EC COMPETITION POLICY NEWSLETTER

Editor: Henrik Mørch
Production & Layout: Vicky Hannan

Address: European Commission, C150, 00/158 Wetstraat 200, rue de la Loi Brussel B-1049 Bruxelles
Tel : +322 2957620
Fax : +322 2955437

Electronic Mail: X400: C=be;A:rtt;P:cec; OU=dg4;S=info4
Internet: Info4@dg4.cec.be
World Wide Web: http://europa.eu.int/comm/dg04/

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Les effets de la concurrence dans la vie quotidienne des citoyens

Alexander SCHAUB, Directeur Général de la DG IV

Introduction : De la structure des marchés aux intérêts des consommateurs

La mondialisation accrue des échanges, l'accélération des évolutions technologiques, l'intensification de la concurrence sur un grand nombre de marchés entraînent les partenaires économiques dans une course à la compétitivité pour maintenir leurs positions de marchés et en gagner de nouvelles. Le rôle des autorités publiques communautaires est de faciliter et d'accompagner ce processus en garantissant que la structure des marchés en Europe soit suffisamment flexible pour permettre aux acteurs économiques de tirer le meilleur profit de leurs efforts et en contribuant à promouvoir une culture de concurrence - par la persuasion ou, au besoin, par la contrainte -, culture de combat, orienté vers la scène internationale, mais qui s'acquiert par la confrontation sur les marchés domestiques.

L'action structurelle de la politique de concurrence s'articule autour de trois axes essentiels: le contrôle des concentrations d'entreprises, la libéralisation des services sous monopole, le contrôle des aides d'état. Cette action sur les structures serait d'une efficacité moindre si la Commission n'engageait également une action plus conjoncturelle, destinée à promouvoir une culture de concurrence en Europe. L'essentiel de cette action repose sur l'article 85 du traité qui prohibe les accords restrictifs de concurrence qui conduisent notamment à la fixation en commun de prix ou de quotas de production, à la répartition de marchés ou de sources d'approvisionnement et l'article 86 qui réprime, quant à lui, les abus commis par une ou des entreprises en position dominante sur un marché donné (limitation de la production, prix excessifs, prix discriminatoires ou prédateurs, ventes liées par exemple).

Ces instruments juridiques permettent de s'assurer que les structures de marché demeurent ouvertes et que le flux des transactions y reste fluide et dynamique ; ils visent aussi à ce que les entreprises ne commettent des pratiques qui faussent ou restreignent le jeu de la concurrence en déterminant artificiellement le conditions de fonctionnement

des marchés sur lesquelles elles évoluent. La politique de concurrence est donc essentiellement tournée vers le marché. Il n'en reste pas moins que la politique de concurrence mise en oeuvre par la Commission européenne intéresse directement le citoyen européen dans sa vie quotidienne dans la mesure où celui-ci est un acteur économique à part entière et où le traité assigne aussi à l'Union l'objectif de «promouvoir un progrès économique et social équilibré et durable », en d'autres termes d'assurer le mieux-être de ses 370 millions de citoyens.

Les textes sur lesquels la Commission se fonde pour mener à bien sa politique de concurrence affirment d'ailleurs clairement la prise en compte de cet objectif, qu'il s'agisse de l'article 85 qui permet aussi d'exempter les ententes si notamment elles contribuent au progrès technique et économique et «réservent aux utilisateurs une partie équitable du profit qui en résulte »(art.85-3) ou qu'il s'agisse du contrôle des concentrations dont le règlement stipule à l'article 2 que la Commission tient compte dans son appréciation «des intérêts des consommateurs intermé-diaires et finals ainsi que de l'évolution du progrès technique et économique pour autant que celle-ci soit à l'avantage des consommateurs et ne constitue pas un obstacle à la concurrence ».

Certes, les effets de la politique de concurrence, dans la mesure où elle agit principalement sur les structures de l'économie, ne sont que rarement immédiats pour le citoyen de l'Union et les actions de la Commission en sa faveur sont pour lui plus ou moins lisibles. Toutefois, la politique de la Communauté européenne en matière de concurrence se singularise très souvent par des répercussions à bien des égards bénéfiques pour le citoyen européen.

1. Le citoyen consommateur

Le consommateur final demeure le bénéficiaire ultime du processus concurrentiel et l'action de la Commission pour maintenir un degré élevé de concurrence dans le marché commun le concerne directement. Au-delà de ses conséquences structurelles que le consommateur ne perçoit pas toujours, la politique de concurrence produit des effets d'ordre conjoncturel dont la lisibilité est sans doute plus grande. Ainsi, lorsqu'une pratique de prix concertée est condamnée, la restauration du jeu de la concurrence conduit nécessairement à une baisse de prix pour le consommateur, ce qui accroît son pouvoir d'achat. De même, lorsqu'une entreprise en position dominante est poursuivie pour entrave à l'accès au marché de concurrents potentiels, la levée des barrières à l'entrée se traduit pour le consommateur par une multi-plication de l'offre, une diversité nouvelle de produits et de services, ce qui améliore son niveau de vie. Enfin, dans le cadre du contrôle des concentrations, si la Commission interdit une opération qui conduit à créer ou à renforcer une position dominante dont le consommateur pâtirait, pour ce qui concerne le niveau des prix et l'étendue du choix, elle défend tout autant la structure du marché que le droit du citoyen européen à bénéficier des avantages d'un marché en situation de concurrence. C'est en quelque sorte sa part de l'allocation optimale des ressources qui est ici garantie.

À cet égard, les exemples abondent.

Le droit communautaire interdit aux producteurs de diviser le marché intérieur par des accords privés et de maintenir les différences de prix entre États membres en organisant une protection territoriale absolue et en empêchant le commerce parallèle. La Commission veille particulièrement à l'application de cette interdiction dans le secteur automobile où les écarts de prix entre les États membres restent importants. La Commission, à la suite de nombreuses plaintes de consommateurs allemands et autrichiens qui avaient eu de grandes difficultés à acheter des véhicules en Italie où les prix étaient particulièrement attractifs après la dévaluation de la lire, a mené une enquête auprès du groupe Volkswagen et de ses conces-sionnaires. Ses investigations ont permis à la Commission de conclure que le constructeur automobile allemand avait mis en oeuvre une stratégie d'entrave au commerce parallèle en interdisant à ses concessionnaires italiens de répondre aux commandes de clients non italiens. Cette pratique a été condamnée et la Commission a infligé une lourde amende à Volkswagen. Cette amende de l'ordre de 102 millions d'écus qui constitue à ce jour l'amende la plus forte que la Commission ait infligée à une entreprise, traduit bien la volonté de lutter contre le cloisonnement artificiel du marché intérieur et de permettre au consommateur de bénéficier de tous les avantages d'un grand marché ouvert et concurrentiel.

Au cours de l'année 1996, la Commission a interdit une fusion entre les deux plus grands groupes de distribution de détail, en Finlande. Une telle concentration risquait en effet de conduire à un gel

du jeu de la concurrence sur ce marché, dont le consommateur finlandais aurait eu nécessairement à pâtir, notamment quant aux prix des produits vendus au détail. Une décision d'interdiction de même type fut adoptée en 1997 dans le secteur de la distribution des jouets aux Pays Bas (Blokker/Toys'r us).

De même, récemment la Commission a interdit le projet de concentration entre Bertelsmann et Kirch en Allemagne afin d'éviter la création d'une position dominante sur le marché allemand de la télévision numérique et de garantir aux consommateurs une situation de concurrence qui leur permette de bénéficier de meilleurs services encore et des prix les plus bas. La Commission a également soumis l'approbation de la fusion entre Guinness et Grand Metropolitan (1997) dans le secteur des alcools à des conditions de cession de certaines marques commerciales, pour maintenir un état de concurrence suffisant en Grèce, en Espagne, en Belgique, au Luxembourg et en Irlande et éviter la création de positions dominantes sur ces marchés.

La Commission a également étendu l'application du droit de la concurrence à des secteurs qui touchent directement le citoyen dans sa vie quotidienne. Je pense ici au domaine sportif. Les compétitions sportives de haut niveau ont donné dans les dernières années naissance à de véritables marchés sur lesquels s'effectuent des transactions commerciales très importantes, qui touchent aussi bien les transferts de joueurs, les droits de retransmission audiovisuelle des rencontres sportives, le parrainage ou encore les ventes de billets. À la suite de l'arrêt Bosman, la Commission a décidé de renforcer l'application du droit de la concurrence dans ce secteur d'activité. Elle a adressé des observations à la FIFA sur le maintien de son système de transferts de joueurs pour les transferts de joueurs non couverts par l'arrêt Bosman. Il n'est pas exclu que la Commission adresse pour finir des griefs à la FIFA.

L'Union économique et monétaire dont les effets sur la concurrence seront sensibles pour l'ensemble des acteurs du marché intérieur et notamment les consommateurs est un sujet de préoccupation majeur de la Commission. La monnaie unique favorisera l'accroissement de la transparence tarifaire dans l'ensemble de l'Union européenne. Elle permettra la comparaison des prix pratiqués dans chacun des États membres, à l'aune d'une référence commune, l'euro. Cette transparence nouvelle facilitera et développera le commerce intra-communautaire, notam-ment le commerce parallèle entre les réseaux de distribution, puisque les acheteurs pourront, pour un même produit, exercer leur choix en fonction des différentiels de prix entre les producteurs européens, sans se préoccuper de l'impact sur le prix final, des fluctuations monétaires ou du coût des transactions. Cette mise en concurrence entraînera néces-sairement une convergence des prix vers le bas. Une telle intensification du jeu de la concurrence pourrait provoquer des réactions de défense de la part de certains opérateurs, qui pourraient être tentés de freiner ou d'enrayer ce processus plutôt que de fournir les efforts nécessaires pour s'adapter à la nouvelle donne. Il sera donc de la responsabilité de la Commission d'engager le fer contre ces opérateurs et les États membres qui les protègent, et d'être particulièrement sévère à leur encontre, dans la mesure où leurs comportements anticoncur-rentiels ou les aides dont ils bénéficient auront, dans un marché très intégré, un impact très fort en termes d'inefficacité économique, impact dont les citoyens auront à payer le prix soit en tant que consommateur, soit en tant que contribuable. C'est pourquoi, la politique de concurrence est un instrument indispensable pour assurer le succès de l'Union économique et monétaire et faire en sorte qu'elle représente un réel progrès pour le citoyen de l'Union.

2. Le citoyen usager

Les mesures en faveur de la libéralisation de certains secteurs comme le transport aérien ou les télécommunications se sont traduites pour l'usager par des réductions de prix significatives et une offre de services accrue. La baisse des tarifs aériens, ces dernières années, a été particulièrement spectaculaire. Elle a permis à un plus grand nombre de voyageurs d'utiliser l'avion, dont on peut dire qu'il est devenu un moyen de transport presque banal. Il est estimé qu'environ 90 à 95% des passagers voyagent désormais à des prix réduits. Sur de nombreuses destinations en Europe, des compagnies aériennes plus nombreuses ont été en mesure de proposer aux consommateurs un plus grand nombre de services tant pour ce qui concerne les horaires que les prestations offertes. Quant aux télécommunications, point n'est besoin d'insister sur la diminution des tarifs des communications téléphoniques ou la multiplication des offres de nouveaux produits et services de téléphonie que chacun peut constater tous les jours.

La Commission veille par ailleurs à ce que ce mouvement de libéralisation ne se fasse pas au détriment du service universel, qui

doit être assuré à l'ensemble des citoyens de l'Union. Sa communication sur les services d'intérêt général en Europe rappelle que les principes de concurrence dans le cadre du marché unique sont compatibles avec les objectifs de solidarité et d'égalité de traitement des usagers des services d'intérêt général. La recherche d'un équilibre évolutif entre concurrence et service d'intérêt général justifie pour la Commission, une approche prudente, progressive et équilibrée dans sa politique de mise en oeuvre de l'article 90 du traité qui prévoit que l'application des règles du traité, et notamment des règles de concurrence, doit rester compatible avec l'exercice des missions d'intérêt général. C'est ainsi par exemple que les premières directives en matière de télécommunications avaient reconnu, en 1990, la nécessité de maintenir la téléphonie vocale sous monopole afin de permettre une évolution graduelle vers un régime de pleine concurrence. De même, en matière de service postal, la Commission a reconnu dès 1989 que les droits exclusifs pour les services postaux de base étaient nécessaires pour empêcher l'écrémage des activités les plus rentables par les opérateurs privés et pour maintenir un service universel.

Enfin, sans se constituer en «régulateur» des secteurs libéralisés, la Commission s'attache à exercer un certain contrôle sur les pratiques des entreprises anciennement sous monopole afin de prévenir des abus de position dominante, notamment dans le secteur des télécommunications. Dans la mesure où les opérateurs nationaux de télécommu-nications disposent encore de positions dominantes sur leurs marchés domestiques, notam-ment en matière d'infrastruc-tures, il est particulièrement important, eu égard à la logique de la libéralisation, que ces opérateurs n'abusent pas de leur pouvoir de marché au détriment de leurs concurrents. C'est pourquoi, la Commission veille à ce que les concurrents des opérateurs nationaux puissent avoir accès aux infrastructures de ces derniers dans des conditions équitables et non discriminatoires, en particulier quant aux prix.

Ainsi, la Commission avait-elle engagé une procédure à l'encontre de *Deutsche Telekom AG (DT)*, l'opérateur allemand de télécommunications, à la suite d'une plainte déposée en 1996 contre les conditions d'accès des tiers aux infrastructures de DT. À la suite de la présentation par DT d'un projet de nouveau contrat d'accès au réseau pour les concurrents, la Commission a fait procéder à une étude de prix par un cabinet comptable international, d'où il est ressorti que DT n'était pas en mesure de démontrer que les prix pratiqués étaient axés sur les coûts et que le niveau de prix était supérieur de 100 % à celui atteint sur des marchés concurrentiels compa-rables. Bien que la Commission ne soit pas et ne souhaite pas être une autorité régulatrice en matière de prix, DT a été invité à adapter ses prix aux réalités économiques, de sorte que ses pratiques tarifaires ne puissent constituer un abus de position dominante. DT a finalement accepté de baisser ses tarifs d'accès au réseau, en particulier pour les fournisseurs de services aux entreprises, de 38 % pour l'accès au réseau local et de 78 % pour l'accès au réseau longue distance. La Commission a alors décidé de clore la procédure.

En outre, la Commission a engagé plusieurs procédures relatives aux prix payés par les opérateurs de télécommunication dominants pour les communications téléphoniques internationales. Une partie importante du prix payé pour ces appels téléphoniques interna-tionaux est constituée par les taxes de répartition, qui équivalent aux prix d'achemi-nement des communications entre des opérateurs situés dans des pays différents. Or, aujourd'hui, à la suite de l'évolution technologique et des réductions de coût qu'elle a entraînées, on estime que ces prix ne reflètent plus le coût réel des appels. Les services de la Commission examineront donc de très près les accords actuels en matière de taxes de répartition, afin de progresser dans la voie de la réalisation de l'objectif d'une orientation des prix en fonction des coûts. Des demandes d'information ont été adressées à tous les grands opérateurs de télécommunication de l'Union européenne, afin d'évaluer les aspects des accords en matière de taxes de répartition liés à la concurrence.

À présent, la Commission s'attache à développer une politique de libéralisation dans les secteurs de l'énergie, gaz et électricité. La Commission est en effet convaincue que l'absence d'un marché intérieur libéralisé de l'énergie constitue un sérieux désavantage concurrentiel pour les utilisateurs et notamment les entreprises européennes par rapport à leurs principaux partenaires commerciaux qui bénéficient, eux, de coûts généralement plus bas. A la fin de l'année dernière, le Conseil a adopté la directive proposée par la Commission concernant des règles communes pour le marché intérieur de l'électricité, qui entraînera une ouverture de plus de 50 % du marché en moyenne, dès l'entrée en vigueur de la directive en 1999. Les

idées centrales sont celles de la libéralisation de la production et de l'accès de tiers au marché, qui permettront à certains acheteurs d'électricité de faire jouer la concurrence par les prix entre les producteurs. Du point de vue opérationnel, la directive propose l'alternative suivante: soit l'accès direct des tiers aux infrastructures, soit l'accès au marché par l'intermédiaire du détenteur du réseau, qui deviendrait acheteur et revendeur unique d'électricité. La Commission a également formulé des propositions de règles communes pour le marché intérieur du gaz naturel. Le Conseil "Énergie" de décembre est parvenu à un accord politique sur la proposition de la Commission. De cette libéralisation, le citoyen de l'Union peut attendre une diminution des tarifs et une amélioration des prestations offertes, sans pour autant que soit remis en cause le principe du service universel.

3. Le citoyen acteur politique

Le citoyen en tant qu'acteur politique est sans doute préoccupé par certains effets de la politique de concurrence dans plusieurs domaines sur l'emploi ou sur l'aménagement du territoire par exemple. L'action de la Commission n'est alors pas toujours bien comprise.

L'intensification de la concurrence se traduit par des restructurations et par l'éviction des acteurs du marché les moins dynamiques, ce qui inévitablement implique, de façon conjoncturelle, la fermeture d'unités de production et donc des effets négatifs sur l'emploi. Dans de telles circonstances, il est difficile d'expliquer aux citoyens et notamment à ceux qui perdent leur emploi, que l'action en faveur de la compétitivité n'est pas, partiellement au moins et à court terme sans doute, destructrice d'emplois. Cependant, la politique de concurrence au-delà des apparences contribue à promouvoir une politique de l'emploi en Europe, ce que le Sommet de Luxembourg a clairement affirmer en assignant aux services de concurrence une tâche spécifique.

Par son action sur la structure des marchés, la politique de concurrence exerce une influence directe sur la compétitivité de l'économie européenne et sur son niveau de croissance, et, en conséquence, participe à l'orientation du cadre macro-économique de l'Union vers l'emploi. Les efforts déployés par la Commission au travers de sa politique de concurrence pour décloisonner les marchés au sein de l'Union, apporte un soutien majeur à l'achèvement du marché intérieur, gage d'intensification des échanges et de croissance. La politique de libéralisation des services publics dans le domaine de l'énergie, des transports ou des télécommunications, que la Commission mène avec mesure dans le respect des missions d'intérêt économique général, conduit elle aussi au soutien d'une politique en faveur de l'emploi. Enfin, le contrôle des aides d'État, comme le souligne le paragraphe 27 des "lignes directrices", permet de s'assurer que de telles aides contribuent à créer des entreprises et donc des emplois durables, tout en garantissant une concurrence loyale. La politique de concurrence apparaît bel et bien comme l'une des politiques clés pour gagner la bataille de l'emploi en Europe.

En ce qui concerne les aides d'état, la politique de concurrence n'est pas toujours comprise du citoyen car il a du mal à saisir les objections de la Commission à certains plans de recapitalisation d'entreprises publiques. Si la Commission peut émettre une appréciation positive quant aux aides qui permettent la rationalisation de la production et la restructuration d'une entreprise en vue de développer sa compétitivité, elle porte en revanche un regard critique vis-à-vis des aides qui se limitent à soutenir une activité sans apporter de garantie quant à sa viabilité future. En effet, de telles aides sont considérées comme contre productives parce qu'elles ne font que retarder des restructurations inévitables, discriminent les entreprises efficientes, voire risquent de les évincer du marché, par le biais de prix subventionnés ou d'autres pratiques d'effet équivalent. En d'autres termes, ces aides perturbent le jeu de la concurrence et déforment la structure des marchés. Elles ont souvent pour effet de déplacer les problèmes d'une entreprise ou d'une région vers d'autres entreprises concurrentes ou d'autres régions de l'Union. La Commission y est particulièrement attentive; le nombre plus élevé de décisions finales négatives ordonnant le remboursement d'aides illégalement versées et incompatibles avec les règles communautaires témoignent de notre détermination. Le citoyen de l'Union doit donc être conscient que les objections de la Commission ne visent en fait que les aides publiques qui, bien qu'elles peuvent à court terme sauver des emplois ou une activité économique, ne sont en définitive que cautères sur jambes de bois et que les fonds publics doivent être mieux orientés vers des actions de restructuration qui assainissent des secteurs ou des régions afin de maintenir ou créer des emplois stables et durables.

Conclusion

Les effets de la politique de concurrence sur la vie quotidienne des citoyens de l'Union sont donc divers et nombreux. Ces effets sont largement positifs, même si parfois certains d'entre eux peuvent paraître de prime abord sujets à controverse. Lorsque d'aventure cela est le cas, il appartient à la Commission de mieux expliquer sa politique et de la situer dans les perspectives de nature sociale qui lui sont fixées par le traité. Comme le dit le Président Santer, l'Union européenne ne saurait être qu'un seul projet économique. Elle se doit d'être aussi la Cité des 370 millions d'Européens, à laquelle la politique de concurrence se doit d'apporter sa contribution active.

COMMUNICATION OF THE COMMISSION ON THE APPLICATION OF THE EC COMPETITION RULES TO VERTICAL RESTRAINTS - FOLLOW UP TO THE GREEN PAPER ON VERTICAL RESTRAINTS

Lucas PEEPERKORN and Donncadh WOODS, IV-A-1

On the 30th of September last the European Commission adopted a Communication on the application of the EC competition rules to vertical restraints[1]. This document is the follow-up document to the Green Paper on vertical restraints in EU competition policy[2] adopted by the Commission in January 1997.

The purpose of the current Communication is to set out the framework of a new policy. The basic idea is to introduce a very wide Block Exemption regulation that will exempt from the application of Article 85 of the EC Treaty all vertical restraints concerning intermediate and final goods and services except for a limited number of hardcore restraints. The principle objective of a wide block exemption regulation is to grant companies who lack market power a safe harbour within which it is no longer necessary for them to assess the validity of their agreements under the EU competition rules. In order to preserve competition and to limit the extent of this exemption to companies which do not have significant market power, the exemption regulation will establish market share thresholds, beyond which companies cannot avail themselves of the safe harbour.

For companies with market shares above the thresholds of the block exemption it must be stressed that there would be no presumption of illegality. The market share threshold would only serve to distinguish those agreements which are presumed to be legal from those that may require individual examination. To assist companies in carrying out such an examination the Commission intends to issue a set of guidelines.

The choice has been made to propose one wide block exemption regulation instead of different regulations for specific forms of vertical restraints or sectors. It thus treats different forms of vertical restraints having similar effects in a similar way; preventing unjustified differentiation between forms or sectors. In this way it is avoided, to the greatest extent possible, to have a policy bias in the choice companies make concerning their formats of distribution. The company's choice should be based on commercial merit and not, as under the current system, on the clauses present in distribution contracts.

In order to implement the new policy, the Commission will have to obtain new legislative powers from the Council of Ministers. Thereafter, the Commission will adopt the new exemption regulation on vertical restraints which will be complemented by the guidelines. Before adopting the regulation and guidelines all interested third parties will be consulted. The new competition rules for the distribution sector should be in place for the year 2000.

The Communication is available on the Internet at the following address:
http://europa.eu.int/comm/dg04/index_en.htm

1 (COM(98) 544 final)

2 (COM(96) 721 final

OPINION 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 1984 IBM Undertaking

Commission's monitoring and practical effects

Fin LOMHOLT, Head fo Unit IV-C-3

1. Introduction

On 1 August 1984, IBM made an undertaking (U/T) to the Commission concerning IBM's future behaviour in the matter of mainframe interface disclosure and memory bundling. In response to the U/T, and on the same date, Mr. Frans Andriessen, Member of the Commission with responsibility for competition policy at that time, sent a letter to Mr. Nicholas deB. Katzenbach, then Senior Vice-President and General Counsel of IBM, informing him that following the U/T the Commission had decided to suspend its proceeding against IBM.

Following a short description of the facts leading to the U/T (section 2), a summary of its main content (section 3) and a description of the 1988 review and 1994 notice (section 4) this article sets out the way in which DG IV monitored the operation of the U/T until its termination in 1995 (section 5). Then follow some indications of the practical effects which the U/T would appear to have had in the marketplace (section 6); and finally a summary of the article is set out (section 7).

2. The events leading up to the U/T

The case was opened at the end of 1980 after investigations into IBM's behaviour in the then common market. During the investigations a number of competitors made complaints to the Commission.

In a formal statement of objections addressed to IBM in December 1980, the Commission alleged that IBM held a dominant position in the Member States at that time for the supply of the key products for its most powerful range of computers, the IBM System/370, and that IBM had abused that position contrary to Article 86 of the EEC Treaty in four ways:

- by failing to supply other manufacturers in sufficient time with the technical information needed to permit competitive products to be used with System/370 ("interface information");
- by not offering System/370 central processing units ("CPUs") without a capacity of main memory included in the price ("memory bundling")
- by not offering System/370 CPUs without the basic software included in the price ("software bundling"), and
- by discriminating between users of IBM software in refusing to supply certain software installation services ("Installation Productivity Options" = IPOs) to users of non-IBM CPUs.

IBM immediately challenged the validity of the Commission's action before the European Court of Justice. IBM's applications were subsequently dismissed.

In its written reply to the Commission's statement of objections, IBM denied both that it had a dominant position and that it had committed any of the alleged abuses. IBM had, however, previously informed the Commission that it had taken steps to make IPOs available to all users of its software and in its written reply stated that it was in the course of unbundling all software.

Following a hearing which took place in February 1982, the Commission sent IBM a statement of the remedies proposed in the event of a decision limited to the issues of memory bundling and interface disclosure. IBM then suggested that discussions should take place with Commission officials with a view to resolving the remaining concerns in the case. Informal discussions started in April 1983 in parallel with the formal proceedings. These proceedings led to a second hearing in June 1983 and the preparation of a preliminary draft decision which was submitted to the Advisory Committee of national experts in June 1984.

During the course of the discussions between IBM and the Commission IBM had made a number of proposals which had been rejected as insufficient. As a result the Commission adopted a decision stating that a formal decision finding that IBM had violated Art. 86 would be adopted after the summer holidays if a satisfactory undertaking had not been received by the end of July 1984.

Following a period of protracted negotiations, a final solution acceptable to the Commission in form of the U/T was reached.

3. Summary of some main terms of the U/T and of Mr. Andriessen's letter

Under the terms of the U/T IBM undertook in respect of all interfaces

between or to System/370 hardware products and in respect of all interfaces between System/370 CPUs (central processing units) and System/370 software products to supply interface information within 120 days of announcement of any such product in the EEC (now EU) or at the date of general availability of the product, whichever was the earlier.

As to all interfaces between or to System/370 software products IBM undertook to supply interface information as soon after announcement as such interfaces had become reasonably stable, and no later than the date of general availability.

Entitled to request interface information under the U/T was any company which could provide satisfactory evidence that it was doing business in the EEC and was developing and manufacturing products of a relevant type for which it was asking interface information. Thus, also e.g. US or Japanese controlled companies satisfying these requirements were entitled to receive interface information under the terms of the U/T .

IBM reserved the right to make a reasonable and non-discriminatory charge to cover the cost of reproduction and dissemination of interface information supplied pursuant to the U/T, as well as the right to charge a reasonable and non-discriminatory royalty for the supply of proprietary information protected by any right enforceable at law.

In respect of the main memory issue, IBM undertook to offer its System/370 CPUs in the EEC either without main memory or with only such capacity as was then strictly required for testing.

As to the duration of the U/T it was stated that it would remain in force until one year after IBM had given notice to the Commission of its intent no longer to comply therewith or any part thereof or until the Commission had taken a Decision against IBM with respect to the subject matter of the U/T. In this respect it was further indicated that such notice would not be given by IBM before 1 January 1989, meaning that in the absence of any formal Commission Decision of the kind referred to the U/T would be in force at least until the end of 1989.

The commitments made by IBM were undertaken "in good faith". As the terms of the U/T were not enforceable the insertion of these words was felt by the Commission to be important because of the implied moral commitment and of the damaging impact any violation of the U/T most likely would have had on IBM's success in presenting itself as being a decent, trustworthy and well run company.

In his letter to Mr. Katzenbach Mr. Andriessen indicated that the Commission would not seek to reactivate the suspended proceeding so long as IBM's implementation succeeded in giving substantial satisfaction. In this respect he emphasized that the effect and implementation of the U/T would be kept under constant review and that the spirit of the U/T should prevail over the letter of particular examples or particular phrasing. At the request of IBM he also confirmed that if the Commission should reactivate the suspended proceeding it would rely exclusively on Article 85 and 86 of the Treaty, and not upon the U/T, in this or any other proceeding.

4. The 1988 review and 1994 notice of termination

As IBM's one year notice of termination of the U/T in principle could be received by the Commission any date after 1 January 1989, and since the facts on which the Statement of Objections were based in respect of IBM's alleged dominance related to IBM's position on the relevant markets before December 1980, DG IV started in the summer of 1988 to prepare an inquiry into the relevant economic sectors, cf. Article 12 of Regulation No 17, in order to be prepared in case IBM were to serve such notice of termination. However, before the relevant requests for information had been sent out discussions were opened between IBM and DG IV as to the Commission's concerns in this respect. The discussions eventually resulted in IBM and the Commission issuing a joint press release in December 1988, stating, inter alia:

"*The Undertaking has come to serve as an effective vehicule for resolving - under the aegis of the Commission - certain interface questions between IBM and competitors*[3]*. After reviewing that experience and current circumstances the Commission and IBM have agreed that neither foresees any change in circumstances that would cause IBM to avail of its right to give notice. However, should such circumstances arise, IBM has agreed to review the matter with the Commission prior to giving any notice.*"

3 No application for a CPU with only the main memory capacity provided for in the U/T had been received by then - and none, in fact, was ever received by IBM.

In the Commission's opinion the U/T had thus been amended in the sense that IBM could no longer just give a notice of termination but would have to refer to a change in circumstances and to have reviewed these with the Commission before giving any notice.

