EC COMPETITION POLICY NEWSLETTER

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ISSN 1025-2266

competition policy NEWSLETTER

1998
number 2
June

Published three times a year by the Competition Directorate-General of the European Commission

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Competition Policy in relation to the Central and Eastern European Countries – Achievements and Challenges

by Karel Van Miert, Commissioner for Competition

1. Introduction

At the European Council meeting in Luxembourg of 12 and 13 December 1997 an historic decision was taken to launch the overall process of enlargement of the European Union to include the ten Central and East European applicant States and Cyprus. The enlargement process is seen as being comprehensive, inclusive and ongoing. Each of the ten Associated Countries of Central and Eastern Europe will proceed at its own rate, depending on its degree of preparedness.

At the European Council in Copenhagen in June 1993 it was decided that accession would take place as soon as a country is able to assume the obligations of membership by satisfying the economic and political conditions. Membership requires that the candidate country achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; and the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union, constitute further requirements for membership.

Furthermore, the European Council in Madrid in December 1995 referred to the need, in the context of the pre-accession strategy, to create the conditions for the gradual, harmonious integration of the applicant countries through the development of the market economy, the adjustment of administrative structures and the creation of a stable economic and monetary environment.

The effective application and enforcement of EC Competition Policy within the enlargement process is crucial to the success of the European integration model. The completion of the Single Market programme cannot be dissociated from developments in the competition field. Without "the institution of a system ensuring that competition in the common market is not distorted" (Article 3g EC Treaty), the internal market would not be workable. Indeed, EC Competition Policy is one of the pillars of the economic constitution established by the EC Treaty, and is a fundamental part of the *acquis communautaire*.

The Europe Agreements therefore stipulate that a major precondition for the Associated Countries' economic integration into the Community is the approximation of those countries' existing and future legislation to that of the Community. Also, the Commission's *White Paper on the preparation of the Associated Countries of Central and Eastern Europe for integration into the internal market of the Union* noted that the introduction of competition policy in these countries and the effective enforcement thereof, must be considered as a precondition for the opening of the wider internal market, and ultimately of accession to the Union. Moreover, effective enforcement requires that the judicial system, the public administration and the relevant economic operators have a sufficient understanding of competition law and policy.

Most of the Central and Eastern European Countries (CEECs) have taken decisive steps in relation to or have started the process of approximation of legislation, institution building and enforcement on the basis of the obligations that are contained in the Europe Agreement.

The ongoing efforts to incorporate EC law (the "*acquis communautaire*") into the legal orders of the CEECs, in the form of national competition laws, and to ensure that these laws are actually applied, is of paramount importance. This will facilitate the harmonious operation of Community policies after accession.

Once the applicant States become Members of the European Union, the competition rules of the EC Treaty and the secondary legislation (for example block exemption regulations), will become directly applicable in the new member countries. The approximation of legislation in the pre-accession phase, therefore, gradually acquaints the CEECs with a Community system which ensures that competition in the common market is not distorted.

Moreover, the current exercise of approximation of the national laws of the CEECs to EC law, contributes to the creation of a European-wide network of competition authorities, which apply the same basic principles of competition law. This should allow the effective decentralised application of competition law in the future enlarged Community.

2. The introduction of a competition regime in the CEECs

Anti-trust policy has long been acknowledged to be an effective tool for regulating monopoly power, and for ensuring that markets function properly. That there are certain hard-core anti-competitive practices which the European Commission and other competition enforcement agencies should seek to halt, is internationally accepted. This is evidenced by work in progress within the WTO and OECD[1].

The introduction of a competition policy is one of the major challenges which the CEECs face in their transition to fully-fledged market economies. Other legal and institutional measures are equally important. They include the restoration of private ownership and property rights, the introduction of company law and rules on bankruptcy and liquidation of companies, and the adjustment of the judicial system and public administration.

Transition entails certain needs. Restructuring is taking place in the CEECs, to redress the imbalance between industry, services and agriculture. The concentration on basic outputs, rather than high-tech processes and on product differentiation, is an inheritance of central planning to be overcome. The existence of large "combinates", whose size was not determined by what the market will bear, is a common feature of centrally planned economies.

This raises the question what specific role competition policy has to play in this process of

[1] The framework of the WTO Working Group on trade and competition is currently being used to study issues relating to the interaction between trade and competition, including anti-competitive practices. The OECD Committee on Competition Law and Policy agreed on the Draft OECD Recommendation on hard-core cartels during its meeting in Paris of 20.02.1998.

transition from centrally planned economies to market economies.

Experience shows that while it is true that liberalisation of prices, trade and foreign direct investment are essential to create workable markets and competition among firms, they are not sufficient to ensure effective competition. Trade liberalisation has proved to be and, in certain cases, still is a difficult objective to be achieved. Moreover, foreign firms have focused their investments in the CEECs on few firms in certain sectors with considerable market power and governments have been willing to grant these foreign investors protection from competition. Furthermore, many markets are still local (such as distribution and retailing) and national markets are often segmented from world markets due to natural, economic or regulatory barriers to entry.

Other deficiencies may further inhibit the development of competition in the CEECs. For example, new firms may have limited access to the necessary credit facilities or to scarce resources, such as land and distribution networks, which often continue to be allocated in a distorted manner, so as to favour existing firms. It is clear that competition rules and enforcement are necessary in countering such barriers to entry.

The development of competition may also be hampered by all kinds of direct or indirect benefits or favours which existing monopolists receive from the State, such as grants, soft loans, state guarantees, tax reliefs, debt write-offs, the sale of public land below market price or preferential tariffs.

Another area of concern is privatisation. Privatisation agencies, supported by the government, the management and the workforce, may wish to sell off public monopolies as a whole to maintain their dominant positions after privatisation, in order to increase revenues. This obviously conflicts with the interest that consumers and new competitors may have in the breaking-up of monopolist firms to foster competition. Where the competition authority does not have the power to block privatisations which would merely result in the transfer of a public monopoly to the private sector, it should have sufficient powers to ensure that the monopolist firm does not abuse its dominance to earn monopoly profits.

There are further arguments for asserting that competition policy is crucial in the CEECs. Cartels in the CEECs may be more damaging, given the absence of a competitive fringe to affect its decisions at the margin. Market foreclosure may be more pronounced in transition economies, given the small number of firms on the market. The lack of vigorous competition and fragile macro-economic conditions in some CEECs may be further affected by unfettered monopoly power in the private sector, lack of control of state aid, and discriminatory treatment by state monopolies of a commercial character.

The experience of the Commission's last 40 years' of enforcement of competition policy provides a useful model for competition policy in the CEECs. However, it is equally important to take into consideration the changing nature of market structures in the CEECs, as transition takes place. For example, the logic of competition policy in relation to high-tech industries and highly evolved distribution structures, clearly calls for a different analysis to that applicable to CEECs, which generally lack high-tech industries, or which have an under-developed distribution network. We should therefore take a pragmatic approach to approximation, ensuring that competition policy in the CEECs is fully compatible with that in the European Community, and at the same time taking into account the needs of transition economies.

We believe that the current institutional, substantive and procedural framework governing relationships between the EC and the CEECs is suited to achieving these goals.

3. The Legal Framework

The introduction of market economies in Central and Eastern Europe has led the

Community to review its trading relations with the CEECs, and to conclude free trade agreements with them. The principal instrument is the *Europe Agreement*, which provides a new framework for trade and related matters between the European Communities and their Member States, on the one hand, and each CEEC, on the other hand, on a bilateral basis. Europe Agreements with nine of the ten CEECs (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic) are in force. The Interim Agreement with Slovenia is in force, and the Europe Agreement with Slovenia is currently passing through the Community legislative process.

Restrictive Agreements, Abuses of a Dominant Position, and State Aids

The Europe Agreements contain the main substantive competition rules which apply where trade between the EC and a CEEC is affected. The competition rules found in the Interim Agreement with Slovenia are the same in substance as those found in the Europe Agreements. Consequently, the following are deemed to be *incompatible* with the proper functioning of the Agreement, in so far as they may *affect trade between the Community and a CEEC*:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) an abuse by one or more undertakings of a dominant position in the territories of the Community of or a CEEC as a whole or in a substantial part thereof;

(iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

The Europe Agreement makes it clear that these rules, and the prohibited conduct, are to be interpreted in accordance with the criteria arising from the application of Articles 85, 86 and 92 of the EC Treaty. Furthermore, the decision practice of the Commission and the case-law of the Court of Justice will be relevant. The principles contained in the block exemption regulations in force in the EC, and a *de minimus* principle below which the agreement will not fall foul of the competition rules relating to restrictive agreements, also apply.

A number of specific rules apply to the general rules set out above. One specific rule concerns the regime for regional aid. The Europe Agreements state that, during the first five years after the entry into force of the Europe Agreement, any public aid granted by a CEEC shall be assessed taking into account the fact that that CEEC shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) EC Treaty (i.e. areas where the standard of living is abnormally low or where there is serious under-employment). In practical terms, any aid which is aimed at the economic development of a CEEC is not prohibited by the Europe Agreement if it is granted in conformity with the Community rules on regional aid under Article 92(3)(a) EC Treaty.

The five year period for this exceptional state aid regime has expired for certain CEECs. These CEECs have requested that the Association Council decides on the extension of this regime by a further period of five years.

Another special regime applies to restructuring aid as regards ECSC steel products. According to Protocol 2 to the Europe Agreements, during the first five years after the entry into force of the Agreement, and by derogation to the existing EC rules on state aid to the steel sector, the CEECs may exceptionally grant public aid for restructuring purposes under certain conditions. There should first be a restructuring programme linked to a global rationalisation and reduction of capacity. This programme should lead to the viability of the benefiting firms under normal market conditions at the end of the restructuring period. Finally, the amount and intensity of such

aid must be strictly limited to what is absolutely necessary in order to restore such viability and must progressively be reduced.

This five year period for coal and steel products has also expired for certain CEECs, which have requested that this period be extended by a further five years. The Association Council has to decide on such an extension. The establishment of a restructuring plan for the steel industries of these individual CEECs, including details on the adjustment of capacities to market demand, the privatisation framework and aid matters, are essential in this context.

The Implementing Rules

According to the Europe Agreements, the Association Council had to adopt the necessary rules for the implementation of the competition rules outlined above within three years of the entry into force of the Agreements.

The Association Council has already adopted rules for the application of the competition rules applicable to undertakings (i.e. restrictive agreements and abuses of a dominant position) for Bulgaria, the Czech Republic, Hungary, Poland and the Slovak Republic. Identical rules in relation to the other CEECs are currently passing through the legislative process.

According to these *Implementing Rules*, cases are dealt with by the European Commission on the EC side, and by the national competition authorities of each CEEC on the side of each CEEC. The competences of the European Commission and the competition authorities of each CEEC to deal with these cases are based on the existing rules of the respective legislation of the EC and each CEEC. Both authorities settle the cases in accordance with their own substantive rules.

The *Implementing Rules for undertakings* also contain procedures for co-operation between the Commission and the competition authorities of each CEEC, procedures for notification of cases to the other Party, the exchange of information, and consultation.

Also in the field of state aid, draft *Implementing Rules* have been prepared and agreed upon in principle between the European Commission and the authorities of the CEECs. The process for the final adoption of the Implementing Rules by the Association Council is underway.

The draft Implementing rules follow a two pillar system of state aid control. On the EC side, the Commission controls the compatibility of state aid granted by the EU Member States, with the Europe Agreement, on the basis of the existing EC rules on state aid. On the side of each CEEC, the national monitoring authority is to monitor and review existing and new public aid granted by the same CEEC, on the basis of the same substantive rules. The draft *Implementing Rules for state aid* provide for procedures for consultation and problem solving, rules on transparency (i.e. each CEEC is to draw up and thereafter update an inventory of its aid programmes and individual aid awards, established on the same basis as in the Community) and rules on mutual exchange of information.

The Community or a CEEC may take appropriate measures after consultation within the Association Council, where either of them considers that a particular practice is incompatible with the competition rules of the Europe Agreement, and is not adequately dealt with under the implementing rules, or in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry. In the field of state aid, such measures must be adopted in accordance with the procedures and under the conditions laid down by the GATT.

The relevant provisions of the Europe Agreements and the Implementing rules are intended to ensure that, already in the pre-accession phase, state aid control is effective, whilst taking into account the specific needs of transition economies. The Implementing Rules for state aid provide for the Commission and

the state aid monitoring authority of each CEEC to work out, in addition to the types of aid allowed in the Community, a S*pecial Guidance* on the compatibility of aid designed to combat the specific problems of each CEEC as it completes transition to a market economy.

However, the Special Guidance should not serve as a general escape clause as regards the granting of state aid to ailing industries. The Special Guidance should only address problems inherited from the past business-economic irrationalities imposed by the centrally planned economies, i.e. transition problems, and will not cover aid measures aimed at development. The development problem is covered by the existing rules on state aid. In particular, the Article 92(3)(a) EC Treaty regime referred to above leaves ample room for granting aid for new investments and expansions, for allowing temporary operating aid and for increasing the level of aid for various horizontal objectives, such as environmental protection, R&D, SMEs etc.

Merger Control

Mergers are not directly referred to in the Europe Agreements. Neither are there any substantive rules on mergers in the *Implementing Rules for undertakings*. However, the competition authorities of a CEEC are entitled to express their views in the course of the procedure under the EC Merger Regulation, where the merger will have a significant impact on the economy of the CEEC concerned. The Commission will give due consideration to that view.

Public undertakings and State monopolies

Under the Europe Agreements, the Association Council must ensure that as from the third year following the entry into force of each Agreement, the rules applicable to public undertakings and undertakings to which special or exclusive rights have been granted, the principles of Article 90 EC Treaty are respected.

Under the Europe Agreements, State monopolies of a commercial character are treated in a similar way to the way they are treated under Article 37 EC Treaty. Consequently, State monopolies of a commercial character are to be progressively adjusted so as to ensure that by a specified date, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of a CEEC.

Approximation

The Europe Agreements also provide that a major precondition for the CEECs' economic integration into the Community is the *approximation* of that country's existing and future national legislation to that of the Community. According to the Europe Agreements, the CEECs must use their best endeavours to ensure that future legislation is compatible with Community legislation. This covers anti-trust, merger control, State monopolies and public undertakings, and state aid.

Approximation of legislation in the context Europe Agreements does not mean that the CEECs should adopt all the details of the *acquis communautaire* in the field of competition verbatim. However, the key elements of EC Competition law, as set out in the *White Paper* must be taken over and implemented in the CEECs. Each country may decide that particular forms of laws or guidelines are the most suitable in its individual situation, and which legal structure provides the most suitable vehicle for its monitoring and enforcement authorities.

It is, however, important to stress that the exercise is not confined to the sole adoption of laws and regulations, or the establishment of the appropriate institutional structures. There must be a continued effort to ensure the enforcement of competition policy and to make competition policy widely known and accepted by all economic agents involved, i.e. by governments, companies and by the workforce.

Essentially, the *White Paper* follows the logic that the appropriate administrative and judicial machinery is required,

for there to be effective application and enforcement of the principles found in European Community law. This is particularly important when it comes to competition and state aid policy. Competition authorities in the CEECs must be endowed with a sufficient degree of independence, and sufficient investigatory and enforcement powers.

4. Achievements and Challenges

The establishment of competition offices has taken place relatively quickly and without too much controversy in the CEECs. Most of the CEECs have also adopted basic competition laws taking over the core elements of Articles 85 and 86 of the EC Treaty and merger control, as well as the necessary enforcement powers, and they are in the process of completing and refining the existing legislative framework. This is a great achievement.

However, the establishment of a competition authority and a competition law is only the first step towards an effective competition policy. A much more difficult task to fulfil is the effective enforcement of the law and application of the law by all economic operators. This requires, first of all that the competition authority has sufficient qualified staff. Secondly, the competition authority needs to be independent from political interference. The political will must also exist to grant the competition authorities of the CEECs real powers to enforce the law. Competition authorities should not only have far-reaching powers on paper, but also the ability to enforce decisions against enterprises, including public undertakings or bodies.

Another major problem has in the past been the lack of expertise and knowledge of competition law among the staff of the competition offices. Intensive training of staff is therefore essential and the Commission has done and still does much in the way of training and technical assistance. The Commission has organised joint training programmes for officials of the competition offices of the CEECs, and it has started with similar training sessions for judges. This should further the general awareness among all economic operators about competition policy and the activities of the competition authority, so as to create a true *competition culture*.

In this context, another important aspect of training is the Annual Conference of the competition authorities of the CEECs, responsible for anti-trust and state aid control, and the Competition Directorate-General of the European Commission. This Conference, which, this year, took place in Bratislava on 25-26 May, is extremely useful for exchanging views and experience on approximation of legislation and the enforcement of competition rules with and amongst the CEECs.

The main challenge for the competition authorities of the CEECs today is to appropriately allocate their resources in enforcing competition law, in order to focus on the kinds of conduct or transactions by firms which most seriously obstruct the proper working of the markets. Due to high barriers to entry and the few number of firms in the market place, collusion between firms or market foreclosure is both more likely to take place and more damaging in the CEECs. Priority should therefore be given to such cases which restrict entry to or expansion of markets. The collusive habits of central planning make breaking up cartels a priority. Finally, liberalisation is a necessary compliment to enforcement of competition policy, as anti-trust policy cannot be successful in ensuring that markets work properly on its own.

With respect to liberalisation, it should be recognised that in most CEECs, the competition authorities have played an important *competition advocacy* role in ensuring that new legislation complies with the principles underlying the competition rules, in particular as regards the regulated sectors, such as energy, telecommunications and transport.

However, leaving this aside, it would seem that the competition

authorities have devoted substantial resources to complaints from firms or consumers in relation to abuses of dominance by the other party to an agreement due to onerous contract terms (typically, complaints in relation to extensive prices and discriminatory behaviour), rather than on hard-core restrictions of competition, particularly cartels.

While the submission of complaints against exploitative behaviour of dominant firms shows a certain level of awareness of the existence of competition law, this type of case should not take priority over cases such as cartels, monopolistic acquisitions, exclusionary practices by dominant firms, or other cases which may have an impact on the competitive structure of the market. Obviously, the competition problems to be solved in such cases are not the easiest to deal with, and they require a certain amount of experience. For cartel cases, the necessary investigative powers to collect evidence, including the power to perform dawn raids, should be in place and should be used.

Finally, it is equally important for competition offices to impose sufficiently deterrent fines where serious restrictions of competition are at stake.

In addition to the above discussion on the anti-trust pillar of the competition rules, certain points need to be made in relation to the state aid pillar of the competition rules in order to consider where progress has been made and where work still needs to be done.

The control of state aid is just as important as anti-trust policy in ensuring that a level-playing field on the market is created and maintained. However, from the outset, the introduction of state aid control in the CEECs has proven much more controversial and politically sensitive than anti-trust policy, the reason being that state aid control goes to the heart of the role of the State, namely how governments use public expenditure to support their industry.

Although the state aid rules in the Europe Agreements and the draft Implementing Rules concerning state aid provide ample possibilities to develop an aid policy consistent with the particular problems of a transition economy, there has been a general fear in the CEECs that the introduction of state aid control would lead to the closing down of companies at a rapid pace, resulting in enormous socio-economic problems which would be politically unacceptable and expensive. This is even more the case where state aid is closely linked to the process of transition.

For example, state aid is often granted in connection with privatisation. State aid may also be involved in the financing of the restructuring necessary to make companies commercially viable. State aid may take the form of state guarantees, low interest loans, debt write-offs or other kinds of operating aid, simply to keep companies alive. Finally, state aid is often granted through tax reliefs, tax arrears, social security contribution reliefs and other measures which find their origin partly in too lax a fiscal policy. This partly results from a habit of granting favours to favourite state-owned companies.

Nevertheless, it is not possible to imagine an internal market where one Party is controlling the granting of state aid to its industry, whereas the other does not do the same. There are also obvious public finance reasons for keeping state aids under strict control.

In contrast to the anti-trust pillar, progress has been slow in the CEECs with respect to the control of state aid. A lot of work remains to be done. The most important objective today is to create transparency in the granting of state aid. Without transparency it is not possible to examine whether existing aid in the CEECs is compatible with the Europe Agreements. Moreover, the rules on co-operation between the EC Commission and the CEEC authorities in the field of state aid, as laid down in the draft Implementing rules on State aid, cannot be operational if transparency is not established.

Therefore, as a matter of urgency, the CEECs need to take

the necessary steps to establish an aid inventory of all existing aid. This inventory must encompass existing state aid granted by all aid granting authorities, not only aid granted through the State budget. This means, in particular, that aid granted by local or regional authorities, aid granted through privatisation funds, environment funds or other funds or bodies controlled by the state must be included in the inventory. Moreover, the aid inventories must cover both direct and indirect aid measures, and it must be updated on a continuous basis as new measures are introduced and existing aid measures are modified or abolished.

In parallel, it will be necessary progressively to review the identified existing aid measures and to modify or abolish those measures which are not compatible with the Europe Agreement.

A second priority is the setting-up of a state aid monitoring authority and a system ensuring that monitoring is carried out in an effective manner. Most of the CEECs have now established such a national monitoring authority. Some of them have appointed a unit within the Ministry of Finance (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Slovak Republic) or within the Ministry of Economy (Poland) as the monitoring authority, while others have given this responsibility to the Competition Office (Lithuania, Romania).

Currently, these monitoring authorities do not yet receive, on a systematic basis, information on all new aid granted in their country so as to enable them to give an opinion on the compatibility of the proposed aid with the Europe Agreement prior to it being granted. There can be many reasons for this. For example, the lack of a clear legal framework identifying the powers and responsibilities of the monitoring authority, the lack of sufficient and qualified staff in the monitoring authority, the lack of the necessary practical tools and procedures to implement the monitoring or a combination of these and other deficiencies may explain why these problems exist.

It is clear that the establishment of a credible state aid control cannot be achieved overnight. However, in order to fulfil the economic criteria for accession to the European Union, and to maintain confidence in current and future trade relations between the Community and the CEECs, it is important that concrete measures are taken to ensure a progressive adjustment of the system of state aid within a reasonable period of time.

On substance, the existing EC rules on state aid, the Europe Agreements and the draft Implementing rules on State aid (including the envisaged *Special Guidance* designed to combat the specific problems of CEECs as they complete transition to a market economy) should provide a satisfactory framework for tackling any particular transition problems while maintaining a level playing field. At the same time, it is clear that certain aid measures cannot be accepted even in transition economies, such as export aid, or can only be accepted under very strict and transparent conditions, such as operating aid and aid to sensitive sectors.

5. Conclusion

The deficiencies which are outlined above should not be seen as lessening the progress of the competition authorities in the CEECs over a time-span of only 5 to 6 years. Achievements in the field of anti-trust policy in particular have been remarkable, and the competition authorities of the CEECs deserve enormous credit for their pioneering efforts.

On the other hand, a lot of work still needs to be done, especially in the field of state aid control. It is necessary to ensure that all operators are working under the same rules, and thus not enjoying any unfair advantages over competitors operating in the same market, as well as to create a climate of confidence comparable to that which exists between EU Member States.

Enlargement is an historic process and has major consequences for the future application and enforcement of

EC Competition Policy. In an enlarged EU, the Commission will be empowered to apply EC Competition law to all the new members. This creates enormous challenges for anti-trust enforcement.

The *screening process* has already been launched, whereby the implementation of the *acquis communautaire* is being examined and discussed with the CEECs on a multilateral and bilateral basis. Enlargement negotiations themselves will not be easy. However, we believe that an effective working relationship between the Commission and the competition authorities of the CEECs will help smooth this process.

The Economics of Verticals

Luc Peeperkorn, DG IV-A-1

1. Introduction

As recognised in the Green Paper on Vertical Restraints in EC Competition Policy (Green Paper), the economic analysis of vertical agreements has in the past been the subject of heated debate between economists.[1] By the early 1980's the position had swung from regarding them as suspect for competition, to a generalised perception that they were innocuous for competition. Nowadays there is a new emerging consensus and economists are becoming more cautious in their assessment of vertical agreements and less willing to make sweeping generalisations.

A first and central element of this new consensus is the importance of market structure in determining the impact of vertical agreements on competition. Economics tells us that in the field of vertical restraints competition concerns can only arise if there is insufficient inter-brand competition, i.e. if there exists a certain degree of market power. On the one hand, the fiercer inter-brand competition, the more likely it is that vertical restraints have no negative effect or at least a net positive effect. On the other hand, the weaker inter-brand competition, the more likely it is that vertical restraints have a net negative effect. This means that the same vertical restraint can have different effects depending on the market structure and on the market power of the company applying the vertical restraint.

This of course raises the question of what is meant by market power? In economics market power is usually defined as the power to raise price above the competitive level (in the short run marginal cost, in the long run average total cost). In other words that a firm by changing its output has perceptible influence on the price at which it can sell and that by charging a price above the competitive level it is able, at least in the short term, to obtain supra-normal profits. Most economists would agree that there already exists market power below the level of dominance as defined by the Court of Justice. This view was also expressed in the Green Paper, to indicate that vertical restraints can harm competition below the level of dominance and therefore that Article 86 and merger control will not suffice and Article 85 needs to be applied to vertical restraints.[2]

A second element of this new consensus is that it is generally recognised that vertical restraints are on average less harmful than horizontal competition restraints like price fixing or market sharing. The main reason for treating a vertical restraint more

[1] Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721 final, of 22.01.1997, point 54.

[2] Green Paper, point 303.

leniently than a horizontal restraint lies in the fact that the latter may concern an agreement between competitors producing substitute goods/services while the former concerns an agreement between a supplier and a buyer of a particular product/service. In horizontal situations the exercise of market power by one firm (higher price of its product) will benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical situations the product of the one is the input for the other. This means that the exercise of market power by either the up-stream or down-stream company would normally hurt the demand for the product of the other. The companies involved in the agreement may therefore have an incentive to prevent the exercise of market power by the other (so called self policing character of vertical restraints).

However, this self-restraining character should not be over-estimated. When a company has no market power it can only try to increase its profits by optimising its manufacturing and distribution processes, with or without the help of vertical agreements. However, when it does have market power it can also try to increase its profits at the expense of its direct competitors by raising their costs and at the expense of its buyers/consumers by trying to appropriate some of their surplus. This can happen when the up-stream and down-stream company share the extra profits or when one of the two imposes the vertical restraint and thereby appropriates all the extra profits.

In this article I will not go into the question when is inter-brand competition weak and when is market power present. This can only be assessed on a case by case basis. One could only observe that, as most markets are rather competitive, in many instances vertical restraints are unlikely to have significant negative effects. A large majority of actual vertical agreements are therefore unlikely to be of interest from a competition policy point of view.

The success of any future policy will depend on it being able to provide a sufficiently wide and well defined safe harbour to exclude this large majority of agreements from competition policy scrutiny. In addition its success will depend on the predictability and clarity of policy towards agreements that are outside the defined safe harbour. It is in this light that in this article an economic classification of vertical restraints is presented. This classification is based on the main negative effects that may result from the different vertical restraints. It also describes the positive effects linked to vertical restraints. Finally it draws some general conclusions.

The final formulation of policy will of course not only depend on the economics of vertical restraints. It will also and most importantly be determined by the choice of policy objectives, the effects on enforcement costs, the effects on legal certainty for industry etc. For example, the assessment of a resale restriction may be very different when not only the protection of competition but also the goal of market integration is considered. However, these issues are also not covered in this article as it concentrates on the economic classification of vertical restraints.

2. The negative effects

2.1. Individual vertical restraints

To analyse the possible negative effects it is appropriate to divide vertical agreements into four groups: an exclusive distribution group, a single branding group, a resale price maintenance group and a market partitioning group. The vertical restraints within each group (as opposed to between these groups) seem to have similar negative effects on competition.

Before describing the four groups a number of general points need to be made. Firstly, the analysis applies to both goods and services, although certain restraints are mainly used in the distribution of goods. This is why throughout this text the term good(s) means both good(s) and service(s) unless otherwise stated. Secondly, vertical agreements can be concluded for

intermediate and final goods and services. Unless otherwise stated the analysis and arguments in the text apply to all levels of trade and the neutral terms supplier and buyer are used. When only a specific level is implicated this is indicated. Thirdly, the terminology used may confuse some as it at times differs from the current legal definitions**.** The classification is based upon what could be described as the basic components of vertical restraints. In practice many vertical agreements make use of more than one of these components. To give an example, exclusive distribution is usually limiting the number of buyers the supplier can sell to and at the same time limiting the area where the buyers can be active. The first component may lead to foreclosure of other buyers while the second component may lead to price discrimination.

Exclusive distribution group

Under the heading of exclusive distribution come those agreements/components that have as their main element that the manufacturer is selling only to one or a limited number of buyers. This may be to restrict the number of buyers for a particular territory or group of customers, or to restrict the kind of buyers. The group comprises exclusive distribution and exclusive customer allocation as the supplier is limiting its sales to only one buyer for a certain territory or class of customers. It also comprises exclusive supply and quantity forcing on the supplier, where an obligation or incentive scheme agreed between the supplier and the buyer makes the former to sell on a particular market only or mainly to one buyer. For example, when a manufacturer pays a shelf allowance to a retailer it will be in its interest to concentrate its sales with this retailer so as to spread the cost of the allowance. Lastly, this group comprises selective distribution, where the conditions imposed on or agreed with the selected dealers may limit their number.

There are two main effects on competition: (1) certain buyers within that market can no longer buy from this particular supplier, i.e. it leads to foreclosure of certain buyers, and (2) as far as the distribution of final goods is concerned, since less distributors will offer this good it will also lead to reduced intra-brand competition. In the case of wide exclusive territories or customer allocation the result may be total elimination of intra-brand competition. When the exclusive distribution type of agreement is used rather selectively, that is not many stores can carry the product, it also leads to less in-store competition and reduced inter-brand competition.

Single branding group

Under the heading of single branding come those agreements/components that have as their main element that the buyer is induced to concentrate his orders for a particular type of good with one supplier. The group comprises non-compete and quantity forcing on the buyer, where an obligation or incentive scheme agreed between the supplier and the buyer makes the latter purchase its requirements for a particular good or service and its substitutes only or mainly from one supplier.

There are two main effects on competition: (1) other suppliers in that market cannot sell to the particular buyers, i.e. foreclosure of certain suppliers, and (2) as far as the distribution of final goods is concerned, the particular retailers will only sell one brand, therefore there will be no in-store competition in their shops. Both effects may lead to a reduction in inter-brand competition.

The reduction in inter-brand competition may be mitigated by stronger ex-ante competition between suppliers to obtain the single branding contracts, but the longer the duration the more likely it will be that this effect will not be strong enough to fully compensate for the lack of inter-brand competition.

Resale price maintenance group

Under the heading of resale price maintenance come those agreements/components that have as their main element that the buyer is obliged or induced to resell not below a certain price, at a certain price or not above a certain price. This group comprises minimum, fixed,

maximum and recommended resale prices. Maximum and recommended resale prices, although in theory unlikely to have negative effects, may work as fixed RPM. As RPM relates to the resale price it is mainly relevant for the distribution of final goods.

There are two main effects of minimum and fixed RPM on competition: (1) the distributors can no longer compete on price for that brand, leading to a total elimination of intra-brand price competition, and (2) there is increased transparency on price and responsibility for price changes, making horizontal collusion between manufacturers easier, at least in concentrated markets. The reduction in intra-brand competition may, as it leads to less downward pressure on the price for the particular good, have as an indirect effect a reduced level of inter-brand competition.

Market partitioning group

Under the heading of market partitioning come what may appear at first sight a miscellaneous group of agreements/components but that have as their main element that the buyer is restricted in where it either sources or resells a particular good. This group comprises exclusive purchasing, territorial sales restrictions, customer sales restrictions, after-market sales restrictions, prohibitions of resale and tying.
The main effect on competition is a reduction of intra-brand competition that may help the supplier or the buyer (in case of after-market sales restrictions) to partition the market and thus hinder market integration. This may facilitate price discrimination. Tying is slightly the odd one out. Its main effect is that the buyers may pay a higher price for the tied good than they would otherwise do but it may also lead to foreclosure of other suppliers and reduced inter-brand competition in the market of the tied good.

