EC COMPETITION POLICY NEWSLETTER

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Contents

Cinq années d'application du règlement "concentrations"

par Karel VAN MIERT, Commissaire en charge de la politique de concurrence

Le règlement (CEE) n° 4064/89 du Conseil, du 21 décembre 1989, *relatif au contrôle des opérations de concentration entre entreprises* est entré en vigueur le 21 septembre 1990. Cela fait donc environ cinq ans que ce règlement est appliqué par la Commission et une telle période de temps m'autorise à dresser un premier bilan et à définir un certain nombre d'orientations pour l'avenir.

BILAN STATISTIQUE

Un bilan, dans un tel domaine, se doit d'abord d'être statistique. Au 30 octobre 1995, la Commission avait examiné 376 opérations notifiées. Elle avait adopté, compte tenu des affaires abandonnées par les entreprises concernées après notification et des affaires encore en cours à ladite date du 30 octobre, 360 décisions finales. Elles se répartissent entre 31 décisions déclarant que l'opération ne relève pas du règlement, 322 décisions d'approbation de l'opération et 4 interdictions (ainsi que 3 décisions de renvoi à un Etat membre; cf infra.). Parmi les 322 décisions d'approbation, 24 étaient assorties de charges et conditions, dont 12 à l'issue d'une seconde phase d'examen approfondi. Ces statistiques montrent que la Commission a su s'acquitter d'une charge de travail considérable. Elles mettent également en évidence, mais j'y ferai allusion ultérieurement, le fait que la Commission applique le règlement avec rigueur mais sans sévérité excessive à l'égard des entreprises: en effet, le nombre d'interdictions, sans être négligeable (environ une par an) reste limité; quant aux décisions d'approbation sous charges et conditions, elles représentent moins de 8% de l'ensemble des concentrations examinées, dont la moitié ont été adoptées sans recourir à une seconde phase d'examen approfondi, c'est-à-dire avec un minimum de contraintes pour les entreprises.

TROIS DEFIS A RELEVER

Il incombait à la Commission de relever plusieurs défis dans le cadre de l'application du règlement "concentrations": d'abord, clairement affirmer la compétence exclusive que lui confère le règlement pour examiner les concentrations qui tombent dans son champ d'application tout en maintenant, selon les termes mêmes du règlement, une liaison étroite et constante avec les autorités nationales; ensuite, faire preuve d'efficacité et de rapidité dans la mise en oeuvre de procédures lourdes et complexes; enfin, adopter des décisions qui soient reconnues pour la qualité de leur motivation, fondées sur les critères du règlement et prenant en compte l'ensemble des politiques communautaires. Sur ces trois aspects, nombreux étaient ceux qui, lors de l'adoption du règlement,

mettaient en cause la capacité de la Commission à relever de tels défis: force est toutefois de reconnaître, à la lumière des développements intervenus depuis cinq ans, qu'ils s'étaient largement fourvoyés.

UN SYSTEME DE REPARTITION DES COMPETENCES ENTRE COMMISSION ET ETATS MEMBRES

Le règlement est fondé sur une répartition des compétences entre la Commission et les Etats membres. Un système de seuils, exprimés en termes de chiffre d'affaires des entreprises parties à la concentration, concrétise cette répartition: si la concentration répond à ces seuils, elle relève du règlement et par conséquent de la compétence exclusive de la Commission; dans le cas inverse, l'opération ne relève pas du règlement et sera traitée par les autorités nationales compétentes. Je reviendrai par la suite sur la pertinence des seuils actuels qui me semblent trop élevés pour refléter convenablement l'intérêt communautaire d'une opération et qui conduisent par conséquent les autorités nationales à traiter d'opérations qui seraient appréhendées plus efficacement par la Commission. Qu'il me soit simplement permis dans l'immédiat d'affirmer que la répartition des compétences, fruit du principe de subsidiarité, a bien fonctionné dans la pratique: aucun conflit n'a surgi, dans des cas concrets, entre la Commission et les Etats membres.

