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The euro and competition

Jean-François PONS and Joachim LÜCKING

Since 1 January 1999, the euro has become the single currency of eleven Member States, whose national currencies are now divisions of the euro. The introduction of this common currency will have a profound impact on competition in Europe.

1. In general, European Monetary Union (EMU) will intensify competition for three reasons:

a) The euro will reinforce the positive effects of the Single Market Programme. The Single Market has had a pro-competitive impact by integrating markets effectively and making the relevant markets broader. The euro should enhance this effect because, for trade between the participating Member States, it will eliminate exchange-rate risk and the transaction costs associated with converting one currency into another. As a consequence, trade flows are likely to increase.

Whereas the effects of the Single Market Programme were mainly concentrated on certain manufacturing sectors which had hitherto been protected by high non-tariff barriers, the euro is likely to affect a wide range of sectors, including notably financial services and distribution. In particular, the markets for many financial services, which are at present national because of the existence of separate currencies, will gradually be widened to cover the whole euro zone.

The broadening of geographic markets offers new opportunities to exploit economies of scale and will lead to an increase in merger and acquisition activity. This will especially be true for the financial sector and for industries where sales networks have previously been largely confined to national boundaries and where companies see prospects for obtaining important cost savings by enlarging these to a European scale.

On the other hand, competition will expose the weaknesses of less efficient companies, which will become prone to take-over bids. In general, the restructuring arising from EMU will pose no competition problems and should enhance the overall efficiency of the Community economy. Provided that market entry is easy, no major competition problems should result from the reduction in the total number of firms as inefficient firms exit and more efficient firms expand. Although the number of domestic suppliers in any local market should fall, the total number of actual or potential competitors in that market should increase after it has been incorporated into a wider geographic market.

- b) The euro will increase price-transparency. After the introduction of the euro, the greater ease with which prices in different countries can be compared will mainly affect those sectors where price dispersion between Member States is high and not due to structural reasons such as differences in consumer tastes and indirect taxation, but rather to the market-segmentation strategies of firms.

A recent study by BEUC – the European Consumers' Organisation – shows that the prices of some goods and

services can differ widely from one Member State to another. Certain consumer durables sectors, such as motor vehicles, are likely to be particularly strongly affected by increased price-transparency, since each purchase represents a high proportion of the consumer's total expenditure. For such products, the potential savings which the consumer can achieve by cross-border purchasing can easily outweigh the additional costs which he incurs.

- c) The euro will allow easier financing, leading to market entry and more mergers. The impact of the euro on the market for corporate equity will reduce the cost of capital which could lead to an increase in the number of mergers. In fact, this number has already increased substantially in anticipation of monetary union, notably in the financial sector (banks, insurance companies). New financing techniques and markets can be put to work for a new generation of EU entrepreneurs thus leading to market entry. Therefore, in principle, the change in the market for capital should further increase the pro-competitive impact of EMU.

For the consumers, the cost of the exchange and the fees for international payments will be reduced in the eurozone.

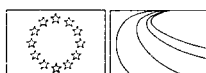
2. Competition policy has an important role to play in safeguarding and enhancing the pro-competitive effects of the euro on the markets for products and services.

In particular, there appear to be two types of risk, relating to antitrust on the one hand and to state aid on the other hand:

- a) Antitrust risks:

The threat of potentially increased competition could also lead to attempts by companies to find ways to reduce the actual level of competition. For example, the euro will allow consumers to immediately compare prices and other terms of transactions across borders. This will create further incentives for parallel trade, but will also increase the temptation for companies to create new obstacles to arbitrage.

Similarly, new competitive threats arising from EMU may induce incumbents to enter into vertical or horizontal agreements with the object of foreclosing rivals' markets, or alternatively to seek state aid. Finally, in the longer run, the expected increase in mergers and acquisitions could create oligopolies in some industries. Companies in these industries could be tempted to reduce the competitive pressure either



by engaging in tacit collusion or by forming cartels. This will be made easier as the increased price transparency will facilitate the monitoring of competitors' prices. It will also be more difficult to deviate from agreed prices and hide this fact behind exchange rate fluctuations.

A recent example of antitrust risks is given by the decisions of the banks regarding the fees for international payments inside the eurozone. These decisions have given rise to the concern that they were devised between the banks at a national level. For this reason, the Commission has decided to start an investigation.

b) State aid risks:

Some companies will inevitably experience difficulties as a result of more intense competition. Consequently, Member States are likely to experience strong pressure to protect

these companies by means of state aids, notably rescue and restructuring aids. Such aids can lead to important distortions of competition at the expense of more efficient companies. Another danger associated with such aid is that it will perpetuate the old, unviable structures rather than promote a genuine adjustment to new economic realities.

Finally, the knowledge that government is willing to intervene to rescue firms in difficulty may give rise to "moral hazard". The expectation that, if the worst comes to the worst, the government will not allow the company to fail may lead some managers to delay making difficult decisions on restructuring and may tempt others to expose their companies to excessive risks. Lenders may also be tempted to underestimate commercial risks in cases where the borrower is perceived as "too big to fail".

* * *

Competition policy therefore needs to remain vigilant to ensure that the euro can deliver its full benefits. Both Community and national competition policy have a vital role to play in ensuring that product and service markets (including especially the financial services) are flexible so that European consumers will truly benefit from the common currency.

In DG IV, Unit A-1 will be specifically in charge of following and analysing the impact of the euro on competition. All relevant analyses and information can be sent to the following address:

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EC COMPETITION LAW AND DIGITAL PAY TELEVISION

Linsey MC CALLUM, DG IV-C-2

1. INTRODUCTION

The past decade has seen significant changes in the television sector in the EU with the development of commercial, advertising-funded broadcasters, trans-national channels, and the emergence of subscription-funded broadcasters or pay-TV operators. The introduction of digital television is now set to change the sector even more radically by increasing the capacity of transmission networks and allowing new types of services, such as pay-per-view, interactive banking or shopping and internet access via television. Pay-TV operators have led the way in introducing digital television in the EU, but the coming decades will see a more general transition to digital television by all operators in the sector, whether State-funded, advertising-funded or subscription-funded.

This article describes the Commission's policy in applying EC competition law to the pay television sector, with particular emphasis on digital pay television. Broader issues relating to the television sector, and in particular the role of public service broadcasters, fall outside its scope.

2. EC COMPETITION LAW AND DIGITAL PAY TELEVISION

2.1. A balanced approach

Co-operation between undertakings with the aim of entering a new and untested market has been recognised by the Commission over decades as having benefits for the Community's industrial, technological and social development by virtue of the increased competition which it can foster. Co-operation can take the form of a joint venture between undertakings, merger of the undertakings' interests or acquisition by one undertaking of another.

Analysis of the effects of such co-operation concentrates on its net impact on competition within the common market, that is the balance between technical progress and restriction of competition. Thus, even where the undertakings concerned are actual or potential competitors on the market in question, the Commission will generally take a favourable approach if the overall effect of the co-operation is pro-competitive.

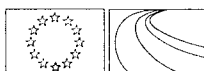
However, where co-operation will eliminate competition on

the market in question by foreclosing the access of third parties and creating a dominant position, then the limits of the advantages of co-operation have been reached. The creation or strengthening of dominance by joint venture, merger or acquisition will always fall foul of the competition rules, unless remedies can be found which prevent such effects. This principle applies equally to undertakings which have achieved a position of market dominance through superior performance. The Commission will object to any further strengthening through joint venture, merger or acquisition or indeed through abusive behaviour.

This balanced approach has been approved over the years by the Court of Justice and Court of First Instance. It is also the approach followed by the Commission in respect of digital pay television as the competition rules set out in Articles 85-90 of the EC Treaty¹ apply to this sector as to all others which have not been specifically excluded from their scope by the Treaty².

¹ As implemented by Council Regulation 17/62 concerning the application of Articles 85 and 86 EC and Council Regulation 4064/89, as amended by Council Regulation 1310/97, concerning the control of concentrations between undertakings ("the Merger Regulation").

² See joined cases 209-213/84 *Asjes* [1986] ECR 1425 at paragraphs 40-42. The cultural exception relating to state aids and Article 90(2) may affect the evaluation of such aids granted to the television sector. However, even this does not amount to a sectoral exemption.



Geographic markets in the television sector tend to be national for linguistic, cultural and regulatory reasons. The introduction of digital television will not change this fact, as is borne out by the comments on the Convergence Green Paper:

“Markets for broadcasting were expected to remain fragmented along national and regional lines for cultural and linguistic reasons but also because of the geographic scope of certain aspects of the business”³.

2.2. Essential policy goal pursued by Commission and ensuing benefits

The essential policy goal of the Commission in relation to digital pay-TV is thus to maintain open market structures and prevent the erection of barriers to entry to national or language-based markets which foreclose further access. This policy has four fundamental benefits.

2.2.1. Benefits for consumers

The competition rules seek to ensure that the Community’s citizens are not exploited by dominant undertakings through high prices and poor quality service. As the Commission recognised in its communication on “Services of general interest in Europe”⁴:

“Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price”.

The benefits of competition in the digital pay television sector for consumers have recently been illustrated in France and the UK. Within a month of the appearance of a competitor in the form of Télévision Par Satéllite (TPS), Canal+ reduced its subscription price⁵. Similarly, the prospect of competition from the digital terrestrial pay-TV operator, ONdigital (formerly British Digital Broadcasting, BDB), has led BskyB not only to reduce its prices for digital pay television, but also to offer consumers a wider choice of services⁶. The creation of ONdigital has already been approved by the Commission. In the case of TPS, the Commission has announced its intention to take a favourable decision⁷. Some commentators have also

argued that the degree of subsidisation of the retail price of digital set top boxes is also due to increased competition.

It is also striking to note that plans for digital pay television in Germany are proceeding apace, despite the declarations of Bertelsmann, Kirch and Deutsche Telekom that the prohibition of their co-operation plans would inevitably mean the abandonment of digital television there. Deutsche Telekom has signed agreements with channel providers for the marketing and distribution of their digital pay-TV services⁸. Kirch had claimed that it would cease operation of its digital pay-TV platform, DF1. Not only has this not happened, but Kirch is seeking investors to develop it⁹. Finally, Premiere has continued to add subscribers to its digital pay-TV service. Thus, the prohibition decision adopted by the Commission on 27 May 1998 has not been to the detriment of German consumers.

2.2.2. Creation of the internal market for television services

The benefits of competition also underlie the Commission’s commitment to the creation of a single market in the television sector¹⁰.

³ SEC (1998) 1284 final, at page 20.

⁴ OJ C 281, 16.09.96, p. 3, at paragraph 15.

⁵ Subscription prices were reduced from 186 FF for the basic package plus two film channels (1994 price) to 130 FF for the basic package plus 4 cinema channels plus the Diney Channel (prices between March and July 1997). 130 FF was the price then charged by TPS.

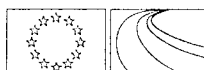
⁶ <http://www.inside-cable.co.uk> - see article of 16 August 1998 “Sky’s digital pricing revealed”. New Media Markets of 13 August 1998 “The decision to launch a £6.99 “special value” value package ... confirms BskyB’s desire to build a mass market digital market and to counteract the rival digital terrestrial service of ONdigital”.

⁷ Notice pursuant to Article 19(3) of Regulation 17, OJ C 65 [1998] of 28 February 1998.

⁸ TV Express of 10 December 1998, p. 14.

⁹ Financial Times of 7 January 1999, “Kirch woos investors with new deal”.

¹⁰ As expressed in particular in the Television Without Frontiers Directive - Council Directive 89/552/EEC of 3 October 1989 as amended by Directive



"Its (the Single Market's) aim was not only to achieve economies of scale but also to set free the dynamism and the creativity inherent in competition" 11.

The Commission's objection to the creation of national dominant positions¹² in the digital pay television sector is a reflection of this fundamental goal. The abolition of State measures which partition national markets would be fundamentally undermined if competition law did not prevent private or public undertakings from replicating

their effect¹³. The development of a European-scale audio-visual industry would be impossible if entry into national markets was blocked.

2.2.3. Media plurality

While the competition rules are of general application, they must take account of each sector's special characteristics¹⁴. In the case of television, there are many such characteristics which will be discussed in the annex on market definition. However, one quite specific point should be stressed here, namely the dangers inherent in the creation or strengthening of dominant positions for media plurality. The goal of media plurality must, therefore, always be kept in mind¹⁵.

2.2.4. Digital television as platform for convergence and further technological progress

Although technological convergence of the television, telecommunications and information technologies sectors is a reality, the types of retail services which will emerge and consumers' demand for them remains unclear. There is broad agreement on one point, however, namely that digital television will be one of, if not the, most important platforms for the widespread introduction of "convergent services" in the EU.

The BiB joint venture is a good example of this: e-mail, limited internet access, home-banking and shopping are to be made available to UK consumers via digital television platforms. The Commission proposes to take a favourable attitude to this joint venture after imposing significant conditions to ensure that BiB will not create a dominant position nor strengthen the dominant positions of two of its parents, BSkyB and BT, in the closely related pay-TV and telecommunications customer access infrastructure markets¹⁶.

The benefits of convergence for all European citizens will only be reaped if market structures remain open and technical progress through innovation is free to develop. This has been

97/36/EC of the European Parliament and of the Council of 30 June 1997.

¹¹ White Paper on growth, competitiveness, and employment, COM(93) 700 final.

¹² One of the conditions of application of Articles 85 and 86 EC is that the agreement or conduct in question "may affect trade between Member States". In cases 6 & 7/73 *Commercial Solvents v. Commission* [1974] ECR 223 at paragraphs 30-35 the Court of Justice confirmed that an agreement which alters the competitive structure within the Common Market to an appreciable extent, or has "repercussions" for that structure will meet the "effect on trade" test. In case 22/79 *Greenwich Film Production v. SACEM* [1979] ECR 3275 at paragraph 11 the Court of Justice confirmed that this applies equally to the provision of services as to supply of goods. The Court of Justice confirmed in case 8/72 *Cementhandelaren v. Commission* [1972] ECR 977 that an agreement covering the territory of a single Member State may affect trade if alters the competitive structure there and directly or indirectly affects trade flows. This principle applies *a fortiori* where the agreement makes penetration of a national market more difficult: case 61/80 *Coöperative Stremsel-en Kleurselabriek v. Commission* [1981] ECR 851.

Under the Merger Regulation, there is no jurisdictional equivalent to the "effect on trade" test.

¹³ "An agreement (...) which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental object of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States (...) could not allow undertakings to reconstruct such barriers" Cases 56 & 58/64 *Consten & Grundig v. Commission* [1966] ECR 299 at 340. The Court of Justice has said that "without (competition law) numerous provisions of the Treaty would be pointless", Case 6/72 *Europemballage and Continental Can V. Commission* [1973] ECR 215 at 244.

¹⁴ See case 45/85 *Verband der Sachversicherer v. Commission* [1987] 405 at paragraphs 12-15.

¹⁵ See also Article 21(3) of the Merger Regulation which recognises the preservation of media plurality as a legitimate interest and thus allows Member States to apply national rules to cleared operations.

¹⁶ Notice published pursuant to Article 19(3) of Regulation 17, OJ C 322 [1998] of 21 October 98.



recognised by industry in the comments on the Commission's convergence green paper. "There was widespread support for their (competition rules') strict application"¹⁷.

2.3. Application of policy goal

Despite these benefits, some commentators plead for a lax application of the Community's competition rules to the sector, in particular, in view of the scale of investment and risk involved in launching digital pay television. A number of different arguments are advanced in support of this proposal: national monopolies in digital pay television will be required in order to recoup the costs of entry; concentration in digital pay television is necessary to rebalance the audiovisual trade deficit with the US; globalisation means that national pay television monopolies are constrained by global potential competition. In sum, therefore, these commentators argue that technological progress, in the form of the introduction of digital television, and application of the Community's competition rules can be difficult to reconcile. However, they provide little or no justification of this proposed specific approach to digital pay television in either legal or economic terms, nor of its longer term implications.

Against the background of this criticism, the remainder of this

¹⁷ SEC(1998) 1284 final, at p. 24.

article is devoted to a more detailed description of the Commission's application of the competition rules to digital pay television, with reference to specific cases. It seeks to explain the broad lines of the Commission's policy in relation to the issues raised by these cases, which are complex and involve examination of the competitive situation at all levels of the vertical supply chain:

- Content – access to important programming rights, and in particular to films and attractive sports events;
- Transmission – access to digital terrestrial, cable and satellite capacity and in the case of more advanced convergent services to broadband customer access infrastructure; and
- Set top boxes – access to proprietary digital conditional access, electronic programme guides and application programming interfaces embedded in digital set top boxes (often referred to as the technical services necessary for pay television).

Section 3 examines horizontal agreements on the pay TV market itself. Section 4 deals with horizontal issues at each level of the vertical supply chain and the effects of vertical integration. Given the importance of market definition, the principles underlying the Commission's approach and their application to the markets pertinent to digital pay television are set out in annex.

3. PAY-TV MARKET HORIZONTAL AGREEMENTS

The Commission has been called upon to consider a number of pay-TV mergers, acquisitions and joint ventures. These can be distinguished into two broad categories:

- Alliances between companies active on different geographic markets; and
- Alliances between companies active on the same geographic market.

The considerations specific to these categories are set out below.

3.1. Alliances between companies on different geographic markets

This form of co-operation is unlikely to pose competition problems as there will be little or no overlap in the geographic areas of activity of the companies in question. Thus, no objection was raised when Kirch and Rlichemont entered the Italian pay-TV market through acquisition of joint control in Telepiu¹⁸. Kirch had previously been active only in the German pay-TV market, whereas Rlichemont through its holding in FilmNet had been active in the pay-TV markets in Belgium, the Netherlands, Denmark, Norway, Sweden and Finland. Equally, no objection was raised when Rlichemont and Multichoice

¹⁸ M. 410 Kirch/Rlichemont/Telepiu, Commission decision of 2 August 1994, OJ C 225 [1994] p. 3.



merged their pay-TV interests in the EEA in Nethold (which held 100% of the voting rights in FilmNet) with a resulting change in the control of Telepiu¹⁹. The concentration of Bertelsmann and CLT's radio and television businesses, including pay-TV, in a newly-created joint venture CLT-UFA was also declared to be compatible with the common market²⁰. With the exception of Germany, Bertelsmann and CLT's activities took place on separate geographic markets. In Germany, the two companies' already operated the channel RTL through a joint venture. In clearing the merger, the Commission refused to follow the comments of third parties that the merged entity, CLT-UFA, would hold a dominant position and stated that, "the mere combination of resources and possible synergies is not sufficient to establish a dominant position in the foreseeable future".

As a general rule, therefore, the Commission will take a positive attitude under the competition rules to the creation of cross-border alliances between companies active in different geographic markets. These are unlikely to result in the creation of dominant positions. Moreover, they contribute to the creation of companies in the European audio-visual sector

which can benefit from economies of scale and scope. There is only one caveat, namely that if a network of strategic alliances between all major European players were to be created, the impact of individual operations would have to be assessed against such a background²¹. There might be a risk of partitioning of national markets and a consequential creation or strengthening of dominant positions in those markets, in particular if two companies with strong market positions were to ally. However, such an effect would have to be proved (and has not yet materialised).

3.2. Alliances between companies active on the same geographic market

It is useful to distinguish two types of pay-TV alliances between companies which are active on the same geographic market.

3.2.1. Alliances between companies which are not active on the pay-TV market, or have only limited activities.

Alliances of this type will generally be considered to be pro-competitive and to raise no fundamental competition law concerns.

Thus, in May 1998 the Commission cleared the creation of a digital terrestrial pay-TV joint venture between Carlton and Granada, British Digital Broadcasting (BDB, now known as ONdigital) in the UK. Carlton and Granada each operate regional advertising-funded television channels in the UK and both already have interests in pay-TV channels. Granada also has a shareholding in BSkyB and operates a pay-TV joint venture with BSkyB. While some amendments to the notified agreements were required, there was no doubt that the creation of BDB was, in principle, pro-competitive as it would provide competition to the dominant incumbent operator, BSkyB.

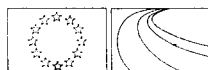
The Commission also announced its intention in February 1998²² to clear the creation of a company, Télévision Par Satellite (TPS) to provide digital satellite pay-TV services in France. TPS's parents companies are the French

²¹ See XVth Competition Policy Report at paragraph 82. "At present, more and more cross-border alliances are being planned or forged, typified by a pan-European outlook. If all these projects come to fruition, most major television distributors in Europe may well be linked through networks of alliances. The Commission will accordingly have to examine these transactions carefully. In particular, it will have to evaluate the alliances' overall impact at European level, going beyond the direct consequences for the specific national markets."

¹⁹ M. 584 Kirch/Richemont/Multichoice/Telepiu, Commission decision of 5 May 1995, OJ C 129 [1995] p. 6.

²⁰ M. 779 Bertelsmann/CLT, Commission decision of 7 October 1996, OJ C 364 [1996] p. 3.

²² Notice pursuant to Article 19(3) of Regulation 17, OJ C 65 [1998] of 28 February 1998.



advertising-funded television operators, TF1, France 2, France 3 and Métropole Télévision (M6), the telecommunications operator France Télécom and the cable operator Suez Lyonnaise des Eaux. Although some modifications to the agreement were necessary, no fundamental competition problems arise from the creation of TPS, as TPS will compete with the well-established French pay-TV operator, Canal+.

3.2.2. Alliances concerning companies which already hold strong positions on the pay-TV market.

While competition law does not object to the creation or strengthening of dominance through superior performance, it does object to the creation or strengthening of dominance by any other means, including merger, acquisition or creation of a joint venture. The Commission has examined two such cases relating to digital pay-TV.

The first arose in the UK. As originally constituted, BSkyB was a party to the BDB joint venture referred to above. After informal discussions with the Commission, the UK authorities insisted that BSkyB exit the joint venture as a shareholder as BSkyB's jointly-controlling shareholding in BDB risked strengthening BSkyB's existing dominant position in the UK pay-TV market. In particular, BSkyB would be able to ensure that there was co-ordination

between BDB and BSkyB on the UK pay-TV market, rather than direct competition.

In the second case, the Commission prohibited the merger of Bertelsmann and Kirch's pay-TV interests in Germany²³. Together, the parties operated the only pay-TV platforms in Germany, Premiere and DF1, held all important German-language pay-TV programming rights, controlled the de facto standard digital set top box and, by virtue of their alliance with Deutsche Telekom could prevent the emergence of a digital cable pay-TV competitor. As the parties were unwilling to provide the Commission with the undertakings necessary to prevent the merger resulting in an enduring near-monopoly in pay-TV in German-speaking Europe, the operation was declared incompatible with the common market.

4. EFFECTS ON COMPETITION ON THE PAY-TV MARKET

Competition on the pay-TV market can be affected by the existence of bottlenecks at each level of the vertical supply chain – the various markets for content, transmission networks and/or technical services - as each of these constitutes an essential in-put for a pay-TV operator. Competition on the pay-TV market can be affected by leveraging of market power

from one level to another or through foreclosure effects caused by vertical integration. Indeed, the conclusion that an undertaking holds a dominant position on the pay-TV market pre-supposes the existence of barriers to entry at one or more of these levels which prevent the emergence of substantial competition. Specific competition issues can also arise at each level of the vertical supply chain.

It follows from this that cases which affect the pay television market require a complex examination of a number of different markets. In the Bertelsmann/Kirch/Deutsche Telekom cases the markets for pay-TV, cable infrastructure and technical services were affected. In the BiB case, the markets for digital interactive TV services, pay-TV, technical services, wholesale film and sport content markets and telecommunications customer access infrastructure have been examined.

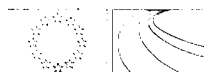
These issues are dealt with below.

4.1. Issues at each level of the supply chain

4.1.1. Content

The programming rights for films and sports events are generally sold exclusively and in respect of national territories. The competition rules do not object to either of these standard

²³ M. 993 Bertelsmann/Kirch/Premiere, Commission decision of 27 May 1998, not yet published.



industry practices²⁴. However, where the duration or the scope of the exclusivity embodied in a particular contract unduly forecloses the access of other pay-TV operators, then Article 85(1) EC will be applicable and an exemption under Article 85(3) EC will be required.

The Commission has applied this principle to rights contracts in respect of both films²⁵ and sports²⁶ in the context of notifications of rights contracts. The considerations relevant to film and sports rights vary. A longer duration of exclusivity for film rights will generally be accepted than for important sports rights as the latter constitute "perishable goods" whose value decreases rapidly with time. The Commission's object has been to maintain access to such rights for third parties within a reasonable time-scale.

However, the existence of networks of long-term exclusive film and sports contracts is also of relevance to the consideration of operations on the pay-TV market itself as a lack of access to such premium content acts as a barrier to entry. Thus, in the

Bertelsmann/Kirch case referred to above, the Commission sought to ensure that the operation would not foreclose access to the pay-TV market for other operators by seeking an undertaking from the parties to cede programming rights. While Kirch and Deutsche Telekom were willing to provide the Commission with the minimum undertakings necessary to ensure competition on the pay-TV market, in particular, by ceding programming rights and allowing private cable operators to independently market *Premiere* in combination with their own channels, Bertelsmann was not. The Commission therefore prohibited the operation.