2.2 Combinations of vertical restraints

The next question to be considered is whether a combination of different vertical restraints increases the negative effects. In the Green Paper a rather prominent place is given to the argument that certain combinations of vertical restraints are better for competition than their use in isolation from each other[3]. Although this may occasionally be the case, it does not appear to be the general rule. In general the opposite seems true, a combination usually aggravates the possible negative effects.

For example, a combination of one of the restraints of the single branding group with one of the exclusive distribution group combines a reduction of inter-brand competition with a reduction of intra-brand competition. In the case of final goods a market is created with local brand monopolists without in-store competition. Also, to foreclosure at manufacturer level is added foreclosure at the retail level. This means that not only may it be difficult for a manufacturer to sell a new brand as stores are tied, but also that new entrants to the retail market may have difficulty obtaining some of the leading brands. This results in a situation where it may be both difficult to find outlets and unprofitable to set up new outlets.

Another example is the combination of one of the restraints of the exclusive distribution group with one of the RPM group. To the reduction of intra-brand competition of the first is added the elimination of intra-brand price competition of the second. This quickly leads to a total elimination of intra-brand competition. This elimination of intra-brand competition may also help to sustain collusive tendencies between manufacturers facilitated by RPM. In general, this combination does also not make sense from an efficiency point of view as both protect the margin of the retailer. One of these restraints would normally suffice to overcome, for example, a free rider problem between retailers.

Lastly, a combination of one of the restraints of the single branding group with one of the RPM group may combine a reduction of inter-brand competition resulting from a lack of in-store competition with a

[3] Green Paper, point 67.

facilitation of collusive behaviour between the manufacturers induced by RPM. Collusive behaviour may become easier as the lack of in-store competition takes away some of the competitive pressure. In addition the reduction of inter-brand competition is combined with a loss of intra-brand price competition resulting from RPM.

A number of combinations may however be viewed more positively, where it can be argued that one of the vertical restraints limits the possible negative effects of the other. In the combination of exclusive distribution with maximum RPM the latter restraint may help the supplier to limit possible price increases the buyer may want to implement under the protection of the territorial exclusivity obtained. The same reasoning can be applied to the combination of selective distribution and maximum RPM. Also the combination of exclusive distribution with quantity forcing on the buyer may work in the same way as the latter may prevent the distributor from raising his prices.

There are three combinations that are particularly negative from a market integration perspective: (1) territorial sales restriction combined with selective distribution at the same level of distribution, (2) exclusive distribution combined with exclusive purchasing, and (3) selective distribution combined with exclusive purchasing. These combinations help to make a distribution system more watertight by making arbitrage, either by final customers or by distributors, more difficult if not impossible.

3. The positive effects

It is said that in a number of situations the usual arm's length dealings between manufacturer and retailer, detailing only price and quantity of a certain transaction, lead to a sub-optimal level of investments and sales. The following generalisations can be made about this:

1) The first and main reason why this (i.e. a sub-optimal level of investments and sales) is supposed to happen is the existence of some form of free rider problem. The person who makes an effort may not be able to appropriate all the benefits his or her effort engenders and may therefore be inclined to invest sub-optimally. This may be the result of free riding by one retailer on the promotion efforts of another retailer. Exclusive distribution or similar restrictions or RPM may be helpful in avoiding such free riding. Free riding can also occur between manufacturers where one invests in promotion in the shops for its brand, thereby also attracting customers for its competitors. Non-compete type restraints can help to overcome this.

   For there to be a problem there needs to be a real free rider issue, something that is not always so obvious. Free riding between retailers can only occur on pre-sales services and not on after-sales services. The good needs to be relatively new or technically complex as the customer otherwise may very well know what he wants from past purchases. And the good must be of a reasonably high value as it is otherwise not attractive for a customer to go to one shop for information and to another to buy. On top of this, when all these conditions are fulfilled it must not be practical for the manufacturer to agree with the retailers effective service requirements concerning the pre-sales services.[4]

   Free riding between manufacturers is also limited by rather strict conditions. It can be the case that a manufacturer who invests in promotion of his own product is also increasing demand for his competitors products. A vertical restraint may however not be helpful in addressing such a free rider problem. When for example advertising in the (national) media leads in general to extra demand with all outlets a vertical restraint will not help. Only in case the promotion leads to extra

[4] The standard argument against contractability of service requirements is that the costs of monitoring and the contract costs may be prohibitive for the manufacturer in case of a large number of small retailers.

demand via certain retail outlets, for example because these outlets are carrying the promotion, a non-compete type of agreement may help capture the full benefits. In addition, such free riding can only occur on pre-sales service, it must not be possible to make the promotion brand specific and it is only likely for relatively new and complex products as customers may otherwise know very well what they want already.[5]

2) A second general point that needs to be made concerns the possible divergence between what is privately efficient and efficient from a total welfare/consumer point of view. What is privately efficient is not always good for total welfare. To go back to the free riding between retailers or between manufacturers. Let's suppose a real free rider problem exists and sales can be expanded by inducing more pre-sales services although this would also lead to higher prices. When these extra services are valued equally by the majority of consumers this may very well lead to higher total welfare. But when the infra-marginal consumers (that is those who are already buying at the current price/service level) know what they want and do not appreciate the extra service, they only suffer from the higher price, especially if there is insufficient inter-brand competition. It may be privately efficient to increase the service level to attract more marginal consumers and thereby increase sales, but total welfare may nonetheless suffer.

3) A special form of free riding is the certification free rider argument. The hypothesis is that certain retailers perform a valuable service by identifying "good" products. The fact that these retailers sell a certain product signifies to the consumer that it is a good buy. This hypothesis may sometimes be useful for explaining the introduction of new products. New and complex products are first stocked by high quality, high margin stores where they are bought by avant-garde consumers. Gradually its reputation becomes established and demand grows enough for it to be sold through low price chains. If the manufacturer can not initially limit its sales to the premium stores, it runs the risk of being delisted and the product introduction may fail. If this is true, a problem analogous to invention patent protection exists. It may be necessary to provide temporary protection against price discounters to help the introduction of the product. However, a period of protection which is too long may only delay the product moving into the mature, price competitive stages of its life cycle, to the disadvantage of consumers. This means, at best, that there may be a reason to allow for a limited duration a restriction of the exclusive distribution or RPM kind; - enough to guarantee introduction, but not so long as to unduly delay large scale dissemination.

4) Yet another special form of free riding is the so-called 'hold-up' problem. Sometimes there are specific investments to be made by either the supplier or the buyer, such as in special equipment or training. In such a case, after the investments have been made the investor becomes to a certain extent prisoner to the other side. The balance of power will shift. In fear of this the necessary investments may not be made, unless ex-ante supply arrangements can be fixed. The investor fears that the other side will free ride on its investment. However, as in the free riding example between retailers, there are a number of conditions which have to be met before such a risk is real. Firstly, the investment must be sunk and specific to deal with that other party only. Secondly, it must be a long-term investment which is not recouped in the short run. And thirdly, the investment must be asymmetric; i.e. one invests more than the other. Only when these conditions are met can there be a real reason to have a vertical restraint for a

[5] Promotion that only creates image without there being real extra quality has doubtful welfare effects and does not need to be protected.

limited duration, of the non-compete type when the investment is made by the supplier and of the exclusive distribution or exclusive supply type when the investment is made by the buyer.

5) The last reason for sub-optimal sales, also discussed in the Green Paper, that should be mentioned, is the problem of 'double marginalisation'. In case both the manufacturer and the retailer have market power each will set its price above marginal cost. They both add their margin that exceeds the one that would exist under competition. This may result in a final price that even exceeds the monopoly price an integrated company would charge, to the detriment of their collective profits and consumers. In this, arguably rather hypothetical case, quantity forcing on the buyer or maximum RPM could help the manufacturer bring the price down to joint profit maximising level.

6) In the economic literature it is explained that there is a large measure of substitutability between the different vertical restraints. This means that the same inefficiency problem can be solved by different vertical restraints. For example, as explained above, the problem of free riding between retailers or the certification free rider problem can be solved by means of exclusive distribution or fixed or minimum RPM. This is of importance as the negative effects on competition may differ between the various vertical restraints. This plays a role when indispensability is discussed under Article 85(3). As RPM is generally considered to be less acceptable from a competition point of view this may be a reason only to allow exclusive distribution or other less serious restraints and not RPM.

4. Differentiation between vertical restraints

A last question to be considered is whether some restraints are more or less harmful than others? To answer this question both negative and positive effects need to be considered. It may be a problem that some vertical restraints that may be most effective to solve a certain free rider problem may also have the most serious negative effects. In addition the answer will depend on the goals being pursued by competition policy. It is therefore not possible to answer this question solely on the basis of the economics involved. I will therefore just draw the attention to some general rules that can be formulated.

As a first general rule, it can be said that exclusive agreements are generally worse for competition than non-exclusive agreements. Exclusive agreements make, by the express language of the contracts or their practical effects, one party fulfil all or practically all its requirements from another party. For example, a non-compete obligation makes that the buyer purchases only one brand, while quantity forcing may leave the buyer scope to purchase competing goods. The degree of foreclosure is therefore different, while often the efficiencies are remarkably similar.

A second general rule, applicable to all four groups, can be formulated: restraints agreed for intermediate goods are in general less harmful than restraints affecting the distribution of final goods. At an intermediate level both the supplier and the buyer are usually professional and knowledgeable. This makes a possible loss of intra-brand competition less important because it stimulates specialisation which leads to comparative advantages.

A third general rule, also applicable to all four groups, can be formulated: the possible negative effects of vertical restraints are reinforced when not just one supplier with its buyers practices a certain vertical restraint but when also other suppliers and their buyers organise their trade in a similar way. These so called cumulative effects can be a problem in a number of sectors. To make a valid assessment of the effects of such a cumulation of vertical agreements requires a sector wide investigation and overview.

Within the RPM group, fixed and minimum price maintenance are evidently the serious restraints. Maximum and recommended prices, when really maximum or recommended, are clearly much less and possibly not at all restrictive.

Within the market partitioning group, which assumes a market integration objective, restriction of resale and after-market sales restrictions seem the worst as they allow market partitioning without clear possible efficiencies. Tying is in general considered a somewhat less serious restriction. It concerns the possible extension of market power from one market into another. Possible efficiency arguments ("need to assure the buyer uses the right sort of input for the fragile machine we sold him as breakdowns may hurt our products image" or "joint delivery is cost saving") may be limited. Exclusive purchasing is the least serious restriction within this group.

5. Conclusion

On the one hand economics tells us that it is only when inter-brand competition is reduced that it may be necessary for a competition authority to intervene against vertical restrictions. It is only in such conditions that it may have to reduce the restrictions on inter- or intra-brand competition which may result from vertical agreements.

On the other hand economics also tells us that vertical agreements are often necessary to realise efficiencies and may help firms to enter new markets.

At the same time rather strict conditions have to be met before one can actually speak of a real free rider problem that justifies the imposition of vertical restrictions. The case is strongest for vertical restrictions of a limited duration which help the introduction of new complex products.

This leads to the conclusion that in situations where the parties have (considerable) market power a case by case approach is warranted for vertical restrictions.

Broadcasting of Sports events and Competition law

An orientation document from the Commission's Services

INTRODUCTION

1. The purpose of this document[1] is to develop an updated approach to the application of competition law to issues arising in the broadcasting of sports events in response to the rapid changes that are taking place. Over the last few years sports broadcasting has become a very important area economically. Sports programmes, and certain sports in particular, are a key ingredient for broadcasters and have driven the development of pay-TV. With increased deregulation and the introduction of new broadcasting technology, broadcasting services are going through continuous and rapid development with major consequences such as an increase in channels and capacity. Digital technology, pay-TV and pay-per-view services, providing additional broadcasting time and capacity, offer to viewers who are prepared to pay for the services, increasing opportunities to view a growing number of sports, either on theme channels or on an event-by-event basis. The new services potentially offer improved picture quality, a choice of perspective of the event and the opportunity to watch the programmes when the viewer wishes to. The importance of sports programming to broadcasters is demonstrated in the corresponding growth of competition (and price) for the acquisition of sports broadcasting rights. In the context of the new services, broadcasting of sports events can no longer be viewed in terms of a mix of programmes.

2. While these developments may indicate a potentially highly competitive market, concerns have been expressed about the consequences on the television landscape of the EU of current practices in the buying, selling and exploitation of broadcasting rights to sports rights. There is now a need for the Commission to examine these practices, many of which have not been considered contentious in the past, and to draw up a general competition policy approach to their assessment. Some Member States have already initiated actions under their domestic competition rules.

3. Broadcasting of sports events is becoming more and more cross-border or international. Television viewers in one Member State are increasingly able to see not only the most important international championships but national championships from other countries. International player and management mobility has generated more interest in sports events taking place in other Member States. The Commission will have to apply the competition rules more and more to horizontal and vertical arrangements relating to the broadcasting rights to sports events.

4. It may be helpful, when considering whether an agreement affects trade between Member States, to consider the following:

- television programmes are received and seen in a second Member State - this is not in itself sufficient to make community law applicable;

- if clubs or teams in one Member State make an agreement amongst themselves to fix prices for broadcasts of their sporting events, such an agreement would probably not be sufficient to make Article 85 of the EC Treaty applicable. It would be applicable if the

[1] This was prepared in consultation of Member State competition authorities

teams involved came from more than one country, for example, for the World Cup;

- there will probably be an effect on trade between Member States if a vendor of rights has sold or is likely to sell to a buyer in another Member State;

- if the buyer of the rights is likely to sublicense in other Member States, there will usually be an effect on trade between Member States.

5. Similar issues arise under Community competition law and national competition law when assessing agreements and complaints. A common approach to analysing the competition problems would offer a degree of certainty to those concluding broadcasting contracts. It is however not possible to provide an answer to each problem, which could then be applied in each Member State or by the Commission to cross-border cases. The facts, and viewers' preferences for sports, will be different in each Member State. The solution in one Member State may be different to the solution in another Member State. The effect on trade between Member States of national arrangements will also differ.

6. Many of the issues identified in the following chapters are often inter-related and so cannot be considered in isolation. This analysis is by no means exhaustive and other issues may arise in different circumstances in the future.

7. Exclusivity is an accepted commercial practice in the broadcasting sector. It guarantees the value of a programme, and is particularly important in the case of sports, as a broadcast of a sports event is valuable for only a very short time. Exclusivity for limited periods should not in itself raise competition concerns. However, competition problems may arise. Duration, quantity and upstream and downstream market power need to be examined in order to assess whether the exclusivity seriously restricts competition. A longer period of exclusivity may be appropriate in certain circumstances, for example, for the broadcasting of the Olympic Games, which occur every four years.

8. Exclusivity has also been questioned on grounds not related to competition law, in particular, where it is exercised by pay-TV operators. Article 3A of the new "television without frontiers" Directive, is an important measure addressing exclusive broadcasting rights to sports events which was introduced to ensure that Member States are able, at the national level, to protect the right to information and to provide for wide access by the public to television coverage of events of major importance for society.[2]

9. Competition rules are neutral with respect to different types of broadcasters and do not provide a legal basis for favouring one category over another. The Court of First Instance (in the EBU Eurovision judgment) has stated that, unless Article 90(2) applies, the Commission would not be justified in giving a preference to television stations merely because they have a public service role, or to publicly owned stations, or to those financed from officially-collected licence fees.

10. Fundamental to consideration of any competition policy implications is the issue of who owns the broadcasting rights to sports events, as witnessed by recent court cases in the Netherlands[3] and

[2] For aspects other than those related to competition law, see the Communication from Mr Oreja to the Commission entitled "Exclusive Rights for TV Broadcasting of Major (sports) Events" (SEC(97) 174 final.

[3] The High Court of Amsterdam verdict of 8 November 1996 (on Feyenoord's appeal against the President of the Utrecht court's previous verdict) was that the television rights in principle belong to the home team and that the statutes of the KNVB are too general to be interpreted as an assignment of the broadcasting rights to the KNVB.

Germany[4] concerning rights to national football games.

11. Many sports have now entered the realms of the market economy. Their commercial activities are operated as businesses. The income received from the sale of broadcasting rights is transforming the sports world and widening the gulf between amateurs and professionals. As with any market, commercial practices fall under the scrutiny of the competition rules. Not only competition among participants in a particular sport may be affected by commercial practices but competition among broadcasters may also be affected.

12. Apart from commercial considerations affecting competition, regard may also be had for genuine objectives based on other considerations applicable to sport because of its intrinsic characteristics and importance to society : "Maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results" and "encouraging the training of young players" - were two legitimate objectives recognised in the Judgment of the Court in the Bosman case[5].

13. In the light of these general considerations, this paper now turns to the main legal issues which arise, or may arise, under Community law, firstly concerning the provisions for the broadcasting rights to major sports events under Article 3A of the new "television without frontiers" Directive, then with respect to Community competition law.

I. Priority for free-access television for the coverage of major sports events

1. There are advantages for viewers if important sports rights are broadcast by free-access television, so that consumers are not obliged to make additional payments for decoders, receiving equipment or cable subscription to view such events, in particular, those in which their compatriot sports men and women take part in international events.

2. More generally, concern has arisen, with the growth and development of pay-TV, that viewers are being denied free-access to important national events because large subscription broadcasters have been buying up those rights to develop their own services. It is said that some sporting events are of such national or heritage importance, that they reflect common identity and value, so that broad free access should be given to them. The complaints are from "public interest" or "national heritage" concern, rather than on competition grounds, and a regulatory approach would be necessary to achieve the desired result.

3. As confirmed by the Eurovision judgment[6], competition rules are neutral with respect to different types of broadcasting and in principle, do not provide a legal base for favouring one category of broadcaster over others.

4. Further to an amendment by the European Parliament, the directive modifying directive 89/552/EEC[7] ("television without frontiers") includes a new Article 3A. The purpose of this Article is explained in recital 18, which reads as follows:

4 Decision of the Bundesgerichtshof 11 December 1997 in case Deutscher Fußball-Bund, UFA Film and ISPR v Bundeskartellamt took the view that teams are the natural owners of the broadcasting rights in the games in question, but left open the question of whether associations may also have a claim to ownership in different circumstances.

5 C-415/93, 15 December 1995

6 Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, judgement of the Court of First Instance of 11 July 1996

7 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ No L202/60 of 30.7.1997)

"Whereas it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the football World Cup and the European football Championship; whereas to this end Member States retain the right to take measures compatible with Community law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events".

5. Article 3A paragraph 3 stipulates, moreover, that Member States shall ensure that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events, which are designated by that other Member State, on free television. According to information supplied to the Commission by national delegations to the Contact Committee set up by the Directive, a large majority of Member States intends to notify their measures taken under Article 3A paragraph 1 in the course of 1998. All Member States have indicated timetables for transposition of Article 3A paragraph 3 by the deadline required by the Directive, i.e. 30 December 1998.

6. The procedure laid down in Article 3A paragraph 2 requires the Member States to notify their measures and the Commission to verify their compatibility with Community law within a period of three months. The Commission must seek the opinion of the Committee established by the Directive. Measures taken by Member States in order to guarantee the availability of coverage of certain events must be in accordance inter alia with Article 90 of the Treaty.

II. The relevant market in sports broadcasting cases

1. The correct definition of the relevant market will be crucial to the assessment of cases concerning the issues referred to below. In the current climate of quickly evolving broadcasting technology and means of distribution, in particular, the development of pay-TV and pay-per-view, the nature and scope of the markets, which are relevant, are changing. The geographic market also is becoming more and more international as more cross-border broadcasts of sports are offered.
2. With the emergence and growing importance of dedicated subscription television sports channels over the last five years, the market seems to be evolving in such a way that it will be no longer possible to define it as for sport programmes in general, but for some specific sports, for example, for football or for Formula 1 motor racing. Standard market definitions may not apply in all Member States. The markets are not necessarily the same in all Member States, as national preferences differ from State to State.

3. When defining the relevant market, demand substitution is not to be viewed exclusively from the viewpoint of the final consumer, since some of the available services are not offered to the final consumer. In connection with rights to televise sports events, a variety of services can be provided:

- owners of broadcasting rights to sports events sell the rights to broadcasters or to sports rights agencies;
- the rights can be exclusive or non-exclusive, for live or deferred transmission, or for highlights;
- a rights owner or broadcaster may subcontract the production of the signal;
- sports rights agencies sell rights to broadcasters;

- companies wishing to associate their brand with a particular sport, particularly if it receives television exposure, sponsor competitions, organisers of sports events, clubs, teams or individuals;
- broadcasters and/or advertising brokers sell advertising time or sponsorship to companies who want exposure on television during sports programmes;
- broadcasters owning sports programmes, or owners of the rights or their agents, license other broadcasters to broadcast the programmes;
- broadcasters can contract with cable companies or operators of other means of transmissions to broadcast their channels and sports programmes;
- cable companies provide television to householders;
- broadcasters transmit sports programmes to viewers;
- viewers may exercise a choice by subscribing to a dedicated sports broadcasting service (rather than choosing from a variety of entertainment programmes on traditional advertising or licence fee funded television).

4. Some sports events are more important, and attract the attention of more viewers, than others. A survey in the UK for the BBC on sport on television indicated that 92% of viewers were interested in watching one or more of the major sports events on television[8]. For really important events, there is no satisfactory substitute for live coverage (viewers' interest in most events is short-lived). There is little substitutability between sports for fans. For football supporters, television coverage of athletics or golf is not a satisfactory substitute. There may be little substitutability between different sports for sponsors, whose investment can be vital for the viability of a sport. For broadcasters some sports generate more income from advertising revenue or subscription than others. There may be an element of prestige in broadcasting certain major sports. For them, the importance and interest of a sports event to a large number of viewers determines whether other sports programmes are a satisfactory substitute. Football, the Olympic Games and Formula One racing are the most popular televised sports events world-wide.

5. There is a market for sports rights, whether sold or licensed, and this market may be further sub-divided into the market for rights to specific sports. Broadcasting rights may be for live or deferred full coverage of an entire event, for extracts and for highlights. The value and use of each type of right differs for broadcasters. The conditions of competition for the various types of broadcaster need to be taken into consideration. Conditions for traditional incumbents - terrestrial and/or free-access broad-casters, offering a general programme mix, who are dependent on licence fee or advertising revenue for their funding, are likely to be different from those for the emerging new broadcasting services, pay-TV and pay-per-view, which include dedicated sports channels and which are dependent upon viewers' subscription fees. A larger proportion of the programming of the new services consists of sports. In the context of sponsors, television advertisers or pay-TV, these factors suggest that it is necessary to define the markets more narrowly, as those for coverage of important events in a particular sport.

6. In the Netherlands, the Decision of the Ministry for Economic Affairs in the KNVB/collective selling of highlights to football games case, the decision defines a separate market for football broadcasting rights[9].
7. In any event, the guidelines set out in the Commission

[8] Convergence within the media industry, and between media, information technology and/or telecommunications - Prospective for competition and competition policy - Report to DGIV prepared by London Economics

[9] Decision of 23 December 1997

Notice on Market Definition[10] should be referred to when considering definition of the relevant market.

III. Exclusivity

1. The sale of exclusive rights to broadcast sports events is an accepted commercial practice. For sports **organisers,** the sale of exclusive rights is a way of ensuring the maximum short-term profitability of the event organised, the price paid for the exclusivity by one broadcaster probably being higher than the sum of the amounts which would be paid by several broadcasters for non-exclusive rights.

2. For the **broadcaster,** sports programmes are considered as particularly suited to attracting a large number of viewers. For them, it can be said that exclusivity represents :

- the only way to guarantee the value of a given sports programme;
- the broadcasting company may get more value from the rights if it can sub-license to competitors;
- a way to build up audience, in the short as well as in the long term (consolidation of audience base, fostering loyalty, improvement of image);
- a substantial increase in advertising or sponsorship revenue as sports programmes are a means of targeting a specific audience, often in large numbers;
- a degree of prestige in being the only broadcaster showing a particularly popular sport;
- for pay-TV channels, exclusivity of rights to very popular sports events is fundamental in order to attract new subscribers; this is especially true for sports theme channels: persuading viewers with specialised tastes to pay for specialised channels is the only way that many such channels could be financed, since the number of interested viewers would be too small to attract enough advertising revenue; it may also be vital to re-coup investment in infrastructure;
- the revenue may be needed by a broadcasting company which wants to invest in cable, decoders and/or satellites.

3. Despite the very large amounts paid by broadcasters for exclusive rights to the most popular sporting events, the purchases are still profitable as long as the acquisition price is outweighed by advertising or sponsorship revenue or subscription fees. Different types of broadcasters, as defined by their method of financing (licence-fee, advertising revenue, subscription etc) are be subject to differing constraints upon their ability to bid for sports rights.

4. In the CODITEL II decision[11], the ECJ held that exclusive licences of performing rights did not per se infringe Article 85(1), even though they conferred absolute territorial protection and might prevent transmission into a neighbouring State. The Advocate General had observed that since performing rights affect the supply of services rather than goods and the doctrine of exhaustion was excluded by Coditel I, such exclusive licences would confer absolute territorial protection. The ECJ concluded that the exercise of those rights may come within the prohibition of Article 85(1) where, regard having been had to the specific characteristics of that market, there are economic or legal circumstances the effect of which is to restrict distribution to an appreciable degree. Certain parallels could be drawn with the granting of exclusive licences for broadcasting rights to sports events, which concern allowing a third party access to land or property or to the participants for filming purposes.

5. Agreements for exclusivity may fall within the scope of Article 85(1) if they lead to

[10] OJ C 372, 9 December 1997

[11] Case 262/81

foreclosure. Duration should not be excessive in length or scope. It is not possible to state what the maximum duration should be, as much will depend on individual circumstances. The effects of an exclusive licence will depend on market definition. The market power of the seller and the acquirer and whether the downstream market is likely to be foreclosed need to be assessed. The cumulative effect of the acquisition of the right may strengthen an already strong position of a broadcaster because it adds to an already attractive portfolio of sports rights. The existence of a sublicensing policy cannot, in itself, alter the need for an individual exemption in circumstances where exclusivity is caught under Article 85(1).

6. Under current practices, the exclusivity granted can vary significantly. It can apply to the live broadcasting of an entire event; to a deferred transmission of an entire event, or for short clips for use in sports programmes. (For the purposes of news reporting, it is the general practice, often enshrined in national legislation, for short clips of an event to be made available to all broadcasters on a non-exclusive basis). It can also be limited to exploitation by any of the different broadcasting modalities - in the clear broadcasting, pay-TV or pay-per-view. Exclusivity for all means of exploitation can be granted to a single operator, who either exploits some of the rights himself and withdraws the remainder from the market, or who is prepared to sub-licence other broadcasters on a live, deferred or highlight basis, according to the different modalities. Alternatively, the right to broadcast through only one modality can be granted only to one operator. Exclusivity can also be granted to a number of operators each exploiting a particular modality. The more forms of exclusive exploitation that are granted to other broadcasters for a particular right or rights the more the strength of each form of exclusivity is diluted, because there is an element of competition for viewers between the various modalities.

7. There are circumstances when a long period of exclusivity may be justified, for example to assist a new entrant becoming established in the market (the "new entrant" rationale) and in particular, a new entrant introducing new and expensive technology who needs a long period of exclusivity in order to recover large investment costs. "Introducing these new technologies may require exclusive access to particular forms of sufficiently attractive content in order to drive penetration and consumer investment into new reception equipment"[12]. When considering the introduction of commercially new, high-risk and potentially pro-competitive services as justification for the granting of an exemption for a long period of exclusivity, a balancing needs to be carried out under Article 85(3). This is particularly relevant when the party is already powerful or the partners to an agreement or a joint venture are already part of large, powerful groups.

IV. Collective selling

1. The broadcasting rights to matches or competitions are often marketed centrally, or sold in exclusive bundled form, by a league or association representing the clubs or participants. At the national level, this practice has been challenged under national cartel law by competition authorities in The Netherlands[13], the UK[14]

12 Convergence within the media industry, and between media, information and technology and/or telecommunications - Prospective for competition and competition policy - Report to DG IV prepared by London Economics

13 The Ministry for Economic Affairs took the view on 6 November 1996 that the collective selling by the KNVB to Sport 7 of the broadcasting rights to matches was a cartel. On 28 December 1997 the Ministry issued a decision that the collective selling of highlights of soccer games was a restriction of competition but gave it a temporary and transitional exemption, on the basis of public interest

and most recently in Germany[15], where the Bundesgerichtshof concluded that the central marketing of broadcasting rights to European Cup football matches by the national football association was a cartel for which exemption was not justified. If there exists an inter-state trade effect, it will be necessary to examine whether the collective selling of rights to broadcasting matches or to series of events or competitions results is an agreement restrictive of competition contrary to Article 85(1) of the EC Treaty and the Commission will have to examine whether the criteria for exemption could nevertheless be met by the arrangements.

2. Before considering the question of the applicability of Community competition law, the ownership of rights needs to be taken into account as there is a danger that commercial agreements may collapse in a dispute about ownership, as has been witnessed in the Netherlands. The question of who owns the rights to broadcast any given event (or series of events) is not one which can be answered by competition law. It is a question governed by the applicable national law. The Commission notes the tendency which is emerging in national court cases concerning football to conclude that the football clubs are the primary owners of the broadcasting rights to football matches in the cases examined by the courts.

3. As ever larger sums are paid for exclusive rights, it is likely that disputes about ownership and the exercise of those rights will increase. Leagues or associations at both the national and international level are increasingly assuming the control and sale of broadcasting rights to individual events or matches by change to their constitutions or rules. The question of who owns the rights has to be determined under national law. Criteria under national law for determining ownership of broadcasting rights are different in different Member States. Ownership can be based on various considerations, such as the ownership of land, "the arena rights" or who takes the commercial risk in staging an event. Circumstances relating to the organisational structure of each sport will have a bearing on determining ownership; these are likely to be different for team sports such as football and rugby; series in which a number of teams or individuals compete at several locations; and events where there is one organiser but where a number of individuals take part, such as marathons, or tennis tournaments. It may be necessary for rights belonging to a number of contributors to the sport to be transferred to the organiser responsible for the game or competition.

4. When considering collective selling or "central marketing" arrangements, it may be relevant to recall:

- the competitive situation in each circumstance has to be evaluated, in order to avoid approving cartel-like arrangements which could be contrary to Article 85(1), particularly when the participants are capable of concluding their own contracts with broadcasters;
- those assuming responsibility for selling the rights on behalf of individual participants or events may enjoy a position of market power, either already held as a result of a regulatory or supervisory function, or gained as a result of the acquisition of a large number of rights. If the acquisition, exercise or exploitation of those rights is abused, Article 86 is likely to be applicable;
- the conditions for international events may be

considerations, in order not to disrupt the market.

[14] Hearing of the Restrictive Practices Court in January 1999 of the collective selling by the Premier League of broadcasting rights to the clubs' matches

[15] Decision of the Bundesgerichtshof 11 December 1997 in case Deutscher Fußball-Bund, UFA Film and ISPR v Bundeskartellamt

different to those for national events;

- collective selling of broadcasting rights entails providing a bundle of rights, which may or may not be capable of being competitors to each other. The product may therefore be different to a product supplied by a single rights holder.

5. Up until now, collective selling of broadcasting rights by national leagues has been left by the Commission to be dealt with under national competition law. No agreements for collective selling had been notified to the Commission, and it was not clear whether there was a significant effect on trade between Member States arising from some of the arrangements which have been made so far.

6. The Commission is currently examining collective selling arrangements for international motor sports.

7. If a competition authority does not permit collective selling of sports rights for national events, a greater number of separate rights will be available to broadcasters. Collective selling or central marketing can be the source of other competition issues related to the broadcasting of sports events.