La Commission a tenu à publier au Journal officiel du 31 décembre 1994 deux communications interprétatives qui résument sa pratique antérieure et relatives, l'une au calcul du chiffre d'affaires, l'autre à la notion d'entreprise concernée et qui permettent aux entreprises de déterminer si leur concentration relève du règlement. Les entreprises tiennent particulièrement au respect de ce principe de répartition des compétences, qui a comme corollaire le système du guichet unique selon lequel une seule autorité -la Commission- rend une décision unique valable pour l'ensemble de la Communauté.

Une interprétation stricte des exceptions

C'est une des raisons qui est à l'origine d'une interprétation stricte par la Commission des exceptions et des atténuations à ce principe que sont les articles 9 et 21 paragraphe 3 du règlement. L'article 9 qui autorise la Commission à renvoyer, sur demande, un cas notifié lorsque l'opération de concentration menace de créer ou de renforcer une position dominante à l'intérieur d'un Etat membre a été invoqué à neuf reprises, mais la Commission n'a accepté le renvoi qu'à trois occasions: dans l'affaire Steetley/Tarmac (marché des briques et des tuiles) à la demande du gouvernement britannique, dans l'affaire McCormick/CPC/Rabobank/OSTM (marché des épices et herbes culinaires) à la demande du gouvernement allemand et dans l'affaire Holdercim/Cedest (marché du béton) à la demande du gouvernement français. Ce faisant, la Commission a refusé de renvoyer des affaires, même lorsque le marché géographique pertinent était national, chaque fois que l'opération revétait un intérêt communautaire ou bien parce que le marché de produit était émergent ou bien parce que la législation communautaire en vigueur en matière de marchés publics ou de normalisation devait conduire à terme à une ouverture des marchés. Tel fut notamment le cas dans les affaires récentes MSG Media Service et ABB/Daimler Benz.

Une approche similaire prudente a été retenue par la Commission en ce qui concerne l'article 21 paragraphe 3 du règlement lequel permet à un Etat membre de prendre vis-à-vis d'une concentration notifiée des mesures additionnelles à celles envisagées par la Commission de manière à sauvegarder un intérêt légitime distinct de la protection de la concurrence. A deux reprises seulement un Etat membre a effectivement adopté de telles mesures: ce fut le cas du gouvernement français dans l'affaire IBM/CGI (protection de la sécurité publique) et du gouvernement britannique dans l'affaire Lyonnaise des Eaux/Northumbrian Water (application de la législation spécifique en matière de distribution d'eau). Dans ces affaires, la Commission a en outre tenu à avoir communication des mesures adoptées par les Etats membres de manière à vérifier qu'elles répondaient aux principes d'adéquation, de proportionnalité et de non-discrimination et étaient par ailleurs conformes au droit communautaire.

De même, la Commission a, contrairement à d'autres domaines du droit communautaire, retenu une interprétation stricte de l'article 223 du traité (protection des intérêts essentiels de la sécurité d'un Etat membre), lorsque celui-ci est invoqué pour soustraire une concentration de dimension communautaire de la compétence de la Commission: sur onze opérations relevant du règlement et relatives exclusivement ou principalement à la production de matériel militaire, seules trois n'ont pas été notifiées en raison de cette disposition, sur la base de critères clairement définis. Enfin, l'article 22 du règlement permet à l'inverse à un Etat membre de demander à la Commission de traiter d'une concentration sans dimension communautaire. Si une telle disposition peut dans certains cas se révéler utile, notamment en l'absence de système de contrôle des concentrations dans l' Etat membre concerné, il n'en reste pas moins qu'elle ne doit trouver application que dans des cas exceptionnels, compte tenu en particulier de l'insécurité juridique dans laquelle elle place les entreprises parties à l'opération. Seules deux concentrations ont été à ce titre examinées par la Commission à ce jour: la reprise de Dan Air par British Airways à la demande du gouvernement belge et la création d'une entreprise commune par RTL, Veronica et Endemol à la demande du gouvernement néerlandais.