4.1.2. *Transmission networks*

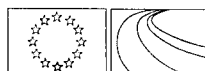
In the long term, digitisation will reduce capacity shortages of broadcast transmission networks (whether satellite, cable or terrestrial), at least for backbone transmission capacity. However, as the Convergence Green Paper recognises, digitisation will not be completed in the short to medium term. The transition phase is, therefore, likely to be lengthy: while it lasts the operators of cable networks and suppliers of satellite transponder capacity are in a position to prevent the emergence of competition in the pay-TV market by refusing to carry a particular pay-TV service or to lease transponder capacity. Ensuring non-discriminatory access to transmission networks is thus essential: the Commission

is examining cases concerning access to both cable networks and satellite transponder capacity.

However, digitisation will not remove all competition problems in relation to transmission networks. In particular, there is likely to be a continuing bottleneck in the market for broadband customer access infrastructure. While digital television services can be provided by means of digital terrestrial, digital satellite or digital cable networks, this is not the case of genuine broadband services which require two-way transmission networks. Digital cable and upgraded telecommunications customer access infrastructure will be the only means of transmission suitable for such services in the medium term²⁷. Dual ownership by telecommunications operators of both cable and telecommunications infrastructures can therefore pose a particular problem which the Commission is seeking to address through its proposal to revise Directive 90/388/EEC as amended by Directive 95/51/EC. This proposal concerns legal separation of cable and telecommunications infrastructures. There have already been moves in a number of Member States²⁸ against such dual ownership which go beyond legal separation. It is likely that

²⁴ Coditel I [1982] ECR 3381 and Coditel II [1980] ECR 881 judgments of the European Court of Justice.
²⁵ ARD decision, Commission Decision of 15 September 1989 OJ L 284, 03/10/1989, p. 36.
²⁶ For example, the granting of a "comfort letter" to the BBC/BSkyB/Premier League agreement in 1993. See press release IP(93)614 of 20 July 1993. Further cases are currently under consideration.

²⁷ Broadband radio services are not an option for the foreseeable future.
²⁸ The Netherlands, Ireland and Germany, in particular.



divestiture of one of these interests may be required on a case by case basis as a condition of approval of a telecommunications operator's participation in pay-TV or multimedia joint ventures. Precisely this issue has recently arisen in the Bertelsmann/ Kirch/Deutsche Telekom and BiB cases which are described below.

4.1.3. Technical services

There are two broad issues relating to proprietary digital set top boxes. The first concerns the access of competing pay-TV operators to existing installed bases of set top boxes. The second concerns interoperability of proprietary digital set top boxes.

4.1.3.1. Access

Generally in the EU, pay-TV operators are also suppliers of technical services. When pay-TV operators entered the market, the technical services necessary for pay-TV did not exist. It was therefore logical that they developed the technical services themselves. In theory, a new entrant into the pay-TV market has a choice between launching a set top box population using his own technical services for reception of his service and seeking to use the set top box population of the incumbent pay-TV operator. In practice, however, the scale of investment required means that the new entrants' most realistic option is to provide a pay-TV service using the set top boxes which

already exist. Quite apart from the investment required, consumers are reluctant to buy or rent more than one digital set top box.

There are three essential components of a set top box which govern the conditions of access: conditional access systems, electronic programme guides and application programming interfaces. If these components are not based on proprietary technology, a new entrant can access the set top box independently of the existing operator of technical services. However, the components are generally proprietary which means that a new entrant will be dependent on his incumbent competitor for access to the marketplace. If access to existing boxes was refused or granted only on discriminatory terms, competition on the pay-TV market would be significantly impeded.

The Advanced TV Standards Directive²⁹ accepted the commercialisation of proprietary digital set top boxes by pay-TV operators within the EU. However, it regulates the provision of digital conditional access services for "digital television services". It does not deal with the provision of digital conditional access services for other types of service, such as digital radio or on-line services,

nor does it deal with provision of access to electronic programme guides or application programming interfaces. However, the scope of the competition rules is not limited by the Directive. Thus, the Commission has examined issues relating to proprietary digital conditional access systems, electronic programme guides and application programming interfaces in the Bertelsmann/Kirch/Deutsche Telekom and BiB cases which are described below.

4.1.3.2. Interoperability

In the future, digital set top boxes will be replaced by integrated digital television sets. The Advanced TV Standards Directive referred to above requires such integrated sets to allow for the addition of modules containing different proprietary conditional access systems and other relevant technical services³⁰. In this way, consumers can be confident in buying such a set that they will not be tied to any one digital service provider.

However, the transition to integrated digital television sets is likely to take a significant number of years. In the meantime, there is a need to ensure that consumers buying a

²⁹ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, OJ [1995] L 281/51.

³⁰ Article 4(a) "Where television sets contain an integrated digital decoder such sets must allow for the option of fitting at least one standardised socket permitting connection of conditional access and other elements of a digital television system of the digital decoder".

proprietary digital set top box are not tied to a single provider of digital services. The Directive does not deal with this issue. Enforced standardisation of digital set top boxes appears to be premature. Indeed, it may even be dangerous to do so before the market has had time to settle. However, some degree of interoperability of digital set top boxes can be ensured by obliging suppliers of technical services based on proprietary technology to enter simulcrypt agreements. Simulcrypt involves a commercial agreement between the suppliers of different proprietary conditional access systems to synchronise the different systems such that populations of digital set top boxes embedding each system are able to descramble signals using both conditional access systems³¹. In the BiB case, BSkyB has been obliged to enter such agreements with operators of different proprietary conditional access systems as one of the proposed conditions of clearance of the joint venture.

4.2. Vertical integration

Vertical integration occurs when a company extends its scope of activity by merger, acquisition or joint venture into markets which are upstream or downstream of its core area of business. The essential rationale for vertical

integration is presumed to be increased efficiency and, as such, it is generally considered by the Commission to be unlikely to pose serious competition problems. However, where the companies involved have strong positions on their core markets, a close examination of the effects of vertical integration is required in order to ensure that it does not threaten to erect barriers to entry by foreclosing access to supplies or markets.

National markets for content, transmission networks, technical services and pay-TV in the EU are characterised by the existence of dominant incumbent operators. Agreements between these operators may well have the effect of strengthening existing dominant positions in core markets and of creating dominant positions in new markets. Such agreements will be acceptable under Community competition law only where the parties accept conditions which prevent such effects. Structural conditions are likely to be necessary, such as divestiture of pay-TV content rights, ceding control of transmission networks and control over proprietary technical services embedded in set top boxes. Behavioural conditions will be considered to be adequate only in very limited circumstances. Behavioural undertakings not to abuse a newly created dominant position will be rejected.

The Commission has concluded in three cases concerning pay-

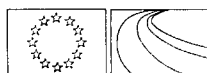
TV that the undertakings offered by the parties were insufficient to prevent vertical integration creating or strengthening dominant positions. In MSG³², the creation of a technical services joint venture by Bertelsmann, Kirch and Deutsche Telekom was prohibited as MSG would hold a dominant position on the technical services market which would have the effect of strengthening the existing dominant positions of the parents on the pay-TV and cable networks markets respectively.

In the Nordic Satellite Distribution case (NSD)³³, the Commission prohibited a joint venture between Telenor, TeleDanmark and Kinnevik to provide transponder capacity and the transmission and distribution of satellite TV channels to the Nordic area. The Commission concluded that NSD would hold a dominant position on the market for satellite TV transponder services suitable for Nordic viewers. NSD's dominance would strengthen TeleDanmark's dominant position on the cable TV market in Denmark. Finally, the creation of NSD would lead to Viasat (Kinnevik's subsidiary) acquiring a dominant position on the market for distribution of pay-TV and other encrypted channels to direct-to-home households.

³¹ For a more technical definition see notice published pursuant to article 19(3) of Regulation 17, OJ C 322 [1998] of October 98.

³² M. 649 Media Services Group [1994] OJ L 364/1.

³³ M. 490 Nordic Satellite Distribution [1995] OJ L 53/20.



In the recent Bertelsmann/Kirch/Deutsche Telekom decisions³⁴, the creation of joint ventures to supply technical services for pay-TV distributed by cable and satellite was prohibited as the joint ventures would hold dominant positions on the technical services market which would strengthen the dominant positions of Deutsche Telekom on the cable network market and of Bertelsmann and Kirch's joint venture Premiere on the pay-TV market. In these cases, the essential problem was Bertelsmann and Kirch's stranglehold over the pay-TV rights which prevented the emergence of a competitor on the pay-TV market. There would be no new entry in the technical services market without a second pay-TV operator. Deutsche Telekom's position on the German cable network market prevented the emergence of competition from the private cable operators. While Kirch and Deutsche Telekom were willing to provide the Commission with the minimum undertakings necessary to ensure competition on the pay-TV market, in particular, by ceding programming rights and allowing private cable operators to independently market Premiere in combination with their own channels, Bertelsmann was not.

³⁴ M. 993 Bertelsmann/Kirch/Premiere and M. 1027 Deutsche Telekom/ Beta-Research, Commission decisions of 27 May 1998, not yet published.

In the BiB case, on the other hand, the parties have been willing to agree to substantial conditions on the operation of the joint venture. On this basis, the Commission proposes to take a favourable attitude to the creation of BiB³⁵. BiB is a joint venture between BSKyB, BT, Matsushita and Midland Bank. It will provide digital interactive TV services in the UK, such as limited internet access, home-banking, home-shopping and e-mail via television sets, by means of digital satellite broadcasting with a telecommunications return path. In contrast to the cases cited above, BiB will not itself be active on the pay-TV market. BSKyB and, to a lesser extent BiB, will be active on the technical services market.

As originally notified to the Commission, there was a serious concern that BSKyB and BiB would not allow third parties, whether pay-TV operators or digital interactive TV services operators, to have non-discriminatory access to the digital set top boxes which BiB will subsidise. Conditions³⁶

³⁵ Notice published pursuant to Article 19(3) of Regulation 17, OJ C 322 [1998] of 21 October 98.

³⁶ The most important conditions can be summarised as follows: legal separation of BiB's subsidy payment/recovery and digital interactive TV services operations, removal of all exclusive rights concerning access to the set top box, provision of necessary information about the set top box and proprietary technical systems to all third parties, obligation to enter simulcrypt agreements, obligations concerning the manner in which subsidy recovery will

have been agreed to ensure that third parties, whether operators of digital television or digital interactive TV services, have fair, reasonable and non-discriminatory access to all proprietary components of the digital set top box which BiB will subsidise (digital conditional access services, the electronic programme guide and application programming interface). As described above, BSKyB has also been obliged to enter simulcrypt agreements.

There was also a concern that BT's dominant position in the telecommunications customer access market would be abused as a result of its participation in BiB. In particular, BT owns both the only national telecommunications customer access network in the UK which, if upgraded, would be suitable for the provision of genuine broadband services in competition with BiB and also cable networks. BT has accepted not to expand its cable interests, and to divest its existing cable interests, in the UK. Moreover, the Commission will keep under close review developments in the UK broadband customer access infrastructure market in order to ensure that BT's participation in BiB does not lead to a reduced incentive in the short to medium

be operated, obligations on the provision of digital conditional access services for on-line services and removal of obligation on customers to subscribe to BSKyB's digital satellite pay-TV service as a condition of purchase of a BiB subsidised set top box.



term to invest in the upgrade of BT's infrastructure.

The combination of these conditions should prevent the BiB joint venture from strengthening B SkyB or BT's dominant positions on the pay-TV and customer access infrastructure markets respectively. They should also ensure that there are no structural barriers to the emergence of competition on the digital interactive TV services market. A final decision is expected in 1999.

5. CONCLUSION

The relationship between competitive, open market structures and technological progress finds supports not only in economic theory, but also in practice, as the developments in EU digital pay-TV markets demonstrate. Competition promotes technical progress, without sacrificing the interests of European citizens. Lower prices and wider choice are the result. Where agreements raise fundamental competition problems, efforts have been made to find solutions. These were accepted by the parties to the BiB case, but rejected by Bertelsmann in the Bertelsmann/Kirch/Deutsche Telekom cases. However, in no circumstances can the Commission countenance the creation or strengthening of national dominant positions which foreclose further market entry: consumers would suffer and the creation of the internal market

would be jeopardised if national markets were to be further partitioned. The Commission's balanced approach to the application of the competition rules as illustrated in the present note serves to promote technological development in the form of the introduction of digital pay television, and also the further developments which convergence will enable, for the benefit of all European citizens.

ANNEX MARKET DEFINITION

1. COMMISSION'S GENERAL APPROACH TO MARKET DEFINITION

Market definition is a tool to identify and define the boundaries of competition between undertakings. It consists essentially in identifying the effective alternative sources of supply for the customers of the undertakings involved³⁷, both in terms of products/services and geographic location of suppliers. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. Market definition is thus the essential first step in the examination of any agreement, as it makes it possible to assess

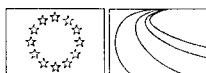
the impact of an agreement on competition. In particular, it allows calculation of market shares that convey meaningful information about market power for the purposes of assessing dominance³⁸. The Commission's general approach to relevant market definition is set out at length in its 1997 Notice³⁹.

Three main sources of competitive constraints on the behaviour of an undertaking are identified: demand substitutability, supply substitutability and potential competition. Of these, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product/service, in particular in terms of their pricing decisions. Supply substitution is taken into account when it is equivalent to demand substitution in terms of effectiveness and immediacy. Potential competition is not taken into account when defining markets since the conditions under which potential competition actually represent an effective competitive constraint depends on an analysis of the specific factors relating to the conditions of entry. However, potential competition will be taken account of in the subsequent competition analysis.

³⁷ In the case of a concentration, the undertakings involved will be the parties to the concentration; in investigations under Article 86 EC, the undertaking being investigated or the complainants; in investigations under Article 85 EC, the parties to the agreement.

³⁸ Market share alone is not indicative of dominance. Other factors are relevant, such as the existence of barriers to entry and the capacity of reaction of customers.

³⁹ Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 [1997] of 9/12/1997.



2. APPLICATION TO PAY TELEVISION SECTOR

2.1. Retail markets

Examination of the demand substitution of consumers of “free to air” and pay television clearly demonstrates that pay television constitutes a separate relevant product market⁴⁰. It is not the case in the case of pay television that consumers have a direct trading relationship with a television broadcaster. Pay-TV operators thus compete for subscribers, whereas “free to air” broadcasters compete for viewers as audience share is the determinative factor in the television advertising market. There is no direct competitive relationship as the actors on the two markets differ. There is, however, a link between the quality of the “free to air” TV offering and the scope for the introduction of pay TV. However, this fact does not undermine the conclusion that separate markets exist. Viewers do not consider “free to air” and pay television to be substitutes, but rather complements. As digital pay-TV is a development of analogue, it does not constitute a separate product market.

It remains to be seen whether new forms of service, such as pay-per-view form a distinct product market. This may be the case, in particular, in respect of

pay-per-view services for sports events. Equally, services in which viewing is not the main object, such as home-banking or home-shopping cannot be considered to be substitutes for entertainment channels. Given the current difference in penetration rates between personal computers (PC) and television sets in the EU, separate markets are also likely to exist in respect of interactive services delivered via PC and television.

The geographic market for pay television is generally national. Cultural, linguistic and regulatory differences between Member States means that viewers in one country do not consider pay-TV services aimed at another country, in another language to be substitutes. Where there are no such language barriers and the cultural differences are not extreme, it may be the case that geographic markets delimited by language areas exist. The comments on the convergence green paper bear out the fact that this phenomenon is unlikely to be affected by the introduction of digital television or further convergence.⁴¹

2.2. Wholesale markets

2.2.1. Content

The acquisition of exclusive television rights to films and attractive sports events has been a determining factor in the

success of pay-TV operators as viewers’ willingness to pay for film and sports channels has been shown to be higher than willingness to pay for other forms of programming. Attractive content is a scarce resource.

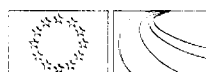
Copyright licences of film rights distinguish between exploitation windows and national territories: there are separate windows for exploitation on pay-per-view, pay TV and free TV. The licences are generally exclusive in respect of each window and territory. As the price charged by suppliers of film rights for pay-TV is not constrained by suppliers of other forms of programming, the acquisition of film rights for pay-TV constitutes a separate market. Its geographic scope will be determined by the territory covered by the licence. Sports rights are also generally sold exclusively. However, exclusivity in this case generally applies to all forms of exploitation. As demand for sports rights is particularly inelastic, a market for the acquisition of sports rights exists. Moreover, separate markets may exist for the rights to specific sports, such as attractive football. The geographic market will again be determined by the scope of the licence.

2.2.2. Transmission

For the moment, television can be transmitted by three means: terrestrial, cable and satellite

⁴⁰ See for example, paragraph 32 of MSG decision, M.649 Media Services Group [1994] OJ L 364/1.

⁴¹ SEC(1998)1284 final, at page 20.



direct-to-home. The technical characteristics of these forms of transmission vary: only cable has genuine broadband capabilities⁴². As terrestrial frequency is scarce, a pay-TV broadcaster generally has a choice only between satellite and cable transmission. The price of leasing satellite transponder capacity and cable carriage vary significantly. Where reception of television by cable is the norm, satellite is unlikely to act as a price constraint. The availability of all three options for a pay-TV broadcaster will also vary between Member States: this is particularly true in respect of cable. Separate product markets are likely to exist in respect of each of these forms of transmission network. Markets will be national in scope for terrestrial and cable transmission. The geographic scope in terms of satellite will depend on two things: the footprint⁴³ of the satellites and whether a policy exists to allocate certain transponders to certain national markets.

Looking more to the future, a provider of genuinely broadband interactive services⁴⁴ will require

a customer access transmission network which has such capabilities. For the moment, there are two options (although broadband wireless infrastructure may emerge in the future). The first is cable, the second is upgraded local loop telecommunications infrastructure⁴⁵. A broadband customer access network market is therefore likely to develop in the future.

2.2.3. *Technical services for pay-TV and interactive services*

Pay-TV operators require a special technical infrastructure which allows them to ensure that only viewers authorised to watch their service are able to do so. These technical services essentially comprise a set top box, conditional access system and related smart cards and subscriber management system⁴⁶. Depending on the sophistication of a given set top box, access to electronic programme guides and application programming interfaces may also be relevant.

Digital set top boxes will also be used by "free to air" broadcasters

to demodulate their digital signals (until all consumers have bought integrated digital television sets). Digital set top boxes and the related technical services will also be required for digital interactive TV services.

These services comprise a distinct product market. The geographic market will tend to follow that of the pay-TV and other services markets for which the technical services are to be used.

⁴² "Broadband" infrastructure is not a precisely defined term. It is used here to refer to a network which is two-way and has significant transmission capability.

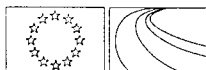
⁴³ The "footprint" of a satellite means the territories which can receive a signal from that satellite. See paragraph 16 of the Nordic Satellite Distribution decision for a definition M. 490 Nordic Satellite Distribution [1995] OJ L 53/20.

⁴⁴ As distinct from the simulated broadband effect which is possible using satellite transmission and a PSTN (public

switched telecommunications network) return path.

⁴⁵ Digital technologies such as the DSL family (ADSL, VDSL, HDSL and DSL Lite) can increase the capacity of the traditional copper wire local loop infrastructure.

⁴⁶ See paragraphs 20-26 of MSG decision M. 649 Media Services Group [1994] OJ L 364/1 and paragraphs for an explanation of these various elements.



ANTI-TRUST RULES

Application of Articles 85 & 86 EC and 65 ECSC

Main developments between 1st October 1998 and 31st January 1999

Recent Commission Decisions concerning the scope of the Group Exemption for Liner Conferences

David WOOD, DGIV-D-2

INTRODUCTION

This article contains a summary of recent decisions adopted by the Commission concerning the scope of Article 3 of Council Regulation 4056/86: the group exemption for liner conferences.

The group exemption for liner conferences is unusual in a number of respects. It is a Council Regulation. It was adopted even though the Commission had no experience of granting individual exemptions. It allows horizontal price fixing. It is unlimited in time. It contains no market share thresholds. In a word, it is generous.

First, reference should be made to the CEWAL⁴⁷ case. That case has established that whilst shipping conferences are, in general, considered to bring about certain benefits and thereby justify the exemptions granted by the regulation, this fact cannot signify that every impairment of competition brought about by shipping conferences falls outside the prohibition broadly laid down

⁴⁷ Joined Cases C-395/96 P & 396/95 P, CMB v Commission.

by Article 85(1) of the Treaty. It also stated that the general rule that all derogations must be interpreted strictly⁴⁸ also applies under Regulation 4056/86.

THE SCOPE OF THE CONFERENCE GROUP EXEMPTION

There are six aspects of the group exemption which the Commission has addressed in its recent decisions: inland price fixing, the meaning of 'uniform or common', capacity management, service contracts and freight forwarder compensation.

Inland Price Fixing

It is nearly ten years since Sir Leon Brittan wrote, with the

⁴⁸ See Judgments of the Court of Justice of 24 October 1995 in Case C-70/93, *BMW v ALD* [1995] ECR I-3439, at paragraph 28 and of Case C-266/93, *Bundeskartellamt v Volkswagen and VAG*, [1995] ECR I-3477, at paragraph 33 "... having regard to the general principle prohibiting anticompetitive agreements laid down in Article 85(1) of the Treaty, provisions in a block exemption which derogate from that principle cannot be interpreted widely and cannot be construed in such a way as to extend the effects of the regulation beyond what is necessary to protect the interests which they are intended to safeguard."

agreement of Karel Van Miert in his then capacity as Transport Commissioner, to the Far Eastern Freight Conference. He expressed the view that inland price fixing by conferences was not permitted under the terms of the group exemption for liner conferences contained in Article 3 of Regulation 4056/86.

This question occupies a central place in the TAA⁴⁹ and FEFC⁵⁰ cases which are currently before the Court of First Instance. It came close to being resolved in the reference to the Court of Justice from the High Court in the SUNAG case⁵¹ for a ruling on a point of interpretation. But that case was settled before the ruling was given.

The debate over the scope of the group exemption does not only apply to price fixing for inland transport. One of the issues not yet fully addressed is where maritime transport services end and land transport services begin. In the FEFC decision the Commission expressly avoided taking a position on this question stating that *this Decision does not address the question whether price fixing agreements relating to port handling services fall within the scope of application of Article 3 of Regulation No 4056/86.*

⁴⁹ Case T-395/94, *ACL v Commission*.

⁵⁰ Case T-96/95, *CMB v Commission*.

⁵¹ Case C-339/95 *Compagnia di Navigazione Marittima v CMB*.



However, the Commission has found that ground handling services at airports⁵² fall within the scope of Regulation 17 and not one of the transport regulations. In the Frankfurt airport case, the Commission found that, inter alia, the loading and unloading of baggage, cargo and mail fell within the scope of Regulation 17 where it took place on the ramp (or apron) of the airport.

So far as individual exemption of inland price fixing is concerned, the Commission's position has been clear since the adoption of its Report to the Council in 1994⁵³: if conference members wish to fix inland prices they must engage in co-operation of a type which necessitates the fixing of inland prices. This position was endorsed by the Group of Wise Men set up under the chairmanship of Sir Bryan Carsberg⁵⁴.

Uniform or Common

According to Regulation 4056/86, 'liner conference' means a group of two or more

vessel-operating carriers ... which has an agreement or arrangement...within the framework of which they operate under uniform or common freight rates ...

The Commission has interpreted the expression 'uniform or common' as meaning that a conference price must be common or uniform not only as between the shipping lines but also with regard to all shippers of the same commodity. Not only does 'common or uniform' preclude a two- or multi-tier price structure as between carriers, it precludes the creation of different classes of shipper⁵⁵.

Once again, this is an interpretation of Regulation 4056 which is before the Court of First Instance in the TAA case.

Capacity Management

A "capacity management programme" is an agreement under which the parties agree not to use a proportion of the space on their vessels for the carriage of goods in a particular trade. The proportion set aside is part of the forecast excess of supply over demand.

Capacity management programmes have operated on the transpacific from 1989 to 1995 (the Transpacific Stabilization Agreement), on the transatlantic from 1992 to 1994 (the TAA) and on the North Europe/Far East trades during 1993 (the EATA).

Only the TAA has claimed to be a liner conference covered by the group exemption. The TAA parties argued that their capacity management programme was covered by the exemption since Article 3(d) expressly refers to "the regulation of the carrying capacity offered by each member".

The Commission considers that Article 3(d) enables the members of a conference collectively to adjust the number of sailings and vessels to seasonal and cyclical variations in demand for transport, to determine the type of vessel used, and thus to ensure that their provision of capacity is appropriate to market conditions.⁵⁶

In the TAA decision, the Commission argued that the TAA capacity management programme was a control mechanism aimed at reinforcing price discipline among its members. It did not regulate the supply of carrying capacity by conference members, but simply restricted the use of available capacity on the ships used by them. It did not adapt available capacity to market conditions,

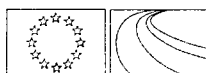
⁵² *Olympic Airways*, decision of 23 January 1985. Commission Decision of 14 January 1998 relating to a proceeding under Article 86 of the EC Treaty - Flughafen Frankfurt/Main AG. 98/513/EC: Commission Decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty - Alpha Flight Services/Aéroports de Paris, OJ L 230 p. 10.