When IBM eventually gave notice of termination of the U/T on 6 July 1994, IBM argued that there had been dramatic changes in the information technology marketplace since 1984 and that these changes had continued at an accelerating pace since 1988.

At the time of the notice the U/T had been in force for almost ten years and so the Commission neither then nor a year later when the U/T actually came to an end took a position on IBM's arguments, but merely made it clear that it would continue to monitor the marketplace and that it would intervene if the conditions of Article 86 appeared to be satisfied. No complaint was ever received by the Commission as a result of IBM's termination of the U/T.

5. How implementation of the U/T was monitored and ensured

Under the terms of the U/T IBM undertook to supply such information as the Commission might from time to time request in order to determine the extent to which the U/T had been implemented. This clause was included in the U/T because such information could not be requested under the terms of Regulation No 17/62.

Moreover, in his letter to Mr. Katzenbach Mr. Andriessen had informed him that he had instructed DG IV to call a meeting annually to take stock of the implementation of the U/T and its effects.

In preparation for these meetings IBM submitted an annual report to the Commission at the end of June or in July describing in detail IBM's response to each question or request received under the terms of the U/T since the last report. These reports were then discussed in the annual meetings between representatives of DG IV and the representatives of IBM who had been put in charge of ensuring IBM's compliance with the terms of the U/T. The annual reports submitted by IBM made it clear that the U/T requests received by IBM varied in content and complexity from easily answered questions to complex inquiries on products requiring extensive investigation and interaction with competitors.

DG IV, for its part, established or maintained a wide range of contacts with the computer industry and with other interested parties. The aim of these contacts was to keep itself fully informed of the way in which the U/T was being implemented and of developments in the industry concerned.

During the duration of the U/T a number of questions as to the interpretation and IBM's implementation of the U/T were raised with DG IV. Such questions resulted either in DG IV taking up directly the issues in question with IBM or in the parties discussing the issues between themselves under the aegis of the Commission with a view to finding a satisfactory resolution. In this connection it is of interest to note that when DG IV suspected that difficulties in finding a satisfactory solution to problems raised by one company requesting interface information under the U/T might have been due to the heavy involvement of legal representatives of the parties, the latter accepted DG IV's suggestion that a meeting take place between only technical staff of IBM and the company in question. As the meeting was found by the parties to be successful they decided to have such meetings on a regular basis from then on.

Although some issues raised with the Commission took time to resolve, and the issue raised towards the end of the U/T's life of how to decide what could be considered a reasonable and non-discriminatory royalty had not yet been resolved when the U/T was terminated, the Commission was able to state in its annual Reports on Competition Policy that it was in general satisfied with the functioning of the U/T.

6. Effects of the U/T

In the view of this author the main effect of the U/T was that as from 1 August 1984 it enabled competitors of IBM who were entitled to receive interface information under the U/T credibly to assure their clients that, due to IBM's obligations, their relevant products would continue to be System/370-compatible for at least about five and a half years. As a result of the U/T the fear, uncertainty and doubt which in that respect had hampered their sales efforts and thus their competitiveness in the marketplace before the Commission's acceptance of the U/T had thus been dispelled for the period up to 31 December 1989.

It is of course true that a formal Commission decision obliging IBM to disclose interface information would not have been limited in time; and it is also likely that such a decision would have compelled IBM to disclose such information at an earlier moment than required by

the U/T. Although formally the U/T merely expressed some obligations which IBM had undertaken unilaterally, in fact the U/T represented a settlement between IBM and the Commission. However, it also seems highly likely that IBM would have appealed a formal Commission decision and that the Court of Justice would have suspended its implementation, cf. Article 185, considering that such a decision would have obliged IBM to disclose valuable information which otherwise would only have been made available at IBM's discretion. By accepting the U/T the Commission, therefore, ensured that even if the Court eventually were to rule in favour of the Commission the interface information necessary to compete with IBM would be available at a substantially earlier time than if a formal decision had been adopted.

The Commission's wish to eliminate the effects of the fear factor was also a central issue during the negotiations between IBM and the Commission in 1988. In fact, if the Commission had accepted an IBM proposal merely to continue its application of the U/T without any commitment as to when a notice could be served, the users and IBM's competitors would again have fallen under the influence of that factor. The acceptance of such a proposal would, of course, also have enabled IBM to time the required notice so as to avoid disclosing interface information in respect of major new products. In addition, the situation resulting from such an acceptance would not have given the Commission much time to prepare itself for the day when the U/T would no longer be in force, as it would have enabled IBM to serve a notice of termination at any moment. The joint 1988 press release was therefore acceptable to the Commission in that it asssured users that their non-IBM suppliers would be able to remain System/370-compatible into the foreseeable future, and in that monitoring of the marketplace would assure the Commission that receipt of a notice would not take it by surprise.

Although the time limits set out in the U/T for IBM to disclose the interface information necessary for its competitors to remain System/370-compatible were longer than wanted from the outset by at least some of those competitors, and although some of the terms of the U/T were influenced by the conditions and constraints in terms of time under which the stipulations of the U/T had been negotiated, DG IV's contacts with the computer industry rapidly made it clear that the U/T was considered to be of fundamental importance to companies needing to be able to offer System/370-compatible products. A clear indication of this may be seen in the last annual report on its implementation of the U/T which IBM supplied to the Commission.

According to that report, by July 1995 IBM had received a total of 262 requests from 24 competitors and containing 2001 individual questions since the U/T had come into force on 1 August 1984. Of those requests 50 had been received during the eleventh year of IBM's implementation of the U/T; and these 50 requests had contained a total number of 436 individual questions.

The U/T had thus been of importance to the industry until its very end. Whether the reason that the Commission has not until now (May 1998) received any complaint as to IBM's conduct in respect of matters covered by the U/T is due to an assessment of IBM's position on any relevant market by companies possibly contemplating lodging a complaint or is due to the timing and quality of the interface information which competitors of IBM may now receive from IBM, this author does not know.

The question may of course be asked whether IBM's obligations to supply interface information under the U/T did not have a negative effect on IBM's interests in developing new products. If that were so, any assessment of the positive effects which would seem to have resulted from the U/T might need to be balanced against the U/T's impact on technological progress.

However, the U/T did not oblige IBM to disclose product design information. This was acceptable to the Commission which throughout the formal proceedings had argued that interface specifications do not reveal the design of the products concerned. As the U/T did not oblige IBM to disclose product design information it would not seem to have removed IBM's incentives to improve its products and to offer the best ones available in the marketplace because if IBM succeeded in doing that customers would address themselves to IBM. The U/T therefore not only stimulated competition in that it removed a major obstacle for IBM's competitors to offer innovative System/370 products at an earlier moment in time than they could have done in the absence of the U/T, if at all, but also because of this reinforced competition it put pressure on IBM to innovate and improve upon its own products.

Some confirmation that IBM did not feel its research and development

efforts negatively affected by its obligations to supply interface information of the kind and in the manner set out in the U/T may be seen in the fact that as far as the author of this article is aware, at no time since the Commission's acceptance of the U/T did IBM claim that its interests in developing new products were negatively affected by the obligations undertaken by IBM in the U/T and in the fact that IBM did not terminate the U/T when it could have done so in 1988 but, on the contrary, only served its notice in July 1994.

7. Summary

This article does not discuss the advantages and disadvantages involved in the Commission accepting an undertaking, nor does it discuss the circumstances under which the Commission most likely would be prepared to accept an undertaking. The article merely argues that in the particular circumstances of the case in question the Commission's acceptance of the proposed undertaking was in the interest of competition in the marketplace concerned. The article also contains a summary of the way in which the Commission monitored the implementation and effects of the undertaking and it concludes that the undertaking in question would appear to have had only pro-competitive effects.

Positive Comity in EU/US Cooperation in Competition Matters

Georgios KIRIAZIS, IV-A-3

Introduction: the notion of "comity"

Comity is a general principle in international antitrust aiming at balancing the exercise of extraterritorial jurisdiction with a readiness on behalf of the country enforcing its competition laws to take into account the important interests of another country. More than an "aspiration" or "a matter of grace"[4], comity is a rule increasingly applied to bila-teral competition relations.

Comity should not be confused with the provision of investigatory assistance or the conduct of enforcement proceedings on behalf of a partner. These are instruments one encounters in "mutual legal assistance treaties".

1. Criteria for the assessment of comity considerations

The fact that another jurisdiction abroad may have certain interests at stake too when one's anti-trust law is applied extraterritorially, was acknowledged by the US Court of Appeals for the 9 Circuit in the *Timberlane Lumber*[5] case. Using the concept of the "comity of nations" as the reason for its approach, the court weighted up the connecting threads between the facts of the case and the various third countries involved, on one hand, and the interests of those countries in the enforcement of their own laws in the case at hand on the other. According to the US court this balancing act should be carried out on the basis of certain criteria like the degree of conflict with foreign law and policy, the nationality of the parties involved, the locations or principal places of business of these parties, the extent to which enforcement by either state could be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there was explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the US as compared with conduct abroad. This list of criteria was subsequently enlarged in *Mannington Mills*[6] but this approach never made it to the mainstream in the US[7].

4 U.S. v. Nippon Paper Industries Co., Ltd. (NPI), (1st Cir. 1997), 72 Antitrust & Trade Reg. Rep. (BNA) 283 (Mar. 20, 1997).

5 *Timberlane Lumber v. Bank of America* [9 Cir. 1976], introducing the so-called "balancing approach".

6 *Mannington Mills v. Congoleum* [3 Cir. 1979].

7 See *Laker Airways v. Sabena* [D.C. Cir 1984], and more recently *Hartford Fire Insurance v.*

However, the US Antitrust Enforcement Guidelines for International Operations of 1995 state that "in enforcing the antitrust laws, the Agencies [the US Department of Justice - DoJ - and the US Federal Trade Commission - FTC] consider international comity. Comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation[8]'. Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected".

The list of criteria laid down for comity analysis in the US Guidelines of 1995 is similar to the one in *Timberlane Lumber.* The list is longer than the list contained in the previous version of the US Guidelines by the following two criteria: "... the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and ... the effectiveness of foreign enforcement as compared to U.S. enforcement action.". According to the US Guidelines, these "factors are derived from considerations in the U.S.-EC Antitrust Cooperation Agreement".[9]

2. Traditional comity versus Positive comity

2.1. Traditional or negative comity

At a first level, "traditional" or "negative" comity is about avoiding conflicts over enforcement activities. Such conflicts can arise when decisions taken during or following parallel investigations of the same conduct or transaction by two or more antitrust enforcement agencies in different countries are incompatible with one another and harmful to important interests of one or the other country.

Conflict avoidance or damage limitation is achieved by i) closely cooperating with a partner and clearly stating ones important interests in various stages of proceedings and ii) adapting ones position in order to take such interests seriously into account.

2.2. Active or positive comity

"Active" or "positive" comity[10] goes further: it provides that a competition authority initiates an investigation to respond to a request by another authority. The idea of a division of labor resulting in a more efficient application of enforcement resources is inherent in positive comity. Thus, in most situations one side (the "requesting" side) is expected to recognize that the other (the "requested" side) is in a better position to handle a particular case, and step back ("suspend or defer its own investigation") while the latter is dealing with the request.

Positive comity is also the product of increased awareness that in certain circumstances (conduct originating abroad and mainly aimed at consumers abroad, difficulty to gain access to relevant persons or information, limited impact on own territory, etc.) extraterritorial application of antitrust rules has its practical limitations and that a cooperative approach may be more successful.

3. Comity in the EC/US Competition Cooperation Agreements

The positive comity mechanism was introduced into EC/US competition relations by Article V of the 1991 EC/US Agreement[11]. An identical provision figures in the 1995 Canada/US Competition Cooperation Agreement.

The 1998 EU/US Positive Comity Agreement[12], signed in Washington on June 4, 1998, spells out more clearly the circumstances in which a request for positive comity will normally be made and the manner in which such requests should be treated.

California [1993], *US v. Pilkington PLC* [D. Ariz. 1994], *US v. Nippon Paper Inds* [1 Cir. 1997].

8 *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

9 Agreement between the Government of the United States of America and the European Communities regarding the application of their competition laws (OJ L 95, 27.4.95, pp. pp.45 - 50 as corrected by OJ L 131\38 of 15.6.95).

10 An overview of available information and literature on positive comity is given in "The nature, history and potential benefits of positive comity", OECD, DAFFE/CLP/WP3(98)3 of 19.05.98.

11 OJ L 131\38 of 15.6.95.

12 Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws, OJ L 173 of 18.06.1998.

According to article I, the "Agreement applies where a Party satisfies the other that there is reason to believe that the following circumstances are present: (a) anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other party; and (b) the activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring". It is clear that while some important (e.g. trade or investment related) interest is necessary in order to put forward a request, violation of the competition rules of the requesting party is not a requirement.

4. The new "presumption" of deferral or suspension of enforcement activities

An important aspect of the 1998 Agreement is the presumption in article IV that in certain circumstances a Party will normally defer or suspend its own enforcement activities. This is particularly the case where anticompetitive behavior does not affect consumers in the territory of the Requesting Party or, even if it incidentally affects them, the behavior is nonetheless occurring principally in and directed principally towards the other Party's territory.

For the presumption of deferral or suspension to operate, certain additional requirements must be satisfied. In particular, the Requested Party must be willing to act in order to remedy the problem, devote adequate resources, keep the Requesting Party informed of all procedural developments, promptly notify of any change, comply with any reasonable request by the other Party and take the latter's point of view into consideration before closing its investigation.

5. Caveats and safeguards

Despite the fact that the Requested Party must accept certain conditions before the other Party agrees to suspend or defer its investigation, there is no obligation for the Parties to act upon a positive comity request, if doing so is contrary to their interests. On the other hand nothing in the Agreement precludes the Party that suspended or deferred its investigation from later reinstituting or initiating enforcement activities.

Further, the 1998 Agreement recognizes that in certain cases in may be appropriate to pursue separate enforcement activities where the anticompetitive conduct affects both territories and justifies the imposition of penalties within both jurisdictions.

In contrast to the 1991 Agreement mergers are in principle not within the scope of the proposed Agreement due to EC and US merger legislation, which would not allow a deferral or suspension of action as envisaged by the Agreement. However, it must be noted that traditional comity and even some elements of positive comity under the 1991 Agreement are in certain circumstances applied in merger cases. For instance, recently the assistance of the US-DoJ has been requested in the enforcement of remedies in the US following a conditional approval here of the Dresser/Haliburton merger[13].

[13] See the press release in this case, IP/98/643 of 08/07/1998.

6. Experience with comity so far

Practical experience with comity instruments (either traditional or positive) is limited. A formal request was made by the US in 1996 when the US-DoJ asked the Commission to investigate specific allegations that a computerized reservation system (CRS) set up by Lufthansa, Air France and Iberia was operated in an anticompetitive manner to prevent US-based CRS's from competing in European markets. The European Commission is currently investigating the case in close cooperation with the DoJ[14].

Further, the investigation in 1996 into the practices of AC Nielsen Company, a provider of retail tracking services, provided also a clear example of successful cooperation. Both the Commission and the DoJ received a complaint from IRI that Nielsen was abusing its dominant position in Europe and thus prevented IRI from establishing a competitive presence there. As the complaint was primarily aimed at contractual practices implemented in Europe and had greatest impact within Europe, the DoJ let the Commission take the lead once it was confident that it had a firm intention to act. The Commission conducted negotiations with Nielsen to arrive at an acceptable solution ensuring that competition was not distorted. At every stage during the negotiations the DoJ was informed of progress and given an opportunity to comment on the undertakings it was proposed to

[14] Alexander Schaub, "Interna-tional cooperation in antitrust matters: making the point in the wake of the Boeing/MDD matter", EC Competition Policy Newsletter, February 1998; see also the US DoJ Press Release dated December 3, 1996.

seek from Nielsen. Once the Commission had secured the necessary undertakings from Nielsen, the DoJ was able to conclude that the practices it has been investigating would not continue and thus it closed its investigation[15].

Conclusion

Despite a number of limitations (ban on sharing confidential information, voluntary nature, limited coverage of mergers) and the need to develop more experience in their application in practice, as an alternative to the extraterritorial application of domestic competition rules traditional and positive comity mechanisms constitute undoubtedly important coope-ration instruments in the area of international antitrust.

15 2nd Commission Report on the application of the 1991 Agreement, COM (97)346 final, 4.7.97.

Organisations internationales

Pierre ARHEL, DG IV-A-3

Différend entre Kodak et Fuji ; décision du panel GATT

Le 13 juin 1996, les USA ont demandé à l'OMC la mise en oeuvre de consultations concernant l'accès au marché japonais du film et du papier photographique.

La procédure est fondée sur trois textes : les accords GATT (accord général sur les tarifs douaniers et le commerce) et GATS (accord général sur le commerce de services) ainsi que la décision de 1960 du GATT sur les pratiques restrictives de concurrence.

L'Union Européenne a demandé à être associée aux consultations concernant les pratiques restrictives de concurrence. Elle a en effet un double intérêt à intervenir dans la procédure :

- intérêt économique : présence d'une importante entreprise européenne sur le marché japonais
- intérêt politique : l'affaire étant un bon exemple d'articulation entre les pratiques anticoncurrentielles et les entraves au commerce, la Commission avait estimé qu'elle pourrait enrichir le débat à Genève, initié par l'Union Européenne, sur la mise en place d'un cadre international de règles de concurrence.

La décision du panel de l'OMC, adoptée définitivement par l'Organe de règlement des différends le 22 avril 1998, s'inscrit dans le cadre de la procédure fondée sur l'accord GATT. Pour l'essentiel, les USA soutenaient que les mesures adoptées par les autorités japonaises en matière de distribution, d'urbanisme commercial et de vente promotionnelles annulaient ou affectaient les concessions tarifaires négociées dans les années 1960 sur le film et le papier photographique en faussant le jeu normal de la concurrence sur le marché japonais (art. XXIII:1(b). Ils estimaient également que ces mesures enfreignaient l'article III:4.

Notons d'abord que les USA ont été déboutés de leur demande parce qu'ils n'ont pas établi la matérialité des faits invoqués :

- concernant les mesures relatives à la distribution :

Comme nous l'avons constaté plus haut, les Etats-Unis n'ont pas pu démontrer que les diverses "mesures" qu'ils citent ont bouleversé les rapports de concurrence entre les pellicules et papiers d'origine nationale et originaires des Etats-Unis au Japon, principalement parce que la distribution d'une seule marque paraît avoir été opérée avant ces "mesures" et indépendamment d'elles, mais aussi parce que les Etats-Unis n'ont pas démontré que lesdites "mesures" visaient à encourager l'intégration verticale ou la distribution d'une seule marque. S'agissant du problème de chronologie, les Etats-Unis n'ont pas présenté d'éléments de preuve ou arguments convaincants montrant que les "mesures" citées ont bien eu pour effet de renforcer la distribution

d'une seule marque. De même, les Etats-Unis n'ont pas expliqué pourquoi la structure du secteur japonais des pellicules, caractérisée par l'intégration verticale et la distribution d'une seule marque - une situation qui, d'après ce que l'on sait, est similaire à celle qui existe ailleurs dans le monde (y compris aux Etats-Unis) - se serait effondrée si le gouvernement n'avait pas continué d'intervenir.

- concernant la réglementation relative aux grandes surfaces : *"nous sommes saisis de mesures réglementant les grandes surfaces qui sont manifestement neutres du point de vue des produits et de l'origine des produits."*
- concernant les ventes promotionnelles : *"Les éléments de preuve confirment aussi que ni les circularies de la JFTC ni le Code de concurrence loyale ne limitent d'une manière significative la publicité ou la concurrence par les prix."*

Il convient cependant de noter qu'au cours de la procédure, le Gouvernement japonais a soutenu qu'il suivait une politique visant à garantir un accès non-discriminatoire au système de distribution japonais et à améliorer, notamment, l'accès au marché du film et du papier photographique. Les USA, ainsi que d'autres membres de l'OMC, et notamment la Commission CE, ont pris acte de ces déclarations et annoncé qu'ils entendaient vérifier la mise en oeuvre de cette politique (com. presse Com. CE IP/98/122, 6 févr. 1998).

La décision du panel s'avère également riche d'enseignements sur les liens entre les échanges et la politique de la concurrence : au-delà du rejet de la plainte, on retiendra que le panel estime que les USA n'ont pu établir que le gouvernement Japonais est à l'origine de pratiques anticoncurrentielles. Il observe notamment que ce sont plus les pressions exercées par Zenren, association de distributeurs, sur les distributeurs de produits Kodak, que les mesures gouvernementales qui expliquent que Kodak ait dû réduire la portée de ses actions promotionnelles. Or cette pratique anticoncurrentielle ne relève pas de la compétence du panel.

La décision laisse ainsi entrevoir l'utilité de compléter les règles de l'OMC par un cadre international de règles de concurrence : on sait que les pratiques anticoncurrentielles peuvent avoir un impact sur l'accès au marché, mais les règles actuelles de l'OMC ne permettent pas de les apprécier de façon satisfaisante. Certes l'expérience montre que des mesures gouvernementales peuvent tolérer, encourager, voire imposer des pratiques anticoncurrentielles. Cependant un cadre des règles internationales de concurrence limité à de telles mesures serait trop étroit.

D'où l'intérêt du débat qui se déroule actuellement, à l'initiative de la Commission, dans le cadre du groupe de travail de l'OMC sur les rapports entre les échanges et la politique de la concurrence.

Commerce et concurrence

Le groupe de travail chargé, par la Conférence de Singapour de décembre 1996, d'étudier les liens entre les échanges et la politique de la concurrence, s'est réuni trois fois en 1997 et devrait se réunir à nouveau quatre fois en 1998, avant de rendre son rapport.

La Communauté Européenne et ses Etats membres ont à ce jour produit 7 contributions qui sont disponibles sur le serveur de l'OMC à http://www.wto.org/wto/ddf/fp/public.html :

- Proposition de la Commission pour le groupe de travail : WT/WGTCP/W/1 du 11 juin 1997
- Inventaire des instruments de politique de concurrence : WT/WGTCP/W/34 du 2 mars 1998
- Incidence de la politique de concurrence sur les échanges : WT/WGTCP/W/45 du 24 novembre 1998
- Réponse aux question posées par les pays membres : WT/WGTCP/W/61 du 6 mars 1998
- Incidence des pratiques anticoncurrentielles sur les échanges : WT/WGTCP/W/62 du 5 mars 1998
- Incidence des monopoles étatiques, des droits exclusifs et des politiques normatives sur la concurrence et le commerce international ; incidence de la politique commerciale sur la concurrence : WT/WGTCP/W/78 du 7 juillet 1998
- Rapports entre les aspects commerciaux de droits de propriété industrielle et la politique de concurrence et entre les investissements et la politique de cours de publication.

Les débats ont d'ores et déjà permis de mettre en évidence que la plupart des membres de l'OMC, y compris les pays en voie de développement, sont convaincus de l'utilité d'un cadre international de règles de concurrence. Parmi les rares voix discordantes, Hong Kong Chine estime que les mesures commerciales constituent des entraves au commerce bien plus importantes que les pratiques anticoncurrentielles. Cette position peut s'expliquer en partie par le récent rejet par le gouvernement de

Hong Kong Chine d'une proposition de loi sur la concurrence.

Le groupe de travail est seulement chargé d'"étudier les liens entre le commerce et la politique de concurrence". La question se pose de savoir si, à l'expiration du mandat du groupe, qui doit intervenir à la fin de l'année 1998, des négociations pourraient intervenir.

M. Van Miert, a répondu par l'affirmative à cette question le 21 avril à Genève, dans un discours prononcé devant une vingtaine d'ambassadeurs de pays tiers. Les négociations porteraient sur les points suivants:

- Règles et des structures internes de concurrence : la première condition pour développer la coopération au niveau international est que le droit de la concurrence soit appliqué dans tous les pays. Le groupe de l'OMC pourrait donc examiner la faisabilité d'un engagement des pays membres d'adopter des règles et des structures internes de concurrence.
- Principes communs : le deuxième domaine de négociation pourrait être l'identification de principes communs à l'ensemble des pays membres, notamment sur les pratiques anticoncurrentielles les plus néfastes (concertations tarifaires horizontales, partage du marché, pratiques prédatrices etc...).
- Coopération : le troisième domaine concerne la création d'un instrument de coopération entre autorités de la concurrence.
- Règlement des différends : le groupe de l'OMC pourrait enfin envisager la possibilité d'appliquer un dispositif de règlement des différends au domaine de la concurrence. Ainsi pourrait être soumis à un panel les cas où un pays ne se conforme pas à ses engagements, par exemple s'il s'abstient de transposer les principes convenus en commun.

Adoption d'une recommandation sur les ententes injustifiables

L'OCDE a adopté le 25 mars 1998 une recommandation sur la coopération dans la lutte contre les ententes injustifiables c'est-à-dire les pratiques entre concurrents visant à fixer des prix, à procéder à des soumissions concertées, à établir des restrictions ou des quotas à la production, ou à partager ou diviser des marchés. Ce texte vise à renforcer l'efficacité de l'activité des pays membres contre les ententes injustifiables en éliminant ou en réduisant les exceptions légales à l'application de leur législation et en dotant les autorités de concurrence des pouvoirs d'investigation nécessaires pour coopérer avec d'autres autorités de concurrence. Cette coopération pourrait impliquer notamment la communication d'informations confidentielles et le recours aux pouvoirs d'investigation pour répondre à une demande d'assistance.

Le document est cependant peu contraignant. D'abord, il ne s'agit que d'une recommandation. Il n'impose donc aucune obligation. Les membres sont seulement « encouragés » à conclure des accords bilatéraux ou multilatéraux pour concrétiser la recommandation. Le texte prévoit de nombreux cas où le pays membre peut refuser de coopérer. Enfin, la communication d'informations confidentielles ne peut être envisagée que si la législation nationale le permet.

Cette recommandation permettra aux autorités de concurrence de différents pays membres de mieux coordonner leur activité contre les ententes injustifiables. Elle donne un signal clair que ces autorités peuvent coopérer efficacement pour lutter contre les ententes qui visent à annuler les effets bénéfiques de la globalisation et de la libéralisation de l'économie mondiale.

Pour la Commission la recommandation est aussi un signe qu'il existe, dans les Etats membres, une volonté politique de réfléchir à des accords bilatéraux et multilatéraux de "seconde génération" (qui permettraient notamment la communication d'informations confidentielles à des autorités de contrôle de pays tiers) pour combattre les ententes injustifiables.

Arrêt important de la Cour de justice sur l'application des articles 5 et 85 du traité aux barêmes des honoraires des ordres professionnels

Enrico TRAVERSA, Service Juridique

1. En adoptant et en maintenant en vigueur une loi qui impose au Conseil national des expéditeurs en douane (Consiglio nazionale degli spedizionieri doganali – CNSD), par l'attribution du pouvoir de décision correspondant, l'adoption d'une décision d'association d'entreprises contraire à l'article 85 du traité CE, consistant à fixer un tarif obligatoire pour tous les expéditeurs en douane, la République italienne a manqué aux obligations qui lui incombent en vertu des articles 5 et 85 du même traité.

2. La République italienne est condamnée aux dépens. »

OBSERVATIONS

1. Cet arrêt marque une étape très significative dans l'évolution de l'interprétation et surtout, de l'application **des articles 5 et 85 du Traité**. C'est en effet **la première fois** que, **dans le cadre d'un recours en manquement *"article 169"***, la Cour a été appelée à se prononcer sur la compatibilité avec ces deux dispositions du Traité, d'une loi nationale qui impose à un Conseil national d'un ordre professionel[16] l'adoption d'un tarif obligatoire (barême d'honoraires) pour tous les membres de la profession.

   La Cour a accueilli pleinement le recours de la Commission, en suivant également l'opinion de son avocat général, et a ainsi condamné pour la première fois un Etat membre pour avoir violé les articles 5 et 85 du Traité.

2. La motivation de l'arrêt, quant au fond du recours de la Commission, est structurée en trois parties.

   Dans la première partie (points 33 à 44 des motifs), la Cour a analysé si la décision par laquelle le CNSD avait adopté le barème des prestations professionnelles des expéditeurs en douane constitue une décision d'association d'entreprises au sens de l'article 85 du Traité.

3. En rejetant la principale objection du Gouvernement italien, la Cour a premièrement déclaré que l'exercice d'une profession libérale ne fait pas obstacle à la qualification de celle-ci comme activité économique et, par conséquent, comme entreprise au sens des articles 85 et 86 du Traité.

   En effet, d'après la Cour, les membres de la profession offrent sur un marché des services contre rémunération. En outre, ils assument les risques financiers de cette activité, puisqu'en cas de déséquilibre entre dépenses et recettes, c'est bien l'expéditeur en douane qui est appelé à supporter les pertes.

4. La circonstance que l'activité de ces opérateurs serait intellectuelle, qu'elle nécessiterait une autorisation (l'inscription au tableau après avoir passé un examen d'accès à la profession) et qu'elle pourrait être poursuivie sans la réunion d'éléments matériels, n'est pas de nature – toujours selon la Cour –, à exclure cette même activité du champ d'application des règles de concurrence du Traité.

5. La Cour a ensuite examiné dans quelle mesure une organisation professionnelle telle qu'un Conseil national d'un ordre professionnel, se comporte comme une association d'entreprises, au sens de l'article 85, paragraphe 1, *"dans le cadre de l'élaboration du tarif"* (point 39), étant entendu que les autres fonctions que la loi nationale a conférées au CNSD[17] ne sont pas visées par l'arrêt.

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16 Le Conseil national des expéditeurs en douane - CNSD.

17 A titre d'exemple : l'établissement du registre national des expéditeurs en douanes, la résolution de conflits de compétence entre les conseils départementaux, la décision sur les recours formés contre les décisions de ces mêmes conseils départementaux, et autres.