8. Collective selling arrangements, if they cannot be shown not to be a restriction of competition, are likely to affect the functioning of the market, because they permit only periodic transactions, restrict output and bundle the products offered. Collective selling can facilitate other restrictive practices, such as granting a long duration of exclusivity, giving preferential treatment to one set of rights at the expense of another, or the denying of the rights to other broadcasters. It could result in the hindering of the development of other sports or participants in the sport, which as a consequence of preferential treatment for some classes of participants, were not able to obtain satisfactory television exposure or attract sponsors. Such restrictions on output could in turn slow down the development of new broadcasting technologies at the national and cross-border levels. The terms of the agreements will affect the price broadcasters are willing to pay for the rights. Whether the resulting restraints on competition are indispensable to the functioning of the market would depend on all the circumstances.

9. Before it could be said whether such arrangements fulfil the criteria for exemption under Article 85(3), a thorough examination is required, first, of the extent of any restrictions of competition under Article 85(1) that arise for the individual parties concerned. Such restrictive agreements must meet the four criteria for exemption of Article 85(3). The fulfilment of these criteria should not be based on purely commercial considerations. The special characteristics of the sport in question have to be taken into account. These could include, for example, the need to ensure "solidarity" between weaker and stronger participants or the training of young players, which could only be achieved through redistribution of revenue from the sale of broadcasting rights. Such aims would have to be a genuine and material part of the objectives and ones which could not be achievable under less restrictive arrangements.

V. Sublicensing

1. If an agreement involving exclusivity for rights gives the parties the possibility of eliminating competition in respect of a substantial part of the products or services in question, a possible remedy could be to require them to share with third parties the rights or advantages they have obtained. This may be particularly relevant when the owner of important rights is also their exploiter in a vertical joint venture with a broadcaster. Sublicensing could therefore be necessary in order to comply with Art. 85(3)(b) as a means of

reducing the anti-competitive affect of exclusivity or of joint buying of sports rights. For certain events, such as the Olympics, sublicensing may be the only fair and competitive way to deal with exclusivity. Before considering arrangements for sublicensing under competition law, it should first be established whether the exclusivity is justified.

2. Sublicensing should not be regarded as a solution to all the competition issues which arise. In most cases it will be necessary and sufficient to deal with, for example, exclusivity which is of an excessive duration or scope. To be effective, the value of sublicensing will depend on the terms on which sublicenses are granted. These should be known, as far as possible, in advance, because the value of the exclusive rights to the company obtaining them depends on any duty to sublicence which it may have. The terms of sublicences should be transparent. They should be non-discriminatory as between licensees in each category. Where the price of the sublicences is unregulated, this may result in prices at monopoly levels and it is not desirable for a competition authority to allow the broadcaster to obtain exclusive rights and then charge other broadcasters monopoly prices. Another adverse consequence could be that of excluding small-scale entry. "Terms" must deal with payment, access to unedited material, embargoes on live transmission or on transmission at popular times, and subject matter (interest and importance of the games or events sublicensed). There should be provision for settlement of disputes. There may be different categories of sublicences. The advantages obtained by the parties in comparison with the sublicense must be proportionate, so that sublicences are of real value to the licensees : the owner of the exclusive rights may not keep all the valuable rights for itself.

3. The Commission will not normally fix the terms of sublicences, and may not find it easy to ensure that the terms are reasonable. In summary, encouraging sublicensing is not by itself either a satisfactory or a convenient way of solving the competition problems of sports broadcasting.

VI. Collective purchasing by broadcasting companies

1. Broadcasting companies sometimes join together to acquire the right to broadcast sports events. Whether this kind of collective buying falls under Article 85(1), and in what circumstances it fulfils the requirements of Article 85(3), depends on all the circumstances. For example, whether such arrangements are anti-competitive will depend, inter alia, on whether the parties are found to be important competitors with a strong position in the relevant market, and the scope and duration of the exclusive rights purchased. In particular, collective purchasing will not raise competition problems if no one member of the group alone would have the resources to bid successfully for any of the rights in question, or where a number of small broadcasters come together which each, individually, have no possibility of acquiring the rights in question.

2. Where collective purchasing is caught under Article 85(1), exemption can be envisaged if its purpose is pro-competitive, for example, by maintaining a broadcasting sector with limited resources facing the big four broadcasters, BSkyB, Canal Plus, Bertelsmann and Kirch, on the market for the procurement of broadcasting rights, or for events of major national public importance, such as the Olympic Games.

3. The removal of joint selling arrangements will minimise the need for collective purchasing.

* * *

This paper only intends to lay down some broad lines identified to date for the application of competition law in a sector in which the structure and economics are very complex and which is the subject of continuous and very rapid developments. Practice in relation to Articles 85 and 86 will be developed by the Commission on a case-by-case basis.

4 May 1998

OPINION AND COMMENTS

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

La politique de concurrence, une politique en faveur de l'emploi

Eric Cuziat, DG IV-A-1

Introduction

Au Conseil européen extraordinaire sur l'emploi, premier sommet européen entièrement consacré à ce sujet, qui s'est tenu à Luxembourg les 20 et 21 novembre 1997, les États membres ont abouti à un accord sur des "lignes directrices" pour renforcer l'action de l'Union européenne en faveur de l'emploi. Il apparaît clairement à la lecture de ces orientations que la lutte pour l'emploi est multiforme et qu'elle nécessite une multi-thérapie. Toutes les politiques de la Commission sont en conséquence mobilisées. Plusieurs des axes définis par ces "lignes directrices" intéressent directement la politique de concurrence: soit de façon implicite lorsque par exemple il est question de l'outil de croissance que constitue "un marché intérieur performant" auquel contribuent activement les politiques de décloisonnement des marchés ou d'allègement des charges administratives pour les Petites et Moyennes Entreprises, soit de façon explicite comme dans cette section intitulée "Les politiques communautaires au service de l'emploi" au nombre desquelles figure la concurrence. Le sommet de Luxembourg assigne clairement un rôle en matière d'emploi à la politique de concurrence, principalement dans le domaine des aides d'état. Le paragraphe 27 des "lignes directrices" affirme en effet qu'il convient de "s'orienter vers des régimes d'aides qui favorisent l'efficacité économique et l'emploi sans pour autant entraîner des distortions de concurrence".

Le champ d'action de la politique de concurrence en faveur de l'emploi est beaucoup plus étendu que celui que les lignes directrices lui attribuent. Certes, la résolution du problème du chômage implique un florilège de solutions diverses et complexes. Toutefois, la politique de concurrence a un rôle non négligeable à jouer dans cet objectif de soutien à l'emploi. En effet, par l'appui qu'elle apporte à la croissance, liée au niveau de compétitivité des marchés qu'elle s'efforce de rendre plus ouverts, par sa contribution active au mouvement de libéralisation des industries de réseaux, par ses actions en direction des petites et moyennes entreprises, de la recherche et de l'innovation, mais aussi au travers de son activité de contrôle en matière d'aides d'état, la politique de concurrence reste l'une des politiques majeures de la Commission qui puisse au mieux contribuer à améliorer la situation de l'emploi en Europe.

1. Le champ d'action de la politique de concurrence en faveur de l'emploi

Dans son discours donné à la conférence sur la croissance et l'emploi qui se tenait à Rome en juin 1996, le Président Santer indiquait déjà quelle devait être l'approche globale que devaient suivre la Commission et ses partenaires pour améliorer la situation de l'emploi en Europe. Il définissait quatre orientations: créer un cadre macro-économique tourné vers l'emploi, engager une action résolue en vue d'achever le marché intérieur, accélérer la réforme des systèmes d'emploi, enfin utiliser au mieux les politiques structurelles européennes. Dans ses lignes directrices en faveur de l'emploi du 1er octobre 1997, la Commission, quant à elle, proposa aux États membres quatre axes d'action: libérer l'initiative entrepreneuriale, développer une nouvelle culture de l'emploi, encourager la flexibilité, renforcer l'égalité entre hommes et femmes. Les conclusions du sommet de Luxembourg de novembre 1997 reprennent pour une large part ces propositions. La politique de concurrence peut concourir au succès d'au moins trois des quatre objectifs définis par le Président Santer et contribuer efficacement à la réalisation des objectifs fixés par le Sommet de

Luxembourg. En effet, par son action sur la structure des marchés, elle exerce une influence directe sur la compétitivité de l'économie européenne et sur son niveau de croissance, et, en conséquence, participe à cette orientation du cadre macro-économique vers l'emploi. Les efforts déployés par la Commission au travers de sa politique de concurrence pour décloisonner les marchés au sein de l'Union, apportent un soutien majeur à l'achèvement du marché intérieur. Enfin, le contrôle des aides d'état, comme le souligne le paragraphe 27 des "lignes directrices", permet de faire en sorte que de telles aides contribuent à créer des entreprises saines et donc des emplois durables, tout en garantissant une concurrence loyale. Gageons aussi qu'une réduction des budgets consacrés aux aides d'État permettrait de libérer des ressources qui pourraient être réorientées vers des actions plus prometteuses en matière de création d'emplois.

2. La libéralisation et l'emploi

La politique de libéralisation des services publics de l'énergie, des transports ou des télécommunications, que la Commission mène avec mesure dans le respect des missions d'intérêt économique général, conduit elle aussi au soutien d'une politique en faveur de l'emploi. La mise en concurrence des opérateurs jouïssant au préalable d'une situation de monopole et l'introduction de nouveaux entrants sur ces marchés se traduisent de façon quasi-immédiate par une amélioration de la productivité des anciens monopoleurs et une réduction de leurs coûts d'exploitation. Ce phénomène génère un double effet positif: il renforce la compétitivité des anciens monopoleurs et provoque des baisses tarifaires pour les consommateurs. Cette tendance décroissante des prix des services des industries de réseau est un facteur déterminant pour la compétitivité de l'industrie européenne dont les différents rapports du Groupe consultatif sur la Compétitivité ont montré que les entreprises souffraient d'un véritable handicap vis-à-vis de leurs principaux concurrents internationaux, lié aux prix élevés de ces services. Dans le premier rapport par exemple, il est fait état d'une étude qui montre que certains de ces services coûtaient en 1995, 22 fois plus cher en Europe qu'aux États-Unis. Le renforcement global de la compétitivité de notre économie soutient la croissance et favorise l'emploi.

Par ailleurs, le processus de libéralisation entamé dans les secteurs de haute technologie comme les télécommunications provoque du fait de l'introduction de la concurrence une émulation entre les entreprises en termes de recherche, d'investissements et de développement de nouveaux produits et services, émulation propre à stimuler la création d'emplois. La libéralisation conduit également de nouveaux entrants à pénétrer des marchés jusque là forclos et à créer de nouveaux emplois. Une étude réalisée en 1996[1] a montré que dans le cadre d'une libéralisation rapide du secteur des télécommunications et d'une diffusion accélérée des technologies, la création globale nette (ou la sauvegarde) de 1,3 millions d'emplois en Europe pouvait être envisagée en 2005. Dans le cadre d'un scénario où la libéralisation serait moins rapide, l'impact est évalué à 200 000 emplois nouveaux..

Au nombre de ces emplois, l'étude précitée souligne que l'apparition de nouveaux opérateurs et prestataires de services se traduirait par la création de 50 000 à 160 000 emplois, selon les scénarios.

L'ouverture des transports aériens à la concurrence a provoqué la restructuration des compagnies nationales qui s'est très souvent traduite par des suppressions d'emplois. En 1994, les membres de l'AEA qui regroupe les compagnies aériennes européennes avaient ainsi supprimé 5000 postes de travail. Il y a fort à parier qu'après la mise en oeuvre des restructurations, dans un contexte d'accroissement du trafic aérien, ces mêmes compagnies renoueront avec les créations d'emplois. On se souvient du plan de survie de British Airways en 1982 qui entraîna une réduction de

[1] Les effets sur l'emploi du processus de libéralisation dans le secteur des télécommunications, Rapport final, BIPE Conseil, octobre 1996.

quelques 20 000 emplois sur les 55 000 que comptait l'entreprise. Après plusieurs années d'efforts, la compagnie ayant renoué avec les bénéfices, British Airways a retrouvé ses effectifs du début des années 1980. Ces emplois doivent être considérés comme des emplois plus sains et plus stables. Parallèlement, la libéralisation a donné naissance à de nouvelles compagnies aériennes[2], créatrices d'emplois. Les tarifs concurrentiels de ces entreprises qui ont entraîné une baisse générale des prix dans ce secteur ont permis à des catégories nouvelles de consommateurs d'accéder au marché du transport aérien[3] et ce faisant ont accru la demande globale sur ce marché. Cet accroissement de la demande, fruit de la libéralisation, réduit le risque d'un simple transfert des postes de travail et garantit une stabilité des emplois maintenus ou créés.

Ainsi, la politique de la Commission en matière d'ouverture des industries de réseaux à la concurrence, politique qui demeure respectueuse des missions de service public, est-elle génératrice d'effets positifs sur l'emploi.

[2] Sur dix ans (1986-1996), le nombre total de compagnies aériennes communautaires opérant des vols réguliers est passé de 99 à 156. Entre 1993 et 1996, 80 compagnies se créèrent, en majorité des compagnies privées, tandis que 60 disparaissaient, y compris à la suite de regroupement.

[3] Il est estimé qu'environ 90 à 95% des passagers voyagent désormais à des prix réduits.(1996).

3. Une action multiforme en faveur de l'emploi

Par des actions plus ponctuelles, la politique de concurrence peut également contribuer à soutenir les autres politiques favorables à la création d'emplois.

Il est bien connu que les Petites et Moyennes Entreprises sont des viviers en matière d'emplois. Toute action qui tend à libérer leur initiative entrepreneuriale est donc positive. Le sommet de Luxembourg recommande notamment de simplifier leur environnement réglementaire et administratif. Dans ses réformes législatives en cours, la Commission a tenu compte de cette exigence, y compris dans le domaine de la concurrence. Non pas que ces règles vont à l'encontre de la création d'emplois puisqu'elles cherchent à créer les conditions optimales de fonctionnement des marchés, mais, dans la mesure où les éventuelles restrictions de concurrence mises en oeuvre par les PME ont rarement un effet sensible sur le marché commun, la Commission considère qu'il n'y a pas lieu d'alourdir inutilement la charge administrative de ces entreprises qui se caractérisent par leur capacité d'initiative et leur célérité. C'est ainsi que la communication sur les accords d'importance mineure réserve un traitement plus favorable aux PME qui se voient exemptées sous certaines conditions de l'application des règles de concurrence. La Commission a adopté une démarche parallèle en ce qui concerne le contrôle des aides d'État, dans ses lignes directrices sur les aides aux PME. De même, certains textes qui cherchent à alléger les contraintes règlementaires et administratives des grandes entreprises peuvent également voir leurs effets bénéfiques se répercuter au stade des PME. Ainsi, le règlement d'exemption concernant les accords de transfert de technologie qui favorise la diffusion rapide des innovations technologiques intéresse les PME qui, dans les secteurs de haute technologie, sont de grandes consommatrices de produits innovants.

Le Conseil indique également dans ses conclusions que la recherche et l'innovation constituent des facteurs importants pour la croissance et donc l'emploi. La politique de concurrence adopte en général une attitude bienveillante à l'égard de ces alliances qui contribuent à la découverte de nouveaux produits et services et à la diffusion de l'innovation technologique. Elle demeure toutefois vigilante sur le respect des principes de concurrence afin que tous les acteurs économiques puissent tirer profit de ces innovations et intensifier le jeu de la concurrence, facteur de compétitivité et de croissance. Dans cet esprit, la Commission a par exemple autorisé la création d'entreprises communes entre concurrents puissants ayant pour objet le développement et la fabrication de nouveaux produits: Pasteur Mérieux/Merck dans le domaine pharmaceutique

(1994) ou ATR/BAe dans le secteur aéronautique (1995) par exemple. La Commission est également conduite à faire en sorte que certains accords ne comportent pas de clauses qui restreignent la capacité innovatrice de l'un des contractants comme dans l'affaire Santa Cruz/Microsoft (1997). En outre, il convient de rappeler ici que la Commission cherche à faciliter la recherche et la diffusion de l'innovation en allègeant la charge administrative qui pèse sur les entreprises en en simplifiant le cadre réglementaire: citons ici l'adoption du règlement sur les transferts de technologie, déjà mentionné, ou les réflexions engagées sur le règlement d'exemption sur les accords de recherche et développement, mais aussi l'action de la Commission en ce qui concerne la société de l'information où les technologies jouent un rôle capital. Ajoutons enfin que les aides à la recherche, autorisées dès lors qu'elles ne contreviennent pas aux dispositions communautaires en matière de concurrence, peuvent constituer des incitations non négligeables à la recherche et à l'innovation.

4. L'exigence sociale

Bien entendu, l'intensification de la concurrence se traduit aussi par des restructurations et par l'éviction des acteurs du marché les moins dynamiques, ce qui inévitablement implique, de façon conjoncturelle, la fermeture d'unités de production et donc des effets négatifs sur l'emploi. Dans de telles circonstances, il est difficile d'expliquer que l'action en faveur de la compétitivité n'est pas, partiellement au moins et à court terme sans doute, destructrice d'emplois. Au-delà des solutions en termes de croissance auxquelles la politique de concurrence peut contribuer activement, il est nécessaire d'apporter une réponse sociale à ces effets conjoncturels, car l'Europe, comme le rappelait le président Santer, ne saurait être qu'un seul projet économique.

Tout d'abord, il faut souligner que dans l'application des règles de concurrence, la Commission n'ignore pas de prendre en compte des considérations d'ordre social, respectant ainsi l'objectif de cohésion économique et sociale qui figure au nombre des objectifs fondamentaux du traité. Cela est particulièrement vrai dans le domaine des aides d'État non seulement lorsqu'il s'agit d'évaluer la compatibilité des aides à l'emploi ou à la formation mais aussi lorsque la Commission apprécie la légalité de certaines aides sectorielles ou régionales et notamment les plans de restructuration qui les accompagne. Cela est vrai également dans le cadre du contrôle des concentrations. Le considérant 13 du règlement stipule en effet que "la Commission se doit de placer son appréciation dans le cadre général de la réalisation des objectifs fondamentaux du traité, y compris celui du renforcement de la cohésion économique et sociale". C'est dans l'affaire Kali und Salz/MdK que la Commission rappela pour la première fois cette exigence en autorisant une concentration sur la base du principe de l'"entreprise défaillante". De même, dans son arrêt du 27 avril 1995, (affaire Nestlé/Perrier), le Tribunal de premier instance a souligné que dans son analyse d'une concentration, la Commission peut dans certaines circonstances tenir compte de considérations d'ordre social. Rappelons enfin que la Cour de justice dans l'arrêt Metro-Saba a fait référence au progrès social comme cause d'exemption d'une entente, bien que les dispositions de l'article 85-3 du traité ne le prévoient pas de façon expresse[4]. La Commission cherche donc dans la mesure du possible à concilier les principes de libre concurrence et de cohésion économique et sociale de sorte que l'application du droit communautaire de la concurrence ne se fasse pas au mépris du tissu social.

En outre, il est nécessaire de respecter le dialogue social: informer les représentants du personnel et discuter avec eux des solutions alternatives

[4] La Cour observe en effet qu'une obligation se justifiait dans la mesure où elle constituait "en ce qui concerne le maintien de l'emploi, un élément de stabilisation dont la recherche rentre, au titre de l'amélioration des conditions générales de production, spécialement dans les circonstances d'une conjoncture économique défavorable, dans le cadre des objectifs que l'article 85-3 permet de viser".

possibles, comme le stipule la directive communautaire sur les licenciements collectifs. Ce dialogue, au-delà des exigences humaines, répond aussi à une nouvelle conception de l'efficacité économique. Associer les salariés de l'entreprise aux décisions stratégiques de ce type est un facteur de gain de compétitivité.
Il est sans doute nécessaire également d'introduire une certaine flexibilité dans le marché du travail, comme le recommandait déjà le Livre Blanc de la Commission sur la croissance, la compétitivité et l'emploi et que le Conseil de Luxembourg à fort justement rappelé, d'inciter les salariés à la mobilité professionnelle et géographique, afin de faciliter les reconversions vers les nouveaux marchés créateurs d'emploi, de développer les actions de formation et le développement des compétences au sein de l'entreprise ou encore de réduire le coût relatif de la main d'oeuvre non qualifiée. Ces mesures qui figurent dans les propositions du Groupe consultatif sur la compétitivité dépassent la politique de concurrence à proprement parler et relèvent du champ plus large de la politique économique et sociale dont la première ne constitue qu'un des aspects. Il appartient sans doute aux services en charge de la concurrence de placer leur action dans cette perspective.

5. Le contrôle des aides d'état

Il est un autre domaine important où la Commission trouve à appliquer le principe de la cohésion économique et sociale, à savoir celui du contrôle des aides d'état. Ce n'est pas sans raison que les conclusions du Sommet de Luxembourg se focalisent sur cet aspect. En effet, les aides d'État peuvent être particulièrement nuisibles au fonctionnement concurrentiel des marchés et par conséquent à la croissance et à l'emploi dans la mesure où ces aides isolent et protègent les entreprises qui en sont bénéficiaires des effets du processus concurrentiel. Les restructurations nécessaires de ces entreprises maintenues artificiellement en activité en sont retardées. Une telle situation ne manque pas de dissuader les entreprises non bénéficiaires d'entrer sur ces marchés protégés. Ainsi, les régions ou les secteurs économiques dans lesquels les aides d'État produisent leurs effets entrent-elles dans un phénomène de sclérose qui ne contribue ni à promouvoir la croissance, ni à créer des emplois stables et durables. C'est pourquoi l'article 92 du Traité interdit l'octroi d'aides publiques à certaines entreprises qui conduisent à fausser la concurrence dans le marché commun. Il n'en autorise pas moins sous certaines conditions les aides nécessaires à la restructuration des entreprises en difficulté ou au développement des régions les plus défavorisées de l'Union.

En ce qui concerne le premier point, la Commission, conformément aux lignes directrices qu'elle a publiées en 1994, subordonne l'approbation des aides à la restructuration au respect de conditions strictes qui permettent de s'assurer que ces aides, limitées dans le temps et de façon irrévocable, ne visent pas à maintenir artificiellement des entreprises, et donc des emplois, en sursis mais à opérer un rétablissement de la viabilité à long terme de l'entreprise dans un délai raisonnable. Dans ces conditions, les aides publiques concourrent à renforcer la capacité des entreprises à affronter la concurrence sur les marchés. C'est ainsi que la Commission a approuvé la recapitalisation et les plans de restructuration de nombreuses compagnies aériennes nationales, ces dernières années.

En matière d'aides à finalité régionale, la Commission sur la base de critères économiques s'attache à circonscrire les zones les plus défavorisées de l'Union et à déterminer pour chacune d'elles le niveau d'intensité des aides, afin que les aides d'état soient ciblées sur les régions de l'Union réellement en difficulté. Alors que le cinquième rapport sur les aides d'état souligne un arrêt de la tendance à la réduction des aides, la Commission vient d'adopter de nouvelles lignes directrices concernant ces aides à finalité régionale. Elles répondent au besoin de plus en plus ressenti de réduire l'effet distorsif des aides sur la concurrence et d'assurer

une plus grande efficacité pour le développement des régions en retard ou en difficulté.

Le contrôle des aides d'état contribue ainsi, de façon décisive, à la cohésion économique et sociale de l'Union européenne dans sa globalité. Il permet notamment d'éviter que certaines aides qui ne seraient pas directement liées au renforcement de la compétitivité ou du développement régional ne maintiennent artificiellement en activité des entreprises ou des régions et ne transfèrent en définitive leurs problèmes d'emploi, temporairement résolus, vers d'autres entreprises ou régions qui, elles, ne bénéficieraient d'aucune aide publique. Veiller à ce que ces transferts ne se produisent, c'est aussi anticiper sur d'éventuelles surenchères entre États ou régions en ce qui concerne le volume des aides accordées pour un résultat neutre en matière d'emplois.

Enfin, la Commission est particulièrement attentive aux aides publiques destinées à l'emploi. De manière générale, un dispositif d'allégement de charges sociales pour un secteur d'activité particulier est considéré comme un système d'aides au fonctionnement. Ces dernières sont reconnues comme perturbant fortement les échanges intra-communautaires et faussant gravement la concurrence entre les États membres sur le long terme. La Cour de justice a confirmé dans sa jurisprudence le caractère d'aide d'État de toute mesure d'allégement de charges sociales ou fiscales qui ne se justifie pas par la nature et l'économie du système dans lequel elle s'inscrit.

En revanche, la Commission a fait preuve d'ouverture et de bienveillance à l'égard d'aides à l'emploi notamment pour les catégories les plus défavorisées de chômeurs ou pour les zones urbaines difficiles tout en s'entourant des garanties nécessaires pour donner un véritable effet utile à l'objectif de création nette d'emplois stables. C'est ainsi qu'à la suite de la notification par la France de son pacte de relance pour la ville, consistant notamment dans des interventions financières de l'État, la Commission a exprimé une position de principe favorable à l'égard de ces aides dont l'objectif est de résoudre autant que faire se peut les problèmes dont souffrent certaines zones urbaines.

Conclusion

Contrairement à une idée reçue, la mise en oeuvre d'une politique de concurrence est compatible avec une action en faveur de l'emploi. Elle est à même en effet de contribuer au maintien voire à la création d'emplois stables et durables en Europe. Dans un contexte d'internationalisation croissante des marchés, la bataille pour l'emploi se gagnera sur le terrain de la compétitivité. A certains égards, il n'est pas faux d'affirmer qu'un marché à haut degré de concurrence prépare les emplois de demain.

À n'en pas douter, une politique de concurrence, menée sans raison, serait à tout le moins indifférente vis-à-vis de l'emploi. Or, la Commission conduit sa politique de concurrence de façon équilibrée en respectant le principe de cohésion économique et sociale ou celui de service d'intérêt général, dès lors que le fonctionnement concurrentiel des marchés n'est pas mis en cause. Il s'agit non pas d'appliquer les règles de concurrence de manière extrême, mais de tenir compte des difficultés sociales dans une mesure compatible avec les règles du traité.

La Commission ne méconnait pas les effets destructeurs sur l'emploi des restructurations qu'implique l'intensification de la concurrence. C'est pourquoi, elle promeut le dialogue social qui est à la base du modèle européen mais incite également les partenaires sociaux à faire preuve d'imagination en matière d'organisation du travail et soutient les actions menées en matière de flexibilité ou de temps partiel qui ont donné des résultats encourageants dans certains États membres de l'Union.

La bataille pour l'emploi se gagnera de deux façons :

-par le développement de la croissance économique, en

misant notamment sur l'innovation et les produits de haute technologie;

-par une modification de l'organisation du travail dans le sens d'une plus grande flexibilité, sans renoncer pour autant au modèle social européen.

Commission Practice concerning excessive pricing in Telecommunications

By Marcel HAAG and Robert KLOTZ, DG IV-C-1

Some of the main recent controversial issues in the telecommunications sector are related to prices for access to services, networks and other facilities of the incumbent telecommunications operators. Already in the run-up to the full liberalisation of the European telecommunications sector as from 1 January 1998 (cf. Article 2 of Commission Directive 90/388/EEC, OJ No L 192, 24.7.1990, p. 10, as amended by Commission Directive 96/19/EC, OJ No L 74, 22.3.1996, p. 13), network access pricing and, more specifically, interconnection tariffs have proven to be of crucial importance for the market entry of competitors. After the full liberalisation, access pricing by the incumbent operators has become even more important, as competitors try to gain market share in the core markets of the traditional carriers, i.e. voice telephony and the underlying network infrastructure.

THE GENERAL FRAMEWORK

As the central problem of opening up telecommunications markets, certain aspects of access to facilities of the former monopoly undertakings have been specifically addressed in secondary Community legislation. For interconnection to the telephone network, the most important examples of access in telecommunications, a set of sector-specific rules were created in the framework of the directives on Open Network Provision (ONP), especially by the one concerning interconnection (Directive 97/33/EC, OJ No L 199, 26.7.1997, p. 32). These provisions, which have to be transposed by the Member States into domestic law and applied by the national telecommunications regulators, are more specific than the general competition rules of the EU and will make their application unnecessary in many cases. In principle, though, the competition provisions, including Article 86 EC-Treaty, continue to be applicable alongside the ONP rules. However, Article 86 EC-Treaty empowers the Commission only to carry out an a posteriori control of abuse. This means that, in general, the Commission is entitled to intervene, be it at its own initiative or upon a complaint, only once the prices are effectively charged by the telecommunications operator concerned.

To take account of the importance of the competition related problems of access in telecommunications, the Commission adopted on 31 March 1998 a notice on the application of the competition rules to access agreements in the telecommunications sector (cf. the contribution by *K. Coates* in this issue), which inter alia explains how the Commission intends to apply Article 86 EC-Treaty to these issues.

According to Article 86 EC-Treaty, the abuse of a dominant position within the common

market shall be prohibited. This provision explicitly mentions in its paragraph 2 lit. a that such an abuse may in particular consist in "directly or indirectly imposing unfair purchasing or selling prices to other companies". In case that such an abuse is found, the Commission is empowered, pursuant to Council Regulation 17/62 implementing Articles 85 and 86 EC-Treaty (OJ No. 13, 21.2.1962, p. 204/62), to oblige the companies concerned to terminate the abuse and to impose fines.

Although price abuses are explicitly mentioned in Article 86 EC-Treaty, formal Commission decisions concerning price abuse are rare. One of the main reasons for the absence of a more extensive case law can be found in the practical difficulties of establishing price abuse. In particular as regards excessive pricing, little case law has developed so far.

According to the European Court of Justice, a price is excessive if it is "excessive in relation to the economic value of the service provided" (Case 26/75, *General Motors Continental*, ECR 1975, p. 1367, para. 12). The Court held that one method of establishing a price excess is by comparing the price and the production cost of a product. In *United Brands*, the Court stated that an "excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production" (Case 27/76, *United Brands*, ECR 1978, p. 207, para. 251). However, given the practical difficulties in many cases to determine the production cost of a product or service, the Court also admitted other methods of calculation. In *Ahmed Saeed*, the Court indicated that Community legislation setting out pricing principles may be taken into account (Case 66/86, *Ahmed Saeed*, ECR 1989, p. 838, para. 43). Furthermore, such an assessment may be made by comparing the prices charged for the same product or service on other geographic markets (cf. Case 395/87, *Tournier*, ECR 1988, p. 2521, para. 38; and Joint Cases 110/88, 241/88 and 242/88, *Lucazeau*, ECR 1988, p. 2811, para. 25). In these cases, the Court stated that "when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case, it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member States concerned and the situation prevailing in all the other Member States." In particular, a comparison between the prices charged by a dominant undertaking and those charged on comparable competitive markets could, according to the Court, provide a basis for assessing whether or not the prices charged by the dominant undertaking are fair (cf. Case 30/87, *Bodson*, ECR 1988, p. 2507, para. 31).

The assessment of the cost of a service is particularly difficult in the telecommunications sector, as many of the dominant operators in the EU have until recently been operated as government departments under public budget rules. Appropriate cost allocation is therefore currently in many cases impossible. In the future, however, it can be expected that cost allocation will be facilitated by the cost accounting requirements set out in the ONP framework (cf. Article 7 of European Parliament and Council Directive 97/33/EC, OJ No L 199, 26.7.1997, p. 32).

RECENT PRACTICE IN THE ASSESSMENT OF PRICE ABUSE

In spite of the practical difficulties entailed in the application of Article 86 EC-Treaty to excessive pricing, the Commission assessed a number of such cases in the telecommunications sector. The Commission's recent practice in this field can be illustrated by the following examples:

1. Upon a complaint by ITT Promedia, the Belgian directory-publishing subsidiary of the US ITT World Directories company, the Commission

investigated into Belgacom's prices for access to subscriber data for the publication of telephone directories. The complainant alleged that the prices charged by the Belgian incumbent telecommunications operator were excessive and discriminatory in the sense of Article 86 EC-Treaty. The Commission carried out an assessment of the prices charged, with the support of an expert auditing firm, and insisted in fully implementing the cost-orientation principle. After the Commission had sent out a formal statement of objections at the end of 1995, Belgacom finally agreed, in a settlement with the Commission, to a substantial reduction (by more than 90%) of these prices by dropping any variable component in relation to the turnover or profit of directory publishers. Following the complainant withdrawing its complaint, this procedure was terminated by the Commission in April 1997 (cf. Press Release IP/97/292 of 11.4.1997).