Coopération entre Commission et Etats membres

Le strict respect du principe de répartition des compétences ne doit toutefois pas occulter la nécessité d'une coopération étroite entre la Commission et les autorités nationales. Dans sa pratique quotidienne, la Commission est bien souvent allée, dans ce domaine, très au-delà de ce que les textes lui imposaient. Les contacts informels entre les administrations compétentes des Etats membres et la Task Force "concentrations" se sont multipliés. La totalité des dossiers ont pu être consultés par les fonctionnaires des

Etats membres lorsqu'ils l'ont jugé nécessaire. La Commission a tiré parti des multiples observations qui ont pu être formulées dans le contexte de l'instruction des dossiers. A une exception près, elle a toujours suivi l'avis du comité consultatif composé d'experts des Etats membres qui est obligatoirement réuni lorsqu'une seconde phase d'examen est ouverte. Elle a toujours choisi de publier cet avis en même temps que la décision finale. Elle continuera, dans le même esprit d'ouverture, de maintenir cette liaison étroite et constante avec les Etats membres qui est source d'enrichissement mutuel et qui concourt à la nécessaire transparence du processus décisionnel.

UNE APPLICATION EFFICACE DES PROCEDURES DU REGLEMENT

Le second défi auquel la Commission devait faire face était la nécessité d'appliquer avec efficacité des procédures lourdes et complexes. Sur ce plan aussi, il me semble que la Commission s'est convenablement acquitée de sa tâche. Si l'on exclut une erreur d'autant plus notable qu'elle fut dûment reconnue et assumée comme telle, toutes les décisions adoptées jusqu'à ce jour l'ont été dans le plein respect des brefs délais imposés, et ceci sans recourir à des artifices de procédure. Les entreprises disposent donc rapidement d'une complète sécurité juridique. La disponibilité et le professionnalisme des fonctionnaires en charge des dossiers sont en général unanimement reconnues. Lorsqu'elle le peut, la Commission tente de limiter l'ampleur des informations demandées: la pratique de la prénotification, qui donne l'occasion aux entreprises concernées d'avoir des entretiens informels et strictement confidentiels dès avant la notification permet en particulier de circonscrire les informations au strict nécessaire; la récente refonte du formulaire CO a prévu un système de notification simplifiée pour les opérations de moindre importance, l'allègement de certaines obligations de renseignements pour les aspects congloméraux et verticaux et l'obligation de fournir des documents déjà existants au sein des entreprises concernées. Dans un souci de transparence, la Commission rend systématiquement publiques toutes les décisions finales lesquelles font en outre l'objet d'un communiqué de presse et d'un résumé dans le bulletin mensuel d'activités des Communautés. C'est aussi notamment un souci de transparence qui a conduit la Commission à élargir les possibilités d'intervention des tiers, et en particulier des concurrents: ils reçoivent copie de la communication des griefs adressée aux parties, ont accès au dossier et peuvent demander à être conviés à l'audition, le tout, bien entendu, dans le plein respect du secret des affaires; ils sont en outre consultés lorsque des engagements sont susceptibles d'être demandés et, de manière à donner à cette consultation tout son sens, la Commission exige dorénavant des parties qu'elles formulent leurs propositions en matière d'engagements au plus tard un mois avant la date ultime de prise de décision. Par ailleurs, la Commission a codifié ces pratiques dans le cadre du nouveau règlement d'application et à l'occasion de l'élargissement du mandat du Conseiller auditeur. La Commission a également eu l'occasion d'accepter les engagements d'entreprises en première phase, c'est-à-dire sans recourir à la procédure longue des investigations approfondies, lorsque le problème de concurrence identifié s'est révélé clair, relativement limité par rapport à l'opération dans son ensemble et qu'il pouvait être résolu par des mesures simples. Toutefois, pour sauvegarder les droits des tiers et des Etats membres, la Commission prend soin ou bien de leur communiquer les projets d'engagements ou bien de les publier au Journal officiel suite au retrait de l'opération et de sa renotification sous une forme amendée. Les récentes affaires Repola/Kymenne et Swissair/Sabena illustrent la démarche de la Commission dans ce cadre.

EVITER LA CREATION OU LE RENFORCEMENT D'UNE POSITION DOMINANTE

Le but principal du règlement "concentrations" est d'empêcher la domination d'un marché par une ou plusieurs entreprises aux dépens, en dernière analyse, du consommateur final. Dans ce contexte, même si telle ou telle décision a pu être ponctuellement critiquée, il me semble que, dans l'ensemble, l'application du règlement faite par la Commission, a été généralement perçue comme positive.