6. Après avoir rappelé[18] que le statut de droit public attribué par une législation nationale à un organisme professionnel est *"sans incidence"* sur l'applicabilité des règles communautaires de concurrence, la Cour a relevé que rien, dans la réglementation nationale concernée, n'empêche les membres du CNSD – tous représentants des expéditeurs en douane – d'agir dans l'intérêt exclusif de la profession. En particulier, aucune disposition nationale *"n'oblige ni même n'incite"* les membres du conseil national de l'ordre, à tenir compte de critères d'intérêt général, tels que les intérêts des entreprises des autres secteurs ou des usagers des services en question, ce qu'en revanche la Cour avait constaté dans certaines affaires antérieures[19] où elle s'était prononcée pour la non application des articles 5 et 85 du Traité aux tarifs d'autres catégories d'opérateurs économiques.

7. Il est à souligner que c'est bien **la première fois** que la Cour reconnaît, et sans aucune ambiguïté, que les membres d'une profession libérale constituent **des entreprises** au sens de l'article 85 du Traité et qu'un conseil national d'un ordre professionnel peut être qualifié **d'association d'entreprises** pour ce qui est de ses actes, tels que barêmes des honoraires, destinés à régler le comportement des membres de la profession sur le marché des services en cause.

8. Dans la deuxième partie de l'arrêt (points 45 à 51) la Cour constate que les décisions par lesquelles le CNSD a fixé un tarif uniforme et obligatoire pour tous les expéditeurs en douane restreignent la concurrence et affectent les échanges intracommunautaires.

   En effet, non seulement le tarif prévoit pour chaque type d'opération, les prix maximaux et minimaux qui peuvent être réclamés aux clients, mais le tarif est impératif, puisque seul le CNSD est habilité à accorder des dérogations, étant donné qu'il est interdit, sous peine de sanctions disciplinaires, à chaque expéditeur en douane de s'en écarter de sa propre initiative.

9. La Cour a également retenu les arguments de la Commission ayant trait à l'affectation du commerce entre Etats membres. S'agissant de prestations de services de professions libérales, il n'est pas toujours facile de démontrer qu'une entente est susceptible d'entraver les échanges intra-communautaires, étant donné que la plupart de ces services sont encore rendus à des destinataires établis dans le même Etat membre du prestataire. Dans le cas des expéditeurs en douane une difficulté spécifique existait en outre dans la démonstration des conséquences négatives sur le commerce entre Etats membres, difficulté découlant de la suppression des frontières fiscales, donc des importations/exportations à l'intérieur de la Communauté à partir du 1er janvier 1993[20].

   La Cour a reconnu à cet égard qu'il existe encore des catégories d'opérations d'importation ou d'exportation à l'intérieur de la Communauté qui exigent l'accomplissement de formalités douanières et peuvent, par conséquent, rendre nécessaire l'intervention d'un expéditeur en douane[21].

10. La troisième partie de l'arrêt (points 52 à 59) est consacrée à la question de savoir si, et dans quelle mesure l'infraction du CNSD peut être imputée à l'Etat italien.

    Même sous cet angle, la Cour a fait sienne l'analyse de la législation nationale proposée par la Commission dans sa requête. C'est ainsi que la Cour a déclaré la responsabilité de l'Etat italien pour la restriction de concurrence mise en oeuvre par le CNSD, en structurant la motivation de cette partie de l'arrêt autour de quatre considérations :

    a) la loi nationale prescrit la conclusion d'une décision

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18 Arrêt BNIC/Clir du 30.1.85, 123/83, Rec. p. 391, point 17.

19 Arrêt 17.11.93, Reiff, C-185/91, Rec. p. I-5801, points 17 et 18, arrêt 9.6.94, Delta, C-153/93, Rec. p. I-2517, poins 16 et 18, arrêt 17.10.95, DIP, C-140/94 à C-142/94, Rec. p. I-3257, points 18 et 19.

20 Cette suppression des frontières fiscales implique que, depuis 1993, la TVA et les accises sont perçus à l'intérieur de l'Etat de destination des biens expédiés.

21 Parmi les cinq catégories d'opérations mentionnées par la Commission, la Cour a retenu, à titre d'exemple, les opérations de *« transit interne »*, à savoir l'envoi de marchandises d'un point à l'autre du territoire de la Communauté moyennant un transit par un payx tiers comme la Suisse (point 50 des motifs).

d'association d'entreprises contraire à l'article 85 du traité, en ce qu'elle contraint le conseil national d'un ordre professionnel à élaborer un tarif obligatoire et uniforme pour les prestations des membres de la profession ;

b) l'Etat italien a renoncé à influer sur la teneur du barème des honoraires, étant donné qu'à cause de la composition du conseil national et des critères sur la base desquels il adopte ses décisions, il apparaît que la législation nationale en cause a complètement abandonné à des opérateurs économiques privés la compétence des autorités publiques en matière de détermination des prix des prestations professionnelles ;

c) la législation italienne renforce les effets des décisions du CNSD en ce qu'elle concourt à assumer le respect du barème des honoraires. Le *« concours »* de l'Etat italien dans l'infraction à l'article 85 se manifeste, d'après la Cour, en deux formes. Premièrement la réglementation nationale interdit aux expéditeurs en douane de déroger au tarif et assortit la violation des prix minimaux et maximaux de sanctions administratives prévues en général dans le cadre de toute profession réglementée (blâme, suspension temporaire de l'exercice de la profession, radiation du tableau) ;

d) deuxièmement, le Ministre italien des Finances, en approuvant par décret le tarif en l'absence de toute disposition législative lui attribuant un tel pouvoir d'approbation, *« a conféré au tarif l'apparence d'une réglementation publique »*.

11. La responsabilité de l'Etat italien étant ainsi établie, et par conséquent la violation par celui-ci de l'article 5 ensemble avec l'article 85 du traité, il convient de rappeler que la Commission a constaté dans sa décision 93/438/CEE[22] la responsabilité du CNSD pour la violation de l'article 85 du traité. Cette décision a fait l'objet d'un recours en annulation du CNSD devant le Tribunal de première instance[23], qui a décidé de reporter l'examen dudit recours jusqu'au prononcé de l'arrêt de la Cour.

Il est évident que l'arrêt rendu par la Cour dans le cadre de la procédure ex article 169 exercera une influence très sensible sur le recours en annulation pendant devant le Tribunal, puisque toutes les principales questions de principe (v. points 2 à 7 qui précèdent) posées par l'application de l'article 85 au barème des honoraires établi par un conseil national d'un ordre professionnel, ont été tranchées par la Cour par ce même arrêt C-35/96.

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22 Décision du 30.6.93, publiée au J.O. L 203, page 27.

23 Affaire T-513/93.

ANTI-TRUST RULES

Application of Articles 85 & 86 EC and 65 ECSC
Main developments between 1st May and 30th September 1998

Recent important decisions

Aéroport de Paris

Corinne DUSSART-LEFRET, DGIV-D-2

La Commission a adopté une décision visant à mettre fin à un système de redevances commerciales discriminatoires pour la prestation de services d'assistance en escale dans les aéroports de Paris-Orly et Paris-CDG.

Le 11 juin 1998 [24] la Commission a adopté une décision à l'encontre d'Aéroports de Paris (ADP) visant à mettre fin à un système de redevances commerciales discriminatoires pour la prestation de services d'assistance en escale dans les aéroports de Paris-Orly et Paris-CDG.

Cette affaire concerne une plainte déposée par AFS, Alpha Flight Services, une entreprise de restauration en vol (catering), à l'encontre du régime de redevances commerciales appliqué dans les aéroports de Paris (Orly et Roissy Charles-de-Gaulle). AFS et OAT, filiale du Groupe Air France, sont des prestataires concurrents pour la fourniture de services de catering à Orly. ADP applique des taux de redevances tant commerciales que d'occupation différents. L'application de taux identiques à ceux de OAT permettrait une diminution de la redevance de AFS d'environ 3.5 millions de francs. La redevance appliquée aux compagnies aériennes qui réalisent elles-mêmes leur restauration en vol, est soit nulle soit inférieure à celle des prestataires pour le compte de tiers. De telles différences n'ont pas de justification objective et diminuent de façon discriminatoire le coût de revient des services de certains prestataires. Non seulement le jeu de la concurrence entre prestataires de services d'assistance s'en trouve faussé, mais également le jeu de la concurrence entre transporteurs aériens puisque certains bénéficient d'avantages en terme de coût, soit par le biais des distorsions entre prestataires aux tiers, soit par le biais du traitement abusivement favorable de l'auto-assistance.

Les dispositions de l'article 86 prévoient qu'une entreprise occupant une position dominante dans une partie substantielle du marché commun ne peut appliquer à l'égard de partenaires commerciaux des conditions inégales à des prestations équivalentes, en leur infligeant de ce fait un désavantage dans la concurrence. La décision de la Commission du 11 juin 1998 constate qu'Aéroports de Paris a enfreint les dispositions de l'article 86 du traité CE en utilisant sa position dominante d'exploitant des aéroports parisiens pour imposer, aux prestataires ou usagers exerçant des services d'assistance ou d'auto-assistance en escale relatifs au commissariat aérien (incluant les activités de chargement dans l'avion et de déchargement de l'avion de la nourriture et des boissons), au nettoyage des avions et à l'assistance fret, des redevances commerciales discriminatoires dans les aéroports parisiens d'Orly et de Roissy-Charles de Gaulle.

Le système de redevance en cause bénéficie principalement aux transporteurs les mieux installés dans l'aéroport. Les transporteurs moins bien implantés, principalement originaires d'autres États membres, subissent une discrimination abusive de la part du gestionnaire de l'aéroport occupant une position dominante. La décision vise à mettre fin à ce système de redevances s'opposant au bon fonctionnement du marché unique du transport aérien.

Il s'agit de l'un des premiers cas d'application des règles de concurrence du traité dans le secteur aéroportuaire qui prend en compte l'évolution récente de la situation concurrentielle du secteur des aéroports du fait de la libéralisation totale du secteur aérien communautaire depuis avril 1997 et de l'adoption par le Conseil de la directive 96/97 relative à l'ouverture du marché de l'assistance en escale.

En date du 10 août 1998, ADP a introduit deux recours auprès de Tribunal de Première Instance, le premier ayant pour objet le sursis à exécution et le second, l'annulation de la décision.

N.B. : Pour les lecteurs intéressés, « Politique de concurrence à l'égard des aéroports » - J.F. PONS : http://europa.eu.int/comm/dg04/speech/eight/fr/sp98039.htm

24 JO L 230 du 18.8.1998 p.10

Pripps/Tuborg

Patrick LINDBERG, DG IV-F-3

On 26.6.1998 the Commission approved a license agreement between Tuborg International A/S ("Tuborg") and AB Pripps Bryggerier ("Pripps") for Tuborg beer in Sweden, but only after the license had been made non-exclusive and a second licensee had been appointed.

Pripps belongs to the Norwegian Orkla group and is the leading brewer on the Swedish market. Tuborg is part of the Danish Carlsberg group, which is Denmark's leading brewer and is also present on the Swedish market through its holdings in Falcon Bryggerier AB ("Falcon"). The Carlsberg group's leading brands are Carlsberg and Tuborg. Pripps has held an exclusive license for Tuborg beer in Sweden since 1975, while the license for Carlsberg beer is held by Falcon.

The Tuborg license agreement was notified to the Commission following Sweden's accession to the EU. The Commission informed the parties that such a long-term exclusive co-operation between competitors, with its likely foreclosure effects, gave rise to serious concern regarding compatibility with Article 85 of the EC Treaty. Certain other restrictions on Pripps (including, *inter alia*, an obligation not to co-operate with certain foreign brewers and a guarantee that Tuborg would be the largest foreign brand in Pripps' portfolio) had already been removed by the parties following their initial discussions with the Commission's services.

The parties have, thereafter, restructured the arrangements for the Tuborg brand in Sweden. Their continued co-operation is based on a non-exclusive right (from 1998 to 2002) for Pripps to manufacture, sell and distribute Tuborg beer in Sweden. In order to avoid an abrupt negative impact on Pripps's utilisation of its production capacities, Tuborg has agreed, under certain conditions, to purchase a steadily decreasing quantity of Tuborg class III beer from Pripps, should Pripps fail to sell this minimum volume on the market.

Following these changes to the agreement, and the appointment of a second licensee (Falcon), the parties have obtained a comfort letter.

AAMS

Claudio MENIS, DGIV-F-3

La Commission condamne des abus de position dominante mis en oeuvre par l'Amministrazione autonoma dei monopoli dello Stato (AAMS)

Le 17 juin 1998, la Commission a adopté une décision constatant que l'Amministrazione autonoma dei monopoli dello Stato (AAMS) a enfreint l'article 86 du traité CE. En effet, cette dernière, profitant de sa position dominante dans le marché italien de la distribution en gros des cigarettes, a mis en œuvre une série de comportements abusifs tendant à protéger et à renforcer sa position sur le marché des cigarettes, en recourant à des moyens autres de ceux qui gouvernent une concurrence normale.

L'AAMS est un organe dépendant directement du Ministère italien des Finances et qui exerce, à la fois, une activité d'entreprise (production, importation, exportation et distribution en gros de tabacs manufacturés) et une activité d'administration publique (exercice de pouvoirs publics visant à assurer le respect de la réglementation italienne relative au secteur des tabacs manufacturés). L'AAMS a le droit exclusif de produire des tabacs manufacturés dans le territoire italien.

La décision distingue trois marchés de référence: a) le marché italien des cigarettes; b) le marché italien de la distribution en gros des cigarettes; c) le marché italien de la distribution au détail des cigarettes.

D'après la décision, l'AAMS est en position dominante dans le marché italien de la distribution en gros des cigarettes. En effet, elle dispose

d'un monopole de facto puisqu'actuellement elle est la seule entreprise à exercer en Italie cette activité.

La décision constate que l'AAMS a abusé de ladite position dominante en mettant en œuvre deux types de comportements.

En premier lieu, l'AAMS a imposé aux producteurs étrangers, qui fabriquent leurs cigarettes dans d'autres Etats membres, des contrats de distribution en gros qui prévoient de nombreuses clauses restrictives qui entravent gravement l'accès des cigarettes étrangères au marché italien. D'abord, ces contrats limitent l'introduction de nouvelles marques de cigarettes étrangères sur le marché italien. Ensuite, ils restreignent les possibilités d'expansion des cigarettes étrangères déjà présentes dans ledit marché. Enfin, ils soumettent les cigarettes étrangères à des exigences de présentation et de contrôle qui ne sont pas justifiées.

En deuxième lieu, l'AAMS a mis en œuvre des comportements unilatéraux visant à favoriser ses cigarettes au détriment des cigarettes étrangères. Ces comportements unilatéraux ont concerné tant les producteurs étrangers que les entrepôts et les détaillants italiens.

Compte tenu de ce qui précède, la décision ordonne à l'AAMS de mettre fin immédiatement aux infractions encore en cours et de s'abstenir de poursuivre ou de répéter les comportements abusifs. Dans ce contexte, la décision oblige l'AAMS à transmettre à la Commission, durant une période de trois ans, un rapport indiquant les quantités de cigarettes étrangères distribuées par l'AAMS, ainsi que tout refus éventuel (total ou partiel) de distribuer lesdites cigarettes.

Enfin, la décision sanctionne par une amende le comportement de l'AAMS. A ce propos, la décision indique que les comportements en cause, d'un côté, correspondent à des infractions ayant une nature et un objet particulièrement anticoncurrentiels et, de l'autre côté, ont eu un impact concret sur le marché qui a été relativement réduit et limité à un seul Etat membre. Compte tenu de la présence de ces divers éléments, la décision considère que lesdits comportements correspondent à une infraction grave. En outre, la décision indique que l'infraction est de longue durée. Pour ces raisons, la décision inflige à l'AAMS une amende de 6 millions d'Ecus.

Vickers/Rolls-Royce

By Paolo ZIOTTI, DG IV-F-2

On 6 April 1998, the Commission adopted a Decision rejecting an application for interim measures lodged by Vickers PLC. On the occasion, it pointed out that, at the stage of a *prima facie* appraisal, the assessment under competiton law of a clause granting the trade mark owner the power to terminate a trade mark licence upon a change of control of the licensee did not seem to be different from that of a provision preventing the licensee from assigning or sublicensing the benefit of the agreement to third parties. The Commission has not considered the latter clause as anti-competitive, but recognizes that it is a provision intended to provide the trade mark owner with the means to ensure that the quality associated with the mark is maintained.

In January 1998, the Commission received a complaint from Vickers PLC, the ultimate parent company of the Rolls-Royce Motors Group, in which it alleged that the agreements between Rolls-Royce Motors Group and Rolls-Royce PLC, relating to the licensed use by the former of the Rolls-Royce name and relevant trade marks infringed Article 85 (1) EC.

In this connection it must be recalled that Rolls-Royce Motors Group, which manufactures and sells luxury motor cars under the « Rolls-Royce » and « Bentley » names and trade marks, and Rolls-Royce PLC, which manufactures, in particular, gas turbine and nuclear propulsive aero-engines, are two separate and unconnected undertakings, although both use the name « Rolls-Royce » in their company name. The owner of the Rolls-Royce name and trade marks is Rolls-Royce PLC.

In its complaint, Vickers objected to a clause of the licence agreement which gave the right to Rolls-Royce PLC unilaterally to terminate the Rolls-Royce Motors Group's right to use the Rolls-Royce name and trade mark in the event that the

motor car business would come under the control of a non-UK resident, including a company or individual resident in another EEA country (the Residence clause). Therefore, the case raised the problem of the relationship between trade mark rights and Community rules on competition. It may be noted that the agreements containing the disputed clause had been notified to the Commission in 1973 and that the notification had been settled by an administrative letter in which the Commission indicated that it was closing the file since the agreements did not restrict competition.

As Vickers was proposing to dispose of the Rolls-Royce Motors Group, it also requested the Commission, as a matter of urgency, to adopt interim measures, namely it requested an order restraining Rolls-Royce PLC from enforcing or seeking to enforce the Residence clause. In this regard Vickers alleged that the threat to exercise the Residence clause by Rolls-Royce PLC would have disrupted an open and fair competitive auction of Roll-Royce Motors Group and Vickers would be denied the opportunity of receiving valuable consideration for it.

The Commission considered that, on the basis of the evidence provided, the criteria for the adoption of interim measures were not met and rejected Vickers' application by means of the above-mentioned decision.
In fact, for the reasons already mentioned, the Commission drew the conclusion that the provision at issue was not prima facie likely to constitute an infringement of Community competition rules. All the more so as, even in the market identified by Vickers as the relevant market, i. e. the luxury car sector, it was not clear that the clause objected to had a significant impact on the conditions of competition by preventing a non-UK resident purchaser from acquiring the Rolls-Royce Motors Group. In particular Vickers did not show that the purchase of an existing player was the only way to increase its share of, or to enter in, that market.

Finally given the fact that Rolls-Royce PLC was supporting a sale of Rolls-Royce Motors Group to a non-UK resident, it did not seem that in the present case the Residence clause would have had the significance which Vickers claimed.

It was also necessary for the Commission to point out that in so far as Vickers disputed the ownership of the Rolls-Royce name and trademark, such a dispute would have fallen within the competence of national courts and not of the Commission.

Concerning the risk of serious and irreparable damage establishing the urgent need to adopt the interim measures, the Commission considered that this condition was not fulfilled either. In fact Vickers did not say anything about the necessity for it to sell its interests in Rolls-Royce Motors Group or about the inability of continuing to operate the Rolls-Royce business. The urgency appeared to be entirely a result of Vickers' own making given its decision to dispose of the Rolls-Royce Motors Group. It was therefore founded on a subjective more than an objective basis.

Furthermore, the Commission recalled that, in ordering interim measures, it must also have regard to the balance between the likely harm to the applicant if it does not act and the legitimate interests of the undertaking which is the subject of the interim measures. In addition, it must not prejudice the final outcome of the procedure. In this regard the Commission pointed out that the order requested by Vickers could have resulted in a sale of the company under the assumption that the buyer would be able to use the Rolls-Royce trade marks against the will of Rolls-Royce PLC, i.e. the owner of the trade marks. This would have been a definitive situation, opposite to the notion of « conservatory measures », the only measures which the Commission has powers to adopt in emergency procedures.

In the event, on 3 July 1998, Volkswagen acquired the Rolls-Royce Motors Group from Vickers. This transaction has been notified to the Commission pursuant to Article 4 of Council Regulation (EEC) n° 4064/89. Subsequently, BMW AG acquired the rights to the Rolls-Royce name and trade mark, for use in motor cars, from Rolls-Royce PLC and granted a licence to Rolls-Royce Motors Group, now owned by Volkswagen, to use the Rolls-Royce name and trade mark until 31 December 2002. Subsequent to this acquisition, the complaint has been withdrawn.

EUCAR

Hugo VERLACKT, IV-F-2

Le 17 septembre 1998, par l'envoi d'une lettre adminis-trative de ses services, la Commission européenne s'est prononcée en faveur des accords de recherche et développement dans le secteur automobile européen.

Le cas d'espèce concerne l'accord EUCAR - European Council for Automotive Research and Development - conclu par les grands groupes automobiles établis en Europe, à savoir Fiat, Peugeot SA, Renault, VW, BMW, Mercedes, Porsche, Volvo, Opel et Ford.

L'objectif d'EUCAR est de renforcer les efforts de recherches en commun de l'industrie automobile européenne dans les domaines économique, technique et écologique par des projets visant à améliorer la compétitivité de l'industrie et à promouvoir une protection durable de l'environnement.

L'accord porte sur le choix des projets relatifs aux activités dans le domaine automobile, ainsi que sur les conditions et moyens pour les réaliser. La plupart de ces projets ont trait à la recherche expérimentale et non à la réalisation d'un type de produit spécifique. Les recherches s'effectuent à un stade précompétitif, ce qui signifie que les produits obtenus ne sont pas directement utilisables dans un type de voiture déterminé. A titre d'exemple peuvent être citées les recherches portant sur l'utilisation des céramiques dans les moteurs, la limitation des nuisances sonores dans les véhicules automobiles et les effets produits sur l'environnement par les émissions nocives des moteurs.

Un projet sera adopté par EUCAR uniquement si au moins deux membres de différents pays européens participent. Par ailleurs, les membres individuels restent libres d'engager leurs propres programmes de recherches.

Les résultats de la recherche toucheront quatre catégories de produits : voitures de tourisme, camionnettes, camions et autobus.

Du point de vue géographique les parties retiennent le marché de l'Espace économique européen, avec comme concurrents principaux les constructeurs américains et japonais.

L'accord EUCAR s'inscrit dans un plan de recherches (Master Plan) de l'association qui réunit les constructeurs automobiles, les producteurs de composants, les laboratoires et les universités. Ce plan définit, pour les véhicules de l'an 2000 et au delà, trois groupes technologiques pour la collaboration :

i. le produit : p.ex. les moteurs électriques, les véhicules à propulsion hybride, les effets de la voiture sur l'environnement et l'intérêt du consommateur ;

ii. la construction du véhicule : les procédés de fabrication, l'organisation du travail, l'efficacité et le roulement des stocks, la situation sociale des travailleurs;

iii. le transport dans son ensemble : l'acceptation de la voiture privée, les transports en commun, le transport multimodal, etc.

L'accord prévoit un cadre dans lequel les instances suivantes sont actives :

- Council (conseil) : qui comprend deux représentants par groupe et décide des questions générales ;
- Coordination Committee (comité de coordination) : qui prépare les différentes coopérations de recherche et développement et effectue le suivi des projets ;
- Thematic groups (groupes thématiques) : qui aborde des questions techniques spécifiques ;
- Accounting group (groupe de comptabilité) : qui assure le contrôle des coûts des projets, la révision des calculs des coûts respectifs et supervise et aide les éventuelles demandes de subvention dans le cadre des programmes européens ;
- Legal group (groupe juridique) : qui suit les affaires juridiques.

L'ensemble est organisé et dirigé par un secrétaire général.

Pour les échanges d'information l'accord fait une distinction entre

- background info : renseignements ou droits de propriété industrielle dont un des participants dispose avant le début du projet en question, et qui est nécessaire à la mise en oeuvre de ce projet ;
- foreground info : renseignements ou droits découlant du projet en question ; il est à noter que ces renseignements sont réservés aux filiales européennes des groupes établis en

dehors de l'Union européenne durant une période de deux années après la fin du projet.

L'association EUCAR a pris l'engagement d'informer régulièrement la Commission du programme de recherches en cours.

L'attitude de la Commission dans cette affaire confirme sa position favorable vis-à-vis de la coopération des entreprises dans le domaine de la recherche, dans les limites imposées par les règles de concurrence communautaires.

TÜV / CENELEC
Conformity assessment and competition: a case in point

Hartmut SCHARF, DG IV-F-1

Conformity Assessment, a procedure for checking that a product, system or service conforms to a standard or specification, is an important issue for European competitiveness. There are a growing number of harmonised European standards private bodies, who are in competition with each other on a given market, provide a service to assess whether these standards are met[25]. Consequently, conformity assessment arrangements have to respect European Competition Law.

CENELEC (*Comité Européen de Normalisation Electrotechnique* - European Committee for Electrotechnical Standardisation) is a private association whose goal is to harmonise technical standards for electrical equipment within the Community. CENELEC created a commonly agreed mark of conformity for Household and Similar Electrical Appliances (in short "Keymark"). According to the rules and regulations only one member per country was admitted. This clearly limited competition. TÜV (*Technischer Überwachungs-verein*), a body which is entrusted by German authorities to issue conformity certificates, was excluded and complained. They argued that the Keymark was very successful and any delay in the full participation of its competent bodies in the scheme would put them out of business. It should be noted that the Keymark is available over a broad range of household and similar electrical appliances. The Keymark is intended to become the "unique European mark".

In a series of negotiations and exchanges of letters, and in consultation with the competent services of DG III, an agreement with CENELEC was reached to allow access to the Keymark to all qualified certification bodies that might apply, and to deal with these applications in an open and transparent manner. These proceedings are fair and will serve as a model for application procedures in related fields. TÜV has since withdrawn its complaint.

25 Conformity Assessment is not to be confused with accreditation which is a system set up under the aegis of public authorities and is thus a public service. Accreditation bodies are to certify that conformity assessment associations offering their services on the market are competent to do their work. In other words, accreditation bodies are not concerned with the assessment of products.

La Commission atteste la compatibilité des accords notifiés par EUDIM et rejette la plainte déposée à leur encontre

Manuel MARTÍNEZ LÓPEZ, IV-F-1

Le 17 septembre 1998, la Commission a clôturé son examen des accords notifiés en novembre 1995 par EUDIM (European Distributors of Installation Materials) par l'envoi d'une lettre administrative émanant de ses services, après le rejet par voie de décision d'une plainte déposée contre ces accords. EUDIM, basé en Suisse, regroupe des grossistes de matériel sanitaire (salles de bains), plomberie et chauffage. Ces grossistes, généralement un par pays, se situent chacun au tout premier plan de leurs marchés nationaux.

La notification des accords était, dans les faits, une étape dans une procédure antérieure, ouverte par la Commission en février 1991 à la suite d'une plainte déposée contre EUDIM par la société Van Marcke NV. A la suite de l'instruction, la Commission avait envoyé à EUDIM une Communication de griefs en février 1995, mettant en cause l'existence d'un gentlemen's agreement, lié à un échange d'informations, en vertu duquel chaque membre d'EUDIM s'abstenait d'entrer sur le marché des autres membres sans autorisation préalable.

Tout en niant l'existence d'un accord de partage de marchés, EUDIM a accepté de compléter et de clarifier ses accords de façon à les mettre en conformité avec les règles de concurrence. Aussi la Commission a-t-elle réagi favorablement aux accords notifiés, en publiant l'essentiel de leur contenu[26]. La publication n'a pas suscité des commentaires de nature a modifier l'évaluation initiale de la Commission. Toutefois, le plaignant Van Marcke a contesté, entre autres, l'appréciation du degré de concentration du marché pertinent, le pouvoir de marché des membres d'EUDIM et, dans ce contexte, l'appréciation de la Commission quant au caractère restrictif des échanges d'information au sein d'EUDIM. Dans sa décision de rejet de plainte datée du 6 août 1998 adressée à Van Marcke, la Commission fournit une évaluation approfondie des conditions concurrentielles du marché pertinent qui lui permettent de conclure au caractère non appréciable d'éventuelles restrictions de concurrence contenues dans les accords notifiés.

En outre, la Commission confirme dans sa décision de rejet de plainte sa ligne de ne pas adopter de décision formelle d'attestation négative sur des accords notifiés si l'intérêt communautaire ne le requiert pas. Des circonstances retenues par la Commission pour déterminer l'absence d'intérêt communautaire en l'espèce ont été, outre le caractère non appréciable d'éventuelles restrictions, l'existence d'orientations suffisantes en matière de coopération entre grossistes, la publication en vertu de l'article 19 (3) du règlement 17 et le rétablissement d'une concurrence saine intervenu à la suite de sa communication de griefs de février 1995, alors qu'elle n'est pas tenue de donner suite à des plaintes pour des pratiques qui ont cessé.

Voir aussi :
http://europa.eu.int/comm/dg04/entente/closed/en/1998.htm#562

26 JO C 111 du 17.04.1996 pp.8-10.

The ECSC Treaty allows the Commission only to deal with infringements having a prospective effect

Christian LEVASSEUR, IV-E-3

The Commission adopted, on 22 April 1998 and on 28 July 1998, decisions not to act on complaints concerning alleged infringements of the ECSC Treaty that occurred in the past.

THE COMPLAINTS

Before 1990, the state-owned British Coal Corporation (BCC) accounted for around 95% of coal production in the United Kingdom. The remaining 5% were produced by private mines which, according to the Coal Industry Nationalisation Act 1946, had to pay BCC a royalty on each tonne they produced. The privatisation of the Central Electricity Generating Board[27] (CEGB) involved the conclusion of new supply contracts for the purchase of coal between the privatised generating companies, BCC and the mines in the United Kingdom. These new contracts took effect on 1 April 1990.

