satisfaites, après un examen qui s'est concentré sur trois points essentiels:

- aide d'état éventuelle
- le contrôle effectif de l'entreprise
- concurrence suffisante dans les airs et dans l'allocation de créneaux horaires.

Background

Au mois de mai 1995, l'Etat belge et Swissair ont conclu un accord octroyant à Swissair 49,5 % de participation dans Sabena. L'accord stipule les termes et les conditions de l'acquisition, la gestion future de l'entreprise et le cadre de la coopération.

Tout ceci fut notifié à la Commission européenne qui est tenue, par le traité, d'examiner certains aspects de l'opération

afin d'assurer notamment que :

- l'entreprise est majoritairement détenue soit par des états membres de l'UE et/ou par des citoyens de l'UE;
- le contrôle effectif de l'entreprise est exercé par des intérêts communautaires;
- l'opération n'implique pas d'aide d'état;
- la fusion respecte les règles en matière de concurrence.

Aspects financiers

Actuellement la Belgique détient 61,6 % des parts de la Sabena, tandis que FINACTA, une entreprise contrôlée par Air France, en détient 37,5 %. Une des conditions essentielles pour l'acquisition par Swissair était qu'Air France vende sa participation dans Sabena. En vertu de l'accord Swissair/Sabena, la Belgique rachètera les parts détenues par FINACTA. Swissair détiendra 49,5 % dans Sabena avec une option - sous des conditions très strictes et à la condition expresse que la législation communautaire ait été modifiée - d'achat de parts supplémentaires à l'avenir qui lui donnerait la majorité.

L'opération implique une recapitalisation de la Sabena qui émettra de nouvelles parts pour un montant de 9,5 milliards de BEF, dont 6 milliards seront souscrits par Swissair et 2 milliards par un consortium d'investisseurs belges, quant à la SFI (Société fédérale d'investissement) une institution publique belge, elle souscrira les 1,5 milliards de BEF restants. Les

nouvelles parts garantissent un traitement identique à la fois en matière de droit de vote, de dividendes et de droit à liquidation.

Par conséquent, Swissair détiendra 49,5 % des parts, la Belgique et la SFI 33,81%, le consortium belge 16,5 %, et d'autres investisseurs 0,19 %.

La part de FINACTA fut acquise en 1992 pour 6 milliards de BEF, dont 4 milliards de BEF par Air France, le reste appartenant à un groupe d'investisseurs belges. Par la vente des parts de FINACTA, Air France récupérera son investissement initial, cette vente étant financée en partie à travers un prêt consenti par Swissair à la SFI. Ce prêt sera valable 10 ans et à partir de l'an 2000, sous certaines conditions, la Swissair pourra faire jouer une option afin d'acquérir le contrôle majoritaire de Sabena.

La Belgique a également notifié son intention d'abroger pour l'ensemble du secteur du transport aérien certaines contributions spéciales en matière de pension, corrigeant ainsi une situation qui remonte à 1969 lorsque de telles contributions furent introduites dans ce secteur afin d'assurer des financements supplémentaires pour couvrir les coûts liés au fait que les pilotes et le personnel de cabine bénéficiaient d'une pension avant l'âge légal de la pension belge.

Après une analyse détaillée, la Commission est arrivée à la conclusion que, selon les lignes directrices des aides d'état au secteur du transport aérien, "des injections en capital ne contiennent pas d'aide d'état à condition que l'injection en capital est proportionnelle aux parts détenues par les autorités publiques et s'accompagne d'une injection de capital par un actionnaire privé; l'investisseur privé doit avoir une signification économique réelle". En termes clairs : la volonté d'un investisseur privé d'associer à un investisseur public est une preuve forte que l'opération est financièrement



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saine. Dans le cas spécifique, Swissair souscrit de nouvelles parts au même prix et aux mêmes conditions que SFI et les investisseurs belges.

La Commission, pour cette raison, considère qu'il s'agit dans le cas spécifique Sabena/Swissair d'une transaction financière normale et non pas d'une aide d'état.

En ce qui concerne les contributions sociales, la Belgique a décidé d'abroger le système de contributions spéciales relatives aux pilotes et au personnel de cabine. Ceci n'affecte pas la compétitivité du secteur mais corrige une situation anormale que les circonstances ne justifient plus. La Commission estime donc que cette mesure fait partie de la politique économique dont la responsabilité incombe entièrement à l'état belge et ne constitue donc aucunement une aide d'état.

La question de contrôle effectif

En vertu du Traité, la Sabena doit rester majoritairement détenue et effectivement contrôlée par des états membres et/ou par des citoyens des états membres. La Commission estime que la condition de propriété majoritaire est remplie puisque, au moins 50% plus une part du capital de la société est aux mains d'intérêts communautaires. Ceci est clairement le cas pour l'accord actuel qui stipule par ailleurs, explicitement, que Swissair ne pourra exercer ses droits d'acquiescer des parts supplémentaires qu'à la condition expresse d'une modification de l'environnement réglementaire.

Le contrôle effectif est une condition liée à l'objectif de sauvegarder les intérêts de l'industrie communautaire du transport aérien et de veiller à ce que des pays tiers ne soient pas à même de tirer un avantage unilatéral du marché aérien communautaire.

L'accord Sabena/Swissair prévoit un conseil d'administration composé de 12

membres, y compris son Président, y prendra toute décision à la majorité simple. Cinq membres seront par Swissair et six, tout ressortissants de l'UE, seront désignés par les actionnaires belges. Le Président sera désigné à la suite d'une décision conjointe des deux groupes actionnaires. La gestion quotidienne sera assurée par un administrateur délégué désigné par le conseil d'administration.

La Commission estime que même si toute proposition en ce qui concerne la présidence doit avoir l'aval de Swissair, la personne qui exercera la fonction de président continuera de dépendre du soutien des actionnaires belges. En outre, en cas de blocage les actionnaires belges ont une majorité absolue au sein de l'assemblée générale des actionnaires. La Swissair détient un droit de veto uniquement quant à d'éventuels amendements du statut de la société, à des augmentations ou des réductions de capital ainsi qu'en cas de liquidation, de fusion ou de séparation de l'entreprise. Toutefois un tel droit de veto ne constitue finalement qu'un degré normal de protection d'un actionnaire minoritaire tel que le prévoient obligatoirement la plupart des législations nationales en matière de droit de société y compris en Belgique. La Commission conclut donc que les termes de l'accord confortent la position des actionnaires belges qui détiennent le pouvoir de décision finale et que, par conséquent, Swissair ne disposera pas de pouvoir incompatible avec la condition de contrôle effectif.

Les aspects de politique de concurrence

L'opération Sabena /Swissair était de nature à créer un large réseau intégré dominé par Swissair, Sabena et une entreprise commune entre Lufthansa et SAS par lequel ces compagnies aériennes détiendraient environ 35 % du trafic de passagers en Europe, soit deux fois plus que la deuxième compagnie en Europe. La Commission a donc exprimé des doutes sérieux quant à l'accord initialement proposé qui, à ses yeux,

pouvait déboucher à une position dominante.

Swissair et Sabena ont accepté une série d'engagements afin de faciliter la position de nouveaux entrants sur les routes entre la Belgique et la Suisse, engagements qui resteront valables jusqu'à la fin de la saison d'hiver 1999/2000:

1. En ce qui concerne les routes Bruxelles/Zurich et Bruxelles/Genève, si un transporteur souhaite commencer ou accroître un service sur ces routes et n'obtient pas les créneaux horaires nécessaires selon la procédure d'allocation normale, Swissair mettra à disposition, par saison, un maximum de 12 créneaux quotidiens à Zurich et de 12 créneaux quotidiens à Genève afin de permettre un nombre de fréquences égal à celui des fréquences cumulées de Swissair et Sabena sur chacune de ces routes.

2. Quant aux routes Bruxelles/Zurich, Bruxelles/Genève, Bruxelles/Berne et Bruxelles/Bâle, la Sabena ouvrira, par saison, un maximum de 18 créneaux horaires quotidiens à Bruxelles, pour garantir un nombre de fréquences cumulées égal à celui de Swissair et Sabena sur chacune des routes.

3. Swissair et Sabena ne pourront augmenter, sans accord préalable, le nombre de fréquences cumulées sur chacune des quatre routes au-delà de 25 % du niveau actuel.

4. Swissair et Sabena conclueront des accords inter-lignes de cinq ans avec des nouveaux entrants.

5. Swissair et Sabena offriront aux nouveaux entrants, si ce n'est pas encore le cas, la possibilité de participer à leur programme de "frequent flyer".

En outre, les gouvernements belge et suisse se sont engagés à prendre les dispositions nécessaires, avant le 31 juillet 1995, pour modifier le régime d'accès pour les transporteurs aériens aux routes entre la Belgique et la Suisse selon les



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modalités suivantes :

- le système actuel de désignation simple sera transformé en un système de désignation multiple;
- toute restriction de capacité sera abolie;
- concernant les tarifs, le principe de pays

d'origine s'appliquera et quatre transporteurs EEE seront admis sur les routes concernées (sur la base du principe "premier arrivé, premier servi") pour les opérations relevantes de la cinquième liberté.

A la lumière de ces engagements, la Commission a conclu que l'opération qui lui a été notifiée est compatible avec le marché commun et l'accord sur l'espace économique européen.

IP/95/805 Date : 95/07/19

Other relevant Press releases

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IP/95/345 : COMMISSION CLEARS ACQUISITION OF ELVIA AND LLOYD ADRIATICO BY ALLIANZ

IP/95/416 : COMMISSION AUTHORISES RIVA GROUP TO ACQUIRE 100% OF THE CAPITAL OF ILVA LAMINATI PIANI SPA

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IP/95/489 : COMMISSION APPROVES JOINT VENTURE EDS - LUFTHANSA

IP/95/490 : COMMISSION FINDS THAT ACQUISITION OF CLARK EQUIPMENT COMPANY BY INGERSOLL-RAND COMPANY DOES NOT FALL UNDER THE MERGER REGULATION

IP/95/515 : COMMISSION APPROVES THE CREATION OF ASPEN JOINT VENTURE BETWEEN ELF ATOCHEM AND UNION CARBIDE CORPORATION

IP/95/526 : COMMISSION TO CARRY OUT DETAILED INQUIRY IN DUTCH TV PROPOSED JOINT VENTURE

IP/95/534 : THE COMMISSION IS INITIATING DETAILED INVESTIGATION INTO THE ORKLA/VOLVO BEVERAGES JOINT VENTURE

IP/95/535 : COMMISSION CLEARS ESTABLISHMENT OF SUPER RTL BETWEEN CLT AND DISNEY

IP/95/538 : COMMISSION APPROVES ACQUISITION BY SEAGRAM OF CONTROL OF MCA

IP/95/539 : THE COMMISSION APPROVES ENTRY OF SAUDI ARAMCO IN A JOINT VENTURE FOR THE REFINING AND RETAILING OF PETROLEUM PRODUCTS IN GREECE

IP/95/550 : THE COMMISSION GIVES ITS APPROVAL TO A JOINT VENTURE THAT WILL CONTRIBUTE TO THE INTEGRATION OF THE EUROPEAN GAS MARKET.

IP/95/578 : COMMISSION APPROVES CREATION OF A JOINT VENTURE OPERATING IN THE ASIAN/PACIFIC OFFICE AUTOMATION MARKET

IP/95/599 : THE COMMISSION CLEARS THE JOINT ACQUISITION OF ISE BY EDF AND EDISON

IP/95/600 : COMMISSION CLEARS ACQUISITION OF THE WHOLE OF FONDIARIA BY FERRUZZI

IP/95/617 : COMMISSION APPROVED PROPOSED JOINT VENTURE BETWEEN GENERALI, BANCA COMMERCIALE ITALIANA (COMIT) AND ROBERT FLEMINGS HOLDING

IP/95/662 : COMMISSION APPROVES TAKE OVER OF MARION MERRELDOW BY HOECHST

IP/95/663 : THE COMMISSION CLEARS A JOINT VENTURE BETWEEN VOLVO AND HENLYS GROUP IN THE NORTH AMERICAN BUS MARKET

IP/95/668 : COMMISSION INITIATES DETAILED INVESTIGATION INTO THE ABB/ DAIMLER-BENZ RAIL TRANSPORTATION JOINT VENTURE

IP/95/674 : IBM - PHILIPS JOINT VENTURE ON CHIPS APPROVED



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IP/95/679 : THE COMMISSION CLEARS JOINT VENTURE OF DAIMLER-BENZ AND CARL ZEISS IN THE FIELD OF MILITARY OPTONICS

IP/95/688 : THE COMMISSION CLEARS THE ACQUISITION OF WARBURG BY SWISS BANK CORPORATION

IP/95/700 : THE COMMISSION APPROVES THE PURCHASE OF AN 80% SHARE IN BUNA SOW OLEFINVERBUND (BSL) BY DOW EUROPE SA

IP/95/713 : COMMISSION APPROVES ACQUISITION BY EMPLOYERS REINSURANCE CORPORATION OF F R A N K O N A RUECKVERSICHERUNGS-GESELLSCHAFT AG AND AACHENER RUECKVERSICHERUNGS-GESELLSCHAFT AG

IP/95/714 : THE COMMISSION CLEARS A JOINT VENTURE BETWEEN SIEMENS AG AND BABCOCK INTERNATIONAL GROUP PLC

IP/95/735 : COMMISSION APPROVES JOINT VENTURE SET UP BY VOEST ALPINE INDUSTRIEANLAGENBAU GMBH AND DAVY INTERNATIONAL LTD TO PRODUCE HOT CONNECT SYSTEMS FOR STEEL MANUFACTURING PLANTS

IP/95/786 : THE COMMISSION CLEARS THE MERGER OF TWO BIG JAPANESE CREDIT INSTITUTIONS

IP/95/801 : COMMISSION DECIDES NOT TO AUTHORISE NSD IN ITS CURRENT FORM, BUT REMAINS OPEN TO EXAMINE NEW PROPOSALS

IP/95/856 : COMMISSION INITIATES DETAILED INVESTIGATION INTO THE PROPOSED ACQUISITION OF

CARNAUDMETALBOX BY CROWN, CORK & SEAL

IP/95/767 : COMMISSION APPROVED PROPOSED JOINT VENTURE (PREVINET) BETWEEN GENERALI AND BANCA COMMERCIALE ITALIANA

IP/95/825 : THE COMMISSION AUTHORIZES THYSSEN HANDELSUNION AG TO ACQUIRE CONTROL OF KLOCKNER AND CO. AG'S OPERATIONS IN THE RECYCLING OF STEEL, METALLURGY AND WASTE TREATMENT.