⁵³ SEC(94) 933 final, adopted by the Commission on 8 June 1994.

⁵⁴ See the Final Report of the Multimodal Group submitted to Commissioner Van Miert on 18 November 1997.

⁵⁵ Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty - Trans-Atlantic Conference Agreement, OJ L 376, 31.12.1994, p1, at paragraphs 322 & 323; Commission Decision of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty - Trans-Atlantic Conference Agreement, not yet published, at paragraph 456.

⁵⁶ TAA at para 365.



but sought to restrict the sale of that capacity in order to drive up prices.

The Commission concluded that such a freeze on the use of capacity was not a traditional liner conference practice and was not envisaged when the block exemption was granted.

The Commission also argued in the TAA Decision that it must be questioned whether a block exemption covering capacity management in conjunction with price fixing would be lawful, since control over both prices and the volume of supply to potential customers would enable participating undertakings to eliminate competition, contrary to the fourth condition of Article 85(3)⁵⁷.

This is another of the outstanding issues before the Court of First Instance in the TAA case.

The Commission has reacted negatively to applications for individual exemption of capacity management programmes. The Commission refused to grant individual exemption in respect of the TAA capacity management programme in 1994 and is likely shortly to do the same in respect of the EATA. In the case of the EATA a meeting of the Advisory Committee of Member States was held on 27 January 1999 and a draft decision will soon be proposed for adoption by the Commission.

⁵⁷ TAA at para 367.

The Commission's view has been that the direct effect of an artificial reduction in capacity utilisation (as opposed to a permanent reduction in capacity) is to share fixed operating costs amongst a smaller number of containers and to have no effect in reducing fixed operating costs. A reduction in capacity could benefit shippers if the cost of transport were reduced, i.e. if capacity was really withdrawn by the progressive withdrawal of certain vessels or certain operators currently present.

Secondly, there is no evidence that capacity management programmes help to ensure that in the long term the level of capacity is better adjusted to meet the level of demand and it is possible that they encourage the unnecessary premature introduction of excess capacity.

Thirdly, capacity management programmes have always been introduced into trades where there has been a functioning conference. The combination of price fixing and output limitation is probably the most potent form of anti-competitive behaviour which can exist. Moreover, they have appealed to non-conference members so that, in the case of the TSA and EATA, the pre-existing conferences have been able to extend their market power in the same way as with a tolerated outsider agreement.

Service Contracts

A service contract is a contract between a shipper and a carrier or

conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period and the carrier or conference commits to a certain rate or rate schedule as well as a defined service level - such as, assured space, transit time, port rotation, or similar service features.

One of the questions which arose in the TACA case⁵⁸ was whether TACA joint service contracts fell within the scope of the group exemption.

The Commission's first argument was that the group exemption permits conferences to agree upon a 'uniform or common tariff'. Since TACA's joint service contracts neither appeared in the tariff nor were they based on the tariff, it could not be said that the group exemption covered the agreement of the TACA parties to enter into such contracts. This is a matter under dispute.

So far as the intention of the legislator was concerned, the Commission saw no reason to assume that the Council must have intended such an important form of arrangement to be exempted. In the Commission's view, there is a clear distinction to be drawn between tariff pricing and contractual arrangements. Carriage at tariff rates and arrangements relating to discounts off tariff rates (such as loyalty contracts and time-volume rates) fall within the

⁵⁸ Case T-191/98, ACL v Commission.



former category and service contracts fall within the latter.

This distinction seems to have its origins in the notion of common carriage and in the TACA Decision the Commission stated that the distinction between common carriage and contract carriage predates liner shipping conferences. It referred to the UK Carriers Act 1830 (11° Geo. IV. & 1° Gul. IV.), an Act of Parliament limiting the liability of common carriers, which provides that *"Provided always, and be it further enacted, That nothing in this Act contained shall extend or be construed to annul or in anywise affect any special Contract between such Mail Contractor, Stage Coach Proprietor, or Common Carrier, and any other Parties, for the Conveyance of Goods and Merchandizes."*⁵⁹

Although the distinction between contractual arrangements and tariff arrangements is not new, the conference system was based on the latter and not the former. So far as service contracts are concerned, the Commission has considered there to be sufficient historical evidence to conclude that they were a new breed of arrangement only just coming into usage at the time of the preparations for the adoption of Regulation 4056/86. There is therefore no reason to assume that they were intended to be covered by the group exemption.

Freight Forwarder Commission

In the TACA Decision, the Commission addressed for the first time the practice of conferences to agree the level of reward which conference members pay to freight forwarders⁶⁰.

Article 3 of Regulation (EEC) No 4056/86 concerns the fixing of rates and conditions of carriage, that is to say, the terms on which maritime transport services are sold to shippers. It does not expressly cover an agreement to fix the terms on which freight forwarders or other intermediaries are rewarded for providing intermediary services to the members of a conference although it has been argued that such a restriction is ancillary to the restrictions of competition permitted under the group exemption.

The TACA parties argued that conferences operating on the Northern Europe/US trades have fixed "westbound levels of commissions agreed to be paid to European [other than UK and Irish] forwarders" since the early 1970s. They have also argued that other conferences have fixed such prices since the beginning of the twentieth century.

The Commission considered that the practice of fixing freight forwarder compensation was intended to restrict competition between the parties to the TACA

thereby adversely affecting competition as regards the demand for services supplied by freight forwarders to the TACA parties. This might deprive customers of the benefits which would result from competition between the TACA parties.

It might also inhibit competition between freight forwarders and be a disincentive to improvements in the quality of services provided by freight forwarders, who may be encouraged to concentrate on the volume as opposed to the quality of business. Thus, competition may also be adversely affected on the supply side.

The Commission did not consider that the removal of maximum levels of freight forwarder commissions (together with the other restrictions described above) would lead to higher prices overall and so justify this restriction of competition. In any event, this is an argument which could be made for every price-fixing agreement on the demand side. In order to achieve optimal allocation, prices should reflect the real economic value of products and services as determined by individual buyers.

If the cost of using freight forwarder services rose too sharply for shippers they would be likely to switch very quickly to dealing direct with the carrier. If, however, the freight forwarder is perceived as being capable of contributing material added value, there is no reason why this should not be reflected in higher prices.

⁵⁹ TACA at footnote 37.

⁶⁰ TACA at paras 505 et seq.



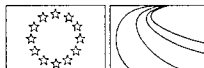
In this respect freight forwarders are in the same position as very many other intermediaries: if the cost of going through the intermediary becomes too high, the consumer will seek other distribution channels such as direct purchase from the supplier.

Accordingly, the Commission did not consider that the agreement to fix the levels of remuneration paid to freight forwarders could qualify for individual exemption. This approach is very much in line with the approach that the Commission has adopted both with other forms of intermediary, such as insurance brokers, and with professional bodies⁶¹.

CONCLUSION

Over the course of ten years, there has been considerable argument as to the scope of the group exemption for liner conferences. Almost every single issue on which the Commission has taken a formal position has been challenged. The Court of First Instance has ruled in the CEWAL case but its judgment has been appealed and the same fate may await the judgments of the CFI in the other main cases (TAA, FEFC, TACA).

⁶¹ The role of intermediaries, such as brokers and agents, may in some circumstances give rise to competition concerns. The Commission has taken no formal decisions in this field, although it did in 1987 publish an Article 19(3) notice proposing to exempt an agreement notified by the Irish Insurance Federation fixing maximum rates of commission that insurers would pay to intermediaries. The insurers wished to avoid commission rates rising (which ultimately had to be paid by consumers), and claimed that consumers would also benefit because intermediaries would be more likely to give best advice uninfluenced by the commission they were receiving. No decision was subsequently taken, and it seems unlikely that the Commission would now be persuaded to exempt this type of horizontal agreement between insurers fixing the rates of commissions to intermediaries (See for example UIC - Distribution of railway tickets by travel agents [1992] OJ L 366/47 (infringement decision with fines for inter alia a standard rate of commission to travel agents; decision annulled because adopted on the basis of Regulation 17 rather than Regulation 1017/68: T-14/93 UIC v. Commission [1995] ECR II-1503; C-245/95 P Commission v. UIC [1997] ECR I-1287).



Changement important dans la structure de la DG IV

Maurice GUERRIN, DG IV-E-1

Depuis de nombreuses années déjà, la Commission n'a cessé de souligner le caractère nocif des infractions particulièrement graves que constituent les cartels ainsi que, selon les propos tenus le 3 décembre 1998 par M. le Commissaire Van Miert, « l'absolue détermination » de la Commission à lutter contre cette forme d'entente.

Dans cette même déclaration du 3 décembre 1998, M. Van Miert a annoncé que dans cet esprit il lui était apparu nécessaire de créer au sein de la DG IV une nouvelle unité E1 chargée spécialement de la détection, de la poursuite et de la répression des cartels pour l'ensemble des activités de produits et services, confirmant ainsi de manière concrète la priorité que la Commission entend donner à la lutte contre ces pratiques.

Par cartels, il convient d'entendre les accords, pratiques concertées, décisions d'associations d'entreprises de type horizontal ayant pour objet ou pour effet de

- fixer les prix et/ou les conditions de vente, coordonner les politiques de vente ;
- répartir les marchés, les clientèles, cloisonner les marchés domestiques ;

- contrôler ou limiter les productions et/ou les investissements ;
- échanger entre entreprises des données individuelles économiques ou industrielles sensibles dans un marché oligopolistiques.

Ces différentes restrictions peuvent être décidées ou mises en oeuvre de manière cumulative ou séparée.

Selon une terminologie communément admise, les cartels sont des accords conclus entre entreprises indépendantes ou des décisions d'associations d'entreprises, en vue d'influencer la production ou la commercialisation par la restriction ou l'élimination de la concurrence et d'altérer ou de modifier de manière artificielle les conditions du marché. Ils sont l'expression d'une volonté de réglementation privée, et le plus souvent secrète, du marché et des relations économiques par des groupes oligopolistiques.

Les cartels créent au profit des entreprises les plus performantes des rentes de situation qui les dissuadent de faire des efforts pour améliorer la qualité des produits, accroître leur productivité, leur technologie, la rationalisation de leurs méthodes de production et de vente parce

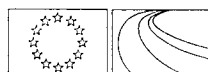
que l'entente neutralise le risque de la concurrence.

Les prix cartellisés étant le plus souvent fixés en fonction des coûts des entreprises les moins performantes, les entreprises dont les coûts de production sont les plus bas disposent ainsi d'une garantie de maintien de marge bénéficiaire injustifiée dans la mesure où l'entente les protège de toute tentative des concurrents de gagner des parts de marché par une politique de prix agressive.

Par ailleurs, les cartels maintiennent en survie artificielle les entreprises les moins efficaces par la garantie de prix et de parts de marchés convenus collectivement, et fixés à des niveaux supérieurs à ceux qui résulteraient de la concurrence active des plus performantes sur le marché.

Enfin, les cartels agissent au détriment du consommateur parce que celui-ci doit payer des prix supérieurs à ceux qui seraient pratiqués dans une situation de réelle concurrence et qu'il ne peut tirer profit des améliorations technologiques qui résulteraient des efforts que devraient nécessairement fournir les producteurs pour accroître leur part de marché en l'absence de l'accord.

En définitive, la lutte contre les cartels vise en tout premier lieu à empêcher la manipulation des équilibres économiques et de la concurrence par les groupes restreints et dominants, car cette



manipulation qui n'est autre qu'une réglementation privée et arbitraire de l'économie, se produit au détriment des utilisateurs. De tels comportements affaiblissent l'économie dans son ensemble par le maintien de structures inefficaces ou obsolètes et l'accumulation de marges et de rentes injustifiées et créent, de ce fait, un dommage considérable à la sauvegarde des emplois dans l'Union Européenne.

Jusqu'à présent, les quatre Directions opérationnelles C, D, E et F de la DG IV ont instruit les procédures relatives aux cartels relevant des secteurs de leur compétence.

La mise en place d'un service spécialisé dans ce type de procédure est apparue indispensable parce qu'une telle structure permet de concentrer les moyens disponibles et de mieux préparer les Rapporteurs à ces tâches particulières.

Plus que jamais nécessaire, la répression des cartels est cependant rendue de plus en plus difficile en raison des moyens sophistiqués de dissimulation des preuves, d'une conception toujours plus large et exigeante des droits de la défense et du niveau plus élevé de standard de preuve écrite imposé par le Tribunal de Première Instance. [Par exemple, à la différence des procédures d'autres ordres juridiques antitrust, la procédure communautaire ne reconnaît pas le caractère probatoire des témoignages sous serment.]

Cette nouvelle Unité administrative entend cependant agir en étroite coopération avec les autres unités de la DG IV afin d'utiliser au mieux les synergies résultant de la spécialisation de ses fonctionnaires dans le traitement des cartels et des connaissances techniques des Directions opérationnelles dans les différents secteurs d'activité des produits et services.

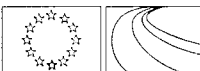
Dans la même logique de recherche d'efficacité, la Commission avait publié le 18 juillet 1996 une Communication sur la non-imposition d'amendes ou la réduction de leur montant⁶² pour les entreprises désireuses de fournir de leur propre initiative les informations et les éléments de preuves permettant d'ouvrir ou d'instruire plus rapidement les procédures anticartels.

La nouvelle structure ne peut manquer de faciliter et de renforcer la mise en oeuvre de cette communication en incitant encore davantage les entreprises à offrir leur coopération pour mettre fin aux ententes secrètes, par la garantie que s'ouvre un dialogue efficace avec un personnel spécialisé et formé à la répression des cartels.

Cette réorganisation d'une partie des services de la DG IV constitue un signal politique très clair adressé aux entreprises trop souvent tentées par la commodité apparente de

concerter ou coordonner leurs comportements avec ceux de leurs concurrents au détriment de l'ensemble des consommateurs européens et de la consolidation du marché intérieur.

⁶² JO C 207/4 du 18.7.96.



New procedures for anti-trust cases: hearings, and notification of transport cases

Téa MÄKELÄ, DG IV-B-2
Charles WILLIAMS, DG IV-D-2

Background

One of the underlying objectives of the current legislative activities of the Commission is to modernise, simplify and make more user-friendly the procedures under which competition cases are examined. As part of that process, the Commission adopted, on 22 December 1998, two Regulations that simplify the legislative framework for examining antitrust cases.

The first of the Regulations is Commission Regulation (EC) No 2842/98 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty⁶³. This Regulation modernises and simplifies the procedures previously contained in Regulation (EEC) No 99/63⁶⁴, which has been a worthy instrument in creating a framework for hearings when

applying competition rules in individual cases. The Regulation improves certain aspects of the hearing procedure by taking account of the relevant jurisprudence, the Commission's practice and certain developments in how the Commission protects the procedural rights of parties in competition cases. In order to simplify the legislative framework for examining competition cases, the Regulation applies to all anti-trust cases including the transport sector.

The second Regulation concerns applications and notifications in transport cases. Commission Regulation (EC) No 2843/98 applies to all transport sectors⁶⁵ (i.e., inland transport, maritime transport and air transport) and has therefore replaced rules previously contained in three separate Commission implementing Regulations. The new

Regulation aligns the transport notification procedures with those under Regulation No 17⁶⁶, and by so doing the Commission has simplified its procedures for the benefit both of notifying parties and of the Commission itself. The complex legislative framework in the transport sector has been the result of the progressive extension of Community competition rules to the different transport sectors since 1962 when Regulation No 141⁶⁷ removed transport from the scope of application of Regulation No 17.

The Commission adopted the two new Regulations after consultation with the Member States, interested industry associations and the legal profession. Drafts of the Regulations were also published on the DGIV Competition Web Site on the Internet. The overall reaction to the Commission's initiative was positive. Both Regulations came into force on 1 February 1999 and together repealed five existing Commission Regulations⁶⁸. The final texts are available to the public in the Community languages not only in the Official Journal but also on the

⁶³ Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, OJ L 354, 30.12.1998, p. 18.

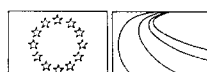
⁶⁴ Commission Regulation (EEC) No 99/63 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17, OJ L 127, 20.8.1963, p. 2268/63.

⁶⁵ Commission Regulation (EC) No 2843/98 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector, OJ L 354, 30.12.1998, p. 22.

⁶⁶ OJ L 13, 21.2.1962, p. 204/62.

⁶⁷ Council Regulation No 141 of 26 November 1962 exempting transport from the application of Council Regulation No 17 amended by Regulations Nos. 165/65/EEC and 1002/67/EEC, OJ L 124, 28.11.1962, p. 2751.

⁶⁸ Commission Regulations (EEC) No 99/63, (EEC) No 1629/69, (EEC) No 1630/69, (EEC) No 4260/88 and (EEC) No 4261/88 were repealed.



DGIV Web Site under <http://europa.eu.int/comm/dg04/>.

Regulation (EC) No 2842/98 – hearing of parties

Hearing of the parties is an important procedural stage in competition cases examined by the Commission in accordance with the powers conferred to it by the EC Treaty to ensure that competition is not distorted in the common market. Regulation (EC) No 2842/98 which has replaced Regulation (EEC) No 99/63 defines the manner in which the Commission ensures the right to be heard of the different parties involved in competition cases.

The parties entitled to submit comments under the Regulation should do so in writing, both in their own interest and in the interest of sound administration, without prejudice to the possibility of an oral hearing where appropriate to supplement the written procedure. The Regulation is divided into different chapters according to the status of the party⁶⁹ in order to make the rules clearer and more user-friendly.

To facilitate the examination of individual cases by the Commission services and to avoid unnecessary delays, the Commission is not obliged to

take account of written submissions from the addressees of a statement of objections received after the date set by the Commission for making their views known on the objections. Moreover, the addressees of a statement of objections are also to indicate by a date, set by the Commission, any parts of the Commission's objections that in their view contain business secrets or other confidential information.

Such an obligation also applies to any party making known its views to the Commission under the Regulation. Such parties must clearly identify any material that they consider to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission. If the parties fail to do so by the set date, the Commission may assume that the objections by the Commission or the submissions by the party in question do not contain such information.

The Regulation includes a provision whereby the applicant⁷⁰ or complainant⁷¹ shall be provided with a copy of the non-confidential version of the objections and given a date by which it may make its views known in writing. This is the

case where the Commission raises objections. This provision has codified the existing Commission practice. However, the Regulation provides for the protection of the legitimate interest of undertakings in the protection of their business secrets and other confidential information. The Regulation also refers to the role of the Hearing Officer in the hearing procedure, and to the right of access to the file without, however, preempting the Commission's further intentions in this field.

With a view to simplifying the way in which the time limit for submissions by the parties to the Commission is calculated, all submissions under the Regulation are to reach the Commission by a certain date set by the Commission in its written submission to the party concerned. In setting such a date, the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case. The time allowed is at least two weeks. Setting a specific date by which the submission must reach the Commission is considered less likely to result in legal uncertainty compared with the calculation of the time limit by the parties themselves.

In order to simplify and expedite the conclusion of the hearing procedure and following the Commission practice in the field of mergers, statements made by each person at the hearing will be recorded and the respective

⁶⁹ Chapter II: Hearing of parties to which the Commission has addressed objections; Chapter III: Hearing of applicants and complainants; and Chapter IV: Hearing of other interested parties.

⁷⁰ Applications made under Article 3(2) of Regulation No 17.

⁷¹ Complaints made under Article 10 of Council Regulation (EEC) No 1017/68, Article 10 of Council Regulation (EEC) No 4056/86 and Article 3(1) of Council Regulation (EEC) No 3975/87.



tape replaces the written minutes.

Regulation (EC) No 2843/98 – applications and notifications in the transport sector

In 1994, the Commission modernised the rules for notifying restrictive agreements in sectors other than transport by adopting Regulation (EC) No 3385/94 and Form A/B.⁷² Commission Regulation (EC) No 2843/98 and the new Form TR (annexed as Annex I to the Regulation) have introduced similar rules for companies which wish to notify restrictive agreements in the transport sector. Form TR specifies the information that must be provided by companies when applying for an exemption under the three transport Regulations and for negative clearance under Regulation (EEC) No 3975/87. The new Regulation has replaced the previous Form II (transport by rail, road and inland waterway), Form MAR (maritime transport) and Form AER (air transport). Form TR(B) (annexed as Annex II to the Regulation) has replaced Form III for crises cartels notified under Article 14(1) of Regulation (EEC) No 1017/68.

The Regulation introduces to the transport sector rules already

⁷² Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17, published in OJ L 377, 31.12.1994, p. 28.

applicable to notifications made on Form A/B, including the following.

- The language used for an application will be the language of the proceeding for the party or parties making the application.
- The rules on the effective date of submission of an application are spelt out more fully, establishing clearly the principle that applications must be complete in order to be deemed valid.
- Companies are required to provide more information than was previously the case. If, however, some of the information requested on Form TR is not necessary for a particular case, the Commission can waive the requirement to provide this information. This avoids unnecessary costs and regulatory burdens for companies.

Although the new Regulation very closely follows Regulation (EEC) No 3385/94, it differs in the following ways.

- References in Regulation (EEC) No 3385/94 to Regulation No 17 are replaced in the new Regulation by equivalent references to the three transport Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87.
- The new Regulation provides that where an application is wrongly made

under one of the transport Regulations it can be examined under another Regulation as is applicable.

- Provision is made for the notification of awards given at arbitration and recommendations by conciliators when they concern the settlement of disputes relating to the practices of liner conferences referred to in Article 4 and points 2 and 3 of Article 5 of Regulation (EEC) No 4056/86.
- Applications and notifications made under the competition rules of the EEA Agreement may also be made in one of the official languages of the EFTA States.



CARTEL ENFORCEMENT

Julian JOSHUA, IV-E-1

The District Heating Pipe Cartel

The formation of a new anti-cartel unit in DG 4 on 1 December 1998 was heralded by the Commission's recent decision imposing fines totalling over 90 million ECU on ten companies which had operated a secret price fixing, market-sharing and bid-rigging cartel in district heating pipes from 1991 to mid-1996. The best known of the companies fined was the Swedish-Swiss industrial combine ABB which collected a penalty of 70 million ECU.

Announcing the decision, Mr Van Miert sent an uncompromising warning to companies which might still be tempted to run the risk of clandestine price fixing:

"Fines have got to be felt. In this particular instance, it is difficult to imagine a worse cartel. The main producers tried to bankrupt the only competitor who was willing to take them on. They deliberately flouted the EU public procurement rules. Bid-rigging is no better than fraud. They continued the violation for nine months after the Commission had caught them red-handed. The violation calls for condign fines."

ORIGIN OF THE CASE

DG 4 had first been alerted to the cartel's existence in January 1995 by Powerpipe, a privately-owned Swedish producer of district heating pipes. Powerpipe claimed to have been threatened with reprisals by the cartel unless it agreed to confine its activities to the Swedish home market, in which case it would get a guaranteed quota. Powerpipe's owner – a well-known venture businessman – had even appealed personally to senior ABB officials to stop the cartel. His urgent request for a meeting was on one occasion rebuffed on the grounds that it "could be viewed by competition authorities as an attempt to induce ABB into illegal arrangements".

The district heating pipe industry is centred on Denmark. The basic idea is that hot water is circulated from a central heat source around a whole district. The pipes used have to be insulated inside a layer of foam and an outer plastic pipe. The greatest demand for pre-insulated pipes comes from the more Northerly Member States. Germany is the largest single national market and the four Danish producers export substantial quantities. ABB had progressively expanded its

activities in the sector by a series of acquisitions and by 1992 had some 40% of the European market. It has factories in Denmark, Germany and several other countries. The other pipe producers were mainly private companies, two of them located in Germany. The market in Europe is worth up to €400 million annually.

The Commission carried out unannounced investigations in June 1995 at all the producers simultaneously. Unusually perhaps in cartel cases, "smoking gun" evidence was found at virtually all the suspected participants.

THE DANISH MODEL

The cartel had first been set up in the Danish market in late 1990 between the four domestic producers. Under the established customer principle, customers were directed to their "usual" supplier. If the allocated quotas were nevertheless exceeded, the offender had to compensate its aggrieved rivals. Stability of market shares made for higher price levels in Denmark than in neighbouring markets. Soon the collusion was extended to export markets and the two German producers were brought in.

Regular secret meetings between the Managing Directors were held, the participants dubbing themselves "the Popes"; lower level managers who dealt with the detail were called "Contact Groups". The earlier cartel arrangements outside Denmark



were relatively fragile and fragmented and the major players led by ABB were looking for a “European solution” covering the whole market. In Germany a quota system was agreed in mid-1993; there was to be quarterly reporting and auditing by accountants. Fines for exceeding the allocation were to be paid into a Swiss bank account. However one of the parties, Løgstør, demurred at signing the document. The others were reportedly unwilling to go ahead on the basis of handshakes. After bitter mutual recriminations and a “price war” in late 1993 peace was re-established and a new structure of collusion was set up in 1994: this time an overall Europe-wide cartel was devised embracing the Baltic States and Eastern Europe as well as the EU.

The cartel allocated sales quotas on both a national and a European level. ABB’s quota was 37%, Løgstør had 20% and three other producers 10% each. Appropriate committees were set up to run the cartel, the senior executives now calling themselves the “Elephants”.

A common price list was devised; agreed discounts “off list” were to be progressively reduced with the declared aim of raising prices 30% in two years.