2. In another case, the Commission dealt with the problem of access to the network of Deutsche Telekom (DT) on the basis of a complaint against DT's business customer tariffs, which was lodged by certain providers of corporate network services in Germany. The Commission found in this case that the introduction of such tariffs lead to an abusive price-cost squeeze on competitors. To get rid of this effect, the Commission invited DT inter alia to conclude more favourable agreements on access to the public telephone network with competitors. DT subsequently put forward an agreement stipulating prices which were unacceptable to competitors. A comparative market study ordered by the Commission showed that the proposed prices were exorbitant. In this study, it was assumed that, in the absence of special circumstances, a price is highly likely to be abusive if it exceeds by more than 100% the ones found on comparable competitive markets and that under those circumstances, the continuation of the procedure would normally be warranted. As a result, DT declared itself willing to substantially reduce its tariffs and presented an appropriate draft contract to the complainants. The tariff reductions conceded by DT were considerable, as they range from 38% in the case of local network access to 78% for access to the long-distance network (cf. Press Release IP/96/975 of 4.11.1996; and *K. Van Miert*, Wirtschaft und Wettbewerb, 1/1998, p. 7).

3. In an own-initiative procedure regarding access pricing, which was opened in the early days of January 1998, the Commission proceeded against DT's high fees concerning the provision of carrier-preselection and number portability. In order to determine whether these fees were excessive in the sense of Article 86 EC-Treaty, the Commission used its powers under Article 11 of Regulation 17/62 to request information from undertakings and industry associations in all EU Member States. With the help of the replies provided, the Commission established a comparative market analysis, on the basis of which an abuse assessment could be carried out. In the course of the procedure, DT considerably reduced the amounts of the fees concerned, notably for carrier preselection by almost 50%. As Community interest and the rights of third parties did not require that the Commission continued its examination pending a parallel procedure before the national regulatory authority, the own-initiative procedure was terminated and the analysis of the information received was communicated to the competent national authorities in order to support them in their investigation of the case (cf. Press Release IP 98/430 of 13.5.1998).

CONCLUSION

The preceding examples show that in recent cases of alleged excessive pricing in the telecommunications sector, the Commission used a cost-price analysis (see case 1, *supra*) or, where necessary, a comparative market analysis (see cases 2 and 3, *supra*), in order to assess a possible abuse. Given that an extensive body of sector-specific legislation, including pricing principles, is now in place, the Commission might in the future, where appropriate, also take those principles into account in

an assessment of a possible price abuse.

In some of the above mentioned cases, it appears that the Commission had to use a comparative approach, because the necessary cost information was not available. To carry out a comparative analysis, the Commission either used expert studies, in particular where complex accounting information was required (see case 2, *supra*) or information gathered on the basis of requests for information in accordance with Regulation 17/62 (see case 3, *supra*). It is clear that a market comparison can only provide an indication of an abuse, if the difference between the prices charged on the various markets is significant. On the contrary, in cases were the prices charged deviate only slightly from the price level on comparative markets, this disparity could not be considered as giving a prima facie indication for abuse. Depending on the merits of each individual case, the benchmark for Commission intervention may vary considerably. In the second case mentioned above, a difference of more then 100% between the price examined and the price levels in comparative markets was found to be unacceptable. In other cases, however, the Commission might have to intervene even if this difference is significantly smaller. In any event, even where a significant difference exists, the undertaking concerned always has the possibility of demonstrating that higher prices are objectively justified.

The Commission itself never aspired to use Article 86 EC-Treaty in order to act as a price setting authority (cf. already the Fifth Report on Competition Policy, 1975, point 76). Recent Commission practice in cases concerning the telecommunications sector is fully in line with this general policy. Price regulation has been left to the national regulatory authorities, acting on the basis of sector-specific telecommunications regulations, which are harmonised under the EC rules on ONP. However, it has also become clear that the Commission will make full use of its powers under Article 86 EC-Treaty wherever this is necessary to prevent abusive pricing strategies and in particular excessive pricing obstructing effective market entry on the liberalised telecommunications markets.

Commentaire sur l'Arrêt de la Cour du 31 mars 1998 dans l'affaire 'Kali und Salz'

F. E. González-Díaz, DG IV-B

Le 31 mars 1998 la Cour a rendu son arrêt dans les affaires mettant en cause la légalité de la décision du 14 décembre 1993 par laquelle la Commission a déclaré, sous conditions, le projet de concentration entre Kali und Salz AG (ci-après K+S) et Mitteldeustche Kali AG (ci-après MdK) compatible avec le marché commun.

Cette décision avait fait l'objet de deux recours, l'un intenté par la République française, l'autre intenté par la Société commerciale des potasses et de l'azote (ci-après SCPA) et par la société Entreprise minière et chimique (ci-après EMC), entreprise mère de SCPA.

Les griefs des requérantes à l'égard de la décision peuvent être résumées comme suit:

a) la Commission n'aurait pas respecté l'obligation qui lui incombe de collaborer avec les autorités nationales en vertu de l'article 19 du

règlement sur les concentrations en ce que, d'une part, elle n'aurait pas fourni en temps utile des données indispensables à l'appréciation de la pertinence de la définition des marchés en cause et de l'impact concurrentiel de l'opération de concentration, et, d'autre part, la remise de ces données à l'occasion de la réunion du comité consultatif aurait été beaucoup trop tardive;

b) la Commission aurait fait une application incorrecte de la "failing company defence" dans son appréciation de l'effet de la concentration sur le marché allemand en ce qu'elle n'aurait pas pris en compte la totalité de critères retenus dans la réglementation antitrust américaine, qu'elle aurait introduit arbitrairement le critère de l'absorption des parts de marché, qu'elle aurait négligé l'éventualité que MdK puisse, avec des aides d'État, retrouver sa viabilité ou la possibilité de reprise moins dommageable pour la concurrence, et, enfin, qu'elle aurait dû imposer des conditions précises et suffisantes visant à ouvrir le marché pertinent à la concurrence;

c) la Commission aurait fait une appréciation erronée de l'opération de concentration sur le marché communautaire à l'exception de l'Allemagne en ce que: i)le marché géographique de référence aurait été incorrectement défini; ii)le règlement sur les concentrations ne serait pas applicable à la création et/ou renforcement d'une position dominante collective; iii)à supposer même que le règlement soit applicable à ce genre de situations, l'opération de concentration ne donnerait pas lieu, en l'espèce, à la création d'une position dominante collective;

En ce qui concerne la prétendue violation de l'article 19 du règlement sur les concentrations, la Cour se borne à constater que les données demandées par les autorités françaises (et transmises par la Commission à l'occasion de la réunion du comité consultatif) n'étaient pas de nature à remettre en cause l'état du marché tel que résultant des informations contenues dans l'avant-projet de décision qui, lui, avait été transmis en temps utile aux autorités françaises et au comité consultatif. La Cour a donc suivi, du moins implicitement, sa jurisprudence traditionnelle en matière de violation de droits procéduraux selon laquelle ce type de violations n'est susceptible d'entraîner l'annulation d'une décision que lorsque l'absence d'irrégularité aurait pu conduire à un résultat différent de celui qui aurait été retenu si ces droits procéduraux avaient été respectés.

Pour ce qui est de l'application de la "failing company defence", la Cour accepte la thèse soutenue par la Commission selon laquelle dès lors qu'une opération de concentration n'est pas la **cause** de la création ou du renforcement d'une position dominante affectant de manière significative la situation concurrentielle sur le marché pertinent, il y a lieu de la déclarer compatible avec le marché commun ainsi que les critéres d'application de cette théorie.

S'agissant de la critique de la France selon laquelle la Commission aurait négligé l'éventualité que MdK puisse, avec des aides d'État, retrouver sa viabilité, l'analyse de la Cour est fort intéressante.

Selon la Cour l'argument de la République française n'était pas fondé étant donné que, en l'espèce, MdK avait déjà reçu des aides d'État considérables et que même avec les aides prévues dans le projet de concentration, à savoir 1 044 millions de DM, il n'était pas probable qu'elle pouvait devenir viable.

Or, bien que la Cour n'ait pas fait, du moins formellement, de l'examen des possibilités de restructuration une condition d'application de la "failing company defence", l'on ne saurait exclure, compte tenu de l'analyse qu'elle a réalisée aux points 117 à 120 de l'arrêt, que l'absence d'examen de cette question puisse s'avérer fatal dans une autre affaire. Par ailleurs, il semble logique de considérer que si l'entreprise défaillante a des chances de se restructurer, éventuellement après avoir obtenu des aides d'État compatibles avec le marché commun, il est préférable, du point de vue de la protection de la libre concurrence, d'interdire la concentration. Néanmoins, ces

possibilités de restructuration ne devraient pas être purement hypothétiques mais devraient être fondées, d'une part, et par analogie avec les règles en matière d'aides à la restructuration, sur la base d'un plan de restructuration crédible, et, d'autre part, sur l'existence d'une forte probabilité d'obtention des aides en question.

En ce qui concerne la définition du marché géographique de référence, la Cour a suivi son approche traditionnelle en la matière. Ainsi, elle a mis l'accent sur l'existence d'un volume appréciable d'importations dans tous les États membres, à l'exception de l'Allemagne, en provenance d'autres États membres, sur l'homogénéité du produit et l'absence de préférences marquées du consommateur pour des spécialités qui ne sont disponibles qu'auprès des producteurs locaux, sur l'uniformité des prix dans tous les pays de la Communauté à l'exception de l'Allemagne et sur l'absence d'obstacles aux flux commerciaux à l'intérieur de la Communauté hormis l'Allemagne en termes de coûts de transport ou d'accès aux canaux de distribution.

Pour ce qui est de l'applicabilité du règlement aux positions dominantes collectives, la Cour a accepté l'interprétation de la Commission selon laquelle s'il était admis que seules les opérations de concentration qui créent ou renforcent une position dominante des parties à la concentration sont visées par ce règlement, la finalité de celui-ci telle que résultant de ses considérants serait partiellement mise en échec en le privant ainsi d'une partie non négligeable de son effet utile, sans que cela s'impose au regard de l'économie générale du régime communautaire de contrôle des opérations de concentration.

En ce qui concerne la constatation de l'existence d'une position dominante collective dans le cas d'espèce, la Cour commence son analyse en décrivant le type d'analyse et les éléments de base caractérisant l'existence d'une position dominante collective.

D'après la Cour, s'agissant d'une prétendue position dominante collective, la Commission est tenue d'apprécier, selon une **analyse prospective du marché de référence**, si l'opération de concentration dont elle est saisie aboutit à une situation dans laquelle une concurrence effective dans le marché en cause est entravée de manière significative par les entreprises parties à la concentration et une ou plusieurs entreprises tierces qui ont, ensemble, notamment en raison des **facteurs de corrélation** existant entre elles, le pouvoir d'adopter une même ligne d'action sur le marché et d'agir dans une mesure appréciable indépendamment des autres concurrents, de leur clientèle et, finalement, des consommateurs[1].

Selon la Cour, une telle démarche nécessite **un examen attentif** notamment des circonstances qui, selon chaque cas d'espèce, se révèlent pertinentes aux fins de l'appréciation des effets de l'opération de concentration sur le jeu de la concurrence dans le marché de référence.

En ce qui concerne le critère de la part de marché, la Cour constate qu'une part de marché totale d'environ 60 % **répartie** à concurrence de 23% pour K+S/MdK et de 37% pour SCPA ne saurait constituer par elle-même un indice décisif de l'existence d'une position dominante collective desdites entreprises.

En d'autres mots, en l'absence de symétrie entre les parts de marché des entreprises en cause, l'existence de parts de marché combinées assez élevées ne constitue pas un indice décisif de l'existence d'une position dominante collective.

Quant aux liens structurels entre K+S et SCPA, dont l'existence a constitué le facteur essentiel sur lequel s'est fondée la Commission pour conclure à la création d'une position dominante collective, la Cour observe que la Commission n'a pas établi à suffisance de droit l'existence d'une **relation causale** entre l'appartenance de K+S et de SCPA au cartel à l'exportation et leur comportement anticoncurrentiel sur le marché en cause.

La Cour exige donc que la Commission montre clairement

[1] Cette référence à l'existence de **facteurs de corrélation** entre les membres de l'oligopole sembler indiquer que la Cour n'exclut pas, a priori, l'application de la théorie de l'oligopole à des cas de concentration même en l'absence de lien structurels au sens strict du terme.

une relation causale entre le lien structurel et le comportement escompté des entreprises sur le marché. Il ne suffit donc pas de mentionner toute une série de liens structurels entre les membres de l'oligopole pour que la Cour accepte que ces liens sont de nature à éliminer leurs rapports de concurrence.

Pour ce qui est des liens entre K+S et SCPA relatifs aux livraisons de K+S en France, la Cour relève que les seuls liens spécifiques de distribution existant entre ces deux entreprises portaient sur la kiesérite, c'est-à-dire un produit ne relevant pas du marché du produit en cause, et que pour le reste, SCPA se limitait à acheter à K+S, aux conditions normales de marché, de la potasse utilisée par EMC ou destinée à la vente en dehors du marché français. La Cour constate donc que K+S et SCPA n'avaient aucun rapport privilégié pour la distribution de produits à base de potasse.

La Cour en conclut que le faisceau de liens structurels unissant K+S et SCPA, qui, selon la décision constituait le coeur de la décision litigieuse, n'est pas aussi dense et probant que ne l'a voulu faire apparaître la Commission.

Néanmoins, et malgré le fait que la Cour aurait pu terminer à ce stade ci son analyse de cette partie de la décision attaquée, étant donné que selon la décision elle-même en l'absence de liens structurels la concentration n'était pas de nature à créer une position dominante collective, elle examine également la question de savoir si l'argument sous-jacent à la constatation de la création d'une position dominante collective entre K+S/MdK et SCPA, selon lequel l'«importante» agrégation de MdK à la seule entreprise K+S maintiendra dans le chef du groupe allemand et SCPA un **intérêt commun** à ne pas s'engager dans une concurrence active l'un vis-à-vis de l'autre, est ou non suffisamment fondé.

Or, bien que la Cour considère que, compte tenu des asymétries en termes de capacité de production ainsi qu'en termes de puissance économique entre K+S et MdK, d'une part, et SCPA, d'autre part, et du fait que, un marché en baisse, tel que celui de la potasse, est généralement considéré comme favorisant, en principe, la concurrence entre les entreprises du secteur concerné (points 235 à 239 de l'arrêt), l'existence de cet intérêt commun n'a pas, en l'absence d'autres éléments décisifs, été prouvé, cette démarche sembler confirmer que la Cour n'est pas hostile à l'idée que l'existence d'une position dominante collective puisse être démontrée même en l'absence de liens structurels entre les membres de l'oligopole.

En ce qui concerne l'accord entre K+S et SCPA interdit par la Commission en 1973, la Cour considère qu'il constitue, en raison du temps écoulé, un indice extrêmement faible, voire insignifiant pour faire présumer l'absence de concurrence entre K+S/MdK et SCPA.

Enfin, s'agissant de l'analyse de la Commission relative au degré de pression concurrentielle pouvant être exercée par les concurrents sur le prétendu groupe formé par K+S/MdK et SCPA, la Cour constate que, contrairement à ce qui a été dit dans la décision attaquée, les possibilités de concurrence des producteurs établis dans la CEI et du producteur espagnol avaient été soit incorrectement évaluées soit sous-estimées.

Dans ces conditions, la Cour a conclu que la Commission n'est pas parvenue à démontrer l'absence d'un contrepoids concurrentiel effectif à l'égard du prétendu groupe formé par K+S/MdK et SCPA.

En ce qui concerne la portée de l'arrêt d'annulation, la Cour a considéré qu'une annulation limitée à la partie du dispositif de la décision litigieuse qui porte sur les conditions et obligations énoncées à son point 63 n'était pas possible sans que la substance de cette dernière soit modifiée. En effet, selon la Cour lesdites conditions forment, avec la déclaration de compatibilité contenue dans le dispositif, une unité indissociable. La Cour a donc annulé la totalité du dispositif de la décision litigieuse. Ceci signifie qu'en principe la Commission serait libre, à l'issue de l'examen de l'opération de concentration telle que notifiée prévu à l'article 10, paragraphe 5 du règlement sur les concentrations, soit de la déclarer compatible, avec ou sans conditions, avec le marché commun soit de l'interdire si,

compte tenu des conditions du marché présentes au moment de la reprise de la procédure, cela s'avère nécessaire.

En conclusion, l'arrêt de la Cour a été globalement favorable à la Commission. En effet, sur le plan des principes, la Cour a accepté l'interprétation du règlement proposée par la Commission concernant tant son applicabilité à la création ou au renforcement d'une position dominante collective que la théorie de la société défaillante. Elle a été aussi sensible aux difficultés administratives découlant des délais rigoureux imposés par le règlement dans son examen des critiques formulées par le gouvernement français à l'égard de la mise en oeuvre du devoir de collaboration étroite et constante avec les autorités nationales chargées des questions de concurrence. Quant à l'analyse au fond, elle a accepté la définition du marché proposée dans la décision. S'agissant de l'application de la théorie de l'oligopole aux faits de l'espèce, elle n'a pas remis en cause les critères de base proposés par la Commission mais plutôt l'examen des faits lui servant de soutien nécessaire. Elle s'est donc bornée à rappeler les obligations qui incombent à la Commission en matière d'instruction d'affaires de concurrence tout en mettant l'accent sur les difficultés découlant de l'analyse prospective qui caractérise l'examen préventif des opérations de concentration. Enfin, en annulant la totalité du dispositif de la décision, elle a fait preuve de son respect pour une allocation correcte de tâches entre les institutions.

Comment on the Judgment of the Court of 2 April 1998, Case C-367/95 P: Commission of the European Communities and French Republic v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL

Ansgar HELD, DG IV-G-1

1. The Background

With judgment of 28 September 1995 the Court of First Instance (CFI) annulled a Commission decision to reject the applicant's request to declare that the French Government has infringed Art 92 and 93 of the Treaty by granting aid to Sécuripost. On 2 April 1998 the European Court of Justice (ECJ) rejected an appeal of the Commission against this judgment.

a. The Facts

In 1987 the French Post Office entrusted to its newly created subsidiary company Sécuripost SA the transportation of money and valuables, which it had previously carried on itself. The applicants are operating in the same market. In September 1989 they filed a request asking the Commission to declare, that several aspects in the relation between the Post Office and Sécuripost constituted state aid and would be in violation of Art 92 and 93 of the Treaty. These circumstances namely regarded

- Leasing of buildings to Sécuripost
- Maintenance of Sécuripost's vehicles
- A loan of 15 000 000 FF
- The prices paid by the Post Office for the transport services
- The secondment of administrative staff of the Post Office to Sécuripost with the possibility to reassign the officials in case of staff reduction, saving Sécuripost the costs for redundancy compensation
- The consequent absence of contributions by Sécuripost to unemployment insurance funds.

In January 1993 the Commission informed the applicants that it had entered the measures mentioned above in the register of non notified aids. On 31 December 1993 the Commission informed the French government that it has decided to close the investigation because the contested circumstances did not constitute state aid. On that same day it sent a letter to the applicants, responding to their arguments and informing them about its decision.

b. Decision of the Court of First Instance

On 2 March 1994 the applicants filed an action against this decision at the CFI. The Court admitted the action, considering the letter of the Commission of 31 December to the applicants as a decision within the meaning of Art 189(4). The Court annulled the Commission decision for lack of sufficient statement of reasons, constituting an infringement of Art 190 of the Treaty. It held that the reasons stated for the decision do not bear out the conclusion that the measures complained of by the applicants did not constitute state aid within the meaning of Art 92.

The Court maintained that the Commission, if the complainant was not able to comment on information obtained in the context of the investigation, is under an "automatic" obligation to examine any objection the complainant would have raised if it had been given the opportunity to comment on this information. More alarming for Commission services sounded the opinion of the Court that the obligation to state reasons for its decision may in some circumstances require an exchange of views and arguments with the complainant. It found this necessary for the Commission in order to ascertain what view the complainant takes of the information gathered by it in the course of its inquiry.

The Court, consequently, did not any more address the issue whether the treatment of Sécuripost by the Post Office constituted state aid or not.

2. The Decision of the Court of Justice

On appeal of the Commission the ECJ upheld the decision of the prior instance, at least in the result.

a. Addressee of the Commission Decision

The ECJ agreed with the Commission's view that the complainants were not the addressees of the Commission decision. It underlined that any decision adopted by the Commission in the area of state aids is only addressed to the Member States concerned. This applies also if the decision concerns complaints from private persons against state measures, which they consider to be state aid. If the Commission takes such a decision and informs the complainant as a measure of good administration, it still is the decision addressed to the Member State which has to be the subject of an action of a third party and not the letter informing this party about the decision.

This legal error, however, did not affect the Court's decision. The Commission could nevertheless be challenged in the Court by private enterprises for its conclusions in the matter since the complainants, as competitors of Sécuripost, are in any case directly and individually affected by the decision (Art 173(4)). They must have the possibility to contest the decision not to open the Art 93(2) procedure.

b. Violation of Art 190

The ECJ underlined that it is the Commissions obligation, pursuant to Art 190, to explain to a complainant in a sufficiently clear way, for what reasons the factual or legal elements of the complaint were not sufficient to suggest the existence of state aid. This obligation, however, the Court underlined, does not include a duty of the Commission to enter into a debate with the complainant. That would clearly overstate the procedural obligations within the preliminary proceeding before the opening of the procedure according to Art 93(2).

Such an obligation would indeed gravely impede the efficient work of the responsible Commission services and be contradictory to the Commission's duty to conclude the preliminary phase of the procedure without delay. In this stage therefore it cannot be concluded from the obligation to give a motivation for decisions that hearings with affected parties are held.

There is furthermore, the Court stated, no obligation for the Commission to put itself *ex officio* in the place of the complainant and to examine any possible comment he could have made to facts and observations that came up during the investigation.

Nevertheless the Court upheld the finding of the first instance that the decision of the Commission was not sufficiently motivated. In its view the Commission failed to give reasons why it did not consider as state aid the secondment of Post Office staff to Sécuripost, with the possibility to return it to the Post Office, and the saving of unemployment fund contributions by the said company.

Concerning the other complaints mentioned above the ECJ admitted that the CFI had confounded the violation of the procedural obligation of Art 190 and the legality of the decision. While the former constituted an infringement of an essential procedural requirement in the sense of Art 173, the latter would be a question of the infringement of the Treaty or a rule of law relating to its application and could only be assessed by the court if invoked by the applicant. In fact the CFI had concluded that the Commission had not sufficiently assessed and examined the relevant facts and erroneously considered this as lack of motivation.

The ECJ did, however, not assess the findings of the first instance with regard to the possible manifest error of appreciation. It did also not address the question whether the applicants have invoked these issues of law. It contented itself with the statement that the attacked decision suffers in any case from a lack of motivation. This would in itself be perfectly sufficient to justify its annulment and consequently the rejection of the Commission's appeal.

c. Consequences

The wrong assessment of several parts of the Commission decision therefore did not lead to a revision of the court ruling. The ECJ confirmed the annulment of the entire decision. It had, indeed, no other choice. If only a part of the decision is not sufficiently motivated, this affects the essential of the whole decision to open an Art 93(2) procedure or not. Any further assessment as to the compliance of other parts of the decision with Community law was unnecessary.

The Commission has to take the decision in question anew. In fact it has already decided to open the Art 93(2) procedure in 1996, after the ruling of the CFI. Any decision closing this procedure needs, of course, to meet at least the same procedural standards as the challenged decision, if not even more, given that the procedure in question was just a preliminary one.

3. Conclusion

The judgment confirmed but did not widen the procedural position of private complainants in an Art 93 proceeding. The Commission will have to take the new decision in respect of all 6 points raised by the applicants. Apart from the necessity to motivate all parts of the new decision, it will certainly be helpful to consider the remarks the CFI has made with respect to a manifest error of appreciation.

In any case it is to be welcomed in the interest of administrative efficiency that the ECJ denied the existence of an obligation for the Commission to enter into controversial debates with complainants in the course of the preliminary proceeding of Art 93(3). It can be questioned, of course, if it wouldn't have been appropriate to open the Art 93(2) procedure in a case where the "preliminary" phase already lasted more than 4 years.

Recent Developments

Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector

Kevin COATES, DG IV-C-1

Background

On 31 March 1998, the Commission adopted a Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (the Access Notice).

The purpose of the Access Notice is three-fold:

- To set out access principles stemming from EU competition law as shown in a large number of Commission decisions in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors;
- To define and clarify the relationship between competition law and sector specific legislation under the Article 100A framework (in particular this relates to the relationship between competition rules and Open Network Provision legislation);
- To explain how competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context.

It is hoped that the Notice will be of assistance not only to operators in the sector, but also to national courts, competition authorities, and, particularly, regulatory authorities, the latter being obliged by Community law to take account of Community competition law provisions in their implementation of the regulatory framework.

The Notice is not a formal legal text, but is an expression of the Commission's view as to the best interpretation of Community competition law as it applies to the most important issues in the telecommunications sector. The Commission will follow the approach set out in the Access Notice not only in cases pending before it, but also in the context of any comments it may make on cases pending before the Court of Justice or Court of First Instance. The Commission will also apply the principles set out in the Notice in the context of any requests from national courts or authorities for guidance on the application of the competition rules.

Procedural Issues

The first section of the Notice examines various procedural issues of particular relevance to the telecommunications sector. Community law has established a sector specific regulatory regime for the telecommunications sector, responsibility for which is largely in the hands of national regulatory authorities (NRAs) established in each Member State.

There are large areas of overlap between the responsibilities of these NRAs, and the responsibility of the Commission and of national competition authorities to apply Community competition rules. Given this overlap the Commission has sought to provide guidance as to when it will be appropriate for the Commission to act in a particular case.

There is no change in cases which must be notified under Regulation 17 in order to benefit from an exemption. Similarly, cases which fall under the Merger Regulation are unaffected by the Notice.

In cases where it is not necessary to notify to the Commission and which fall within the jurisdiction of the NRAs, the Commission would encourage applicants to

approach the NRAs in the first instance, approaching the Commission only if the applicant feels that its rights under Community competition law have not been respected. The Commission is encouraging this decentralised approach given the more detailed and specific powers given to NRAs. However, applicants continue to have rights under Community competition law and the Commission must intervene where there is no other appropriate means of protecting those rights. The Notice therefore sets out the criteria where the Commission will intervene.

Market Definition

The Commission has approved a Notice on Market Definition, and Notices such as the Access Notice will simply refer to the more general Notice on Market Definition, with further explanation being limited only to points of particular importance to the subject in question.

The Access Notice therefore sets out in general terms the distinction between the provision of services, and the provision of access to the facilities necessary to provide those services to end-users. The distinction is important to bear in mind, as historically telecoms operators are vertically integrated and would not necessarily have distinguished between their different operations.

Substantive Issues

Article 86

The section on Article 86 is probably the most important aspect of the Notice. It sets out a number of practices which could constitute abuses where operators are either solely or jointly dominant.

In relation to refusals to grant access to facilities, this could constitute an abuse on the basis of a number of different legal arguments:

- essential facilities: if the facility is essential to the business of the requesting party;
- discrimination: if the facility is refused to the requesting party, but is made available to its competitors;
- bundling: if the requesting party is offered access to the facility only in combination with other elements which the requesting party does not require.

The Notice also looks at some detail at various pricing problems:

- excessive pricing: if the price charged for a good or service is unrelated to the costs of provision. In determining this the Commission can have regard to the actual costs of provision, the price charged by the operator for comparable goods or services, the price charged in other geographic areas, or the price which would prevail in a competitive market (building on the work of the Commission and national regulatory authorities in this area).
- discriminatory pricing: if an operator charges different prices for equivalent transactions, where such discrimination could have an effect on competition. One example of this would be if a dominant telecoms operator charged different prices for call termination depending on whether the call originated on a fixed or a mobile network.
- predatory pricing: if an operator charges a price for a good or service below which it could only make a profit by weakening or eliminating one or more competitors. Again, drawing on the work of the Commission and the national regulatory authorities, this determination would tend to be based on costs which are incremental to the provision of the service, over a period of longer than one year.

Article 85

The Notice also looks briefly at Article 85 issues: in the current development of the telecommunications sector, there is relatively little concern about the possible anti-competitive implications of interconnection agreements. Concerns related to market partitioning may develop over time, however, and this is an area which the Commission will keep under careful review.

Conclusions and Review

The Commission has indicated that the Notice will be kept under general review in light of technical and economic developments in the market, and particularly in light of the implications of the convergence of the telecommunications, media and information technology industries.

The principles set out in the Notice do, however, apply to other sectors to the extent that comparable problems emerge, and it is anticipated that the Access Notice will be a useful reference for competition problems in areas other than traditional telecommunications.

Recent important decisions

EACEM scheme to reduce stand by power use of TVs and VCRs receives a comfort letter because of its environmental benefits

John FINNEGAN, DG IV-C-3

The European association of consumer electronics manufacturers (EACEM) and sixteen of its members, all major manufacturers of televisions and video recorders, made a voluntary commitment to reduce the electricity consumption of televisions and video recorders when they are in "stand by" mode. Although such an agreement between competing manufacturers to act in parallel can be seen as a restriction of competition in breach of Article 85(1) of the Treaty, the environmental benefits of the scheme, the fact that these benefits will be shared with consumers and the fact that the scheme will not eliminate competition in the sector mean that the scheme meets the conditions for the grant of an exemption under Article 85(3) of the Treaty. The scheme was devised in consultation with the staff of DG XVII - Energy of the Commission. The reduction in power use could result in total European electricity use being 3,2 TWh lower each year than it would otherwise have been by 2005. This energy saving will have significant environmental benefits, reducing CO2 emission, resource use and global warming.

The vast majority of televisions and video cassette recorders in use are operated using a remote control, and are typically turned off using a remote control rather than disconnected totally from their power supply. Turning a television or video cassette recorder off using a remote control switches it to a stand by mode where it continues to consume electricity at a rate that can exceed 10W. The consumer electronics industry was aware that televisions and video cassette recorders are typically left in this stand by mode for long periods of time and that their design could be improved to reduce this stand by power use. A report prepared for DG XVII - Energy of the Commission quantified this power use, and estimated the savings that would result from reducing it. The key result of this research was that simply by reducing average stand by power use to 6W, total power use could be reduced by 3,2 TWh per year by 2005, and by 4,9 TWh per year by 2010. The maximum cost per unit of reducing the stand by power use of a television or video cassette recorder was estimated as 3 ECU.

No individual firm in the industry felt able to introduce

lower power use in their products. Margins are low in the industry and the firms feared that consumers would not be prepared to pay for the cost of the power savings, despite the fact that they would save money in the long term. The consumer electronics industry therefore devised the voluntary scheme in consultation with the services of the Commission. The manufacturers who entered the scheme, and membership is open to additional firms, have undertaken to meet certain targets on power use. The European Association of Consumer Electronics Manufactures (EACEM) has undertaken to monitor the operation of the scheme and to report regularly to the Commission on its progress. In order to avoid any exchange of confidential information between the member firms, which could have a negative effect on competition, EACEM has engaged an independent consultant who will gather information from the firms as to their sales and the power use of units sold, and simply report the names of manufacturers not meeting their commitment.