Un processus décisionnel adéquat

Ceci est dû à mon avis en premier lieu au processus d'élaboration des décisions. En effet, loin de travailler en vase clos, la DG IV nourrit ses analyses d'enquêtes et d'investigations auprès des concurrents, clients et fournisseurs des parties à la concentration; en outre, elle intègre également les préoccupations des autres directions générales de telle manière à ce que le projet de décision soit cohérent avec l'ensemble des politiques communautaires pertinentes; enfin, l'adoption de la décision au niveau du commissaire responsable ou de l'ensemble des commissaires réunis en collège pour les affaires les plus importantes garantit qu'une appréciation politique des mesures proposées a été effectuée. Un tel système décisionnel est à mon sens le seul possible à l'heure actuelle compte tenu des sensibilités différentes des Etats membres en matière de droit de la concurrence. Il est essentiel en outre pour ne pas faire de ce droit une fin en soi mais un instrument au service du marché unique. Enfin, comme l'a reconnu le Tribunal de Première Instance dans ses arrêts récents dans les affaires T-96/92 et T-12/93 (relatives à la décision Nestlé/Perrier), la priorité accordée, dans le cadre du règlement, à l'instauration d'un régime de libre concurrence peut, dans certains cas, être conciliée, dans le cadre de l'appréciation de la compatibilité d'une opération de concentration avec le marché commun, avec la prise en considération d'incidences de caractère social.

Une analyse approfondie des conditions de concurrence

On ne saurait toutefois en déduire que les décisions adoptées sont pauvres en matière d'analyse concurrentielle: bien au contraire, elles font preuve d'une connaissance approfondie des secteurs industriels ou de

services concernés et les notions sur lesquelles elles sont fondées (par exemple le concept de dominance oligopolistique depuis l'affaire Nestlé/Perrier ou celui de *failing firm defence* depuis le cas Kali und Salz/MdK/Treuhand) n'ont rien à envier aux systèmes de contrôle des concentrations les plus avancés. En revanche, il est exact que la Commission, contrairement peut-être à certaines autorités nationales, a une vision plus dynamique et moins figée du marché géographique pertinent, c'est-à-dire de la zone géographique sur laquelle s'exerce la concurrence: elle tient compte, dans ses analyses, de la concurrence potentielle des entreprises extérieures au marché géographique et des effets de la législation communautaire en matière de normalisation, de marchés publics et de liberté d'établissement, pour autant, bien entendu, que leur impact réel soit confirmé par les enquêtes effectuées. Tel a été le cas par exemple dans les affaires récentes Mercedes/Kassbhorer pour le marché des autobus et autocars et ABB/Daimler Benz pour le marché du matériel ferroviaire. Ce faisant, la Commission attache une importance moindre à une position dominante transitoire qu'à l'existence de barrières à l'entrée de toutes sortes qui verrouillent définitivement un marché. C'est ce qui explique que les décisions récentes d'interdiction dans les trois affaires MSG, Nordic Satellite et RTL/Veronica/Endemol soient intervenues là où l'intégration verticale des parties conduisait à de multiples positions dominantes, empêchant pour longtemps toute concurrence réelle sur des marchés émergents où de nouvelles technologies sont développées et dont la libéralisation est en cours. De même, dans les affaires aériennes, et singulièrement dans le cas Swissair/Sabena, la Commission a-t-elle cherché, sur les routes où un monopole était créé, à permettre l'entrée de nouveaux concurrents. Enfin, il convient de signaler que la Commission s'attache à rechercher des remèdes adéquats et proportionnels aux problèmes rencontrés et, dans toute la mesure du possible, simples et structurels. Toutefois, si la complexité des situations rencontrées et la volonté de ne pas dans la mesure du possible remettre en cause une opération, rendent parfois difficile de qualifier de 'simples' et 'structurels' les engagements donnés par les entreprises, cela ne saurait être mis sur le compte d'une soi-disant volonté de faire du "meccano industriel".