IP/95/831 : COMMISSION CLEARS THE ACQUISITION OF ENICHEM AUGUSTA S.P.A. BY RWE-DEA AG IN THE PETROCHEMICAL SECTOR.

IP/95/856 : COMMISSION INITIATES DETAILED INVESTIGATION INTO THE PROPOSED ACQUISITION OF CARNAUDMETALBOX BY CROWN, CORK & SEAL

IP/95/881 : THE COMMISSION CLEARS THE ACQUISITION OF KLEINWORT BENSON BY DRESDNER BANK

IP/95/893 : COMMISSION APPROVES ACQUISITION BY JEFFERSON SMURFIT OF MUNKSJO ■

Court Judgements

Arret du Tribunal du 27 Avril 1995, Aff. T-96/92; Comité central d'entreprise de la Société générale des grandes sources e.a. / Commission des Communautés européennes - Concurrence; Concurrence - Règlement nu 4064/89 - Décision déclarant une concentration compatible avec le marché commun - Recours en annulation - Recevabilité - Syndicats et comités du personnel - Intérêt suffisant conférant aux représentants reconnus des travailleurs le droit de présenter leurs observations, à leur demande, dans le cadre de la procédure administrative - Actes les concernant directement et individuellement; (Deuxième chambre élargie)

Arret du Tribunal du 27 Avril 1995, Aff. T-12/93; Comité central d'entreprise de la société anonyme Vittel e.a. / Commission des Communautés européennes - Concurrence; Concurrence - Règlement nu 4064/89 - Décision déclarant une concentration compatible avec le marché commun - Recours en annulation - Recevabilité - Syndicats et comités du personnel - Acte les concernant directement et individuellement - Intérêt suffisant conférant aux représentants reconnus des travailleurs le droit de présenter leurs observations, à leur demande, dans le cadre de la procédure administrative; (Deuxième chambre élargie) ■



LIBERALISATION & STATE INTERVENTION

Application of Article 90 EC

Main developments between 1st April and 31st July 1995

Summary of the most important recent developments

by José-Luis BUENDIA, DG IV-A-3

LA LIBÉRALISATION DU SECTEUR DES TÉLÉCOMMUNICATIONS

L'activité de libéralisation de la Commission dans le secteur des télécommunications se poursuit avec plusieurs initiatives importantes qui sont actuellement en cours. Il est intéressant de noter que les orientations générales et les objectifs de l'action de la Commission dans ce domaine ont reçu l'appui du Conseil le 13 juin dernier.

Pour ce qui est des aspects concernant la concurrence, les initiatives principales sont trois propositions de directives de la Commission concernant l'ouverture des réseaux de TV par câble pour la fourniture de services de télécommunications, la libéralisation de la téléphonie mobile et la libéralisation totale des services et des infrastructures de télécommunications.

Ces trois textes sont fondés sur l'article 90.3 du Traité CE, norme qui attribue à la Commission la faculté d'adopter, sous le contrôle de la Cour de Justice, des directives de libéralisation, visant à préciser certaines obligations que le Traité impose aux Etats membres et à éliminer des infractions au Traité.

En règle générale, la Commission n'exerce pas la faculté que l'article 90.3 du Traité lui attribue, qu'après avoir consulté le Parlement européen, les Etats membres et les parties intéressées. Elle a donc présenté ces projets aux Etats membres et au Parlement européen. Les

projets ont fait ou feront aussi l'objet de publication au *Journal Officiel* afin de permettre aux parties intéressées de formuler des commentaires en temps utile, avant qu'elle procède à une décision définitive sur le projet.

PROJET DE DIRECTIVE ART. 90 § 3 SUR L'OUVERTURE DES RÉSEAUX DE TV PAR CÂBLE POUR LA FOURNITURE DE SERVICES DE TÉLÉCOMMUNICATIONS

La Commission avait déjà, en décembre 1994, adopté en première lecture un projet de directive article 90.3 sur l'ouverture des réseaux de TV par câble pour la fourniture de services de télécommunications. La consultation sur ce projet vient d'être finie et les services de la Commission travaillent sur des modifications à introduire dans le texte avant son adoption finale dans un futur proche.

PROJET DE DIRECTIVE ART. 90 § 3 SUR LA LIBÉRALISATION DE LA TÉLÉPHONIE MOBILE

La Commission a adopté le 21.06.1995, en première lecture, un projet de directive de l'article 90.3 du Traité qui vise à libéraliser le marché européen de la téléphonie mobile à partir du 1er janvier 1996. Le projet a été adopté à l'initiative conjointe de MM. Karel Van Miert et

Martin Bangemann, responsables de la politique de concurrence et des affaires industrielles

Cette initiative qui est intervenue une semaine après le débat des Ministres des Télécommunications de l'Union européenne - le 13 juin dernier - implique essentiellement que les nouveaux arrivants sur ce marché pourront offrir les services de communication mobile en utilisant leurs propres infrastructures ou des infrastructures dites "alternatives".

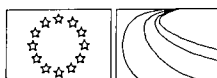
Ce mouvement parachève les progrès substantiels accomplis dans plusieurs Etats membres à la suite de l'abolition des monopoles pour la fourniture de services de communication mobile.

La directive que propose la Commission se fonde sur le large débat entamé en 1994, à la suite du Livre Vert publié par la Commission en matière de communications mobiles et personnelles.

Elle demande aux Etats membres d'abolir tous les droits exclusifs ou réservés dans le domaine des communications mobiles et de mettre en place, si cela n'est pas encore le cas, des procédures de licences afin d'autoriser le lancement de services numériques.

Cette directive permettra à l'Europe d'être la première puissance mondiale à se doter de conditions réglementaires indispensables au développement de communications mobiles et personnelles dans un marché de dimension considérable. Le marché européen sera ainsi le premier à pouvoir bénéficier à la fois d'une libéralisation de services et de réseaux et de la mise en place de normes numériques harmonisées et originales couvrant un tel territoire.

Le projet adopté par la Commission s'appuie sur le consensus qui s'est dégagé entre Ministres des Télécommunications des Quinze, certes, mais il va plus loin



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encore quant à certains aspects spécifiques, notamment le recours aux infrastructures propres et alternatives. Les nouveaux opérateurs de communications mobiles pourront ainsi bénéficier d'un accès ouvert également aux infrastructures de tiers.

Cela étant, les pays de l'Union disposant de réseaux moins performants pourront bénéficier s'ils le souhaitent, de dérogations allant jusqu'à 5 ans au-delà du 1er janvier 1996 : il s'agit de l'Espagne, de la Grèce, de l'Irlande et du Portugal. Quant au Luxembourg, en raison de la dimension réduite de son réseau, la dérogation éventuelle portera sur un délai supplémentaire de 2 ans.

En outre, la directive abolit les restrictions existantes quant à l'interconnexion directe entre réseaux mobiles. Le recours à d'autres infrastructures que celles des opérateurs de Télécommunications traditionnels constitue un élément essentiel du succès des nouveaux venus sur le marché de la communication mobile, parce que cela leur permet de mieux maîtriser leurs structures de coûts. Le recours à des lignes louées représente, actuellement, un facteur de coûts pour les seconds opérateurs se situant entre 30 et 50 %. Dans plusieurs Etats membres, d'ailleurs, les concurrents des premiers opérateurs ont estimé qu'au prix facturé par ces derniers pour louer leurs capacités, ils auraient déjà pu créer leurs propres réseaux. Seules des restrictions d'ordre réglementaires, ajoutent-ils, les ont empêchés de recourir à cette alternative nettement plus intéressante.

Dans la plupart des pays membres, les restrictions actuellement en vigueur à l'interconnexion directe signifient que le deuxième opérateur de communication mobile est obligé de transiter par le réseau fixe de l'opérateur national traditionnel pour atteindre un autre Etat membre. L'interconnexion directe avec un opérateur librement choisi dans le

pays de destination est très souvent à la fois moins cher et techniquement plus logique.

Le secteur des communications mobiles est, de loin, le plus dynamique du marché des Télécommunications, avec des taux de croissance moyens de l'ordre de 60 %. Ainsi, de mars 1994 à mars 1995, le nombre d'abonnés au téléphone cellulaire, en Europe, est passé de 9 à 15 millions. Des analyses faites dans les services de la Commission, prédisent quelque 38 millions d'utilisateurs du téléphone cellulaire mobile vers l'an 2000 et quelque 80 millions dix ans plus tard.

En plus des réseaux analogiques très importants dans des pays tels que le Royaume-Uni, l'Italie et la Scandinavie, le potentiel de croissance du système numérique est à présent tout à fait réel dans la plupart des pays de l'Union. En France, par exemple, les abonnés au GSM ont augmenté de 112.000 unités à environ 500.000 au cours de la dernière année. La Belgique est passée de 11.000 abonnés GSM au début de 1994 à environ 90.000 aujourd'hui. Quant à l'Italie, le nombre d'abonnés est passé de 9.000 en 1994 à 94.000 en 1995. L'Allemagne reste largement en tête avec un marché de plus de 2,5 millions d'abonnés au téléphone mobile, dont près de 2 millions disposent du GSM.

Cela étant, des progrès sensibles sont perceptibles dans d'autres pays également, dont le réseau est moins développé : ainsi, en Grèce, le nombre d'abonnés au GSM est passé de 45.000 à 180.000 en un an et au Portugal on est passé de 109.000 à 175.000 abonnés. La progression la plus spectaculaire est à mettre au compte de la Suède, où, en un an, le nombre d'abonnés au GSM est passé de 38.000 à 465.000, les deux opérateurs concurrents se partageant assez équitablement la part du gâteau.

Les communications mobiles créent un nombre significatif d'emplois dans les pays de l'Union : selon certaines extrapolations, elles créent directement

plusieurs dizaines de milliers d'emplois en Europe.

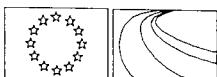
L'un des aspects les plus importants de ce secteur sera son passage à un véritable marché de masse, rendant la communication mobile accessible à un très grand nombre de citoyens de l'Union. Les communications sans fil, dans la plupart des cas, constituent en outre l'alternative la moins coûteuse pour atteindre des usagers et des régions excentrées, améliorant ainsi le service universel.

PROJET DE DIRECTIVE ART. 90 § 3 SUR LA LIBÉRALISATION TOTALE DES SERVICES ET DES INFRASTRUCTURES DE TÉLÉCOMMUNICATIONS

La Commission a approuvé le 19 juillet 1995 un "paquet" comprenant deux mesures qui seront déterminantes pour le marché des Télécommunications en Europe au cours des années à venir. L'initiative a été présentée par Mr. Van Miert, membre de la Commission responsable de la Concurrence et par Mr. Bangemann, membre responsable des Télécommunications.

La première mesure est un projet de directive de la Commission fondée sur l'article 90.3 du Traité CE concernant l'introduction générale de la concurrence dans les marchés des télécommunications.

Ce projet met en oeuvre l'accord politique des Etats membres pour libéraliser tous les services de Télécommunications (c'est-à-dire y compris la téléphonie vocale) et les infrastructures de Télécommunications d'ici le 1er janvier 1998, avec des périodes de transition pour certains Etats membres. Elle invite également les Etats membres à prendre les mesures nécessaires avant 1998 afin de s'assurer que les marchés seront entièrement ouverts d'ici l'échéance convenue. Elle spécifie notamment que les restrictions à l'utilisation des



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infrastructures alternatives devraient être levées d'ici 1996 (à part la téléphonie vocale publique, dont la libéralisation est prévue pour 1998) et que les conditions et les règles d'autorisation d'interconnexion devraient être établies d'ici 1997.

Pour le moment ce projet n'a été adopté par la Commission qu'"en première lecture". Suivant la procédure déjà utilisée pour les deux directives article 90.3 concernant le câble et les télécommunications mobiles, ce nouveau projet de directive sera publié au *Journal Officiel* pour consultation publique. Son adoption finale par la Commission est prévue pour la fin de cette année.

Quant à son contenu, le projet de texte fixe les principes fondamentaux pour autoriser des nouveaux entrants dans les marchés de la téléphonie vocale et de l'infrastructure de télécommunications d'ici 1998. Les principes non seulement garantissent l'introduction de la concurrence dans ces secteurs, mais également prévoient les mesures nécessaires visant à sauvegarder le service universel dans les Etats membres.

Le projet de directive établit des dates fermes pour la publication par les Etats membres de la législation en question de sorte que l'objectif de libéralisation complété d'ici 1998 soit effectivement réalisé. D'ici janvier 1997, les Etats membres doivent notifier à la Commission les procédures d'autorisation concernant la téléphonie vocale et les réseaux publics d'infrastructure, et d'ici juillet 1997 les Etats membres doivent publier les conditions d'autorisation et les procédures de déclaration ainsi que les termes et conditions d'interconnexion. Les Etats membres avec des réseaux de télécommunications moins développés, ou des réseaux très petits, pourront bénéficier, à leur demande, de périodes d'extension allant jusqu'à cinq ans et deux ans respectivement.

Le service universel signifie l'accès à un prix abordable à un service minimal

défini de télécommunications d'une qualité spécifiée pour tous les utilisateurs. Actuellement les éléments principaux sont la connexion au réseau comme abonné, les services de téléphonie vocale de base, les services d'urgence et les cabines téléphoniques publiques.

Cependant il est également reconnu que le concept de service universel doit évoluer pour suivre les progrès techniques et économiques. La directive souligne que le service universel doit être sauvegardé mais que cela ne doit pas fausser inutilement la concurrence. Ainsi elle admet l'établissement de systèmes équitables pour partager le coût net des obligations universelles de service entre l'opérateur existant et les opérateurs publics concurrents, mais elle oblige également les Etats membres à communiquer de tels systèmes à la Commission pour analyse au regard des règles de la concurrence européenne.