Under the scheme the manufacturers have undertaken that, by 1 January 2000, the TVs and VCRs that they sell will consume no more than 10 W of power when in standby mode and that the average power consumption of all TVs and VCRs that they sell will be no more than 6 W in stand by mode. Such an agreement to act in a co-ordinated way is a restriction of competition, and falls under the prohibition of Article 85(1) of the EC Treaty. However Article 85(3) provides that the Commission can exempt an agreement from this provision where it meets certain conditions. These conditions are that the agreement contributes to technical and economic progress, that its benefits be shared with consumers, that competition not be eliminated in the sector and that the restrictions of competition are indispensable to achieving the benefits of the agreement. The energy saving and environmental benefits of this scheme clearly represent technical and economic progress, and by their nature are passed on to consumers. The Commission was also satisfied that competition would not be eliminated in the affected markets and that the restrictive effect of the scheme was essential to achieving its full benefits.

(see also the Commission's press release : IP/98/346)

Commission clears the IFCO packaging system

Dieter BIRKENMAIER and Sari SUURNÄKKI, DG IV-E-1

On 20 May 1998 the Commission declared the Articles 85(1) and 86 of the EC Treaty to be inapplicable to the German IFCO packaging system (International Fruit Container Organization). This system is a multi-transport way of packing fruit and vegetable, based on the use of standardised, collapsible and reusable plastic crates. The boxes are produced by subsidiaries of the firm Schoeller Plast Holding GmbH, Düsseldorf, and used for the transport of goods between producers, grocers and shops by twelve big German food trading companies. The crates had been introduced at the end of 1992, when the trading chains declared to their suppliers that they would prefer goods to be packed in plastic crates.

Following complaints introduced by some trade associations,

traders and fruit producers, the Commission examined the IFCO system under the competition rules of the EC Treaty. In the course of the procedure, the Commission demanded substantial modifications to the system. Accordingly, the obligatory use and other aspects of the system such as to fix model contracts, lump sum payments to IFCO, an arbitration system for users and an obligation for the food traders to exchange detailed information about trade flows, were abolished. The Commission informed the public about these modifications by a press release of 3 June 1993 and in letters to food traders.

In its juridical analysis the Commission defined the relevant product market as being the market for packaging intended or suitable for transportation of fresh fruit and vegetables, irrespective of the material used (plastic, wood or carton). In fact, price and cost differences for these materials are existing, but not important enough so as to assume different markets. Nor should, at present, a distinction be made - in the absence of a clear preference established by national or European environmental legislation on packaging and packaging waste - between reusable (multi-trip) or recyclable and recoverable materials.

Regarding the relevant geographical market for IFCO crates, the Commission held that it is rapidly becoming EU-wide, even if the stronghold of the system is still Germany.

Analysing a potential prevention or restriction of competition caught by Article 85(1), the Commission concluded that the IFCO system does not violate the Treaty, taking into account the modifications introduced to the system during the procedure. The Commission based its argumentation on the fact that the use of crates is organised unilaterally by IFCO/Schoeller, which lend their products on the base of bilateral contracts to users. These contracts are partly based on standard general terms, partly on individually negotiated stipulations. The IFCO system is therefore a market-based service in direct competition with other packaging systems, e.g. those based on plastic, wood or cartonboard.

The Commission had also to examine the compatibility of the IFCO system with Article 86 of the EC Treaty. According to the results of an inquiry into the use of crates by German foodtraders done in March 1997, the traders participating in IFCO have a market share for fruit and vegetable of around 47%. About 23% of their trade in the relevant goods is packed in IFCO crates, corresponding to 13% of German sales. Consequently, the Commission concluded that the IFCO system does not have a dominant position on the German market for fruit and vegetable packing. The relevant market share is considerably below the percentage normally necessary for assuming a dominant position; a collective dominance could be excluded, as competition among the IFCO users and with other companies active in the German food trading sector is vivid.

On the basis of the above considerations, the complaints against the IFCO-system have been rejected.

La Commission condamne un cartel de prix entre des producteurs d'acier inoxydable

Céline GAUER, DG IV-E-1

Le 21 janvier 1998[1], la Commission a adopté une décision d'interdiction assortie d'amende à l'encontre de 6 producteurs de produits plats en acier inoxydable représentant plus de 80% de la production européenne de produits finis en acier inoxydable.

Les entreprises s'étaient réunies en décembre 1993 à Madrid et avaient convenu d'une hausse identique et simultanée des prix de l'acier inoxydable. Cette augmentation a été obtenue par la modification concertée de la formule de calcul de l'extra alliage, supplément de prix fonction du cours des éléments d'alliage utilisés dans l'acier inoxydable.

La Commission a décidé que cet accord de prix constituait une infraction grave à l'article 65 du traité CECA et a infligé aux entreprises des amendes d'un montant total de 27,3 millions d'écus.

Cette décision est la deuxième décision d'interdiction au titre de l'article 65 CECA en l'espace de quelques mois[2]. Elle s'inscrit, comme déjà la décision "Poutrelles"[3] en 1994, dans le cadre de la lutte contre les ententes illégales dans le secteur sidérurgique.

Dans cette décision, la Commission a pour la première fois fait application des lignes directrices pour le calcul des amendes[4] et de la communication de la Commission concernant la non-imposition d'amendes ou la réduction de leur montant dans les affaires portant sur des ententes[5].

Les amendes ont donc été calculées à partir d'un montant en valeur absolue déterminé en fonction de la gravité de l'infraction pondérée par la durée de participation de chacune des entreprises. Ce montant de base a été majoré et minoré pour tenir compte des circonstances aggravantes et atténuantes propres à chacune des entreprises. Il a enfin été fait application de la communication sur la non-imposition d'amendes précitée.

La rédaction de la décision (paragraphe 73 et suivants) montre comment l'objectif de transparence des lignes directrices peut être atteint. En effet, dans une affaire impliquant plusieurs entreprises, il est possible à chacune d'entre elle de connaître à la lecture de la décision l'appréciation sur les différents paramètres déterminant l'amende pour tous les auteurs de l'infraction. La motivation de chacun des paramêtres de calcul est très détaillée.

Ceci est particulièrement important pour la coopération des entreprises. En l'espèce, toutes les entreprises ont invoqué la communication sur la coopération mais seules deux d'entre elles ont véritablement coopéré en mettant fin à l'infraction pour l'une et en apportant des informations importantes à la Commission au cours de l'instruction pour l'autre. Grace au détail du calcul présenté dans la décision publiée, les entreprises ont été en mesure d'apprécier la différence de traitement effectuée par la Commission entre celles qui coopèrent réellement et celles qui se limitent à une déclaration d'intention.

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1 JO L100 du 1.04.1998 p.55

2 La première a été adoptée le 26 novembre 1997 dans l'affaire "Wirtschaftsvereinigung Stahl" et concernait un accord d'échange d'informations (JO L1 du 3.01.1998 p.10)

3 JO L116 du 6.5.1994, p.1

4 JO C 9 du 14.01.1998 p.3

5 JO C207 du 18.07.1996 p.4

The "old" Inntrepreneur standard UK pub leases

By Dirk VAN ERPS, DG IV-F-3

By Decisions of 5 March and 14 April 1998[1], the Commission has rejected the last two complaints concerning the "old" standard UK pub leases used by Inntrepreneur.

The Commission rejected the complaints because there was no longer a Community interest to deal with these cases following the withdrawal by Inntrepreneur of the notification of these "old"[2] standard leases.

By withdrawing the notification, the question of whether Article 85(1) applies can be decided by the UK courts. Unlike the Commission, the national judge could, if he found Article 85(1) to apply, also determine the civil law effects following from the prohibition set out in Article 85(2).

If the Commission had continued with the case, this would have lead to a duplication of procedures, which is not in the Community interest.

Furthermore, the Commission has pointed out in the Decisions that the national judges could take some indirect guidance on the application of Article 85 from published communications pursuant to Article 19(3) of Regulation No 17, indicating the Commission's intention to *exempt* the "new" Inntrepreneur pub leases (see footnote 2).

[1] Both published on DG IV's Internet site (Antitrust - Cases - Cases closed by Formal Decision 85/86 1998 - pick "NAIL" and "AIL").

[2] With the reference to "old", the Commission refers to the standard leases entered into by Inntrepreneur with its lessees since 1989 that do not incorporate a discount scheme introduced by Inntrepreneur in February-March 1997. Leases that do incorporate this scheme are called the "new" leases. For these "new" leases, notifications are still pending and the Commission has published "exemption" 19(3) notices for the Inntrepreneur (OJ C 374, 10.12.1997) and Spring (OJ C 61, 26.2.1998) estate covering the period up to 28 March 1998 and a "negative clearance" 19(3) notice for thereafter (OJ C 133, 30.4.1998). These notices are also available on DG IV's Internet site.

The Commission adopts a Decision against Unilever concerning freezer cabinet exclusivity in the Irish ice cream market

By Stephen RYAN, DG IV-F-3

On 11 March 1998, the Commission adopted a Decision condemning Unilever's practice of "freezer exclusivity" in Ireland, with a view to facilitating access by other suppliers to the "impulse" ice cream market. A Unilever subsidiary, Van den Bergh Foods Limited, is the leading supplier of ice cream in Ireland, with a market share in excess of 85%. The company has an extensive network of freezer cabinets which are put at the disposal of retailers, with no direct charge but subject to the condition that the cabinets are to be used exclusively for the storage of Unilever's products.

The Commission has found that, in the circumstances of the Irish market, this provision of cabinets on exclusive terms results in many of the recipient outlets only being in a position to offer for sale the ice cream products of Unilever. Market research relied on by the Commission demonstrates that retailers are very unlikely either to replace incumbent cabinets, in particular those installed by Unilever, or to install additional ones, particularly alongside Unilever cabinets. Unilever's competitors are consequently denied access to these outlets, with the result that their products are not offered for sale from a very substantial proportion of retail outlets in Ireland.

TheCommission therefore found that the exclusivity condition, as applied in relation to outlets whose only ice cream cabinets have been provided by Unilever, infringes Article 85 of the EC Treaty. The Commission has moreover found that Unilever is abusing its position of market dominance in Ireland, contrary to Article 86 of the EC Treaty, by inducing retailers to enter into exclusive arrangements of this sort.

The case originated with a complaint made by Mars in 1991. In the light of objections first made by the Commission in 1993, Unilever had made a number of modifications to its distribution arrangements. In particular, a scheme allowing retailers to hire purchase freezer cabinets from Unilever was introduced in 1995 as an optional alternative to the traditional method of cabinet provision. It was expected that these changes would be likely to render Unilever's distribution arrangements compatible with the competition rules by facilitating an evolution toward wider freezer cabinet ownership by retailers. This would have enabled retail outlets to offer for sale the products of any supplier, thereby contributing to a real opening up of the Irish impulse ice cream market. The changes did not however succeed in bringing about such an evolution, a failure confirmed by a comprehensive market survey carried out on behalf of the Commission in the summer of 1996, and a new set of objections was accordingly put to Unilever in 1997.

Affaire IV/35.733 - Volkswagen

Ulrich KRAUSE-HEIBER, DG IV-F-2

Décision de la Commission du 28 janvier 1998[1]

La Commission a infligé une amende d'un montant de 102 millions d'Ecus à l'entreprise Volkswagen AG - le principal groupe de constructeurs automobiles européen - pour avoir systématiquement forcé ses concessionnaires italiens à refuser de vendre des automobiles de la marque *Volkswagen* et *Audi* à des clients étrangers, notamment allemands et autrichiens. Depuis 1995, de nombreux consommateurs se sont plaints à la Commission des difficultés qu'ils rencontraient pour l'achat de voitures neuves en Italie. Dans sa décision, la Commission conclut que Volkswagen AG, sa filiale italienne Autogerma S.p.A. ainsi que sa filiale Audi AG se sont entendus avec leurs concessionnaires italiens sur une stratégie visant à empêcher et/ou limiter substantiellement le commerce en provenance d'Italie et à destination des autres Etats membres, en particulier l'Autriche et l'Allemagne.

Volkswagen disposait de trois mois pour acquitter l'amende et devait, en outre, dans un délai de deux mois, prendre toutes les dispositions imposées par la Commission afin d'éliminer ces diverses pratiques.

La décision de la Commission est l'aboutissement d'une procédure entamée à la suite de nombreuses réclamations introduites par des consommateurs sur les difficultés d'acheter en Italie des voitures neuves de marque Volkswagen et Audi.

En octobre 1995, la Commission a effectué des inspections dans les locaux de Volkswagen AG à Wolfsburg, de Audi AG à Ingolstadt et de Autogerma S.p.A. à Vérone (filiale à 100 % de Volkswagen et l'importateur officiel des deux marques pour l'Italie) et auprès d'un certain nombre de concessionnaires VAG dans le nord de l'Italie. Les documents découverts lors de ces inspections ont apporté la preuve évidente de la politique de cloisonnement des marchés mise en place par Volkswagen, Audi et Autogerma.

La Commission établit dans sa décision que la conduite de Volkswagen menace le fonctionnement normal du Marché Unique et constitue une très grave infraction aux règles du droit communautaire de la concurrence.

Pour fixer l'amende, la Commission a tenu compte de la durée de l'infraction - plus de dix ans – et entre autres, du fait que les sociétés membres du groupe Volkswagen ont exploité leur puissance économique vis-à-vis de leurs réseaux de concessionnaires en Italie pour mettre en place les pratiques restrictives. En outre, la Commission a retenu comme facteur aggravant le fait que Volkswagen n'a pas réagi de manière appropriée aux injonctions de la Commission de mettre fin à cette infraction grave.

L'importance de l'amende démontre la volonté de la Commission de ne pas tolérer de telles pratiques et d'agir avec la même rigueur vis-à-vis d'autres constructeurs qui entendent cloisonner le marché intérieur.

Par date du 8.4.1998, l'entreprise a introduit son recours contre la décision et l'amende infligée auprès du Tribunal de Première Instance.

[1] voir IP/98/94 du 28.1.1998; le texte intégral de la décision se trouve au JO L 124 du 25.4.1998, p.60.

Parrainage et homologation d'articles sportifs : le cas de la Fédération danoise de tennis

Franco GIUFFRIDA, DG IV-F-1

1. A l'issue d'une procédure déclenchée par la plainte d'un importateur parallèle danois de balles de tennis, la Commission, après avoir amené la Fédération danoise de tennis (FDT) d'abord à changer ses pratiques et ensuite à les notifier, a **approuvé le système de parrainage** mis en oeuvre par la Fédération. Au-delà du cas concret, cette approbation, sous la forme d'une lettre administrative de classement de type attestation négative, constitue un signal donné aux fédérations sportives nationales et internationales et aux producteurs/distributeurs de produits sportifs quant à certaines pratiques que la Commission considère comme compatibles avec les articles 85 et 86.

2. Pour mieux comprendre la portée de cette première prise de position de la Commission, il convient de rappeler la situation telle qu'elle se présentait au moment de l'introduction de la plainte. L'importateur parallèle qui s'était d'abord adressé à l'Autorité danoise de la concurrence et ensuite, sur conseil de cette dernière, à la Commission, se plaignait d'une situation bloquée. Il ne pouvait pratiquement pas vendre au Danemark des balles achetées dans d'autres États membres à cause d'accords conclus entre la FDT et un certain nombre de producteurs/importateurs.

   Ces accords prévoyaient que dans tous les tournois organisés par la FDT, seules pouvaient être utilisées les balles des firmes ayant conclu un accord de parrainage avec la FDT et étant de ce fait autorisées à apposer sur les boîtes de leurs balles, le sticker "balle officielle de la FDT". Toute partie de tennis jouée avec des balles autres que celles vendues par les réseaux officiels des fournisseurs officiels était déclarée nulle. Les arbitres des compétitions organisées par la FDT étaient sous l'obligation de contrôler que les balles utilisées sortaient bien de boîtes munies de stickers. Dans ces conditions, un double effet de forclusion se manifestait : dans les tournois de la FDT, il n'était pas question d'utiliser des balles de marques autres que celles des fournisseurs officiels et, en plus, il était interdit d'utiliser des balles, même de ces marques, si celles-là provenaient du marché parallèle. Le plaignant faisait observer que l'effet de ces pratiques était de lui interdire pratiquement toute vente de balles, les joueurs préférant acheter même pour leurs parties en dehors des tournois, les balles des fournisseurs officiels de la FDT (effet "vitrine", ou en mots simples : "si ces producteurs sont les fournisseurs officiels de la FDT, cela signifie que leurs balles sont meilleures que les autres").

   Les services de la Commission essayèrent de convaincre la FDT que ces pratiques contrevenaient aux articles 85 et 86 du Traité CEE. A la suite de l'envoi d'une lettre de mini-griefs et ensuite d'une communication de griefs, dans laquelle la FDT se voyait reprocher la violation tant de l'article 85 (à cause de ses accords avec les fournisseurs officiels, destinataires eux aussi, d'une communication de griefs tant au niveau national qu'international -coupe Davis-) que de l'article 86 (abus de position dominante

sur le marché de l'organisation des tournois), la FDT préféra mettre fin aux pratiques incriminées. Elle notifia donc un nouveau système de parrainage qui se caractérisait essentiellement par les 3 aspects suivants :

- mise sur pied d'un pool de sponsors, constitué après appel d'offres et portant sur une période d'une année;

- renonciation à l'utilisation de la dénomination "balles officielles de la FDT";

- libre utilisation des balles de marques composant le pool, indépendamment de l'achat par le biais des réseaux officiels, c'est-à-dire, possibilité d'achats sur le marché parallèle.

3. La Commission considérant que, sous cette forme, le contrat de parrainage ne soulevait plus les mêmes objections que les contrats précédents non notifiés, publia une communication art. 19§3 annonçant son intention de prendre une attitude favorable à son égard.

4. Entre-temps, la FDT avait toutefois à nouveau changé de système. Il lui était en effet apparu que la mise en oeuvre du pool de sponsors provoquait des problèmes concrets de difficile solution et avait remplacé ce système par une troisième version de ses contrats de parrainage. Une deuxième notification intervint donc en 1995.

   L'élément qui distinguait les deux accords notifiés était les disparition du pool remplacé par le choix d'un seul sponsor qui aurait été lié à la FDT pour une période de 3 ans, sans toutefois pouvoir utiliser la mention "balles officielles de la FDT" ni imposer l'utilisation de balles vendues par le réseau officiel.

5. Face à cette nouvelle donne, les services de la Commission furent obligés à apprécier si un contrat d'exclusivité qui donnait à **une seule marque** le droit de voir ses balles utilisées - à l'exclusion de toutes autres - pour une période de 3 ans, pouvait obtenir son accord.

   Si après discussions avec la FDT, qui accepta de réduire la durée du contrat de 3 à 2 ans et de mettre sur pied un système structuré d'appel d'offres avec mention des critères employés pour le choix de la firme retenue, la Commission put enfin marquer son accord, cela est dû essentiellement aux considérations suivantes :

   a) Il est vrai que le caractère exclusif du contrat représente une restriction de concurrence, en ce qu'il limite la liberté contractuelle de la FDT de conclure avec d'autres producteurs/distributeurs ainsi que la liberté des tiers qui ne peuvent pas être choisis comme co-contractants. Il est tout aussi vrai que le système initialement notifié d'un pool de sponsors pourrait être considéré comme étant moins restrictif de concurrence. L'argument invoqué par la FDT pour justifier le passage du système du pool à celui du contractant exclusif a toutefois convaincu les services de la Commission. Sur un marché de dimensions réduites comme le marché danois, il est vraisemblable qu'il n'y ait pas d'espace pour plusieurs membres d'un pool : les perspectives de voir augmenter ses ventes ne sont pas suffisantes pour induire plusieurs entreprises à devenir sponsors. La conclusion que les services de la Commission en tirent est que si dans le cas d'espèce la restriction de concurrence a été considérée comme non sensible, il pourrait en être autrement sur d'autres marchés plus importants, où un contrat de parrainage avec un seul contractant exclusif serait susceptible d'engendrer des effets sensibles sur la structure du marché que ce soit à l'intérieur d'un territoire d'un ou plusieurs Etats membres.

b) La FDT a accepté de réduire de 3 à 2 ans, la période de chaque contrat de parrainage en mettant sur pied un système d'appel d'offres assurant que la sélection se fasse de manière transparente, non discriminatoire et ouverte à tous les fournisseurs.

c) La FDT a accepté de supprimer la mention de "balle officielle" en "fournisseur officiel". Cet aspect mérite un approfondissement afin d'expliquer la position de la Commission à l'égard du problème de l'homologation de produits sportifs par la Fédération, nationale ou internationale.

A ce sujet, il y a lieu de noter que l'homologation technique des balles de tennis intervient au niveau de la Fédération internationale de Tennis. Toute balle satisfaisant aux normes techniques définies par la fédération internationale peut être homologuée, moyennant paiement d'une somme forfaitaire destinée à couvrir les frais des tests et des analyses. Les balles homologuées reçoivent la dénomination de "First grade Tennis Balls" et sont reconnues de la sorte aptes à être utilisées dans tous les tournois et compétitions.

La plupart des fédérations nationales de tennis introduisent cependant, ce que l'on pourrait appeler un second niveau d'homologation ou de sélection, basé celui-ci, sur des critères purement financiers. Moyennant paiement d'une somme forfaitaire ou moyennant, dans certains cas, négociations ou même procédures d'enchères, une ou certaines marques de balles de tennis peuvent se voir attribuer le label de "Balles officielles" de telle ou telle fédération nationale - ou encore "Balles officielles" de tel ou tel grand tournoi organisé par cette fédération. Le label peut être apposé sur les boîtes ou même imprimé sur les balles. Et la mention de "Balles officielles" peut généralement être suivie du texte "Balles sélectionnées" ou "Balles recommandées" par ces fédérations.

Outre divers avantages supplémentaires en matière publicitaire ou de promotion qui leur sont réservés (et qui varient d'une fédération à l'autre), ces "Balles officielles" sont également généralement les seules à pouvoir être utilisées dans les tournois, championnats et autres activités organisées par ou sous l'égide de ces fédérations. En tournoi et champion-nat, la sanction en cas d'utilisation par des club de tennis de balles non-officielles consiste généra-lement en l'annulation du match. Quant au joueur qui voudrait utiliser une balle non officielle, il se voit en principe déclaré perdant. Les fédérations nationales rappellent régulièrement aux clubs de tennis qu'ils sont tenus de respecter ce règlement.

L'appréciation de pareils systèmes d'homologation par les fédérations de tennis nationales au regard des articles 85 et 86 a été développée essentiellement dans la présente affaire.

Le monopole dont disposent les fédérations nationales de tennis dans l'organisation des activités officielles relatives à ce sport leur donne non seulement une position dominante sur ce marché, mais leur confère également (outre, bien sûr, l'exclusivité d'attribuer le label de "balles officielles") une autorité morale indéniable pour tout ce qui concerne la pratique de ce sport. Cette autorité leur permettra notamment d'influencer, le cas échéant, le choix du consommateur pour les produits (balles, raquettes,...) utilisés dans cette pratique. Le label de "Balles officielles" et

l'autorisation de faire suivre cette mention par les termes "recommandées" ou "sélectionnées" par une fédération nationale de tennis est ainsi de nature à inciter les consommateurs à considérer que ces balles sont meilleures sur le plan technique, alors même que l'autorisation de porter ce label a été conditionnée par des critères purement financiers et que les balles non sélectionnées, pour autant qu'elles aient été homologuées comme "First Grade Tennis Balls" par la Fédération internationale de Tennis, possèdent les mêmes qualités techniques.

Il s'ensuit que le système de délivrance par les fédérations nationales de tennis du label de "Balles officielles" doit être considéré discriminatoire à l'égard des producteurs et/ou distributeurs exclus et partant, compte tenu de la position dominante de ces fédérations, comme un abus au titre de l'article 86.

Un tel système porte également préjudice aux consommateurs dans la mesure où il entraîne inévitablement un niveau plus élevé des prix des balles sélectionnées.

C'est pour cet ensemble de raisons que l'abandon par la FDT de la mention "balle officielle" a amené la Commission à renoncer à sa communication de griefs basée sur l'article 86.

En conclusion :

Par la présente affaire, la Commission entend donner des indications aux parties intéressées quant à la ligne de conduite qu'elle adoptera à l'avenir. Il n'est pas exclu que, comme cela a été fait notamment par l'Autorité suisse de la concurrence, la Commission soit amenée à l'avenir, à publier une communication au sujet de matériel sportif officiel et du parrainage dans le secteur du sport.

La Commission approuve l'accord de coopération conclu entre les plus grands producteurs d'appareils photos et de films

Franco GIUFFRIDA, DG IV-F-1

Quand les plus grands producteurs au monde d'un produit se mettent d'accord pour coopérer au développement d'un nouveau produit destiné, dans leurs intentions, à supplanter à moyen terme les produits existant sur le marché et à devenir le nouveau "standard", on imagine aisément que cette coopération fasse l'objet d'un examen attentif de la part des Autorités de concurrence.

C'est exactement ce qui s'est passé dans le cas de ce qu'il est convenu d'appeler le **A**dvanced **P**hotographic **S**ystem (APS)[1].

La procédure

En 1991, Kodak, Fuji, Canon, Minolta et Nikon avaient conclu entre elles un accord pour le développement et l'exploitation sous licence d'un nouveau système photographique de pointe constituant une alternative aux précédents systèmes ainsi qu'à l'imagerie électronique.

[1] Press Release IP/98/353 of 15/4/1998.

Les difficultés techniques à surmonter étaient considérables et portaient tant sur la production de nouveaux types d'appareils photos que de nouveaux films ainsi que d'équipements de développement des films.

En 1993, les parties notifièrent à la Commission les accords intervenus, bien que les accords ne fussent pas tout à fait complets: l'activité de coopération entre elles se poursuivît, tant au plan technique, qu'à celui de la mise au point des textes juridiques régissant leur relation.

Les services de la Commission ne soulevèrent toutefois aucune objection à examiner des accords qui constituaient manifestement une base de travail susceptible d'être adaptée et précisée en cours de route. Il fut de la sorte possible d'amener les parties notifiantes à englober dans leurs considérations industrielles, au cours d'un processus, certes de longue haleine mais cependant fructueux, des remarques tenant aux aspects de concurrence. Dans cette phase, la Commission a pu bénéficier des prises de position formulées par des tiers qui, tout en étant intéressés à devenir licenciés pour le nouveau produit, souhaitaient des changements dans les conditions de licence.

La toile de fond des interventions de la Commission était constituée par deux principes :

- la coopération était utile et devait être favorisée,
- des efforts devaient être entrepris pour faire disparaître certains éléments considérés comme inacceptables du point de vue des règles de concurrence.

A l'issue de ce long processus de négociation, les parties notifiantes complétèrent leur notification début 1997 en tenant compte des souhaits exprimés par la Commission. Dans ces conditions, celle-ci publia une communication art. 19(3) au JO[2] qui ne donna lieu à aucune remarque des tiers. La procédure fut donc achevée par la consultation du Comité Consultatif et l'envoi d'une lettre administrative de classement de type "exemption".

Le fond de l'affaire

Dès le début, il était clair aux parties notifiantes que le gage de succès du nouveau produit tenait à deux aspects essentiels: d'abord un produit fiable, et ensuite son degré d'acceptation par les autres producteurs non parties à l'accord de coopération. Si l'APS devait avoir une chance de devenir le nouveau standard, les entreprises conceptrices devaient donc en assurer sa diffusion outre que par leur production propre par des accords de licence avec les concurrents.

Les parties notifiantes engagèrent donc des efforts considérables pour conclure des contrats de licences avec leur concurrents en organisant des réunions d'information et des séminaires. Le résultat en fût qu'un nombre important de contrats de licence fût conclu bien avant la date de commercialisation du nouvel APS qui eu lieu en Europe en avril 1996.

L'intervention de la Commission eut principalement pour but de faire modifier dans les contrats de licences certaines clauses qui à ses yeux limitaient indûment la liberté des licenciés. En effet les entreprises coopérantes, tout en souhaitant favoriser l'utilisation sous licence de leur nouveau produit, affirmaient être en même temps soucieuses de limiter les risques de productions techniquement non fiables. D'ou des restrictions sensibles dans les possibilités par les parties licenciées de coopérer entre elles. Le but de la démarche de la Commission était notamment d'assurer que les tiers, un fois les licences accordées, puissent être à temps sur le marché avec des produits sous licences pour concurrencer les cinq partenaires.

A la suite de l'intervention de la Commission une certaine libéralisation de la politique de licence a été atteinte. Le savoir faire technique et un service d'assistance ont été offerts aux licenciés à une plus large échelle qu'initialement proposé et ce contre redevance ou gratui-

[2] JO N°C 330 du 01/11/1997, p.10.

tement. En plus, s'agissant des clauses limitant la liberté industrielle des licenciés, un système dégressif dans le temps a été introduit de sorte qu'au plus tard en 2004 la coopération entre les licenciés sera totalement ouverte.

Dans ces conditions il a été estimé que les cinq partenaires à l'issue des nombreuses réunions technique avec les services de la Commission, avaient montré leur promptitude a prendre toute les mesures nécessaires pour permettre aux licenciés d'accéder au marché en temps voulu et dans des conditions ne suscitant plus des inquiétudes en termes de concurrence.

JUDGMENTS

Judgment of the Court of 31 March 1998, Cases C-68/94 and C-30/95 : French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities. Community control of concentrations between undertakings - Collective dominant position. Joined cases C-68/94 and C-30/95.

Judgment of the Court (Fifth Chamber) of 17 March 1998, Case C-387/96 : Criminal proceedings against Anders Sjöberg. Reference for a preliminary ruling: Svea hovr„tt - Sweden. Social legislation relating to road transport - Exception granted for vehicles used by public authorities to provide public services which are not in competition with professional road hauliers - Obligation on the driver to carry an extract from the duty roster.

Judgment of the Court (Fifth Chamber) of 12 February 1998, Case C-163/96 : Criminal proceedings against Silvano Raso and Others. Reference for a preliminary ruling: Pretura circondariale di La Spezia - Italy. Freedom to provide services - Competition - Special or exclusive rights - Undertakings holding a port terminal concession.

Order of the Court (First Chamber) of 15 January 1998, Case C-196/97P : Intertronic - F. Cornelis GmbH v Commission of the European Communities.

PRESS RELEASES

IP/98/355 [1998-04-15]
The Commisison conditionally approves sponsorship contracts between the Danish Tennis Federation and its tennis ball suppliers (see p. 54)

IP/98/353 [1998-04-15]
Commission clears co-operation between photo-graphic manufacturers (see p. 57)

IP/98/346 [1998-04-15]
European Commission exempts an industry scheme from the competition rules because of its environmental benefits

IP/98/242 [1998-03-11]
The Commission adopts a decision against Unilever concerning freezer cabinet exclusivity in the Irish ice cream market (see p. 52)

IP/98219 [1998-03-05]
Maritime Transport : Consortium agreements win approval of the Commission

IP/98/197 [1998-02-26]
The European Commission sets out its provisional position on Spring's « new » pub leases

IP/98/154 [1998-02-13]
Car prices in the European Union on 1 November 1997 – differences remain high

➢ ANTI-TRUST RULES

IP/98/141 [1998-02-10]
Commission launches inquiry into mobile and fixed tlephony prices in the European Union

IP/98/94 [1998-01-28]
Commission fines Volkswagen ECU 102 million following consumer complaints (see p. 53)

IP/98/70 [1998-01-21]
Commission fines stainless steel cartel (see p. 50)

IP/98/30 [1998-01-14]
Book pricing agreements between publishers and booksellers in Germany

IP/98/27 [1998-01-14]
European Commission ends Frankfurt airport ground-handling monopoly

IP/98/25 [1998-01-13]
Commisison intends to clear Scottish and Newcqstle's standard pub leases

IP/98/8 [1998-01-07]
Reaction of Commissioners Flynn and Van Miert to Press Repots regarding FIFA's proposal to exclude sport from the scope of European Law

IP/98/7 [1998-01-07]
Commission has decided to examine agreements concerning air alliances between Air Grance/Delta and Air France/Continental

MERGERS

Application of Council Regulation 4064/89
Main developments between 1st January and 30st April

Recent developments

The new merger rules have entered into force

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At the beginning of March 1998 a package of new merger rules entered into force. The package includes modifications to the Merger Regulation adopted by the Council in June 1997, a new procedural Regulation adopted by the Commission (Implementing Regulation) and a set of new explanatory notices. The notice aligning the procedural rules for processing mergers under the ECSC and EC Treaties, which had been adopted earlier were also applicable as from March 1998.