The day before, the National Association of Licensed Opencast Operators (NALOO) lodged a complaint with the Commission alleging that the price paid to its members was too low and that the royalty set by BCC was excessive. Similar complaints were lodged by the South Wales Small Mines Association (SWSMA) and a coal producer.

The complainants relied, *inter alia*, on :

- Article 63 ECSC prohibiting systematic price discrimination. The parties alleged that the generators infringed Article 63 ECSC in that they offered better conditions to BCC than to all other coal wines
- Article 66(7) ECSC or Article 86 EC prohibiting abuse of dominant position. NALOO alleged that BCC had infringed Article 66(7) ECSC in imposing an excessive royalty on private mines.
- Article 65 ECSC or Article 85 EC prohibiting agreements that restrict competition. NALOO alleged that the contracts between BCC and the private mines constitute a restriction of competition because the royalty rate set out in those contracts was excessive

The Commission took the complaints of the private mines up and achieved that for the future (i.e. as of 1 April 1990) the price received by private mines was improved and the royalty charged by BCC was reduced. Consequently, the Commission rejected on 23 May 1991 the complaints relating to the situation after 1 April 1990.

NALOO was not satisfied with the reduced royalty set by BCC and challenged the Commission's decision[28]. Furthermore two of the NALOO and SWSMA members initiated proceedings before the British Courts, to receive compensation for past wrongs they allegedly suffered before 1 April 1990. These actions led to two preliminary rulings : *Banks*[29] in 1994 and *Hopkins*[30] in 1996 rejecting the claims.

After the Judgement in *Banks* was rendered, NALOO lodged a new complaint with the Commission concerning the alleged infringements that occurred before 1 April 1990 (excessive royalty and discriminatory pricing). Reacting on NALOO's new complaint BCC called on the Commission, under Article 35 ECSC, to rule that it lacked jurisdiction to examine NALOO's complaint and, in the alternative, to reject that complaint on grounds of law, without any examination of the merits. When the Commission did not reject NALOO's complaint within the two months period set out under Article 35 ECSC, BCC lodged an action before the Court for the annulment of the implied decision of refusal to be inferred from the Commission's failure to reject NALOO's complaint immediately. BCC's application was however dismissed, by the Court order of 29 April 1998[31].

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27 The CEGB was the monopoly power producer in the UK. Its assets have been split up between – amongst others – National Power and PowerGen.

28 T-57/91 *NALOO v Commission* [1996] ECR II-1019

29 C-128/92 *HJ Banks and Co Ltd and Others v BCC* [1994] ECR I-1209

30 C-18/94 *B Hopkins and Others v National Power, PowerGen* [1996] ECR I-2281

31 T-367/94 *BCC v Commission*, Order of the Court of First Instance of 29 April 1998

After that the Commission decided on 22 April 1998 and on 28 July 1998, not to act on the NALOO and SWSMA complaints. NALOO is challenging this Commission decision in an action brought on 8 June 1998[32].

Before analysing the argumentation that led the Commission to reject the complaints of the mines' associations it is useful to summarise the Court's Judgements in *Banks* and in *Hopkins*.

EXCLUSIVE POWER OF THE COMMISSION TO APPLY THE PROVISIONS OF THE ECSC TREATY

Banks had alleged that the excessive royalties imposed by BCC breach the ECSC Treaty (Articles 4(d), 60, 65, 66(7)), or, in the alternative, the EEC Treaty (Articles 85, 86, 232(1)).

The Court of Justice held however that the ECSC Treaty was applicable and not the EEC Treaty because both the activity in question (the extraction of unworked coal) and the undertakings considered (undertakings engaged in production in the coal industry) fell within the scope of the ECSC Treaty.

The Court also held that the licences to extract coal and the royalties had to be assessed under Article 4(d) (ban on restrictive practices which tend towards the sharing of markets), Article 65 (ban on agreements restrictive of competition) and Article 66(7) (abuse of dominant position) of the ECSC Treaty.

Hopkins had alleged that the discriminatory practices of CEGB breach the ECSC Treaty (Articles 4(b) and 63), or, in the alternative, of the EEC Treaty (Article 86).

The Court of Justice ruled again that the ECSC Treaty – in particular Articles 4(b) and 63(1) thereof – is exclusively applicable and that there was no place for the application of the EC Treaty.

ABSENCE OF DIRECT EFFECT

The Court of Justice ruled also on an important distinction between the Treaty of Paris and the Treaty of Rome. In contrast to the EC Treaty the competition rules of the ECSC Treaty have, in *Banks* and in *Hopkins*, no direct effect :

- Article 4 is applicable only in the absence of more specific rules. As there are more specific rules (Articles 63(1), 65 and 66(7)) applicable to the cases, Article 4 has no direct effect (*Banks* and *Hopkins*)
- Article 63(1) empowers the Commission to make appropriate recommendations to the Governments concerned when it finds that discrimination is being systematically practised by purchasers. It follows that individuals cannot contend before the national courts that such discrimination is incompatible with Article 63(1) as long as the alleged discrimination has not been the subject of a Commission recommendation (*Hopkins*)
- The second subparagraph of the fourth paragraph of Article 65 ("exemption") confers on the Commission sole jurisdiction to exempt agreements restricting competition. As long as the Commission has not decided on the applicability of Article 65 to an agreement, individuals may not plead before national courts, that an agreement is incompatible with Article 65 (*Banks*)
- Article 66(7) too reserves to the Commission the power to intervene against abuses of dominant positions. This precludes individuals from relying directly on Article 66(7) before the national courts (*Banks*)

The consequence of these rulings is a reinforcement of the Commission as a competition authority. It is the sole authority to apply the ECSC competition rules. This monopoly would, however, create a formidable burden for the Commission, if it had to intervene in all cases of alleged violations of the ECSC competition rules brought to its attention.

REQUIRED PROSPECTIVE EFFECT: THE COMMISSION'S DECISION NOT TO ACT ON THE COMPLAINT

The Commission did not publish the decision not to act on the complaint lodged by NALOO in 1994. However, it is clear from the Notice relating to the action brought by NALOO against the Commission on 8 June 1998 that the Commission considered that

- the imposition of allegedly excessive royalties did not constitute an infringement of Article 65 ECSC Treaty
- it was not empowered to deal with past infringements under Articles 63(1) and 66(7) ECSC Treaty
- NALOO had not provided sufficient evidence in support of its complaint

We will try here to explain how the Commission came to these views in relation to Articles 65, 63 and 66(7) ECSC Treaty, leaving aside the issue of "evidence" as this is not specific to the ECSC Treaty.

[32] Notice published in OJ 1998, C 234, p. 36

1. Application of Article 65

The Commission did not accept NALOO's contention that BCC's licensing contracts infringed Article 65 because the royalty rate set out in these contracts was excessive. The Commission made a parallel between the competition rules of the EC treaty and those of the ECSC Treaty. It then relied on the case law of the Court of Justice in relation to the imposition of excessive prices which relies exclusively on Article 86 EC.

The position is summarised by Gleiss[33] :

"This obligation [to pay royalties] is never incompatible with Article 85(1). This is true even if the royalties are unreasonably high. Article 85 is not a means for correcting business or technical mistakes or erroneous speculations. Therefore, minimum royalties are admissible even if they cannot be recouped by utilising the licensed rights..."
and by Ritter[34]:

"The level of royalties to be paid by the licensee is left to the parties' agreement. In cases where the licensor holds a dominant position the royalty rate must not be abusive"

2. Application of Articles 63(1) and 66(7) to infringements that occurred in the past

The Judgement of the Court in *Hopkins* refers to the prospective wording of Article 63(1), which empowers the Commission to make appropriate recommendations when it *"finds that discrimination is being systematically practised by purchasers"*. The wording of Article 66(7) too is of prospective nature in that the Commission may make recommendations to under-takings in dominant position in order to *"prevent the position from being so [for purposes contrary to the Treaty] used"* (par. 17).

In paragraph 19 the Court expressly addresses the issue of applying Article 63(1) to restrictive practices in the past :

"In order to ensure the effectiveness of the prohibition laid down in Article 4(b), the powers conferred by Article 63(1) on the Commission must be such as to enable it, not only to oblige the authorities of the Member States to bring to an end for the future any systematic discrimination which the Commission has found to exist, but also, on the basis of that finding, to draw all the consequences as regards the effects which such discrimination may have had in relationships between purchasers and producers within the meaning of Article 4(b) even before the Commission took action. That same finding may be relied on by the persons concerned before the national courts."

The Commission interprets this statement as follows :

- it can recommend to Member States to bring to an end for the future any systematic discrimination it has found to exist. This merely confirms the prospective interpretation of Article 63(1)
- it can only deal with discrimination that occured in the past, if this is necessary to ensure the effectiveness of the prohibition laid down under Article 4(b)

In the NALOO complaint, for example, the Commission was called upon to intervene in 1994 with regard to alleged infringements that took place between 1973 and 31 March 1990. The Commission found that it was not empowered to deal with these infringements under Article 63(1) as this was not necessary in order to ensure the effectiveness of Article 4(b). The same reasoning, applied *mutatis mutandis*, underlies its decision not to act under Article 66(7).

Of course this does not mean that the Commission could never be competent to deal with infringements of Article 63(1) and 66(7) that occurred in the past. It merely makes such intervention conditional upon the necessity to ensure the effectiveness of Article 4, a condition that was not met in the cases at issue in the decisions adopted recently.

CONCLUSION

The Commission has sole jurisdiction to apply the competition rules of the ECSC Treaty. This does, however, not transform the Commission into a civil Court whose task it is to provide remedy for all past wrongs complained against by private parties. The legal protection provided for by the ECSC Treaty is different. Violations of the ECSC competition rules have to be seen in the light of the Treaty objectives. The Treaty requires the Commission to intervene only if a restrictive practice has a bearing in the future. Effective legal protection of private parties occurs thus only if this is in line with the general objectives of the Treaty.

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33 *Gleiss, Hirsch*, Common Market Cartel Law, The bureau of National Affairs, 1981, p.230

34 *Ritter, Rawlinson, Braun*, EEC Competition law: a practitioner's guide, Kluwer Law and Taxation, p.498

Application of the new Article 2(4) of the Merger Regulation – a review of the first ten cases

Jonathan Denness, DGIV–C–1

The new Merger Regulation[35] came into force on 1 March 1998, incorporating a number of amendments. Of these amendments, one of the most significant was the addition of Article 2(4)[36] and the amendment of Article 3 which together extended the scope of the Merger Regulation to include joint ventures where more than one of the parent companies remained on a market which was that of the joint venture, upstream or downstream of the joint venture, or neighbouring to that of the joint venture. These joint ventures are known as full function co-operative joint ventures. This amendment brings into the scope of the Merger Regulation a number of joint ventures which would formerly have been examined under Regulation 17/62.

To the end of September 1998, ten cases had involved a detailed analysis under Article 2(4). These operations have all been concentrated in the Internet, telecommunications and telecommunications equipment areas. Even though there has only been a limited number of cases, already certain themes have emerged in the type of operation on which Article 2(4) assessments, in addition to that of dominance, are being carried out. The first case is described in detail to provide an illustration of the Commission's approach to these cases so far, whilst the outcome of the other cases is summarised briefly.

Internet

The first case was in the Internet field. This case is worth describing in detail as it helped to establish the Commission methodology in handling Article 2(4) issues under the Merger Regulation. Telia, the incumbent telecoms operator in Sweden, Telenor the Norwegian incumbent and Schibsted, a Norwegian publishing and broadcasting company formed a joint venture to provide Internet gateway services and offer web site production services[37]. Internet gateway services are designed to enable users of the Internet to access content more easily. This content may be provided by the gateway service provider or other third parties and may be free of charge to the user (normally financed by advertising) or content for which the user has to pay for access ("paid for content").

In its analysis of the case, the Commission found that the supply of gateway services in themselves did not amount to a market as such, but that advertising on web pages and paid for content could be considered as relevant markets. These two markets were relevant markets for the purposes of dominance, as was the production of web sites. Web site production was also considered to be a candidate market for the analysis of co-ordination under Article 2(4) as the joint venture and two of the parent companies (Telia and Telenor) were present on this market. The other candidate market was the provision of dial up Internet access where both Telia and Telenor (through its stake in the Swedish

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35 Regulation (EC) 4064/89 (O.J. L 395 of 30 December 1989, p.1; corrected version O.J. L 257 of 21.9.1990, p. 13) as last amended by Regulation (EC) No. 1310/97, O.J. L 180 of 9.7.1997, p. 1; corrigendum in O.J. L 40 of 13.2.1998, p. 17

36 The full text of Article 2(4) is as follows: To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 85(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.
In making this appraisal, the Commission shall take into account in particular:
whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
whether the co-ordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

37 Case No JV.1 - Telia/ Telenor/Schibsted of 27 May 1998.

telecommunications company Telenordia) were present.

In its analysis of the operation, the Commission had two distinct situations to assess under Article 2(4). First, the web site production market involved the presence of the joint venture and two of the parent companies on the same market. The combined market share of the parent companies and the joint venture was less than 10% on the narrowest possible and most unfavourable market definition to the parties. Accordingly, the Commission concluded that even if the parent companies were to co-ordinate their activities on this market, it would not amount to an appreciable restriction of competition. In the second part of its Article 2(4) reasoning, on the dial up Internet access market in Sweden, the Commission found that that market was characterised by high growth, relatively low barriers to entry and low switching costs. The market shares which Telia and Telenordia enjoyed on this market were 25-40% and 10-25% respectively, but the Commission found that these market shares were of a limited significance in such a growing market and, therefore, the market structure is not conducive to the co-ordination of competitive behaviour. In addition, the likelihood of co-ordination was reduced further by the relative size of the dial up Internet access market (which accounted for over 90% of Internet revenue in Sweden) compared with the size of the other markets on which the joint venture would be active. The Commission therefore concluded that there would be no likelihood for the parent companies to co-ordinate on this market.

The Commission has also examined three other Internet cases under Article 2(4). In the case of Cegetel/Canal+/AOL/Bertelsmann [38], a joint venture was created to provide interactive services in France. The candidate markets for co-ordination were Internet advertising, paid for Internet content and network distribution services. The Commission found no appreciable restriction of competition on any of these markets. In @Home Benelux[39], a joint venture company was created between @Home, a US based Internet service provider and two cable companies based in The Netherlands to provide Internet access, Internet content and related services. In this case the candidate markets for co-ordination were Internet access, Internet advertising, paid-for Internet content and network distribution services on which no appreciable restriction of competition was found. In WSI Webseek[40], Deutsche Telekom, the German publishers and broadcasters Axel Springer and Holtzbrinck and the Internet search provider Infoseek set up a joint venture to provide search services for German-speaking Internet users. In this case, the candidate markets for co-ordination were Internet advertising and paid for Internet content. Again, no appreciable restriction of competition was found on either of these markets.

Telecommunications

The Commission has considered five cases involving telecommunications markets which involved an investigation under Article 2(4). These cases involved operations in both fixed and mobile telephony. Three of the operations involved operations on which the joint venture was formed outside the European Union, where the dominance markets were also mainly or wholly outside the EU but where the Article 2(4) effects had to be investigated on markets within the EU.

In BT/AirTouch/Grupo Acciona/Airtel[41], BT and AirTouch were part of a group of existing shareholders in Airtel, the second Spanish mobile operator, which signed an agreement which gave them joint control of Airtel. Airtel operates a GSM mobile phone service in Spain, whilst two of its parent companies are shareholders in GSM and DCS1800 (the other major digital mobile phone standard in Europe) operators in other European countries. Depending on the precise geographic market definition used, these two parent companies were either competing with one another or with the joint venture. The Commission concluded that the new shareholding situation would not have the effect of co-ordinating the competitive behaviour of BT and AirTouch, which had previously acted independently in mobile telephony whilst being non-controlling shareholders in Airtel.

In VIAG/Orange[42], the Commission again looked at the parent companies activities in the mobile telephony sector outside of the joint venture. The activities concerned (in Austria and Germany) did not give rise to any likelihood of co-

38 Case No. JV.5 – Cegetel/Canal+/AOL/Bertelsmann of 4 August 1998

39 Case No. JV.11 - @Home Benelux of 15 September 1998

40 Case No JV.8 - WSI Webseek of 28 September 1998

41 Case No. JV.3 – BT/AirTouch/-Airtel of 8 July 1998

42 Case No. JV.4 - VIAG/Orange of 11 August 1998

ordination. In two decisions involving Telia and Sonera in Lithuania[43], mobile telephony was again a potential Article 2(4) market but no likelihood of co-ordination was found, because of inter alia the relative size of the Lithuanian market of the joint venture and the Swedish and Finnish markets on which the co-ordination could have taken place. The former decision, covering the acquisition of a stake in Lietuvos Telekomas came to the same conclusion for fixed telephony.

In the formation of a joint venture in Italy by France Telecom (FT), Deutsche Telekom (DT) and ENEL[44], the Commission also assessed the co-ordination effects between FT and DT on mobile markets outside of the joint venture. Here the Commission also looked at the likelihood of co-ordination of fixed line telephony in France and Germany, where each of FT and DT was regarded as a potential competitor to the other. The Commission concluded that the absence of the two companies from each other's markets was a deliberate decision and was not as a result of the creation of the joint venture.

Mobile phones/wireless information devices

The other case subject to an Article 2(4) examination concerns the formation of a joint venture by Ericsson and Nokia, both mobile phone manufacturers and Psion, a manufacturer of palmtop computers, to develop operating system software for wireless information devices, which are a combination of palm top computer and mobile phone in one device[45]. The joint development of the operating system by the three companies led to potential Article 2(4) effects in the markets for wireless information devices and mobile phones, where both Ericsson and Nokia were present. The Commission concluded that there was no likelihood of co-ordination between the parent companies inter alia because for wireless information devices, the cost of the operating system was very small in relation to the cost of the device overall and for mobile phones the operating system was not a part of the device and there was no automatic transfer of market shares in the mobile phone market to the wireless information device market.

Conclusion

The Commission's first ten cases which have included an examination of Article 2(4) effects have already demonstrated some common themes. The relative size of the Article 2(4) market and the joint venture's market, which is assessed for dominance purposes, has been important in assessing the likelihood of co-ordination. However, it cannot be considered as a sufficient condition for the absence of co-ordination between the parent companies. The nature of the markets themselves will also play a part in the Commission's assessment. The nature of existing links between the parent companies is also relevant for the determination of Article 2(4) effects, though their existence does not automatically imply that there is no effect. Again, other factors would have to be taken into account before that analysis can be made.

The fact that most cases have occurred in the telecommuni-cations or Internet sectors is not surprising. The telecommuni-cations sector is subject to enormous regulatory and technological change, with the advent of liberalised telecommunications markets in most of the EU from 1 January 1998 and the development of new technologies which enable previously separate markets to converge, different mobile phone standards, for example. This rapidly changing environment is likely to lead to the need frequently to examine possible Article 2(4) effects on markets upstream, downstream or neighbouring to that of the joint venture. The Internet is another area where Article 2(4) effects are likely to continue to occur. Different Internet markets are closely related, a consequence of the nature of the technology and companies have formed joint ventures to share their different specialist skills in the technology.

The dynamic nature of the markets with which the ten cases have been concerned has not only made an Article 2(4) assessment more likely, but has also in some cases helped to resolve any concerns about co-ordination. Further cases, especially those which raise concerns which cannot be resolved in the first phase of the Merger Regulation procedure, will define the Commission's policy on the application of Article 2(4) in the future.

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43 Cases Nos.: JV.7 - Telia/Sonera/ Lietuvos Telekomas of 14 August 1998 and JV.9 - Telia/Sonera/ Motorola/UAB Omnitel of 18 August 1998

44 Case No. JV.2 - ENEL/FT/DT of 22 June 1998

45 Case No JV. 6 - Ericsson/ Nokia/Psion of 11 August 1998

Recent Developments and Important Decisions

John KEMP and Geraldine EMBERGER, IV-B-4

Introduction & Statistical Overview

The first keynote of the last four months is a further and significant reinforcement of the upward trend in activity (see also previous issues of the Newsletter). No less than 86 operations were notified, an increase of nearly 25% on the previous four month period. The total for the year to date (155) already exceeds that for every full year of the Merger Regulation's[46] operation except 1997 – the total for the whole of which (172) appears likely to be substantially exceeded. Similarly as regards Decisions. There were 106 Decisions disposing of cases under the Regulation's main provisions (ie Articles 6, 8 and 9) – an increase of over 45% on the previous four-month period and bringing the total for the year to 178, an increase of nearly 60% on the figure for the whole of 1997 (itself a record).

These figures speak for themselves as regards the demands placed by the current economic situation on the Community's merger control system and the institutions and individuals responsible for its operation. Nor – not that it should be expected - has the level of complexity of this caseload eased. There were two decisions to open a full, second phase investigation (Article 6(1)(c)). This compares with six in the previous period, though the total of 11 for 1997 as a whole still appears likely to be exceeded. Equally significant, there were also six cases in which commitments were accepted in Phase I under the newly-introduced provisions (see last Newsletter), bringing the total to eight. In one further case the parties withdrew their notification and decided not to proceed with the operation after being advised by the Merger Task Force that it raised serious competition issues – a situation that has occurred increasingly of late. There were also five Decisions disposing of cases following a second phase investigation (Article 8): two prohibitions and three to allow the completion of the transaction – one of them subject to commitments from the parties to remedy the competition problems that the Commission had identified.

The two prohibitions concerned a major project in the digital TV market, principally in Germany[47]. The Commission's decision to prohibit (a power previously used in only eight cases since the Regulation's inception in 1990) was essentially motivated by the need to prevent foreclosure of this important emerging consumer market to other potential suppliers - notably of set-top digital decoder technology, and films and other programming; one or other of the parties having a very strong position in each of the sectors concerned. The Commission's attempts to reach agreement with the parties on satisfactory undertakings to remedy the competition problems so that the deal could go ahead, proved unsuccessful; prohibition was the only alternative.

The second keynote is, of course, initial experience in the operation of the amendments to the Regulation[48] and of the new Implementing Regulation[49], and the revised versions of the related Commission Notices[50] (all introduced in March). A revised version of the 'Yellow Book' (containing the texts of the Regulations and associated Notices) should be available, at least in English and possibly in other languages, by the time this Newsletter is published. A revision of the Notice on Ancillary Restrictions is also under way.

Whilst it is still too early for a comprehensive assessment of the impact of these changes, some points of interest are already emerging.

Perhaps most important is the success (see statistics above) of the new power to resolve problematic cases by means of formal commitments without a full second phase investigation. This is proving advantageous to all concerned. Parties now have the opportunity of obtaining rapid clearance for their transactions, even in cases which raise potentially serious issues of

46 Council Regulation (EEC) No 4064/89

47 V/M 993, Bertelsmann/Kirch/Premiere; IV/M 1027, Deutsche Telekom/Betaresearch; also discussed below.

48 Council Regulation (EC) No 1310/97

49 Commission Regulation (EC) No 447/98

50 For details, see Competition Policy Newsletter 1998 Number 2, page 63

dominance – provided of course that the problems can be quickly identified and a full and effective remedy rapidly developed and put in place. For its part the Commission can save most of the considerable resources that would be needed for a Phase II case. Not all competition problems can be resolved in this way, of course, especially given the short timescale – for example, commitments must be submitted within three weeks of the notification. Moreover it should be emphasised that notifying parties wishing to avail themselves of this possibility should not do so unless they are prepared to make a frank acknowledgement of the problem at an early stage (some have done so even before notifying) and to cooperate fully with the Commission in the search for a solution. Otherwise disappointment, and a Phase II investigation, are likely to follow.

The new provisions for the treatment of 'full-function' joint ventures (see previous issue, page 63) are also working well. Although no cases which were decided in the period involved significant coordination between the parents on relevant markets (Article 2(4)) – and would, accordingly, have previously fallen wholly outside the Merger Regulation - the issue was examined in detail in a number of cases, and was being considered in several more at the end of the period. All of the decided cases concerned joint ventures in the telecommu-nications and related fields such as Internet services. This reflects the rapid growth in the development of this sector, and the wish of the (often very large) enterprises within it to combine some of their activities in order to offer new 'packages' of services to their customers; in some cases, across national borders.

Another important change to the Regulation concerned the suspension period within which a notified transaction could not be implemented without special dispensation from the Commission (Article 7(4))[51]. Initial experience confirms the desirability of allowing the Commission a measure of flexibility by comparison with the previous situation. The suspension (which now automatically applies throughout the period of examination) can now be lifted in a slightly wider range of circumstances than before, where a derogation could only be granted if maintaining the suspension would be likely to cause 'serious damage' to one or more of the undertakings concerned. The Regulation now provides for the Commission to make a balanced assessment of all relevant factors, including effects on third parties and the threat to competition posed by the concentration. A derogation of the new type has been granted in two cases since the provision came into force. Details are confidential, but the effect of certain provisions of national law as regards public bids, and the clear absence of risk of any significant anti-competitive effect arising from the merger, were material factors. In a number of other cases, the parties decided not to proceed with a formal request for derogation after discussing the prospects with the Task Force.

The supplementary turnover thresholds[52] – designed to address the problem of multiple notifications of the same transaction to several national authorities – also appear to be having the expected effect; eight cases in all had been notified by the end of the period, broadly in line with the Commission's estimates of the likely impact.

As well as its wide-ranging work on individual cases and on the impact of the changes to the legislation, the Task Force has also been examining a number of more general policy and procedural issues. Of these perhaps the most significant are the issues concerned with the treatment of oligopoly (or 'joint/collective dominance') under the Regulation. These issues have arisen more particularly in the context of the judgment of the ECJ in *Kali u. Salz,* reported in the last Newsletter[53], but they are also of more general significance in the light of the ongoing globalisation of competition – as reflected in cases such as *Boeing/McDonnell Douglas* and *Worldcom/MCI*[54] - and the recent phenomenon of 'mega-mergers', involving the bringing together of major firms who are often the main competitors in sectors that are already heavily-concentrated. Such developments have potentially significant consequences, alike for the substance of a European merger control system and for its organisational structure and operating methods; assessing them and deciding on an appropriate response will form an important part of the Task Force's future work programme. At the same time, there is also a need, becoming more pressing in the light of the continuous growth in the workload, to focus on ways of optimising the use of the Commission's merger control resources. Accordingly

51 For details, see previous Newsletter, page 62

52 Regulation (EC) No 1310/97, Article 1(1)(b)

53 At pages 38-42

54 IV/M. 1069, 08.07.98 – see also elsewhere in this Newsletter

work is currently underway on exploring options for streamlining and simplifying the treatment of the many cases which *prima facie* are unlikely to raise competition problems.

Important Decisions

Phase II Cases

Of the **Article 8 Decisions**, (ie following a Phase II investigation) those on the two digital TV cases, already referred to, are probably the most significant.

The first major Phase II decisions concerned two proposed concentrations in the German pay-tv sector. In a first step *CLT-UFA*, a joint venture between Bertelsmann AG and Audiofina SA, and Kirch, the leading supplier of cinema films and TV entertainment programmes in Germany, would have acquired joint control by of the German pay tv-provider *Premiere* and the German company *BetaDigital*. In a second part of the operation, *CLT-UFA*, *Kirch* and *Deutsche Telekom* would have taken over the German company *Beta-Research*. The aim of the proposal was to develop Premiere into a joint digital pay-tv channel and marketing platform using Kirchs current digital TV activities and its "D-box" technology. BetaDigital should have provided the technical services for the provision and broadcasting of pay-tv programmes.

After a first examination of the operation the Commission identified serious concerns in the markets for pay-TV and related services in Germany on a number of issues. The concentrations were notified separately but later on handled in parallel because together they would have set the framework for digital pay-TV in Germany. Premiere would have achieved a monopoly position as programme platform and as marketing platform. BetaDigital would have achieved a dominant position for technical services for pay-TV and for satelites and by Deutsche Telekom for its cable network. At the same time, Deutsche Telekom would have strengthened its dominant position in the cable network market. At the end of January 1998 the Commission announced to open detailed investigations on these proposed concentrations. On 27 May 1998 the Commission decided to prohibit both operations.

The proposed operations would have led to the creation or strenghtening of dominant positions on the markets for pay-TV, technical services for pay-TV and cable networks.

Currently Premiere and DF1 are the only providers of pay-tv in Germany. Through the merger Premiere would have achieved a dominant position on the market for pay-TV in Germany and in the German-speaking area. The concentration would also have involved a problem regarding market access of potential competitors. The combination of the important program resources of Kirch and CLT-UFA and the subscription base of Premiere would have prevented that an alternative broadcasting and marketing platform could have developed in the German pay-tv-market. After the merger Premiere would have become permanently the only pay-TV broadcasting and marketing platform in Germany which would have been in a position to determine the conditions under which other broadcasters could enter into the pay-TV market.
With regard to the market for technical services for pay-TV BetaDigital would have attained a lasting dominant position on this market for the satellite sector. Deutsche Telekom would have become permanently the only supplier of technical services for pay-tv in the cable network. All current providers of digital pay-TV and Deutsche Telekom as the future provider of technical services in the cable sector were committed to use the Beta-access technology and the d-box decoder, which operates with a self-contained (proprietary) encryption system. Since the development of an alternative decoder infrastructure was not very likely, other service providers would have to use the d-box decoder and the Beta access technology and would depend on obtaining a licence for this technology from Beta-Research. BetaResearch could thus have prevented through its licence policy that other service providers could enter the market. Moreover, Bertelsmann, Kirch and Deutsche Telekom would have controled the further development of the decoder technology.