Cette directive libéralisera également d'ici le 1er janvier 1996 l'utilisation des infrastructures alternatives pour les services déjà libéralisés de télécommunications. Cela signifie que, à partir de cette date, l'utilisation des réseaux de télécommunications de services publics tels que le rail, l'électricité et l'eau pour tout service de télécommunications à part la téléphonie vocale publique est permise. De tels réseaux alternatifs fourniront des transmissions de grande vitesse à capacité élevée à des prix plus bas. Une telle capacité est actuellement indisponible ou prohibitivement coûteuse sur le réseau de l'opérateur national de télécommunications dans la plupart des Etats membres. Les services qui en profiteront comprennent: services interactifs audiovisuels et multimédia pour les entreprises, institutions scolaires et publiques; services d'information fournissant l'accès aux bases de données, au traitement des données à distance, au courrier électronique, aux services de transaction (tels que les transactions financières, transfert de données commerciales, vente par correspondance

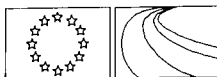
et les téléreservations), à la téléphonie vocale d'entreprise et à d'autres services à valeur ajoutée. Comme pour la libéralisation de 1998, les Etats membres avec des réseaux moins développés ou très petits peuvent solliciter une extension pour la libéralisation d'infrastructure alternative de cinq ans (ou de deux ans pour les réseaux très petits) à partir de 1996.

L'interconnexion entre les nouveaux entrants (souvent avec une couverture limitée du marché) et les opérateurs de réseau nationaux est essentielle pour la concurrence complète et efficace sur un marché où les communications entre n'importe quels points sont indispensables. Les caractéristiques et les principes généraux pour l'interconnexion dans un environnement favorables à la concurrence sont présents ici, en complément nécessaire des dispositions de la directive d'interconnexion ONP.

En résumé, la directive article 90 sur la concurrence complète créera une certitude précoce en ce qui concerne la législation nationale et les droits et obligations des acteurs du marché dans l'environnement libéralisé des télécommunications. Ses dispositions visent à l'engagement sur la date de 1998 pour la libéralisation complète.

La deuxième mesure est une proposition de directive du Conseil et du Parlement, fondée sur l'article 100A du Traité CE, et visant à établir un cadre harmonisé pour l'interconnexion des télécommunications dans le contexte de l'ONP (Open Network Provision), permettant d'assurer le service universel et l'interopérabilité des services de télécommunications dans toute l'Union européenne. Cette proposition sera soumise à l'approbation du Parlement européen et du Conseil, et devrait être mise en oeuvre avant 1998.

Quant au contenu de cette proposition, les nouveaux arrivants sur le futur marché libéralisé des télécommunications devront avoir la possibilité d'interconnecter leurs équipements avec ceux des opérateurs en place afin de pouvoir accéder aux clients



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des secteurs commercial et résidentiel. Il est essentiel d'établir des règles claires sur l'interconnexion afin d'encourager les nouveaux investissements, de stimuler le développement rapide d'une concurrence efficace, d'assurer le service universel et de garantir que la libéralisation soit source de bénéfices immédiats pour tous les utilisateurs européens.

L'accès aux réseaux et services avancés de télécommunications et de technologies de l'information est au coeur même de la future société de l'information. L'infrastructure de télécommunications européenne, en pleine évolution, se composera d'une multitude de réseaux détenus et exploités par des entreprises indépendantes qui offriront une grande variété de services fondés sur les télécommunications et l'information. Il est capital de garantir l'interconnexion et l'interopérabilité de ces réseaux et services. Le projet de directive établit les droits et obligations fondamentaux des acteurs du marché dans ce secteur, sous la surveillance des autorités réglementaires nationales chargées des télécommunications. Les interdictions existantes relatives aux interconnexions transfrontalières dans l'Union européenne sont appelées à disparaître.

Les principales caractéristiques du cadre réglementaire d'interconnexion proposé sont les suivantes :

- application des principes de transparence, d'objectivité et de non-discrimination caractérisant la fourniture d'un réseau ouvert, conformément au principe de proportionnalité;
- priorité accordée aux négociations commerciales entre les parties qui s'interconnectent, sous réserve de certaines conditions qui doivent être fixées a priori par les autorités réglementaires nationales de télécommunications;
- responsabilités précises des autorités réglementaires nationales,

conformément au principe de subsidiarité, y compris mécanismes efficaces de règlement des conflits aux niveaux national et européen.

D'autres points sont abordés dans la proposition de directive: interconnexion et contribution au service universel, exigences de non-discrimination et de transparence, principes de tarification de l'interconnexion et systèmes de comptabilisation des coûts, séparation comptable et comptes financiers, responsabilités générales des autorités réglementaires nationales, exigences essentielles, co-implantation et partage des installations, numérotation, normes techniques, publication d'informations et accès à ces informations.

Ces deux mesures, le projet de directive article 90.3 et la proposition de directive article 100A, relèvent de l'approche équilibrée de l'Union européenne grâce à laquelle la libéralisation et l'harmonisation dans le secteur des télécommunications progressent de pair. Elles représentent le coeur d'un ensemble des modifications réglementaires que la Commission prépare pour l'environnement post-1998, et sont le résultat d'une consultation étendue avec le secteur durant les mois passés. On s'attend à ce que d'autres mesures déjà annoncées dans la Communication de la Commission sur les consultations sur le Livre vert sur les infrastructures soient publiées à la fin de 1995.

LIBÉRALISATION DU SECTEUR POSTAL

La Commission européenne a présenté le 26 Juillet 1995 des propositions visant à ouvrir progressivement à la concurrence avant l'année 2001 les activités postales, sauf la distribution du courrier domestique dont le poids est inférieur à 350 grammes ou le prix supérieur à cinq fois le tarif standard, qui pourra rester soumise à un monopole afin de garantir

le financement d'un service universel de qualité. Il s'agit d'une libéralisation par étapes allant de pair avec une harmonisation. L'initiative a été présentée par Martin Bangemann, commissaire chargé des services postaux et Karel van Miert, commissaire responsable de la concurrence.

Les mesures proposées sont, d'une part, un projet de directive du Conseil et du Parlement et, d'autre part, un projet de communication de la Commission sur l'application des règles du Traité au secteur postal.

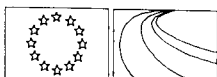
Le projet de directive du Conseil et du Parlement présenté par la Commission prévoit que la libéralisation soit faite d'une façon progressive. Une décision définitive sur l'étendue du secteur concurrentiel ne sera prise qu'en juin 1998.

Conformément au principe de la séparation des fonctions réglementaires et de gestion, la directive proposée demande à tous les Etats membres de créer une autorité réglementaire nationale indépendante des opérateurs postaux.

Les prestataires du service universel ont l'obligation de tenir une comptabilité transparente et d'établir des comptes séparés pour les services ouverts à la concurrence et les services non réservés.

Afin de garantir la viabilité financière du service universel, la directive définit les critères harmonisés pour les services susceptibles d'être réservés aux fournisseurs du service universel. Deux critères ont été retenus pour définir l'étendue des services réservés pour le courrier domestique:

- Une limite de poids qui s'applique pour le courrier domestique dont le poids est inférieur à 350 gr;
- une limite de prix calculée de la manière suivante : cinq fois le tarif public d'un objet de correspondance standard dans chaque Etat membre (normalement une lettre de 20 gr).



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En conséquence, tout le courrier domestique situé au-dessus de ces seuils sera libéralisé. Le courrier transfrontalier sortant qui est déjà "de facto" libéralisé dans la plupart des Etats membres sera aussi exclu des services susceptibles d'être réservés.

Par contre, le publipostage et le courrier transfrontalier entrant sont susceptibles de continuer d'être réservés jusqu'à la date du 31 décembre 2000 pour autant que cette reservation soit nécessaire à l'équilibre financier du fournisseur du service universel. La Commission décidera cependant au plus tard le 30 juin 1998, de la nécessité de maintenir le publipostage et le courrier transfrontalier entrant dans le secteur réservé au-delà du 31 décembre 2000 en tenant compte des développements intervenus dans le secteur.

Un réexamen général de l'étendue du secteur réservé sera effectué au plus tard pour le premier semestre 2000.

La directive prévoit à ce stade de la libéralisation un filet de sécurité qui garantira le financement du service universel: les Etats membres peuvent recourir à des procédures d'autorisation qui doivent cependant être objectives. L'octroi des autorisations peut être assujéti à des obligations de service universel et à la condition de ne pas entraver abusivement les services réservés. Lorsque les obligations de service universel constituent une charge financière inéquitable pour le prestataire du service universel, les Etats membres peuvent assujétiir les autres prestataires de services à l'obligation de contribuer financièrement à un fonds établi spécifiquement à cet effet.

Le projet de Communication de la Commission, qui vient compléter les mesures d'harmonisation, présente les principes qui guideront la Commission dans l'application au secteur postal des règles du Traité, et notamment des règles de concurrence, en vue de faciliter la

libéralisation progressive et contrôlée du secteur postal.

Ainsi que l'a reconnu la Cour de justice des Communautés européennes, les règles de concurrence sont pleinement applicables au secteur postal. Le projet décrit l'approche que la Commission entend adopter dans le traitement de la compatibilité des mesures d'Etat limitant la libre prestation de services et/ou la libre concurrence sur les marchés postaux avec les règles de concurrence du Traité. Par ailleurs, il aborde les questions de la non-discrimination, des subventions croisées et des protections réglementaires nécessaires pour garantir une concurrence loyale dans ce secteur.

Le projet de Communication sera publié au Journal Officiel et fera l'objet d'une consultation publique de deux mois à compter de cette publication. A l'issue de cette consultation, la Commission a l'intention d'adopter la Communication de manière à apporter aux acteurs de ce secteur la clarté indispensable pour l'application des règles du Traité.

LIBÉRALISATION DU SECTEUR ÉLECTRIQUE

Les propositions modifiées de directives présentées par la Commission concernant le marché intérieur du gaz et de l'électricité n'ont pas encore pu faire l'objet d'un accord au sein du Conseil. Cette institution, lors de sa réunion du 1er juin 1995, a formulé des conclusions qui, tout en identifiant certains principes sur lesquels un accord est possible, ont laissé de nombreuses questions ouvertes.

Déjà dans ses conclusions du 29 novembre 1994, le Conseil avait souhaité des discussions supplémentaires sur la possibilité de prévoir simultanément un système d'ATR négocié et un système dit d'acheteur unique. Dans ce contexte, il avait demandé de vérifier que les deux

approches aboutissent à des résultats économiques équivalents et, par conséquent, à un niveau directement comparable d'ouverture des marchés et qu'elles sont conformes avec les dispositions du Traité.

Sur la base du document de travail de la Commission sur l'organisation du marché intérieur de l'électricité, le Conseil a à nouveau confirmé que l'un des principaux objectifs de la directive concernant le marché intérieur de l'électricité est l'approfondissement de la concurrence au bénéfice de l'ensemble des consommateurs, et que, à cette fin, les systèmes électriques européens doivent progressivement incorporer des mécanismes de marché, tenant compte notamment de la situation des producteurs indépendants et des consommateurs éligibles, dans le cadre de solutions souples et pragmatiques.

Le Conseil a insisté sur la nécessité de garantir, dans le cadre de la future législation, l'accomplissement d'obligations de service public imposées aux entreprises du secteur électrique dans l'intérêt économique général, y compris les objectifs concernant la sécurité d'approvisionnement et la protection environnementale. Le Conseil a aussi insisté sur l'idée que la mise en oeuvre de ces obligations doit être faite dans le respect du Traité et en particulier de son article 90.2, ainsi que sur l'idée que le développement des échanges ne doit pas être affecté dans une mesure contraire à l'intérêt de la Communauté.

Le Conseil a considéré que le système d'ATR négocié et le système d'acheteur unique pourraient coexister sous réserve que certaines conditions, destinées à assurer la réciprocité entre les deux systèmes ainsi que des effets équivalents, soient satisfaites.

- l'acheteur unique doit acheter l'électricité dans des conditions objectives qui garantissent en particulier la transparence des prix de transport et une absence totale de discrimination;



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- un système d'autorisations accordées à des producteurs indépendants, selon des critères transparents, sera introduit parallèlement aux procédures de mise en concurrence dans la zone couverte par l'acheteur unique;
- à l'intérieur d'un système d'acheteur unique, des consommateurs éligibles, conformément au principe d'équivalence mentionné ci-dessus, pourront négocier des contrats de fourniture à l'étranger;
- des conditions appropriées de transparence dans le transport et la distribution seront définies dans les deux systèmes afin de garantir que soit évitée toute sorte de discrimination ou de comportements prédateurs, en particulier dans le commerce intercommunautaire ;
- des mécanismes appropriés et efficaces de régulation, de contrôle et de règlement des conflits seront introduits dans les deux systèmes afin d'éviter tout abus de position dominante, au détriment notamment des consommateurs;
- dans le système de l'acheteur unique, les producteurs non liés par contrat à l'acheteur unique, devraient pouvoir exporter leur électricité via son réseau, sous réserve qu'il y ait des capacités de transport suffisantes et que cela soit techniquement faisable;

Néanmoins, des discussions supplémentaires sont encore nécessaires sur les points suivants, pour lesquels il n'y a pas d'accord au sein du Conseil :

- la question de la construction et l'utilisation des lignes directes;
- la question de la définition des producteurs indépendants ;
- la question de la définition de tous les consommateurs éligibles et de leurs droits et responsabilités ;
- les conditions concrètes d'acceptation ou de rejet des autorisations pour les producteurs indépendants ainsi que les conditions dans lesquelles les producteurs indépendants peuvent négocier des contrats d'approvisionnement avec des consommateurs éligibles;
- la possibilité de limites quantitatives à l'électricité importée par les consommateurs éligibles ;

- le problème des compagnies intégrées, en ce qui concerne la production, le transport et la distribution, pour éviter la discrimination, les subventions croisées et la concurrence déloyale ;
- la question de savoir qui sera responsable de l'organisation des procédures d'appels d'offres;
- les modalités des périodes et régimes transitoires ;
- le problème des investissements échoués.
- les conclusions à tirer en particulier du document de travail présenté le 11 mai 1995 par la Commission sur la spécificité des petits systèmes, notamment les petits systèmes fortement interconnectés, en particulier en ce qui concerne la réalisation de lignes directes;

En conclusion, les discussions au sein du Conseil doivent encore se poursuivre afin de trouver des solutions satisfaisantes à toutes ces questions. ■

Relevant Press releases

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Judgements and Opinions of Advocates-General

Conclusions de Monsieur l'Avocat général M.B. Elmer du 17 mai 1995: Affaire C-259/94, Commission des Communautés européennes / République hellénique; Manquement d'Etat - Défaut d'avoir transposé, dans le délai prévu, la directive 92/44/CEE du Conseil relative à l'application de la fourniture d'un réseau ouvert aux lignes louées.