The main changes to the Merger Regulation broaden its scope and deal with procedural aspects. The new implementing texts reflect these changes and also take account of the past experience in applying the Community merger rules.

In view of the wide use that is made of these texts particularly by the general public, the Commission decided to adopt new texts rather than amendments to the old texts.

This approach ensures that, in particular with regard to the Implementing Regulation, there will be a single legal text for each document which incorporates all the amendments rather than a number of texts.

The new texts have been adopted by the Commission after widespread consultation with the Member States, interested industry associations and the legal profession. The texts were also published on the web site of DG IV on the internet. The overall reaction to the texts proposed by the Commission had been positive. Many of the remarks that were made in the course of the consultation are reflected in the final texts.

The final texts are available to the public in the Community languages not only through their publication in the Official Journal but on the internet. The Commission services have furthermore prepared a consolidated version of the Merger Regulation for the facility of the reader which is also available there. In due course a paper copy of all relevant legislative and interpretative texts in the merger area will also be made available as a Commission publication.

1. The Merger Regulation

The amendments[1] to the Merger Regulation[2] have been examined in detail in an earlier edition of this Newsletter.[3] In summary the changes include an additional set of thresholds designed to ensure a reduction in the number of multiple national filings of the same transaction. Furthermore all full-function joint ventures which meet the turnover thresholds of the Merger Regulation will now be assessed under the procedures of that regulation. Co-operative aspects of such joint ventures will be examined under the criteria of Articles 85 (1) and (3) of the EC-Treaty within the procedures of the Merger Regulation. The three week suspension period has been extended with the effect that a transaction can now only be implemented after a clearance decision by the Commission. In addition the parties will now be able to adapt the operation during the first month of the investigation in order to eliminate competition concerns. Operations which affect competition in more than one Member State can now be

[1] Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 180, p.1, 9.7.1997; corrigendum in OJ L 40, p. 17, 13.02.98.

[2] Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 395, 30.12.1989; corrected version OJ L 257, 21.9.1990.

[3] See for more details Jean-Louis Aribaud, Summary of the most important recent developments, Competition Policy Newsletter, Volume 3, Number 2, Summer 1997.

jointly referred to the Commission by two or more of these Member States. Other changes relate to the calculation of turnover for credit and financial institutions.

2. The Implementing Regulation, including Form CO

In order to implement these changes to the Merger Regulation the Commission has adopted a new Implementing Regulation on 1 March 1998.[4] Modifications have also been made to the notification Form CO, annexed to the regulation, in particular to reflect the fact that all full-function joint ventures which meet the turnover thresholds will in future be treated under the Merger Regulation. Other amendments to the Implementing Regulation have been introduced on the basis of past experience with the application of the Community merger legislation. In some languages they include linguistic improvements, many of which were suggested by the Member States. The new Implementing Regulation entered into force on 2 March 1998.

Changes necessitated by the amendments to the Merger Regulation

Full-function joint ventures

One of the most important changes in the Merger Regulation relates to the application of the Merger Regulation to all full function joint ventures. The text of Form CO takes this into account at various points. A new Section 10 has been introduced reflecting the treatment of co-operative joint ventures under the newly introduced Article 2 (4) of the Merger Regulation.

New thresholds

A new Section 2.4. has been introduced to Form CO to reflect the new turnover thresholds that have been introduced to Article 1 paragraph 3 of the Merger Regulation.

Calculation of deadlines

The amended Article 23 of the Merger Regulation provided the legal basis for the Commission to streamline the calculation of the time periods foreseen by the Merger Regulation for a variety of procedures. In the old Implementing Regulation the rules on the calculation of time limits only applied to deadlines regarding decisions at the end of the first and second phase of the examination of an operation.

Suspension of the concentration

The text of Article 12 of the Implementing Regulation now takes account of the fact that under the amended Merger Regulation an operation remains suspended until it is cleared by the Commission.

Suspension of time limits

The suspension of time limits relating to first phase decisions under Article 6 Merger Regulation is now possible under similar conditions as in phase two. Furthermore a suspension is possible, if the parties are responsible for the failure of third parties to provide information. This case will now be treated in the same way as a refusal by the parties themselves to reply.

Commitments

The new wording of Article 18 and the newly introduced Article 19 of the Implementing Regulation take account of the amendments in the Merger Regulation providing for the express possibility of commitments in the first phase of the merger procedure.

Changes due to past experience with the legislation

Amendments considered useful on the basis of the experience with the application of the Community merger legislation include a variety of issues such as the way a notification or other communications to the

[4] Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 61, 2. 3. 1998; replacing Commission Regulation (EC) 3384/94 of 21. December 1989, OJ L 377, 31.12.1994.

Commission have to be made, the extent of market related information to be supplied and the hearing procedure.

Requirements on notifications and other submissions to the Commission

The Implementing Regulation and Form CO clarify that the notification and other specified documents have to be submitted in one original as well as the indicated number of copies. The number of copies varies as to the needs of the stage of procedure for which they are required. The time by which the notification has to reach the Commission in order to ensure registration of a notification on the day of arrival has been specified.

Form CO reiterates explicitly that in accordance with the requirements of the Merger Regulation the time limits will not begin to run before the parties have provided a complete notification. The rules governing the granting of waivers from the requirements in Form CO have also been amended with the same purpose of clarification.

Information required in Form CO on market participants has to be provided even in cases of short form notification to enable the Commission to make market enquiries. It has further been clarified that generally such information shall relate to independent customers and suppliers to ensure that the information gathered by the Commission in a market enquiry does reflect the views of independent market participants.

Market definition

A number of points in Form CO relating to the information to be provided on the markets concerned by an operation have been clarified. In particular Sections 6.2 and 6.3 have been drafted to state that information must be provided for neighbouring markets to affected markets (i.e. markets on which a minimum level of market share is reached) as well as for non-affected markets (markets on which the market share is lower than specified for affected markets). The text formerly in force contained certain ambiguities in this respect, in particular in some language versions.

Hearings

The text relating to the hearing provisions in Articles 14 and 15 of the Implementing Regulation has been streamlined and modernised, taking account of the creation of the office of the Hearing Officer and introducing an obligation on parties to provide non-confidential versions of specified documents. A similar exercise is currently under way with regard to Regulation 99/63 on hearings in the area of Articles 85 and 86 EC-Treaty.

3. The Notices

The amendments to the Merger Regulation also required changes to the Commission's explanatory notices. The notice on joint ventures[5] and to a lesser degree the notice on the calculation of turnover[6] are most affected. The notice on the concept of undertakings concerned[7] has been modified only in one point of substance. The notice on the concept of a concentration[8] takes account of the changes in its references to the other texts. In some languages linguistic changes have been made with a view to improve the text. The notice on ancillary restraints was not amended at this stage but is currently being revised.

Notice on Joint Ventures

The new notice on joint ventures reflects the fact that the distinction between concentrative and co-operative joint ventures has ceased to determine the applicability of the Merger Regulation. Jurisdiction will now be determined by applying the criterion of full functionality, on which further guidance has been given. Co-

[5] Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2. 3. 1998, p.1.

[6] Commission notice on the calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2. 3. 1998, p. 25.

[7] Commission notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2. 3. 1998, p. 14.

[8] Commission notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2. 3. 1998, p. 5.

operative aspects are therefore not discussed in the notice anymore.

It is intended that guidance on the substantive issues regarding the co-operative aspects of full-function joint ventures will be provided in due course after the Commission has had some experience in handling such issues. Pending the preparation of such guidance the notice refers to the relevant principles in the old notice.

The opportunity has also been used to up-date the references to previous cases where the issue of full-functionality has been discussed in more detail.

Notice on the Calculation of Turnover

The new notice on the Calculation of Turnover reflects the fact that an additional set of turnover thresholds has been introduced into the Merger Regulation. More changes to the notice were needed due to the new rules on the calculation of turnover for financial institutions, based on banking income.

Notice on Undertakings Concerned

This notice has been changed only in one matter of significance, that is, to adapt paragraph 23 of the text to the Commission's policy regarding the treatment of a single parent subsidiary. The Commission considers that when one or several new shareholders acquire joint control of a single parent subsidiary while the initial parent company remains, the subsidiary is not an undertaking concerned. This policy had already been published by the Commission in its Competition Report 1996.

Notice on the alignment of procedures for processing mergers under the ECSC and EC Treaties

This notice sets out the treatment of concentrations that fall under the ECSC Treaty. The procedure for these mergers will be the same as applied to mergers under the EC Treaty within the limits imposed by the ECSC Treaty. The measures are designed to increase transparency, set out the rights of defence and to speed up the decision making process. They have to be seen against the backdrop of the forthcoming expiry of the ECSC Treaty.

In particular the measures provide for the issuing of a statement of objections, access to file and an oral hearing in complex cases where the Commission is considering a conditional authorisation or a prohibition. They provide for time limits similar to those set out in the Merger Regulation. In addition the fact of a notification will be published in the Official Journal. Public versions of Article 66 ECSC decisions adopted after a statement of objections will be published in the Official Journal as will the fact of the adoption of other decisions. Public versions of these other decisions will be available to interested parties on request.

4. Procedure

These changes to the merger rules will entail a number of organisational changes within the Directorate General for Competition (DG IV). This applies in particular to joint ventures which may have co-operative aspects which will be handled directly by the relevant sectoral unit within DG IV, thereby optimising the use of resources and expertise within the Directorate General. For the initial twelve months however all notifications and initial contacts will still be received by the Merger Task Force in DG IV.

Recent important decisions

Geraldine Emberger and John Kemp, DG IV-B (Merger Task Force)

Statistical Overview

The new year so far shows a further continuation and strengthening of the upward trend in activity recurrently noted in previous issues of the Newsletter. Sixty-nine operations were notified, an increase of 64% on the same period in 1997 and compared with an annual increase of 30% in 1997 over 1996. There were 72 decisions disposing of cases under the Merger Regulation's main provisions (ie, Articles 6,8 and 9 of Regulation EC 4064/89) - an increase of some 100% on the equivalent period last year.

Of this total, 60 decisions related to operations which were cleared by the Commission at the end of the first phase of investigation, and a further six to operations where a second, more detailed phase of investigation was opened because the Commission had serious doubts about the operation's compatibility with the common market. There were also two decisions on cases following second phase investigation, in both instances clearing the operation subject to undertakings from the parties to remove the risk of creation or reinforcement of the dominant positions identified by the Commission, and one decision under Article 9, granting partial referral of the case back to the relevant national competition authority.

First Application of New Provisions

The period also includes the introduction (as from the beginning of March) of the new thresholds and other changes to the regulation (see previous articles). Noteworthy in this respect were the completion of the first case involving undertakings given under the new powers to deal formally with such matters in the first phase of investigation (see Owens-Illinois/BTR Packaging below) and the first two notified cases which fell to be examined under Community merger control procedures because they satisfied the new second level of thresholds, designed to ensure a reduction in the number of national filings of the same transaction.

The Commission also began to examine the potential application of Article 2(4) of the regulation to full-function joint ventures where cooperative aspects could be relevant. (For an explanation of the new rules on structural joint ventures see feature 'The New Merger Rules Have Entered Into Force' elsewhere in this issue of the Newsletter.). The organisational arrangements within DGIV in particular to deal with potential Article 2(4) cases - whereby full-function joint ventures which may have cooperative aspects will be handled by the relevant sectoral unit within DGIV - were also put into effect.

First Company Fined for Non-Compliance

Finally, this period also saw the first case in which the Commission used its powers to impose fines on companies for late notification and unlawful implementation (see Samsung/ AST below).

The following sections provide further details of the more significant cases dealt with in the period.

DECISIONS UNDER ARTICLE 8 (including withdrawals in Phase II)

Hoffmann-La Roche/ Boehringer Mannheim

In September 1997, the Swiss pharmaceutical company Hoffmann-La Roche proposed to acquire Corage Ltd., ultimate parent company of the Boehringer Mannheim Group (BM). After a preliminary appreciation of the case the Commission concluded that in

clinical chemistry ('CC') *in vitro* diagnostics - used to test cholesterol, glucose and other substances of the body - the parties would after the merger have a dominant position in 7 Member States, namely Austria, Denmark, Germany, Finland, Portugal, Spain and Sweden, and on 2 October 1997 decided to undertake a detailed investigation of the case (Article 6(1)(c) of the regulation). Its view was based not only on high combined market shares (between 40 and 80% in different national markets) but also on the weakness of existing competitors, the parties' unequalled installed base of instruments on which CC tests are performed, and the absence of countervailing purchasing power. In addition, Roche had built a dominant position in the DNA probes market in all Member States of the EEA, based on its significant patent estate relating to this key-technology. The Commission found that the merger would have strengthened this position even further, as BM was about to enter this market and would have become one of the most important competitors to Roche.

To address the Commission's competition concerns Roche undertook to divest the majority of its CC business in all Member States where the concentration would otherwise cause competitive concerns. Moreover in the market for DNA Probes, Roche undertook to grant world-wide licences for its key probe technology to all interested market participants. Whereas the divestment of the CC activities will greatly reduce the market share additions created by the merger, the undertaking to license the probe technology will enable entry into the DNA probe market and should accelerate the development of this important growth market.

On 4 February 1998 the Commission therefore approved the concentration, subject to full compliance with the undertakings.

Agfa-Gevaert/Du Pont

In September 1997, Agfa-Gevaert NV and Agfa-Gevaert AG notified their intention to acquire the graphic arts films businesses of EI Dupont de Nemours & Co (Dupont). The operation concerned the sectors for graphic arts film and offset printing plates. The Commission was concerned at the possibility that in view of the large overlapping shares that appeared to be present, and other relevant factors the merger would create dominant positions in some or all of the sectors and geographic markets involved. Accordingly on 9 October 1997 it decided to undertake a detailed investigation (see previous issue).

In the second-phase investigation the Commission found that the proposed concentration would lead to a dominant position in the EEA market for negative plates for use in offset printing. The Commission defined separate markets for negative printing plates and offset printing plates. This definition was based on two main factors. First, there is only limited supply-side substitutability, due to the substantial costs of adapting production lines and acquiring a new customer base. Second, in contrast to production costs, market prices for different types of plates were shown not to converge. The finding of dominance was based not only on the large market share Agfa would gain from the acquisition of Dupont (over 52% in the EEA) but also on a number of market-specific factors, in particular finance arrangements with manufacturers and exclusive arrangements Agfa and Dupont had with main distributors.

To address the Commission's concerns, Agfa offered to terminate its exclusive arrangements with its equipment suppliers and distributors to allow competitors to offer their own negative plates to distributors and thereby develop their sales more readily.

The Commission considered that, subject to full compliance with the conditions and obligations the operation would not lead to the creation or strengthening of a dominant position in the EEA, and accordingly decided, on 11 February 1998, to approve the operation on that basis.

Wolters Kluwer/Reed Elsevier

The proposed merger of Wolters Kluwer and Reed Elsevier was notified to the Commission on 10 November 1997. After initial examination it was concluded that the operation gave rise to serious competitive concerns in a number of national markets for professional publishing, and an in-depth investigation was opened on 11 December 1998 (see previous issue). This confirmed that the merger between these two leading publishers could create a dominant position in : the world-wide market for academic publishing (scientific journals and books); in the markets for publications for professional use in the areas of law and tax in the Netherlands, the United Kingdom, France and Italy; in the market for publications for primary and secondary schools (educational publishing) in the United Kingdom; in a number of markets for business publications in the Netherlands; in the market for Dutch dictionaries; and in the European market for the services provided from transport databases.

An important aspect of the Commission's concerns related to the size of the merged entity - several times larger than any other publisher of professional information in the Community. Such a market structure could in the Commission's view prevent the maintenance of a competitive situation in the supply of legal, fiscal and scientific information in the European Union, with a significant impact on the terms and prices at which this information is made available to user and consumers. In addition, the combination of the parties' financial resources and ownership of copyrighted content across Europe would discourage investments by competitors in this area.

For these reasons, the Commission decided to raise objections to the merger on competition grounds and addressed a statement to that effect to Wolters Kluwer and Reed Elsevier. However, on 9 March 1998 the parties announced that they had decided to abandon their current project to merge, so the Commission had no reason to continue its procedure under the merger regulation and no final decision on the planned merger has been or will be adopted.

Wienerberger/Cremer & Breuer

On 4 December 1997 Wienerberger Baustoffindustrie AG ("Wienerberger") and Deutsche Steinzeug Cremer & Breuer ("Cremer & Breuer") notified their intention to combine their activities in the area of clay sewage pipes in a joint venture. Cremer & Breuer is the leading clay pipe producer in Germany and Wienerberger is the second biggest supplier of clay pipes.

According to the parties, although the pipes are made from several different materials - clay, concrete, different kinds of plastic, and cast iron - users could easily substitute one type for another, so that there was a single product market, throughout Europe, for sewage pipes of all types. However, the Commission's initial examination found indications to suggest that certain materials were more suitable for particular applications than others. Moreover, there appeared to be specific preferences for certain materials in various Member States, which could lead to different conditions of competition. In Germany in particular, there was said to be a significant preference for clay pipes, especially for dirty-water main sewers and mixed-water sewers of small and medium-sized diameters. In the light of these indications, on 15 January 1998 the Commission decided to commence an in-depth investigation of the proposed operation. However, on 20 March 1998 the parties informed the Commission that they had annulled their joint venture agreement and consequently withdrew their notification.

KPMG/Ernst & Young

On 23 December 1997 the Commission was notified of the proposed merger between KPMG and Ernst & Young, two of the so-called 'Big Six' worldwide accountancy and audit firms. On 5 February 1998 the Commission announced its intention to carry out a detailed investigation of the proposal in view of the possibility that the merged entity would have high market shares in several EU

Member States as regards the provision of auditing and accounting and tax services in a significant number of industrial and commercial sectors. In reaching this decision, the Commission also took account of the fact that two other members of the 'Big Six' - Price Waterhouse and Coopers and Lybrand, had recently also notified their intention to merge (see below). However, shortly afterwards KPMG and Ernst & Young abandoned the merger plan. There was then no grounds for the Commission to continue its investigation, and accordingly no final decision on the case has been or will be adopted.

Thyssen Krupp Stahl/ITW Signode/Titan

On 5 May 1998 the Commission approved an operation creating a joint venture between Thyssen Krupp Stahl and ITW Signode. The joint venture will produce both steel and plastic strapping in Germany for sale in Western Europe and the rest of the world. The approval followed a detailed second phase investigation under the Merger Regulation (decision adopted on 22 December 1997, see previous issue).

Thyssen Krupp Stahl is itself a joint venture between Thyssen Stahl AG (a subsidiary of Thyssen AG) and Krupp Hoesch Stahl (a subsidiary of Fried Krupp AG) and was established to combine the two groups' production and distribution of flat carbon steel products. ITW Signode is a subsidiary of Illinois Tool Works Inc. of the United States of America and is the world's largest producer of strapping. The joint venture will acquire all the shares of Titan Umreifungstechnik, currently a subsidiary of the Krupp Group and Signode System GmbH, which produces both steel and plastic strapping. Signode System GmbH is a subsidiary of ITW Signode. Titan Umreifungstechnik, which produces steel strapping and strapping equipment, has entered into an agreement to sell the equipment manufacturing part of its business and its distribution operation for both strapping and equipment to a privately owned German company P W Lenzen. This operation will take place immediately after the shares in Titan Umreifungstechnik have been acquired by Thyssen Krupp Stahl and ITW Signode.

The Commission's investigation showed that ITW Signode and the joint venture would together have between 35% and 40% of the combined market for steel and plastic strapping in Western European market. The Commission has concluded that the operation would not strengthen or create a dominant position for a number of reasons. In particular because while the overall (i.e. for both steel and plastic strapping) was growing, consumption of steel strapping the only strapping product made by Titan has been falling over the long term and will continue to decline. On the other hand consumption of plastic strapping, where the parties are comparatively weak, is growing rapidly. Thus the parties market position will be eroded over time by the joint effects of the decline of the product sector in which they are strong and the growth in the plastic sector. Barriers to entry in the growing plastic sector are low and there are already a large number of active competitors.

OTHER IMPORTANT DECISIONS UNDER ARTICLE 6 OF THE REGULATION

Schweizerische Bankgesellschaft (SBG)/Schweizerische Bankverein (SBV)

On 3 February, 1998 the undertakings Schweizerische Bankgesellschaft (SBG) and Schweizerischer Bankverein (SBV), two Swiss based companies active in private and corporate banking and in the financial services business world wide, notified their proposal to merge their businesses into UBS AG (UBS), an entitiy which would replace SBG and SBV.

The concentration has world wide scale given the fact that UBS will be the largest European bank with total assets of around 508,000 million ECU and will be among the leading finance institutions world wide in investment banking and asset management. The merger involves some issues concerning retail banking in Switzerland which are currently dealt with by the Swiss Antitrust

authorities. The proposed merger has also been notified to the US antitrust authorities.

The affected product markets where SBG and SBV have overlapping activities in the EU are M&A (merger and aquisition), equity underwriting and equity trading.

In M&A and equity underwriting the parties had market shares of 42 % and 32% respectively in Portugal. However, shares of the parties and their competitors varied considerably over time. The Commission found out that the fluctuations were largely due to the tendency to carry out transactions without the use of an external advisor as well as to the fact that in smaller economies there are usually only a limited number of large acquisitions and privatisations every year. SBG and SBV temporarily succeeded in achieving a stronger market position in M & A advice and equity underwriting in Portugal after obtaining a contract to privatise the Portuguese telecommunications sector. However, given the above-mentioned circumstances, these shares were not considered likely to establish a long-term or permanent dominant position on the markets in question.

As for equity trading, combined market shares post merger amounted to around 20 % in the UK. However, the increment was less than 1%. Furthermore, UBS' strongest competitor, Merrill Lynch & Co., has about 7-15% market share in the UK.

Finally, the Commission took into account that there are a number of other important competitors active in the affected markets, namely Merrill Lynch & Co., Goldman, Sachs and Co., Morgan Stanley & Co., Deutsche Bank, etc. The banking services sector is characterised by a high degree of liberalisation and deregulation offering market access to potential competitors without significant restrictions, which are limited to the respective national banking and stock exchange control regimes. The banking services market is a highly innovative and competitive market with an increasing degree of globalisation.

For these reasons, the Commission concluded that the concentration would not create any dominant position in the common market or in a substantial part of it, and decided on 4 March 1998 to approve the operation.

Nestlé/Dalgety

On 2 April 1998 the Commission approved Nestlé's acquisition of the Spillers pet food business from Dalgety. Nestlé of Switzerland is engaged in a wide range of food businesses including pet food. Dalgety of Britain is active in agribusiness, food distribution and food manufacturing including pet food. The operation was notified on 27 February 1998.

The markets affected by the operation were the EEA markets for prepared dog and cat food. Dog and cat food are differentiated product markets with a large variety of products, brands and packages. A distinction is normally made between food for dogs and that for cats, and also between so-called dry and wet food types ('dry' foods requring the addition of milk or water before serving, 'wet' foods being ready-to-eat).

In the dog food market, the operation created only small market share additions, giving the parties will a combined market of less than 15% . Mars of the US will continue to be the clear market leader. Consequently, the Commission concluded that the operation did not lead to the creation or strengthening of a dominant position in the dog food market.

As far as the cat food market is concerned Mars is the market leader with almost half of the market at the EEA level. Spillers is number two and Nestlé number three. Following the operation Nestlé/Spillers will be a clear number two, and together Mars and Nestlé/Spillers will have more than 70% of the cat food market. Furthermore, Nestlé/Spillers will be a company with a range of brands and a breadth of production and logistics which is comparable to the market leader Mars. The Commission, therefore, examined whether the operation would give rise to the creation of duopolistic dominance in the cat food market.

In past years the cat food market has been characterised by a

significant degree of competition and falling prices. After having examined the market structure of the cat food market and the resulting likely future competitive relationship between Mars and Nestlé/Spillers, the Commission concluded that the competitive pressures were likely to continue to exist for the foreseeable future, despite the highly concentrated nature of the market. In particular, the Commission noted that the dry sector of the market is under-developed and likely to grow rapidly, which should encourage competition; furthermore, the market will remain subject to potential competition.

Consequently, the Commission concluded that the concentration did not create or strengthen any dominant position in the Common Market or in a substantial part of it, and, therefore, decided to approve the operation.

Owens-Illinois/BTR Packaging

The Commission decided on 21 April 1998 to clear the acquisition of BTR's Packaging Business Group (BTR Packaging) by Owens-Illinois, Inc (Owens-Illinois), subject to commitments submitted to the Commission. The decision marks the first occasion of the use of the Commission's new powers regarding formal acceptance of commitments at the first phase of investigation.

Owens-Illinois, an American corporation, is an international manufacturer of glass containers, machinery and plastic packaging products and a world-wide licensor of glass technology. BTR is a global engineering company and manufactures glass containers in the UK through its subsidiary BTR Packaging. The case was notified on 4 March 1998.

The Commission's investigation found competition concerns arising from the operation in the glass container market. The Commission concluded that the proposed operation, as originally notified, would have created or reinforced Owens-Illinois's dominant position in the glass container market in the UK and Ireland. This finding was based on the high market shares of the parties (50-75% depending on the end-user segment), the low market shares of the remaining competitors, and the lack of competitive pressure from outside the UK due to high transport costs.

Following negotiations with the Commission, Owens-Illinois gave commitments to address these concerns. The commitments include undertakings to divest the whole of the glass container business carried on by BTR Packaging through its subsidiary Rockware Group Limited (Rockware) at its four plants in the UK. Owens-Illinois has also undertaken to divest Rockware's 50% interest in a glass recycling joint venture, British Glass Recycling Company Ltd., which is jointly owned with Owens-Illinois.

These remedies, whose implementation will be closely monitored by the Commission, will completely eliminate the overlap between Owens-Illinois and BTR Packaging in the UK glass container market and render the operation compatible with the common market.

Modifications to the Merger Regulation which came into force on 1 March 1998 expressly provide for this possibility and give the Commission an extended period of 6 weeks in which to adopt a first phase decision if commitments are offered. Commitments in the first phase of the procedure are only accepted where the competition problem is readily identifiable, and where a clear-cut remedy is available providing a complete and effective solution which can be implemented without undue complication and delay.

REFERENCE BACK TO MEMBER STATES UNDER ARTICLE 9 OF THE REGULATION

Promodes/S21/Grupo GS

On 10 March 1998 the Commission decided to refer partially to the competent Italian authorities ("Autorità Garante della Concorrenza e del Mercato") the examination of the acquisition by the French retailing group Promodès of joint control with Schemaventuno (a holding company belonging to the Benetton and Del Vecchio

families) of GS, a company formerly solely controlled by Schemaventuno. By a second decision adopted the same day the Commission declared the rest of the operation compatible with the common market.

In its decisions on this case the Commission confirmed its practice concerning partial referral of the examination of a merger to a Member State (now codified with the latest amendments to the Merger Regulation).

The Autorità had asked for the partial referral of the case on 16 February 1998, as in its view the creation of the new group would threaten to create or reinforce a dominant position in certain local markets for retail distribution within Italy - specifically, in the provinces of Torino, Vercelli and Aosta.

The Commission decided to refer the case to the Autorità as regards the effects of the operation on each of these local areas. The Commission considered that an examination by the national authority would enable the relevant geographic markets and the position of the retail outlets concerned by the operation to be more precisely defined, so that a full competitive analysis could be carried out.

As far as the rest of the case was concerned, the Commission considered that the notified operation did not raise any serious doubts about competition at the national level. Irrespective of the exact product market definition adopted, the combined market shares of the parties were generally low. The operation was most likely to have effects in North-Western Italy (Piemonte and Lombardia). Even there, however, the operation did not appear to raise serious concerns other than in the three provinces mentioned above, in view of the locations of the sales points, the relatively small market shares and increments and the presence of a number of competitors. In consequence, the Commission declared the operation compatible with the common market as regards those aspects which were not the subject of the referral to the Italian Authority.

DECISION TO IMPOSE FINES FOR LATE FILING AND UNLAWFUL IMPLEMENTATION OF A CONCENTRATION - ARTICLE 14 OF THE REGULATION
Samsung/AST

On 11 February 1998 the Commission announced that it had fined the Korean company Samsung ECU 33,000 for failing to notify a concentration to the Commission in good time and for putting into effect the concentration without the Commission's authorisation. This was the first occasion on which the powers under the Merger Regulation to impose fines have been exercised.

On 22 April 1997, the Commission received a notification of a proposed concentration pursuant to the Merger Regulation by which the undertaking Samsung Electronics Co., L+d (Samsung) acquired control of the whole of AST Research, Inc. (AST) , an American company active in the market for personal computers, by way of public bid. However, the information in the Commission's possession indicated, beyond doubt, that Samsung had already acquired, without prior notification, control of AST at least in January 1996 within the meaning of the Merger Regulation. The Merger Regulation requires that a concentration with a Community dimension shall be notified to the Commission not more than one week after the acquisition of a controlling interest. In addition, Samsung also breached the Merger Regulation's requirement that an undertaking must not implement a proposed merger until it has received prior authorisation from the Commission.

In setting the amount of the fine the Commission took into account that no damage to competition had been caused; that the parties finally notified the operation and the infringement appeared not to be intentional; and that Samsung recognised the breach and cooperated with the Commission in its investigations. Nevertheless, the absence of notification and the implementation of the merger without the Commission's

authorisation continued for a significant period of time; moreover, Samsung is an important company with significant activities in Europe and must be considered to be aware of the Community Merger control rules.

The relatively small amount of the fines takes particular account of the fact that this is the first time a company has been fined for non compliance with its obligations under the Merger Regulation.

JUDGMENTS

France v Commission C-68/94, C-30/95 European Court Reports 1998 0000 full textCelex No. : 694J0068 Date of document : 31/03/98 Date of application : 18/02/94Judgment of the Court of 31 March 1998. French Republic and Soci,t, commerciale des potasses et de l'azote (SCPA) and Entreprise miniŠre et chimique (EMC) v Commission of the European Communities. Community control of concentrations between undertakings - Collective dominant position. Joined cases C-68/94 and C-30/95.

PRESS RELEASES

IP/98/390 [1998-04-29]
Commission approves the buy-out of BTR's Formica business by three investment banks

IP/98/389 [1998-04-20]
Commission approves the GE SEACO joint venture between GE Capital Services and Sea Containers Ltd

IP/98/371 [1998-04-24]
Commission clears acquisition of AMB, GPA and Proxima by Assicurazioni Generali S.p.A.

IP/98/370 [1998-04-24]
The Commission clears takeover of Royal Nederland Verzerkeringsgroep by Assurances Générales de France

IP/98/369 [1998-04-23]
Commission clears the acquisition of BTR PACKAGING by OWENS-ILLINOIS with undertakings submitted by OWENS-ILLINOIS (see p. 70)

IP/98/366 [1998-04-21]
Wienerberger and Cremer & Breuer withdraw their notification of creation of a joint venture (see p. 67)

IP/98/363 [1998-04-17]
The Commission approves acquisition of Novalis and Nyltech by Rhodianyl, subsidiary of Rhône-Poulenc

IP/98/362 [1998-04-17]
Commission approves the formation of a joint venture between ARAG and Winterthur in Switzerland

IP/98/332 [1998-04-06]
Commission decides that Deutag and Ilbau asphalt plant joint venture is not a merger

IP/98/326 [1998-04-03]
Commission approves Nestlé's acquisition of the Spillers pet food business from Dalgety (see p. 69)

IP/98/318 [1998-04-03]
Commission approves merger between ROYAL BANK OF CANADA (RBC) and BANK OF MONTREAL (BMO)

IP/98/294 [1998-03-26]
Commission clears UK music and bookshop joint venture

IP/98/293 [1998-03-26)
Commission clears UK plant hire joint venture by Tarmac and Bovis

IP/98/269 [1998-03-24]
Commission clears hotel groups merger

IP/98/268 [1998-03-24]
Commission clears acquisition of Digital by Compaq

IP/98/265 [1998-03-19]
Commission clears a concentration between NORTEL and NORWEB in the telecommunications sector

IP/98/264 [1998-03-19]
Commission has approved the creation of a joint venture between Sanofi and Bristol-

Myers Squibb for two new pharmaceuticals

IP/98/261 [1998-03-18]
Commission authorises the acquisition of a participation in ESTAG by EDF

IP/98/252 [1998-03-13]
The Commission approves the creation of a joint venture between CEREOL/EBS and SOFIPROTEOL in the sector of oilseed crushing and oil production

IP/98/249 [1998-03-12]
Commission approves joint venture in the modern retail sector (hard discount) in Italy

IP/98/248 [1998-03-12]
The Commission approves merger in foundry equipment sector

IP/98/244 [1998-03-11]
Commission has decided to refer partially to the Italian authorities the proposed acquisition of GS by PROMODES and SCHEMAVENTUNO for a detailed investigation. Commission has also cleared the rest of the operation.