LES AMELIORATIONS A APPORTER

Le bilan auquel je viens de procéder serait toutefois incomplet s'il ignorait un certain nombre d'éléments insatisfaisants: les premiers relèvent uniquement de la Commission et c'est donc elle qui doit y porter remède; les seconds sont inhérents à la rédaction actuelle du règlement et il conviendrait donc de modifier ce dernier. A l'heure actuelle, une administration publique peut être considérée comme exerçant une autorité légitime que pour autant que son activité soit transparente, ce qui suppose une certaine prédictibilité de ses actes, que son processus décisionnel soit rapide et que ses décisions soient fondées. L'application, par la Commission, du règlement "concentrations" répond à ces exigences: toutefois, la Commission est consciente de certaines critiques en ces domaines et il convient de faire mieux encore. En ce qui concerne la transparence, la Commission envisage de publier, après consultations internes et externes à l'institution, de nouvelles communications interprétatives relatives à la méthodologie d'appréciation des opérations. En ce qui concerne la rapidité du processus décisionnel, elle pense réduire le délai d'adoption des décisions pour les opérations d'importance mineure. En ce qui concerne la motivation des décisions, la Commission recourra, plus que par le passé, aux techniques statistiques et économétriques.

La révision du règlement

Cependant, force est de constater, après cinq ans d'application du règlement, que c'est par des modifications législatives que le contrôle des concentrations communautaire pourrait être amélioré. En premier lieu, les seuils actuels reflètent imparfaitement l'intérêt communautaire d'une opération dans le sens où, pour des raisons de compromis politique, ils furent fixés arbitrairement à un niveau trop élevé lors de l'adoption du règlement. La Commission souhaiterait par conséquent les voir ramenés à 2 milliards d'écus en ce qui concerne le chiffre d'affaires mondial et à 100 millions d'écus en ce qui concerne le chiffre d'affaires communautaire. Ainsi seraient par conséquent évitées les notifications multiples que les entreprises sont parfois conduites à faire auprès des autorités nationales des Etats membres. Quoi qu'il en soit, si un abaissement des seuils n'était pas envisageable, il conviendrait de mettre en oeuvre un système qui permette d'éviter la notification d'une même opération à plusieurs autorités d'Etats membres et faire en sorte que, dans un tel cas, le régime de notification unique du règlement soit applicable. En second lieu, d'autres aspects du règlement mériteraient d'être revus: tel est le cas de la distinction entre entreprises communes concentratives et coopératives qui est d'un maniement délicat et qui a donné lieu, malgré les efforts de clarification récents à travers une nouvelle communication interprétative, à tant de critiques de la part de l'industrie; tel est également le cas du chiffre d'affaires des institutions financières dont la détermination est actuellement insatisfaisante; tel est enfin le cas d'autres dispositions plus mineures comme le renvoi d'un cas à une autorité nationale lorsque le marché géographique est local ou encore la période de suspension de la concentration. Enfin, la pratique des engagements de première phase mériterait d'être consacrée par une disposition explicite. Sur tous ces points, je proposerai prochainement à la Commission d'adopter un Livre vert destiné aux autres institutions communautaires, aux Etats membres et au monde des affaires. J'espère que les réactions que ne manquera pas de susciter ce Livre vert confirmeront le succès du règlement et aideront la Commission à élaborer des propositions concrètes permettant, au bénéfice de toutes les parties en présence, de remédier aux imperfections actuelles.

■

OPINIONS AND COMMENTS

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

The New Regulation on Motor Vehicle Distribution

by Dieter SCHWARZ, Head of Unit, DG IV-F-2

The new **Commission Regulation (EC) No 1475/95** (OJ L 145 of 29.6.1995, p.25) on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements has become applicable from **1 October 1995** to all agreements on vehicle distribution and servicing existing on that day. The undertakings are given a period of one year to adapt their contracts to this Regulation. Therefore, after from **1 October 1996** onwards, all selective and exclusive distribution agreements have to comply with the **new** Regulation.

Experience has shown that the most important **objectives** of the **old Regulation**, namely the opening of national markets and the establishment of flexible and efficient distribution and servicing systems, has only been **partially attained.** In order to overcome the obvious weaknesses and to promote competition, the Commission decided not to create a entirely new Regulation, but to amend the existing Regulation (EEC) N° 123/85, taking into account the requirements of the internal market and the European Union.