Arrêt de la Cour du 6 Juillet Aff. C-259/94, Commission des Communautés européennes / République hellénique Rapprochement de législations; Manquement - Directive 92/44/CEE - Télécommunications - Fourniture d'un réseau ouvert aux lignes louées; (Cinquième chambre)

Conclusions de Monsieur l'Avocat général M.B. Elmer du 11 mai 1995: Aff. C-220/94, Commission des Communautés européennes / Grand-Duché de Luxembourg; Manquement d'Etat - Défaut d'avoir transposé, dans le délai prévu, la directive 92/44/CEE du Conseil relative à l'application de la fourniture d'un réseau ouvert aux lignes louées ■



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Summary of the most important recent developments

by Henrik MØRCH, DG IV-E-1

THE COMMISSION ADOPTS EMPLOYMENT AID GUIDELINES

The persistent high unemployment rate within the Community remains the fundamental economic and social problem which the Community is faced with today. The development in the unemployment situation is characterized by an increased number of long-term unemployed and a particularly high unemployment rate within certain categories of workers, such as the young and unskilled. Although the forecast economic recovery is expected to improve the employment situation within the Community, it is not yet in itself sufficient to bring down the unemployment rate to a socially acceptable level. The Commission's White Paper on Growth, Competitiveness and Employment sets out the various ways to promote employment in harmony with the Community's competition policy, in particular the state aid rules in Articles 92-94 of the EC Treaty. These orientations have been supported by the European Council in Essen in December 1994 and in Cannes in June 1995.

In an attempt to remedy the grave unemployment situation there is a tendency in Member States to introduce an increasing number of measures to promote employment. Although these measures primarily have a social objective, in some cases they may contain aid elements as certain firms may benefit from them, in particular in terms of reductions in labour costs. It must be ensured, therefore, that these measures do not work against the efforts undertaken

by the Commission under the state aid rules in Articles 92-93 of the EC Treaty to eliminate unjustified distortions of competition.

In the light of the above considerations the Commission has found it appropriate to clarify its state aid policy in respect of aid for employment. The objective of the Employment Aid Guidelines is primarily to inform Member States and other interested parties of the principles the Commission will apply to determine the compatibility of employment aid measures with the common market under Articles 92-94 in the Treaty and to ensure coherence between the competition rules and the recommended employment policy measures to be taken to combat unemployment in the Commission's White Paper on Growth, Competitiveness and Employment. The Guidelines confirm the Commission's favourable approach towards aid measures to promote employment, which is already reflected in the accelerated clearance procedure under the Commission's SME Aid Guidelines (see OJ C 213 of 19.8.1992. In the SME Guidelines the Commission has introduced an accelerated clearance procedure for certain aid schemes to SMEs, including aid of up to ECU 3000 per job created, as the Commission will normally not object to this kind of aid) and the Commission's Communication to Member States on the principles of coordination of regional aid systems (see OJ C 31 of 3.2.1979. In this Communication the Commission decides that regional aid ceilings are fixed as a percentage of initial investment or in ECU per job created).

Which employment measures constitute State aid under Art. 92(1) ?

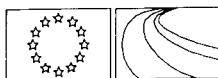
Most of the measures taken by Member States to implement their labour market policies do not constitute aid under Article 92(1) because they do not favour certain enterprises or the production of certain goods or because they do not affect trade between Member States. For example, measures providing for a reduction of social charges or an automatic premium to all enterprises recruiting or employing certain categories of workers regardless of the size, location or sector of those enterprises do not fall under Article 92(1). If the advantage for a firm remains below the threshold of the *de minimis* rule or if public subsidies are given to set up purely local services, intra-community trade is not perceptibly affected.

However, certain measures which selectively reduce labour costs of certain firms or in certain sectors to encourage them to increase their labour force, to recruit certain categories of workers or to maintain the level of employment distort or threaten to distort competition because they favour the beneficiaries with respect to their competitors. Such measures constitute aid falling under Article 92(1) in so far as they affect trade between Member States. They must be notified and approved by the Commission before they are put into effect.

Aid under Article 92(1) may take any form whatsoever: a fixed premium per job created, a subsidy as a percentage of wage costs or relief from certain social security or tax liabilities.

Compatibility with the common market

In respect of aid measures falling under Article 92(1), the Guidelines make a distinction between aid for job creation, i.e. a net increase in the number of jobs in the firm with reference to a certain period, and aid for maintaining jobs, i.e. aid



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offered to a firm to prevent it from making workers redundant.

1. The Guidelines confirm the traditionally positive approach the Commission has adopted towards state aid for job creation. Thus, subject to certain ceilings (see the ECU 3000 ceiling under the accelerated procedure in the SME Guidelines and the ceilings laid down in the 1979 communication on the principles of coordination of regional aid systems), the Commission will normally adopt a favourable position if the aid is granted to SMEs or firms located in regions eligible for regional aid to take on unemployed persons, provided this employment leads to a net increase in the number of jobs in the firm concerned.

Similarly, the Commission will normally adopt a favourable position if the aid is granted to firms to take on unemployed persons having particular difficulties in finding a permanent job. This applies to any firm and irrespective of the location of the firm. The positive approach is not subject to compliance with any ceilings and it is not required that the employment lead to a net increase in the number of jobs in the firm, as long as the vacancy is due to normal departure, not redundancy.

In its assessment of the aid, the Commission will take into consideration whether the unemployed person is employed on a contract of unlimited duration or for a period which is sufficiently long to ensure a certain stability in the job created. Moreover, the Commission will take account of possible counterparts offered by the firm for the aid received going beyond the employment of the unemployed, such as training. The Commission will also examine whether the aid intensity and the amount of aid offered to a firm is a necessary incentive to take on an unemployed person and verify that the aid is temporary.

2. Even if the above conditions are complied with, the Commission will

normally look unfavourably on aid for job creation available to one or more sectors only which are sensitive, suffering from overcapacity or in a crisis. The negative effects these aid measures may have on competing firms within the same sector in other Member States and the risk that the aid will merely export the unemployment to other Member States prevail over reduction of the unemployment rate in the Member State granting the aid. However, if the aid is granted in regions with serious unemployment problems the Commission will take account of this fact in the assessment of the compatibility of the aid with the common market. Likewise, the Commission may adopt a more favourable position in respect of aid for job creation in sub-sectors which experience economic growth and generate many jobs.

3. The Guidelines confirm the traditionally unfavourably approach the Commission adopts towards aid for maintaining jobs in a firm. In fact, aid for maintaining jobs amounts to an operating aid which generally has the effect of preventing or delaying the necessary changes to render the firm/sector concerned economically viable, thereby keeping unprofitable businesses artificially alive. Therefore, the Commission will only approve aid for maintaining jobs in a limited number of cases and under strict conditions.

Aid for maintaining jobs may be authorized in regions faced with particularly serious socio-economic problems and which for that reason are eligible for regional aid pursuant to Article 92(3)(a) of the EC Treaty (for more detail see the Commission Communication on the method for the application of Article 92(3)(a) to regional aid, OJ C 212 of 12.8.1988). Aid for maintaining jobs granted in the context of a rescue or restructuring plan may be approved provided the conditions in the Guidelines on state aid for rescuing and restructuring firms in difficulty are complied with (for more detail see the

Rescue and Restructuring Guidelines, OJ C 368 of 23.12.1994).

Notification procedure

In order to reflect the urgency of measures to deal with the current unemployment crisis in the EU and to support the promotion of structural employment policies, in particular by means of active labour market measures, the Commission will adopt an accelerated procedure for the notification of employment and training aid schemes. Under the accelerated procedure the Commission will decide within 20 working days on notified aid measures.

The Guidelines will be subject to review 5 years after their adoption.

COMMUNICATION TO THE MEMBER STATES ON THE RECOVERY OF ILLEGAL AID

It follows from Article 93(3) of the Treaty that Member States are under an obligation to notify all aid measures within the meaning of Article 92(1) to the Commission and may not put the aid measure into effect before the Commission has adopted a decision approving it.

A non-notified aid may confer an important economic advantage to the recipient firm consisting of the interest on the aid from the time it was granted till the Commission adopts a final decision and an improvement in the creditworthiness of the firm during the same period. This economic advantage may cause serious distortions of competition in favour of firms in receipt of non-notified aid.

The continued violation of the notification obligation induced the Commission since 1986 systematically to require the recovery of incompatible aid illegally



▷ STATE AID

granted, i.e. without prior notification under Article 93(3) (see Com(86) PV 844/3 of 3.11.1986). This practice has been confirmed by the European Court of Justice (see case C-142/87 of 29.3.1990 (Tubemeuse) who considered, moreover, that the recovery of incompatible aid granted in breach of the notification obligation does not oppose the principle of legitimate expectations, as a diligent economic operator must ensure himself that this procedure has been complied with (see case C-5/89 of 20.9.1990 (BVG-Alutechnik). In addition to the power to demand the recovery of incompatible aid the Commission has the power, after allowing the Member State concerned to express its view, to issue an interim order requiring the Member State to suspend the implementation of aid granted in breach of the notification obligation until the Commission has approved it (see the Court's judgment in case C-301/87, (1990) ECR I-307 (Boussac).

However, the Commission's power to issue an interim suspension order pending the outcome of the Commission's examination of the non-notified aid only takes effect for the future, i.e. in respect of the part of the aid still to be granted. It leaves the potential distortion of competition caused by the non-notified aid already granted subsisting during the period the aid is examined by the Commission. Moreover, in respect of the power to demand the recovery of incompatible aid illegally granted it does eliminate the economic advantage the firm receives in the form of interest on the aid received, as the obligation to reimburse incompatible aid includes interest from the day the aid was paid, but does not eliminate the economic benefit derived from the improved creditworthiness of the firm during the period the firm may dispose of the non-notified aid. The latter advantage is particularly important for firms suffering from economic difficulties.

The Commission therefore considers that the means it now applies in respect of

non-notified aid are not sufficient to eliminate the distortions of competition derived from the non-respect of the notification obligation. In fact, the present situation discriminates in favour of those Member States (and firms) who do not follow the notification procedure. To eliminate the economic advantage firms may receive from the granting of non-notified aid and in light of the Court's judgment in "Boussac" (see case C-301/87, France v. Commission, (1990) ECR I-307) the Commission in May adopted a Communication to the Member States concerning the recovery of state aid stipulating that in certain cases the Commission may require by an interim decision, having given the Member State concerned the opportunity to submit its comments on the matter within a period of 20 days and invited it to notify the measure under the rules applicable to rescue aid, that the beneficiary immediately reimburses the non-notified and thus illegal aid to the Member State with interest at a commercial rate pending the Commission's decision on the compatibility of the aid. The obligation to reimburse aid illegally granted is only provisional, i.e. until the Commission has adopted a final decision on the compatibility of the aid with the common market. The illegal aid will have to be recovered in accordance with the requirements of domestic law.

If the Member State fails to comply with an order of this kind the Commission may refer the matter to the Court of Justice directly by way of an application for an interim measure analogous to the applications provided for in Article 93(2).

THE NOTION OF AID UNDER ARTICLE 92(1)

Application of the Market Economy Investor Principle

Public funds, provided to a (public) undertaking on terms more favourable than those on which a private investor

operating under normal market conditions would provide them to a private firm in a comparable financial and competitive position constitutes state aid. In that case the firm is receiving an economic advantage not available to other firms. In making this assessment it must be recognized that a private investor may provide funds to one of its companies with motivations other than profit in the short term, such as the concern to maintain the trade image of the group or to reorganize its overall activities. This may include the provision of funds, for a limited period of time, to cover the losses of a subsidiary to enable it to close down its operations under the best possible conditions. However, the provision of funds by the State to a company, in the absence of any possibility of profit even in the long term, constitutes state aid (see case C-303/88 Italian Republic v. Commission (ENI Lanerossi), ECR 1991-I, 1433). In view of the fact that the intended capital injection by the Bavarian State to cover the accumulated losses of the steel undertakings Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH would coincide with the sale of its shares in these companies, thereby removing any prospect of profitability from the provision of these funds even in the long term, the Commission decided that these capital injections constituted state aid under Article 92(1).

For similar reasons the Commission decided that the capital injections made by the Italian State through its industrial holding company ENI into the fertilizer company "Enichem Agricoltura S.p.A." in the years 1991-1994 constituted state aid, as the capital injections were made before a restructuring plan was set up solely to prevent the company from going bankrupt and, thus, without any prospects of a reasonable return. The Commission considered, moreover, that under the circumstances the period during which the company had suffered from heavy losses, i.e. 5 years, was too long to be acceptable for a private market investor, who would have liquidated or thoroughly restructured the company well before. The capital



▷ STATE AID

injections to be made in the context of a restructuring plan set up at a later stage therefore also constituted state aid and, moreover, the Commission considered the positive results expected from the implementation for the plan to be too low compared to the total injection of new capital.

On the other hand if the capital injection by the State into a company goes together with the injection of capital by a private investor on equal terms and the private investor's holding in the company has real economic significance, the Commission considers that aid is not involved in the public intervention (see also Commission Communication on the application of Article 92 and 93 of the EC Treaty to public authorities' holdings, Bulletin EC 9-84). The Commission therefore decided that the capital injection and loans provided by the authorities of Wallonia (Belgium) to the textile company "EM-Filature" were based on normal commercial considerations and did not constitute state aid, as this intervention went together with an injection of capital by private shareholders making them majority shareholders in the company and as private shareholders offered loans on similar terms. For similar reasons the Commission considered that the injection of capital by the Portuguese State into the ship repair company "Lisnave" in connection with a restructuring of the company did not involve state aid under Article 92(1).