IP/98/243 [1998-03-11]
Commission clears the take over of GUILBERT by the group PINAULT-PRINTEMPS-REDOUTE

IP/98/230 [1998-03-10]
Wolters Kluwer and Reed Elsevier have announced that following the objections of the Commission, they have abandoned their projected merger (see p. 67)

IP/98/226 [1998-03-10]
Commission approves joint venture TRANSRAPID between THYSSEN, ADTRANZ and SIEMENS to merge their magnetic leviation train activities

IP/98/216 [1998-03-05]
Commission approves the merger between Schweizerische Bankgesellschaft (SBG) and Schweizerischer Bankverein (SBV) (see p. 68)

IP/98/215 [1998-03-04]
Commission clears acquisition of Dutch real estate bank by the German Bayerische Vereinsbank

IP/98/213 [1998-03-04]
Commission to carry out detailed inquiry into proposed merger between WorldCom and MCI

IP/98/206 [1998-03-02]
Commission clears the take over of Havas Intermédiation by the group CLT-UFA

IP/98/205 [1998-03-02]
Waste management: the UK group Shanks & McEwan enters the Belgian market by acquiring some of the activities of the Suez-Lyonnaise des Eaux group

IP/98/202 [1998-02-27]
Commission clears acquisition of ACTEBIS Holding GmbH by OTTO Versand

IP/98/201 [1998-02-27]
The Commission authorises the acquisition by British Steel of a part of the capital of Europipe

IP/98/181 [1998-02-24]
The Commission approves Caterpillar's acquisition of Perkins diesel engine business

IP/98/166 [1998-02-18]
The Commission fines Samsung for late notification of a concentration

IP/98/159 [1998-02-17]
Commission clears the acquisition of San Pellegrino by Nestlé

IP/98/158 [1998-02-17]
Commission clears a concentration in local and regional passenger transport sector

IP/98/157 [1998-02-16]
Commission clears the merger between Zürich and the financial services business of B.A.T. Industries

IP/98/156 [1998-02-17]
Commission clears merger in private medical insurance

IP/98/155 [1998-02-16]
Commission authorises the acquisition of Hüls Styrene Business by BP

IP/98/152 [1998-02-12]
Commission authorises the acquisition of the automotive components activities of Philips by Mannesmann

➢ MERGERS

IP/98/148 [1998-02-11]
Commission approves acquisition by AGFA of Dupont's activities in the graphic arts sector, subject for conditions (see p. 66)

IP/98/139 [1998-02-09]
The Commission approves the acquisition of sole control over HAMBROS BANK by Société Générale

IP/98/138 [1998-02-09]
Commission approves the acquisition by PROMODES of SIMAGO, S.A. in the sector of the retail grocery in Spain (see p. 70)

IP/98/137 [1998-02-09]
Commission clears the acquisition of Catteau by Promodès in the retail distribution sector

IP/98/132 [1998-02-05]
Commission to carry out detailed inquiry into proposed merger between KPMG and Ernst & Young (see p. 67)

IP/98/131 [1998-02-05]
The Commission approves the acquisition by Stinnes of BTL from Finnlines

IP/98/130 [1998-02-05]
Commission clears the acquisition of Francorosso by Alpitour under the joint control of IFIL and the Isoardi family

IP/98/129 [1998-02-05]
The Commission approves the acquisition of Fritidsresor by Thomson

IP/98/121 [1998-02-04]
The Commission clears the acquisition of Boehringer Mannheim by Hoffmann-La Roche under conditions and obligations

IP/98/107 [1998-01-30]
Commission clears acquisition of DEUTSCHE WAGGONBAU AG by BOMBARDIER

IP/98/106 [1998-01-30]
Commission clears acquisition of Klöckner Chemiehandel GmbH by Metallgesellschaft AG

IP/98/105 [1998-01-30]
Commission clears the computer training joint venture "Futurekids Deutschland" between Burda and Bertelsmann

IP/98/104 [1998-01-30]
Commission clears the take over of Bertrand Faure by Ecia

IP/98/103 [1998-01-30]
Commission opens indepth investigation in the Deutsche Telekom / Beta Research case

IP/98/102 [1998-01-30]
The Commission approves the acquisition of sole control over Banque Paribas Nederland by Banque Paribas Belgique

IP/98/101 [1998-01-30]
Commission approves joint venture between DFO and Scadlines to merge their Baltic Sea ferry operations

IP/98/98 [1998-01-29]
Commission clears the acquisition of Matra BAe Dynamics of a 30 % interest in the missile business of Daimler Benz Aerospace

IP/98/97 [1998-01-28]
The Commission authorises two concentrations affecting the situation of control in CABLE I TELEVISIO DE CATALUNYA (a cable operator in Catalonia)

IP/98/83 [1998-01-26]
The Commission approves the acquisition of sole control over Banque Bruxelles Lambert/Bank Brussel Lambert by the ING GROEP

IP/98/78 [1998-01-23]
Commission clears joint venture between Dow Jones and NBC

IP/98/77 [1998-01-22]
Commission opens indepth investigation in the BERTELSMANN / KIRCH / PREMIERE case

IP/98/74 [1998-01-22]
Commission to carry out detailed inquiry into proposed merger between Price Waterhouse and Coopers & Lybrand

IP/98/73 [1998-01-22]
Commission approves a joint venture in the clinical sector

IP/98/57 [1998-01-20]
The Commission authorises the acquisition by Usinor of control of Fabrique de Fer de Charleroi

IP/98/51 [1998-01-19]
Commission decides to open indepth investigations regarding the creation of a joint venture between Wienerberger and Cremer & Breuer (see p. 67)

➢ MERGERS

IP/98/50 [1998-01-19]
The Commission approves merger in information technology sector in Denmark

IP/98/49 [1998-01-19]
The Commission approves the creation of a joint venture between Eastman Kodak and Sun Chemical in the sector of graphic arts

IP/98/48 [1998-01-19]
Commission clears the acquisition by Mannesmann of a controlling stake in the Italian telecommunications operator INFOSTRADA

IP/98/47 [1998-01-19]
Commission clears acquisition of PFANNKUCH-Group by SPAR Handels AG/ITM-Group

IP/98/46 [1998-01-19]
Commission clears acquisition of parts of PRO-Group by SPAR Handels AG/ITM-Group

IP/98/38 [1998-01-15]
The Commission approves the acquisition by ARBED / ACERALIA of the ARISTRAIN STEEL group

LIBERALISATION & STATE INTERVENTION

Application of Article 90 EC
Main developments between 1st January and 30th May

Développements les plus récents,

Angela BARDENHEWER, DG IV-A-1

Télécommunications

Cable review

Deux directives, celle de 1995 concernant le câble[1] et celle de 1996 sur la libéralisation totale des télécommunications au 1er janvier 1998[2], imposaient à la Commission une révision de la directive "câble" sous deux aspects particuliers :

- l'incidence sur la concurrence de la fourniture, par un seul et même opérateur, de réseaux de télécommunications et de réseaux câblés de télédistribution, et
- les restrictions à l'utilisation des réseaux de télécommunications pour la fourniture de capacité de télédistribution par câble.

A la lumière des conclusions de deux études qu'elle a fait entreprendre, la Commission a adopté, le 17 décembre 1997 une Communication concernant le réexamen de ces deux directives[3], ensemble avec un projet de directive modifiant la directive 90/388/CEE en vue de garantir que les réseaux de télécommunications et les réseaux câblés de télévision appartenant à un seul et même opérateur constituent des entités juridiques distincts[4]. La Commission compte finaliser son texte législatif après avoir pris connaissance de commentaires éventuels qui devront lui parvenir, dans un délai de deux mois environ, après la publication au Journal Officiel (7.3.1998).

En vue de conclure la consultation publique, la Commission a publié une invitation d'expression d'intérêt pour la réunion de consultation qu'elle envisage d'organiser.[5]

Internet

Le 1 janvier 1998, la Commission a adopté une Communication définissant sa politique en matière de communications vocales sur Internet.[6] Il est prévu dans ce texte que les communications vocales sur Internet ne relèveront pas du règlement régissant la téléphonie vocale jusqu'à ce qu'un certain nombre de conditions aient été remplies.

Dans le cadre du droit communautaire, la fourniture de communications vocales sur Internet ne constitue pas pour l'heure un "service de téléphonie vocale" au sens de la directive 90/388/CEE ("directive services de télécommunication")[7]. Les Etats membres ne peuvent donc la soumettre à des procédures de licence individuelle, mais tout au plus à des procédures de déclaration.

Les communications vocales sur Internet ne seront définies comme services de téléphonie vocale et, partant, ne relèveront de la réglementation sur les services classiques de téléphonie vocale qu'à condition que:

- ces communications fassent l'objet d'une exploitation commerciale,
- elles soient fournies pour le public,
- le service soit fourni au départ et à destination des points de terminaison du réseau public
- il comporte le transport direct et la commutation de la voix en temps réel.

Actuellement, les services de communication vocale sur Internet ne satisfont pas à tous ces critères; ils ne seront donc

[1] Directive 95/51/CE de la Commission, JO L 256 du 26.10.1995, p. 49.
[2] Directive 96/19/CE de la Commission, JO L 74 du 22.3.1996, p. 13.
[3] JO C 71 du 7.3.1998, p. 4-17.
[4] JO C 71 du 7.3.1998, p. 23-26.
[5] J.O. C150 du 16.5.1998, p. 3. Les parties intéressées peuvent manifester leur intérêt par télécopieur (32-2-2969819) ou par courrier électronique (cable-review@dg4.cec.be). Ces parties seront individuellement invitées à la réunion de consultation
[6] JO n° C 6 du 10.01.1998, p. 4). Le texte de la Communication est également disponible sur le site web de la DG IV (http://www.europa.eu.int/en/comm/dg04/lawliber/libera.htm).
[7] Directive de la Commission; JO L 192 du 24.7.1990, p. 10.

pas considérés pour le moment comme des services de téléphonie vocale. Les marchés resteront ainsi ouverts à l'innovation en ce qui concerne Internet, ce qui pourrait permettre de proposer des services de téléphonie multimédia sur Internet. Cela signifie également que les prestataires d'accès à Internet ne peuvent être tenus de contribuer au financement du service universel.

Toutefois, compte tenu de la sophistication croissante de leur offre, certains fournisseurs de communications vocales sur Internet pourront être considérés comme des prestataires de services de téléphonie vocale sur la base des critères énoncés et seront donc soumis à la réglementation applicable aux fournisseurs de services de téléphonie vocale dès qu'ils offriront une qualité de service équivalente aux services classiques de téléphonie vocale.

La Communication de la Commission concerne également les Etats membres qui ont obtenu des délais de mise en oeuvre supplémentaires pour la libéralisation de la téléphonie vocale après le 1er janvier 1998. Elle précise que, jusqu'à la date de la libéralisation totale, ces pays ne peuvent par exemple bloquer la fourniture sur Internet d'un service de communications vocales fonctionnant par carte, à moins qu'ils ne puissent apporter la preuve que le service en cause ne constitue qu'un simple substitut du service universel de téléphonie vocale et qu'il se taille à ce titre une part importante du marché des communications internationales et à longue distance.

L'état de la libéralisation du marché des télécommunications dans l'Union

Un peu plus d'un mois après l'ouverture complète du marché des télécommunications dans la majeure partie de l'Union, le 18 février 1998, la Commission a adopté un nouveau rapport sur la mise en oeuvre par les Etats membres des directives en matières de télécommunications.[8] Ce rapport fournit une "photographie" de la situation après le "big bang" du premier janvier et confirme que dans tous ces Etats membres de nouveaux opérateurs ont été autorisés à fournir des services de téléphonie vocale ou à établir et exploiter des réseaux publics de télécommunications en concurrence avec l'opérateur en place.

La Commission avait déjà adopté, en mai et octobre 1997, des rapports sur l'état de la transposition de ce paquet réglementaire et a ainsi pu identifier les Etats dans lesquels des efforts étaient encore nécessaires pour assurer une mise en oeuvre effective du cadre réglementaire. En novembre 1997, la Commission avait lancé des mises en demeure à l'encontre de sept Etats membres qui n'avaient pas respectés des échéances importantes. Ces procédures se sont révélées efficaces, et ont, comme le démontre le rapport de février 1998, poussé les pays concernés à prendre les mesures appropriées en vue de la transposition du cadre réglementaire.

Ce bilan globalement encourageant est important compte tenu de l'entrée en vigueur de l'accord OMC sur les services de télécommunications de base, début février 1998.

Il n'en demeure pas moins que le rapport identifie un certains nombre de problèmes subsistants, y compris en ce qui concerne la transposition de la directive 90/388/CEE de juin 1990 (call-back non libéralisé au Portugal et en Grèce par exemple). En outre des retards de transposition de la libéralisation des infrastructures alternatives ont été observés dans certains des Etats membre qui bénéficient de dérogations (et ceci malgré les périodes additionnelles de mise en oeuvre accordée à ces Etats membres pour l'adoption de ces mesures). Certains Etats membres n'ont en outre toujours pas totalement mis en oeuvre la directive visant à libéraliser les services par satellite, alors que la troisième génération de mobiles (UMTS) et les futurs services de communications personnelles par satellites (S-PCS) sont déjà à l'ordre du jour. Cette situation est lourde de conséquences pour

[8] COM (1998) 80 final.

la préparation et le développement des ces services.

La Commission a depuis l'adoption du rapport entamé des procédures d'infraction à l'encontre de certains des Etats membres concernés, concernant des cas de transposition incomplète. En parallèle, elle continue l'examen de la conformité des mesures nationales relatives à l'interconnexion, au contour du service universel et aux modalités de calcul du coût et du financement de celui-ci, ainsi qu'aux procédures et conditions d'octroi des autorisations. L'impact de ces mesures nationales sur les conditions de concurrence est analysé et des actions devront être prises s'il devait s'avérer qu'elles constituent des barrières à l'entrée pour les nouveaux opérateurs, pour s'assurer que l'ouverture des télécommunications à la concurrence profite davantage aux citoyens européens.

Dans sa réunion du 6 mai 1998 la Commission a ainsi décidé d'entamer des procédures d'infraction formelles à l'encontre des certains Etats membres qui ont imposé des obligations aux opérateurs de télécommunications d'affecter une partie de leurs recettes ou investissements à la recherche et développement ou à la formation. De telles conditions ne sont en effet pas prévues dans la directive 97/13/CE[9], qui harmonise de manière exhaustive les conditions auxquelles l'octroi de licences peut être soumis.

De nouveaux opérateurs dans le marché des radiocommunications mobiles

La date du 1er janvier 1998, était également l'échéance fixée pour l'octroi d'autorisations dans l'ensemble de la Communauté pour l'exploitation de systèmes mobiles DCS-1800. Tous les Etats membres ayant à cette date entamé les procédures nécessaires, sauf l'Italie. La Commission a donc décidé d'entamer une procédure d'infraction contre l'Italie, qui a néanmoins été suspendue, suite à un accord entre la Gouvernement italien et la Commission. Selon cet accord, les services de la Commission ont été étroitement associés aux différentes étapes de l'élaboration et du lancement de l'appel d'offres pour un troisième opérateur mobile en Italie. La procédure de sélection devrait pouvoir être achevée à la fin du mois de mai.

Compte tenu du temps nécessaire pour construire les réseaux concernés, les nouveaux opérateurs devraient commencer d'opérer à la fin de cette année, ce qui devrait augmenter le degré de concurrence au bénéfice des utilisateurs.

[9] Directive du Parlement et du Conseil du 10.4.1997 relative à un cadre commun pour les autorisations générales et les licences individuelles dans le secteur des services de télécommunication, JO L 117 du 7.5.1997, p. 15.

Énergie

La directive concernant le marché intérieur du gaz a été adoptée lors du Conseil "Energie" du 11 mai 1998. Les principales dispositions de cette directive, qui n'ont pas été modifiées depuis l'adoption de la position commune par le Conseil en décembre 1997, ont été décrites dans le numéro précedent du Newsletter.

PRESS RELEASES

IP/98/309 [1998-03-31]
Commisison adopts Notice on the application of the competition rules to Access agreements in the telecommunications sector

IP/98/182 [1998-02-25]
Commission publishes Monitoring Report on Universal Service in the Telecommunications Sector

IP/98/165 [1998-02-18]
Third report on the implementation of the EU telecommunications regulatory package

IP/98/39 [1998-01-15]
Commission defines its position on Internet telephony in the context of the liberalisation of the EU telecommunications markets

IP/98/32 [1998-01-14]
An Event marking the liberalisation of telecom-munications in Europe, Bibliothèque Solvay, Brussels, 19th January

STATE AID

Main developments between 1st January and 30th April 1998

Recent developments

The Commission's proposal for a Regulation on State Aid procedures

Adinda SINNAEVE, DG IV-G-1

I. The Commission's objectives

At the Industry Council of 14 November 1996, under the Irish Presidency, the Commission launched an initiative for the reorientation of State aid control by the use of Article 94 of the Treaty. The modernisation programme would focus on the implementation of a more transparent, coherent and efficient policy. The Council welcomed these ambitious plans and encouraged the Commission to make proposals.

With the adoption of a Commission proposal for an enabling Regulation on 15 July 1997, a first step to realise the Commission's objectives was made. Adopted by the Council on 7 May 1998, this Regulation empowers the Commission to exempt certain categories of aid from the notification obligation by means of block exemption Regulations. This should simplify the control system for "routine" cases and allow the Commission to concentrate its resources on the more complex and most distortive cases.

The proposal for a procedural Regulation adopted by the Commission on 18 February 1998 is the second chapter of the Commission's initiative under Article 94. It has a double goal.

First, the proposal aims at increasing transparency and legal certainty by a codification and clarification of the procedural rules in the State aid field. At present, the only legal provisions on State aid procedures are those of Article 93 of the Treaty. However, during the last 40 years a whole set of rules has been developed through the Commission's practice and the jurisprudence of the Court of Justice. This fragmentation of rules in case law, Commission notices, communications, guidelines, etc. has reduced the clarity of the system provided for in the Treaty. Integration of the procedural rules in one coherent text was thus needed, in order to make State aid control transparent for Member States, enterprises and the public at large.

The proposal should not be limited to a codification of the existing practice, however. In the Commission's view, the Regulation should also contribute to realise the objective of efficiency and a reinforcement of State aid control. The proposal therefore enlarges the control system with some new instruments and tightens up the rules on those points where the need for a more effective system arose.

II. Contents of the proposal

As the Regulation lays down rules for the application of Article 93 of the Treaty, it confirms first of all the cornerstones of the system foreseen in this Article: the obligation of prior notification and the standstill clause. Effective State aid control can only function if Member States notify their aid projects to the Commission and do not put them into effect before the Commission has authorised them. Most of the other provisions are either consequences of these principles or instruments to ensure that they are respected.

Concerning the "normal" procedure of notification the proposal mainly codifies the existing practice. According to Article 93 of the Treaty two phases can be distinguished. After a preliminary examination, the Commission may decide not to raise objections if the notified measure does not constitute aid or does not raise doubts as to its compatibility with the common market. If doubts about the

compatibility of the notified measure exist, the Commission has to open a formal investigation procedure and invite the Member State concerned and interested parties to submit their comments before taking a final decision. The first examination phase shall be closed within two months from the receipt of a complete notification.

Where Member States have infringed the rules of prior notification and standstill, the procedure basically follows the same pattern as for notified aid, but it is completed with several additional instruments, which are mainly based on the case law of the Court.
During the examination of the compatibility of the illegally granted aid, the Commission has different kinds of injunctions at its disposal:

- the information injunction, which should allow the Commission to obtain all necessary information on the unlawful aid;
- the suspension injunction, by which the Commission can order a Member State to suspend the unlawful aid until a decision on its compatibility is taken.
- the recovery injunction, by which the Commission can order provisional recovery of the unlawful aid pending its final decision.

The suspension injunction and the recovery injunction are conservatory measures and a logical consequence of the standstill clause. They aim at re-establishing a situation which should have prevailed anyway if Article 93 (3) had been respected. The recovery injunction is also an important tool for the protection of competitors, which may have suffered damage from the illegal granting of aid, which a final recovery decision could not repair.

In cases where the examination of the unlawful aid results in a final negative decision, meaning that the aid is not only unlawful on procedural grounds but also incompatible with the common market, definite recovery of the aid from the beneficiary is the only way to restore competition. Since the middle of the 1980s, the Commission has developed a policy of systematically asking recovery. This practice is reinforced in the proposal by the *obligation* for the Commission to order recovery of incompatible unlawful aid.

What is even more important, however, is the execution of recovery decisions. Experience has shown that the present situation regarding compliance with recovery decisions is far from being satisfactory. Nearly 10 % of the recovery decisions are not executed *10 years* after they have been taken, in the majority of cases because of pending procedures before national courts. Such delays make restoration of fair competition practically impossible and diminish the effectiveness and credibility of competition policy. Moreover, there appear to be significant differences between Member States in this regard. The majority of long-pending cases of unrecovered aid occur in a few states, so that an inequality of treatment between beneficiaries is created. In order to remedy this situation the Commission's proposal states that national procedures for recovery shall only apply, "provided that they allow the immediate and effective execution of the Commission's decision" and that "remedies under national law shall not have suspensive effect". This last sentence could be directly applied by national judges and is in line with the jurisprudence of the Court which has constantly rejected the application of provisions of national law that prevent the effective execution of recovery decisions. According to the proposal, beneficiaries could still use the legal remedies existing in their national law system, but pending the outcome of the proceedings, reimbursement should take place.

It should be recalled that the whole procedure on unlawful aid, including the recovery rules, would never have to be applied, if Member States respected the rules of the Treaty. Figures show a high proportion of non-notified cases over the years (ca. 21 % of all registered cases in 1997). Taken account of this situation, a stricter policy, including the use of suspension and recovery

injunctions, and the effective enforcement of recovery decisions is indispensable.

An efficient State aid control system would not be complete without the necessary means to monitor compliance with Commission decisions. The proposal contains three instruments that should enable the Commission to do this follow-up:

- a general reporting obligation on all existing aid schemes. Annual reports are an important source of information in the context of the constant review of existing aid according to Article 93 (1) of the Treaty. In addition, they should provide information about pre-accession aid schemes, which would otherwise perhaps remain unknown to the Commission.
- on-site monitoring powers of the Commission. The proposal foresees that the Commission shall be allowed to make on-site monitoring visits to the beneficiary, in cases where serious doubts about compliance with conditional decisions exist. If, for instance, the Commission has approved an aid under the condition of a capacity reduction, such visits may be the only way to check whether the conditions have been respected.
- Co-operation with national independent supervisory bodies. The Commission proposes that Member States designate an independent body, such as the competition authority or the Court of Auditors, which the Commission can ask for a report when it has doubts about compliance with certain decisions. This third instrument would give national bodies a role in the monitoring of State aid.

III. Third party rights

The Commission proposal confirms the bilateral character of State aid procedures, which are based upon a dialogue between the Member State concerned and the Commission. It chose not to create specific new rights for third parties, and in particular not to give complainants a status similar to the one they enjoy in Art. 85-86 cases. This position was recently upheld by the Court of Justice in the Sytraval judgment (see comment in this Newsletter). The Court confirmed that the role of competitors in State aid procedures is strictly limited to the formal investigation procedure, where their comments on the aid should help the Commission to obtain all the information necessary to assess compatibility.

The Commission considers that, under the present system, the rights of third parties are already sufficiently protected at every stage of the procedure:

- They may complain to the Commission about an alleged unlawful aid to a competitor. The proposal confirms that the Commission is obliged to examine such information.
- Every interested party can obtain a copy of Commission decisions on State aid.
- Where the Commission decides not to raise objections to an aid, competitors have the possibility to introduce an action for annulment of the decision under Article 173 (4) of the Treaty, in order to oblige the Commission to open the formal investigation procedure.
- Under the formal investigation procedure every interested party is invited to submit comments.
- Finally, competitors can introduce actions pursuant to Article 173 (4) against positive or conditional decisions closing the formal investigation procedure.

To create additional rights similar to those in anti-trust procedures would not only be in conflict with the objective of increasing efficiency, but also contradict the concept and logic of State aid control, which defines third party rights within the context of a procedure between the Member State and the Commission.

IV. Conclusion

The Commission's proposals under Article 94 are a historical step in State aid policy. After the

unsuccessful proposals made at the end of the Sixties and the beginning of the Seventies, no initiatives had been taken anymore and scepticism about the expediency of using Article 94 had grown. Today, the context has changed. The adoption of the enabling Regulation on 7 May 1998 will allow a simplification of procedures. The procedural Regulation could be another important step in the modernisation exercise and give the Commission the right instruments to achieve its objectives with regard to State aid control.

Recent important decisions

Madeleine Tilmans – DG IV.G.1

ITALIE. La Commission autorise un régime d'aides à l'emploi en Sicile favorisant la transformation d'emplois précaires en emplois stables.

La Commission européenne a approuvé en décembre 1997 un projet de régime d'aide en faveur de l'emploi en Sicile (Italie). Ce régime prévoit, pour les entreprises opérant en Sicile, des exonérations de charges sociales visant à la création nette de nouveaux emplois ainsi que la transformation d'emplois précaires en emplois stables. L'aide moyenne maximale sera de 22.000 Ecus par emploi créé ou stabilisé. Le budget alloué à ce régime est de +/- 76,5 millions d'Ecus.

L'intérêt de ce cas réside dans les aides pour la transformation des emplois précaires en emplois stables. En effet, ce type d'aides n'est pas expressément prévu par les Lignes directrices communautaires pour les aides à l'emploi qui se réfèrent uniquement à deux catégories : création nette d'emplois et maintien de l'emploi.

La mesure approuvée ne s'apparente ni à l'une ni à l'autre catégorie. Elle présente la caractéristique particulière de permettre la stabilisation d'emplois précaires. Elle comporte donc une valeur ajoutée constituée par la création nette d'emplois stables qui n'existaient pas auparavant.

Or, la Commission a observé que les Lignes directrices communautaires concernant les aides à l'emploi, bien qu'elles ne prévoient pas expressément ce type d'intervention, font référence au concept de stabilité en tant que valeur positive, en permettant l'octroi d'aides uniquement dans les cas où les emplois sont créés pour une durée suffisamment longue. Le concept de stabilité est en outre présent dans la conclusion du Conseil européen pour l'emploi de novembre 1997 qui préconise, entre autres, des mesures "pour faire reculer *durablement* le chômage".

Sur la base de ces considérations, la Commission a estimé qu'on ne peut pas exclure à priori l'approbation de ces mesures sous prétexte qu'elles ne sont pas expressément prévues par les Lignes directrices citées, car elles répondent à une valeur qui y est inscrite et sont susceptibles d'améliorer la situation du marché du travail d'une région gravement affectée par le problème du chômage et éligible à la dérogation de l'article 92.3.a) du traité. Elle a donc conclu en faveur de la compatibilité de ces aides.

De cette manière, la Commission a rendu compte du soutien de la politique de concurrence aux objectifs communautaires de lutte contre le chômage.

PORTUGAL. Aides à la formation. Clôture du dossier.

The European Commission and the Portuguese Government have reached agreement on the repayment of training aid to AutoEuropa, a Ford/Volkswagen joint venture, that exceeded the applicable ceiling. The Commission has therefore decided to close the file.

AutoEuropa is based at Setubal in Portugal and produces the Ford Galaxy, VW Sharan and Seat Alhambra models. The company was created in 1991, on a greenfield site, and has been a foremost example of successful inward investment into Portugal. The investment required significant resources, some of which were provided in the form of regional funding (for investment) and social funding (for training purposes). The Commission approved these measures in 1991 and has since monitored their application.

During this monitoring process the Commission found out that AutoEuropa was still receiving public funds for training purposes after the launch of production in 1995. The Commission has assessed such payments under the rules on training contained in the car aid framework establishing a ceiling of 50% of total cost for basic training purposes and 25% for job specific training.

Once the Commission established that such ceilings had been exceeded the Portuguese authorities have co-operated fully with the Commission to ensure prompt repayment of the excessive aid. This allowed the Commission to close the file.

BELGIQUE. La Commision décide l'ouverture de la procédure de l'article 93 §2 du traité CE en vue d'examiner la compatibilité avec le marché commun de l'octroi par les autorités régionales flamandes d'une garantie de crédit en faveur de la société de télécommunications Hermes Europe Railtel N.V.

On 7 April 1998, the Commission decided to open Article 93(2) proceedings concerning a State guarantee covering 50% of a loan of 50 million ECU which is envisaged to be awarded by the Regional Flemish authorities to Hermes Europe Railtel (HER).

HER, a joint-venture between the American telecommunications service company GTS and the Dutch HIT Rail B.V, aims to become one of the leading pan-European Carrier's Carrier. HER intends to supply, via its network, a wide range of hi-tech transfrontier telecommunications services and will thus be acting in a market which has only recently been liberalised throughout the EU. HER will set-up and operate along Europe's rail system an optical fibre network which, by mid 1998, will interconnect 6 countries of the EU and Switzerland and, by the end of the project, will be acting all over Europe. HER's management centre is located in Hoeilaart and its back-up centre is in Antwerp. The project will lead, according to the Belgian authorities, to the creation of more than 200 new jobs.

The overall investment sum in Flanders will be 64 million ECU out of which 50 million ECU will be financed by private banks. The Flemish authorities intend to provide a guarantee securing 50% of the loans provided by the banks.

The Commission had serious doubts as to the compatibility of the proposed guarantee with the Community rules on State aid. First of all, the Commission could not exclude that the guarantee constitutes State aid since there were doubts whether the guarantee would be awarded under market conditions as claimed by the Belgian authorities. Secondly, having in mind that it is normally favourable to investment aid of this kind if such an investment is carried out by an SME or if the investment creates new employment in a depressed area with high unemployment, it concluded that none of these two requirements were fulfilled in the present case. The Commission therefore decided to open the procedure in order to examen the proposed aid in more depth.

FRANCE. La Commission décide d'ouvrir la procédure au titre de l'article 93 §2 du traité CE à l'égard des aides en faveur de Gooding Consumer Electronics et de Cofidur pour la reprise de l'ancienne usine Grundig située à Creutzwald en Lorraine.

Le 25 février 1998, la Commission a décidé d'ouvrir la procédure prévue à l'article 93 § 2 du traité CE à l'égard des aides octroyées et projetées dans le cadre de la reprise de l'ancienne usine Grundig de Creutzwald en Lorraine en faveur, en premier lieu, de la société Gooding Consumer Electronics (GCE) et, après la faillite de la société créée sur le site et dénommée Gooding Electronique S.A. (GESA), en faveur de la société Cofidur, le nouveau repreneur. GCE a bénéficié d'une aide à la restructuration s'élevant à 36 millions de FF (5,44 millions d'écus). Quant à Cofidur, les aides à la restructuration prévues en sa faveur pour la reprise de l'ancienne usine GESA se composent d'une aide exceptionnelle à l'investissement de 2,25 MFF et de deux aides régionales, soit une subvention de 1,4 MFF et une avance remboursable dont l'élément aide est de 0,9 MFF.