BID RIGGING

A disturbing feature of the case was the setting up of a bidding ring. This is in fact the first major case of bid-rigging dealt with by the Commission under Article 85. The market for district heating systems is mostly project-based; customers are mainly local authorities or other public utilities. Contracts are usually put up for competitive tender, the EU directives on public procurement applying to any project worth over €400.000.

In Germany in particular, where some 1500 projects a year are put out to competitive tender, sales managers met every two or three weeks to deal out contracts. For each project, one producer was nominated “favourite” to win the bid; it informed the others what it was going to quote and they had to put in higher “protection” offers to ensure it obtained the business. Any temptation to cheat and undercut the designated favourite was diminished by a reporting system; a computer programme was devised to monitor all bids, and one company even acted as a kind of “Chief Whip” to ensure cartel discipline.

BOYCOTT

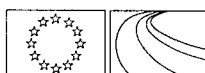
Unlike some other smaller producers, Powerpipe not only rejected pressure to join the club; it incurred the wrath of the cartel by systematically underbidding the favourite and winning a series of major projects in

Germany. The most egregious example was the Leipzig-Lippendorf project, one so big that no single cartel member could meet it; a “consortium” of the three German producers – including ABB – was therefore secretly nominated to “win” the tendering procedure. When the news broke in March 1995, the cartel met in a Düsseldorf hotel and decided an immediate boycott: a meeting note reads succinctly: “No producer to supply at all to L-L...; none of our subcontractors may work for Powerpipe; if they do, further co-operation will be stopped. We shall try to prevent Powerpipe from obtaining supplies of (for example) plastic.”

BUSINESS AS USUAL

The Commission’s surprise investigations followed just three months later. Despite DG 4’s success in uncovering the evidence, the cartel gambled on carrying on as if nothing had happened. The only concession to the Commission’s investigation was to move meetings to Zurich; to avoid generating travel records which could leave a trace, the Danish participants flew to Switzerland in a private aircraft. At this stage the cartel had defined quotas for all markets. Elaborate tables were drawn up to check the observance of the allocated market shares.

This continued for nine months and indeed the cartel only fell apart when the Commission confronted the participants with



detailed Article 11 requests to explain their own incriminating documents.

FINES: GUIDELINES AND LENIENCY

The sudden disintegration of the cartel may have been accelerated by the imminent publication of the Commission Notice on the non-imposition or reduction of fines (OJ C 207/4 of 18 July 1996).

Several of the companies approached DG 4 via their legal advisers offering to co-operate with its investigations. Some produced hitherto undiscovered documents; tables and memoranda proving the cartel had gone on long after the investigations were probably the most damning examples.

The companies could not of course bring themselves under sections B or C of the Notice providing for most favourable treatment as the Commission had already abundant proof of the infringement. Most of them however qualified for a significant reduction in the otherwise appropriate fine under Section D: this allows a discount of between 10% and 50% for co-operation by volunteering substantial evidence before a statement of objections is sent or even for not substantially contesting the allegations.

There is no question of formal "plea bargaining" along the lines of the American model. Under the Notice, the Commission will

only decide at the *end* of the administrative procedure what any co-operation was worth. Moreover the "otherwise appropriate" fine is fixed at decision stage by the full Commission itself; DG 4 officials are neither able nor authorised at any stage to "negotiate" the fine amount with the companies. Undertakings and their lawyers should also remember that the conditions for granting leniency apply throughout the administrative procedure; backtracking half-way through the case may well mean losing the benefit of the Notice.

The open question is of course the amount of the fine that would have been appropriate before any leniency.

For "very serious infringements", the Guidelines on fines issued in January 1998 (OJ C9/3 of 14.1.1998) provide for a starting point of at least €20 million. Cartels invariably fall in this category.

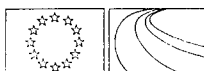
One object of the Guidelines was to break the link between fines and turnover in the product market. They recognise that while Regulation No 17 provides for an absolute ceiling of 10% of the undertaking's total turnover, it does not in fact require fines to be calculated as any particular percentage. Nor is the Commission limited to 10%, or any other percentage, of the turnover of the relevant "business" inside a multiproduct group. (Earlier practice along

these lines has given rise on occasion to some odd-looking figures, and more seriously, to disputes before the CFI about exactly what should be considered the "relevant" turnover.)

The basic principle of the Guidelines is one of equal punishment for the same misconduct. This does not mean the same amount for all. It would be perverse to impose exactly the same fine on great and small alike; the Guidelines thus expressly allow the Commission flexibility to recognize the specific weight and real impact of the offending conduct in each particular case.

The latter exercise is particularly necessary where (as in the pipes case) there are both huge multinational group and private single-product companies in the same infringement and a vast disparity in the sizes of the firms involved.

Here – apart from ABB – the offenders were mostly single-product companies; even the largest of them – Løgstør – was only half the size of ABB's pre-insulated pipe business. The gravity of the offence meant that fines had to be at or near the top of the scale; but even a fine on ABB of double the amount imposed on the second producer (Løgstør) would have been a mere pinprick to a combine with a total turnover of €30 billion. The specialist companies would be much harder hit in relative terms than ABB. On the other



hand practical considerations alone dictate against a fine of 10% of ABB's total worldwide turnover. How could fairness be achieved?

The Commission resolved the dilemma by dividing the ten producers into four broad categories according to their relative importance in the pipes market. The "basic" fine thus reflected in general their relative sales in district heating pipes in the EU; ABB had the highest starting point (at ECU 20 million), but this was subject in its case to a further upward adjustment to take account of its position as one of Europe's largest industrial companies.

ABB had attempted to portray its involvement as the aberrant, unauthorised and wholly atypical actions of a minor Danish subsidiary. The documentary evidence showed however that in fact the cartel had been conceived, approved and directed at a very high level in the Group.

The upward adjustment served the dual purpose of ensuring deterrence and reflecting the proven involvement in the cartel of a most senior level of corporate management.

The Commission considered that the minimum fine of ECU 20 million should in ABB's case be weighted by x 2,5 in order to ensure sufficient deterrence.

The long duration of the cartel was reflected by an additional weighting of x 1,4; while aggravating factors (such as ABB's leadership role and its deliberate continuance of the cartel after being caught) added a further 50%.

After account was taken in mitigation of ABB's payment of compensation to Powerpipe, the "otherwise appropriate" fine stood at exactly ECU 100 million.

Under its leniency programme the Commission then gave ABB a discount under Section D of the Notice of 30%.

This was not of course a case where an undertaking had informed the Commission about a secret cartel before it undertook investigations or after unsuccessful visits. The information provided by ABB – and others – did however assist materially in establishing the facts, in particular as to the origins of the cartel as early as 1990.

With regard to each of the other offenders the Commission went through a similar exercise. A special nuance should be noted in the fixing of the "basic" amount. Although the fine Guidelines would normally have called for a minimum starting point of ECU 20 million, this would in some cases have come close to the entire sales of the company; The starting point for

the first of the "single product" companies, Løgstør, was therefore fixed at ECU 10 million and proportionately less for the others.

WHERE DO WE GO FROM NOW ?

This was only the latest in a long series of hard-core cartel violations uncovered by the Commission. Fines reckoned in millions and now tens of millions do not even seem to have acted as a brake on illegal price fixing. Companies still seem to make the cynical calculation whether the risk is one worth taking. This no doubt keeps cartel investigators employed but that is not the main objective of our policy. Perhaps only the certainty of being caught in the end will make violators think again. The establishment of a special cartel unit will sharpen the focus on enforcement. In this context the Commission's Leniency notice could also play a crucial role. The programme is designed to enhance the Commission's effectiveness as an antitrust enforcement authority. The Commission may not have available to it weapons like the Grand Jury and compelled testimony under Court-ordered immunity, still less the full weight of the Federal criminal law, but the Leniency Policy clearly signals to violators that timely co-operation pays.



SICASOV - La Commission exempte des accords types de production et de vente de semences protégées par des droits d'obtention végétale en France

Claudio MENIS DG IV-F-3

1. Le 14 décembre 1998, la Commission a adopté une décision qui exempte, au titre de l'article 85, troisième paragraphe, du traité CE, des accords types pour la production et la vente de semences protégées par des droits d'obtention végétale en France. Ces accords sont conclus entre, d'une part, la SICASOV (Société Coopérative d'Intérêt Collectif Agricole Anonyme à Capital Variable, Paris) et, d'autre part, les établissements multiplicateurs. La SICASOV regroupe les obtenteurs de variétés végétales protégées en France et a pour tâche de gérer les variétés végétales qui lui ont été confiées par lesdits obtenteurs (ou par leurs ayants-droits). Cette gestion comporte notamment la conclusion de contrats de production avec des établissements multiplicateurs qui sont les entreprises qui assurent la multiplication des semences en vue de satisfaire aux besoins des agriculteurs.
2. Les produits en cause sont les semences protégées par des droits d'obtention végétale (au titre du droit français ou du

règlement communautaire applicable en la matière).

Les réglementations communautaires et nationales établissent des règles détaillées concernant la production et la vente des semences. Sur la base desdites réglementations, les semences peuvent être subdivisées en:

-*semences de base*: ce sont des semences qui ne sont pas destinées à être vendues aux agriculteurs pour leurs semences mais qui sont exclusivement destinées à produire d'autres semences. Elles peuvent donc être en quelque sorte comparées à un matériel industriel intermédiaire;

-*semences certifiées*: ce sont des semences qui généralement sont destinées à être vendues aux agriculteurs pour leurs semences. Elles sont donc, en quelque sorte, comparables à des produits industriels finis protégés par un brevet;

- *semences techniques*: ce sont des semences certifiées qui, dans certains Etats, peuvent licitement être utilisées pour produire d'autres semences certifiées (et remplissent donc

la fonction de semences de base) tandis que, dans d'autres Etats, peuvent être uniquement être vendues aux agriculteurs (et remplissent donc la fonction de semences certifiées).

Pour pouvoir être licitement commercialisées, les semences doivent appartenir à une variété qui a été préalablement inscrite dans un des catalogues nationaux, selon les règles applicables dans les différents Etats membres. Après une certaine période d'inscription au catalogue national, la variété est inscrite au catalogue commun, ce qui permet aux semences de ladite variété de circuler librement à l'intérieur de la Communauté européenne sans être soumises à aucune restriction.

3. La SICASOV a notifié à la Commission des accords types en vertu desquels elle concède aux établissements multiplicateurs (ci-après: les "licenciés") une licence non-exclusive de production et de vente de semences sur le territoire français (ou, s'il s'agit de semences protégées par un droit d'obtention communautaire, sur l'ensemble de la Communauté européenne).
4. En premier lieu, les accords types prévoient un ensemble de clauses qui soumettent au contrôle de la SICASOV les semences de base et les semences techniques. Ainsi, les accords interdisent aux



licenciés les exportations (directes et indirectes) des semences de base et leur imposent l'obligation de "déclasser"⁷³ les semences techniques avant leur exportation. La décision indique que ces clauses relèvent de l'existence même du droit d'obtention végétale et que, de ce fait, elles ne sont pas visées par l'article 85, par. 1, du traité CE (en ce sens, voir l'arrêt de la Cour de justice *Erauw Jacquery/La Hesbignonne*, 19.4.1988, aff. 27/87, Rec. 1988, p.1919).

5. En deuxième lieu, les accords types prévoient des clauses qui interdisent l'exportation de semences certifiées vers des Etats non membres de la Communauté européenne ou vers des Etats qui ne prévoient pas de protection légale pour les obtentions végétales. La décision considère que cette obligation échappe à l'interdiction prévue par l'article 85, paragraphe 1er, du traité CE.
6. Enfin, les accords types prévoient une clause selon laquelle le licencié ne peut pas exporter directement les semences certifiées vers des Etats membres autres que la France lorsque la variété à laquelle lesdites semences appartiennent est inscrite au catalogue commun depuis

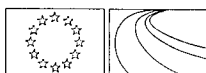
⁷³ Le déclassement a pour effet d'empêcher que les semences exportées puissent faire l'objet d'actes de reproduction (en dehors du contrôle de l'obteneur) dans le pays de destination

moins de quatre ans. La décision considère que cette obligation a pour objet de restreindre la concurrence et qu'elle tombe donc dans le domaine d'application de l'article 85, paragraphe 1er, du traité CE. En outre, la décision estime que les accords ne font pas partie intégrante d'une organisation nationale de marché ni ne sont nécessaires à la réalisation des objectifs énoncés à l'article 39 du traité CE. Par conséquent, la décision indique que l'exception prévue par l'article 2 du règlement n. 26/62 doit être écartée et que, de ce fait, l'article 85, paragraphe 1, du traité CE est applicable à ladite obligation.

Toutefois, d'après la décision, l'obligation en cause peut être exemptée au titre du paragraphe 3 de l'article 85 du traité CE puisqu'elle favorise la diffusion de nouvelles variétés dans les Etats membres autres que la France. En effet, les entreprises situées dans ces Etats seront incitées à conclure des accords de licence et de distribution relatifs aux nouvelles variétés puisqu'elles auront la certitude de ne pas être soumises aux exportations directes des licenciés français pendant quatre ans. Par conséquent, même si une telle obligation limite les exportations, elle doit néanmoins être exemptée puisqu'elle contribue à promouvoir le progrès technique et la diffusion de

nouveaux produits au bénéfice des utilisateurs.

7. Sur la base des considérations développées ci-dessus, la Commission a décidé d'adopter une décision d'exemption, au titre de l'article 85, troisième paragraphe, du traité CE, valable jusqu'au 26 octobre 2004.



The Commission fines a cartel of British sugar producers and merchants

*Rüdiger DOHMS, DG IV-A-2
Matthijs VISSER, DG IV-F-3*

On 14 October 1998, the Commission adopted a Decision by which fines have been imposed on the sugar producers British Sugar and Tate & Lyle, as well as the sugar merchants Napier Brown and James Budgett for violation of Article 85(1) of the EC Treaty. The Commission found that the companies have pursued the object of restricting competition through a co-ordination of their pricing policy on the white granulated sugar market in Great Britain. The Commission therefore imposed fines of 39.6 million ECU on British Sugar, 7 million ECU on Tate & Lyle, 1.8 million ECU on Napier Brown and 1.8 million ECU on James Budgett.

The Decision concerns the collaborative strategy of higher pricing by British Sugar, Tate & Lyle, Napier Brown and James Budgett on the industrial white granulated sugar market in Great Britain, as well as a similar kind of strategy pursued only by British Sugar and Tate & Lyle on the retail white granulated sugar market in Great Britain.

The relevant period during which these infringements took place was between 20 June 1986 and 2

July 1990 with respect to British Sugar and Tate & Lyle, and between late 1986 and 2 July 1990 with respect to Napier Brown and James Budgett. During this period the four companies represented around 90% of the entire white granulated sugar market in Great Britain.

The Commission found evidence of numerous meetings between the parties, which took place in regular intervals throughout the relevant period. In the initial meeting between British Sugar and Tate & Lyle on 20 June 1986, the principles of the future anti-competitive conduct were set. The merchants Napier Brown and James Budgett joined this conduct before the end of 1986.

18 further meetings about industrial white granulated sugar took place between all four parties. During these meetings British Sugar informed Tate & Lyle, Napier Brown and James Budgett of target prices it intended to obtain with respect to industrial sugar. Concerning retail sugar, there were 8 further meetings between British Sugar and Tate & Lyle in which British Sugar revealed to Tate & Lyle its pricing policy and in which the

two companies discussed their respective discount policies towards large retail customers.

Whilst the Commission did not have sufficient evidence that prices charged to individual buyers of industrial or retail sugar were jointly fixed, the systematic participation of all four parties in regular meetings concerning industrial sugar, and of British Sugar and Tate & Lyle concerning retail sugar, lead to an atmosphere of mutual certainty as to the participants' intentions concerning their future pricing behaviour. Each of them could rely, if not on the precise price levels of the other participants, at least on their intentional pursuit of the collaborative strategy of higher pricing.

For all the participants this mutual assurance was of interest, particularly, - though not exclusively - in the price range above the break-even point, in which range price competition was possible while still profitable.

The Decision rejects in detail all the parties' arguments for why there should not have been a violation of Article 85. In particular, the Decision disproves all the parties' alternative explanations for why their meetings took place. Moreover, the Decision shows that British Sugar's price leadership on the market for industrial and retail sugar in Great Britain during the relevant period left scope for competition by the other three companies in particular by



undercutting British Sugar's price increases. In addition, the fact that the market in the present case was oligopolistic so that competition for structural reasons tended to be limited to a certain extent, did not allow the companies to go further and *ex ante* actively co-ordinate their future pricing policy.

The fines imposed by the Decision have been calculated on the basis of the Commission's published Guidelines on the imposition of fines⁷⁴. The Commission has taken into account that the infringements were serious and of medium duration. Considerable differentiation between the individual contributions of the four parties to the infringement has been made:

- The participation of British Sugar, on account of its high share on the relevant markets for industrial and retail sugar, and due to its position as price leader on these markets, was essential to the operation of the cartel.
- Tate & Lyle, on account of its share on the relevant markets was the second most important member of the cartel.
- The merchants Napier Brown and James Budgett did not participate in the key meeting of 20 June 1986. They joined the cartel only several months later and from then onwards only participated in the infringements concerning industrial sugar. Moreover,

due to the fact that they were dependent on the supplies from the two domestic sugar producers – British Sugar and Tate & Lyle – for a significant part of the sugar they sold in their function as merchants, their influence on the relevant market and their possibility of exercising power on that market, was limited.

Moreover, with regard to British Sugar, several aggravating factors have been found:

- British Sugar was the instigator of the infringements and throughout the relevant period remained the driving force. In fact, after having waged a price war against its competitors, it took the initiative, by arranging the meeting of 20 June 1986, to replace this price war by a collaborative strategy of higher pricing with its competitors.
- British Sugar acted in a manner contrary to the clear wording contained in its full comprising compliance programme, which it presented to the Commission in October 1986 in the course of the *Napier Brown* procedure, and which the Commission took into account as a mitigating factor when setting the fine in the *Napier Brown*-decision⁷⁵.
- Already in July 1988, in its *Napier Brown* decision, the Commission fined British

Sugar for having attempted to force a merchant out of the retail market on the white granulated sugar market in Great Britain. This means that British Sugar practiced the collaborative strategy of higher pricing, which is at issue in the present Decision, for two years in parallel with the Commission-procedure leading up to the *Napier Brown* decision.

As to Tate & Lyle, the Commission substantially reduced the fine under the Notice on the non-imposition or reduction of fines in cartel cases ("Leniency Notice")⁷⁶, in order to take account of the fact that Tate & Lyle co-operated with the Commission, in particular by submitting two self-incriminating letters to it. Indeed, these two letters adduced decisive evidence of the cartel's existence and allowed the Commission to intervene in this case.

At the end of 1998, British Sugar (T-204/98), Tate & Lyle (T-202/98) and Napier Brown (T-207/98) have lodged appeals with the Court of First Instance against the Commission Decision.

⁷⁴ 14 January 1998, OJ 1998 C 9/03.

⁷⁵ Commission Decision No 88/518/EEC of 18 July 1988, *Napier Brown – British Sugar*, OJ L 284/41.

⁷⁶ 18 July 1997, OJ 1997 C 207/04.



Greene King / Roberts

Nils VON HINTEN-REED, IV-F-3

Mr and Mrs Roberts operate a pub owned by Greene King. They complained in May 1997 to the European Commission asking the Commission to conclude that the beer tie (the obligation to buy most beer they sell only from Greene King, their landlord-brewer) in their lease infringes Article 85. Such a conclusion might have allowed the Roberts to buy their beer from the suppliers of their own choice, thereby benefiting from the substantial discounts these suppliers offer.

The assessment in this case is an application of two tests set out in the *Delimitis* judgement for deciding whether the cumulative network of agreements of an individual brewer falls within the scope of EC competition rules.

The first test is whether the market concerned is foreclosed. The Commission considers that, given the current data, the UK on-trade beer market continues to be foreclosed. In 1997, between 50 and 58 per cent of the throughput on the UK on-trade beer market was covered by restrictive agreements.

The second test is whether the network of agreements of an individual brewer contributes

significantly to that foreclosure. Here, the Commission concludes that Greene King is too small to contribute significantly to the foreclosure of the UK on-trade beer market as Greene King's sales in its managed, tenanted and loan-tied estate account for only 1.3% of the UK on-trade market. This is considerably less than the 5% (or more) that each of the big UK brewers (Scottish & Newcastle, Bass, Whitbread and Carlsberg-Tetley) realises in their tied network (including the restrictive agreements with non-brewing pub companies).

The reasoning applied to Greene King is also valid for the leases of the other small and regional UK brewers and for the leases of non-brewing pub companies, which are supplied by more than one brewer. The decision can therefore be considered as a clear precedent for these companies, and the pubs they tie.

Info-Lab/Ricoh

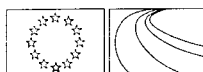
Elke FISCHER, DGIV-E-2

On 7 January 1999 the Commission rejected a complaint of Info-Lab, a manufacturer of toner for photocopiers, against Ricoh, a photocopier manufacturer. Info-Lab alleged that Ricoh abused its dominant position on the market

for toner cartridges compatible with certain Ricoh photocopiers and protected by Ricoh intellectual property rights by refusing to supply Info-Lab with empty toner cartridges, which would enable Info-Lab to

compete with Ricoh in the sale of filled toner cartridges.

Info-Lab claimed that it is not possible to design a toner cartridge which would fit into the Ricoh machines and at the same time would not violate Ricoh's intellectual property rights. It would therefore like to purchase empty toner cartridges from Ricoh, fill them with toner which it already manufactures and then sell the filled toner cartridges in competition with



Ricoh. Ricoh, however, which has so far not licensed its design rights or sold empty cartridges to anyone, refused to do this.

According to Info-Lab the relevant product market would be the market for empty toner cartridges compatible with Ricoh copiers which are supposed to be filled with toner powder and sold to end-users. Such a market however does not exist. No producer or dealer sells empty toner cartridges compatible with Ricoh copiers. Aside from Ricoh, no company can produce these toner cartridges, since they are protected by intellectual property rights held by Ricoh, which so far has not licensed its design rights. Nor does Ricoh sell empty toner cartridges to other companies or end-users. At the retail level there is no demand for empty cartridges either. Cartridge and powder are sold together as a single product. Other copier manufacturers and independent toner cartridge manufacturers, such as Info-Lab itself, sell filled cartridges to end-users. This satisfies a recognised consumer need, reduces costs, and means that the components have to be used together. Powder and cartridge have therefore to be considered as a single product.

Since a market for empty toner cartridges compatible with Ricoh copiers does not exist, the question is whether Ricoh, which has neither licensed its design rights nor sold empty cartridges, could be forced to start selling them so as to allow

Info-Lab to enter the market. Since there is no consumer-demand for empty toner cartridges, because the components cartridge and powder are used together by end customers, the sole purpose of selling empty cartridges would be to enable Info-Lab to compete with Ricoh in the market for filled toner cartridges. The Commission is of the opinion that a company cannot be obliged to such forced co-operation with prospective market-players or that such forced co-operation could only be envisaged under exceptional circumstances (see restrictive approach of Court of Justice to doctrine of "essential facilities" in the recent Oscar Bronner case; 26 November 1998, Case C-7/97).

The application of Article 86 in a case like the present one could at most be envisaged were Ricoh to have a dominant position on the consumables market, which would allow it to act independently of possible competitors and especially to be free in setting prices. Ricoh is the only undertaking which sells filled toner cartridges compatible with Ricoh photocopiers. According to the Commission's investigation, however, Ricoh has no dominant position in the photocopiers market. This raises the issue whether a company could be considered as dominant on the consumables market where there is no dominance in the upstream market, i.e. the photocopier market. Central to this issue is the existence of a

close link between these two markets.

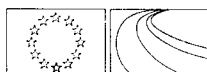
In the Pelikan/Kyocera case⁷⁷ the Commission took the view that Kyocera could not be considered to have a dominant position in the market for toner and other consumables which were compatible with its proprietary system in the market for printers, since Kyocera's market share in the market for printers was relatively low and there was considerable competition on this market. The Commission found that the printer market and the consumables market were interrelated in such a way that the horizontal competition on the printer market constituted effective discipline in the vertical market.

For assessing whether there was sufficient interrelation between the primary and the secondary market the Commission used four criteria, which should also be applied in the present case.

a) The consumer can make an informed choice including lifecycle pricing

According to a number of photocopier manufacturers, the producers also offer service support agreements or all-inclusive rental and leasing contracts to photocopier machines customers at an annual fee, where the toner for a fixed number of copies is included.

⁷⁷ See XXVth Report on Competition Policy 1995, p. 140.