REGIONAL AID

The Commission approved pursuant to Article 92(3)(c) of the EC Treaty the new regional aid map for the Netherlands for the period 1995-1999 only covering 17.26% of the Dutch population, which is the lowest coverage within the Community of fifteen. As the main Dutch regional investment aid scheme "IPR" (Investeringspremieregeling) is only available within regions approved as national assisted areas under the

mentioned Commission decision and offers investment aid for physical investments below the maximum investment aid intensity authorized in regions eligible for regional aid pursuant to Article 92(3)(c), i.e. 30% net, the Commission decided to approve the scheme.

The Commission may approve investment aid in regions eligible for regional aid under Article 92(3)(a) covering up to 75% of the eligible investment costs. In view of the socio-economic problems in Greece the total Greek territory may benefit from regional aid pursuant to Article 92(3)(a) and as the new Greek regional aid scheme offers grants and soft loans for investments covering up to 75% of eligible costs the Commission decided to approve the scheme.

The Commission may only authorize investment aid schemes in favour of firms bigger than SMEs if these firms are located in national assisted areas pursuant to Article 92(3)(a) or (c) (see the SME Aid Guidelines, OJ C 213 of 22.8.1992). The Commission therefore decided to open the Article 93(2) procedure in respect of a German guarantee scheme in the State of Saarland which is indefinite in time and may therefore, in principle, offer guarantees for investment projects in favour of bigger firms than SMEs which - after the expiry of the Commission decision concerning the regional assisted areas in Germany at the end of 1996 - may be located in non-assisted areas.

In approving regional aid schemes the Commission normally impose the condition that the aid must not give rise to a sectoral overcapacity at the Community level such that the Community's sectoral problems produced may be more serious than the original regional problem. Given the fact that the investment aid granted by the Italian Government to the non-ECSC steel undertaking "Ilva Lamiera e Tubi" did not involve any increase in production capacity and, therefore, did not further

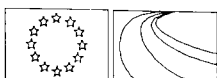
deteriorate the situation with overcapacity in the market, that the undertaking was located in a region eligible for regional aid under Article 92(3)(a), the Commission considered that the regional benefits of this aid outweighed the possible sectoral problems and decided to approve the aid.

SECTORAL AID

The Commission has an unfavourable attitude to sectoral aid due to the particular distortive effects on competition normally caused by this kind of aid, notably in sectors which are sensible, suffering from structural overcapacity or in crisis. This approach is confirmed in the Employment Aid Guidelines which stipulates that the Commission will normally have an unfavourable attitude to employment aid measures only available within certain sectors having these characteristics (see for more detail above and the Employment Aid Guidelines). In line with this policy the Commission decided to open the Article 93(2) procedure in respect of an employment aid scheme in Italy providing for fiscal incentives to firms within the shoe-sector employing additional workers.

Steel

Under the Steel Aid Code state aid may be authorized only if it is used to finance the activities enumerated in the Code, that is aid for R&D, aid for environmental protection purposes, social aid in connection with closure of steel plants, aid to steel undertakings that cease production permanently and investment aid granted before the end of 1994 under general regional aid schemes in Greece and the new German Länder. As the aid to the state-owned steel undertaking "Irish Steel" in the form of state guarantees for loans, which appear to have been granted to enable the company to continue its operations, and the planned restructuring aid do not seem to fall within any of the eligible categories of aid under the Code, the Commission decided to open the



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Article 6(4) procedure in respect of these aid measures.

The Commission moreover decided to adopt a final negative decision with regard to the intended capital injections and investment aid to be granted by the Bavarian State to the two German steel undertakings Neue Maxhütte GmbH and Lech-Stahlwerke GmbH, as the aid did not comply with the conditions under the Steel Aid Code.

It follows from the Code that investment aid to steel undertakings can normally not be approved. However, an exception to this rule is provided for in the aforementioned Article 5 of the Code until the end of 1994. As the Greek Government notified the Commission of its intention to grant investment aid to the steel undertaking "Halyvourgia Thessalias" in February 1995 and thus after the elapse of the deadline of 31.12.1994, the Commission could not approve the aid pursuant to Article 5 and decided to initiate the procedure provided for in Article 6(4) in respect of this aid.

Aid to shipbuilding

The Seventh Directive on aid to shipbuilding (see Directive 92/68/EEC) contains a derogation from the rules applicable to other Community yards allowing additional aid to the shipyards in the former GDR in order to enable those yards to undergo urgent and comprehensive restructuring and thereby become competitive. The Commission has approved first tranches of the restructuring aid for all yards concerned. To benefit from further releases of this aid the German Government must show the further necessity of the aid, that the restructuring plan is being followed and resulting in the capacity limitations required and that any risk of spill-over of aid to other yards is being eliminated. In view of the fact that these conditions were met in respect of further aid to the German shipyard "Volkswerft" the Commission decided to approve the release of this aid.

Aid to the motor vehicle industry

The Community Framework on state aid to the motor vehicle industry was introduced with effect from 1.1.1989 on the basis of Article 93(1) for a period of two years. It has been reviewed and renewed twice, in December 1990 and 1992. Contrary to the Commission's view the European Court of Justice decided in its judgment of 29 June 1995 that the 1992 review of the Framework could not extend it for an indefinite period, but could only prolong it for two years (see case 135/93, Spain v. Commission). Given that the Commission did not renew the Framework before end 1994, the framework ceased to have its effects from 1.1.1995.

In view of the legal vacuum created by the judgment of the Court in respect of aid to the motor vehicle industry the Commission has decided to re-introduce the Framework according to Article 93(1) of the Treaty and to introduce interim measures in the form of a retroactive prolongation of the original Framework, i.e. the Framework in force until the end of 1994, until the procedure foreseen by Article 93(1) will be completed or for a maximum period of one year, i.e. until 31.12.1995. The latter decision implies that the Member States, in conformity with the obligations of co-operation vested in Article 5 of the EC Treaty, refrain from granting state aid to the motor vehicle sector without prior notification to and approval by the Commission. The new Framework will enter into force when all Member States have given their agreement or at the latest by 1.1.1996.

The new version of the Framework to be adopted pursuant to Article 93(1) EC modifies the threshold for the obligation to notify aid granted to undertakings operating in the motor vehicle sector under a scheme approved by the Commission. Under the revised Framework only aid to projects the costs of which exceed ECU 17 million (ECU 12 million under original Framework) are

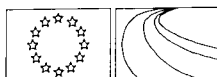
subject to prior notification under Article 93(3) EC. This increase in the threshold reflects developments in the price levels since 1989 and will allow the Commission to focus more on bigger projects which are more likely to seriously influence intra-Community competition.

The Commission decided to open the Article 93(2) procedure in respect of aid granted or to be granted by the Spanish authorities in favour of the car manufacturer "SEAT S.A.", a subsidiary of the German car manufacturer "Volkswagen", as the aid on the basis of the information available to the Commission would appear to be incompatible with the common market.

Aid to the synthetic fibres industry

The award of aid to the synthetic fibres industry has been subject to strict control since 1977 and the current version of the Code on aid to the synthetic fibres industry requires Member States to notify the Commission of any plan to grant aid, in whatever form, to synthetic fibres producers by way of support for such activities. The Commission will only authorize award of aid if it results in a significant reduction in production capacity. Earlier this year, in view of the fact that the Code was introduced almost twenty years ago the Commission appointed a consultant to assess the efficacy of the Code since 1977 and determine whether or not to continue to impose specific sectoral measures on aid to the synthetic fibres industry. Their report was received recently and the Commission is considering what action to take, in particular whether or not to proceed with a second study that would make specific recommendations on the most appropriate means by which to impose sectoral control in the future.

Pending the outcome of this work, the Commission extended the period of validity of the current Code to 31.3.1996 subject to the condition, however, that the Code may be abolished or revised at any time before that date.



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The current Code requires notification of proposals to award aid in direct support of new fibre production capacity or in support of downstream activities, such as the commercialisation or transformation of the fibres, which could constitute indirect support of fibre production if the fibres used in the subsidized activities would be supplied from new capacity belonging to the prospective aid beneficiary or the Group to which it in turn belongs. This appeared to be the position in the case of the French authorities' proposal to award aid to Beaulieu Group on which the Commission decided to open the Article 93(2) procedure.

The textile sector

Aid within the textile sector is subject to specific control under the Community Guidelines on aid to the textile industry (see SEC(71) 363 of July 1971) due to the prevailing structural overcapacity in the sector. Thus, aid to a textile company may only be approved if it does not lead to an increase in the production capacity of the textile sector. Under the Community Guidelines on rescuing and restructuring firms in economic difficulty the Commission may approve restructuring aid to textile firms in economic difficulty provided the aid is given in the context of a restructuring plan enabling the firm to return to full viability, that the aid is proportionate to the total costs of the project and that the firm provides an adequate counterpart to reduce the distortion of competition caused by the aid. In view of the fact that the aforementioned conditions were met in respect of a restructuring aid to the French textile company "Fabertex S.A." the Commission decided to approve the aid pursuant to Article 92(3)(c).

The banking sector

The Commission considers that the state aid rules may apply to the banking sector taking into consideration, however, the specific features of this sector and the

sensitivity of financial markets. The Commission thus considers that the Market Economy Investor Principle may be applied to banks to determine whether financial support by the State constitutes aid under Article 92(1) (see for more detail the 25th Annual Report on Competition Policy). State aid under Article 92(1) to banks in economic difficulty may be approved under the Guidelines on rescuing and restructuring firms in economic difficulty (see below) provided that the aid is granted in the context of a restructuring plan enabling the bank to return to full viability within a reasonable period, that the aid does not exceed what is strictly necessary and that undue distortions of competition through the aid is avoided. In the context of this assessment the Commission will also take account of the possible negative effects on the financial system and the public confidence in the banking sector.

The Commission considers that the financial transactions carried out in connection with the restructuring of the French bank "Crédit Lyonnais" involve state aid under Article 92(1). In view of the fact that it was not possible for the Commission to determine whether the aforementioned conditions for approving the aid under the Guidelines on rescuing and restructuring firms in economic difficulty were complied with, the Commission decided to initiate the Article 93(2) procedure in respect of this aid. However, on the basis of a number of strict conditions, in particular in terms of a substantial reduction of capacity on foreign markets to reduce the distortive effects on competition caused by the aid, the Commission decided to approve the restructuring aid to "Crédit Lyonnais".

HORIZONTAL AID MEASURES

Rescue and restructuring aid

The Commission continued to apply the new Guidelines on rescuing and restructuring firms in economic difficulty (see OJ C 368/12 of 23.12.1994). It

follows from the Guidelines (see point 3.1 and 3.2.2) that rescue and restructuring aid is exceptional in character and should therefore normally be a one-off operation to enable the firm to return to full viability. In view of the fact that certain German guarantee and soft loan schemes for the rescue and restructuring of firms in difficulty did not, in principle, exclude the repetitive provision of aid for such operations in favour of the same firm, the Commission reserved its right to examine such repetitive aid individually and in its approval of the scheme put emphasis on the fact that the German Government had made a commitment to notify all repetitive aid exceeding ECU 1 million individually.

The Commission cannot itself impose a condition of privatisation on an undertaking that receives aid for restructuring purposes (see Article 222 of the EC Treaty). However, a commitment from a Member State of privatizing the beneficiary of the aid is the best guarantee available to the Commission that the restructuring of the company will enable it to return to full viability and that no additional aid will be necessary in the future. Moreover, the privatization may provide the recipient firm with the necessary funds to make the significant contribution to the restructuring plan normally required under the Guidelines. The Commission may therefore in its decision on the compatibility of a restructuring aid with the common market take account of such a commitment, which may in turn form part of the conditions for approving the restructuring aid. In approving the restructuring aid to the Italian company "Enichem Agricoltura S.p.A." the Commission therefore took account of the commitment made by the Italian government to privatize the company.

Under the Guidelines it is a condition for authorizing restructuring aid to firms operating within sectors suffering from structural overcapacity that the recipient firm reduces capacity in a genuine and irreversible way. In its approval of restructuring aid to the Italian fertilizer



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company "Enichem Agricoltura S.p.A." the Commission therefore put emphasis on the implementation of irreversible reduction of the firm's production capacity and decided, moreover, that this condition for approval shall be respected until the moment at which the effects of the aid on the competitive situation in the Community will be insignificant.

It follows from the method for implementing the principles of coordination of regional aid systems (see Commission Communication, OJ C 31 of 3.2.1979) that the Commission may approve regional aid for initial investment covering, among others, investments in fixed assets in the context of an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalization, restructuring or modernization) and, moreover, investments in fixed assets by way of takeover of an establishment which has closed down or which would have closed had such takeover not taken place. However, to ensure that such aid is not offered for the restructuring of firms in difficulty, in particular in favour of firms bigger than SMEs, without a scrutiny of such aid under the Guidelines on rescuing and restructuring firms in economic difficulty, the Commission required individual notification of guarantees offered to companies bigger than SMEs under a German guarantee scheme in the State of Saarland.

Research & Development

Under the Community Framework on aid for R&D aid which is designed to promote the execution of an important project of common European interest may

qualify for the exception provided for in Article 92(3)(b) of the EC Treaty. In order for state aid for R&D to benefit from this derogation the aid must promote a clearly defined project of a qualitative and quantitative significance and the common interest in this project must be demonstrated. In view of the necessity to create a common European research within the field of microelectronics to reach a strategic position in relation to competition from overseas and the fact that the JESSI programme has participants from several Member States and has a considerable budget of MECU 3800, the aid for R&D offered by the Italian Government to firms for participating in the JESSI programme was approved by the Commission pursuant to Article 92(3)(b).

Aid for environmental protection

The Commission does not normally authorize operating aid. However, under the Environmental Aid Guidelines (OJ C 72 of 10.3.1994) the Commission may allow relief from new environmental taxes where such relief is necessary to offset losses in competitiveness due to the fact that similar taxes are not introduced in other countries and provided that the relief is temporary and in principle degressive. In view of the fact that the relief for certain firms from environmental taxes on the consumption of groundwater and on waste in the Netherlands complied with these conditions the Commission decided to approve the scheme.