The elaboration of the new Regulation by the Commission took place with wide-ranging **public consultation** from an early stage. This involved a long discussion with a broad range of interested parties, the Member States, which were in fact consulted twice, and the other institutions. In the course of this procedure the services of the Commission received a large number of submissions from European and national associations, undertakings including car manufacturers and dealers, as well as distributors of spare parts, resellers, independent repairers and consumer organizations. It also received comments from Members of Parliament, lawyers and other advisers.

The European Parliament held a hearing at which various interested parties were invited to make their opinions known, and provided a Resolution to the Commission, in which it explicitly called on the Commission to ensure that the market for the supply of original spare parts be liberalized in tandem with the market for cars themselves, and the Economic and Social Committee communicated their positions on the draft of the new draft Regulation.

OBJECTIVE

The objective of the new Regulation is indeed to open up markets in terms of geography, products and competitors. In order to attain this aim, the Commission seeks above all:

- to assure a greater commercial independence for dealers, most of which are small and medium-sized undertakings, as against manufacturers;

- to facilitate access by independent spare-part manufacturers and dealers to the different markets and distribution channels, namely the official networks of the manufacturers;

- to improve the situation of the final consumer pursuant to the principles of the internal market;
- to make the dividing line between permitted and prohibited clauses or behaviour clearer, and to reinforce the provisions of the Regulation in case of abuse.

Some of these aims may already be commercial practice in certain Member states, in particular in those with less restrictions on multi-make dealerships and distribution of spare parts.

MOST IMPORTANT AMENDMENTS CONTAINED IN REGULATION 1475/95

The scope of the exemption

First of all, it should be made clear that the Regulation applies to the distribution and servicing of new motor vehicles and to the distribution of spare parts associated therewith. However, the separate distribution of replacement parts without any connection to the distribution of vehicles, is not covered by the Regulation.

Forbidden clauses and practices

As an important amendment, the Regulation contains, in its Article 6, a list of so-called **"black clauses"** which are prohibited and which, if included in an agreement, lead to the **automatic loss of the benefit** of the exemption. This would be the case if, for example, an dealer's agreement contains restrictions which go beyond those permitted, or if

the manufacturer has the unilateral right to alter the contract territory during the term of the agreement, or the right to appoint other dealers within the contract territory.

The Regulation also enumerates so-called **"black practices"**, which, if committed systematically or repeatedly, lead to the automatic loss of the exemption. Such practices are, for example, where manufacturers fix, instead of merely recommend, resale prices, or where final consumers are directly or indirectly prevented from buying a vehicle whereever they wish in the Common Market, or where the manufacturer, without objective reason, makes the dealer's rebate dependent on the destination of the sale, or where the manufacturer interferes with the dealer buying spare parts of equal quality from a supplier of his choice, or where the manufacturer refuses to pass on technical information, required for the maintenance or repair of its vehicles, to independent repairers without justified reasons. I will come back to some of these examples later.

Provisions in cases of abuse

Experience has shown that the old Regulation did not always specify, in an appropriate manner, sanctions in the event of abuse. So as to overcome this problem and to bring the provisions into line with those in other block exemption Regulations, the new Regulation clarifies and reinforces the legal consequences of an abuse, which depend on whether it concerns "black clauses" or "black behaviour".

In the event that a prohibited **"black clause"** is agreed by the parties, the exemption becomes automatically lost with regard to all restrictions of competition contained in the agreement, irrespective of whether they are in favour of the manufacturer or the dealer. These restrictions, which would normally be allowed under Articles 1 to 4 of the Regulation, become automatically prohibited under Article 85 (1) of the EC Treaty from the date of the agreement, and the parties can be fined by the Commission.

The parties may notify an agreement containing "black clauses" and request an individual exemption. However, such exemption will only be granted in an exceptional situation, where it can be justified by the specific circumstances of an individual case. Such notification provides immunity from fines, unless and until the Commission finds that the agreement falls under the prohibition of Article 85 (1), and that an individual exemption under Article 85 (3) is not justified and decides to lift immunity from fines.