When purchasing a photocopier machine the customer can choose between such an “inclusive contract” or an “exclusive contract”, where he purchases the toner cartridges separately. The consumer therefore gets a general idea of the average costs for consumables during the lifetime of the photocopier machines and is able to compare prices.

b) The consumer is likely to make an informed choice

Since the consumer can calculate the price per copy by simply comparing the various inclusive and exclusive contracts offered by the different photocopier manufacturers, it is very likely that this factor is taken into account when a purchase decision is made.

c) In case of an apparent policy of exploitation being pursued in one specific aftermarket a sufficient number of customers would adapt their purchasing

behaviour at the level of the primary market

In cases where there is sufficient potential for new customers, the existing customer base appears to be protected from exploitative behaviour by the attentive eye of the new customer. Regarding the low market share of Ricoh in the relevant photocopier market and the normal life of a photocopier of about 3 years it follows that there is a large number of customers that qualify as potential new customers of Ricoh machines.

d) Adaptation within a reasonable period of time

In Pelikan/Kyocera the Commission considered it to be decisive whether, should Kyocera start raising prices for its consumables today, such behaviour would trigger an adaptation in the purchasing pattern of new customers. The Commission held that such an adaptation would take place on the printer market. There are no indications that the situation

would be any different if Ricoh began to raise its prices for photocopier consumables.

While Ricoh is the only supplier of toner cartridges for certain Ricoh photocopier machines, there is no indication that Ricoh has a dominant position in the market for the photocopier machines in question. The former market is, however, closely linked to the latter. Under the approach adopted by the Commission in Pelikan/Kyocera, Ricoh cannot be considered to have a dominant position.

Even if Ricoh had a dominant position it is doubtful whether this would be sufficient to justify imposing an obligation on Ricoh to sell empty toner cartridges to Info-Lab. In the present case, however, any circumstances which might at most justify such forced co-operation with prospective market-players do not exist.

Decision of the Commission dated 9/12/98 in case IV/34.466-Greek Ferries

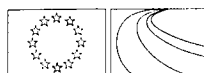
Panayotis ADAMOPOULOS, DG IV-D-3

The facts

Following receipt of a complaint from a member of the public, the

Commission carried out investigations without prior warning at the offices of ferry operators, in Greece and in Italy

in July 1994. Strong evidence of an infringement of Article 85 was discovered. The Commission concluded that ferry companies operating in Ancona, Bari, Brindisi – Greece routes participated in a price fixing cartel for several years and it identified seven companies that participated therein, i.e. six companies based in Greece Minoan, Karageorgis,



Marlines, Strintzis, Anek, Ventouris Ferries and one Italian company, namely Adriatica.

The legal assessment

It was clear from the evidence in the this case that the parties engaged in regular, direct consultations aimed at fixing passenger fares and freight rates between Greece and Italy. Regular, detailed discussions took place each year to decide the tariff levels for the following year, and ad hoc consultations took place to decide how the parties should react to issues that arose during the year, such as currency devaluation or new categories of vehicles. It is also clear that these discussions took place at senior levels between the parties. There can be no doubt that this arrangement amounted to an agreement, the object of which was to fix selling prices and other trading conditions by the parties thereto.

The arguments of the parties

The arguments of the parties related to the Greek legal framework as well as to the situation in the relevant market during the years of the infringement. According to the parties, the Greek law which gives the Ministry of Mercantile Marine the right to intervene in cases of price wars between ferry operators, induced the companies

to agree on tariffs in order to avoid such intervention.

Furthermore, the war in Ex-Yugoslavia created a state of emergency.

For the Commission, there is no evidence of the Greek authorities' imposing or encouraging price-fixing collusion in the Adriatic routes. Moreover, no crisis or emergency is recorded in the parties' correspondence.

The relevant market

The relevant market is limited both in geographical scope and size. It concerns three out of five routes in Adriatica (there are still Venice-Patras and Trieste-Patras). Moreover, even if all Greece-Italy routes are taken into account, the market is still small compared to other markets within the EU.

As regards the impact of the cartel, the prices in the market were relatively low compared to other routes within the common market, since the Ministry encouraged, during that period, the parties to keep them at that level in order to protect Greek exports to the rest of the EU. The number of the companies operating in the market is relatively high. In 1993, last full year of the infringement there were 18 operators in Greece-

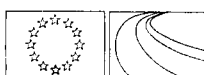
Italy routes. New competitors entered the market since 1994.

Fines

A price-fixing cartel is by its nature a very serious infringement. However, taking into account the limited size of the relevant market as well as the limited impact of the infringement in this market, the Commission concluded that the infringement was a serious and not a very serious one.

The Commission also concluded that the administrative practice of the Greek authorities created some degree of confusion to the companies as to whether their contact constituted an infringement. The reason for this was that the Ministry, which according to the Greek law decides the level of tariffs for the domestic part of the Greece - Italy route, required the companies to arrive to a common proposal prior to the Ministry's decision.

The co-operation of the undertakings with the Commission has been also taken into consideration. Providing incriminating documents and non-contesting the facts as described in the Commission's Statement of Objections lead to significant reductions of fines.



EUDIM : Complément d'information

Le comité de rédaction estime utile d'apporter à l'article sur l'affaire EUDIM figurant à la page 26 du numéro précédent de «Compétition Policy Newsletter» les précisions suivantes :

Le 5 février 1991, Van Marcke NV a introduit une demande visant les accords au sein d'EUDIM auprès de la Commission en vertu de l'article 3 du règlement 17/62 CE du Conseil.

Parmi d'autres mesures d'instruction, la Commission a demandé des renseignements aux entreprises concernées et effectué des vérifications en vertu des articles 11 et 14 dudit règlement.

Le 7 février 1995, la Commission a décidé d'ouvrir la

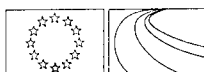
procédure en vertu de l'article 9 paragraphe 3 dudit règlement et d'envoyer une communication de ses griefs à EUDIM dans cette affaire, conformément à l'article 2 paragraphe 1 du règlement 99/63 CE de la Commission. La communication des griefs de la Commission exposait son point de vue provisoire que, tel que pratiqués, les accords d'EUDIM constituaient une infraction à l'article 85.

EUDIM a exprimé par écrit son point de vue à l'égard des griefs, conformément à l'article 3 paragraphe 1 du règlement de la Commission précité, selon lequel ses accords ne constituaient pas une infraction, tout en renonçant à l'audition prévue à l'article 19 paragraphe 1 du règlement du Conseil précité.

Le 28 novembre 1995, EUDIM a notifié des accords en vertu des articles 2 et 4 du règlement du Conseil précité. Les accords notifiés incluait des dispositions qui complétaient ou clarifiaient certaines dispositions visées par les griefs de la Commission.

Le 17 avril 1996, la Commission a publié l'essentiel du contenu de la notification en vertu de l'article 19 paragraphe 3 du règlement du Conseil précité et annoncé son intention de prendre une position favorable, sur les accords, tels que modifiés et notifiés.

Le 6 août 1998, la Commission a adopté une décision rejetant la plainte de Van Marcke susmentionnée. Le 17 septembre 1998, les services de la Commission ont envoyé une lettre à EUDIM l'informant que les observations reçues à l'égard de la publication susdite n'étaient pas de nature à modifier l'évaluation de l'affaire et que, par conséquent, le dossier allait être classé.



Recent Developments and Important Decisions

John KEMP, DG IV-B-4

Introduction & Statistical Overview

The final four months of 1998 saw no reduction in the continuing upward trend in activity under the Merger Regulation⁷⁸ that characterised the year as a whole (see also previous issues of the Newsletter). A further 80 operations were notified, bringing the total for the year to 235, an increase of over a third (36%) on the already-record level for 1997, nearly 25% on the previous four month period. There were 60 Decisions on cases under the Regulation's main provisions (Articles 6, 8 and 9) – bringing the total for the year to 238, an increase of over 40% on the figure for the whole of 1997 (itself a record).

The potential for adverse effects on competition which such a caseload implies is also largely unaltered from previous years, notwithstanding the erosive effect of inflation on the Regulation's thresholds for notification. There was one further decision in the period to open a full, second phase investigation (Article 6(1)(c)), bringing the total for the year to a record 12. Equally significant, however, there were another two cases in which commitments were

accepted in Phase I under the newly-introduced provisions (see Newsletter 1998/2), bringing the year's total (in fact, only 10 months, since the provision's effective date was 1 March) to nine. There were also two Decisions on cases following a second phase investigation (Article 8), bringing the total for the year to 10: both were cleared, one subject to formal commitments from the parties to remedy the competition problems that the Commission had identified.

Phase II Decisions

In (*Skanska/Scancem*)⁷⁹ the Commission's investigation focussed on the markets for cement and concrete (both dry and ready-mixed) and concrete products in Sweden, Finland and Norway. The combined market shares produced by the merger were in some instances very high – as much as 90% in cement. The merger also produced substantial vertical effects, since both parties also had significant activities at all three main levels of the construction industry – raw materials (cement and aggregates), construction materials (concrete, concrete products) and construction itself. Most

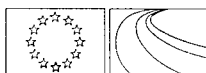
competitors were not vertically integrated, further reducing their ability to compete effectively after the merger. Skanska undertook to divest the whole of its shareholding in Scancem and to dispose of Scancem's cement business in Finland to an independent purchaser. The first part of the remedy is designed to end the vertical links; the second, to ensure an independent source of supply.

The other Phase II case, *Enso/Stora*⁸⁰, was cleared. The Commission's initial analysis suggested that oligopoly issues were likely to arise. The merging parties – Enso of Finland and Stora of Sweden, would together make the largest integrated paper and board group in the world. In the EEA, there were only six significant suppliers of newsprint, and the combined group would become the largest. The Commission's detailed investigation found that these markets displayed many of the characteristics of an anti-competitive oligopoly – low demand growth, concentrated supply-side, homogeneous products, mature technology, high entry barriers, similar cost structures. The merger would significantly increase the level of concentration. However, the Commission also found that other key oligopoly characteristics were not present: in particular, there was no market transparency – information on prices and quantities supplied was not readily available to competitors, and indeed there were secret discounts. Moreover there was evidence that

⁷⁸ Council Regulation (EEC) No 4064/89.

⁷⁹ Case No. IV/M 1157.

⁸⁰ Case No. IV/M 1225.



customers – principally, large publishing groups – could exercise a measure of countervailing power.

‘Buyer power’ was also considered in this case in respect of the market for liquid packaging board (used, eg, for milk and fruit juice cartons). The merger would reduce the number of suppliers in this specialised market in the EEA to three, with the merged entity becoming the largest. Technical and commercial entry barriers were found to be high and total demand growth modest, making new entry unlikely. However, the market was also heavily concentrated on the demand side, with one firm in particular – Tetra Pak – accounting for a very substantial share. The two other main buyers (Elopak and SIG Combibloc) did not purchase such large quantities as Tetra Pak. However they too appeared to possess a measure of countervailing power, since they imported ‘strategic’ quantities from the USA. Overall, the Commission’s investigation suggested that these circumstances produced, exceptionally, a situation of mutual dependence between buyers and sellers, which the merger was unlikely to disturb.

In clearing the operation, the Commission also took account of certain undertakings which had been offered by the parties (some of them in the course of the first phase of the investigation) in order to address concerns about the position of Elopak and Combibloc after the merger. Enso would divest its shareholding in a joint conversion operation with Elopak, since this vertical link could

weaken Elopak’s countervailing power. The merged company would offer Elopak and Combibloc an arrangement designed to ensure that they were not subject to unjustified price discrimination in comparison with Tetra Pak. Finally, the parties undertook not to oppose an application for a duty-free quota for liquid packaging board from outside the Community. The adoption of such a quota would make imports more competitive and thus encourage other suppliers.

Phase I Decisions

The popularity and effectiveness of the new power to accept formal undertakings to remedy competition problems at Phase I was confirmed by the addition of two cases⁸¹ in this category during the period. In many ways typical of this process was *ABB/Elsag Bailey Process Automation NV*⁸². This concerned the acquisition by the ABB engineering and technology group of Elsag Bailey’s process control business. The Commission’s investigation found that, although in general the overlaps (where any existed) between the parties’ activities were not significant, there was one product area in which the operation raised doubts about its compatibility with the common market. The parties’ combined market shares in gas chromatograph analysers – a

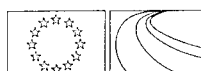
specialised instrument used mainly in the petrochemical industry, would have been high enough to give rise to competition concerns. However, ABB proposed a modification to the operation by which it agreed to divest the key elements of Elsag Bailey’s business in this area (Applied Automation Inc – ‘AAI’). The activities to be divested comprise Elsag Bailey’s interest in gas chromatographs and in the development of a related product, a mass spectrometer. After testing this proposal in the market, the Commission concluded that the divestment would remove the doubts about compatibility, and declared the operation compatible on that basis.

This case demonstrates many of the essential elements of a successful use of the ‘Phase I undertakings’ procedure:

- clearly identified product and geographic market(s) in which a competition problem is found to exist at an early stage of the examination (some parties have even drawn such potential problems to the Commission’s attention themselves, in order to hasten the process);
- the notifying party’s ability to divest an overlapping business that clearly covers the area(s) of concern, and can be easily identified and readily severed from the remainder;
- readiness on the part of the notifying party to acknowledge the competition problem rapidly and to cooperate with the Commission in seeking mutually acceptable ways of resolving it.

⁸¹ in the second case - No. IV/M 1286 , Johnson & Johnson/Dupuy - the undertaking concerned the divestment of an overlapping business in the manufacture of replacement hip and knee joints.

⁸² Case No. IV/M 1339.



It is also worthwhile recalling the constraints which the Regulation's very short timescales place on the Commission and on the parties under this procedure, and in particular the need for the Commission to 'market test' a proposed remedy with customers, competitors etc and to liaise with Member States. Popular and economical as it is proving, the Commission is not obliged to accept a remedy at Phase I, and if the above elements are not all present, then a full investigation under the Phase II procedures can be expected.

Joint Ventures

Another change to the Merger Regulation whose effects can now be seen more clearly is the inclusion within its scope of operations known as 'full function co-operative joint ventures' (FFCJVs). The aim of the change is, broadly, to increase clarity and consistency. Now, all joint ventures involving long-term change in the structure of the enterprises concerned are - like other 'concentrations' - dealt with under the Merger Regulation (provided they have a Community dimension) rather than under the rules for agreements between undertakings⁸³. The change also means that these cases can benefit from the 'one stop shop' and fixed timescales that apply to the assessment of other concentrative operations.

Article 2(4) brings within the Regulation's scope all joint ventures constituting a concentration as defined in Article

3. It provides that they will be appraised under Article 85, EC Treaty 'to the extent that [the joint venture] has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent'⁸⁴. Thus, the operation's concentrative effects are assessed under the Merger Regulation's 'dominance test'⁸⁵ as with other concentrations; any effects on competition resulting from the coordination of the parents' activities other than through the joint venture (known as 'spillover effects') are assessed under Articles 85(1) and 85(3). Article 2(4) requires the Commission to take account in particular, in its appraisal of 'spillover', of whether two or more parent companies retain significant activities in upstream, downstream or neighbouring markets to those of the joint venture; and whether the coordination which is the direct consequence of the joint venture's creation affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question. Previously, the likelihood of spillover effects being found in a notified merger case could raise doubts over whether it should be examined under the Merger Regulation or under Regulation 17/62, leading to additional delay and uncertainty, and the prospect of having to engage a different procedure.

In the 10 months of 1998 since the amendments to the Merger Regulation took effect, 26 of the 76 joint venture-cases decided under the Regulation necessitated some analysis under Article 2(4). The most detailed analyses have been made in cases within the telecommunications and the Internet areas. Remedies to settle Article 2(4) concerns have been adopted in one case decided so far (*Canal+/ CDPQ/ BankAmerica*⁸⁶) in one other case (*BT/AT & T*⁸⁷) the Commission decided to open a second phase investigation.

In *Canal+/CDPQ/BankAmerica*, the spill-over effects were found on a market upstream from the joint venture. The joint venture itself concerned pay-TV in France; but competition problems were found to result in the market for the wholesaling of TV rights in Spain. In Spain, Canal+ had strong or dominant positions on the pay-TV market as well as on the upstream market for content. The notified transaction was found, through the balance of power in the joint venture, to give Canal+ a strong incentive to favour Cableuropa (controlled by CDPQ and BankAmerica) in the sale of Spanish pay-TV rights. The remedies adopted are designed to eliminate the possibility of discrimination against other competitors on the Spanish pay-TV market.

The case shows the potential use of Article 2(4). Firstly, the notified transaction did not create or strengthen the dominant position of Canal+ as such.

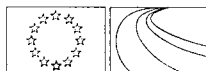
⁸³ Regulation (EEC) No. 17/62.

⁸⁴ For further details see also Commission Notice on the concept of full-function joint ventures, OJ 98 C 66/01, 2.3.1998.

⁸⁵ Merger Regulation, Article 2(1) - 2(3).

⁸⁶ Case No. IV/M.1327.

⁸⁷ Case No. JV.15.



Rather, it gave rise to a situation where the company's commercial incentives would change so that there would be an increased risk of discrimination against other pay-TV operators in Spain. It created a direct link between Canal+ and the notified transaction which provided incentives to behave in a potentially anti-competitive way. Secondly, the remedy sets a benchmark for the future conduct of Canal+ on the Spanish market for pay-TV content, but leaves the notified transaction structurally unchanged. In the absence of Article 2(4), this remedy would have been difficult to accept under the Merger Regulation.

The Commission decided to open detailed enquiry into a proposed joint venture between British Telecom and the US firm AT&T, two of the world's largest telecommunications operators. The joint venture will provide a broad range of telecommunications services to multinational corporate customers as well as international carrier services to other carriers. The Commission decided to carry out a second-phase inquiry into the effects of the venture on several global telecommunications markets and also some in the UK. Subsequent to its preliminary inquiry, the Commission expressed concerns in the following areas: the parties' combined market position on the markets for the provision of global telecommunications services to large multinational companies and for international carrier services, the effect of the creation of the joint venture leading to the possible creation or strengthening of a dominant position for certain

telecommunications services in the UK and the possible co-ordination effects of the proposed joint venture in the UK between ACC, a wholly-owned subsidiary of AT&T, and between BT and Telewest, in which AT&T through TCI will have a jointly controlling stake. The final decision is expected in April 1999.

The Commission's first 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. Normally, the commercial incentives, and, thus, the risk of co-ordination, is smaller if the joint venture's market is significantly smaller than the Article 2(4) market. 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 causality between the notified operation and the 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 could be made.

Other Changes to the Regulation

Another important change to the Regulation concerned the suspension period within which a notified transaction cannot be implemented without special dispensation from the Commission (Article 7)⁸⁸. Initial experience confirms the desirability of allowing the Commission more flexibility. The suspension now automatically applies throughout the period of examination, but can be lifted in a slightly wider range of circumstances than before. Previously, the test was whether 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. A derogation of the new type was granted, in some instances subject to conditions and limitations, in five cases. 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 discussions with the Task Force.

The supplementary turnover thresholds—designed to address the problem of multiple notifications of the same

⁸⁸ For details, see previous Competition Policy Newsletter, page 62.



transaction to several national authorities – also appear to be having the expected effect; the number of cases notified by the end of the period (14) being broadly in line with the Commission’s estimates of the likely impact.

Other Developments

Incomplete Notifications

The total number of notifications concerning merger cases which have been declared incomplete by the Commission (according to Article 4 of the Implementing Regulation) remains small, but has undergone a certain increase in recent years. The Commission is keen to find ways of reducing the number of incomplete notifications. Accordingly it was pleased to enter into discussions on this matter with representatives of the legal community, as a result of which some Best Practice Guidelines have been drafted and published on the Directorate-General IV website on the Internet⁸⁹.

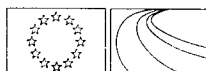
The Commission found that in many cases where a notification was declared incomplete, the parties had made little or no prior contact with the Commission before submitting it. This clearly increased the risk. Otherwise, the main causes of incompleteness were as follows. Formal issues – for example, not all the relevant parties had been included, or the notification was made before sufficiently clear agreements to

bring about the concentration were in existence – accounted for some cases. Possibly the largest single category, however, was where the supporting information provided was inadequate or unclear – for example, as regards the markets considered to be affected by the merger and the parties’ and competitors’ shares in them. Because the time allowed for the Commission to reach a decision is short, clarity is especially important in cases where the documentation is extensive and the possible markets numerous or complex. The third category comprised cases where the Commission’s investigation revealed, sometimes only at a late stage, potential affected markets not identified by the notifying party - although, in some instances at least, they arguably could, and therefore should, have been.

The guidelines cover prenotification (including the desirability, in appropriate cases, of giving the Commission the opportunity to see the notification in draft form for comment), timing, information on market definition and shares (eg, where there is scope for debate over geographic market definition, providing market data on a national basis as well as a wider one such as the EU as a whole) and the value of meetings with representatives of the undertakings concerned who know well the activities and markets involved. The Commission of course remains free to make declarations of incompleteness where appropriate. But if followed, the guidelines should minimise the risk of a notification being declared incomplete and also

reduce the need for the Commission to request further information after notification.

⁸⁹ See ‘Mergers – Other Documents’ on the DGIV website - <http://europa.eu/int/comm/dg04>



Unanimous agreement in the Council on the procedural regulation

Adinda SINNAEVE, DG IV-G-1

I. Introduction

The agreement reached in the Industry Council on a procedural regulation for State aid marks a new era of State aid policy. After more than 40 years, the Community control of State aid will finally be endowed with a basic act, integrating for the first time all the rules of procedure in a single and coherent text. The regulation also widens the instruments at the disposal of the Commission to act against unlawful aid and to monitor the respect of State aid decisions. By its contribution to increase the transparency and efficiency of State aid policy, the regulation can thus be regarded as one of the main pillars of the modernisation initiative which the Commission is carrying out in the field of State aid.

Despite the expected difficulties of reconciling the different and opposed interests, which are involved in State aid procedures, the Commission's proposal made its way through the Council in a relatively short time. On 18 February 1998, the Commission had adopted its proposal for a regulation on State aid procedures on the basis

of Article 94 EC-Treaty⁹⁰. It was submitted to the Council on 27 February and discussed under the British and Austrian presidencies. After a first debate on 7 May 1998, the Industry Council reached on 16 November 1998 a political agreement on the regulation. Meanwhile the European Parliament has given its opinion, so that the regulation is now ready for formal adoption.

A comparison between the original proposal of the Commission and the final text agreed upon by the Council shows that the structure and main contents of the proposal generally remained. The following text gives an overview of the most important points of the agreement reached by the Industry Council, focusing especially on the changes with regard to present practice.

II. The question of time-limits for the different steps of the procedure

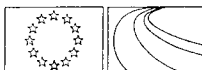
According to a long established practice based on the Lorenz

judgement of the Court⁹¹, the regulation confirms that the preliminary examination of a notified aid should be concluded within two months from a complete notification. Where the Commission has not taken a decision within this period, the Member State concerned may put the measures concerned into effect, after giving the Commission prior notice thereof, unless the Commission reacts within 15 days from the receipt of the notice. From the wording of the *Lorenz* case, it had not been clear whether the Commission could still have such an additional period at its disposal, when receiving notice that the Member State intended to implement the proposed measure. In the Commission's view, an additional period to rectify the situation is needed in order to avoid seriously distortive aid inadvertently becoming authorised, without any possibility to rectify the situation. The fact that a formal Commission decision within the 15 days gives more legal certainty to the beneficiary than an implicit approval, played a role in the acceptance by the Council of the Commission's proposal.

Article 5 concerning information requests on incomplete notifications introduces a change to the preliminary examination phase as it is currently practised. It states that a notification will be considered to be withdrawn if

⁹⁰ OJ C 116/13, 16.4.1998. See also Competition Policy Newsletter, 1998, nr. 2, p. 79.

⁹¹ Case 120/73 *Lorenz v Germany* [1973] ECR 1471.



a Member State does not provide the requested additional information within the established time limit. This provision should be a disincentive for Member States to drag the procedure by delayed and incomplete replies and can thus be useful in order to speed up decisions. The consequence of implicit withdrawal is mitigated by the ability of the Commission to extend the deadline and by the right of the Member State to answer in a duly reasoned statement that the requested information is not available or has already been provided, so that the notification should be considered to be complete. The latter possibility constitutes a procedural innovation. By arguing that the requested information is not available, the Member State can ask for a decision and make the two months period definitely run. This possibility could come close to letting the Member State in exceptional cases decide itself that a notification is complete, while current practice and the Commission's proposal left this decision entirely with the Commission. Where the Commission considers that it nevertheless lacks information to reach a decision, it will open the formal investigation procedure.

The Commission's original proposal did not contain a time limit for the formal examination procedure. This choice was not only based on the practical problems such a time-limit would bring for its services, but also on the difficulty of

establishing a time-limit which is appropriate for all cases, taking account of factors such as differences in the complexity of cases, new questions which may arise following the comments from third parties and require additional information, etc. However, since it was one of the main demands from Member States to accelerate proceedings and to establish at least a maximum duration for the formal examination procedure, a solution acceptable to all parties had to be found. An agreement was reached on a time limit of 18 months from the opening of the procedure. Once this time limit has expired, and should the Member State so request, the Commission must take a decision within two months. Although the time limit for the formal examination procedure might still seem to be very long, it should be reminded that it is not meant to become the rule, but only to establish a maximum duration.

Finally, it should be noted that time limits are not applicable to unlawful aid. Member States which do not respect the basic principles of State aid law – notification obligation and standstill clause – should not be put on an equal footing with those who do so. It seems therefore justified that the benefit from binding deadlines is reserved for the examination of notified aid. Nevertheless, even in the absence of the constraint of deadlines, it is the Commission's objective and task to put an end to the possibly

incompatible distortions of competition caused by unlawful aid as quickly as possible.