For reasons similar to those mentioned above the Commission decided to authorize a relief from an environmental

tax on the production of plastic bags in Italy to the benefit of plastic bags for export, although this tax relief benefited firms exporting plastic bags exclusively and thus constituted an export aid. However, in respect of the relief from a similar environmental tax on the commercialization of the raw material polyethylene in Italy to the benefit of the export of this material the Commission decided to initiate the Article 93(2) procedure, as it was not clear whether this tax relief complied with the conditions for approval under the Guidelines, in particular that it must be temporary.

Levy schemes

It is the Commission's well established policy not to authorize a levy scheme, when the levy is imposed on national as well as imported products and the proceeds of the levy is used to subsidize activities to the benefit of the domestic firms in the sector concerned. In other words, the method of financing in itself may render the levy scheme incompatible with the common market under Article 92(1) (see also case 47/69 France v. Commission, ECR 1970 p. 487). On these grounds the Commission decided to initiate the Article 93(2) procedure in respect of the aforementioned environmental tax on the commercialization in Italy of the raw material "polyéthylène" and plastic films as the proceeds of these two taxes seem (partly) to benefit the Italian producers of these products and as the tax on plastic films is only imposed on imported products (see also the description of other measures under the same scheme in Italy above under the point "Aid for environmental protection"). ■



Press releases

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CREDIT LYONNAIS: EUROPEAN COMMISSION APPROVES AID PLAN OF THE FRENCH GOVERNMENT PER CONTRA OF A SERIOUS "EMACIATION CURE"

En contrepartie du feu vert de la Commission Européenne à un montant maximum de 45 milliards de FF d'aide de l'Etat français- principal actionnaire de la banque - le Crédit Lyonnais devra réduire d'au moins 35% sa présence commerciale à l'étranger d'ici à la fin de 1998, dont une partie substantielle du réseau bancaire européen.

Telle est en substance, la décision que la Commission Européenne a prise ce mercredi à l'initiative de M. Karel Van Miert, responsable de la politique de concurrence.

Afin d'assurer un contrôle effectif de cette décision, les autorités françaises devront soumettre à la Commission tous les six mois une série de rapports et documents reprenant notamment tous les détails sur les actifs bancaires et non-bancaires du Crédit Lyonnais cédés. Un premier rapport du genre devrait être soumis à la Commission dès le mois de septembre.

Par ailleurs, la Commission a tenu compte dans sa décision de l'objectif de privatisation du Crédit Lyonnais - tel qu'affirmé par les autorités françaises - à l'horizon de l'an 2000.

Quant aux autres conditions imposées par la Commission, elles stipulent notamment que:

- aucune modification du plan ne sera possible sans accord préalable de la Commission;

- le Crédit Lyonnais ne pourra racheter des actifs industriels et commerciaux cantonnés (cas Usinor-Sacilor) qu'au prix auquel l'actif a été transféré au Consortium de Réalisations (CDR - voir background ci-dessous), ou au prix de marché si celui-ci est supérieur au prix du transfert de l'actif au CDR, et en tout cas dans la limite globale de FFr 5 milliards;

- une séparation plus nette sera réalisée entre le CDR et le Crédit Lyonnais, en ce qui concerne leurs dirigeants, la gestion, ainsi que le système de contrôle et de surveillance de la gestion du canton; en outre, il est prévu que l'indépendance des comités de direction des sociétés cantonnés à l'égard du Crédit Lyonnais soit assurée et que le Crédit Lyonnais ne pourra avoir aucun intéressement aux produits des réalisations du CDR;

- le Crédit Lyonnais devra affecter le produit des cessions à la restructuration des actifs et des activités non performantes, pour éviter qu'il puisse réinvestir ce produit dans le rachat des participations industrielles ou financières;

- la Société de Participation Banque/Industries (SPBI - voir background ci-dessous) devra non seulement recevoir les produits de la privatisation du Crédit Lyonnais, mais aussi une partie substantielle des bénéfices réalisés par la banque (selon la clause dite de "retour à meilleure fortune").

En prenant cette décision, la Commission se dit consciente de la sensibilité des marchés

financiers et des caractéristiques particulières du secteur bancaire. Toutefois, la protection des concurrents exigeait une évaluation détaillée et transparente des mesures adoptées par les autorités françaises en faveur du Crédit Lyonnais, dans le respect des règles de concurrence et particulièrement celles prévues par les Traités européens en matière de contrôle des aides d'Etat.

M. Van Miert s'était d'ailleurs adjoint les conseils de trois "sages" - deux anciens responsables de banques centrales et un haut responsable d'un grand groupe bancaire - chargés d'examiner les effets de l'application au secteur bancaire des règles du Traité sur les aides d'Etat : en substance, ces trois personnalités ont conclu qu'il n'y a lieu d'appliquer ces règles également aux institutions financières, tout en tenant compte des conséquences que cela peut avoir sur les marchés financiers.

Background

Le 14 mars dernier, le Ministre français de l'Economie et des Finances, M. Edmond Alphandéry avait présenté à M. Van Miert les grandes lignes du plan de restructuration du Crédit Lyonnais : en substance, le responsable européen de la politique de concurrence avait indiqué que ce plan constituait "un pas dans la bonne direction" mais qu'il y avait présomption d'aide d'Etat et que, dès lors, des compensations importantes devaient être accordées - en termes de cession d'actifs valables .

Le 22 mars, par ailleurs, les Présidents de deux des principaux groupes bancaires français concurrents du Crédit Lyonnais - la Banque Nationale de Paris et la Société Générale - adressaient à M. Van Miert un aide-mémoire conjoint dans lequel ils se plaignaient de la "distorsion de concurrence" que l'aide d'Etat risquait d'entraîner.

L'Etat français est l'actionnaire principal du Crédit Lyonnais : au 31 décembre 1993, il détenait 55 % du capital de la banque .

A cette même date, le Crédit Lyonnais était le premier groupe bancaire européen en termes d'actifs totaux, soit près de 2.000 milliards de FF, et il employait quelque



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71.000 personnes dans le monde, et comptait environ 900 agences en Europe (en dehors de la France) et 800 agences dans le reste du monde.

Après environ cinq ans de forte croissance, le Crédit Lyonnais a enregistré des résultats négatifs en 1992 (1,8 milliards de FF) et en 1993 (6,9 milliards de FF).

Afin d'éviter que le ratio de solvabilité de la banque ne descende au-dessous du niveau minimum de 8% (fonds propres par rapport aux actifs ajustés pour couvrir leur risque), l'Etat consent, en 1994, une augmentation de capital de 4,9 milliards de FF et prend à sa charge 18,4 milliards de FF sur 42 milliards de FF d'actifs peu performants.

La banque recourt pour ce faire à la pratique dite de "défaillance" : sur un encours global de plus de 100 milliards de FF dans le secteur immobilier, 42 milliards de FF de créances douteuses dans ce secteur, insuffisamment provisionnées sont placées dans une société ad hoc - OIG.

Au début de 1995, le Crédit Lyonnais enregistre une nouvelle perte supérieure à 10 milliards de FF pour l'année comptable 1994 : le principal actionnaire, l'Etat français, met en place un nouveau mécanisme de sauvetage en créant une structure spécifique dite " de cantonnement" destinée à prendre en charge notamment les actifs pas ou peu performants du Crédit Lyonnais.

Cette structure, appelée " Consortium de Réalisations " (CDR), filiale à 100 % du Crédit Lyonnais achète, selon le plan de restructuration communiqué à la Commission par le gouvernement français, presque 190 milliards d'actifs de la banque - notamment ceux détenus par OIG - dont 55 milliards de FF de passifs.

L'achat d'actifs " nets" (à savoir 190 milliards de FF moins 55 milliards, soit 135 milliards de FF) sera financé par un prêt de 135 milliards de FF de la part de SPBI (Société de Participation Banque-Industrie). Selon le plan, tous ces actifs - actifs immobiliers, filiales bancaires Altus, SDBO et Colbert, financements consentis dans le secteur du cinéma et portefeuille industriel -devront être cédés ou liquidés : ainsi, 80 % des actifs devront être cédés dans les cinq

ans et si les conditions de marché le permettent, au moins 50% de ces actifs devraient être cédés d'ici à trois ans.

IP/95/829 Date : 95/07/26

Other Press Releases

IP/95/333 : COMMISSION APPROVES AID TO THE GERMAN COAL INDUSTRY

IP/95/341 : COMMISSION AUTHORIZES SECOND TRANCHE OF STATE AID TO TAP

IP/95/342 : COMMISSION ORDERS AIR FRANCE FUNDS TO BE PUT IN A BLOCKED ACCOUNT PENDING COURT DECISION

IP/95/349 : THE COMMISSION DECIDES THAT A PROPOSAL TO MODIFY THE DANISH ELECTRICITY ACT DOES NOT INVOLVE STATE AID

IP/95/351 : THE COMMISSION APPROVES GERMAN AID SCHEME "PRODUKTION 2000" IN FAVOUR OF KNOWLEDGE TRANSFER TO SMES

IP/95/352 : COMMISSION APPROVES INVESTMENT AID TO UK SHIP REPAIR YARD

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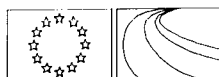
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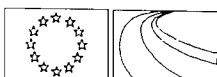
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INTERNATIONAL DIMENSION OF COMPETITION POLICY

Main developments between 1st April and 31st July 1995

Summary of the most important recent developments

by *Stefaan DEPYPERE, Thinam JAKOB and Brona CARTON*
DG IV-A-1

CENTRAL AND EASTERN EUROPEAN COUNTRIES (CEEC), COUNTRIES OF THE FORMER SOVIET UNION AND MEDITERRANEAN COUNTRIES

White Paper endorsed at Cannes

In May 1995 the Commission adopted a White Paper on the Preparation of the Associated Countries of Central and Eastern Europe (CEEC) for integration into the Internal Market of the Union. This White Paper was endorsed by the European Council of Cannes. It can be termed the most important element of the pre-accession strategy since the beginning of 1995.

The White Paper lays down guidelines for the integration of the six associated countries into the Internal Market, which is regarded as a priority by those countries themselves. Without prejudice to future accession negotiations and without imposing new conditions for accession, the White Paper is intended to support the efforts of the associated countries in describing what the Commission considers to be key elements for such an integration, as well as the necessary structures, without laying down a timetable. At the time of accession, the associated countries will then accept all of the *acquis communautaire*. In the meantime technical assistance will be provided for the associated countries.

Competition as one of the key elements of the internal market figures both in the

introductory part of the White Paper as well as in its technical annexes. The White Paper concentrates on the importance of having a viable competition policy for economies in transition and in the annex, lays down in four "fiches" (covering antitrust, mergers, state aid and state monopolies/ exclusive rights) the key elements which should be taken over by the associated countries in a first stage.

Signature of Europe Agreements with Baltic States

With the three Baltic States (Estonia, Latvia, Lithuania), Free Trade Agreements entered into force on 1 January 1995. The competition rules contained in those Agreements correspond to those of the Europe Agreements with the CEEC. The Free Trade Agreements will soon be replaced by Europe Agreements, which were signed on 12 June 1995. The three Baltic States are now considered to fulfil the conditions for inclusion in the pre-accession strategy which the European Union has developed towards the CEEC. For competition this means that they will be treated on the same footing as the six CEEC.

Training Programme - Collective traineeship

Providing training is an essential element of a successful introduction of competition policy in the associated

countries. The Europe Agreements contain a clause on training and the Council of Essen reconfirmed this point by asking the Commission to set up a training programme based on its experience and that of the Member States' competition authorities.

Until now EU training was given in various forms, e.g. :

- through lectures in the association countries - often delivered by consultants paid through the PHARE programme;

- by financing, through PHARE, the participation by Central European competition officials in conferences, seminars, ...

- by providing documentation;

- by accepting trainees in DG IV.

Member States have undertaken similar actions.

After consultation with the Member States, DG IV sent a questionnaire to all CEEC in order to learn about the training they found most suitable. The replies showed that traineeships in DG IV and in the Member States' authorities were highly valued. There was a preference for case work rather than general lectures.

This is good reason to increase the number of available traineeships and to coordinate activities between DG IV and the Member States' authorities. However, individual traineeships in their present form place a high burden on the hosting operational units. Therefore a pilot-project is being set-up along the following lines :

- The aim is to offer an in-depth introduction in the Union's anti-trust policy and institutions. The target is a group of "young" officials from the various competition authorities in the CEEC and Baltic states, each authority



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could send up to four officials.

- The selected candidates will receive in advance a documentation set which they will be expected to study before attending. All participants will come together in Brussels for a period of 2 weeks to attend lectures (1st week) and to participate actively in workshops on individual cases (2nd week). For a further period of two weeks the participants will visit a competition authority of a European Union Member State. During this period the authority will explain how it operates, what have been its important cases, its problems, ...

- After the visits the candidates will be expected to submit a short report and an analysis paper on a topic to be selected during his/her stay in Brussels.

Diligent participation and a good report will be honoured by a certificate of participation.

The advantages of this formula are multiple:

- DG IV and the authorities of the Member States can provide an introduction of high quality in competition policy:

- if the project is successful it can easily be repeated, possibly covering other topics or addressing different types of public (e.g. judges, academics);

- there is a fair chance to develop a group dynamism leading to better inter-CEEC relations.

The individual traineeships will continue to exist but their relative frequency is expected to decrease. In the future they would probably be reserved for specialised officials.

The "collective traineeship" is a first element of the training programme asked for by the Essen Council. The Member States and DG IV will take into account this first experience for their further planning.

Visegrad Conference

On 19-21 June the Office of Economic Competition of Hungary and DG IV organised a conference in the town of Visegrad, near Budapest. The topics for discussion were anti-trust and state aid policies. It was the first occasion for authorities from all CEEC and the Commission to analyse these topics together in a systematic manner.

The participants came from the anti-trust authorities, represented both at the top level and at the operational level, and from other administrations that tend to be involved in state aid monitoring matters such as the ministries of finance.

During a plenary session the conference focused on the specific competition problems of economies in transition and on the interaction of anti-trust and state aid policies. Afterwards two working groups analysed precise topics in anti-trust and state aid respectively.

During the conference the heads of the anti-trust authorities agreed on a joint action programme with the following concrete actions:

1. The seven authorities will create a system of mutual information exchange. This will comprise inter alia projects for new regulations, annual reports, documents produced e.g. for the OECD, etc.