With regard to the market for cable networks Deutsche Telekom continues to hold a dominant position on this market since it controls the lion's share of the cable network on the netlevel 3. Broadcasting of cable tv takes place on the netlevel 3 and netlevel 4 of the cable network. On the netlevel 3 Deutsche Telekom supplies 16.5 million out of the total of 18.5 million cable-tv-households whereas on the netlevel 4 Deutsche Telekom supplies about 1/3 of the tv-households and about 2/3 are supplied via private cable networks. The transaction would have significantly restricted the scope for competition on the part of the private cable network operators and as a result strengthened Deutsche Telekom's dominant position on the

cable network in Germany on a lasting basis. On the basis of the structure of the proposed concentration the private cable operators would have been deprived of the chance to participate in the added value chain of digital tv since Deutsche Telekom had adopted a transparent transmission model for digital pay-tv. The consequence was that the private cable operators would have had no prospect of securing Premiere's agreement to a marketing model of their own which would have allowed them to finance the necessary investments for further development of the cable networks.

The third major Phase II decision concerned *Worldcom/MCI*. At the time of its announcement the plan to effect a US$37 billion merger between these two US telecoms companies was the largest merger plan in corporate history. The case was notified to the EU and US competition authorities. After an initial assessment of the notification, the Commission declared the notification incomplete, on the basis of insufficient information about possible product/service markets in the Internet sector. The information requested was received in the early part of 1998, but was not sufficient to resolve the Commission's concerns about the impact of the merger in this area, and second phase proceedings were opened. After a full investigation the case was cleared, subject to the carrying out of commitments from the parties, on 8 July after the receipt of undertakings jointly offered to the US DOJ and the EU, which involved the divestment of MCI's Internet activities, and represented the largest divestment in anti-trust history.

This was the first major investigation by the Commission of a merger of significant players in the Internet sector. The main issue for consideration was whether the merger would give the parties concerned a dominant position in the market for the supply of universal connectivity, ie the ability to offer access to anywhere and everywhere on the Internet, without having to pay others to complete the connections. Although the parties initially argued that the Internet was a 'free for all' in which any player, no matter how large or small, could set himself up to offer such service, it became clear on closer examination that it was a hierarchical structure, with only a few comparatively large players capable of offering such service, of which the merging parties were two of the biggest providers.

Assessment of the case was hampered by the lack of publicly available, reliable information, and the Commission had to organise, along with the US Department of Justice, collection of information from market players. This confirmed that the parties enjoyed a relatively large market share. As a result of 'network effects' - the phenomenon whereby the attractiveness of one network to subscribers relative to a competing work relates to the size of the network - the size of the combined entity's network would have been such that they would have been in a position to dictate terms to all other competitors who needed interconnection.

The Internet by nature is a cross-border phenomenon and international in scale. The case was marked by particularly close cooperation between the EU and the US Department of Justice, which extended to co-ordination of information requests, the presence of DOJ observers at the Oral hearings in Brussels, joint negotiations with the parties on remedies, as well as coordination of market testing.

The remedy offered by the merging parties was the removal of the competition problem by the removal of the overlap, but in a way designed to maintain existing conditions of competition by ensuring the divestment was to a new entrant, rather than to an existing player in the same market. The parties offered the same undertaking jointly to the Commission and the US Depart-ment of Justice. The means of enforcing the remedies had to reflect the different procedures of the US Department of Justice and the Commission, and although the Commission took powers to appoint independent trustees to oversee and if necessary to carry out the divestment, these powers were held in reserve while the parties were given the opportunity to complete the divestment, under the supervision of the US Department of Justice, before closing the merger.

The other two Phase II cases on which final decisions were reached during the period were cleared. One is of interest as an example of the need, on occasion, to make the kind of detailed market analysis that can only be effectively undertaken in the longer timescale of a Phase II case, in order to establish whether or not a dominant position would be created. The other concerns the Commission's approach to the question of oligopoly/duopoly in merger cases.

In *ITS/Signode/Titan*[55], cleared on 6 May, the Commission assessed competition in the supply of steel and plastic strapping in Western Europe following the completion of

[55] IV/M 970

this joint venture. Whereas the initial examination of the case suggested that merger could lead to dominance in the steel strapping sector, after extensive enquiries of customers and competitors, the Commission found that plastic strapping could be readily substituted for steel in many applications, without cost penalty, so that an analysis on the basis of a product market combining both types was appropriate. The geographic market was found to be Western Europe-wide, and in this market the operation would lead to an aggregate market share for the parties of around 40%. An examination of the strength of competitors showed that although the parties would, after the merger, be by some way the largest supplier, with a comprehensive product range, other competitors could also offer a satisfactory range and possessed the technical expertise. Although entry into steel strapping was quite difficult, plastic strapping was relatively easy to produce and market, and growing demand in that sector (by contrast with the steel variety) would encourage entry and expansion. There was also some evidence to suggest that customers could exercise some countervailing power in the event of any attempt by the parties to raise prices above the competitive level. Many customers were large firms with sophisticated purchasing operations. The product was homogenous and this, together with the important role played by distributors, made it less likely that the parties could exploit their position by discriminating against smaller users. For these reasons the Commission decided to clear the transaction.

In *Price Waterhouse/Coopers & Lybrand*,[56] cleared on 20 May, the Commission examined the possibility that the proposed merger would create collective – oligopolistic or duopolistic - dominance, as well as the more usual concern over dominance by a single firm. The market in question was that for the supply of auditing and accounting services to large companies. This was found to be a distinct product market because for such companies, only accountancy and audit firms with very extensive resources and specialised expertise, wide geographic spread, and a strong reputation in the world's financial markets, would be able to provide the nature and quality of service they required. For these customers, the market comprised few suppliers – essentially, only the so-called 'Big Six', of whom the parties were two (the others being Arthur Andersen, Deloitte Touche Tohmatsu, KPMG, Ernst and Young). This market was found to be national in geographic scope, in view of differing national requirements for statutory audits and the professional qualifications of auditors and accountants, together with the need for suppliers to have a local presence in the country concerned.

The Commission found that the risk of single-firm dominance was adequately constrained in view of the parties' combined market shares of less than 40% in any Member State and by the presence of the four other large firms which would remain. Their behaviour, and the potential for clients to exercise a degree of countervailing power through the customary use of long-term contracts and tende-ring processes – by which an unsatisfactory incumbent could be excluded for years to come – implied a reasonably competitive environment. (A possible merger between another two of the Big Six – KPMG and Ernst & Young – was also under consideration earlier in the year but was abandoned after the Commission opened Phase II proceedings in February.)

On the oligopoly/duopoly issue, the Commission examined the situation according to already-established criteria.[57] These are, principally, that collective dominance is more likely to arise where demand growth is low or negative and demand inelastic relative to price, and on the supply side, that besides relatively high concentration, there are incentives and possibilities for suppliers to engage in parallel pricing and other oligopolistic behaviour – notably, significant entry barriers, mature production technology, structural links between suppliers and high market transparency with a homogenous product.

The Commission found some of these characteristics to be present. Demand was effecti-vely stagnant and price elasticity low – customers have to have a proper audit and have only a limited choice of supplier – with a homogeneous product in which there was little scope for innovation, and for which prices were relatively transparent. In some countries, audit fees had to published in the customer's Annual Report, and staff costs could readily be ascertained from recruitment advertising and staff transfers. Although there were no direct structural links between the Big Six, there were regular contacts between them via the institutions responsible

56 IV/M 1016

57 cf IV/M 619, Gencor/Lonrho, 1996.

for self-regulation of the accountancy/audit sector, in which the major firms had a leading role in setting the professional standards to be applied in carrying out audit and other accountancy work. This influence could facilitate the creation of a system which favoured the operations of those firms and hence contribute to the creation of a collective dominant position.

However the Commission found no firm indications that such a position existed at present or was likely to ensue after the merger. Other things equal, the likelihood of oligopolistic dominance decreases with the the presence of a number of participants, since maintaining and enforcing the necessary coherence among the participants gets by definition more difficult. Customers did not appear to believe that oligopolistic conduct was already occurring. There was found to be a degree of movement of business by customers among the Big Six, notwithstanding the long-term nature of most audit relationships, and no reason why that should not continue or even increase.

As to the creation or reinforcement of a duopoly between the merged entity and one of the other Big Six companies, the Commission found that the abandonment of the proposed KPMG/Ernst & Young merger removed the otherwise substantial risk of joint dominance by the two biggest firms. That being so, the difference in the shares of the second- and third-largest remaining competitors after the present merger would not be large (generally below 10%). This would in the circumstances make it difficult for Price Waterhouse/Coopers & Lybrand to successfully adopt parallel behaviour with any one of them, since to do so they would have to neutralise the other (and probably some of the smaller competitors as well). 'Multi-firm' parallelism leading to duopoly also appeared unlikely. The parties would have to match the behaviour of a different competitor in different national markets, since the competitors' shares varied significantly as between those markets. A competitor would be unlikely to accept the benefits of parallelism with the merging parties in one country when such behaviour with another competitor elsewhere was working to its detriment.

In these circumstances, and also having regard to the judgment of the Court in *Kali u. Salz* (see previous Newsletter) – which emphasised that there was a particularly strong burden of proof on the Commission in cases where collective dominance was in issue – the Commission decided to clear the merger.

Phase I Cases

Probably the most interesting cases decided at Phase I in the period were those – six in all – which were cleared subject to formal commitments by the parties to remove the risk of dominance which the Commission's initial analysis had found to exist. As is clear from, among things, the fact that two cases were made the subject of Phase II proceedings during the period, the possibility of clearance with undertakings at Phase I is a complement to the existing Phase II procedure, not a replacement for it, especially where the issues involved are complex and facts uncertain, or where the Commission considers it unlikely that any remedy short of prohibition will suffice. And as mentioned above, the procedure, and especially its short timescale (only two weeks, in total, longer than the normal first phase) places constraints on the parties and the Commission alike.

A clear theme running through these 'Phase I undertakings' cases is that the competition problem that was found was clearly identified at an early stage and was limited to a specific, and usually comparatively small, aspect of the overall merger transaction. Consequently a structural remedy could be readily developed and implemented. For example, in *Neste/Ivo*[58] the merger would have combined a monopoly in natural gas distribution in Finland (via Gasum) with Ivo's leading position in electricity production and distribution there; the remedy was to remove Neste's controlling interest in Gasum. In *Allianz/AGF*[59], where the overlap of concern was in the field of credit insurance, the remedy was to require AGF to dispose of its stake in its existing subsidiary to a suitable and unconnected buyer, as well as removing all personal personal links between AGF and the company and not to exercise its voting rights until the divestiture was completed. In *Akzo Nobel/Courtaulds*[60] the main problem arose in connnection with Courtaulds's aerospace coatings business, acquisition of which would create a market share of c.80% in the EEA. The parties undertook to dispose of this business, and the associated aerospace sealants business – in which possible concerns had been raised by third parties at a late stage in the investigation - to a suitable independent buyer, or alternatively to dispose of Akzo Nobel's stake in ADAF (an existing joint venture in the same sector) to the other j.v

58 IV/M 931, 02.06.98

59 IV/M 1082, 08.05.98

60 IV/M 1182, 30.06.98

partner. This disposal effectively removed all possibility of overlaps which might cause competition concerns, and was accordingly accepted.

In the other two cases, slightly less straightforward remedies were accepted. In *Thyssen/ Krupp* [61] the overlap of concern arose in the lifts sector, where Thyssen and Kone (in which Krupp held a 10% share and certain other rights and privileges) were among only four significant suppliers in Europe. The parties themselves identified this as a potential problem area in contact with the Commissio at the prenotification stage – which considerably increased the prospects of a satisfactory outcome at Phase I. Krupp undertook to give up permanently its right to appoint a Director to the Board of Kone, and its privileges in regard to the further acquisition of Kone shares; also to obtain the annulment of non-compete arrangements between the two companies. The Commission considered these measures sufficient to ensure the continued existence of four effectively independent competitors in the relevant market, thereby removing the competition concerns.

In *Alcatel/Thomson – SCS* [62], a joint venture in the supply of satellites, the key competition issue was the vertical one arising from the leading position of a Thomson subsidiary (TTE) in the upstream market for the supply of travelling wave tubes (TWTs), an important component of a satellite's payload section, when combined with the joint venture's significant share in the supply of complete satellites. (In this case the problem was also brought to the Commission's attention at an early stage, by a complainant.) In the circumstances, however, divestiture of TTE would not have been feasible; instead, the parties undertook to provide a means whereby third parties could be assured of obtaining TWTs on non-discriminatory terms by comparison with SCS. The measures proposed included: an undertaking not to take any steps to integrate the TWT activities of TTE with those of SCS or to transfer them to SCS without authorisation from the Commission; to create a special committee in TTE which would monitor and report to the main Board on all substantial proposed TWT sales, such reports to be provided also to the Commission; and automatic recourse to an independent arbitrator, namely the European Space Agency, in the event of any dispute. These undertakings were found to provide an acceptable remedy (after appropriate 'market testing' among interested parties and consultation with Member States, as in all cases where undertakings are offered) and the operation was accordingly cleared on that basis.

In *Exxon/Shell*,[63] the Commis-sion found there to be significant competition problems in the supply of viscosity index (VI) improvers, arising from this joint venture between the two oil companies in the fields of lubricant and fuel additives. VI improvers are used in the manufacture of, in particular, lubricants, to improve their performance. The joint venture's share in an EEA market for VI improvers would have exceeded 50%. Accordingly, Exxon undertook to divest, within a limited time - the greater part of its VI improvers business to a specified third party (Chevron) or to another buyer acceptable to the Commission.

One other case, in which undertakings were considered, but which was in the end withdrawn and abandoned by the parties, is perhaps worth mentioning. In *Pakhoed/Van Ommeren*[64] an overlap of concern was found in the markets for storage of vegetable oils, chemicals and petroleum products in the ARA (Amsterdam, Rotterdam, Antwerp) harbour area. Talks between the parties and the Commission resulted in a satisfactory divestment solution being found for the first two markets, but not for petroleum products, in which the parties would have a market share of nearly 90% in Rotterdam. Whether or not this narrower geographic market for petroleum products was approriate (as, in contrast to the parties, third parties contended it was) was in the Commission's view a complex issue which could only be properly clarified in the course of a full Phasc II investigation. In the event, however, the parties decided, shortly before the deadline for a Phase I decision, to abandon their merger plan rather than offer further divestment to address the Commission's concerns.

Full Function Joint Ventures

As stated above the cases in which the potential application of Article 2 (4) was considered have been in the telecommunications and internet sectors. For a further description of those cases see contribution by Jonathan Denness of Directorate C on page 30 above.

61 IV/M 1080, 02.06.98

62 IV/M 1185, 04.06.98

63 IV/M 1137, 08.07.98

64 IV/M 1145, notified on 14.05.98

The Kali+Salz-case – the re-examination of a merger after an annulment by the Court

Nicole HACKER, IV-B-4

(1) Background

With judgement of 31 March 1998 the European Court of Justice annulled the Commission's decision in the case Kali+Salz/MdK/ Deutsche Treuhand. The case came before the Court as an appeal against the Commission decision of 14 December 1993 under the Merger Regulation, approving a concentration by which the potash and rock salt activities of Kali+Salz AG and of Mitteldeutsche Kali AG (MdK) should have been combined in a joint venture between Kali+Salz AG and the Treuhandanstalt. The Commission granted clearance following a second phase investigation, subject to compliance with commitments entered into by the parties vis-a-vis the Commission. The aim of the commitments was to bring an end to existing co-operation between Kali+Salz AG/MdK and Société commerciale des Potasses et de l'Azote (SCPA), a subsidiary of the French group Entreprise Minière et Chimique, thus resolving the Commission's concerns at the creation of a collective dominant position on the part of the merging parties and SCPA.

The Court confirmed that Article 2 (3) of the Merger Regulation also applies to concentrations resulting in a collective dominant position. Nevertheless, the Court annulled the decision on the basis that the Commission had failed to establish that the concentration would give rise to a collective dominant position on the part of Kali+Salz AG/MdK and SCPA on the Community market apart from Germany. This is the first time a Commission decision under the Merger Regulation had been annulled[65].

Following the judgement, the Commission has re-examined the concentration and, after a new examination, decided to clear it in first phase. The re-examination of a concentration, which had been notified in 1993 and completed after the clearance by the Commission, raised procedural and substantive questions, in particular with respect to the start of the deadlines under the Merger Regulation and the factual basis for the new assessment.

(2) The deadline for a new examination pursuant to Article 10 (5) of the Merger Regulation

Article 10 (5) of the Merger Regulation provides that where the Court of Justice gives a judgement, which annuls the whole or part of a Commission decision, the periods laid down in this Regulation shall start again from the date of the judgement. This does, however, not mean that the period of one month for phase 1 proceedings laid down Article 10 (1) would start automatically after the date of the judgement. Article 10 (5) has to be seen in context with Article 10 (1). Pursuant to Article 10 (1) the one-month-period begins on the day following the receipt of the notification or where the notification is incomplete on the day after the receipt of the completed notification. Since Article 10 (5) does not explicitly state that the period of one month shall start again from the date of the judgement, this period can only begin when all the requirements of Article 10 (1) are met.

Under Article 10 (1) the event which triggers the one month period is the submission of a complete notification, i.e. a notification containing on the basis of the Form CO all the information necessary to enable the Commission to carry out a proper assessment of the case. Therefore, in an Article 10 (5) situation the question of the beginning of this period is closely linked to the question whether the Commission has to carry out an examination of the competitive impact of the concentration on an ex-tunc or an ex-nunc basis. As set out below, the only reasonable approach in this respect is an assessment ex-nunc. The original notification will normally not contain all the data necessary to allow an ex-nunc assessment. Therefore, it must be completed, in particular by providing the actual market data, before the one month period can start.

This was also the situation in the Kali + Salz case. Since the notification submitted by the parties in 1993 did not contain all the information necessary for a new examination of the concentration in 1998, it was regarded as incomplete. On 8 June 1998 the undertakings

65 For comments on the Kali+Salz judgement, see the article by F.E. Gonzalez-Dias, DG IV-B, in Competition Policy Newsletter 1998 Number 2 June

concerned provided the additional information required for a new examination of the notified concentration. Accordingly, the deadline for a new examination pursuant to Article 10(5) of the Regulation started on 9 June 1998.

(3) Ex-tunc or ex-nunc Examination

Where the Commission following a judgement has to re-examine a concentration the question arises whether it should examine the case on the basis of the original notification (ex-tunc) or on the basis of the actual situation (ex-nunc). For the new examination of the Kali+Salz/MdK/Treuhand-case the Commission chose a mixed approach.

(a) Concentration with Community dimension

The Commission had concluded in its decision of 14 December 1993 that the proposed concentration had a Community dimension and fell within the scope of the Merger Regulation. Since the decision had not been contested in so far, the Commission did not re-examine the question of its jurisdiction, but decided it on the basis of the original notification.

(b) Competitive Assessment

The competitive assessment, however, has to be made on the basis of the actual situation. It would not be justified if, for example, the Commission intervened against a concentration on the basis of "historical" data although the operation does not lead to competition problems under the today's conditions of competition. Therefore, the Commission has to examine whether on the basis of the actual conditions on the relevant markets and in particular the present position of the undertakings concerned on these markets the concentration would be compatible with the Common Market. In case of an annulment of the whole of its decision, the Commission has to redo the entire competitive assessment, including also those parts of the contested decision, which were upheld by the Court. In this respect, the Commission also has to re-define the relevant product and geographical markets.

The Relevant Markets

In its decision of 14 December 1993 the Commission had identified two distinct geographical markets for potash salt-based products for agricultural use: the German market, and the Community market apart from Germany.

Following a new examination the Commission came to the conclusion that with respect to the geographical market of potash salt-based products for agricultural use the German market and the Community market apart from Germany still have to be seen as distinct markets. Since imports in the German market were significantly below 10% in 1997, there is strong evidence that the German market still is not easily penetrable by imports. The Community market apart from Germany, however, was – and today still is – characterised by a significant trade exchange between the individual Member States which is in the view of the Commission a result of the essentially homogeneous conditions of competition in the community apart from Germany.

Situation in the German potash market

In its decision of 14 December 1993 the Commission had concluded that the concentration would have lead to a de facto monopoly of the joint venture on the German potash market. However, there was no causal link between the proposed concentration and its effect on competition since the identical worsening of competition was to be expected even without the concentration ("failing company defence").

On the basis of the new figures provided by the parties the joint venture still has a de facto monopoly position on the German market with a market share of almost 96 % in 1997. However, the conditions for the "failing company defence", as outlined in the Commission decision of 14 December 1993, would still be met.

In this respect, the Commission came to the conclusion that the "failing company-situation" cannot be re-examined on the basis of the actual situation. The application of the "failing company defence" was related to the very special situation that existed in 1993. In 1993 MdK found itself in such a disastrous economic situation that it would have withdrawn from the market in the foreseeable future if not taken over by another undertaking. The investigations of the Commission at that time had lead to the conclusion that the Kali+Salz AG was the only potential acquirer for MdK. Furthermore, the German market for potash salt-based products for agricultural use was sealed off against competition from the outside and Kali+Salz AG was the only competitor of MdK. Therefore, after MdK's withdrawal from the market

its market share would have accrued "automatically" to Kali+Salz AG.

This situation, however, cannot be re-assessed on a today basis since it does no more exist. After the clearance by the Commission MdK Aktiengesellschaft, which combined the potash and rock salt activities of the former German Democratic Republic, was transformed into a GmbH (company with limited liability under German law). Kali+Salz AG transferred its potash and rock salt activities to this company whose name was changed to K+S GmbH (K+S). The production facilities and other assets as well as the management of the former Kali+Salz AG and the former MdK had been merged to such an extent that a new economic entity was created. This newly created economic entity could today no more be divided in economic entities corresponding to the former Kali+Salz AG and the former MdK AG. Therefore, the question whether the conditions for the "failing company defence" are still met has to be regarded as an exception to the general rule. This is in particular true for the question whether or not there may be a potential alternative acquirer. Unlike the assessment of the competitive situation, the "failing company-situation" has to be decided also in the context of the new examination on the basis of the situation at the time when the concentration had been originally notified.

Situation in the Community apart from Germany

With respect to the Community market apart from Germany, the Commission had found in its decision of 14 December 1993 that the proposed concentration would have lead to the creation of a duopoly between Kali+Salz AG/MdK and SCPA. The Commission based its analysis on its finding that supply outside the Kali+Salz AG/MdK and SCPA grouping came from operators who did not appear to be able to attack the total market share of about 60% held by the duopoly and on the strong probability that there would be no effective competition between Kali+Salz AG/MdK and SCPA, in particular because of their long-standing close commercial links. Those links consisted essentially of the control of a joint venture in Canada, Pottacan, the co-operation of Kali+Salz AG and EMC/SCPA in the export cartel Kali-Export GmbH, and the long-established links on the basis of which SCPA provided almost all of Kali+Salz AG's supplies in France.

Following its new examination, the Commission reached the conclusion that in the current situation the concentration would no more give rise to a dominant duopoly on the Community market apart from Germany. The total market share of K+S and SCPA together lies meanwhile below 50%. Furthermore, the close commercial links between Kali+Salz AG and SCPA have been removed. According to the commitments entered vis-à-vis the Commission in 1993, K+S established its own distribution organisation in France and started to be active as an independent competitor. Also SCPA supplies for the first time potash in the German market. The export cartel has been ended voluntarily and the Kali Export GmbH has been liquidated. Finally, K+S sold its 50% stake in the joint venture in Canada. In these circumstances, the absence of effective competition between K+S and SCPA cannot be established.

(5) Summary

In case of the annulment of a Commission's decision under the Merger Regulation by the Court of Justice or the Court of First Instance

- the deadline pursuant to Article 10 (1) does not start automatically again on the day of the judgement, but only begins when the parties have provided the additional information required for a new examination, i.e. in particular the actual market data;

- in substantive terms the competitive assessment has to be based on the actual conditions of competitions in the relevant markets rather than on the "historical" situation;

- an exception from this general rule can exist in the case of re-examining the "failing company defence".

Développements les plus récents

Christian LEVASSEUR, DG IV-E-3

Energie

Accès négocié pour la transmission d'électricité en Allemagne (Verbändevereinbarung)

I. Accès au réseau électrique

Nous nous trouvons à l'aube de l'ouverture du marché intérieur de l'électricité prévu par la directive 96/92/CE (« directive électricité ») qui doit être transposée par la plupart des Etats membres avant le 19 février 1999. A l'approche de cette échéance, les dispositifs mis en place par les Etats se précisent et laissent apparaître une certaine diversité dans le choix des options qui leur sont offertes.

Par exemple, la directive prévoit deux possibilités - à savoir un accès « réglementé » ou un accès « négocié » - lors de la détermination des charges de transport ou de distribution susceptibles d'être facturées aux utilisateurs des réseaux par leurs propriétaires. En cas d'accès réglementé, les clients éligibles [66] se voient donner un droit d'accès aux réseaux sur la base de tarifs publiés alors que, en cas d'accès négocié, les Etats membres doivent prendre les mesures nécessaires pour que des négociations entre acheteurs du service de transmission (les utilisateurs du réseau) et vendeurs de ce service (les propriétaires de réseaux) aient lieu en vue de déterminer au cas par cas le prix applicable.

La loi qui transpose la directive électricité en droit allemand prévoit l'ouverture totale et immédiate du marché de l'électricité. Pour cela, elle envisage un système d'accès négocié aux réseaux de transport et de distribution tout en laissant la possibilité au gouvernement de réglementer ledit accès en cas de besoin.

Le choix de l'accès négocié aux réseaux dans un Etat qui, comme l'Allemagne, voit coexister plusieurs centaines de propriétaires de réseaux[67], a conduit le gouvernement à encourager la conclusion, par des organisations représentatives des principaux intéressés, d'un accord cadre définissant des principes communs de tarification. La Direction Générale de la Concurrence a examiné récemment cet accord (la Verbändevereinbarung, en abrégé « VV ») dans le cadre d'une procédure ex-officio qui a conduit à l'envoi aux parties d'une lettre dont les grandes lignes sont exposées ci-après.

II. Contenu de la Verbände-vereinbarung

La VV a été conclue le 22 mai 1998 entre les représentants de l'industrie électrique (Vereinigung Deutscher Elektrizitätswerke e.V. - VDEW) et les représentants de l'industrie consommatrice et/ou productrice d'électricité (Verband der Industriellen Energie- und Kraftwirtschaft e.V. - VIK et Bundesverband der Deutschen Industrie e.V. - BDI) pour une durée limitée au 30 septembre 1999.

L'accord définit les différents postes de tarification applicables en fonction des caractéristiques propres à chaque hypothèse de transmission. Parmi ces postes figurent, entre autres, le coût d'utilisation du réseau par niveau de tension, le coût de transformation d'un niveau de tension à un autre ainsi que le coût des prestations dites de « maintien du système » (réglage de tension, de fréquence,...). Ces postes font l'objet d'une facturation forfaitaire (principe du « timbre-poste ») une fois corrigés d'un facteur lié à la durée d'utilisation des installations.

Les critères déterminants pour la prise en compte (ou non) des postes de tarification reposent sur l'appréciation de la distance à vol d'oiseau entre point d'entrée sur le réseau et point de sortie ainsi que sur les niveaux de tension d'entrée et de sortie. La distance est utilisée ici pour évaluer le nombre de transformations vers un niveau de tension supérieur nécessaires à l'acheminement de l'électricité transmise, en partant du principe qu'un niveau de tension donné ne transporte de l'électricité que sur une distance limitée avant de la « faire passer » au niveau de tension suivant jusqu'à aboutir, le cas échéant, au niveau « haute-tension » seul susceptible de lui faire

66 C'est-à-dire ceux qui, dans le cadre de l'ouverture progressive du marché, ont le droit de choisir le fournisseur d'électricité de leur choix.

67 Dont 8 « grands » réseaux haute tension et plusieurs centaines de réseaux basse et moyenne tension (communes,...)

parcourir de longues distances. La transformation vers des niveaux de tension inférieurs et l'utilisation des réseaux qui en découle sont également évaluées lors du prélèvement de l'électricité ainsi transmise. Pour finir, la VV limite le montant des frais de transmission en ne prenant en compte que les seuls postes de facturation mis en jeu lors du prélèvement, évitant ainsi la tarification répétée d'un même poste.

Les prix correspondants aux postes de tarification forfaitaires ne sont pas fixés en commun mais sont à déterminer par chaque propriétaire de réseau en fonction des coûts qui lui sont propres en s'appuyant encore une fois sur des critères communs. Il faut noter que, si une transmission met en oeuvre plusieurs réseaux appartenant à des propriétaires différents[68], la facturation est limitée pour chaque poste à un prix moyen et qu'il n'y donc pas de cumul des prix de chaque réseau.

La VV ne se limite pas à ces principes de tarification forfaitaire mais va plus loin en fixant le prix d'une composante additionnelle indexée sur la distance et facturée en cas de transmission haute-tension sur une distance de plus de 100 km. Dans ce cas, la somme de 12,50 DM/kW*100km*an doit être ajoutée au coût de la transmission.

La VV contient également différentes dispositions relatives au calcul des prix de transmission en cas de multiplicité de points d'entrée ou de sortie du réseau (cas, par exemple, d'un producteur d'électricité disposant d'un parc de plusieurs centrales ou d'un consommateur industriel présent sur plusieurs sites), dispositions que nous n'examinerons pas en détail mais qui peuvent se résumer au calcul d'une distance minimale pondérée entre points d'entrée et de sortie.

Enfin, la VV prévoit une procédure d'arbitrage en cas de désaccord quant au contrat ou au prix d'une transmission et met en place les bases d'une négociation ultérieure devant aboutir à un nouvel accord valable après le 30 septembre 1999.

III. Analyse de la DG IV

La VV constitue un accord entre associations d'entreprises qui a pour objet et pour effet de définir des principes de tarification et - en haute tension au-delà de 100 km - un prix communs. L'accord présente à la fois une composante horizontale (les vendeurs du service de transmission entre eux au sein du VDEW) et une composante verticale (les vendeurs et certains de leurs acheteurs).