III. Unlawful aid: provisional and definite recovery

Where aid has been awarded without authorisation, the Commission should be provided with the necessary instruments to rectify the procedural and material infringement of the Treaty. As a consequence, the procedure for the examination of unlawful aid differs in some regards from the "normal" procedure.

First of all, the Commission has different kinds of injunctions at its disposal during the procedure on unlawful aid. The regulation codifies these injunctions: information injunction (Art. 10 (3)), suspension injunction (Art. 11 (1)) and provisional recovery injunction (Art. 11 (2)). With regard to the latter injunction, the regulation will bring an end to the academic debate on the legal competence of the Commission to order an interim recovery, as the Council, though adding three conditions, accepted the principle of a recovery injunction. According to the final text of Art. 11 (2), the Commission may order a Member State provisionally to recover aid provided that (1) there are no doubts that the measure constitutes a State aid, (2) there is an urgency to act and (3) there is a serious risk of substantial and irreparable damage to a competitor. These criteria in practice limit the



scope of the recovery injunction to the most serious cases, where immediate action for the protection of competitors is needed. If the recovery injunction has been complied with, the regulation provides that the Commission will take a decision within the time limits for notified aid. The exceptional application of time limits to unlawful aid is justified by the fact that the effective reimbursement of the aid establishes a situation which is, from a competition point of view, similar to the one prevailing in case of notified aid.

Where unlawful aid is incompatible with the common market, an effective State aid control should ensure its definite recovery from the beneficiary. Art. 14 of the regulation introduces, in accordance with the Commission's proposal, an obligation for the Commission to order recovery of all unlawful aid that is incompatible with the common market. It also confirms the Commission's proposal that, for the implementation of a recovery decision, national procedures shall only apply as far as they allow the immediate and effective execution of the decision. However, the controversial sentence concerning the exclusion of suspensive effect of national remedies against a recovery order from the Member State, has been deleted from the final text of the regulation. It was considered by the Council to be a harmonisation provision, for which Art. 94 would not

constitute a sufficient legal basis. In the Commission's view, this argumentation does not seem convincing, since the non-application of suspensive effect is only a concrete consequence of the previous sentence of the article, which states that national law should not prevent the *immediate* execution of the Commission's decision. Since provisions granting suspensive effect precisely prevent this immediate execution, they should in any case be disregarded, for their application would infringe the regulation. The Council has also added a new sentence to Art. 14 (3) which obliges Member States, in case of proceedings before national courts, to take all necessary measures, even provisional measures, in order to obtain immediate reimbursement.

Taking account of the fact that the regulation introduces an obligation for the Commission to ask recovery whenever it takes a negative decision on unlawful aid, the question arose whether, for reasons of legal certainty and proportionality, some kind of restriction should not be built into the system. During the negotiations in the Council an agreement could be reached on a limitation period for the recovery of aid. According to the new Article 15, after a period of ten years starting from the award of the aid, the Commission cannot ask recovery anymore. Although at first sight, this provision could be seen as reducing the Commission's powers, its

practical effect should not be overestimated. Cases of unlawful aid which remained unknown to the Commission for more than 10 years, are not only rare, but can hardly be very distortive. Moreover, any action of the Commission with regard to the measure (e.g. a request for information) makes the 10 years period start running afresh. On the whole, it seems that for the few cases where the limitation period might apply in future, this is justified.

IV. Third party rights

With regard to the issue of third party rights, neither the Commission nor the Council intended to modify the present situation. It was considered that the rights of interested parties are sufficiently protected under the current system and that, even presuming that it would be practically possible to enlarge these rights, no substantial increase of the efficiency of State aid control could be expected therefrom.

Nevertheless, it appeared useful, for the sake of transparency, to define in a separate chapter of the regulation all the possibilities which third parties have to defend their interests: the right to inform the Commission about alleged unlawful aid or misuse of aid and to be informed of possible Commission decisions on the matter concerned; the right to submit comments where the Commission has initiated a formal investigation procedure and to be sent a copy of the final



decision in that case; the right to receive on request a copy of decisions which are not published or not published in full. In the Commission's proposal these rights were spread over different articles or only implicitly expressed since they are to be seen within the context of a bilateral procedure between the Commission and the Member State concerned. As to the substance, the new chapter VI of the regulation does not change the means of action third parties currently have but, by bringing them together in one chapter, makes them more visible.

V. On-site monitoring

The Commission's proposal contained three instruments that should reinforce its powers to monitor compliance with its decisions. Two of these were agreed to by the Council.

First of all, a general reporting obligation with regard to all existing aid schemes should allow the Commission to obtain all necessary information to monitor existing aid schemes in accordance with Art. 93 (1). If Member States do not comply with the obligation to submit annual reports, the Commission might propose appropriate measures with regard to the scheme concerned, going as far as the abolishment of the scheme.

Secondly, the regulation gives the Commission the right to undertake on-site monitoring visits to the beneficiary of an

aid, where serious doubts about compliance with certain decisions exist. Whereas the original Commission proposal had only foreseen on-the-spot visits for checking the respect of conditional decisions, the scope of this article was widened during the Council negotiations to all decisions authorising aid. This new power of the Commission is certainly one of the main innovations of the regulation in strengthening State aid control.

The third instrument, a cooperation procedure with national independent supervisory bodies, was not retained in the final text of the regulation. However, the considerably enlarged on-site monitoring powers of the Commission seem largely to compensate for this deletion.

VI. Publication

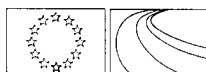
Publication of decisions is an area where the potential conflict between transparency and efficiency is most striking. It goes without saying that full publication of all decisions in all languages would provide a perfect transparency, but - aside from the paradox that too much transparency might have the effect of reducing it - this would jeopardise the goal of increasing efficiency by speeding up the decision making process, especially as far as decisions to open a formal investigation are concerned. Therefore, the regulation now provides that the latter decisions will only be

published in the authentic language together with a summary in the other languages. In practice this means, that e.g. for a decision on a French aid, the Official Journal published in Finnish will contain the authentic French text together with a summary in Finnish. This system should give sufficient information to allow third parties to submit their comments on the case. At the same time, it should reduce the delay in publishing openings of a procedure and thereby have a direct positive effect on the total duration of the proceedings.

However, with regard to final decisions, where the objective was to speed up the publication - and thereby the legal certainty of the beneficiary - rather than the decision making, the transparency arguments prevailed and the present system of publishing the full text in all languages will be retained. It should be noticed, however, that the possible gain of resources with regard to the publication of openings of a procedure might also help to reduce the delay in publication of final decisions.

VII. Conclusion

The significance and impact of the procedural regulation might be compared to that of regulation 17 for the application of Art. 85-86. Its main importance lies not so much in the new instruments it introduces to improve the effective enforcement of state aid control, but rather in the value of a codification itself. A



streamlined and binding legal text setting out the different state aid procedures will finally put an end to the mixture of case law and soft law which is at present dominating the State aid field. It will provide the required legal certainty which state aid is

missing. Finally, it will increase the transparency and visibility of state aid rules and is a prerequisite for administrations, enterprises and academics increasing their knowledge of this area. Since a better respect of the rules presupposes a better

knowledge of them by Member States and by the legal and business world as a whole, the regulation has an important role to play in this regard. For all these reasons, its final impact can be expected to far exceed its contents.

Principaux développements du 1er octobre au 31 décembre 1998

Madeleine TILMANS, DG IV-G-1

Communication de la Commission sur l'application des règles relatives aux aides d'Etat aux mesures relevant de la fiscalité directe des entreprises.

Le 11 novembre 1998, la Commission a adopté une communication sur l'application des règles relatives aux aides d'Etat dans le domaine de la fiscalité directe des entreprises. Le but principal de celle-ci est de clarifier le champ d'application des règles en matière d'aides d'Etat et de préciser les procédures appliquées. C'est ainsi qu'un avantage fiscal tombe sous l'application des dispositions en matière d'aides d'Etat lorsqu'il est spécifique à certaines entreprises ou certaines productions et qu'il n'est pas justifié par la nature ou l'économie du système fiscal concerné, c'est-à-dire que sa nécessité pour le fonctionnement et l'efficacité dudit système n'est pas démontrée par un

raisonnement économique. Par contre, les mesures de pure technique fiscale et les incitations fiscales poursuivant un objectif de politique économique générale peuvent, quand elles s'appliquent indifféremment à toutes les entreprises, être considérées comme des mesures générales qui ne tombent pas sous l'application des dispositions en matière d'aides d'Etat. La Commission évaluera ou réévaluera les aspects aides d'Etat des régimes fiscaux des Etats membres en se fondant sur cette communication.

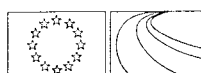
Extension of the validity of the Code on aid to the synthetic fibres industry until 31 August 2001.

On 16 December 1998 the Commission decided to extend the validity of the Code on aid to the synthetic fibres industry (OJ C 94, 30.03.1996) beyond its scheduled expiry date of 31 March 1999, until 31 August 2001. This

decision followed a discussion of the issue at a multilateral meeting of State aid experts on 18 November 1998.

The award of aid to the synthetic fibres industry has been subject to strict control since 1977 when, because of the low rate of capacity utilisation for the production of synthetic fibres within the Community and the consequent loss of jobs as well as the risk that aid to the industry would exacerbate the situation and distort competition, the Commission decided to introduce a sector-specific Code for the control of aid to the sector. Capacity utilisation rates generally continue to lag well behind optimal levels for such a capital-intensive industry. In the Commission's view there was insufficient evidence to suggest that the development of capacity utilisation for any of the fibres and yarns covered by the Code had improved to such an extent as to justify its immediate abolition without engendering future problems.

The question of whether sector-specific rules for this industry remain appropriate beyond August 2001 will depend on the planned



evaluation of the effectiveness of the «multisectoral framework on regional aid for large investment projects», which entered into force on 1 September 1998 for a trial period of three years.

Détermination des plafonds nationaux de couverture des aides régionales.

En adoptant, le 16 décembre 1997, les lignes directrices concernant les aides d'Etat à finalité régionale (JOCE C 74 du 10.3.1998), la Commission s'est dotée d'une nouvelle méthode de détermination des régions éligibles aux dérogations prévues aux articles 92§3.a) et c) du Traité. En application des dispositions établies par ces lignes directrices, la Commission a également fixé le plafond global de couverture des aides régionales à 42,7% de la population de l'Union pour la période 2000-2006, ce qui représente une réduction en 4 points de pourcentage de la couverture actuelle.

Le 16 décembre 1998, la Commission a arrêté définitivement les plafonds nationaux de couverture des aides régionales (JOCE C 16 du 21.1.1999) sur base des statistiques les plus récentes (1994-1996 pour le PIB par habitant et 1995-1997 pour le chômage). En application de la méthode établie par les lignes directrices, ces plafonds nationaux sont fixés, dans le respect du plafond global de 42,7%, sur la base de critères socio-économiques objectifs et transparents, rappelés ci-après.

En premier lieu, et comme dans le passé, peuvent bénéficier de la

dérogation de l'article 92 § 3 a) les régions, correspondant à une unité géographique de niveau II de la NUTS, qui ont un produit intérieur brut (PIB) par habitant, mesuré en standard de pouvoir d'achat (SPA) sur la base de la moyenne des trois dernières années pour lesquelles des statistiques sont disponibles, ne dépassant pas le seuil de 75 % de la moyenne communautaire. Une répartition de la couverture communautaire qui reste disponible pour l'article 92 § 3 c) entre les différents Etats membres est ensuite effectuée en utilisant une clé de répartition qui tient compte des disparités régionales, en terme de PIB/SPA par habitant et/ou de chômage, dans le contexte national et communautaire. Si nécessaire, les résultats ainsi obtenus sont alors corrigés de façon à garantir:

- que, dans chaque Etat membre, la population éligible au titre de la dérogation 92§3.c) soit au moins égale à 15% et ne dépasse pas 50% de la population non couverte au titre de la dérogation 92§3.a);
- que, dans chaque Etat membre, la couverture de population éligible au titre de la dérogation 92§3.c) soit fixée à un niveau suffisant pour inclure l'ensemble des régions venant de perdre le statut 92§3.a), ainsi que les régions à faible densité de population;
- que la réduction de la couverture totale des aides régionales d'un Etat membre ne dépasse pas 25% de sa couverture actuelle;
- que la somme des différentes couvertures nationales de l'article 92§3.c) égale celle

disponible pour l'Union européenne (par le biais d'un ajustement proportionnel des résultats obtenus pour les Etats membres non concernés directement par les corrections précédentes).

Ainsi, les plafonds nationaux de population assistée au titre des dérogations des articles 92§3.a) et 92§3.c) que la Commission considère comme compatibles avec le marché commun sont, pour la période 2000 à 2006 et par Etat membre:

- Belgique:	30,9 %
- Danemark:	17,1 %
- Allemagne:	34,9 %
- Grèce:	100 %
- Espagne:	79,2 %
- France:	36,7 %
- Irlande:	100 %
- Italie:	43,6 %
- Luxembourg:	32,0 %
- Pays-Bas:	15,0 %
- Autriche:	27,5 %
- Portugal:	100 %
- Finlande:	42,2 %
- Suède:	15,9 %
- Royaume-Uni:	28,7 %

Tel qu'établi par la décision de la Commission du 16.12.1997, les données statistiques utilisées se réfèrent au découpage géographique de niveaux II et III de la NUTS en vigueur au 15 octobre 1997. Dans la mesure où des changements de nomenclature NUTS auraient eu lieu entre-temps, la Commission appréciera l'éligibilité des régions proposées par les Etats membres aux dérogations régionales prévues aux articles 92§3.a) et c) du Traité sur la base de la nomenclature en vigueur au moment de la notification des cartes des aides



régionales, dans le respect des plafonds nationaux.

La Commission a communiqué officiellement ces plafonds à tous les Etats membres le 30 décembre 1998. Les Etats membres sont dès lors en possession de tous les éléments pour procéder à la notification de leurs cartes des aides régionales, qui seront valables pour la période 2000-2006. Ils ont été invités à procéder à cette notification avant le 31 mars 1999, pour permettre que l'exercice de sélection des régions assistées se termine à temps, faute de quoi aucune aide à finalité régionale ne pourra être octroyée après le 31 décembre 1999.

Report on "services of general economic interest in the banking sector"

At its meeting in June 1997 in Amsterdam the European Council adopted a Declaration on "Public credit institutions in Germany" mentioning the possibility that "services of general economic interest" might exist also in the banking sector. This Declaration notes the Commission's opinion that the Community's existing competition rules would allow to take such services and possible necessary compensation measures into account in full.

Following the adoption of the Declaration the Council asked the Commission to examine whether similar cases exist in the other Member States and to inform the ECOFIN Council about the findings. In order to gather the necessary information the Commission sent a questionnaire to all Member States, asking which

particular kind of tasks of their credit institutions they considered to be such services of general economic interest.

Based on the answers to this inquiry the Commission drew up the report which was presented to the ECOFIN Council at its meeting on 23.11.1998. In summary, the answers suggest a distinction between three types of activities which are consequently discussed in the report:

1. the provision of a basic financial infrastructure which covers in full a certain territory,
2. the fulfilment of certain specific tasks by credit institutions on behalf of a Member State and
3. the raising of funds exclusively for the public authorities.

1. A vast majority of the Member States do not consider the provision of a comprehensive and efficient financial infrastructure covering the entirety of a certain territory as service of general economic interest within the meaning of Art. 90 (2) EC Treaty. (Only two Member States, Germany and Austria, entrust credit institutions with the task to provide a basic financial infrastructure covering a certain territory.) Furthermore, all Member States agree that such infrastructure can be and is provided by the credit institutions under market economy conditions. (Only Sweden compensates the Postbank for the extra costs of operating certain particular branches in remote areas.) Therefore, no exemptions from

the competition rules seem necessary to ensure a comprehensive financial infrastructure within the Community.

2. Special tasks performed by certain credit institutions on behalf of the state, e.g. social housing loans, might fall under Art. 90 (2).
3. Fund raising activities of special institutions exclusively for non-commercial, non-competitive public purposes should not pose problems under the competition rules of the Treaty if all repercussions on commercial activities are avoided.

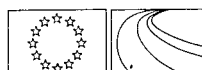
Based on the findings of the report the Commission will examine the compatibility of individual cases and systems under Art. 90 (2) on a case to case basis.

Sweden - Measures in favour of employment and in favour of training.

On December 16, the Commission has authorised two measures proposed by the Swedish government in favour of professional training and employment, considering that such measures do not constitute state aid.

The aim of the approved measures is to provide an incentive for companies to take-on long-term unemployed persons.

The first measure is a scheme in favour of employment which allows companies to receive support of up to 50% of the gross



salary of every long-term unemployed person they recruit. Long-term unemployed people are defined as people who have been unemployed for more than 12 months and registered as unemployed by the public employment service. People who are less than 25 year old and who have been unemployed for more than 3 months are considered as "long-term unemployed" as well.

Support under the scheme is granted for a maximum period of 6 months. If the duration of the employment contract is less than six months, support will only be provided for the duration of the contract. Companies have an obligation to provide training to these new persons, so that they gain professionally useful skills and become fully employable in the longer term. The subsidy will correspond to 50% gross of the salary which may not exceed SEK 350 (€ 37.3) per day.

This scheme also includes a provision to support employment of long-term unemployed people for up to 12 months when they are recruited for public investments or investments of social nature. When a public authority (for instance a territorial administration) planning to make such an investment wishes to benefit from the scheme, it must first obtain the agreement of the County Employment Board, a central government agency in charge of administering the scheme. Once the public authority in charge of the investment project has obtained this agreement, it will proceed with a call for tenders from companies wishing to carry out the investment project. This

call for tender will indicate that companies winning the tender and thus obtaining a contract in connection with the public or social investment project will automatically receive employment subsidies for up to 12 months if they recruit long-term unemployed persons. This transparent procedure ensures that the only beneficiary of the employment aid for public investments or investments of social nature (besides the recruited persons themselves) is the promoter of the project, which is a public authority.

In addition to the above described scheme in favour of unemployment, the Swedish government will implement a measure aimed at stimulating professional training of companies' staff. Companies may benefit from public support up to approximately € 2130 for the training costs of each staff member, provided that they take on a long-term unemployed person as a substitute for every staff member sent for training.

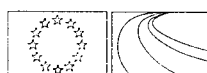
Neither the measure for employment nor the measure for training favours any specific sector. These measures do not contain any discrimination with regard to free movement of workers, services or free right of establishment. Both measures are unlimited in time, and would still be applied even if the actual expenses exceeded the foreseen budget. Furthermore, provided that the criteria set for the application of these measures are fulfilled, companies will be automatically eligible for public support. Therefore, the European

Commission reached the conclusion that these measures are general in nature, and do not constitute state aid within the meaning of the EC Treaty.

The Netherlands. - The Commission considered aid compensating for damage caused by extreme heavy rain in The Netherlands compatible with the common market.

On December 9th the European Commission decided to consider the aid measure compensating for the damage caused by extreme heavy rain on September 13th and 14th 1998 compatible with the common market. Purpose of the aid is to make partially good the damage caused by this natural disaster.

The weather conditions on 13 and 14 September 1998 in the damage area concerned have been exceptionally harsh: at least 100 millimetre of rain has fallen in these two days, an event which according to the Dutch Royal Meteorological Institute occurs only once every 125 years. The water led to a disruption of the society in the areas hit by the water (parts of the Provinces Zuid-Holland, Zeeland, Noord-Brabant en Zuid-Limburg). In Zuid-Limburg several rivers overflowed their banks. In the remaining damage area, a "polder" area (below sea level), a strong wind coming from the sea made it impossible to drain the water to the sea – on the contrary, water was pushed inwards towards the land. The water management systems in the region failed, with the result that the level of the water table rose and the land



became saturated from below. The consequences of this chain of events were therefore very similar to those which would have occurred had the land been flooded in the traditional sense. Therefore, the Commission considered this very unusual combination of geographical and climatic circumstances as a natural disaster. According to the Dutch authorities, thousands of households and over 5000 companies have suffered losses because of this unexpected natural phenomenon.

The aid scheme fixes the area that is hit by the flooding and settles the modalities, which determine the amount of the compensation to the victims. It concerns an one time only direct grant that compensates partially for the damage. This scheme applies to anybody or any institute (private households, lower government bodies, churches, companies, etc) that suffered damage. The amount of the loss will be valued by an independent expert and will be specified in a damage report.

The Commission notes that the aid does not result in overcompensation of damage. The Dutch authorities have confirmed that the calculation of the losses will be undertaken individually for each beneficiary, who will be expected to bear a proportion of the losses (own risk) themselves. The own risk for companies in relation to the amount of the loss is limited to NLG 10.000 (€ 4560). Only compensation will take place for costs, which are in principle not insurable, are not or could not have been compensated on another account and are not

caused by own guilt or because the victim didn't take sufficient measures to prevent or to limit the damage. Furthermore, it is noted that no compensation will be granted if the amount of the loss is under the threshold of NLG 2000 (€ 907.56)

The costs of the aid measure are estimated between NLG 300 million (€ 135 million) and NLG 400 million (€ 180 million). The Commission considered the aid in line with Article 92 (2) b of the EC Treaty. According to Article 92 (2) (b) of the Treaty Member States can grant State aid in order to make good the damage caused by natural disasters.

Germany - Opening of the Article 93(2) procedure in respect of the shipyard Kvaerner Warnow Werft GmbH

On 25 November the European Commission decided to open the Article 93(2) procedure in respect of the Eastern German shipyard Kvaerner Warnow Werft GmbH in order to examine the company's exceeding of an annual new shipbuilding capacity limitation.

Restructuring aid of DM 1 247 million (€ 638 million) had been granted to this former GDR shipyard by means of several Commission decisions in 1993-1995. The approval of the aid had been made subject to an annual new-building capacity limitation of 85 000 cgt. However the regular monitoring report of the yard (of 30.6.1998) indicated that production would be considerably in excess of this limit for 1998 and 1999. Accordingly, as the

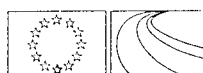
conditions of the decisions had been breached, the aid could no longer be considered compatible with the common market pursuant to provisions of Directives 92/68/EEC and 90/684/EEC on aid to shipbuilding.

At Germany's request this matter was discussed at the Industry Council of 16 November 1998. Germany tried to get the Council to ask the Commission to review the interpretation of the capacity limit set in the Council Directive 92/68/EEC. The Council's overall opinion was that the State aid rules and the Commission's decisions must be respected in full.

Italie - Décision d'injonction dans le cadre de la procédure ouverte au titre de l'article 93 § 2 du traité CE à l'égard de la société Seleco S.p.a.

Le 2 décembre 1998, La Commission a pris une décision d'injonction imposant au Gouvernement italien de lui fournir toutes les informations nécessaires pour lui permettre de clore la procédure ouverte à l'égard des aides octroyées à plusieurs reprises à la société Seleco S.p.a. Celle-ci appartient au secteur de l'électronique (téléviseurs couleurs, décodeurs de programmes cryptés, projecteurs et moniteurs).

La Commission s'apprêtait à clore par une décision partiellement négative la procédure qu'elle avait ouverte en 1994 à l'égard d'aides octroyées à Seleco lorsqu'elle apprit l'existence d'aides supplémentaires en faveur de cette dernière. Elle décida dès lors, en



janvier 1998, d'étendre la procédure ouverte afin d'examiner l'intégralité des aides octroyées dans une même procédure.

En septembre 1998, les autorités italiennes communiquèrent que la faillite de Seleco S.p.a avait été déclarée en avril 1997, c'est-à-dire 10 mois avant l'extension de la procédure. Après avoir vainement tenté d'obtenir de la part des autorités italiennes les informations complémentaires, notamment concernant la procédure de liquidation en cours, qui lui sont nécessaires pour clore la procédure par une décision finale sur l'ensemble des aides en cause, la Commission a décidé de prendre la décision d'injonction précitée à l'égard du gouvernement italien.

Allemagne - La Commission conclut que les dotations financières en faveur de la société Infraleuna Infrastruktur und Service GmbH ne constituent pas des aides d'Etat tombant sous l'application de l'article 92 du traité CE

La Commission, le 25 novembre, a clos la procédure au titre de l'article 93 §2 du traité CE qu'elle avait ouverte à l'égard de l'assistance financière que les autorités allemandes projettent d'octroyer à la société Infraleuna Infrastruktur und Service GmbH nouvellement créée, dans le Land de Sachsen Anhalt, sur le site du complexe chimique de Leuna dont les installations de production ont été privatisées et vendues à une centaine d'investisseurs différents. Infraleuna, dont la majorité des parts appartient au secteur public, a pour objet la réalisation et la

gestion de l'ensemble des infrastructures du site au profit des entreprises qui s'y sont installées. Elle a également été chargée de l'assainissement du site dont l'exécution incombait aux autorités publiques, ces dernières ayant réalisé les terrains au prix du marché pour un site assaini.