2. Given the success of the first Competition Conference in Visegrad, a similar conference will be organised on an annual basis in one of the Central European countries. On the invitation of Mr Belehradek, Minister of Economic Competition of the Czech Republic, the second conference will take place in May 1996 in Brno.

3. Whenever one of the Competition authorities organises a conference on a specific topic it will extend an invitation to the partner authorities to participate.

4. In the framework of the PHARE programme the European Commission's Directorate General for Competition will organise joint training sessions for your officials of the Central European authorities. They will be supplemented by traineeships for the participants within Competition authorities of the European Union Member States. The first training session will start in September in Brussels.

In addition, the European Commission's Directorate General for Competition will continue to invite officials from the Central European countries for individual traineeships financed by the PHARE programme.

5. The seven Competition authorities will intensify bilateral contacts at all levels, in particular to clarify any problem which may arise in the process of implementing the Europe Agreements in the area of competition. In the margin of mutual working visits, short lectures and presentations on new developments and controversial issues in competition policy will be organised for a broader audience.

6. In support of the information exchange system mentioned under point 1., the seven Competition authorities will explore the possibility of developing telematic information links between the European Commission's Directorate General for Competition and the other Competition authorities. The exploratory phase will start immediately.

Whereas the implementing rules (undertakings) will provide a legal basis for exchanging information on cases, this action programme will facilitate cooperation in practice by favouring good human relations and establishing information links. It will also support the process of approximating legislation.

Implementing Rules

While the implementing rules (undertakings) are in the process of being adopted by the respective Association



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Councils, the implementing rules (state aid) are currently being discussed at technical level. Just as the implementing rules (undertakings) they should provide for pragmatic modalities of cooperation between the authorities responsible for state aid control.

Working Group EU-Russia

Even before the entry into force of the Partnership and Cooperation Agreement between the EU and Russia, the creation of a Working Group on Competition was decided by the Joint Committee under the current Agreement with Russia. The first meeting of the Working Group took place in Brussels in May. It was co-chaired by representatives from DG IV and the SCAP (State Committee for Antimonopoly policy and the promotion of new economic structures). Apart from discussions on substantive issues, a programme of technical cooperation could be agreed upon which will inter alia encompass provision of documentation, on the spot training and traineeships in DG IV. At the Council of Cannes a decision was taken to lift the objections against the interim Agreement. This decision should lead to an intensification of bilateral cooperation in the area of competition between DG IV and the SCAP.

Customs Union with Turkey

In March 1995 the Association Council decided on the creation of a Customs Union between the European Union and Turkey. This Decision still has to be ratified and must in particular pass before the European Parliament in autumn.

In the competition field, far-reaching clauses on approximation of legislation have been agreed upon. Before the entry into force of the Customs Union (i.e. before 1 January 1996) Turkey must establish a competition law compatible with the EC system (which has been done) and a competition authority which

effectively enforces the law. It must likewise adapt its aid schemes to be compatible with the Community framework for textiles. Further obligations of approximation must be fulfilled within one respectively two years after the entry into force of the Customs Union.

These obligations must be seen in the wider context of a reduction of trade measures. Where competition policy is effectively implemented, the need for trade measures (for instance anti-dumping or anti-subsidy measures) will be reduced.

Mediterranean countries

An Association Agreement has been concluded with Tunisia, and similar agreements are being negotiated with Morocco, Egypt, Jordan and Israel. The competition regime for these agreements closely resembles those established with the CEEC. T. JAKOB, S. DEPYPERE

EU/US AGREEMENT ON COMPETITION POLICY

On Monday 10 April 1995 a joint decision [OJ L95 of 27 April 1995 as rectified by OJ L 134 of 20 June 1995] of the Council and the Commission approved the Agreement with the Government of the United States of America regarding the application of the competition rules.

The Commission had itself concluded this Agreement in September 1991 and the Agreement had been implemented pending the outcome of a challenge by a Member State before the European Court of Justice. On 9 August 1994 the Court annulled the act by which the Commission had concluded the Agreement. The Court, in fact, considered that the conclusion of such an act was a matter for the Council (with the

exception, however, of the aspects relating to the ECSC Treaty). Nonetheless, the Court did not annul the Agreement and by virtue of the 1969 Vienna Convention on the law of treaties (Article 46) it remained valid under international law, as an international agreement concluded by an authority which is not manifestly incompetent binds the state for which it acts.

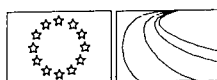
The Council therefore had either to terminate the Agreement under the procedure set out in the Agreement itself or to regularise the legal position within the Union by concluding the Agreement on behalf of the European Community. The Council chose this latter option.

Earlier in the year, the European Parliament [PV of 20 January 1995, Part II, point 3] had also approved the Agreement in the form originally signed by the Commission.

The Agreement was the first of its kind to be concluded by the Community. Its principal purpose is not so much to create a framework within which conflicts between the Commission, as the EU's competition authority, and the US' Department of Justice and Federal Trade Commission can be resolved. Rather, it is to prevent such conflicts from happening in the first place.

It does this by regular and systematic notification of investigations which may affect the important interests of either Party and by providing for cooperation between the Parties, including twice yearly meetings between the competition authorities of the EU and US. Its main provisions include:

- the exchange of information on general matters relating to the implementation of the competition rules as well as on cases handled by the competition authorities of one Party, when these cases concern the "important interests" of the other Party;
- cooperation and coordination of the enforcement actions of both Parties' competition authorities;



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- a "traditional comity" procedure by virtue of which each Party is committed to taking into account the important interests of the other Party when it takes measures to enforce its competition rules; and

- a "positive comity" procedure through which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory and affecting the first Party's important interests.

In addition, the Agreement makes clear that none of its provisions may be interpreted in a manner which is inconsistent with the legislation in force in the European Union and the United States of America; in particular, the competition authorities remain bound by the internal rules regarding the protection of the confidentiality of information gathered by them during their respective investigations.

In parallel with the adoption of the Agreement, the Council decided to proceed with an exchange of letters [OJ L 134 of 20 June 1995] with the US authorities. This exchange of letters is intended, in particular, to:

- confirm that the Agreement does not permit the Commission to derogate from its obligations on confidentiality resulting from the 1962 first Regulation implementing Articles 85 and 86 of the EC Treaty (or similar provisions of equivalent regulations);

- make clear the conditions under which the Commission will inform the Member States on the implementation of the Agreement.

The agreement has been in place for almost four years. However, the doubt created by the court challenge led to a certain hesitation in fully applying it. Nonetheless, up to the end of 1994 the Commission had received 128 notifications from the US authorities and

the Commission has sent notifications to the US authorities in 103 cases. The majority of notifications on both sides relate to mergers and acquisitions.

The usefulness of this kind of systematic exchange of basic information was amply demonstrated in the Microsoft case. There, the mere fact that the Commission was aware that the US authorities were investigating a matter in which we had also received a complaint, resulted in cooperation between the competition authorities (with the consent of Microsoft) on an unprecedented scale. It is hoped that similar cooperation may take place in the future where appropriate cases arise.

There have also been regular meetings between the Commission and the US competition authorities to exchange views on areas of common interest, such as international aspects of competition policy, policy developments within the EU or the US, or specific sectors which are most profoundly implicated in the global economy, e.g. telecommunications and air and sea transport.

It is inevitable that in a global economy we should wish to cooperate with competition authorities in other countries to ensure that competition is fair and is not distorted. The scale of business dealings means that increasingly several competition authorities are called upon to investigate matters affecting the important interest of third countries or even to review the same set of facts. The possibility of eliminating conflicts between competition authorities before they happen and of cooperating and coordinating enforcement activities should lead to a more harmonious application of the different rules. Undoubtedly the political approval of the EC/US Agreement by the Member States in Council has given new impetus to cooperation between the EC and the US authorities and we expect to see it grow in the future.

B.CARTON

Press releases

*The full texts of Commission's Press releases are available on-line from the RAPID database, on the day of their publication by the Commission's Spokesman's Service. To obtain access to RAPID, please write to **EUR-OP EUROBASES, c/o European Commission, Wetstraat 200 rue de la Loi, Brussel B-1049 Bruxelles, tel. +322 295 00 01 or 03, fax +322 296 06 24***

THE COMMISSION PROPOSES TO LAUNCH A DEBATE TO REINFORCE INTERNATIONAL COOPERATION BETWEEN COMPETITION AUTHORITIES

On the joint initiative of Mr Karel Van Miert and Sir Leon Brittan, and in agreement with Mr Martin Bangemann, the Commission today decided to submit to public debate a report entitled "Competition policy in the new trade order: strengthening international cooperation and rules". This report is the fruit of a collaborative effort between three external experts [Professors U. IMMENGA - Abt. für internationales und ausländisches Wirtschaftsrecht Universität Göttingen, Deutschland, F. JENNY - Professeur d'Economie, ESSEC et Conseil de Concurrence, France) E-U. PETERSMANN - Hochschule St. Gallen, Schweiz] and several Commission officials participating in a personal capacity.

First, the authors of the report analyze recent economic developments which make necessary improved cooperation between competition authorities; they thus considered that:

- with the positive conclusion of the Uruguay Round leading to a progressive



▷ INTERNATIONAL DIMENSION

reduction of state-imposed trade barriers, the risk exists that these barriers will be replaced by other obstacles to international trade resulting from the behaviour of countries, e.g. setting up cartels, whose members divide world markets (in this way, each company assures the protection of its traditional national market), partitioning distribution networks of large, global companies along national borders, etc. Such behaviour, if widespread, would compromise the expected benefits of liberalized international trade in terms of growth and employment;

- there is a growing contradiction between the increasing internationalization of economic activity and the limited territorial control exercised by national competition authorities (or by a "regional" authority such as the Commission).

For example, behaviour taking effect on the market of a particular country could raise questions under the competition rules; however, the evidence that would allow the competition authority of this country to act against the companies concerned is inaccessible because it happens to be located within the territory of a neighbouring state (this is often the case for export cartels).

Also, it often happens that the same company practices affect several national markets: several competition authorities are thus at once competent, and conflicts between them can arise on the measures to be taken.

Developments such as these call for strengthening links between the authorities charged with enforcing competition rules.

The authors of the report then make an inventory of the forms of cooperation already existing between competition authorities. These forms of cooperation consist mainly of mechanisms, based on bilateral relations, which favour the exchange of information (while

respecting of the rights of companies to protect their business secrets) as well as consultation with a view to accommodating the concerns of each of the parties and their respective competition rules.

The Group recommends that the European Union extend to other countries the network of bilateral agreements that link it with certain of its partners (the United States and the countries of Central and Eastern Europe). The Group considers, moreover, that it would be necessary to increase the scope of these agreements by providing for, in particular, the possibility of exchanging confidential information.

To establish a multilateral cooperation

However, the Group considers that bilateral agreements cannot in isolation respond to all the needs of international cooperation. That is why the Group is in favour of putting in place a plurilateral cooperation structure accompanied by a dispute resolution procedure based on a set of common rules. It recommends that negotiations are pursued in this manner with interested countries such as Australia, New Zealand, Korea, Japan, Canada, Hong Kong, Taiwan and Singapore, and Mexico.

In concrete terms, the experts judge that a plurilateral framework should contain four key elements:

1. An instrument enabling the exchange of information between competition agencies, including business information, but with watertight guarantees with respect to the protection of their confidential nature;
2. So called "positive comity instrument", by which one competition agency can ask another to investigate and if necessary act against a practice that harms its substantial interests yet falls outside its jurisdiction, that would be binding in nature;
3. A set of appropriate substantive rules, with tougher disciplines as practices are

considered to have more pronounced anticompetitive effects (i.e. stronger rules against hard core cartels than against vertical restrictions);

4. A dispute settlement system subject to strict deadlines, whereby the complainant authority can seek redress within a relatively short period of time if the rules of the Agreement have not been respected.

The Commission wants to launch a debate

Without committing itself on the content of the report, the Commission considers that the questions raised deserve to be debated in depth within the Community institutions as well as with our principle partners.

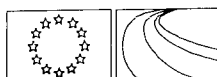
The authors of the report did not recommend which forum would be the most appropriate to pursue the negotiations on a plurilateral competition arrangement; however the Commission points out the advantages that the WTO would have and will ask member states as well as our trading partners to express their views on this specific subject .