Depuis le 22.6.1995, GESA est en redressement judiciaire suite à un dépôt de bilan. Les autorités judiciaires françaises ont maintenu ce redressement judiciaire jusqu'au maximum légal, c.à.d. février 1997. Elles ont, par la suite, prononcé la liquidation de GESA et accordé les actifs de cette société au groupe COFIDUR (le passif n'ayant pas été repris, conformément à cette procédure dite de cession). Par ailleurs, le 25 juin 1997, les autorités françaises ont notifié à la Commission un projet de nouvelles aides à la restructuration en faveur de la société COFIDUR qui, selon les autorités françaises, est une nouvelle société.

Dans l'ouverture de la procédure concernant Gooding, la Commission a examiné la conformité de l'opération proposée par CGE avec les lignes directrices communautaires pour les aides au sauvetage et à la restructuration des entreprises en difficulté qui subordonnent la compatibilité de l'aide au respect d'un certain nombre de conditions. Or, le retour dans un délai raisonnable à la viabilité à long terme de Gooding n'était pas assuré puisque l'on peut douter du caractère réaliste de certaines hypothèses concernant les conditions d'exploitation futures. La prévention de distorsions de concurrence indues n'était pas assurée puisque la production était amenée à doubler avant la fin du plan de restructuration. Le fait que l'entreprise GESA ait cessé d'exister peut également être un indice qu'elle n'avait pas la solidité financière nécessaire.

En ce qui concerne l'ouverture de la procédure relative à Cofidur, celle-ci se justifie par l'alternative suivante :

- soit, Cofidur est une société qui ne reprend pas l'intégralité des actifs et du passif de l'entreprise faillie (GESA). Dans ce cas, Cofidur ne semble a priori ni être responsable des aides versées antérieurement, ni être éligible à des aides à la restructuration;

- soit, Cofidur reprend l'intégralité des actifs et du passif, auquel cas elle pourrait être éligible aux aides à la restructuration si les conditions requises par les lignes directrices en la matière sont réunies. Dans ce cas, elle pourrait également être tenue pour responsable du remboursement des aides précédentes à GESA si la Commission devait décider qu'elles sont incompatibles avec le Traité.

Une aide à la restructuration en faveur de Cofidur ne pourrait être autorisée que si ladite société assumait le passif de l'ancienne (GESA), y compris le remboursement des aides incompatibles perçues par cette dernière. Si, par contre, ces aides étaient considérées comme aides régionales à l'investissement, elles pourraient être autorisées au titre du régime régional français PAT.

ROYAUME-UNI. Feu vert de la Commission à l'octroi d'aides à la R&D en faveur de Rolls-Royce.

The Commission has authorised the proposed R&D aid by the UK authorities to Rolls-Royce for the development of a new generation of three high thrust aero-engines. The new engines will be derivatives of the existing Trent engines. The aid is in the form of a reimbursable advance of £200m to be granted over 4 years (1988-2001). The total cost of the R&D programmes is £736m.

A pre-condition to obtain the Government funds is achievement by the company of a number of performance milestones. Significant failures in key parts of the R&D programme could result in the withdrawal of further Government funding.

The Commission found that the terms of the planned investment will be as commercial as possible. On the other hand, it recognised that given the risk of partial failure of the R&D programmes the investment cannot be consider as fully commercial. In the absence of the Government support the company would be unable to raise the moneys on the capital markets and proceed with the R&D programme.

After a thorough examination of the case the Commission found that the aid complies with the provisions of the Community framework for State aid for R&D. In particular, the programme costs for which aid will be granted pertain to the stage of precompetitive development activity. The aid intensity as a proportion of the eligible costs is in conformity with the R&D framework and the Commission practice in the field of reimbursable advances.

The Commission has verified the incentive effect of the aid. It has found that if the notified aid was not authorised, the Rolls Royce programmes could not be carried out because of the not availability of finance from alternative sources.

The Community framework on R&D aid recognises that one aim of competition policy is to improve the international competitiveness of Community industry and thereby contribute to the achievement of the objectives set out in Article 130(A) of the Treaty. The Commission considers that Rolls Royce is the only European company which has the ability to design and develop aero-engines for large civil aircraft. If the Commission did not authorise the notified aid Rolls Royce could not carry out the R&D programmes. The aid is aimed, inter alia, at redressing such a market failure and as such has an incentive effect.

The Commission has examined the situation of the world wide large aero-engine industry and arrived at the conclusion that the aid contributes to promote the competitiveness of the Community industry.

Nevertheless, the UK Government has been required to submit an annual report to the Commission on the implementation of the aid and to notify in conformity with Article 93(3) of the Treaty any modification to the modalities of the aid.

AUTRICHE. La Commission a décidé d'ouvrir la procédure au titre de l'article 93 §2 du traité CE à l'égard d'une aide prévue en faveur de KNP Leykam au titre de la R&D

On 25 March 1998, the Commission decided to open a procedure with respect to the Austrian government's proposal to give aid of ECU 3.5 million to KNP Leykam (Gratkorn) for the development of a "mill information and control system" relating specifically to the construction of a new paper machine at Gratkorn, Austria.

KNP Leykam is Europe's leading producer of coated woodfree paper. In 1995, it began an investment programme at their Gratkorn site which included investing of more than ECU 400 million in a new paper machine including production hall.

The aid would contribute to the development of a "Mill Information and Control System" for the new paper machine and was notified as

being aid for research and development, falling in the R&D-stage of precompetitive development. The eligible R&D-costs are given as ECU 8.86 million, the proposed aid amounts to ECU 3.53 million. For the most part, these costs will not be incurred by KNP Leykam directly, but by its subcontractors.

The Commission has opened the procedure given its doubts as to whether the aid proposal fulfils the conditions of the EU Framework for State Aid for Research and Development. In particular, these doubts relate to the R&D-character of the project and the "incentive effect" of the aid, i.e.whether the aid presents an inducement for the company to carry out research which it would not otherwise have pursued.

THE NETHERLANDS. Dutch Government drops State aid to Philips for R&D: the Commission closes its investigation

On 22 April 1998, the Commission decided to close an investigation into the Dutch government's proposal to give research and development aid to Philips Semiconductors, an international semiconductor manufacturer. Funding of ECU 4 million was proposed for 1995, with further financing foreseen from 1996 to 1998 for a project on 'Semiconductor Systems for Multimedia'. The proposed public funding corresponded to operating aid for the company. The decision to close the investigation was taken after the withdrawal of the proposal by the Dutch authorities who undertook not to grant the aid.

ALLEMAGNE. La Commission ouvre la procédure au titre de l'article 93 §2 du traité CE à l'égard des aides qui ont été octroyées au titre de la R&D au groupe SICAN et à ses associés.

On 11 March 1998, the Commission decided to open a procedure with respect to aid given to SICAN-group. SICAN-group, situated in Hannover, Niedersachsen, has been set up in the early 90th to undertake research in the area of microelectronics. It has carried out research projects together with and under contract to enterprises in Niedersachsen. Since 1990, the group is said to have received several million ECU in state funding.

It seems that a total of more than ECU 100 mio state funding had never been approved by the Commission and the Commission has not been able to ascertain the beneficiaries, the precise amount of aid granted to them, the incentive effect and the necessity for such aid.

ALLEMAGNE. Décision finale négative de la Commission à l'égard des aides à la restructuration octroyées à la Stahl- und Hartgußwerke Bösdorf AG.

La Commission a décidé de clore par une décision négative la procédure de l'article 93 paragraphe 2 du traité CE qu'elle avait ouverte à l'égard des aides à la restructuration octroyées à la Stahl- und Hartgußwerke Bösdorf AG (SHB). Cette société opérait dans le secteur de la fonte d'acier. En juin 1996, la Commission avait approuvé des aides à la restructuration en sa faveur pour un montant de 5 millions de DM (2,5 MECU) sous forme d'une prise de participation par le fonds de consolidation du Land de Sachsen. Avant que cette décision n'ait été prise par la Commission, les autorités allemandes ont octroyé des aides supplémentaires qui n'ont fait l'objet d'une notification qu'en août 1996. Il s'agissait d'une subvention non remboursable d'un montant de 4,5 Millions de DM (2,25 MECU) et du prolongement du délai de remboursement d'un crédit s'élevant à 1,5 Millions de DM (0,75 MECU). En octobre 1996, la SHB a néanmoins dû demander l'ouverture d'une procédure de faillite.

En raison des doutes quant à la compatibilité des nouvelles aides avec le marché commun et quant à la réalisation du plan de restructuration qui accompagnait la première aide, la Commission,

le 5 février 1997, a ouvert la procédure de l'article 93 paragraphe 2 CE. En raison du défaut d'informations de la part des autorités allemandes, la Commission, par décision du 15 juillet 1997, a enjoint formellement à l'Allemagne de lui fournir les informations utiles à l'examen du dossier.

La Commission a appris, dans le cadre de cette procédure et suite à l'injonction, que le plan de restructuration de l'entreprise n'avait pas été mis en oeuvre d'une manière conséquente. Le plan présenté n'avait pas été adapté aux difficultés de l'entreprise et n'était pas de nature à permettre le rétablissement de la viabilité de l'entreprise à long terme. De plus, après examen des aides à la lumière des lignes directrices communautaires pour les aides d'Etat au sauvetage et à la restructuration des entreprises en difficulté, elle a dû conclure que les aides en question ne pouvaient pas être considérées comme compatibles avec le marché commun.

La Commission a donc pris une décision négative concernant toutes les aides octroyées en faveur de SHB [DM 11 millions (5,5 MECU) au total] et a demandé le remboursement de ces aides.

ALLEMAGNE. La Commission prend une décision finale négative à l'égard des aides octroyées à la manufacture de porcelaine Triptis Porzellan GmbH.

La Commission a pris une décision finale négative à l'égard des aides dont la manufacture de porcelaine Triptis Porzellan GmbH, installée dans le Land de Thüringen et privatisée en 1993, a bénéficié illégalement et qui consistent en l'abandon de créances pour un montant de 8 millions de DEM (4 MECU) et en garanties du Land de Thüringen à concurrence de 90 % de crédits s'élevant à 26,75 millions de DEM, l'élément aide représentant 24,075 millions de DEM (12 MECU). La Commission a conclu à l'incompatibilité de celles-ci et en a imposé la récupération.

Fin 1996, les autorités allemandes notifièrent à la Commission l'octroi d'une aide à Triptis Porzellan sous forme d'un abandon de créances relatives à des crédits publics octroyés en 1995, en vue de la restructuration de l'entreprise, pour un montant de 8 millions de DEM, crédits qui auraient déjà dû être notifiés préalablement à leur octroi en 1995. Dans le cadre de cette restructuration, la Hessische Landesbank (HeLaBa), banque publique, avait également abandonné une créance de 10 millions de DEM.
Une procédure au titre de l'article 93 § 2 CE fut ouverte en mai 1997 par la Commission en vue, notamment, de déterminer si l'abandon de créance de la part de la HeLaBa constituait ou non une aide d'Etat. Au cours de cette procédure, il est apparu que non seulement la créance de 10 millions de DEM abandonnée par HeLaBa était en réalité garantie à concurrence de 90 % par le Land, ce qui constituait clairement une aide d'Etat, mais que, de plus, au cours des années 1993 et 1994, le Land avait garanti, toujours à 90 %, des prêts de la part de HeLaBa pour un total de 26,75 millions de DEM (les 10 millions précités inclus), sans qu'aucune notification n'en ait été faite à la Commission.

Entretemps, en avril 1997, Triptis Porzellan a été déclarée en faillite. Etant donné que l'abandon de créance de 10 millions de DEM datait de 1996, seul le solde de 16,75 millions a été réclamé par HeLaBa dans le cadre de la procédure de faillite. Il est pratiquement certain que seule une part infime de cette créance pourra être récupérée et que la garantie du Land en couvrira donc pratiquement l'intégralité. C'est pourquoi, la Commission, dans sa décision finale, a imposé la récupération de l'intégralité de l'aide (24,075 millions de DEM) liée à la garantie accordée illégalement sur les 26,75 millions de DEM. En juin 1997, les installations de Triptis ont été cédées par la curatelle, pour un prix de 2,5 millions de DEM (1,25 MECU), à l'entreprise Winterling Porzellan AG Kirchenlamitz qui, selon les autorités allemandes,

ne bénéficiera d'aucne aide à la restructuration.

ALLEMAGNE. Décision finale négative concernant le régime d'allégement fiscal en vertu de l'article 52 § 8 de la Loi allemande relative à l'impôt sur le revenu

En janvier 1998, la Commission a pris une décision négative à l'égard du régime d'allégement fiscal instauré par l'article 52, paragraphe 8, de la loi allemande relative à l'impôt sur le revenu et prévoyant, pour les exercices 1996 à 1998 un allégement fiscal particulier destiné à stimuler le marché des participations dans les entreprises situées dans les nouveaux Länder et à Berlin-Ouest et, en conséquence, à augmenter les fonds propres de ces entreprises. Elle en a interdit l'application après avoir conclu à son incompatibilité avec les règles du traité CE pour les motifs qui sont exposés ci-après.

Selon le droit fiscal allemand, les bénéfices résultant de la vente de certains biens économiques sont assujettis à l'impôt sur les revenus ou à celui sur les sociétés. En vertu de l'article 6 b de cette loi, les personnes physiques ou morales qui réalisent des bénéfices par la cession de certains biens mobiliers ou immobiliers ou encore de participations dans des sociétés de capitaux et qui réinvestissent ces bénéfices par l'acquisition, entre autres, de participations dans des sociétés de capitaux peuvent déduire de leur base imposable 50 % des bénéfices réinvestis dans ces acquisitions.

L'article 52, paragraphe 8, entré en vigueur le 1er janvier 1996, prévoit pour les exercices 1996 à 1998 une extension de cet allégement fiscal. Sur la base de cette disposition, les assujettis peuvent déduire de leur base imposable 100 % des bénéfices réinvestis lorsqu'il s'agit d'acquisition de parts liées à une augmentation de capital ou à la constitution de nouvelles sociétés de capitaux, et que ces sociétés de capitaux comptent au plus 250 salariés et ont leur siège social, ainsi que leur direction, dans les nouveaux Länder ou à Berlin-Ouest.

Ce régime constitue donc un avantage direct pour les investisseurs bénéficiant de l'allégement fiscal mais il procure également un avantage indirect aux entreprises bénéficiant des investissements réalisés grâce à cet incitant fiscal.

En ce qui concerne les bénéficiaires directs, la Commission a estimé que cet allégement fiscal constitue une mesure générale. Celle-ci ne comporte pas d'élément d'aide étant donné que tous les assujettis peuvent en bénéficier indépendamment de leur taille, leur secteur d'activité ou la localisation de leur siège social, ce pour autant que les bénéfices soient investis d'une manière déterminée.

Par contre, ce régime constitue une aide d'Etat en faveur des bénéficiaires indirects, soit les entreprises est-allemandes et berlinoises comptant maximum 250 employés. En effet, du fait de l'entrée en vigueur de l'article 52, paragraphe 8, ces dernières ont bénéficié d'un double avantage résultant, d'une part, d'un accroissement de la demande de participations et, d'autre part, du fait que cette augmentation de la demande a permis à ces entreprises d'imposer aux investisseurs l'acceptation de conditions contractuelles plus intéressantes pour elles-mêmes. Ensuite, cet allégement entraînant une diminution des recettes fiscales, il est bien accordé au moyen de ressources d'Etat et la concurrence intra-communautaire risque d'être faussée car les entreprises qui ont leur siège social et leur direction dans la région en question seront favorisées par rapport à celles qui sont situées dans d'autres régions d'Allemagne et dans d'autres Etats membres. Même si l'intensité d'aide de cette mesure est faible, ce régime doit être considéré comme une aide d'Etat conformément à la jurisprudence de la Cour de Justice selon laquelle la faible importance d'une aide n'exclut pas a priori que les échanges entre Etats membres soient affectés.

Par ailleurs, étant donné que la prise de participation n'est pas liée à la réalisation d'investissements initiaux, ce régime comporte des aides au

fonctionnement qui ne peuvent pas être considérées comme compatibles avec le traité CE étant donné qu'elles sont également d'application à Berlin-Ouest, région non éligible à une telle forme d'aide. De plus, les règles spécifiques afférentes à l'octroi d'aides dans les secteurs sensibles ne sont pas respectées.

Enfin, le régime prévoit comme condition pour la déduction fiscale le fait que les entreprises bénéficiaires des participations aient leur siège et leur direction dans les nouveaux Länder allemands ou à Berlin-Ouest. Cette disposition est contraire à l'interdiction de discrimination prévue aux articles 52 et suivants du traité CE relatifs à la liberté d'établissement.

PAYS-BAS. La Commission prend une décision finale négative à l'égard d'une aide à l'investissement en faveur de la construction d'une usine de peroxyde d'hydrogène à Delfzijl.

Le 21 janvier 1998, la Commission a adopté une décision finale négative estimant qu'une partie des aides accordées en 1994 par les autorités néerlandaises à la société FMC Industrial Chemicals (Netherlands) B.V. pour la construction d'une usine de peroxyde d'hydrogène à Delfzijl était incompatible avec le marché commun.

Cette décision concerne uniquement les aides dépassant le plafond maximum autorisé par le régime d'aide régional à l'investissement applicable à la région où se situe Delfzijl. En effet, les aides perçues par FMC s'élèvent à 29,09 MHFL alors que compte tenu de l'importance de l'investissement réalisé, elle ne pouvait en recevoir que 22,79 MHFL, soit 20% brut des coûts éligibles.

La Commission a demandé aux autorités néerlandaises de prendre les mesures nécessaires afin de procéder à la récupération des aides, pour la partie dépassant ledit plafond régional autorisé. En effet, une acceptation par la Commission d'un dépassement des plafonds d'aides régionales constituerait un précédent dangereux, remettant en cause sa politique en la matière.

Par ailleurs, dans le cadre du dossier, les autorités néerlandaises avaient affirmé que FMC avait supporté d'importants investissements à caractère environnemental, pour lesquels un dépassement de l'intensité maximum d'aide régionale pouvait être admis. La Commission a constaté que le site où l'usine est implantée fait partie d'une réserve naturelle où la réglementation en matière environnementale est très stricte et que la compagnie n'a fait que ce conformer à ladite réglementation. Par conséquent un supplément d'aide n'a pu être accepté.

JUDGMENTS

Judgment of the Court of 2 April 1998 , Case C-367/95 P : Commission of the European Communities v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL. Appeal. Case C-367/95 P.

Order of the Court (Fourth Chamber) of 25 March 1998, Case C-174/97 P : Fédération française des sociétés d'assurances, Union des sociétés étrangères d'assurances, Groupe des assurances mutuelles agricoles, Fédération nationale des syndicats d'agents généraux d'assurances, Fédération française des courtiers d'assurances et de réassurances et Bureau international des producteurs d'assurances et de réassurances v Commission of the European Communities. Appeal.

Judgment of the Court (Sixth Chamber) of 19 February 1998, Case C-309/95 : Commission of the European Communities v Council of the European Union. Exceptional aid to producers of table wine in France.

Judgment of the Court (Sixth Chamber) of 29 January 1998, Case C-280/95 : Commission of the European Communities v Italian Republic. State aid - Fiscal bonus on certain taxes - Recovery of aid – Not absolutely impossible

➢ STATE AID

PRESS RELEASES

IP/98/380 [1998-04-22]
The Commission investigates the opening of two new Italian shipyards

IP/98/379 [1998-04-22]
Dutch Governement drops State aid to Philips for R&D: the Commission closes its file (see p. 86)

IP/98/378 [1998-04-22]
Commission adopts a negative decision on aid to Stahl- und Hargußwerke Bôsdord AG

IP/98/377 [1998-04-22]
Commission takes a final negative decision against Triptis Pozellan GmbH (see p.87)

IP/98/347 [1998-04-14]
Commission opens procedure into aid to Wildauer Kurbelwelle GmbH

IP/98/349 [1998-04-08]
Commission examines State guaranteed loan to Hermes Europe Railtel (see p. 83)

IP/98/348 [1998-04-08]
Commission approves aid for research projects in France and The Netherlands

IP/98/344 [1998-04-07]
Commission approves prolongation of aid scheme for the Land of Thuringia for the years 1997-2001

IP/98/338 [1998-04-07]
Commission opens procedure into aid to the French maritime company Brittany Ferries

IP/98/336 [1998-04-07]
Aid for debt settlement and consolidation for agricultural co-operatives and other entreprises in Greece

IP/98/302 [1998-03-31]
Commission inquiry into State aid to 'Centrale del Latte di Roma'

IP/98/288 [1998-03-25]
Commission closes its investigation over transport aid to Volvo Truck Corporation in Umeå (northern Sweden)

IP/98/287 [1998-03-25]
Commission decides to investigate state aid to KNP Leykam, Austria

IP/98/286 [1998-03-25]
Commission approves environmental aid to Belgian steel company SIDMAR

IP/98/285 [1998-03-25]
Commission opens investigation into aid to Spanish synthetic fibres producer BRILEN S.A.

IP/98/284 [1998-03-25]
Hoogovens Staal : Commission raises no objections to proposed aid in favour of the « Cyclone Converter Furnace » R&D project

IP/98/283 [1998-03-25]
Commission authorises R&D aid to Rolls-Royce large engine programmes in the United Kingdom.

IP/98/282 [1998-03-25]
Commission approves regional aid to Opel for two projects in Bochum

IP/98/281 [1998-03-25]
Commission opens procedure regarding State aid to Draiswerke GmbH in Mannheim

IP/98/280 [1998-03-25]
Commission opens enquiry against Italian state aid for road sector and intermodal transport

IP/98/278 [1998-03-25]
Approval for aid to the RISO 2000 project in Italy

IP/98/260 [1998-03-18]
Land purchases in the new Länder

IP/98/241 [1998-03-11]
The Commission decides to investigate state aid to Océ N.V.

IP/98/240 [1998-03-11]
Banco di Sicilia and Sicilcassa : Commission requsts further information on support measures for two Sicilian banks

IP/98/239 [1998-03-11]
Commission opens procedure regarding State aid th the SICAN group for R&D in microelectronics

IP/98/236 [1998-03-11]
Autoeuropa : closure of file after satisfactory cooperation between the Commision and Portuguese authorities

IP/98/192 [1998-02-26]
Commission opens procedure against investment aid to Tubos Europa (Extramadura, Spain)

IP/98/186 [1998-02-26]
Restructuring of the Volkswerft shipyard in Stralsund (Germany, Mecklenburg-Western Pomerania)

IP/98/191 [1998-02-25]
Commission declares German development aid to Indonesia in breach of the shipbuilding Directive

IP/98/189 [1998-02-25]
La Commission ouvre une procédure à l'égard d'aides en faveur d'Addinol Mineralölwerke GmbH

IP/98/188 [1998-02-25]
Commission approves proposed employment aid scheme in Sicily (see p. 82)

IP/98/187 [1998-02-25]
Commisison declares aid to Bremer Vulkan incompatible with the Treaty

IP/98/171 [1998-02-18]
Commission opens procedure against aid to Lürssen in relation to take-over of Bremer Vulkan Marine Schiffbau GmbH

IP/98/170 [1998-02-18]
Improved transparency in state-aid monitoring procedures

IP/98/169 [1998-02-18]
Commission gives go-ahead for regional aid scheme for research and development in the region of Castile-leon (Spain)

IP/98/168 [1998-02-18]
Commission approves aid scheme for SMEs in the tourism sector in Doñana (Andalusia, Spain)

IP/98/167 [1998-02-18]
Commission opens investigation into state aid to BIOTEC Biologische Naturverpackungen GmbH

IP/98/120 [1998-02-04]
Commisison approves training aid to Opel Belgium

IP/98/68 [1998-01-21]
Commisison terminates proceeding concerning aid of FRF 2.5 billion to Société Française de Production (SFP)

IP/98/67 [1998-01-21]
Commission takes note of unconditional acceptance by Sweden of new state aid framework for motor vehicle industry

IP/98/66 [1998-01-21]
Guidelines of the Wirtschafts-service Burgenland Aktien-gesellschaft (WIBAG) on holdings in companies: Commission launches investigation

IP/98/65 [1998-01-21]
The Commission approves a budget increase ot the consolidation fund of Mecklenburg-Vorpommern

IP/98/64 [1998-01-21]
The Commisison finds that no state aid elements are involved in the privatisation of the Spanish Aluminium Group INESPAL

IP/98/63 [1998-01-21]
Green light for aid for employment in Berlin and North Rhine-Westphalia

IP/98/13 [1998-01-09]
The European Commission approves an aid programme for defence industry conversion in Spain

Conférence sur le droit et la politique de concurrence à Tunis les 1 et 2 avril 1998

Jean-François PONS, Directeur Général Adjoint

Le Conseil de la Concurrence de Tunisie, présidé par M. CHATTI, a organisé les 1er et 2 avril 1998 une conférence de haut niveau sur la concurrence, ouverte à de nombreux experts et praticiens tunisiens et étrangers, qui était la première du genre sur la rive Sud de la Méditerranée.

Elle a permis de faire le point sur la mise en oeuvre du droit de la concurrence en Tunisie - qui est un droit jeune, puisque la création du Conseil de la Concurrence ne remonte qu'à 1995 -, ainsi que sur les développements récents de la politique de concurrence en Europe, sur la base d'exposés introductifs de Mesdames SCHIRMANS (Présidente du Conseil de la Concurrence de Belgique) et PICARD (Rapporteur Général du Conseil de la Concurrence français), MM. JENNY (Vice-Président du Conseil de la Concurrence en France, Président du Comité de l'O.C.D.E. sur la concurrence, ainsi que du Groupe de travail ad hoc de l'O.M.C.), PONS (Directeur Général adjoint de la D.G. IV) et SOUTOU (Conseil de la Concurrence français). Cette comparaison internationale a aussi été complétée par deux exposés de M. BOUFAMA, Président de l'autorité de Concurrence algérienne, et de M. DHANJEE, représentant de la CNUCED.

Cette conférence, ouverte par M. BOUAZIS, Ministre du Domaine de l'Etat et clôturée par M. ZNEIDI, Ministre du Commerce, a été l'occasion, pour le Gouvernement tunisien, de confirmer sa volonté de voir mise en oeuvre une réelle politique de concurrence en Tunisie. Elle a été suivie par un nombreux public, qui est largement intervenu à l'issue des exposés.

Cette volonté exprimée par les autorités tunisiennes est d'autant plus importante que l'accord d'association entre la Tunisie et l'Union européenne est entré en vigueur le 1er mars 1998 et que, aux termes de cet accord, la Tunisie devra appliquer les règles de concurrence du Traité de l'Union européenne, dès lors que les pratiques en cause affectent le commerce entre les deux parties à l'Accord.

Les intervenants européens ont assuré les Autorités tunisiennes de leur disponibilité pour leur fournir la coopération nécessaire.

INFORMATION SECTION

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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 confernces on Comteition policy which have been brught to our attention. Organisere of conferences that wish to make use of this facility shoul refer to page 1 for the address of DG IV's Information Officer.

SPEECHES AND ARTICLES

EC Competition Policy and its Implications for the Sports Sector - SCHAUB - World Sports Forum - St Moritz - 8/03/

Entwicklung der Breitband-kabelnetze aus Europäischer sicht - UNGERER - ONLINE'98 Congress II. Symposium II.4 - Düsseldorf - 18/02/98

The Impact of European Liberalisation and the WTO - UNGERER - CommEd Conference : Pricing '98 - Brussels - 11/02/98

International co-operation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings - SCHAUB - Newsletter-February 1998 - 1/02/98

Innovation and Competition - PONS - Newsletter-February 1998 - 1/02/98

Competing for the Internet - COATES - Newsletter-February 1998 - 1/02/98

Commentaire des arrèts de la Cour du 23.10.97 relatifs aux monopoles d'importation et d'exportation de gaz et d'électricité - LEVASSEUR - Newsletter-February 1998 - 1/02/

Dominance sur un marché de produits secondaires - CHEVALIER - Newsletter-February 1998 - 1/02/98

Ports maritimes et concurrence - ARMANI - Newsletter-February 1998 - 1/02/98

State aid policy enforcement in the new Länder of Germany - Status in 1997 - DEPYPERE - Newsletter-February 1998 - 1/02/98

Probleme der Buchpreisbindung nach europäischem Kartellrecht - KAUFMANN - Venise - 29/01/98

COMMUNITY PUBLICATIONS ON COMPETITION

Unless otherwise indicated, these publications may be purchased from the sales agents of the European Communities (see last page) ; use ISBN or Catalogue Number to order.

Legislation

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

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Catalogue No: CM-88-95-436-xx-C (xx=language code: ES, DA, DE, GR, EN, FR, IT, NL, PT

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

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

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

Merger control in the European Union
Catalogue No: CV-88-95-428-xx-C (xx=language code: ES, DA, DE, GR, EN, FR, IT, NL, PT

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.
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Official documents

Dealing with the Commission (Edition 1997)-Notifications, complaints, inspections and fact-finding, powers under Articles 85 and 86 of the EEC Treaty
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Catalogue No: CV-11-98-803-EN-C

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

Competition decisions

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

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty.-93/94
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Recueil des décisions de la Commission en matièrre de concurrence - Articles 85, 86 et 90 du traité CEE-64/72
Catalogue No: CM-76-92-996-xx-C (xx=DE, FR, IT, NL.)

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

XXVI Report on Competition Policy 1996
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XXV Report on Competition Policy 1995
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European Community compe-tition policy 1994 (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI). Copies available through Cellule Information DG IV

XXIIIe Report on competition policy 1993
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XXIe Report on competition policy 1991
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Fifth survey on State aid in the European Union in the manufacturing and certain other sectors (Edition 1997)
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4ième rapport sur les aides d'Etat dans l'Union Européenne dans le secteur des produits manufacturés et certains autres secteurs
Catalogue No: CM-92-95-368-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT, SV, FI)

Other documents and studies

The application of articles 85 & 86 of the EC Treaty by national courts in the Member States
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Examination of current and future excess capacity in the European automobyle industry - Ed. 1997
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Communication de la Commission: Les services d'intérêt général en Europe (Ed. 1996)
Catalogue No: CM-98-96-897-xx-C xx= DE, NL, GR, SV

Study of exchange of confidential information agreements and treaties between the US and Member States of EU in areas of securities, criminal, tax and customs (Ed. 1996)
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Report by the group of experts on competition policy in the new trade order [COM(96)284 fin.]
Catalogue No: CM-92-95-853-EN-C

New industrial economics and experiences from European merger control: New lessons about collective dominance ? (Ed. 1995)
Catalogue No: CM-89-95-737-EN-C

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

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

Proceedings of the 2nd EU/Japan Seminar on competition (Ed. 1995)
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Bierlieferungsverträge in den neuen EU-Mitgliedstaaten Österreich, Schweden und Finnland - Ed. 1996
Catalogue No: CV-01-96-074-DE-C DE
Surveys of the Member States' powers to investigate and sanction violations of national competition laws (Ed. 1995)
Catalogue No: CM-90- 95-089-EN-C

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Catalogue No: CA-99-56-948-EN-C

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

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

Competition policy in the new trade order: strengthening international cooperation and rules (Ed. 1995)
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Forum consultatif de la comptabilité: subventions publiques (Ed. 1995)
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Les investissements dans les industries du charbon et de l'acier de

la Communauté: Rapport sur l'enquête 1993 (Ed. 1995)
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Study on the impact of liberalization of inward cross border mail on the provision of the universal postal service and the options for progressive liberalization (Ed. 1995) Final report,
Catalogue No: CV-89-95-018-EN-C

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

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

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

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

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

International transport by air, 1993
Catalogue No: CA-28-96-001-xx-C xx=EN, FR, DE<Picture>Les investissements dans les industries du charbon et de l'acier de la Communauté: Enquête 1992 (Ed. 1993) - 9 languages
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PUBLISHED IN THE OFFICIAL JOURNAL

1st January to 30th April 1998

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