La Commission a constaté qu'étant donné l'impossibilité de trouver un investisseur privé pour les infrastructures, la création de Infraleuna constituait l'unique alternative à l'accomplissement de ces diverses tâches par les autorités publiques et que, dès lors, la dotation initiale en capital de cette dernière pour un montant de 1.018 millions de DEM (520,50 millions d'€) ne constituait pas une aide d'Etat tombant sous l'application de l'article 92 § 1 du traité CE. Quoiqu'une partie, non quantifiable, de la subvention de 150 millions de DEM (76,69 millions d'€) en faveur de l'environnement constitue une aide d'Etat, celle-ci est néanmoins compatible avec les dispositions de l'encadrement des aides en faveur de l'environnement. La Commission a constaté également l'inexistence d'aides dans le chef des entreprises nouvellement installées sur le site, celles-ci rémunérant à un prix normal les services rendus par Infraleuna, rémunération qui assurera le financement ultérieur de cette dernière.

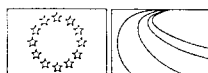
La Commission a cependant imposé certaines conditions au gouvernement allemand, notamment, quant à l'assurance que les services d'Infraleuna seront offerts à toutes les entreprises du site sans discrimination, quant à l'oblige-

tion d'exclure des subventions projetées celle d'un montant de 50 millions de DEM (25,57 millions d'€) prévue au titre de compensation des pertes et quant au contrôle de l'utilisation des différentes subventions.

France - La Commission prend une décision partiellement négative sur les aides octroyées illégalement depuis 1996 à la société Nouvelle Filature Lainière de Roubaix et en impose le remboursement à concurrence de plus de 15 millions de FRF.

La Commission a clos la procédure au titre de l'article 93 § 2 du traité CE qu'elle avait ouverte en 1997 et a décidé que les aides octroyées illégalement en 1996 pour la reprise des activités de l'ancien groupe Lainière de Roubaix par la l'entreprise nouvellement créée Nouvelle Filature Lainière de Roubaix, située dans la région du Nord-Pas-de-Calais, constituent en partie des aides incompatibles avec le marché commun. Ces aides ont été octroyées sans approbation par la Commission sous la forme d'une prime à l'investissement de 22 millions de FRF (3,35 millions d'€) et d'un prêt participatif de 18 millions de FRF (2,74 millions d'€).

En ce qui concerne la subvention de 22 millions de FRF, octroyée pour la réalisation d'investissements d'un coût de 22,2 millions de FRF, la Commission a conclu que seul pouvait se justifier, au titre d'aide régionale à l'investissement, un montant de 7,77 millions de FRF (1,18 millions d'€) correspondant au



plafond régional de 35 % pour les PME.

Quant au prêt participatif de 18 millions de FRF, la Commission a constaté que cette aide ne pouvait pas être approuvée en tant qu'aide au sauvetage ou à la restructuration d'une entreprise en difficulté, le gouvernement français n'ayant pas présenté à la Commission un plan de restructuration permettant de s'assurer de la viabilité à long terme de l'activité. D'autre part, étant donné qu'il couvre des coûts continus, le prêt comporte des aides au fonctionnement s'élevant au total à 1,46 million de FRF (0,22 million d'€), soit la différence entre le taux appliqué et le taux de référence applicable au moment du prêt. Ces aides ne peuvent pas être approuvées dans le cas présent étant donné que la Lainière de Roubaix est située dans une région assistée au titre de l'article 92(3)(c) alors que ce n'est que dans les régions assistées au titre de l'article 93 § 3 a) que de telles aides peuvent éventuellement être autorisées.

La Commission a dès lors décidé d'autoriser la partie de la subvention s'élevant à 7,77 millions de FRF et d'imposer la suppression des autres aides par le remboursement de la somme de 14,23 millions de FRF (2,74 millions d'€) augmentée des intérêts et par l'application au prêt participatif d'un taux s'élevant au minimum au taux de référence de 8,28 % applicable au moment de l'octroi de ce dernier.

Allemagne - La Commission interdit l'octroi de plusieurs aides nouvelles en faveur de la société Addinol Mineralöl

GmbH i.GV (Addinol Old) et de la nouvelle société Addinol Lube Oil GmbH & Co. KG., tout en confirmant la compatibilité avec le marché commun d'aides antérieures.

Le 25 novembre, la Commission a décidé de clore la procédure au titre de l'article 93 § 2 du traité CE qu'elle avait ouverte à l'égard de nouvelles aides en faveur de la société Addinol Mineralöl GmbH i.GV (Addinol Old) et de la nouvelle société Addinol Lube Oil GmbH & Co. KG., créée après l'ouverture d'une procédure en faillite à l'égard d'Addinol Old pour reprendre les activités de distribution de lubrifiants de cette dernière. Il s'agit d'aides déjà octroyées à concurrence de 7 millions de DEM (3,58 millions d'€) et prévues pour un montant de 40,05 millions de DEM (20,48 millions d'€). La Commission a constaté que ces aides ne respectent pas les prescriptions des lignes directrices pour les aides aux entreprises en difficulté, notamment en ce qui concerne la viabilité à long terme des bénéficiaires et la contribution des actionnaires privés qui, dans le cas présent, est notablement insuffisante par rapport à celle de l'Etat. La Commission a dès lors imposé la récupération de l'aide de 7 millions de DEM, augmentée des intérêts compensatoires, et a interdit l'octroi des 40,05 millions de DEM projetés.

Etant donné l'existence de ces nouvelles aides, la Commission avait également décidé de réexaminer la compatibilité des aides au sauvetage qu'elle avait précédemment approuvées en faveur de Addinol Old. Elle a

conclu que la compatibilité de ces dernières ne devait pas être remise en cause.

Germany - Commission does not approve illegal aid to the firm of the chemical sector Riedel-de Haën and asks for repayment.

The European Commission has not authorised state aid measures already granted by Germany to Riedel-de Haën on its investment in a residue processing plant. Germany provided grants of in total DEM 8 million (€ 4,09 million). The Commission decided that the grants are not consistent with the current Community guidelines on State aid for environmental protection and are therefore incompatible with the common market. Consequently, the State aid must be abolished and repaid.

Riedel-de Haën pursues its activities in the chemical sector and forms part of the US group AlliedSignal Inc. The production of the company causes a number of tonnes of liquid waste per year, which contains halogen hydrocarbon compounds (halogenhaltige Kohlenwasserstoffverbindungen). Up to date, the company has sold its liquid waste to waste disposal companies, which incinerated the waste in special waste incineration plants. In 1994, the company began to invest in a residue processing plant to dispose this liquid waste at the company's site. This plant is still not in service.

Germany maintained that the aid was given to improve on mandatory standards and to provide a significant improvement



of the environment in the area where mandatory standards do not exist. However, Germany did not define the part of the investment, which was required to achieve a significant improvement of the environment. Accordingly, the Commission could not approve the grants as environmental aid since Germany has not demonstrated the existence of eligible costs. The grants are therefore not consistent with the current Community guidelines on

State aid for environmental protection and are, consequently, pursuant to the environmental criteria, incompatible with the Common market.

The Commission also assessed the project in accordance with the rules for a general investment. Riedel-de Haën is located outside the assisted areas and is a large undertaking. The Commission does not consider a general investment aid to a large

undertaking to be compatible with the Common market.

As there is no justification for this aid, it has to be regarded as adversely affecting trading conditions to an extent contrary to the common interest. The aid would give Riedel-de Haën an unjustified advantage over its competitors on the market, which do not receive such aid. Consequently, the State aid must be abolished and repaid.



Organisation Mondiale du Commerce

Pierre ARHEL, DG IV-A-3

S'inspirant d'une proposition communautaire, (communication de la Commission au Conseil du 18 juin 1996 "Vers l'établissement d'un cadre international de règles de concurrence", COM (96)284 ; comm. P. Arhel Rev. du Marché Commun n° 410, juil.-août 1997), la première Conférence ministérielle de l'Organisation Mondiale du Commerce, qui s'est tenue à Singapour en décembre 1996, a chargé un groupe de travail d'étudier les problèmes relatifs aux liens entre les échanges et la politique de la concurrence, y compris les pratiques anticoncurrentielles, afin d'identifier tous domaines qui mériteraient d'être examinés au sein de l'OMC".

Après deux ans de discussions (la liste des contributions écrites produites par la Communauté et ses Etats membres a été publiée dans le précédent numéro de Competition Policy Newsletter), et conformément au mandat de Singapour, le groupe de travail a rendu un rapport comprenant deux parties :

1) Une partie factuelle, reflétant la richesse des débats, notamment sur les liens entre la concurrence, les échanges et le développement.

Cette partie fait notamment apparaître les éléments suivants :

- Importance de la contribution qu'une politique active de concurrence peut apporter aux objectifs de promotion du commerce international poursuivis par l'OMC ;
- Importance de la politique de concurrence pour le développement économique ;
- Importance de la coopération entre autorités de contrôle.

2) Une recommandation :

"The Working Group shall continue the educative work that it has been undertaking pursuant to paragraph 20 of the Singapore Ministerial Declaration. In the light of the limited number of meetings that the Group will be able to hold in 1999, the Working Group while continuing at each meeting to base its work on the study of issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, would benefit from a focused discussion on: (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice-versa (ii) approaches to promoting cooperation and communication

among Members including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. The Working Group will continue to ensure that the development dimension and the relationship with investment are fully taken into account. It is understood that this decision is without prejudice to any future decisions that might be taken by the General Council including in the context of its existing work programme."

Le texte de cette recommandation est tout à fait satisfaisant pour la plupart des pays membres. D'une manière générale, la rédaction est bien équilibrée. A la grande satisfaction des USA, de la Communauté, du Brésil, du Canada, etc..., un programme de travail, portant sur des questions de concurrence, a été établi. Cependant, le programme n'est pas exclusif, ce qui répond en grande partie aux préoccupations de pays tels que l'Inde, l'Egypte, le Mexique et le Pakistan : à chaque réunion n'importe quel pays membre pourra soulever des questions qui ne sont pas expressément prévues dans la liste, dès lors qu'elles relèvent du mandat de Singapour.

Par ailleurs, conformément aux souhaits de la Communauté, la recommandation comprend une indication de calendrier ("In the light of the number of meetings (...) in 1999 ..."). Afin d'éviter toute interférence avec la préparation de la troisième



Conférence ministérielle, qui doit se tenir cette année aux USA (le Conseil Général de l'OMC devra notamment déterminer si les négociations du cycle du millénium pourront,

comme le souhaite la Commission, être étendues au domaine de la concurrence), la Commission estime que le groupe devrait terminer ses

travaux à la fin du mois de juillet au plus tard.

Le 11 décembre, cette recommandation a été approuvée par le Conseil Général de l'OMC.

Enlargement

Maria BLÄSSAR and Joos STRAGIER, DG IV-A-3

Accession negotiations

At the end of March 1998 accession negotiations were opened with six candidate countries, i.e. Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus. These negotiations are part of a wider accession process comprising the ten Central and Eastern European applicant States (CEECs) and Cyprus. In April 1998 the Commission started the analytical examination ("screening") of the *acquis communautaire* simultaneously with the first six countries and with five countries (i.e. Bulgaria, Romania, Slovak Republic, Latvia and Lithuania) with which the opening of negotiations will take place at a later stage.

On 9-19 October, the first six candidate countries participated in the screening of the

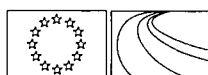
competition chapter⁹². The objective of the exercise was to inform - during a day of multilateral screening (the explanatory section) - the applicants about the Community *acquis* and - at subsequent bilateral meetings (the exploratory sections) - to identify, within each applicant country, possible substantive problems that could arise during the accession negotiations proper.

The Commission transmitted its screening reports to the Council at the end of last year. The six candidate countries have announced that they will submit their negotiation positions on competition in January of this year. In line with the intentions of the German Presidency, draft common positions on competition policy will be

prepared and presented by the Commission in March.

If the screening results are confirmed, candidate countries will be asking for only a few transitional periods and it is expected that most of them will confirm that their legislation and implementation capacity will be ready at the date of accession. However, in the field of competition, it will be necessary for the Commission to conduct a general assessment of the ability of the candidates to withstand the competitive pressures of the internal market resulting from the full and direct application of the competition *acquis* upon accession. An essential factor of this assessment is whether the respective countries respect their obligations under the competition rules of the Europe Agreement, and in particular whether they have sufficiently aligned their legislation to the Community competition regime and have set up adequate enforcement structures. This again underlines the need to properly prepare for accession and to adapt progressively but decisively to the situation prevailing in the Community

⁹² Following a multilateral screening meeting on competition in May 1998, the five other CEECs will participate in bilateral screening meetings on competition in March-April 1999.



well in advance of actual membership.

Progress in alignment of competition rules

The Commission agreed to report regularly to the European Council on progress made by each of the candidate countries towards accession. The first *progress reports* for the ten CEECs, Cyprus and Turkey were submitted at the end of 1998. The reports take into consideration progress since the delivery of the Commission Opinions in 1997⁹³.

In 1998, most of the CEECs took decisive steps to adopt or prepare new legislation, or amendments to existing legislation, in order to further align their legislation with Community law. This was certainly the case in the field of anti-trust. For example, new competition acts came into force in Hungary, Bulgaria, Estonia and Latvia. The competition authorities of the CEECs have further gained experience in the enforcement of the law. However, in general, there is still need to strengthen the competition authorities, in particular with regard to their investigative and fining powers, independence and resources.

In contrast to anti-trust policy, the introduction of State aid control in the CEECs has proven to be much more controversial

and difficult to bring about. While a number of countries have started introducing or preparing rules on the control of State aid, all the countries still lag clearly behind the level that is required in the run-up for accession. The most urgent priority is to create transparency in the granting of State aid by establishing a State aid inventory of all existing direct and indirect aid. While during 1998 some CEECs provided reports to the Commission on the distribution and volume of aid to industry, the Commission has generally been critical of the lack of a comprehensive picture of the State aid situation in most CEECs.

A second priority is the setting-up or strengthening of an independent State aid monitoring authority, and of a system for implementing this monitoring. Most of the CEECs have now established such a monitoring authority. However, legal procedures and the necessary powers to ensure genuine control of new and existing State aid in these countries are still lacking.

Finally, substantial progress is still needed with respect to approximation of substantive and procedural rules in this field in most of the countries.

Joint training sessions on competition

In view of these remaining shortcomings, technical assistance in the field of competition remains an essential

tool to prepare the candidate countries for accession. While it is for the candidate countries themselves to devote the necessary resources to focused and cost-efficient implementation of competition law, Community assistance serves as a catalyst.

The annual DG IV training for officials of the candidate countries, i.e. the *Joint Training Sessions*, was organised in 1998 for the fourth time. The first session (16-20 November 1998) targeted the junior competition officials whereas during the second session (14-18 December 1998) lectures were given to experienced officials.

As to the themes raised during the Joint Training Sessions, it was relevant to focus on the obligations of the candidate countries both during the pre-accession phase (i.e. under the Europe Agreements) as well as on those arising upon accession. The important link between pre-accession and accession is now all the more apparent following the opening of the membership negotiations with five Central and Eastern European Countries (Estonia, Czech Republic, Hungary, Poland and Slovenia) and Cyprus in 1998 (see *infra*). Basically the substantive rules in the competition field under the Europe Agreements follow the criteria arising from Articles 85, 86 and 92 of the EC Treaty. Despite the differences between procedural rules and institutional set-up during pre-accession and accession, it is becoming

⁹³ Competition Report 1997, paragraph 323.



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increasingly important to underline the current obligations of the candidate countries. The more they comply with the Europe Agreements, the better they will prepare themselves for full membership.

It was against this background that the training programmes were drafted. Since the gravest problems facing the candidate countries in the field of competition are those relating to

State aid, the topics for the State aid sessions were chosen in an ambitious and careful manner. A lot of emphasis was put on issues that are of particular interest and/or relevance to the CEECs such as the notion of aid, State aid control mechanism under the Europe Agreement, set up of an inventory on existing aid and the preparation of the annual State aid report, regional aid, steel aid, restructuring and privatisation. Specific problems such as

Special Economic Zones and fiscal aids were also discussed. The topics which were chosen for the anti-trust sessions included, among other things, merger control, abuse of dominant position, horizontal and vertical agreements, and competition in some specific sectors such as transport, financial services and telecommunications.



COMPETITION POLICY IN THE CENTRAL AND EASTERN EUROPEAN COUNTRIES

At the Competition Conference of the CEECs and the EC Commission in Bratislava on 26 May 1998 it was agreed, in order to strengthen awareness of competition enforcement in the CEECs, to create a special section in this Newsletter for contributions on competition issues from the CEECs. This is the first contribution of this kind. The articles in this section are delivered under the sole responsibility of the authors and the views expressed in these articles do not necessarily reflect those of the Commission or DG IV.

HUNGARY : MATÁV / JÁSZ-TEL Concentration

Gizella GYORKI, Senior Counsellor
International Section, Hungarian Competition Office

The Hungarian Telecommunication joint stock company (hereinafter: MATÁV) notified to the Competition Office its intention of acquiring control over JÁSZ-TEL Telecommunications Developing and Servicing joint stock company (hereinafter: JÁSZ-TEL) by buying 95 per cent of its shares.

Activities of the Parties

The main activity of MATÁV is operating public wired telephone services, and it has controlling right over 11 further undertakings (10 of them supporting MATÁV's operation and another one is a mobile phone operator). Its net turnover of the previous business year was more than HUF 200 billion. The majority shares of MATÁV is owned by MagyarCom that is controlled jointly by Ameritech and Deutsche Telecom.

JÁSZ-TEL is a local operator of public wired phone service. Its net turnover of the previous business year was HUF 1.2 billion.

The Market

Under concession contracts MATÁV acquired right of operating long distance domestic and international service as well as operating 36, out of 54, primer local public telephone services. The duration of the concession period is 25 years starting from December 1993, during the first 8 years of which MATÁV has an exclusive right. During this period the primer areas could connect exclusively through MATÁV's trunk network for the purpose of domestic long distance- and international calls. For the use of the trunk network primer areas pay charges set by law.

JÁSZ-TEL also operates under concession contract in a local area for 25 years and, similarly to MATÁV, has an exclusive right for 8 years.

In the year under review 76.7 per cent of the end users, linked to wired network, subscribed to MATÁV and only 0.8 per cent of them prescribed to JÁSZ-TEL and the market shares counted on the bases of incomes are also similar.

From the date of expire of exclusivity several undertakings are expected to enter the market of service on linkage on trunk network.

The Planned Transaction

JÁSZ-TEL is jointly owned (50-50 per cent) by Swisscom AG and KPN Telecom BV and they intended to sell their shares, altogether 95 per cent 47,5 per cent of each, to MATÁV which was the highest bidder.

The Notification

The undertakings concerned had obligation to notify the planned transaction as their aggregate net annual turnover exceeded the HUF 10 billion and the undertaking becoming integrated exceeded the HUF 500 million net turnover threshold in the previous business year, as it is defined in the Competition Act.

Arguments of the Parties

The parties concerned referred to the fact that they were not competitors as they were acting on different geographic markets therefore the concentration would not have any effect on the structure of the relevant market. They explained the advantages of the concentration in the following way:

- considering the possibility of purchasing larger quantities after the transaction more efficient economic activities

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would be performed by the parties,

- in the present area of JÁSZ-TEL operation the offered service would reach the level of MATÁV, both in quality and quantity,
- after the transaction a more modern management and office system would be available,
- JÁSZ-TEL would take over the present lower tariffs of MATÁV,
- JÁSZ-TEL would introduce a registration of the actual time of telephone conversation on the bill one year before the legal obligation would be alive,
- the deadline of exclusivity of JÁSZ-TEL would be advanced six months, equally to MATÁV's.

Furthermore MATÁV argued that, after the expire of its exclusivity, its market share as well as its dominance prospectively will be reduced due to appearance of alternative networks and technical progress.

Opinion of Third Parties

According to the opinions of third parties, received by the Competition Office on its announcement, the concentration would strengthen the dominant position of MATÁV therefore limitation of competition and hindering the market entrance would be expected. In the view of these arguments the concomitant advantages of the

transaction do not exceed the concomitant disadvantages.

The Decision of the Competition Council

Considering the present legal and market situation the Competition Council stated that the planned transaction does not have significant effect on the existing competition since, on the one hand the parties are operating on different geographic markets of wired telephone service, and the vertical link between JÁSZ-TEL and MATÁV (the trunk network used by JÁSZ-TEL is operated by MATÁV) does not harm competition either, on the other.

The Competition Council, however, made a thorough examination of the liberalised market period after 2002 when MATÁV will not have exclusive rights and any undertakings which will own trunk network will be able to operate connection services. In the case of expiration of the exclusivity of the 54 undertakings operating in the country, in theory, several undertakings would be able to operate services for subscribers on the given territory.

At present 80 per cent of the end users are clients of MATÁV on the wired telephone service which situation will not change considerably in the early period of the liberalised market. Due to the high cost of building up new networks and the difficulties of establishing new range of clients

considerable problems for new market entrants are expected.

On the market of local networks the dominant position of MATÁV is strengthened by the fact that it is acting not only on the market of service for end-users but on the market of trunk network as well.

The Competition Council emphasised that, similarly to EU Member States, in the liberalised period the Hungarian telecommunications will be governed by sectoral rules which protect against abusive market conducts. In its view, however, it is a substantial interest that MATÁV be dominant only to the slightest possible extent in the liberalised period, since it is more difficult to treat a dominant position ex post than hindering an increase of the market power ex ante. The Minister, supervising telecommunications, has not impeded the concentration but also expressed his concerns

The Competition Council considered that the planned concentration strengthens the market power of MATÁV therefore it examined its concomitant advantages as well:

- It pointed out that in the case of authorisation advantages are verifiable only on the local area of JÁSZ-TEL while disadvantages (strengthening of dominant position) appear on the whole territory of the country.
- Cost savings resulting from the economies of scale,



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followed by price reduction is advantageous for the end users of JÁSZ-TEL only, permanent advantages, however, could be assured only by the pressure of competition.

- Similarly, the improvement of the level of service must be the question of market pressure instead of an intention of undertakings.
- It did not consider as significant argument of the

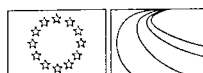
parties that the exclusivity of JÁSZ-TEL would expire 6 month earlier.

- The Competition Council did not consider as very important the argument that JÁSZ-TEL, because of its poor economic efficiency, needs the concentration with MATÁV. There would be a more acceptable argument for the Competition Council if JÁSZ-TEL, indeed, would not be able to stay on the

market anymore or if no other bids had been received.

The Competition Council did not clear the planned transaction as it considered that the argued advantages did not outweigh the disadvantages of the increasing dominance.

The parties did not appeal against the decision therefore it take effect.

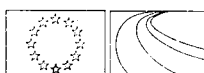


INFORMATION SECTION

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	<i>Suzette SCHIFF</i>	2957657/2995365
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	<i>Eric VAN GINDERACHTER</i>	2954427
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2. Transports et infrastructures des transports	Serge DURANDE	2957243/2954623
3. Commerce et autres services	Jorma PIHLATIE	2953607/2960256

DIRECTION E

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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

DIRECTION F

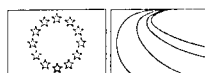
Industries des biens d'équipement et de consommation	Sven NORBERG	2952178/2965550
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Documentation...

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

La politique européenne de concurrence et l'audiovisuel : ententes, alliances et concentrations - PONS - LEGAL EUROPE - Paris - 21/01/99

Some views on pricing and EC competition policy - MARTÍNEZ LÓPEZ - Conférence "Legal Challenges of Pricing" - Norton Rose - 7/12/98

L'application du droit communautaire de la concurrence et le contrôle des concentrations et des alliances dans l'audiovisuel - AUBEL ANTOINE - Centre Français du Commerce Extérieur - 1/12/98

Der wettbewerbliche Binnenmarkt für Strom und Gas Zur Rolle von Art.90 Abs.2 EGV - SCHAUB /DOHMS - Die Aktiengesellschaft (AG) - issue 12/1998 - 1/12/98

Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union - UNGERER - Competition Workshop - Florence - 13/11/98

Extension of EU air transport competition rules to air transport to and from the EU - DRABBE - European Air Law Association

annual conference - Vienna - 6/11/98

After Taca? Towards a more Competitive and Innovative Liner Shipping Market - PONS - European Shippers' Council - Barcelona - 29/10/98

Universal postal service in Europe and the future of the social dialogue - UNGERER - European Union Joint Postal Committee - Brussels - 29/10/98

EC Competition System - Proposals for Reform - SCHAUB - FORDHAM CORPORATE LAW INSTITUTE - New York - 22/10/98

Antitrust and Trade Policy - Round Table: Proposed answers to Professor Jenny's questions - FAULL - Fordham Corporate Law Institute - New York - 22/10/98

Comision de libre competencia y asuntos del Consumidor - RIVIÈRE MARTÍ - Congreso Internacio Sobre Competencia - Panama - 6/10/98

La politique européenne de concurrence : tendances récentes et nouveaux défis - PONS - 70 Encontro Nacional de Economia Industrial - Vila Real - 2/10/98

Intervention de M. Karel Van Miert, commissaire en charge de la politique de concurrence, devant la

commission économique et monétaire du Parlement européen - VAN MIERT - European Parliament - Bruxelles - 24/09/98

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.
Cat. 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.
Cat. 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.
Cat. 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
Cat. 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)
 Cat. 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*

Cat. No: CV-15-98-899-xx-C
 (xx=language code: EN, FR; the
 other versions will be available
 later).