IP/95/752 Date : 95/07/12

Other Press Releases

IP/95/393 : EU/US AGREEMENT ON COMPETITION POLICY

IP/95/657 : EUROPEAN COMMISSION AND SIX CENTRAL EUROPEAN COUNTRIES AGREE ON AN ACTION PROGRAMME ON COMPETITION POLICY ■



INFORMATION SECTION

DG IV staff list

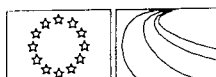
Télécopieur central : 295 01 28

Directeur général	Alexander SCHAUB	2952387/2954576
Directeur général adjoint (plus particulièrement chargé des directions A et D)	Jean-François PONS	2994423/2962284
Conseiller principal Conseiller auditeur	... Hartmut JOHANNES	2955912/2956942
Conseiller chargé de la sécurité des informations et des auditions dans les affaires de contrôle de concentration	Joseph GILCHRIST	2955673/2960246
Conseiller	Georgios ROUNIS	2953404/2960256
Assistants du Directeur général	Irène SOUKA Christopher JONES	2957206/2960189 2965030/2958316
Directement rattachés au Directeur général :		
- Cartels	Julian JOSHUA	2955519
1. Affaires administratives, budgétaires et Information	Irène SOUKA	2957206/2960189
2. Questions informatiques	Guido VERVAET	2959224/2951305
Task Force "Contrôle des opérations de concentration entre entreprises" en vertu des Traités CEE et CECA Conseiller	
1. Unité opérationnelle I	Götz DRAUZ	2958681/2959031
2. Unité opérationnelle II	Enrique LOPEZ VEIGA	2957381/2961180
3. Unité opérationnelle III	Roger DAOUT	2965383/2965574
4. Unité opérationnelle IV	Juan Antonio RIVIERE MARTI	2951146/2960997
DIRECTION A: <u>Politique générale de la concurrence & coordination</u>		
	Rafael GARCIA PALENCIA	2950253/2954512
1. Politique générale et aspects internationaux - Relations avec le Parlement Européen et le Comité économique et social	Claude RAKOVSKY	2955389/2962368
- Chef adjoint d'unité (plus particulièrement chargé des questions internationales)	Stefaan DEPYPERE	2990713/2950225
2. Questions juridiques et procédurales, réglementation, procédures d'infractions, dumping intracommunautaire	Helmut SCHRÖTER	2951196/2955911
- Droits de propriété industrielle et intellectuelle, recherche-développement	Sebastiano GUTTUSO	2951102/2955894
3. Coordination économique et juridique des décisions d'application des règles de concurrence	David DEACON	2955905/2960562
- Chef adjoint d'unité	Emil PAULIS	2965033/2965045



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DIRECTION B	Humbert DRABBE	2950060/2952701
<u>Ententes, abus de position dominante et autres</u>	<u>distorsions de concurrence I</u>	
1. Constructions électrique et électronique, industries de l'information	Fin LOMHOLT	2955619/2951150
2. Télécommunications	Herbert UNGERER	2968623/2968622
3. Banques et assurances et autres services	Luc GYSELEN	2961523/2957491
4. Médias, électronique de divertissement, éditions musicales, commerce	...	2953936/2962696
DIRECTION C	Gianfranco ROCCA	2951152/2951139
<u>Ententes, abus de position dominante et autres</u>	<u>distorsions de concurrence II</u>	
1. Acier, métaux non ferreux, produits minéraux non-métalliques, bâtiment, bois,	Maurice GUERRIN papier, verre, caoutchouc	2951817/2951816
2. Energie, produits chimiques de base	Paul MALRIC-SMITH	2959675/2956422
3. Produits chimiques transformés, produits agricoles et alimentaires	Jürgen MENSCHING	2952224/2961179
DIRECTION D	John TEMPLE LANG	2955571/2958133
<u>Ententes, abus de position dominante et autres</u>	<u>distorsions de concurrence III</u>	
1. Constructions mécaniques, textile, habillement, cuir et autres industries manufacturières	Franco GIUFFRIDA	2956084/2950663
2. Inspection CECA	Pierre DUPRAT	2953524/2954850
3. Transports et tourisme	Serge DURANDE	2957243/2954623
4. Automobiles, autres moyens de transport et construction mécanique connexe	Dieter SCHWARZ	2951880/2950479
DIRECTION E <u>Aides d'Etat</u>	Asger PETERSEN	2955569/2958566
Conseiller	Ronald FELTKAMP	2954283/2960450
Conseiller	...	
- Automobiles et fibres synthétiques	Geert DANCET	2960993/2950068
1. Coordination et politique générale, régimes généraux d'aides	Jonathan FAULL	2958658/2965201
- Chef adjoint d'unité	Anne HOUTMAN	2959628/2969719
2. Aides à la recherche-développement	Claude ROUAM	2957994/2963131
3. Aides à finalité régionale	Luigi CAMPOGRANDE	2952767/29
- Chef adjoint d'unité	Alfredo MARQUES	2962542/2960872
4. Aides à finalité sectorielle I	Francisco ESTEVE REY	2951140/2955900
- Chef adjoint d'unité	Wouter PIEKE	2959824/2958900
5. Aides à finalité sectorielle II	Constantin ANDROPOULOS	2956601/2955410
6. Inventaire et analyse	Reinhard WALTHER	2958434/2955410



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NEW DG IV staff list

On the 19th of July the Commission decided to re-organize DG IV to ensure that the structure and responsibilities of the Directorates dealing with Articles 85 and 86 reflect the changes in the structure of the European economy during the previous years. This means that four operational Directorates have been established rather than the existing three. The detailed changes can be seen from the following staff list, which will enter into force on the 1st of October 1995.

Directeur général	<i>Alexander SCHAUB</i>
Directeur général adjoint plus particulièrement chargé des Directions C et D	<i>Jean-François PONS</i>
Directeur général adjoint plus particulièrement chargé des Directions E et F	<i>Gianfranco ROCCA a.i. (as of 1st of August 1995)</i>
Conseiller principal	...
Conseiller auditeur	<i>Hartmut JOHANNES</i>
Conseiller auditeur (chargé également de la sécurité des informations)	<i>Joseph GILCHRIST</i>
Assistants du Directeur général	<i>Christopher JONES</i>
	...
<i>directement rattachés au Directeur général :</i>	
1 Affaires administratives et budgétaires; Information, Parlement européen, Comité Economique et Social	<i>Irène SOUKA</i>
2 Questions informatiques	<i>Guido VERVAET</i>
DIRECTION A	
Politique générale de la concurrence et coordination	...
Conseiller	<i>Juan RIVIERE MARTI</i>
1 Politique générale de la concurrence et Coordination Chef adjoint d'unité	<i>David DEACON</i> <i>Emil PAULIS</i>
2 Affaires juridiques et législation Chef adjoint d'unité	<i>Helmut SCHRÖTER</i> ...
3 Aspects internationaux Chef adjoint d'unité	<i>Claude RAKOVSKY</i> <i>Stefaan DEPYPERE</i>
DIRECTION B	
Task Force "Contrôle des opérations de concentration entre entreprises"
1 Unité opérationnelle I	<i>Götz DRAUZ</i>
2 Unité opérationnelle II	<i>Enrique LOPEZ VEIGA</i>
3 Unité opérationnelle III	<i>Roger DAOUT</i>
4 Unité opérationnelle IV
DIRECTION C	
Information, communication, multimédias	<i>John TEMPLE LANG</i>
1 Télécommunications et Postes Coordination Société d'information - Cas relevant de l'Article 85/86	<i>Herbert UNGERER</i> <i>Suzette SCHIFF</i>
2 Médias, éditions musicales - Aspects de propriété intellectuelle <i>Sebastiano GUTTUSO</i>
3 Industries de l'information, électronique de divertissement	<i>Fin LOMHOLT</i>



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DIRECTION D Services

Conseiller

1 Services financiers (banques, assurances)

2 Transports

3 Commerce (y compris la grande distribution),
tourisme & autres services

Humbert DRABBE

Georges ROUNIS

Luc GYSELEN

...

Luigi CAMPOGRANDE

DIRECTION E Industries de base

1 Acier, métaux non ferreux, produits minéraux non
métalliques, bâtiment, bois, papier, verre

2 Produits chimiques de base et transformés, caoutchouc

3 Energie(charbon, hydrocarbures, électricité, gaz)

4 Cartels et Inspections
Chef adjoint d'unité notamment chargé des Cartels

Rafael GARCIA PALENCIA

Maurice GUERRIN

...

Paul MALRIC-SMITH

Pierre DUPRAT
Julian JOSHUA

DIRECTION F Industries des biens d'équipement et de consommation

1 Industries mécaniques et électriques et industries diverses

2 Automobiles, autres moyens de transport
et construction mécanique connexe

3 Produits agricoles, alimentaires, pharmaceutiques,
textiles et autres biens de consommation

Franco GIUFFRIDA

Dieter SCHWARZ

Jürgen MENSCHING

DIRECTION G Aides d'Etat

Conseiller
Conseiller

1 Politique des aides d'Etat
Chef adjoint d'unité

2 Aides horizontales

3 Aides à finalité régionale
Chef adjoint d'unité

4 Aides sectorielles I
Chef adjoint d'unité

5 Aides sectorielles II
Chef adjoint d'unité

6 Entreprises publiques et services

7 Analyses, inventaires et rapports

Asger PETERSEN

Francisco ESTEVE REY

...

Jonathan FAULL
Anne HOUTMAN

Claude ROUAM

...

Alfredo MARQUES

Constantin ANDROPOULOS
Geert DANCET

...

Wouter PIEKE

Ronald FELTKAMP

Reinhard WALTHER



▷ INFORMATION SECTION

Documentation ...

This section contains details of recent speeches or articles given by Community officials that may be of interest. Copies of some of these may be available from DGIV's Information Officer. Future issues of the newsletter will contain details of conferences on competition policy which have been brought to our attention. Organisers of conferences that wish to make use of this facility should refer to page 1 for the address of DGIV's Information Officer. A compilation of the most interesting books received by DG IV's Library is also presented.

SPEECHES AND ARTICLES

Full Competition - The Role of Services on Demand & Cable. by Dr Herbert UNGERER, CommEd Conference, Services on Demand, London, 30-31 March 1995 (sp95009)

Ground Handling : Legal Aspects - A Competition Perspective from the European Commission, by Dr John Temple Lang, ACI Europe Conference, Montpellier, 3-5 April 1995 (sp95010)

Surveys of Member States' Powers to Investigate and Sanction Violations of National Competition Law, by Laraine L.Laudati, Consultant to DG IV (sp95011)

Regulatory Directions for Satellite Communications in Europe, by Dr H. Ungerer, Intelsat Summit, 2 March, (sp95012)

The Application of the Competition Rules in the Telecommunication Sector : Strategic Alliances, by Miguel Angel Peña Castellot, (sp95013)

Why Do We Need a Competition Policy ? by S. Depypere, Brno Seminar, 14 February 1995 (sp95014)

The Importance of Competition Policy in the International Field,

by C.D. Ehlermann, Brno Seminar, 14 February 1995 (sp95015)

Comments on "The Coherence of EU Policies on Trade, Competition and Industry Case Study : High Technologies" (D FORAY, P. Rutsaert & L. Soete), by David Deacon (sp95016)

L'Union Européenne Face aux Pays d'Europe Centrale et Orientale : Délocalisations Industrielles ou Harmonisation des Conditions de Concurrence ? par Claude Rouam (sp95017)

Economic Assessment of Oligopolies under the Community Merger Control Regulation, in European Competition Law Review, Vol. 14, Issue 3, May/June 1993, Sweet & Maxwell Publ., ISSN 0144-3054, by Juan F. BRIONES ALONSO

The 17th Annual Advanced EC Competition Law Conference - Market definition and oligopolistic dominance - Review of Decisions taken under the merger Regulation, Brussels, 8/11/94, by Juan F. BRIONES ALONSO [sp95020]

Der Einzelhandel aus europäischer Sicht, von Karel Van Miert, Konferenz "Einzelhandel im Umbruch", Frankfurt, 30. Mai 1995 (sp95022)

Die Telekommunikationspolitik der europäischen Gemeinschaft,

von Dr Herbert UNGERER, Präsidentenseminar "Die Deutsche Telekom AG im Spannungsfeld des internationalen Wettbewerbs", Berlin, Akademie für Führungskräfte, 11. Mai 1995 (sp95023)

The core of the constitutional law of the Community - Article 5, EC Treaty, by Dr John Temple Lang (sp 95024)

Abuse of dominant position, by Thomas Näcke, Symposium on Competition Policy in a Global Economy, Taipei, 19 April 1995 (sp95025)

Anforderungen an die Telekom-Struktur in Europa, by Dr Gerbert UNGERER, Wien, 24. Mai 1995, (sp95026)

Infrastructure competition : alternative networks and business opportunities, by Dr Herbert UNGERER, 8th International Reseau Conference, Venice, 18 May 1995, (sp95027)

Auf dem Communication Highway in die globale Informationsgesellschaft, by Dr Herbert UNGERER, Forum Telekommunikation, Bonn, 1. Juni 1995, (sp95028)

Les règles communautaires applicables aux concentrations, dans Observateur de Bruxelles N° 13 Dr. Georgios KYRIAZIS, DG IV (art95002).



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Politique européenne de concurrence dans le domaine des transports, Séminaire "jeunes cadres commerciaux SNCF" - Monteton - 16 juin 1995 (sp95029).

Renewal of the regulation 123/85 : Pending the outcome, R. GOYER, The SMMT Conference, 20 June 1995 (sp95030).

Improvements in the enforcement of Article 85, (Outline of the speech by Mr. Jean-François Pons, Deputy Director General DG IV - European Commission at the DTI/Linklaters and Paines Seminar), 11 July 95, London (sp95031) ■

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The future of the European Social Policy - Options for the Union, by CCE and UCL, Louvain University Press 1994, [02.02.01]



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International Enforcement of US Antitrust Laws, Morrison & Foerster, 8 February 1995, [04.04.00]

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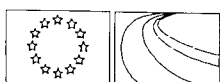
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New Dimensions of Market Access in a Globalising World



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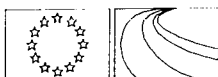
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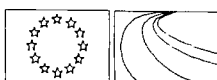
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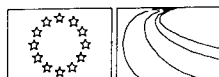
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Coming up

The following publications are under preparation by DG IV:

EC Competition Policy Newsletter: scheduled for publication as follows: Autumn/Winter 1995 on January 1996

Competition law in the European Communities - volume 2A Rules applicable to state aid

Competition law in the European Communities - volume 1B Explanation of rules applicable to undertakings.

Competition law in the European Communities - volume 3A International Aspects

Repertory of Commission Decisions in the Competition field - end 1990 to 1992.

Dealing with the Commission - notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty.

Competition law in the European Communities - update of volume 1A Rules applicable to undertakings.

Proceedings of the 2nd EU/Japan Seminar on competition.

XXIV Report on competition policy 1994.

Actes du Forum Européen de la Concurrence.

Competition Aspects of Interconnection Agreements in the Telecommunications Sector

Surveys of the Member States' powers to investigate and sanction violations of national competition laws

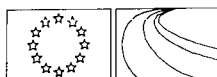
New industrial economics and experiences from European Merger Control - New lessons about collective dominance ?

L'application des articles 85/86 par les juridictions nationales

4me rapport des Aides d'Etat

Competition policy in the new trade order : strengthening international cooperation and rules - Report of the Group of Experts

Brochure explicative sur les modalités d'application du Règlement (CE) N° 1475/95 de la Commission concernant certaines catégories d'accords de distribution et de service de vente et d'après-vente de véhicules automobiles



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The members of the Cellule INFORMATION will endeavour to answer your enquiries. If they are unable to do so they will find someone who can. They will not, however, answer questions pertaining to ongoing cases.

In addition to copies of the speeches listed above, DGIV also has available, or is in the process of preparing, a number of more detailed publications on its competition policy. If you are interested in receiving some of these, or details of where they can be purchased, please contact the Cellule.

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