Dans son analyse, la Direction Générale de la Concurrence a considéré que les vendeurs du service de transmission étaient en concurrence et que d'éventuelles restrictions de concurrence étaient susceptibles d'affecter le commerce entre Etats membres dès lors qu'elles produiraient leurs effets à l'échelle de toute l'Allemagne.

La Direction Générale de la Concurrence – à l'instar du Bundeskartellamt qui lui aussi a examiné la VV - a fait connaître aux parties son évaluation *a priori* positive de l'accord tout en émettant quelques réserves relatives à certains éléments examinés plus bas. Il faut noter que l'ensemble de l'examen prit place sans que la VV eût connu d'application pratique. La nature complexe des règles définies dans l'accord et le caractère imprédictible de leur application sur un marché en pleine d'ouverture à la concurrence donnent à l'expression « *a priori* » tout son sens et justifient pleinement la prudence de langage utilisée à la fois dans les relations avec les parties et dans cette publication. La courte durée de la VV semble indiquer par ailleurs que les parties elles-mêmes considèrent leur accord plutôt comme une étape que comme un accord définitif.

Un accord positif...
En premier lieu, l'accord constitue une démarche concrète réunissant les propriétaires de réseau et certains utilisateurs en vue d'organiser les modalités pratiques de l'accès en prenant comme point de départ à la réflexion le fait que la transmission de l'électricité constitue un service échangé sur un marché comme les autres. Ceci constitue en soi une avancée importante par rapport à la situation passée où l'accès des tiers au réseau faisait l'objet de contentieux menés par nos homologues du Bundes-kartellamt.

- De plus, la coordination entre les propriétaires de réseau en vue d'élaborer des principes de tarification communs devrait bénéficier aux utilisateurs. En effet, les principes retenus reposent sur :

- une limitation du nombre de négociations entre utilisateurs et propriétaires de réseaux, ces derniers réglant entre eux les problèmes liés à la transmission d'électricité à travers plus d'un réseau. Ceci évite aux utilisateurs de devoir négocier avec plusieurs propriétaires de

68 On tient compte seulement des (deux) réseaux d'entrée et de sortie, donc sans inclure des réseaux éventuellement « traversés » (transit)

réseaux et constitue à ce titre un élément favorable déterminant pour le développement de la concurrence
- le partage de la tarification forfaitaire entre réseau d'entrée et réseau de sortie pour les transmissions mettant en oeuvre plus d'un réseau. Cette méthode évite l'addition pure et simple des coûts individuels de chaque réseau concerné par une transmission
- la prise en compte des postes de tarification mis en oeuvre en phase de prélèvement uniquement. Là encore cette méthode évite l'addition de coûts.

Enfin, les principes de tarification retenus par les associations ont le mérite d'être clairs, basés sur les coûts et parfaitement identifiables.

...qui appelle quelques réserves
Ces réserves peuvent être divisées en trois grandes catégories :

a) le fait, pour des concurrents, de fixer un prix en commun (composante distance au-delà de 100 km)

Les accords de prix constituent une des restrictions expressément visées par l'article 85(1) et ne sont en principe pas exemptés au titre de l'article 85(3). Cependant, dans le cas d'espèce, la Direction Générale de la Concurrence a pris en considération les éléments de fait propres à l'affaire et plus particulièrement :

- les coûts de transaction exceptionnellement élevés qui résulteraient d'une négociation individuelle entre un acheteur du service de transmission et chacun des vendeurs auxquels il devrait s'adresser en cas d'absence de la VV
- la rédaction même de la directive électricité qui prévoit expressément la possibilité pour le gouvernement allemand de réglementer les tarifs de transmission, ce qui aurait pour effet d'aboutir à une situation comparable – i.e. une méthode de tarification uniforme pour l'ensemble du pays – à celle résultant de la VV

b) les principes de tarifications eux-mêmes

Les aspects qui seraient susceptibles de donner lieu à des doutes quant à leur compatibilité avec les articles 85 et 86 du traité sont les suivants :

- la tarification indexée sur la distance opérée en haute-tension au-delà de 100 km pourrait avoir pour effet de dissuader la transmission sur de longues distances. Elle pourrait alors avoir un impact négatif non seulement sur le marché allemand de l'électricité mais aussi sur les échanges transfrontaliers.
- la prise en compte d'une distance minimale pondérée en cas de multiplicité de points d'entrée et/ou de sortie du réseau. Cet élément pourrait avoir pour effet de donner un avantage aux producteurs d'électricité qui ont à leur disposition un parc important et étendu géographiquement (par exemple, les grands producteurs déjà présents sur le marché). De plus, une pondération basée sur la distance pourrait avoir pour effet de partitioner le marché en zones géographiques où l'entrée ne serait pas rentable pour un producteur éloigné. D'un autre côté, cette pondération pourrait aussi être mise à profit par des "traders" en électricité qui, ayant constitué un portefeuille diversifié de contrats de production, profiteraient de la méthode pour réduire leur coût de transmission.

Ces deux aspects doivent être placés dans le contexte allemand où la plupart des propriétaires de réseaux sont également producteurs d'électricité et donc potentiellement sensibles aux développements attendus sur ce dernier marché.

c) le niveau de prix auquel conduit l'application de ces principes

Les simulations présentées par les parties font apparaître des niveaux de prix *a priori* supérieurs à ceux pratiqués dans d'autres Etats membres pour des transmissions comparables. Cette situation trouverait son origine dans la méthode de détermination des coûts choisie.

La Direction Générale de la Concurrence a fait connaître ses réserves aux parties à la VV mais sans toutefois engager de procédure devant conduire à l'interdiction de l'accord. En effet, comme il a déjà été exposé, la Direction Générale de la Concurrence a décidé d'observer les effets pratiques de l'accord afin de vérifier si ses réserves – qui reposent pour l'instant sur un examen théorique – se concrétisent et justifient donc une action de sa part. Malheureusement, à la mise sous presse de cet article, aucun exemple de transmission reposant sur la VV n'est connu de la Direction Générale de la Concurrence.

IV. Conclusion

Le traitement de ce cas par la Direction Générale de la Concurrence illustre le choix d'une

approche pragmatique en cette phase sensible de libéralisation du marché. Plutôt que de viser tout de suite à l'interdiction de tel ou tel aspect de la VV dont l'appréciation théorique laisserait planer des doutes en termes de compatibilité avec les articles 85 et 86, la Direction Générale de la Concurrence a préféré tenter de favoriser le développement du marché de la transmission d'électricité en s'abstenant et en se réservant l'adoption d'une position plus tranchée à la lumière de l'expérience acquise. En effet, le développement de ce marché de la transmission est un prérequis indispensable à la libéralisation souhaitée et sera sans doute appelé à constituer, en collaboration avec les autorités compétentes des Etats membres[69], un des thèmes centraux de l'action de la Direction Générale de la Concurrence dans les mois à venir.

Il est important de souligner également combien certains des principes retenus dans la VV pourraient servir de base à une réflexion plus large menée à l'échelon communautaire et ayant pour objet de trouver une solution au problème d'addition des coûts de transmission. Ce problème est susceptible d'apparaître en cas de transmission impliquant plus d'un propriétaire de réseau à l'échelon européen (par exemple : de la France vers l'Italie), et ce indépendamment de la méthode d'accès (négocié ou réglementé) adoptée par chacun des Etats membres concernés. Il consiste simplement en l'addition des coûts propres à chaque réseau (dans notre exemple, le réseau français plus le réseau italien), cette addition ayant pour effet de dissuader les utilisateurs de réaliser de telles transactions et donc de limiter les échanges intra-communautaires d'électricité.

C'est précisément ce problème que la VV tente – à l'échelle cette fois-ci d'un état – de régler en prévoyant un partage des coûts entre réseau d'entrée et réseau de sortie et en limitant les coûts forfaitaires pris en compte à ceux encourus lors du prélèvement. L'avenir nous dira si ce modèle peut servir à l'échelon européen. En tout état de cause, la Commission ne peut que rester attentive au problème d'addition et devra sans doute envisager l'adoption de mesures adéquates – reposant sur le droit de la concurrence ou sur d'autres instruments – afin d'y remédier s'il persiste.

69 Cf article 20(3) à 20(5) de la directive électricité ainsi que la récente Communication de la Commission relative à la coopération avec les autorités de concurrence des Etats membres, JO 1997 C313/3

L'encadrement des aides d'Etat à la formation

Adinda SINNAEVE, IV-G-1

I. Introduction

L'emploi est une des principales priorités de l'UE. Au sommet extraordinaire de Luxembourg les 20-21 novembre 1997, les Etats membres se sont mis d'accord pour lancer une stratégie pour l'emploi, dans laquelle la formation professionnelle occupe une place primordiale. En effet, la formation a été identifiée comme l'instrument-clé tant pour réintégrer les chômeurs dans le marché du travail que pour réduire le risque de chômage de ceux qui travaillent. Plus ces derniers bénéficient d'actions de formation continue, plus ils améliorent leurs qualifications, leur capacité d'adaptation et, partant, leur « employabilité ». Par ailleurs, au niveau global la présence d'une main d'œuvre qualifiée est un facteur important pour renforcer l'attractivité d'une région comme lieu d'investissement et la compétitivité des entreprises européennes.

L'effort à accomplir dans le domaine de la formation n'est pas une tâche que les entreprises peuvent remplir à elles-seules. Bien qu'une entreprise ait certainement un intérêt propre à investir dans la formation de ses travailleurs, son effort total tendra en général à être inférieur à l'optimum social. Dès lors, pour combler le « skills gap », des interventions de l'Etat peuvent être nécessaires. C'est là que le contrôle des aides d'Etat commence à jouer. Car lorsque l'Etat prend en charge une partie des frais qu'une entreprise doit supporter pour former ses travailleurs, cette intervention est susceptible de tomber sous les articles 92-93 du traité.

Afin de clarifier dans quelles circonstances des financements publics en faveur de la formation peuvent relever des règles de concurrence relatives aux aides et de définir les critères pour examiner la compatibilité de ces aides avec le marché commun, la Commission a adopté le 22 juillet 1998 un encadrement des aides à la formation. Comme les autres encadrements et lignes directrices en matière d'aides d'Etat, ce texte vise à rendre la politique de la Commission plus transparente et ses décisions prévisibles. Il répond aussi à un besoin des Etats membres qui, pour la mise en œuvre des « plans d'action nationaux » pour l'emploi, dont une partie concerne la formation, ont souhaité des clarifications sur la notion et le traitement des aides à la formation et sur la cohérence entre l'application des règles de concurrence et les objectifs communautaires en matière de formation.

II. Aides à la formation ou mesure générale

L'encadrement rappelle tout d'abord que seule une partie limitée des financements publics en faveur de la formation est susceptible de constituer des aides d'Etat au sens de l'article 92 § 1 du traité.

En effet, le budget qu'un Etat membre consacre à la formation concerne principalement des mesures générales qui n'entrent pas dans le champ d'application de l'encadrement. Le principal facteur distinguant une aide d'une mesure générale est l'élément de sélectivité ou de discrimination. Une mesure générale est en principe ouverte à toutes les entreprises dans tous les secteurs et ne pose donc pas de problèmes du point de vue de la concurrence, alors qu'une aide favorise certaines entreprises ou certains secteurs par rapport aux autres.

Ainsi, les mesures qui s'adressent directement aux travailleurs, indépendamment de l'entreprise où ils travaillent, et celles qui sont ouvertes à toutes les entreprises (par exemple un crédit d'impôt formation ou des mesures fiscales automatiques), constituent des mesures générales et ne sont donc pas visées par le présent encadrement. Il en est de même pour les systèmes de formation initiale, y inclus les contrats d'apprentissage et la formation en alternance. Même si l'Etat prend en charge une partie des frais de l'entreprise, il ne lui procure pas d'avantage par rapport aux autres entreprises, le vrai bénéficiaire étant l'apprenti. Par ailleurs, le système scolaire d'un Etat membre peut être tel que certaines professions ne sont accessibles que par le biais d'une formation donnée partiellement ou intégralement dans l'entreprise, alors que dans un autre Etat membre la même formation est donnée dans une école. Dès lors, les financements que l'Etat accorde aux entreprises dans le cadre d'une formation initiale qui, à sa complétion permet au bénéficiaire d'entrer dans le marché du travail, peuvent être considérées comme des mesures générales. Enfin, les projets

de qualification et de requalification des chômeurs ne relèvent pas non plus du contrôle sur les aides. Tel pourrait être le cas si le service d'emploi, à la demande d'une entreprise lui forme des chômeurs que l'entreprise aurait normalement dû former elle-même.

A cet égard, il convient de préciser qu'une mesure peut, tout en étant théoriquement d'application générale, revêtir un caractère spécifique lorsque les pouvoirs publics disposent, dans son application, d'un pouvoir discrétionnaire qui leur permet de moduler l'intervention financière en fonction des circonstances du cas.
Il est clair qu'en pratique la distinction entre une aide et une mesure générale n'est pas toujours facile à opérer. Ce problème n'est pas typique du domaine de la formation et dépasse les objectifs de l'encadrement. Tant que la notion d'aide n'est pas définie - et pour des raisons évidentes une définition exhaustive ne semble ni possible ni souhaitable - , sa contrepartie, la mesure générale, continuera aussi à se développer à travers la pratique décisionnelle de la Commission et la jurisprudence de la Cour. C'est pourquoi l'encadrement se limite à définir les principes, illustrés par des exemples, qui devraient permettre de transposer la logique développée à d'autres cas de figure.

III. Les critères d'appréciation des aides à la formation

Lorsqu'une aide publique favorise seulement certaines entreprises en réduisant les coûts qui leur incombent normalement pour la formation de leurs travailleurs, elle leur accorde un avantage par rapport à leurs concurrents et est susceptible de fausser la concurrence. Elle doit donc être notifiée à la Commission conformément à l'article 93 § 3 du traité. Dans l'examen de la compatibilité d'une aide à la formation la Commission a toujours suivi une approche très favorable. Comme pour d'autres types d'aides, la Commission prendra une telle position lorsqu'un domaine est caractérisé par des imperfections de marché que les aides contribuent à corriger. Ceci est particulièrement le cas pour la formation professionnelle, vu qu'elle produit de nombreuses externalités.

L'importance des externalités de la formation est liée principalement à la transférabilité des compétences qu'elle procure. Dans certains actions de formation dans les entreprises, une part substantielle bénéficie réellement aux travailleurs, au-delà de ce qui est nécessaire sur leur poste de travail, alors que d'autres formations répondent surtout aux besoins spécifiques de l'entreprise, l'avantage pour le travailleur étant très réduit. Afin de tenir compte de cette différence tant pour le travailleur qu'en termes de concurrence, l'encadrement introduit une distinction entre la formation spécifique et la formation générale. Le premier type de formation se limite à procurer des connaissances nécessaires sur le poste de travail du travailleur et peu transférables à d'autres entreprises (par exemple procédés internes, propres à l'entreprise). La formation générale, par contre, dépasse ce qui est uniquement ou principalement applicable sur le poste de travail et procure au travailleur des compétences largement transférables (par exemple cours de langues, cours d'informatique généraux, ...). Elle améliore donc effectivement le niveau de qualification, « l'employabilité » et « l'adaptabilité » du travailleur. Ainsi, ce type de formation apporte une contribution plus importante à la réalisation d'objectifs communautaires en matière d'emploi. C'est pourquoi elle peut bénéficier d'intensités d'aides beaucoup plus élevées qu'une formation spécifique à l'entreprise.

Le caractère transférable des compétences acquises par la formation devra être apprécié au cas par cas. Cependant, dans certaines circonstances la transférabilité peut être présumée, par exemple si la formation est sanctionnée par un diplôme ou un certificat reconnu par l'Etat membre concerné, ou si la formation est organisée dans le cadre d'une coopération entre plusieurs entreprises.

A part le caractère de la formation, ce sont la taille de l'entreprise et la région dans laquelle elle est située qui déterminent le niveau d'aides autorisables. Les statistiques montrent pour les PME et pour les régions assistées un sous-investissement significatif en matière de formation. Dès lors une modulation des intensités d'aides admissibles en fonction de ces éléments est justifiée. Ceci donne le résultat suivant :

PME	Formation spécifique	Formation générale
en dehors d'une région assistée	35	70
Dans une région assistée au titre de l'article 92 § 3 point c	40	75
Dans une région assistée au titre de l'article 92 § 3 point a	45	80

Grandes entreprises	Formation spécifique	Formation générale
en dehors d'une région assistée	25	50
Dans une région assistée au titre de l'article 92 § 3 point c	30	55
Dans une région assistée au titre de l'article 92 § 3 point a	35	60

Par ailleurs, une majoration de 10 points est encore prévue lorsque les bénéficiaires de la formation sont des catégories de travailleurs défavorisés, qui rencontrent des difficultés particulières sur le marché du travail (par exemple, travailleurs âgés, handicapés, ...).

Les intensités d'aides admissibles se calculent par rapport aux coûts éligibles du projet. Ces coûts éligibles concernent notamment les coûts de personnel des formateurs, les matériaux et l'équipement au prorata de son utilisation pour le projet de formation. Par ailleurs, il convient de noter que l'encadrement permet d'inclure aussi dans les coûts éligibles les salaires des participants à la formation pour 50 % du coût total éligible. Par rapport à la pratique actuelle, où les salaires des participants ont généralement été exclus, il s'agit là d'une évolution motivée par l'objectif de tenir compte de manière concrète de la politique de la Commission en matière d'emploi et de formation. Les coûts de personnel des participants à la formation représentent une grande partie des frais du projet. Dès lors, leur inclusion partielle dans les coûts éligibles semble nécessaire si l'aide d'Etat veut jouer un rôle substantiel dans la décision de l'entreprise de donner cette formation, et fait preuve de l'encouragement actif de la formation par la Commission.

IV. Entrée en vigueur et mesures utiles

L'encadrement entre en vigueur à la date de sa publication au Journal officiel des Communautés européennes (prévue pour octobre 1998). Il ne porte pas atteinte aux régimes déjà autorisés par la Commission. Toutefois, dans l'objectif d'assurer une égalité de traitement, la Commission procédera à un réexamen de ces régimes sur la base de l'article 93 § 1 du traité.

Pour les régimes d'aides à la formation existants, la Commission propose aux Etats membres de lui notifier tous les régimes qui ne seraient pas expirés avant le 31.12.1999, ce qui permet aux Etats membres de bénéficier d'une période transitoire. Par ailleurs, elle propose de lui notifier à partir du 1.1.1999 tous les cas d'application d'un régime approuvé dépassant 2,5 millions d'écus sur une période de 3 ans.

V. Conclusion

Dans l'encadrement des aides à la formation, la Commission a confirmé son approche traditionnellement favorable pour ce type d'aides. En même temps, afin de tenir directement compte de la stratégie d'emploi, lancé par l'UE, elle a nuancé cette position en modulant les intensités admissibles en fonction des effets de la formation sur l'employabilité des travailleurs. Pour un programme de formation générale dans des PME situées dans une région assistée au titre de l'article 92 § 3 point a, qui forment des catégories de travailleurs défavorisés, les aides peuvent atteindre 90 % des coûts éligibles. Par contre, une formation spécifique dans une grande entreprise hors les régions assistées, ne pourra bénéficier que de 25 % d'aides. Cette position plus différenciée vise à intégrer concrètement les objectifs communautaires en matière d'emploi et de formation dans la politique de concurrence et, partant, d'avoir une politique globale cohérente.

Dans le futur, la Commission a l'intention d'adopter un règlement d'exemption par catégorie pour les

aides à la formation. L'encadrement lui permettra de gagner une expérience suffisante avec l'application des nouvelles règles. Une fois acquise cette expérience, elle traduira les critères définis dans l'encadrement, avec les modifications nécessaires, dans un règlement d'exemption de sorte que les aides remplissant ces critères ne doivent plus être notifiées à la Commission. Cette simplification de la procédure a été rendue possible par l'adoption, le 7 mai dernier, d'un règlement du Conseil habilitant la Commission à exempter certaines catégories d'aides « horizontales » de l'obligation de notification préalable (voir JO L 142 du 14.5.1998).

Principaux développements du 1er mai au 31 juillet 1998

Madeleine TILMANS, IV-G-1

The Commission decided that Germany must apply the multisectoral framework on regional aid to large investment projects

As explained in the last Newsletter of 1997, the Commission adopted the European Union (EU) "Multisectoral Framework on regional aid to large investment projects" in December 1997 (OJ C 107 of 7.4.1998), with the aim of reducing excessive amounts of regional aid to very large mobile capital-intensive investments, which seriously distort competition and jeopardise jobs elsewhere in the EU.

The Framework requires Member States to notify planned aid to large projects above certain thresholds. The Commission will assess the aid using a formula combining a number of criteria, notably the capacity situation in the sector concerned, the degree of direct and indirect jobs created by the project, and the investment cost per job created. The new rules will not ban aid in individual cases, but rather allow for adjusting regional aid levels in accordance with these criteria. Given the notification thresholds, the Framework will apply only to a very limited number of projects and will not therefore bind the freedom of Member States to develop regional policy in most cases.

With the exception of Germany, all the Member States agreed on the application of these new rules, which came into force on 1 September 1998. The Commission, therefore, opened on 20 May 1998 an Article 93(2) procedure in order to appreciate the reasons pointed out by Germany for its refusal to accept the Framework. On 14 July, the Commission closed the procedure and decided that Germany must comply with the notification obligation of the Framework.

The Commission's powers to investigate individual cases of regional aid had hitherto been limited to those sensitive sectors such as steel and motor vehicles which operate under special sector-specific rules. The Multisectoral Framework will for the first time subject the largest cases of such aid in other sectors to examination by the Commission even when granted under a scheme already approved by the Commission.

Danemark - La Commission approuve des aides d'Etat en faveur du secteur du gaz naturel.

La distribution du gaz naturel est assurée au Danemark par l'entreprise publique DANGAS, chargée de l'importation, du transport et de la vente du gaz naturel et responsable de l'intégralité du réseau de gaz naturel au Danemark. La distribution en est assurée par cinq sociétés régionales qui se fournissent auprès de DANGAS et avec lesquelles les municipalités ont passé des contrats à cet effet. Depuis leur création en 1984, Dangas et ces sociétés régionales ont bénéficié d'une aide sous forme d'allégement d'impôt résultant du fait que le prix imposé pour la vente de gaz naturel ou de pétrole est identique mais que le gaz naturel n'étant pas soumis aux taxes frappant le pétrole, les fournisseurs de gaz bénéficient d'une aide équivalent au montant de celles-ci. Ce système, qui est dénommé « régime de la taxe fantôme », n'avait jamais été notifié à la Commission conformément aux dispositions de l'article 93 § 3 du traité CE.

Ce système avait été mis en place à l'origine, dans le cadre de la promotion de la protection de l'environnement et des économies d'énergie, pour financer le démarrage et l'expansion de la distribution de gaz naturel et lui permettre d'être en équilibre financier. En vue, cependant, d'éviter que l'aide ne dépasse le montant nécessaire à cet effet et ne devienne ainsi disproportionnée par rapport à son objectif recherché en matière environnemental et énergétique, les autorités danoises, en 1997, ont notifié à la Commission une modification du système de la « taxe fantôme » qui diminue l'allégement fiscal octroyé au secteur et en limite l'octroi à la fin de l'année 2000.

Lors de l'examen des mesures au regard des dispositions de l'article 92 du traité CE, la Commission a conclu que celles-ci constituaient des aides au fonctionnement tombant sous l'interdiction édictée à l'article 92 § 1 du traité CE et ne pouvant bénéficier d'aucune des dérogations prévues aux paragraphes 2 et 3 dudit article 92.

Cependant, l'obligation imposée aux sociétés régionales de distribuer le gaz naturel à tous les consommateurs (entreprises et utilisateurs privés) entre dans le concept de « gestion d'un service d'intérêt économique général » au sens de l'article 90 § 2 du traité CE, ainsi que l'a constaté la Cour de Justice dans son arrêt du 23 octobre 1997 (cas C-159/94). La Commission a, dès lors, examiné les aides à la lumière des dispositions dudit article 90 § 2 et elle a considéré que ces aides étaient nécessaires à l'accomplissement du service d'intérêt général en cause, que l'application des articles 92 et 93 du traité CE pourrait faire échec à cet accomplissement et que le développement des échanges n'était pas affecté dans une mesure contraire à l'intérêt commun. Elle a conclu que les dispositions de l'article 90 § 2 s'appliquaient au système d'aide danois et que les aides en cause pouvaient être autorisées.

The Netherlands. The Commission approved collaborative research and development aid to ASML, ASMI and Philips for the project Medea T601 (Eureka 1535)/Atlas.

On 29 July, the Commission has approved the Dutch government's proposal to give research and development aid for a collaboration project involving research and development on a new generation of production equipment for 300mm wafers with very small feature sizes. The project period runs from the end of 1996 until 1-1-2001.

The aid beneficiaries of this project are ASML, situated in Veldhoven, ASMI situated in Bilthoven and Philips semiconductors, situated in Eindhoven. The aid for Philips amounts up to NLG 2,6 million (ECU 1,2 million), for ASMI amounts up to NLG 13,3 million (ECU 6 million) and for ASML amounts up to NLG 82,3 million (ECU 37 million). Besides these grants ASML will receive a technological development loan of NLG 100 million (ECU 45 million).

The maximal aid intensity is 24,8% of the eligible project costs in case the project fails and the loan will not be repaid. The aid intensity will amount to 12,29% in case the project succeeds and the loan will be fully repaid.

The project centres on two technological developments. The first is to reduce the feature size to allow the IC industry to develop even more complex IC's without enlarging the surface of the chip. The second is to increase the wafer size to 300mm. The purpose of the research is to generate equipment and technological know how to develop equipment for 0,18 µm resolution on 300mm wafers with a potential for enlargement to higher resolutions.

MEDEA was formally adopted as 'EUREKA project 1535' during a ministerial conference of June 29th 1996. The co-operation in MEDEA is organised around six industrial core competencies (multimedia technologies, communication technologies, automobile and traffic applications, design techniques and libraries, CMOS based technology platforms, manufacturing technologies). The MEDEA-T601 project concerns the core competency of manufacturing technologies and consists of five subprojects. The MEDEA T601/Atlas project focuses on three of them: Equipment specification/assessment, 300mm Vertical Furnace and 300mm Wafer DUV Lithography System. The targets set in this project are going beyond the targets set within the MEDEA framework. As a consequence of this project collaboration will take place between a large number of companies, universities and research-institutes all over Europe.

The Commission took note that the aid has clearly an incentive effect. It will foster cross-border co-operation in the field of IC equipment industry. Without the aid the collaboration would not take place at a sufficient scale and without the necessary content. Furthermore, the Commission noted that the project

is complex with high technological risks and that, because of the project, the R&D expenditures of ASMI and ASML will increase considerably.

The aid measure was approved by the Commission as it was considered in conformity with the community framework for state aid for research and development.

France – La Commission ouvre la procédure à l'égard d'aides accordées par l'EDF à certaines entreprises appartenant au secteur de la papeterie.

Le 20 mai, la Commission a décidé d'ouvrir la procédure de l'article 93 § 2 du traité CE à l'égard de l'aide accordée par de la société publique Electricité de France (EDF), contrôlée à 100 % par l'État français, à cinq papeteries situées en France. L'aide consiste en une avance qu'EDF accorde aux papeteries concernées pour l'installation d'équipements de séchage du papier par infrarouge électrique. Cette avance correspondrait au rabais du prix de la consommation d'électricité du séchoir en question pendant la durée du contrat de fourniture, normalement six ans. La valeur totale actualisée des rabais s'élève à 42,75 millions de FRF (6,45 millions d'écus).

Les doutes de la Commission proviennent du fait qu'EDF facture aux cinq papeteries des prix égaux ou même inférieurs à ceux facturés à de très grands consommateurs industriels alors que les consommations de ces papeteries sont mille fois inférieures à celles de ces derniers. Ces prix préférentiels semblent fausser la concurrence au bénéfice :

(i) d'une part, des producteurs d'équipements de séchage infrarouge électrique au détriment de ceux produisant des équipements fonctionnant au gaz naturel, puisque les consommateurs sont détournés artificiellement de cette dernière technologie, qui semble pourtant économiquement plus avantageuse, et

(ii) d'autre part, des papeteries bénéficiant d'une avance en échange de l'installation d'équipement de séchage infrarouge, puisque le coût d'énergie constituerait environ 20-30% du coût final du papier.

À ce stade, le fait qu'EDF accorde des rabais à certains bénéficiaires ciblés au lieu de réduire le niveau général des tarifs, notamment en faveur des petits consommateurs captifs, semble constituer un avantage non justifié par des conditions objectives de consommation.

Espagne – La Commission décide une extension de la procédure ouverte au titre de l'article 93 § 2 du traité CE à l'égard des aides octroyées à l'entreprise Daewoo Electroctronics Manufacturing España S.A. ("DEMESA")

Following the submission of several complaints in 1996 from the European Committee of Manufacturers of Domestic Equipment (CECED) and the Spanish Federation of Manufacturers of Household Appliances (ANFEL), the Commission, by decision of 16 december 1997, opened the 93(2) CE proceeding with regard to aid in favor of the firm Daewoo Electronics Manufacturing España S.A. (DEMESA) in the form of a land disposal below market prices and regional tax incentives above the 25% NGE ceiling for regional aid in the Basque Country. These aids were awarded on the basis of the regional aid scheme « EKIMEN » approved by the Commission in 1996.