In the case of "black behaviour", all restrictive clauses which benefit the party responsible for the black behaviour become void. The consequences are limited to the contract territory where the distortion of competition takes place; if a larger area is concerned, the exemption becomes lost for all distribution contracts concluded for this area. The benefit of the Regulation is lost as long as the misconduct lasts.

This means in practice that, in cases where the manufacturer or importer is responsible for the "black behaviour", the dealers are released from all obligations which have been imposed on them. If prohibited practices have been imposed by one party (for example the manufacturer), but accepted by the other party (for example the dealer), such behaviour is considered as concerted practice prohibited under Article 85 (1). As in the case of "black clauses", the Commission can fine the parties, which may, again, request an individual exemption, which however is unlikely to be granted.

Price differentials

There are other circumstances in which the Commission may **withdraw the benefit of the exemption**. An example is where the distribution system leads, over a considerable period, to substantial differences in prices and sales conditions between Member states. The Commission has already published a Notice which explains what are acceptable and unacceptable price differentials. This note remains valid.

Price differentials are partly a reflection of the particular play of supply and demand in the regions concerned. However, where price differentials are substantial, there is reason to suspect that national measures or private restrictive practices lie behind them. With this Regulation, the Commission has confirmed the conditions for intervention where price distortions are chiefly caused by restrictions of competition contained in distribution agreements. Where price differentials are chiefly caused by other factors, there will be no direct and automatic repercussion on the legal standing of the dealer contracts. An example of such factors are extremely high taxes and charges payable in a Member state, forcing manufacturers to keep net list prices low. However, European consumers should be free to buy in such countries any vehicle obtainable from dealers, in the specification required. If they are hindered in their freedom, a Commission proceeding for abuse of the exemption may follow.

Multi-make approach

With the aim of promoting competiveness of dealers, the new Regulation determines that the dealer must be given the right to sell more than one make. The manufacturer can however oblige the dealer to do this in separate sales premises, under separate

management, in the form of a distinct legal entity and in a manner which avoids confusion between the different makes. There may however be exceptions from these obligations if the dealer shows objective reasons justifying same. Such a reason would be where the obligations prevent the dealer from operating on an economically viable basis.

Beside this, dealers are entitled to own, or to invest into, companies which belong to the network of competing manufacturers. A dealer may also appoint sub-agents, provided the manufacturer gives his prior consent, which he can only refuse by objectively valid reasons. Finally, it is not allowed that an agreement contains a clause imposing on the dealer to cooperate with a specific finance or insurance company.

As concerns repair of different makes, the dealer cannot be obliged to have separate workshops. On the other hand, a manufacturer may request his dealers to assure that third parties (e.g.competitors) do not unduly benefit from investments made by him in equipment or personnel.

Sales targets, and purchase and stock requirements

The new Regulation lays down that sales targets, the number of exposition vehicles and purchase and stock requirements can only be fixed by agreement between the manufacturer and the dealer. In the case of disagreement on the annual figures of such minimum requirements, the matter must be referred to an expert third party. Minimum requirements for a shorter period may only be of an indicative nature. If they are made binding, this may result in an automatic loss of the benefit of the group exemption.

Parallel trade in new motor vehicles by dealers

Currently, motor vehicle distribution is still based on a national concept. This is illustrated by the persistence of price differences between Member states, which cannot only be attributed to differences in consumer taste or behaviour or to exchanges rate flucatuations. Furthermore, there is virtually no trade between members of one and the same network.

In order to promote intra-brand competition within distribution networks, the Regulation prohibits any restrictions on dealers on selling to, or purchasing from, other authorised dealers within the Common Market. Consequently, the dealer may not be obliged to purchase exclusively from the manufacturer. The manufacturer may however oblige his dealers not to sell vehicles to a reseller who does not belong to its distribution network.

Conditions for the duration, and for regular and early termination of dealer's agreements

The provisions of the old Regulation have created a serious imbalances to the detriment of dealers, above all in countries where contracts were concluded for an indefinite period and with a one year's period of notice and without compensation in case of regular termination. Consequently, dealers had no sufficient protection for their investments and manufacturers were not obliged to give reasons for a termination.