*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.*

Cat. 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*

Cat. No: CV-95-96-552-xx-C (xx=
 FR, ES, EN, DE, NL, IT, PT, SV,
 DA, FI)

*Green paper on vertical restraints
 in EC competition policy -COM
 (96) 721- (Ed. 1997)*

Cat. No: CB-CO-96-742-xx-C (xx=
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 SV FI)

*Final report of the multimodal
 group - Presented to Commissioner
 Van Miert by Sir Bryan Carsberg,
 Chairman of the Group (Ed. 1997).*

Cat. 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).

Cat. 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).

Cat. 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) N° 1475/95 de la
 Commission concernant certaines
 catégories d'accords de distribution
 et de service de vente et d'après
 vente de véhicules automobiles -
 Copies available through DG IV-F-
 2 (tel. +322-2951880, 2950479, fax.
 +322-2969800) EN, FR, DE*

COMPETITION REPORTS

*XXVII Report on Competition
 Policy 1997*

Cat. No: CM-12-98-506-xx-C

*European Community on
 Competition Policy 1997*

Cat. No: Cv-12-98-263-XX-C (xx=
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 DA, FI)

*XXVI Report on Competition Policy
 1996*

Cat. No: CM-04-97-242-xx-C

*European Community Competition
 Policy 1996*

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 ES*, DA*, DE*, GR*, EN*, FR*,
 IT*, NL*, PT*, FI*, SV*)

*XXV Report on Competition Policy
 1995*

Cat. No: CM-94-96-429-xx-C

(xx=ES, DA, DE, GR, EN, FR, IT,
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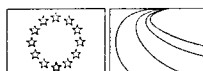
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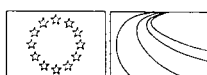
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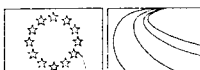
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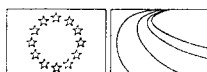
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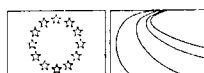
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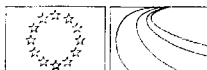
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C 344 98/C 344/06 Prior notification of a concentration (Case No IV/M.1320 - LGV/Dorana/ Emtec)

C 344 98/C 344/05 Non-opposition to a notified concentration (Case No IV/M.1279 - CDE/La Henin)

C 344 98/C 344/04 Inapplicability of the Regulation to a notified operation (Case No IV/M.1315 - ENW/Eastern)

11/11/98

C 343 98/C 343/06 Prior notification of a concentration (Case No IV/M.1332 - Thomson/Lucas)

10/11/98

C 342 98/C 342/05 Renotification of a concentration (Case No IV/M.1293 - British Petroleum/ Amoco)

C 342 98/C 342/03 Non-opposition to a notified concentration (Case No IV/M.1188 - Kingfisher/Wegert/Promarkt)

C 342 98/C 342/06 Prior notification of a concentration (Case No IV/M.1339 - ABB/Elsag Bailey)

C 342 98/C 342/07 Prior notification of a concentration (Case No IV/M.1252 - AT& T/TCl)

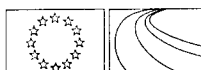
C 342 98/C 342/04 Prior notification of a concentration (Case No IV/JV.15 - BT/AT& T)

7/11/98

C 339 98/C 339/02 Prior notification of a concentration (Case No IV/M.1359 - Royale Belge/Anhyp)

6/11/98

C 338 98/C 338/04 Non-opposition to a notified concentration (Case No IV/M.1306 - Berkshire Hathaway/ General RE)



4/11/98

C 336 Non-opposition to a notified concentration (Case No IV/M.1314 - Framatome/Berg Electronics)

C 336 Non-opposition to a notified concentration (Case No IV/M.1194 - SGB/Fortis AG)

C 336 Non-opposition to a notified concentration (Case No IV/M.1304 - Hercules/Betzdearborn)

C 336 Non-opposition to a notified concentration (Case No IV/M.1271 - Pirelli/Siemens)

31/10/98

C 334 Prior notification of a concentration (Case No IV/JV.14 - PanAgora/DG Bank)

30/10/98

C 332 Renotification of a concentration (Case No IV/M.1327 - Canal+, CDPQ and Bank America/NC)

29/10/98

C 331 Prior notification of a concentration (Case No IV/M.1337 - Koch/Saba/Hoechst)

C 331 Initiation of proceedings (Case No IV/M.1246 - LHZ/Carl Zeiss)

27/10/98

C 329 Opinion of the Advisory Committee on Concentrations delivered at its 49th meeting, held on 30 September 1997, concerning a preliminary draft Decision in Case IV/M.938 - Guinness/Grand Metropolitan

C 329 Prior notification of a concentration (Case No IV/M.1114 - SAP/Heidelberger)

23/10/98

C 325 Prior notification of a concentration (Case No IV/M.1331 - ING/BHF)

22/10/98

C 324 Non-opposition to a notified concentration (Case No IV/M.1097

- Wacker/Air Products)

21/10/98

C 322 Prior notification of a concentration (Case No IV/M.1334 - Volvo Aero/ABB/TurboGen)

20/10/98

C 321 Prior notification of a concentration (Case No IV/M.1325 - Bayer/Chiron Diagnostics)

16/10/98

C 319 Prior notification of a concentration (Case No IV/M.1326 - Toyota/Daihatsu)

C 319 Prior notification of a concentration (Case No IV/M.1303 - ADEG/EDEKA)

14/10/98

C 316 Prior notification of a concentration (Case No IV/M.1269 - LSG/Onexcorp/Sky Chefs/Caterair)

10/10/98

C 311 Prior notification of a concentration (Case No IV/M.1313 - Danish Crown/Vestjyske Slagterier)

C 311 Prior notification of a concentration (Case No IV/M.1301 - Texaco/Chevron)

9/10/98

C 309 Non-opposition to a notified concentration (Case No IV/M.1291 - Bosch/ZF Friedrichshafen)

C 309 Non-opposition to a notified concentration (Case No IV/M.1219 - Seagram/Polygram)

C 309 Non-opposition to a notified concentration (Case No IV/M.1300 - Allied Signal/AMP)

8/10/98

C 308 Prior notification of a concentration (Case No IV/M.1318 - Constructor/Dexion)

7/10/98

C 307 Non-opposition to a notified concentration (Case No IV/M.1132

- BT/ESB)

C 307 Non-opposition to a notified concentration (Case No IV/M.1161 - Alcoa/Alumax)

C 307 Prior notification of a concentration (Case No IV/M.1282 - Retevisión Móvil)

C 307 Non-opposition to a notified concentration (Case No IV/M.1168 - DHL/Deutsche Post)

C 307 Non-opposition to a notified concentration (Case No IV/M.1276 - NEC/PBN)

6/10/98

C 306 Prior notification of a concentration (Case No IV/M.1293 - BP/Amoco)

C 306 Non-opposition to a notified concentration (Case No IV/M.1273 - Crédit Suisse/Nikko/Msa)

C 306 Non-opposition to a notified concentration (Case No IV/M.1258 - GEC Marconi/Alenia)

C 306 Non-opposition to a notified concentration (Case No IV/M.1296 - Norske Skog/Abitibi/Hansol)

C 306 Prior notification of a concentration (Case No IV/M.1254 - Dexia/Argentaria/Credito Local)

2/10/98

C 303 Prior notification of a concentration (Case No IV/M.1246 - LHZ/Carl Zeiss)

C 303 Initiation of proceedings (Case No IV/M.1221 - REWE/Meinl)

C 303 Prior notification of a concentration (Case No IV/M.1319 - Smurfit Condat/CVC)

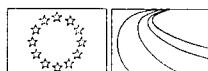
1/10/98

C 302 Prior notification of a concentration (Case No IV/M.1327 - Canal+, CDPQ and Bank of America/NC)

STATE AID

29/01/99

C 24 1999/C 024/06 Authorisation for State aid pursuant to Articles 92



and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 24 1999/C 024/05 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 24 1999/C 024/04 Commission notice on the extension of the period of validity of the Code on aid to the synthetic fibres industry ...

27/01/99

C 22 1999/C 022/05 State aid - C 68/98 (ex N326/98) - Greece ...

23/01/99

C 20 1999/C 020/16 Judgment of the Court (Fifth Chamber) of 1 December 1998 in Case C-200/97: (reference for a preliminary ruling from Corte Suprema di Cassazione): *Ecotrade Srl v. Altiforni e Ferriere di Servola SpA (AFS)* (State aid - Definition - Advantage conferred ...

21/01/99

C 16 1999/C 016/04 National ceilings for regional aid coverage under the derogations provided for in Article 92(3)(a) and (c) of the Treaty for the period 2000 to 2006

C 16 1999/C 016/03 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 16 1999/C 016/05 State aid - E 23/95 - Sweden ...

15/01/99

C 11 1999/C 011/02 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

13/01/99

C 9 1999/C 009/06 State aid - C 61/98 (ex NN 189/97) - Austria ...

30/12/98

C 409 98/C 409/06 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 409 98/C 409/05 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

24/12/98

C 405 98/C 405/04 State aid - C 60/98 (N196/98) - Portugal ...

23/12/98

C 403 98/C 403/07 State aid - C 48/98 (ex NN60/98) - Italy ...

19/12/98

C 397 98/C 397/25 Judgment of the Court (Sixth Chamber) of 12 November 1998 in Case C-415/96: *Kingdom of Spain v. Commission of the European Communities* (State aid for undertakings in the textile sector)

C 396 98/C 396/03 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 396 98/C 396/02 State aid - C 62/98 (ex N118/98) - Greece ...

18/12/98

C 395 98/C 395/08 State aid - E/1/98 - Ireland ...

C 395 98/C 395/07 State aid - C 3/97 (ex N546/96) - Italy ...

C 395 98/C 395/09 State aid - E/2/98 - Ireland ...

17/12/98

C 394 98/C 394/09 Corrigendum to Guidelines on National Regional Aid (OJ C 74, 10.3.1998) ...

16/12/98

C 392 98/C 392/05 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases

where the Commission raises no objections ...

C 392 98/C 392/03 Authorisation for State aid - Measures not constituting aid in the meaning of Article 4(c) of the ECSC Treaty ...

C 392 98/C 392/04 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

15/12/98

C 390 98/C 390/05 Initiation of proceedings (Case No IV/JV.15 - BT/AT& T) ...

C 390 98/C 390/04 State aid - C 57/98 (ex N826/97) - Italy ...

12/12/98

C 387 98/C 387/04 State aid - C 23/97 (ex N90/97) - Germany ...

C 387 98/C 387/05 State aid - C 8/98 (ex N237/97, NN151/97) - Germany

10/12/98

C 384 98/C 384/08 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 384 98/C 384/03 Commission notice on the application of the State aid rules to measures relating to direct business taxation ...

C 384 98/C 384/07 State aid - C 49/98 (ex NN75/98 and NN164/97) - Italy ...

9/12/98

C 382 98/C 382/08 State aid - C 26/98 (ex NN79/96) - Italy ...

4/12/98

C 376 98/C 376/02 State aid - C 32/98 (ex NN 22/98) - Greece ...

2/12/98

C 372 98/C 372/05 State aid - C 59/98 (N701/97) - The Netherlands ...



1/12/98

C 371 98/C 371/04 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

28/11/98

C 369 98/C 369/03 State aid - C45/98 (ex NN45/97) - Germany ...

27/11/98

C 367 98/C 367/04 State aid - C47/98 (NN41/98) - Italy ...

25/11/98

L 316 Commission Decision of 6 May 1998 concerning the extension of eligibility for regional aid for the acquisition costs of intangible property for large firms provided for in the 25th outline plan for the joint Federal Government/Länder programme for improving regional economic structures (notified under document number C(1998) 1942) (Only the German text is authentic) (Text with EEA relevance)

L 316 Commission Decision of 1 July 1998 on State aid granted by the Republic of Austria and the Land of Upper Austria to Actual Maschinenbau AG (notified under document number C(1998) 1943) (Only the German text is authentic) (Text with EEA relevance)

L 316 Commission Decision of 25 February 1998 concerning aid awarded by Germany to HIBEG and by HIBEG via Krupp GmbH to Bremer Vulkan AG, facilitating the sale of Krupp Atlas Elektronik GmbH from Krupp GmbH to Bremer Vulkan AG (notified under document number C(1998) 582) (Only the German text is authentic) (Text with EEA relevance)

L 316 Commission Decision of 16 December 1997 on State aid granted by the Land of Thuringia to Thüringer Motorenwerke GmbH (notified under document number

C(1997) 4341) (Only the German text is authentic) (Text with EEA relevance)

C 363 98/C 363/08 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 363 98/C 363/07 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 363 98/C 363/04 State aid - C51/98 (ex N852/97 and N6/98) - Portugal ...

24/11/98

C 361 98/C 361/04 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections ...

C 361 98/C 361/03 State aid - C80/97 (ex NN53/97) - Germany ...

19/11/98

C 353 98/C 353/03 State aid - C 22/98 (ex NN 9/98 (N 433/97)) - Germany

18/11/98

C 351 98/C 351/04 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

14/11/98

L 304 Commission Decision of 14 July 1998 concerning aid schemes in Germany under which aid could be awarded which is subject to the notification requirement of the multisectoral framework on regional aid for large investment projects (notified under document number C(1998) 2271) (Only the German text is authentic) (Text with EEA relevance)

11/11/98

C 343 Framework on Training Aid

C 343 98/C 343/07 Framework on training aid

7/11/98

C 340 98/C 340/32 Judgment of the Court of First Instance of 15 September 1998 in Joined Cases T-126/96 and T-127/96: Breda Fucine Meridionali SpA (BFM) and Ente Partecipazioni e Finanziamento Industria Manifatturiera (EFIM) v. Commission of the European Communities

C 340 98/C 340/29 Judgment of the Court of First Instance of 15 September 1998 in Case T-140/95: Ryanair Limited v. Commission of the European Communities (State aid - Formal investigation procedure under Article 93(2) of the Treaty - Conditional decision approving aid
C 340 98/C 340/30 Judgment of the Court of First Instance of 16 September 1998 in Case T-188/95: Waterleiding Maatschappij Noord-West Brabant NV v. Commission of the European Communities (State aids - Tax exemptions - Refusal to open the procedure laid down by Article 93(2))

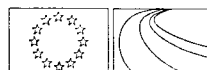
C 340 98/C 340/31 Judgment of the Court of First Instance of 15 September 1998 in Case T-95/96: Gestevisión Telecinco SA v. Commission of the European Communities (State aid - Public service television - Complaint - Action for declaration of failure to act)

C 340 98/C 340/27 Judgment of the Court of First Instance of 15 September 1998 in Case T-11/95: BP Chemicals Limited v. Commission of the European Communities (State aid - Action for annulment - Time-limits - Persons individually concerned - Private market economy investor)

6/11/98

C 338 98/C 338/03 State aid - C 15/98 (ex NN 191/97) - Germany

5/11/98



C 337 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

C 337 Authorization of State aid pursuant to Article 61 of the EEA Agreement and Article 1(3) of Protocol 3 to the Surveillance and Court Agreement - EFTA Surveillance Authority decision not to raise objections

C 337 Authorization of State aid pursuant to Article 61 of the EEA Agreement and Article 1(3) of Protocol 3 to the Surveillance and Court Agreement - EFTA Surveillance Authority decision not to raise objections

4/11/98

C 336 STATE AID C 54/98 (ex N 101/98) Germany

31/10/98

C 334 State aid - C 44/98 (ex N 708/97) - Netherlands

C 334 State aid - C 56/98 (ex NN 42/98) - Germany

C 334 State aid - C 10/97 (ex NN 9/97) - Portugal

27/10/98

C 329 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

20/10/98

C 321 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

13/10/98

C 314 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

10/10/98

C 311 State aid - C 36/96 (ex N 963/F/95) - Netherlands

9/10/98

C 309 State aid - C 53/98 (ex N 31/98) - Italy

8/10/98

C 308 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

C 308 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

C 308 Authorisation for State aid pursuant to Articles 92 and 93 of the EC Treaty - Cases where the Commission raises no objections

7/10/98

C 307 State aid - C 37/98 (ex N 124/98) - France

C 307 State aid - C 20/98 (ex NN 166/97, NN 169/97, NN 170/97) - Germany

C 307 State aid - C 43/98 (ex N 558/97) - Netherlands

C 307 State aid - C 35/98 (ex N 783/97 and N 160/98) - Italy

COURT OF JUSTICE / COURT OF FIRST INSTANCE

Devant le Tribunal

Aff. T-108/98 AJ

Udo Platte / Commission : Demande d'assistance judiciaire présentée antérieurement au recours concernant le refus de la Commission de donner suite à la plainte du requérant visant à ce que celle-ci retire à l'importateur de véhicules «Mazda Motors (Deutschland) GmbH» le bénéfice de l'exemption par catégorie prévue dans les règlements n. 123/85 et n. 1475/95

Aff. T-110/98

RJB Mining plc / Commission : Annulation d'une décision de la Commission, du 10 juin 1998, portant sur des interventions

financières de l'Allemagne en faveur de l'industrie houillère en 1997, en ce qu'elle autorise un certain nombre de mesures

Aff. T-111/98

RJB Mining plc / Commission : Annulation de trois décisions de la Commission, du 3 juin 1998, statuant sur des interventions financières complémentaires de l'Espagne en faveur de l'industrie houillère en 1994, 1995 et 1996, en 1997 et en 1998, en ce qu'elles autorisent le versement d'un certain nombre d'aides

Aff. T-112/98

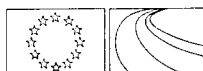
Mannesmannröhren-Werke AG / Commission : Annulation de la décision de la Commission, du 15 mai 1998, relative à une procédure au titre de l'art. 11, paragraphe 5, du règlement CEE/17/62 du Conseil - Demande de renseignements dans le cadre d'une enquête sur une infraction à l'article 85 du traité CE

Aff. T-116/98

Compañía Trasmediterránea SA / Commission : Annulation de la décision de la Commission, du 18 février 1998, d'engager la procédure prévue à l'article 93, paragraphe 2, du traité en ce qui concerne le système d'aides à la navigation maritime que les autorités espagnoles se proposent de mettre en place (nouveau contrat de service public maritime)

Aff. T-121/98

Taurus Beteiligungs-GmbH & Co. KG / Commission : Annulation de la décision de la Commission K(1998) 1439, du 27 mai 1998, modifiée par la décision K(1998) 1518 de la Commission, du 2 juin 1998, relative à une procédure d'application du règlement (CEE) n. 4064/89 du Conseil, déclarant incompatible avec le marché commun et le fonctionnement de



l'accord EEE l'opération de concentration visant au contrôle conjoint des sociétés Premiere Medien GmbH & Co. KG, BetaDigital Gesellschaft für digitale Fernsehdienste mbH et BetaResearch Gesellschaft für Entwicklung und Vermarktung digitaler Infrastrukturen mbH par les sociétés CLT-UFA SA et Taurus Beteiligungs-GmbH & Co. KG

Aff. T-127/98

UPS Europe SA / Commission : Recours en carence visant à faire constater que la Commission s'est illégalement abstenue de prendre une décision définitive dans le cadre d'une procédure concernant la prétendue infraction de l'article 86 du traité CE par la Deutsche Post AG

Aff. T-128/98

Aéroports de Paris / Commission : Annulation de la décision de la Commission C(1998) 1417 final, du 11 juin 1998, relative à une procédure d'application de l'article 86 du traité CE concernant des redevances commerciales discriminatoires imposées par l'exploitant des aéroports parisiens

Aff. T-139/98

Amministrazione Autonoma dei Monopoli di Stato (AAMS) / Commission : Annulation de la décision de la Commission, du 17 juin 1998, relative à une procédure d'application de l'art. 86 du traité CE - Position dominante dans le marché italien de la distribution en gros de cigarettes

Aff. T-148/98

J.G. Evans e.a. / Commission : Annulation de la décision de la Commission, du 30 juillet 1998, rejetant les plaintes déposées par les requérants contre le Central Electricity Generating Board (CEGB) et British Coal, relatives à

une prétendue entente concernant les prix de vente du charbon destiné à la production d'électricité

Aff. T-154/98

Asia Motor France SA e.a. / Commission : Annulation des décisions de la Commission, du 16 juillet 1998, rejetant les plaintes des requérants relatives à des prétendues pratiques d'ententes concernant l'importation en France de véhicules de marques japonaises

Aff. T-162/98

South Wales Small Mines Association / Commission : Annulation de la décision de la Commission, du 30 juillet 1998 (affaire IV/E-3/SWSMA), rejetant la plainte déposée par la requérante contre le Central Electricity Generating Board (CEGB) et ses successeurs National Power et PowerGen, relative à une prétendue entente concernant les prix de vente du charbon destiné à la production d'électricité

Aff. T-181/98

Georgsmarienhütte Holding GmbH / Commission : L'annulation de la décision de la Commission, du 29 juillet 1998, K(1998) 2556 concernant une aide du Land Niedersachsen à l'entreprise Georgsmarienhütte GmbH

Aff. T-182/98

UPS Europe SA / Commission : L'annulation de la décision de la Commission de ne pas engager la procédure prévue à l'art. 93, par. 2, du traité CE, suite à la plainte de la requérante concernant les aides prétendument accordées par les autorités allemandes à Deutsche Post

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Aff. C-279/98 P

Cascades SA / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 du 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton - Maintien des amendes, malgré l'insuffisance constatée en ce qui concerne la motivation de leur calcul. Interprétation erronée de la notion d'«effets de l'infraction sur le marché» - Violation du principe de non-discrimination

Aff. C-280/98 P

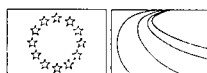
Moritz J. Weig GmbH & Co. KG / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire T-317/94 opposant Moritz J. Weig GmbH & Co KG à la Commission à une procédure d'application de l'article 85 du traité CE - Carton - Annulation ou réduction de l'amende - Circonstances atténuantes

Aff. C-282/98 P

Enso Española SA / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 Commission, du 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton - Calcul d'une amende exprimée dans une monnaie qui a subi des dévaluations

Aff. C-283/98 P

Mo och Domsjö AB / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 de la Commission, du 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton



Aff. C-286/98 P

Stora Kopparbergs Bergslags AB / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 de la Commission, du 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton

Aff. C-288/98

Istituto nazionale della previdenza sociale (INPS) / Mario Maraldi SpA : Préjudicielle - Corte suprema di cassazione - Interprétation des art. 92 et 93, par. 3, du traité CE - Sociétés en état d'insolvabilité qui n'ont pas été déclarées en faillite et qui, bénéficiant d'une suspension des créances, sont autorisées à poursuivre leur activité productive et sont exonérées du paiement d'amendes pour le non versement de contributions sociales

Aff. C-291/98 P

Sarrió SA / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton

Aff. C-294/98 P

Metsä-Serla Oyj e.a. / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans les affaires jointes T-339/94, T-340/94, T-341/94 et T-342/94 opposant Metsä-Serla Oyj e.a. à la Commission - n 94/60 d'application de l'art. 85 du traité CE - Carton - Entreprises membres d'une association à l'encontre de laquelle la Commission a constaté une infraction - Responsabilité solidaire des entreprises membres pour l'amende

Aff. C-297/98 P

SCA Holding Ltd / Commission :

Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 Commission, du 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton

Aff. C-298/98 P

Metsä-Serla Oy (anciennement Teollisuus) / Commission : Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 14 mai 1998, dans l'affaire n 94/60 Commission, du 13 juillet 1994, relative à une procédure d'application de l'art. 85 du traité CE - Carton - Motivation défectueuse complétée au cours de la procédure judiciaire - Pratique des «rabais» pour «aveu» ou «non-contestation»

Aff. C-332/98

France / Commission : Annulation de la décision de la Commission (C(1998)1728 final), du 10 juin 1998, relative à l'aide du gouvernement français au Centre d'exportation du livre français (CELF)

Aff. C-336/98

Agenzia R di Recapito Srl et Poste Italiane Ente Pubblico Economico : Rinaldo Agenzia di Ricapito Srl : Préjudicielle - Tribunale amministrativo regionale per la Lombardia - Interprétation des art. 86 et 90 du traité CE - Entreprise publique chargée de la gestion de l'ensemble des services relevant du monopole postal se désaisissant de la gestion directe de certains de ces services par le biais de concessions à des tiers désignés directement sans passer par des procédures concurrentielles - Service de courrier rapide

Aff. C-344/98

Masterfoods Ltd et HB Ice Cream Ltd : HB Ice Cream Ltd et Masterfoods Ltd, agissant sous le

nom commercial «Mars Ireland» Préjudicielle - Supreme Court - Application d'une décision de la Commission relative à une procédure d'application des art. 85 et 86 du traité CE - Obligations des juridictions nationales lorsqu'une telle décision fait l'objet d'un recours devant le Tribunal de première instance - Décision interdisant la pratique de mise à la disposition des détaillants de surgélateurs affectés en exclusivité à la vente de glaces produites par le fournisseur desdits surgélateurs

Aff. C-351/98

Espagne / Commission : Annulation de la décision (C(1998)2048 final), du 1 juillet 1998, relative au régime espagnol des aides à l'achat de véhicules industriels «Plan Renove Industrial» (avril 1994 à décembre 1996)

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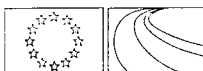
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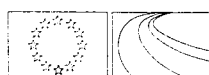
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