The information provided by the Spanish authorities did not serve to remove the doubts expressed in the Commission's decision as regards:

- the effective respect of the conditions laid down in the "EKIMEN" aid scheme to award the non-refundable grant reaching 25% (the maximum aid intensity allowed for the Basque Country) of the tangible investment in fixed assets, and of the start-up expenses entered in the books as depreciable expenses;
- the correlation between the investment costs provided by the Spanish Government and the real amounts invested by DAEWOO. The Spanish authorities declared costs for ESP 11.835,7 millions (70,53 millions d'écus) as the effective costs, while several complaints alledge that the effective investment would not be higher than ESP 5.785 millions (34,47 millions d'écus).

The Commission approved the regional aid scheme EKIMEN considering that it favoured the regional development without affecting adversely trading conditions to an extent contrary to the common interest. However, in the present case it appears that the conditions laid down in the regime in question have not been completely fulfilled. Therefore, due to the difficult situation of the sector, the demonstration that aid to DEMESA will not affect trading conditions to an extent contrary to

the common interest has still to be made by the Spanish authorities

Therefore, the Commission decided on 6 May to extend the 93(2) procedure. Accordingly, the Spanish authorities were informed that, in view of the serious doubts which remained, the Commission considered the aid received by DEMESA - regarding the part not covered by the general rule allowing an aid intensity of 10% of the effective eligible costs - as a new individual aid not covered by the approved regime, since it appeared that the conditions laid down in the regime in question had not been completely fulfilled, in particular as regards the strategic nature of the investment and the net employment creation.

In addition, both the Cooperation Agreement signed between Daewoo and the Basque regional authorities, and the complainants agree that the sector suffers from excess of supply in Europe. It should be also recalled that in this sector 95% of the sales are based on replacements. The difficult situation of the sector is confirmed by the fact that many producers are restructuring their activities by closing down several plants. Aid given to DEMESA is therefore likely to induce a further job reduction in its competitor's plants in Spain (particularly in the Basque Country) and in the rest of the Community.

France – La Commission réexamine les aides accordées au Pari Mutuel Urbain (PMU).

En septembre 1993, la Commission avait pris une décision finale à l'égard des différentes mesures de soutien en faveur du PMU. Elle avait conclu que certaines d'entr'elles ne constituaient pas des aides d'Etat tombant sous l'application des dispositions de l'article 92 § 1 du traité CE. Quant aux autres mesures, elle avait estimé qu'elles étaient compatibles avec le marché commun, à l'exception de l'exonération de la participation des employeurs à l'effort de construction, aide dont la Commission avait réclamé la restitution à partir de 1991.

Un recours en annulation ayant été introduit par la société concurrente Ladbroke, le Tribunal de Première Instance, en janvier dernier, a annulé partiellement la décision de la Commission dans la mesure où cette dernière avait conclu que ne constituaient pas des aides d'Etat les avantages résultant : (1°) de la modification de la répartition des prélèvements Etat/PMU en 1985 et 1986, (2°) des facilités de trésorerie représentées par les reports du paiement de certains prélèvements sur les paris, (3°) de l'abandon au PMU des gains non réclamés et (4°) de la dispense de la règle de décalage d'un mois pour la déduction de la TVA. Le Tribunal a également annulé le fait d'avoir fixé à 1991, et non à 1989, la date à partir de laquelle l'aide sous forme d'exonération de la participation à l'effort de reconstruction devait être restituée. La décision de la Commission était confirmée pour le surplus.

Dans le cadre de l'exécution du jugement du Tribunal, la Commission a estimé que la procédure devait être reprise au stade immédiatement antérieur à la décision partiellement annulée et, le 6 mai dernier, elle a décidé d'apporter à la procédure ouverte en 1990 un complément concernant les mesures suivantes :

- modification de la répartition des prélèvements intervenue en 1985 et 1986, qui se traduit par l'abandon de 180 millions de FRF sur les prélèvements de 1986 ;
- facilités de trésorerie octroyées par l'autorisation de différer le paiement de certains prélèvements sur les paris à partir de 1980 ;
- abandon au PMU des gains non réclamés, ces sommes étant destinées à verser un complément d'indemnités de licenciement en 1985 ;
- dispense de la règle de décalage d'un mois pour la déduction de la TVA, après le 1er janvier 1989.

La Commission a pris cette décision après avoir constaté qu'en ce qui concerne les mesures qui avaient été déclarées ne pas constituer des aides d'Etat, elle ne dispose pas, au stade actuel des informations en sa possession, d'éléments supplémentaires lui permettant d'apprécier le caractère d'aide ou de mesure générale de ces mesures et, au cas où il s'agirait d'aides d'Etat, d'en déterminer la compatibilité avec le marché commun. En outre, la Commission rencontre des difficultés pour identifier avec précision les bénéficiaires - PMU et/ou sociétés de courses – des aides en cause, ainsi que pour déterminer le montant global de celles-ci et leur répartition entre les bénéficiaires.

Quant à l'aide sous forme d'exonération de participation à l'effort de construction, la Commission a pris note de ce que le Tribunal avait confirmé la compatibilité de celle-ci jusqu'en 1989 et son incompatibilité après cette date, tout en rejetant l'argumentation consistant à n'en réclamer le remboursement qu'à partir du 11 janvier 1991.

The Netherlands. The Commission decided to open the 93 (2) proceedings with regard to the Dutch aid proposal: 'Process Integrated Gas Turbine at the NEREFCO refinery'.

The Commission has decided to investigate the proposal of the Dutch government to give aid of about ECU 6,7 million to support the construction of a Process Integrated Gas Turbine at the NEREFCO refinery. The Dutch authorities would like to give this aid in the frame of the general CO2 reduction plan.

The project entails the construction of a gas turbine that is fully integrated with a process unit of a refinery in order to partially replace a conventional, separate heat and power generator. The realisation of the project will give rise to a considerable benefit in the area of CO2 emissions (-23%). Moreover it will reduce other noxious emissions and lead to important energy savings. Although the utilisation of gas turbines in heat-power stations results in a considerable improvement of the energy efficiency and in lower emissions of CO2 than conventional, separate generation of heat and power, it is not yet widely applied in process installations.

The project involves the following companies: NEREFCO (joint-venture of BP and Texaco), Texaco Nederland BV and ENECO BV. The overall investment amounts to HFL 93 million (about ECU 42,2 million) and includes the construction of a gas turbine, a furnace and a residual-heat boiler. The eligible project costs are fixed at HFL 50,7 million (about ECU 23 million). The aid corresponds to 29,6% of the eligible costs.

Following the Commission's preliminary assessment, it seems that not all relevant parameters were correctly taken into account for calculating the eligible costs. This is particularly the case for the electricity that will be generated and supplied to the grid. Amongst others it is not clear to the Commission, whether the considerable electricity production is obtained on the basis of a given amount ton-equivalent energy input and whether it has been accounted for in the calculation of the eligible project costs, as it is for instance for the energy savings.

The Commission is also missing information necessary to determine the extra investment costs to meet environmental objectives. According to the Commission's practise the extra investments costs are obtained by comparing the environment friendly investment to the costs of setting up a similar production capacity by using conventional technologies. The Commission has not been provided with information concerning the overall costs of a conventional installation at today prices and is therefore not able to calculate the extra investment costs.

Notwithstanding the favourable appreciation of the expected environmental benefits, the Commission has clear concerns on the aid proposal as to the respect of the conditions set out in the Community guidelines on State aid for environmental protection. At this stage of the inquiry the Commission has doubts on whether the aid is compatible with the common market and, on 17 June, has therefore decided to open the procedure under Article 93(2) of the EC Treaty.

France – La Commission autorise des aides supplémentaires en faveur du Crédit Lyonnais.

La Commission a approuvé le 20 mai dernier les aides accordées par la France au Crédit Lyonnais (CL) en supplément des aides s'élevant à 45 milliards de francs et à environ 4 milliards de francs déjà autorisées en 1995 et 1996 (7,394 milliards d'écus). Les aides additionnelles, don't le montant est estimé se situer dans une fourchette allant de 53 et 98 milliards de francs (7,997 à 14,788 milliards d'écus), sont approuvées à condition que le Crédit Lyonnais réduise son bilan pour un montant de 310 milliards en Europe et dans le monde, en plus des réductions déjà imposées à la banque en 1995, soit une réduction totale de son bilan de plus du tiers depuis le 31.12.1994. Le Crédit Lyonnais devra en outre réduire le nombre de ses agences en France à 1850 en l'an 2000. Le Gouvernement français s'est engagé à privatiser le Crédit Lyonnais d'ici octobre 1999. Après la privatisation, la croissance de la banque demeurera limitée à 3,2% par an jusqu'en l'an 2001, et elle devra distribuer 58% de son résultat net social sous forme de dividendes jusqu'à l'exercice 2003.

Les mesures d'aides en question constituent le 3ème paquet d'aides approuvé par la Commission. Dans sa décision de juillet 1995, la Commission avait approuvé un premier plan d'aides au Crédit Lyonnais, d'un montant total estimé à 45 milliards de francs, afférent à la prise en charge des pertes du Crédit Lyonnais sur les mauvais actifs de la banque transférés au Consortium de Réalisations (CDR), et à une recapitalisation de 4,9 milliards de francs en 1994. En septembre 1996, dans le cadre de mesures d'urgence, la Commission a approuvé des aides

supplémentaires d'un montant d'environ 4 milliards de francs, qui concernaient principalement un rehaussement du taux du prêt du CL à l'Etablissement public de Financement et de Participations (EPFR), pour 1995 (rétrospectivement) et 1996.

Le nouveau paquet d'aides au Crédit Lyonnais a trait :

- à l'augmentation des pertes du CDR, dont la dernière estimation, au 31 décembre 1996, est de 100,2 milliards au lieu de 60 milliards de francs précédemment ;
- à une modification des conditions de taux du prêt du Crédit Lyonnais à l'EPFR ;
- et à l'abandon de la souscription par l'EPFR d'une obligation de 10 milliards de francs à coupon zéro, que devait financer le Crédit Lyonnais, élément qui avait été pris en déduction des aides telles qu'estimées en 1995.

En tenant compte de ces aides supplémentaires, le total des aides accordées par l'Etat français au Crédit Lyonnais est compris dans une fourchette allant de 102 à 147 milliards de francs (15,38 à 22,16 milliards d'écus), soit un montant d'aides en faveur d'une même entreprise unique dans les annales de la Communauté.

La Commission a examiné si les mesures de restructuration présentées par la France, malgré un montant d'aides aussi important, pouvaient être déclarées compatibles avec le marché commun. Elle considère, sous réserve que les efforts engagés pour améliorer la rentabilité de son exploitation soient poursuivis, que le Crédit Lyonnais est viable, et note que la banque contribue dans toute la mesure de ses moyens au financement du plan de restructuration, de sorte que les aides sont limitées au strict nécessaire. Sur cette base, la Commission a accepté une modification des conditions de taux du prêt accordé par le Crédit Lyonnais à l'EPFR. Par ailleurs, la Commission a considéré que des contreparties très importantes pour compenser les concurrents pour les distorsions de concurrence subies étaient indispensables, d'un montant minimal de 310 milliards de francs, sous forme de cessions et de fermetures d'activités de la banque, principalement en Europe. Ces contreparties doivent se traduire par une réduction très significative de la présence commerciale du Crédit Lyonnais, et, en tenant compte des contreparties déjà exigées en 1995, par une diminution de son bilan de plus du tiers par rapport au bilan de la banque au 31 décembre 1994. De plus, la Commission a exigé une réduction significative du nombre d'agences du Crédit Lyonnais en France à 1850 en l'an 2000, soit environ 300 points de vente de moins que prévu dans le plan que lui avaient soumis les autorités. La Commission a obtenu des engagements du Gouvernement lui donnant pleine satisfaction sur ces points : sauf dans des cas particuliers devant être justifiés, l'essentiel de ces cessions ou fermetures d'activités devra intervenir avant octobre 1999.

Le Gouvernement s'est également engagé à privatiser le Crédit Lyonnais avant octobre 1999 par une procédure ouverte, transparente et non discriminatoire, de sorte qu'à l'avenir la banque pourra rechercher sur le marché les ressources supplémentaires dont elle aura besoin. Préalablement à la privatisation, le Crédit Lyonnais rachètera sous forme d'une émission d'actions réservée à l'EPFR la clause de retour à meilleure fortune instituée en 1995, qui assurait à l'Etat une rémunération compensatoire sur les résultats de la banque. Par ailleurs, le Gouvernement français s'est engagé à maintenir un mécanisme de bridage de la banque, dont la croissance sera limitée à 3,2% par an jusqu'en l'an 2001, et qui devra jusqu'en 2003 inclus distribuer 58% de son résultat social sous forme de dividendes. Au-delà de 2001 et jusqu'en 2014, le Crédit Lyonnais ne pourra pas faire croître ses engagements au détriment d'une détérioration de son ratio de solvabilité. Le Gouvernement présentera à la Commission un suivi régulier des engagements qu'il a pris.

Compte tenu de tous ces éléments, la Commission considère que les aides au Crédit Lyonnais peuvent être déclarées compatibles avec le marché commun.

Italie – La Commission clôt par une autorisation conditionnelle la procédure ouverte à l'égard de plusieurs mesures d'aide en faveur du Banco di Napoli.

Le 29 juillet dernier, la Commission a approuvé les aides octroyées par le Gouvernement italien pour l'assainissement et la restructuration du Banco di Napoli en vue de sa privatisation.

Le Banco di Napoli est un groupe bancaire public présent sur tout le territoire italien et possédant des filiales à l'étranger. Le groupe, dont les activités s'étendent aux divers domaines de l'intermédiation financière et du crédit, vient de sortir d'une période de graves difficultés, ayant enregistré des pertes importantes au cours des années 1994 et 1995. Depuis 1996 les résultats sont redevenus positifs.

Les aides qui ont été autorisées comprennent :

1. une augmentation du capital du Banco di Napoli de la part du Trésor pour un montant de 2.000 milliards de lires italiennes (1.026,7 millions d'écus),
2. des avances de la Banca d'Italia – la banque centrale italienne – pour couvrir les pertes de la S.G.A, société de cantonnement ayant pour objet la gestion des créances non performantes ou douteuses du Banco ;
3. des allégements fiscaux de 17 milliards de lires italiennes en valeur nette (8,7 millions d'écus).

Quant aux avances octroyées par la Banca d'Italia au Banco pour la liquidation de la banque ISVEIMER, dont il exerçait le contrôle, la Commission a estimé que celles-ci ne constituaient pas des aides d'Etat à condition toutefois que le Banco ne rachète pas d'actifs de l'ISVEIMER, sauf dans le cas où il s'avérerait impossible de les vendre ou de les réaliser à des conditions plus avantageuses dans le cadre de la liquidation.

La Commission a cependant subordonné cette autorisation des aides au respect de plusieurs conditions, notamment la fermeture ou la cession par le Banco, avant la fin de 1998, de 18 guichets ayant leur siège dans le Nord et dans le Centre de l'Italie, ainsi que de sa filiale de Madrid, ceci s'ajoutant aux cessions de 59 guichets et de 7 filiales et bureaux à l'étranger qui ont déjà été réalisées.

Le coût net de la privatisation pour l'Etat est estimé se situer dans une fourchette de 2.217 milliards à 11.895 milliards de lires (1.138 à 6.106,3 millions d'écus) l'ampleur de cette fourchette s'expliquant par la prise en compte de la totalité des risques du mécanisme de défaisance.

Le Gouvernement italien est également tenu de garantir la mise en œuvre de toutes les mesures de redressement contenues dans le plan de restructuration présenté à la Commission, ledit plan ne pouvant pas être modifié sans l'accord préalable de cette dernière. Les reports des déficits fiscaux du Banco sont supprimés pour un montant égal à l'augmentation de capital du Trésor.

Lors de son appréciation des aides, la Commission a tenu compte du fait que le plan de restructuration du Banco s'inscrit dans une opération de privatisation qui a été réalisée dans des conditions concurrentielles et transparentes. Celle-ci a été menée dans un laps de temps très réduit, sans attendre la confirmation du redressement de la banque et en laissant aux repreneurs potentiels la tâche de recapitaliser le Banco, cette recapitalisation étant nécessaire car la dotation en fonds propres de ce dernier se situait bien en dessous du niveau minimum prévu par les règles communautaires. Pour la Commission, cette privatisation apporte une crédibilité supplémentaire au redressement de la banque et contribue à la réforme du système global de gouvernement d'entreprise de celle-ci qui était à l'origine des pertes du groupe. C'est ainsi qu'à l'avenir, le Banco devra faire appel à ses actionnaires privés et/ou au marché pour trouver les ressources supplémentaires nécessaires.

Espagne – Clôture de la procédure ouverte à l'égard des aides en faveur de la société Porcelanas del Norte S.A.L. (PONSAL), devenue Comercial Europa de Porcelanas S.A.L (Comepor).

On 14 July, the Commission decided to close by a partial negative Decision. the Article 93(2) proceeding against aid which was awarded to Porcelanas del Norte S.A.L. (Ponsal) / Comercial Europa de Porcelanas S.A.L (Comepor) The firm Ponsal, a producer of porcelain, tableware and ornamental ceramics was set up in Pamplona (Navarra) in 1957. Since the firm had been suffering financial problems for many years, in 1994, it drafted a restructuring plan. In the context of the restructuring, Ponsal had received significant amounts of aid by the Government of Navarra (investment grants, guarantees) which, however, had not been previously notified to the Commission.

Being requested, even by way of an injunction, to provide information on this aid, the Spanish authorities succeeded in providing evidence that most of the aid was based on exising aid schemes. Nevertheless, the Commission discovered that there were further inconsistencies in the context of the financial relationship Ponsal/ public authorities for which it was not clear whether illegal aid was involved.

Thus, Ponsal was liquidated via a suspension of payment proceeding. Therein, Ponsal's public creditors had waived public debts towards the government of Navarra and the social security amounting to PTA 3100 million. After Ponsal's liquidation, a new company "Comercial Europa de Porcelanas S.A.L. (Comepor)" had been

founded and continued Ponsal's activities. The Commission nourished serious doubts in respect of a sound execution of Ponsal's suspension of payment proceeding and it could not exclude that the liquidation was only carried out in order to allow new industrial projects with new aid and the assets of the previous (non viable) company.

In addition, further aid was awarded to the new firm Comepor, consisting in investment grants for job creation amounting to PTA 500 000 per created job. This aid was allegedly based on an existing aid scheme of 1982. The Commission, however, found out that this scheme allows only a grant amounting to PTA 400000 per created job and that the authorities of Navarra in so far went beyond the limits of this scheme.

On top of that, the Commission received press reports according to which Comepor has received further aid consisting of a PTA 750 million loan. No justification for this aid was given so far.

The Commission therefore decided on 30 April 1997 to open Article 93(2) proceedings against

- the PTA 3100 million (18 million ecus) waiver on the occasion of the suspension of payment proceeding
- the investment grants for job creating as far as they exceeded the aid ceiling of the existing aid scheme and
- the loan amounting to PTA 750 million (4,5 million ecus).

In the course of the Article 93(2) proceeding and in respect of the PTA 3100 million waiver, the Spanish authorities' provided evidence that they fully respected the Spanish bankruptcy legislation.

Concerning the PTA 500 000 subsidy per job created, the Spanish authorities' proved that these payments were based on existing aid schemes.

Regarding the PTA 750 million loan which was granted to Comepor, however, there was no way to approve this intervention. This credit was only secured by the value of Comepor's shares which was, as the Spanish authorities admitted themselves during the proceeding, at zero. Since no private bank would have awarded this credit to a firm in a situation Ponsal/ Comepor was under the same conditions the public authorities did, the Commission concluded that this credit had to be considered as State aid.

Since, in addition, none of the derogations of the Article 92 of the EC- Treaty was applicable by which the credit could be approved the Commission concluded that this aid was illegal operating aid. It therefore decided to request its recovery from the Kingdom of Spain.

Germany - Aid to shipbuilding - Misuse of restructuring aid for MTW and Volkswerft in the Bremer Vulkan Group. The Commission decides that the aid must be recovered.

On 22 July 1998 the Commission adopted a final negative decision concerning the misuse of DEM 788.7 millions (ECU 400 millions) of aid in undertakings of the former Bremer Vulkan Group, which had been granted for the restructuring of MTW Schiffswerft in Wismar and Volkswerft Stralsund

Bremer Vulkan Verbund AG had acquired these two shipyards in East Germany in 1992 and 1993 from Treuhandanstalt. For their restructuring and comprehensive modernization large amounts of aid had been provided. The Council had adopted in 1992 a specific derogation under the Seventh Directive on Aid to Shipbuilding (90/684/EEC) for the restructuring of the shipyards in the former GDR (Council Directive 92/68/EEC). According to the provisions of this legislation the aid provided had to be used exclusively for the restructuring of the yards in question. In view of this requirement and the extremely high amounts, the Commission had decided to authorize the aid in tranches only.

In view of strong indications of a misuse of aid the Commission decided to open the proceedings in February 1996. The proceedings were extended in November 1996 when it had become clear from an auditor's report that the scope of the case was much wider than originally assumed.

The Commission learnt in the course of the proceedings, that the notifications of the aid given in the context of the privatisations had been incomplete. Large amounts of the aid had been disbursed in advance, without knowing of the Commission, based on side agreements between Treuhand-anstalt and Bremer Vulkan. Including interest accruing up until end of 1995, the two companies had received aproximately DEM 327 millions (ECU 166 millions) more aid than had been authorised by the Commission. The granting of this additional amount infringed the provisions on investment aid (Article 6) and on the maximum operating aid to be granted for the restructuring (Article 10a) of the amended Seventh Directive on aid

to shipbuilding. The Commission decided therefore that this aid amount was incompatible with the Treaty.

The parts of the aid, which were not yet needed for the restructuring, were lent-on in the Bremer Vulkan Group, either based on individual credit agreements, or from 1994 onwards, in the cash concentration system of the group. In spite of extensive investigations it has been impossible until now to determine for certain for which purposes the aid amounts placed with the group had been used. There are two reasons for this. As contrary to normal commercial practice Treuhandanstalt did not ensure that provision was made in the privatisation agreements for any earmarking of the lump-sum cash subsidy or any suitable monitoring procedures. From 1995 at the latest the mixing of funds became irreversible owing to the multitude of transactions in the cash concentration system. When the cash concentration system was wound up in early 1996 the total claims of MTW and Volkswerft amounted to DEM 854 millions, of which DEM 788.7 millions originated from aid. According to the expertise of the auditors it is very likely that at least those daughter companies of Bremer Vulkan, which were the main debtors under the cash concentration system, received parts of the misused aid. It is certain that these DEM 788.7 millions (which include the unauthorised amount of DEM 327 millions) were not used as required for the restructuring of the two shipyards but misused in the meaning of Article 93(2) of the Treaty.

The Commission decided that the German Government shall recover the misused aid from Bremer Vulkan Verbund AG as part of the bankruptcy proceedings concerning that company. In addition the German Government shall take all steps required by German law to recover any partial amounts from companies previously belonging to the Bremer Vulkan Group should suitable opportunities arise in the course of subsequent inquiries.

INTERNATIONAL

Main developments between 1st May and 30th September 1998

Implementing Rules for State aid - Czech Republic

Maria BLÄSSAR, IV-A-3

On 24 June 1998, the Association Council adopted the Implementing Rules for State aid in the Czech Republic. The Czech Republic is the first associated country where such rules are now formally in force in the field of State aid.

The Implementing Rules follow a two pillar system of State aid control foreseen by the Europe Agreement. On the EC side, the Commission assesses the compatibility of State aid granted by the EU Member States on the basis of the existing EC rules on state aid. On the side of the Czech Republic, the Czech national monitoring authority is to monitor and review existing and new public aid granted by its country, on the basis of the same criteria arising from the application of the rules on State aid of the EEC and ECSC Treaties. The Implementing Rules for State aid provide for procedures for consultation and problem solving, rules on transparency (i.e the Czech Republic is to draw up and thereafter update an inventory of its aid programmes and individual aid awards, established on the same basis as in the Community) and rules on mutual exchange of information.

Competition Conference in Bratislava

Joos STRAGIER, IV-A-3

On 25-26 May 1998 the fourth Competition Conference of the Central and Eastern European Countries (CEEC) and the European Commission took place in Bratislava. The delegations included high level officials from the competition and State aid monitoring authorities of each Associated Country. The Commission delegation was headed by Mr Schaub, Director General DG IV.

The annual Conference serves as a forum to exchange views and experience in the field of approximation of competition legislation and the implementation of competition rules. It also aims at establishing and strengthening of professional contacts between officials responsible for competition in the Community and in the CEEC. At the same occasion future policy and new legislation in the field of competition are discussed.

In view of the growing experience of the CEEC in the enforcement of competition rules, this year's programme put more emphasis on discussion in workshops. Six different workshops were held on both general issues and on specific or sector-related competition problems. Among the items discussed were the control of mergers; selected antitrust cases, and competition in the field of telecommunications and electricity. In the field of State aid, particular attention was devoted to the legislative framework concerning the lawfulness, monitoring and control of State aid in the CEEC and to specific problems such as State aid in the form of tax expenditure, State aid for rescue and restructuring and for regional development, and State aid inventory.

At the plenary part of the Conference Mr Jonathan Faull (DG IV) made a presentation on the international dimension of EC competition policy. Mr Novotny, Judge of the High Court of the Czech Republic discussed the role of courts in competition matters *(see text of his presentation in this CPN)*. A Joint Declaration was signed at the end of the Conference setting out the priority areas and the various forms of future co-operation between the Commission, in particular DG IV, and the CEEC in the field of competition.

The following conclusions are drawn from discussions in the workshops and the plenary sessions:

- In the past year and until very recently, most of the CEEC

have taken decisive steps to adopt or prepare new antitrust legislation or amendments to existing legislation in order to further align their legislation to Community legislation.

- It is recognised that the current efforts of the CEEC to approximate their competition legislation to that of the Community will facilitate the harmonious operation of Community competition policy after accession. Moreover, approximation of law contributes to the creation of a European-wide network of competition authorities which apply the same basic competition principles. This should contribute to the effective decentralised application of competition law in the future enlarged Community.

The approximation of legislation also includes measures to ensure the effective enforcement of the rules by independent and competent competition offices. Most of the CEEC have now established competition authorities which have the necessary enforcement powers. This is a great achievement. Obviously, most of the competition offices still feel the need to strengthen their legal and economic expertise to deal with complicated competition cases. The discussion of individual antitrust cases learned that, generally speaking, the methodology for analysing competition cases in the CEEC is similar to the EC approach.

- Like DG IV, the competition authorities of the CEEC face the problem to allocate adequately the limited resources to the kinds of conduct or transactions by firms that most seriously obstruct the proper working of markets. In this context, the establishment of an appropriate *de minimis rule* and the setting of adequate notification thresholds for mergers are essential.
- In sectors such as telecommunications and energy, the process of progressive liberalisation has started. Views were exchanged on questions such as the role of competition offices in the field of liberalisation (in most cases, the competition offices in the CEEC do not have a direct competence, to enforce the law in respect of State measures, in the same way as the EC Commission can act under article 90 Some of them however played an important competition advocacy role); the relationship between regulatory authorities and the competition authority; restrictions of competition by monopolists blocking new entry; dominance in one market which is used to strengthen position in related market.
- While a number of countries have started introducing or preparing rules on the control of State aid, a lot of work remains to be done. A major objective is the creation of transparency in the granting of State aid (discussion on State aid inventory and State aid report).
- Another major objective is the creation of the necessary legal framework for the control of state aid in accordance with EC law and practice, in particular the introduction of an *ex ante* control notification through a compulsory notification procedure and an *ex post* monitoring on the way the aids have been used. Several countries are currently preparing for the adoption of such legal framework ar for the amendment of exixting legislation to bring it close to EC rules. Most of the CEEC have now established national State aid Monitoring Authorities. It is however still necessary, in most cases, to provide these authorities with the necessary powers to effectively implement the monitoring of State aid.

The role of a national judge in Competition cases

(Oral presentation to the 4th Competition Conference in Bratislava, 24 - 26 May 1998)
by JUDr. V. Clav NOVOTNY – Chairman of the Senate of the High Court in Olomouc, Czech Republic

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The role of a national judge in competition cases is certainly the same as in any other matter he/she deals with. There is the responsibility to one's conscience, the constitution and laws, the individual and the society. What is specific and what forms the genius of competition law at national level is its extremely close link to the European Community law. No area of law, other than competition law, became as closely dependent on the treaty establishing the European Economic Community, or rather the European Community, and the European Council and European Commission Regulations, as well as decisions of the Commission and the European Court of Justice. What is involved is not so much an institutional manifestation of this link, i.e. the content of the association agreements with the European Communities, but rather a source of information about the competition which underwent decades of undisturbed development and is at the stage of developed economies. A national judge thus can, or should be able to, learn about competition law from the normative activities of the Communities, as well as the application practice of its bodies, because the principles of protection of the competitive environment, as stipulated in Articles 85 and 86 of the Treaty of Rome, must form a basis for the national provisions of law and the same must not be in contravention thereof. This means that the application of national laws must not contravene the application practice of EC authorities, with a view to the specific condition and development of the economies of Central and Eastern Europe, for whom free competition means a fundamental change.

Therefore, the inspiration of courts by community law is quite legitimate because the principle of fair competition is an unspecific, quite general notion, clearly common to all economies which are not centrally controlled. That is why answers to questions arising at national level can be sought from European institutions and courageously compared to the national provision of law, so as to help discover the real meaning and purpose of the law for the protection of competition. The application of community law takes place to the extent set forth in the respective association agreement, if any. At this stage, there remains room for the national judge to take into account the specific conditions of national economies. The same, however, must not be grasped randomly and arbitrarily, but must represent a properly founded postulate. A regular discrepancy between the community case law and national decisions puts further distance between the country in question and the single European economic area.

The national judge must not surrender his/her responsibility for the harmonization of the national and community laws, although there is only limited room and resources available at present. The court is obliged to expend its best effort to become acquainted with at least the principal decisions of the Commission and the European Court of Justice in competition cases.

