

BER, in light of the cumulative foreclosure effect created by the parallel networks of agreements with similar non-compete and/or exclusive purchasing obligations entered into by Neste and its competitors.

Applying the *Delimitis* judgment ⁽³¹⁾, the Commission found that there were real opportunities for motor fuel suppliers to enter the market, by obtaining contracts with existing DODO stations switching suppliers and by opening new stations. On average, 20 % of the motor fuel supply agreements with DODO stations come up for renewal each year. The Commission noted the increasing trend in Finland towards an innovative distribution channel, namely unmanned stations which require less investment and a lower throughput to operate profitably, and the development in Finland of an innovative distribution channel with still great potential, namely service stations operated by supermarkets. The Commission established that new entrants had been able to use these opportunities to enter successfully the Finnish motor fuel retailing market.

Accordingly, the Commission found by way of comfort letter that the notified agreements were covered by the BER, subject to strict compliance for DODO service stations ⁽³²⁾ with the maximum five-year duration of non-compete obligations set out in Article 5(a) of the BER. To this end, the Commission required Neste to align the duration of land lease agreements that it had concluded with some DODO dealers for the siting of Neste backcourt automatic diesel pumps (which were not the subject of the notification) with that of the motor fuel supply agreement. This requirement was aimed at preventing any barrier that may have limited the freedom of the DODO dealer to switch suppliers upon termination of the DODO agreement.

BP Lubricants ⁽³³⁾

The assessment of a notification of certain agreements with motor vehicle repairers in all Member States filed by BP plc ⁽³⁴⁾ has given the Commission the opportunity to restate and to apply its policy on vertical restraints which are not covered by a block exemption. The notified agreements now fall under the scope of block-exemption Regulation (EC) No 1400/2002 on the motor vehicle sector. They concern lubricants supplied for maintenance services and combine trade loans or other incentives with a minimum purchase obligation which de facto amounts to most if not all of the repairer's requirements over a five-year period, thereby amounting to an indirect non-compete obligation. These agreements are in widespread use in the sector. Yet indirect 'non-compete obligations' of the kind notified by BP are block-exempted under Article 5(a) of Regulation (EC) No 2790/1999 on vertical restraints, but not under Article 5(1)(a) of the sector-specific regulation. Several industry associations had thus approached the Competition DG seeking previous guidance on the status of their agreements under the new regime introduced by the motor vehicle block exemption.

The assessment of BP's agreements showed that, in many Member States, the agreements were not likely to appreciably restrict competition. Where Article 81(1) could apply, it appeared that, although the agreements did not meet the conditions of the applicable block-exemption regulation, Article 81(3) applied on an individual basis to the restraints as they stood in almost all the other Member States. Among other reasons, BP was not dominant, supplied only a minor fraction of all the products needed to provide repair and maintenance services and did not apply other restraints which aggravated the negative

⁽³¹⁾ C-234/89 *Stergios Delimitis v Henninger Bräu* [1991] ECR I-935.

⁽³²⁾ In the case of CODO service stations which are owned by Neste, the five-year limitation does not apply, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the dealer.

⁽³³⁾ COMP/F2/38.730.

⁽³⁴⁾ Notified in accordance with Articles 2 and 4 of Council Regulation No 17. See notice on the notification published in OJ C 126, 28.5.2003.

effects of the notified non-compete obligation. Moreover, BP also modified the notification in order to bring the notified agreements into line with the Commission's policy on vertical restraints ⁽³⁵⁾, in Member States where two cumulative conditions are or will be met:

- firstly, that BP's market share exceeds 30 %;
- secondly, that, provided that parallel networks of restraints producing effects on competition similar to those notified by BP cover no less than 30 % of a relevant market, BP's 'tied market share' exceeds 15 %.

In those Member States, BP undertook to inform and to give buyers that are tied by the notified agreements, a right to give six months' notice to terminate the agreements after two years following their entry into force. In September, the Competition DG was thus able to close the case by means of a comfort letter and to inform lubricant industry associations that it intends to apply the above principles to similar agreements.

Electronic communications

T-Mobile Deutschland/O₂ Germany — Network sharing Rahmenvertrag ⁽³⁶⁾ and O₂ UK Limited/T-Mobile UK Limited — UK network sharing agreement ⁽³⁷⁾

On 30 April and 16 July, the Commission adopted two exemption decisions which set out how far mobile operators can cooperate through network sharing in the United Kingdom and Germany. In February 2002, T-Mobile and mmO2 had notified two agreements that provided for the parties to cooperate by way of network sharing in the build-out of their third-generation ('3G') mobile telecommunications networks.

Site sharing between mobile operators was found not to restrict competition in either of the cases: the cooperation extends only to basic network elements and the parties retain independent control of their core networks. Site sharing is also considered beneficial for environmental and health reasons.

National roaming ⁽³⁸⁾ between mobile operators was found to restrict competition at the wholesale level with potential harmful effects in downstream retail markets. Roaming undermines infrastructure-based competition since it significantly limits competition on coverage, quality and transmission speeds. It also reduces the scope for price competition at services level since operators are limited to differentiating their customer offering on the basis of the services on offer, rather than on price or quality.

However, national roaming allows operators to provide better coverage, quality and transmission rates for their services and within a shorter time frame. This is particularly the case in rural and remote areas, where the economic incentives to roll out a high-quality network are low. In urban areas, the economic incentives to build out separate networks are high and competition between competitors will be critical in determining the competitiveness of the market. National roaming can only be justified for a limited period, e.g. to help promote competition during the initial roll-out phase of a network and the commercial launch and early take-up of 3G services.

⁽³⁵⁾ Commission notice 'Guidelines on vertical restraints' (OJ C 291, 13.10.2000; as to single branding or non-compete arrangements, see points 138 to 158 and, especially, point 156). See also the explanatory brochure on Commission Regulation (EC) NO 1400/2002 issued by the Competition DG, question 17.

⁽³⁶⁾ COMP/C1/38.369, OJ L 75, 12.3.2004, press release IP/03/1026, 16.7.2003.

⁽³⁷⁾ COMP/C1/38.370, OJ L 200, 7.8.2003, press release IP/03/589, 30.4.2003. COMP/C1/38.369, OJ L 75, 12.3.2004, press release IP/03/1026, 16.7.2003.

⁽³⁸⁾ National roaming concerns a situation where the operators concerned do not share any network elements but simply use each others' networks to provide services to their own customers.