I would now like to focus, in more detail, on some specific cases handled by the High Court in Olomouc as the body performing judicial review of decisions issued by the Czech Office for the Protection of Economic Competition.

In the following merger case, the court had to resolve a fundamental issue as to who the parties to the proceedings are, with whom the office is obliged to deal pursuant to procedural rules, and who is therefore entitled to judicial protection within the meaning of the respective article of the Constitution. In the TEL. case, the court resolved this issue by not recognizing third parties, which had not directly participated in the merger, as parties to the proceedings within the meaning of procedural rules. Therefore, the third parties in question were not given judicial protection. The court rejected the motion against the national office and voiced the opinion that it is not permissible to have, as a party to the proceedings, somebody who does not hold a positively defined right or is not the beneficiary of a positively defined obligation, where specific subjective rights and obligations are

the subject matter of the proceedings. Such specific subjective rights and obligations include the obligation of an undertaking taking part in a merger to apply to the office for an approval of such a merger, coupled with such and only such undertaking's right to have the office decide on its application. The office is fully empowered to use its administrative discretion and issue a positive or negative decision pertaining to the application only. The decision may not concern a legally positively defined right of anyone other that the undertaking participating in the merger. The court considered the fact that the administrative authority had acquainted itself with the position and objections of the plaintiffs. After the court decision had been contested by means of a constitutional complaint, the arguments used by the court included EC Regulation No 4064/89, as well as procedural rules contained in EC Regulation No 3384/94, which the court interpreted as stipulating that the Community does not deem third parties to be direct parties to mergers, strictly speaking, but nonetheless deals with the same and gets acquainted with their position and views. Therefore, not even the above-mentioned regulations can be interpreted to the effect that the national authority is obliged to interpret the national law as requested by the plaintiff. The Constitutional Court rejected the constitutional complaint by virtue of its resolution and found that the position of the high court conformed to the Constitution.

As regards cartel agreements, the court handled two important cases. In the T. case, undertakings specializing in the testing of welders and their periodical examination agreed on a joint procedure for the conclusion of agreements with welding schools which used the services of their examiners. Within a very short period of time, the prices for various services related to examination and re-examination at different welding schools, serviced by individual companies, were unified. The companies involved provided some 90% of the total of services provided in this area. The prices were so similar they were almost identical. The office managed to prove that prices were discussed at the meetings of individual organizations and a certain price regulation was prepared. The court confirmed the conclusion of the administrative authority, i.e. that the identical prices for services were not a coincidence, but rather the result of coordinated conduct of the testing companies over an extended period of time. What was decisive was the fact that it was established there were contacts between the companies and prices were gradually unified at a later stage. The sum of indirect evidence showed that discussions on prices of the relevant services were held, although the extent of such discussions and the resultant agreement, if any, was not established. Any doubts, however, were eliminated by the price-lists of individual undertakings which were drawn up so as to be identical. That justifies the administrative authority and the court in doubting whether this could be a mere coincidence and leads to the conviction that the same was due to negotiations in which the parties took part regularly, and which resulted in the mutual agreement to regulate prices to the maximum extent possible, as described above. The court stated that acting in concert does not have to take the form of express acts but may be accomplished by a mere acceptance, e.g. acceptance of prices charged by competitors in a manner which does not give rise to doubts as to the intention to maintain identical prices on otherwise unchanged commercial, delivery or payment terms. In this particular case, when they fixed their prices and maintained them at identical level, the parties provided identical services without taking advantage of free competition. This conduct was found to be harmful to a fair competitive environment.

Another important case which ended up before the Constitutional Court of the Czech Republic was a case involving the Czech Professional Chamber ("Chamber"). The Chamber issued a document entitled Architects' Services and Fees for individual areas, which document was found to constitute a de facto price-list stipulating minimum prices for certain services. In the course of the proceedings, it was discovered that the Chamber had merely acknowledged the document, that no approval process had taken place and the material had not been published as a binding, but rather an informative document. The management of the Chamber, however, had previously issued an instruction to the effect that Architects' Services and Fees should be prepared for approval by the general meeting, so as to become binding. Eventually, the same had not been submitted for approval by the presidium and were merely acknowledged by the general meeting of the Chamber. The office viewed this conduct of the Chamber as a decision aiming at the creation of a cartel agreement for the unification of prices for services; in some cases, even for the setting of minimum prices. The court had to deal particularly with the question as to what constitutes a cartel agreement and how to understand the notion of the Chamber's decision - whether, in the formal legal sense,

as an institute with certain procedural rules, or whether as the expression of will of a certain entity. The court stated that in this case the decision had been an expression of will of the Chamber which does not have to contain any rights or obligations. This was a decision to recommend something or a decision to act in a certain manner. Such a decision does not have to conform to internal rules and in most cartel cases, there is not written agreement or document. To the contrary, anticompetitive actions are being disguised and hidden in different ways. The document in question, Architects' Services and Fees, gives the recipients a clear idea as to how they should price their services and is an expression of the Chamber's desire to coordinate the activities of its members. If architects were to follow the document, economic competition might really be distorted. In the Czech legal order, the Chamber is based on obligatory membership of all authorized architects. In this case, the Constitutional Court rejected the complaint filed against the High Court in Olomouc and accepted the legal conclusion of the court, i.e. that the given resolution of the general meeting of the Chamber constitutes an agreement which aims to make the parties behave in a certain manner. With a view to competition law, by providing an instruction for a concerted action by the undertakings - architects - in price negotiations, the Chamber aims to make the same behave in an unlawful manner. The court had to resolve another issue - whether the law can be applied to a professional association and whether such application would not jeopardize its position as a self-administrative body. The court resolved that the law itself sets only limits within which a self-administrative body acts, without interfering with its self-administrative mechanism and endangering its existence. The Constitutional Court accepted and reiterated the above arguments. In both cases referred to hereafter, the court drew inspiration from the UNASCA case, as well as annual reports of competition offices of some member states of the Community, and specific decisions, e.g. the decision of the Bundesgerichthof in the Chamber of Architects case of 1976 and the decision of the Bundeskartellamt in the Chamber of Pharmacists case of 1986. After the rejection of the constitutional complaint, this court decision became a turning-point one as regards the understanding of cartel agreements in the sense of standard European notion of dangerousness of such unlawful arrangements and agreements.

A leading case concerning an abuse of dominance and monopoly is undoubtedly that of the S. car company, which was fined by the office for its very sluggish approach to the provision of spare parts for the FAVORIT passenger cars. The production of spare parts for the FAVORIT cars was terminated and the company explained that the reason behind this step was that its effort and energy was focused on the production of a new model, FELICIA. A producer of spare parts for FAVORIT was found but the production was significantly delayed, resulting in a 4-5 month shortage of parts, including bonnets and fenders. The company's market share was well over 30%. In its decision, the court for the first time defined the market with a view to its geographic, temporal and local aspects. For the first time in the history of Czech judiciary, the court referred to the Europe Agreement establishing the association between the Czech Republic and the European Communities, as well as the principles which govern community competition law within the meaning of the application of Articles 85 and 86 of the Europe Agreement. The reasoning was that further actions could be added to the list of forms of abuse of market dominance, as stipulated by the Czech law, which actions are deemed to constitute an abuse of dominance in the member states of the European Communities, without such expanded list being in contravention of the wording of national, i.e. Czech, law. The court ruled that the sluggish approach, which was established, constituted an abuse of dominance to the detriment of consumers. As for the constitutional complaint, the Constitutional Court rejected the application for the annulment of the decision issued by the High Court in Olomouc and accepted the High Court's position in its entirety, as regards the procedure or inspiration by the European community law, and in the formulation as described above. The Constitutional Court also defined the difference between administrative discretion and interpretation of the law, specifying that this particular case involved an interpretation of the law, rather than administrative discretion, which interpretation conformed to the law for reasons stated by the court. In the proceedings before the Constitutional Court, the High Court pointed out the AB VOLVO & ERIK VENG and PORT-OF-GENOA & GABRIELLI cases. The Constitutional Court quoted these references during oral hearings and included them in its overall position to the effect that such approach on part of the court conformed to the Constitution of the Czech Republic.

No other constitutional complaint against any other decision of the High Court in Olomouc has been raised.

A case in which the court drew some inspiration from EC Regulation No. 93/13 involved a savings bank which allegedly abused its dominant position on the market for budget accounts by enforcing inappropriate conditions, specifically by stipulating in pre-formulated standard agreements, whose content the clients could not influence in any way, that the account holder be liable for any damages and monetary liabilities due to a loss, theft, falsification or alteration of payment instruments. For instance, the client would be objectively liable in a situation where his/her cashpoint card would be stolen, even by force, and a certain amount withdrawn from his/her account, thus becoming due to the savings bank. Pursuant to the agreement, the client would have to provide compensation for the damages incurred. The court refused to accept this notion of principles of contractual freedom and decided that such a condition in an agreement, whose content the consumer cannot influence in any way, constitutes an abuse of market dominance. The savings bank imposed on the client a form of liability which is not common in civil law, and did so in a situation where the client does not and cannot know the extent of compensation which may possibly be requested from him/her. The court also had to deal with the question whether a contractual arrangement based on a different law, i.e. commercial or civil law, may take precedence over mandatory provisions of the Competition Act. The court concluded that no contractual arrangement, although based on the Commercial or Civil Codes, may contravene the provision of law as set forth in the Competition Act.

The last case which directly quotes a specific decision issued by European institutions was the Z. case involving an abuse of dominance on the part of a steam supplier towards a steam buyer. To resolve a long-term unhealthy business relationship between the two undertakings, including a 3-year absence of any written supply and purchase agreement, as customary under Czech law, as well as delayed payments for the steam supplied, the steam supplier ceased supplying the buyer whose existence depended on the steam supply (the buyer was a dairy plant) at an extremely short notice. A one-day interruption in the steam supply caused significant damage and an interruption lasting for several days would have caused a collapse of the plant. Due to an official intervention, the steam supply was renewed and the whole matter was brought before an administrative authority and later on before a court. The court accepted the position of the administrative authority, i.e. that the case involved an abuse of dominant position. The steam supplier submitted an agreement containing provisions which were clearly unfavourable for the steam buyer. The supply-purchase relationship lasted for over 25 years. The problems described above emerged in the last three years. The court considered the fact that in the Czech economy, there was a secondary inability to pay, together with a lack of payment discipline. The same can be attributed to a variety of economic causes, and the supplier cannot be expected to resign itself to the state if affairs and abstain from adequately responding to such lack of discipline. On the other hand, the court emphasized that in such case, a termination or interruption of the steam supply should be effected at a sufficient notice and with an adequate warning, so as to enable the steam buyer to respond in a timely manner and avoid significant irreversible damages. References were made to the Instituto Chemioterapico Italiano and Commercial Solvents Corporation, United Brand, and BBI & Boosey abd Hawkes. A dominant undertaking may take adequate action to protect its interests but the means used must be fair and commensurate with the threat involved. The dominant undertaking can change its distribution system and exclude some of its customers, but if such exclusion is effected suddenly and without any warning, the same may constitute a violation of Article 86 of the Treaty of Rome.

I am deeply convinced that even at the present stage and status of association with the member states of the EC, the principles of protection of economic competition can be applied in harmony with European trends, at least in the extent outlined above, unless the relevant association agreement stipulates otherwise.

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 C et D**	***Jean-François PONS***	2994423/2962284
Directeur général adjoint **plus particulièrement chargé des Directions E et F**	***Gianfranco ROCCA***	2951152/2951139
Directeur général adjoint **plus particulièrement chargé des Directions G et H**	***Asger PETERSEN***	2955569/2958566
Conseiller pour les réformes	***Helmut SCHRÖTER***	2951196/2960246
Conseiller auditeur	***Roger DAOÜT***	2965383
Conseiller auditeur	. . .	
Assistants du Directeur général	***Henrik MØRCH***	2950766/2967532
	. . .	
directement rattachés au Directeur général :		
1. Personnel, Budget, Administration, Information	***Irène SOUKA***	2957206/2995988
2. Questions informatiques	***Guido VERVAET***	1959224/2951305
DIRECTION A		
Politique de concurrence, Coordination, Affaires Internationales et relations avec les autres Institutions	***Jonathan FAULL***	2958658/2957689
Conseiller	*Juan RIVIÈRE MARTI*	2951146/2960699
Conseiller	*Georges ROUNIS*	2953404
1. Politique générale de la concurrence, aspects économiques et juridiques	*Kirtikumar MEHTA*	2957389/2995470
Chef adjoint d'unité	. . . .	
2. Projets législatifs et règlementaires ; relations avec les Etats membres	*Emil PAULIS*	2965033/2955894
Chef adjoint d'unité	*Paolo CESARINI*	
3. Affaires internationales	*Yves DEVELENNES*	2951590/2966861
Chef adjoint d'unité	. . . .	
DIRECTION B		
Task Force "Contrôle des opérations de concentration entre entreprises"	***Götz DRAUZ***	2958681/2952965
	Télécopieur du Greffe Concentrations	2964301/2967244
1. Unité opérationnelle I	*Claude RAKOVSKY*	2955389/2962368
2. Unité opérationnelle II	. . .	
3. Unité opérationnelle III	*Wolfgang MEDERER*	2953584
4. Unité opérationnelle IV	*Paul MALRIC SMITH*	
DIRECTION C		
Information, communication, multimédias	***John TEMPLE LANG***	2955571/2954512
1. Télécommunications et Postes	*Herbert UNGERER*	2968623/2968622
Coordination Société d'information		
- Cas relevant de l'Article 85/86	*Suzette SCHIFF*	2957657/2995365
- Directives de libéralisation, cas article 90	*Christian HOCEPIED*	2960427
2. Médias, éditions musicales	*Anne-Margrete WACHTMEISTER*	2953895/2963904
Chef adjoint d'unité	*Eric VAN GINDERACHTER*	2954427
3. Industries de l'information, électronique de divertissement	*Fin LOMHOLT*	2955619/2951150

DIRECTION D		
Services	***Humbert DRABBE***	2950060/2952701
1. Services financiers (banques, assurances)	*Luc GYSELEN*	2961523/2959987
2. Transports et infrastructures des transports	*Serge DURANDE*	2957243/2954623
3. Commerce et autres services	*Jorma PIHLATIE*	2953607/2960256
DIRECTION E		
Industries de base et énergie	*Maurice GUERRIN ff*	2951817/2951816
1. Acier, métaux non ferreux, produits minéraux non métalliques, bâtiment, bois, papier, verre	*Maurice GUERRIN*	2951817/2951816
2. Produits chimiques de base et transformés, caoutchouc	*Wouter PIEKE*	2959824/2956422
3. Energie et eau	. . .	
4. Cartels et Inspections	. . .	
Chef adjoint d'unité notamment chargé des Cartels	*Julian JOSHUA*	2955519
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Industries des biens d'équipement et de consommation	***Sven NORBERG***	2952178/2965550
1. Industries mécaniques et électriques et industries diverses	*Franco GIUFFRIDA*	2956084/2950663
2. Automobiles, autres moyens de transport et construction mécanique connexe	*Dieter SCHWARZ*	2951880/2950479
3. Produits agricoles, alimentaires, pharmaceutiques, textiles et autres biens de consommation	*Jürgen MENSCHING*	2952224/2995276
DIRECTION G		
Aides d'Etat I	***Michel PETITE***	2965052
Conseiller	. . .	
1. Politique des aides d'Etat	*Anne HOUTMAN*	2959628/2960562
Chef adjoint d'unité	. . .	
2. Aides horizontales	*Jean-Louis COLSON*	2960995/2962526
3. Aides à finalité régionale	*Loretta DORMAL-MARINO*	2958603/2952521
Chef adjoint d'unité	*Klaus-Otto JUNGINGER-DITTEL*	2960376/2965071
4. Analyses, inventaires et rapports	*Reinhard WALTHER*	2958434
DIRECTION H		
Aides d'Etat II	***Martin POWER***	2955436
1. Acier, métaux non ferreux, mines, construction navale, automobiles et fibres synthétiques	. . .	
Chef adjoint d'unité	. . .	
2. Textiles, papier, industrie chimique, pharmaceutique, électronique, construction mécanique et autres secteurs manufacturiers	*Cecilio MADERO VILLAREJO*	2960949/2955900
Chef adjoint d'unité	. . .	
3. Entreprises publiques et services	*Ronald FELTKAMP*	2954283/2967987
Task Force 'Aides dans les nouveaux Länder'	*Conrado TROMP*	2960286

Documentation...

This section contains details of recent speeches or articles given by Community Officials that may be of interest. Copies of these are available from DG IV's home page on the World Wide Web. 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 DG IV's Information Officer.

SPEECHES AND ARTICLES

Die Zukunft der europäischen Wettbewerbspolitik - VAN MIERT - Ludwig-Erhard-Preises - Bonn - 17/09/98

The application of competition and anti-trust policy in media and telecommunications in the European Union - PONS - International Bar Association - Vancouver - 14/09/98

Market restructuring, alliances, mergers - Satellite communication - UNGERER - 6th Satel Conseil Symposium - Paris - 8/09/98

New Priorities for telecommunications in a competitive world - the 1999 Review - UNGERER - IIC TELECOMMUNICATIONS FORUM - Brussels - 6/07/98

The future of broadcasting - PONS - Institute of Economic Affairs - London - 29/06/98

The arrival of competition in European telecommunications - UNGERER - European Lawyers' Union - Luxembourg - 16/06/98

Postal Services, Liberalisation and EC Competition Law. Preparing for a new era in postal services - UNGERER - Brussels - 12/06/98

Telecoms Pricing Policies and their effect on the European Internet - UNGERER - EUROISPA Conference - Brussels - 4/06/98

Competition Law on Enterprises by National Courts and National Authorities - TEMPLE LANG - FIDE Congress 1998 - Stockholm - 3/06/98

La politique européenne de concurrence à l'égard des aéroports - PONS - 1/06/98

Broadcasting of sports events and Competition Law - WACHTMEISTER - Newsletter-June 1998 - 1/06/98

Comment on the "Sytraval" judgment - HELD - Newsletter-June 1998 - 1/06/98

Commentaire sur le jugement "Kali and Salz" - GONZALEZ-DIAZ - Newsletter-June 1998 - 1/06/98

Commission practice concerning excessive pricing in Telecommunications - HAAG - Newsletter-June 1998 - 1/06/98

La politique de concurrence, une politique en faveur de l'emploi - CUZIAT - Newsletter-June 1998 - 1/06/98

The Economics of Vertical - PEEPERKORN - Newsletter-June 1998 - 1/06/98

Competition Policy in relation to the Central and Eastern European Countries - Achievements and Challenges - VAN MIERT - Newsletter-June 1998 - 1/06/98

Special Sectors:How much is too much? Telecoms & Postal Services - UNGERER - EU Committee 15th Competition Conference - Brussels - 28/05/98

Beating the band-width bottleneck - UNGERER - Paris - 14/05/98

EU anti-trust law (Articles 85 and 86) and their potential impact on the banking sector of the Czech - NEGENMAN - Fédération Bancaire de l'Union Européene (FBE) - Bruxelles - 28/04/98

The WTO and Competition Policy: the need to consider Negociation - VAN MIERT - Geneva - 21/04/98

Global competition and issues of governance - UNGERER - Aspen Seminar - Cernobbio - 27/03/98

Competition policy in the air transport sector - VAN MIERT - Royal Aeronautical Society - London - 9/03/98

COMMUNITY PUBLICATIONS ON COMPETITION

Legislation

Competition law in the European Communities-Volume IA-Rules applicable to undertakings -

Situation at 30 june 1994; this publication contains the text of all legislative acts relevant to Articles 85, 86 and 90.
Catalogue No: CM-29-93-A01-xx-C (xx=language code: ES, DA, DE, GR, EN, FR, IT, NL, PT).

Competition law in the European Communities-Addendum to Volume IA-Rules applicable to undertakings - Situation at 1 March 1995.
Catalogue No: CM-88-95-436-xx-C (xx=language code: ES, DA, DE, GR, EN, FR, IT, NL, PT).

Competition law in the European Communities-Volume IIA-Rules applicable to State aid - Situation at 31 December 1994; this publication contains the text of all legislative acts relevant to Articles 42, 77, 90, 92 to 94.
Catalogue No: CM-29-93-A02-xx-C (xx=language code: ES, DA, DE, GR, EN, FR, IT, NL, PT).

Competition law in the EC-Volume II B-Explanation of rules applicable to state aid - Situation at December 1996
Catalogue No: CM-03-97-296-xx-C (xx=language code= FR; les autres versions suivront)

Competition law in the European Communities-Volume IIIA-Rules in the international field - Situation at 31 December 1996 (Edition 1997)
Catalogue No: CM-89-95-858-xx-C xx= language code: ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI)

Merger control in the European Union – Situation in March 1998
Catalogue No: CV-15-98-899-xx-C (xx=language code: ES, DA, DE, GR, EN, FR, IT, NL, PT , SV, FI).

Brochure concerning the competition rules applicable to undertakings as contained in the EEA agreement and their implementation by the EC Commission and the EFTA surveillance authority.
Catalogue No: CV-77-92-118-EN-C

Official documents

Dealing with the Commission (Edition 1997)-Notifications, complaints, inspections and fact-finding, powers under Articles 85 and 86 of the EEC Treaty
Catalogue No: CV-95-96-552-xx-C (xx= ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI)

Green paper on vertical restraints in EC competition policy -COM (96) 721- (Ed. 1997)
Catalogue No: CB-CO-96-742-xx-C (xx= ES DA DE GR EN FR IT NL PT SV FI)

Final report of the multimodal group - Presented to Commissioner Van Miert by Sir Bryan Carsberg, Chairman of the Group (Ed. 1997).
Catalogue No: CV-11-98-803-EN-C

The institutional framework for the regulation of telecommunications and the application of EC competition rules - Final Report (Forrester Norall & Sutton).
Catalogue No: CM-94-96-590-EN-C

Competition aspects of access pricing-Report to the European Commission
December 1995 (M. Cave, P. Crowther, L. Hancher).
Catalogue No: CM-94-96-582-EN-C

Community Competition Policy in the Telecommunications Sector (Vol. I: July 1995; Vol. II: March 1997)-volume II B - a compedium prepared by DG IV-C-1; it contains Directives under art 90, Decisions under Regulation 17 and under the Merger Regulation as well as relevant Judgements of the Court of Justice. - Copies available through DG IV-C-1 (tel. +322-2968623, 2968622, fax +322-2969819).

Brochure explicative sur les modalités d'application du Règlement (CE) Nø 1475/95 de la Commission concernant certaines catégories d' accords de distribution et de service de vente et d'après vente de véhicules automobiles - Copies available through DG IV-F-2 (tel. +322-2951880, 2950479, fax. +322-2969800) EN, FR, DE

Competition decisions

Recueil des décisions de la Commission en matière d'aides d'Etat -Article 93, paragraphe 2 (Décisions finales négatives)- 1964-1995
Catalogue No: CM-96-96-465-xx-C [xx=FR, NL, DE et IT (1964-1995); EN et DA (73-95); GR (81-95); (ES et PT (86-95); SV et FI (95)]

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.-93/94
Catalogue No: CV-90-95-946-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.-90/92
Catalogue No: CV-84-94-387-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.-89/90
Catalogue No: CV-73-92-772-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.- 86/88
Catalogue No: CM-80-93-290-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.- 81/85
Catalogue No: CM-79-93-792-xx-C (xx=DA, DE, GR, EN, FR, IT, NL.)

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.- 73/80
Catalogue No: CM-76-92-988-xx-C (xx=DA, DE, EN, FR, IT, NL.)

Recueil des décisions de la Commission en matièrre de concurrence - Articles 85, 86 et 90 du traité CEE-64/72
Catalogue No: CM-76-92-996-xx-C (xx=DE, FR, IT, NL.)

Competition reports

XXVII Report on Competition Policy 1997
Catalogue No: CM-12-98-506-xx-C (xx= FR, ES, EN, DE, NL, IT, PT, SV, DA, FI)

European Community on Competition Policy 1997
Catalogue No: Cv-12-98-263-XX-C (xx= FR, ES, EN, DE, NL, IT, PT, SV, DA, FI)

XXVI Report on Competition Policy 1996
Catalogue No: CM-04-97-242-xx-C

European Community Competition Policy 1996
Catalogue No: CM-03-97-967-xx-C (xx= ES*, DA*, DE*, GR*, EN*, FR*, IT*, NL*, PT*, FI*, SV*)

XXV Report on Competition Policy 1995
Catalogue No: CM-94-96-429-xx-C

European Community Competition Policy 1995
Catalogue No: CM-94-96-421-xx-C (xx= ES*, DA*, DE*, GR*, EN*, FR*, IT*, NL*, PT*, FI*, SV*)

XXIV Report on competition policy 1994
Catalogue No: CM-90-95-283-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI)

European Community competition policy 1994 (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI). Copies available through Cellule Information DG IV

XXIIIe Report on competition policy 1993
Catalogue No: CM-82-94-650-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

XXIIe Report on competition policy 1992
Catalogue No: CM-76-93-689-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT

Fifth survey on State aid in the European Union in the manufacturing and certain other sectors (Edition 1997)
Catalogue No: CV-06-97-901-xx-C (xx= ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI)

4ème rapport sur les aides d'Etat dans l'Union Européenne dans le secteur des produits manufacturés et certains autres secteurs
Catalogue No: CM-92-95-368-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI)

Other documents and studies

The application of articles 85 & 86 of the EC Treaty by national courts in the Member States
Catalogue No: CV-06-97-812-xx-C (xx= FR, DE, EN, NL, IT, ES, PT)

Examination of current and future excess capacity in the European automobyle industry - Ed. 1997
Catalogue No: CV-06-97-036-EN-C

Video : Fair Competition in Europe- Examination of current
Catalogue No: CV-ZV-97-002-xx-V (xx= ES, DA, DE, GR, EN, FR, IT, NL, PT, FI, SV)

Communication de la Commission: Les services d'intérêt général en Europe (Ed. 1996)
Catalogue No: CM-98-96-897-xx-C xx= DE, NL, GR, SV

Study of exchange of confidential information agreements and treaties between the US and Member States of EU in areas of securities, criminal, tax and customs (Ed. 1996)
Catalogue No: CM-98-96-865-EN-C

Survey of the Member State National Laws governing vertical distribution agreements (Ed. 1996)
Catalogue No: CM-95-96-996-EN-C

Services de télécomunication en Europe: statistiques en bref, Commerce, services et transports, 1/1996
Catalogue No: CA-NP-96-001-xx-C xx=EN, FR, DE

Report by the group of experts on competition policy in the new trade order [COM(96)284 fin.]
Catalogue No: CM-92-95-853-EN-C

New industrial economics and experiences from European merger

control: New lessons about collective dominance (Ed. 1995)
Catalogue No: CM-89-95-737-EN-C

Proceedings of the European Competition Forum (coédition with J. Wiley) -Ed. 1996
Catalogue No: CV-88-95-985-EN-C

Competition Aspects of Interconnection Agreements in the Telecommunications Sector (Ed. 1995)
Catalogue No: CM-90-95-801-EN-C

Proceedings of the 2nd EU/Japan Seminar on competition (Ed. 1995)
Catalogue No: CV-87-95-321- EN-C.

Bierlieferungsverträge in den neuen EU-Mitgliedstaaten Österreich, Schweden und Finnland - Ed. 1996
Catalogue No: CV-01-96-074-DE-C DE

Surveys of the Member States' powers to investigate and sanction violations of national competition laws (Ed. 1995)
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Catalogue No: CA-99-56-948-EN-C

Information exchanges among firms and their impact on competition (Ed. 1995)
Catalogue No: CV-89-95-026-EN-C

Impact of EC funded R&D programmes on human resource development and long term competitiveness (Ed. 1995)
Catalogue No: CG-NA-15-920-EN-C

Competition policy in the new trade order: strengthening international cooperation and rules (Ed. 1995)
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Forum consultatif de la comptabilité: subventions publiques (Ed. 1995)
Catalogue No: C 184 94 735 FR C

Les investissements dans les industries du charbon et de l'acier de la Communauté: Rapport sur l'enquête 1993 (Ed. 1995)
Catalogue No: CM 83 94 2963 A C

Study on the impact of liberalization of inward cross border mail on the provision of the universal postal service and the options for progressive liberalization (Ed. 1995) - Final report,
Catalogue No: CV-89-95-018-EN-C

Meeting universal service obligations in a competitive telecommunications sector (Ed. 1994)
Catalogue No: CV-83-94-757-EN-C

Competition and integration: Community merger control policy (Ed. 1994)
Catalogue No: CM-AR-94-057-EN-C

Growth, competitiveness, employment: The challenges and ways forward into the 21st century: White paper (Ed. 1994)
Catalogue No: CM 82 94 529 xx C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

Growth, competitiveness, employment: The challenges and ways forward into the 21st century: White paper (Ed. 1993)-Volume 2 Part C
Catalogue No: CM-NF-93-0629 A C

The geographical dimension of competition in the European single market (Ed. 1993)
Catalogue No: CV-78-93-136-EN-C

International transport by air, 1993
Catalogue No: CA-28-96-001-xx-C xx=EN, FR, DE

Les investissements dans les industries du charbon et de l'acier de la Communauté: Enquête 1992 (Ed. 1993) - 9 langues
Catalogue No: CM 76 93 6733 A C

EG Wettbewerbsrecht und Zulieferbeziehungen der Automobilindustrie (Ed. 1992)
Catalogue No: CV-73-92-788-DE-C

Green Paper on the development of the single market for postal services, 9 languages
Catalogue No: CD-NA-14- 858-EN-C

The effect of different state aid measures on intra Community competition (Ed. 1990)
Catalogue No: CM 59 90 702 EN C

The effect of conglomerate mergers on competition (Ed. 1990)
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