In order to improve the balance, the new Regulation provides that distribution agreements may be concluded for a **definite**, or for an **indefinite**, period. The minimum term of the former is five years. The fixed term agreement should contain a clause requiring each party to give the other at least six months notice if one of the parties does not want to renew the contract. If the term of the agreement is indefinite, the period of notice for termination is two years. Agreements can be terminated on one year's notice, if the manufacturer undertakes to pay damages or if the agreement is concluded with a newcomer to the network.

The new Regulation also provides for an **early termination** of dealer's contracts in two cases: the manufacturer may terminate the agreement by one year's notice (instead of two years in case of regular termination) when he sees the need for a substantial restructuring of his network. However, it is required that the parties agree on the necessity of restructuring (including on whether it is substantial), either voluntarily or by an expert third party or an arbitrator. In case the manufacturer provides for himself unilateral rights of early termination which exceed the limits set by the Regulation, he automatically loses the benefit of the exemption.

The possibility of early termination has been introduced to provide the manufacturer with an instrument for flexible adaptation to changes in distribution structures. This may be required if competitors alter their behaviour, or due to other economic developments affecting the contract territory.

Secondly, the new Regulation maintains the right for either party to terminate an agreement at any time without prior notice, where the other party fails to perform one of its basic obligations. One reason for early termination might be where a party infringes contractual obligations allowed under Articles 1 to 4 of the Regulation.

Referral to an expert third party or an arbitrator, and the respective procedure

Both parties should refer to an expert third party or an arbitrator when they disagree on annual sales targets, permanent stock requirements, or the number of demonstration vehicles. Recourse to an expert third party or an arbitrator is also provided for in the case of an early termination of an agreement. The parties are free to decide whether they wish to refer to an expert third party or an arbitrator, and to choose such a procedure also in other cases of dispute.

Any qualified person (or persons) accepted by both parties may be appointed as expert third party or arbitrator. It seems advisable that the contract specifies what kind of nomination procedure is to be used in cases of dispute. The procedure of using first an expert third party or an arbitrator, which, in the Commission's opinion, should assure a quick an efficient dispute settlement, does however not prevent either party of applying to a national court to the extent that this is allowed under national law.

Direct sales to final consumers

Manufacturers remain free to supply final customers in the contract territory with vehicles, and to provide servicing, unless the contract contains a clause obliging the manufacturer not to do so. On the other hand, customer restrictions may not be imposed on the dealer and would, if contained in an agreement, lead to the automatic loss of the exemption. Moreover, manufacturers should take care not to affect, by such direct sales, the economic viability of the dealers' businesses.

Market access for independent spare part producers and extension of dealers' sources of supply

The Commission's experience shows that manufacturers may try to preserve the markets for spare-parts. In order to assure that independent spare-part producers can effectively compete on maintenance and repair markets, which is in the interest of both dealers and consumers, the Regulation entitles dealers to **out-source spare-part supplies**, provided that those spare parts match the quality of the original parts. Accordingly, manufacturers may prevent dealers from using spare parts of lower quality for repair or maintenance of vehicles. Dealers are however free to buy spare parts which do not compete with the manufacturer's original parts.

The manufacturer may oblige its dealers to inform customers about the use of spare parts from other sources, in repair and maintenance work; in a general manner before repair work has been undertaken and in a more specific manner after completion of the repair and maintenance work.

Pursuant to the Regulation, all spare parts coming from the same source of production are deemed to have the same quality, irrespective of whether they are supplied to the manufacturer or to other parties. Should a dealer have doubts in certain cases, he should ask the spare-part supplier for clarification. For guarantee work, free servicing and vehicle-recall work, the manufacturer may oblige its dealers to use original parts.

It has to be noted that **oil and other liquids**, as well as **accessories**, are not considered as spare parts in the meaning of the Regulation. Consequently, dealers are free to obtain such items whereever they wish, and any restriction imposed by the manufacturer on his dealers, or any inclusion of those parts in their dealer's agreement, will result in the automatic loss of the group exemption.

For the purpose of calculating discounts to be granted to their dealers, the manufacturer must distinguish between discounts given: a) for the sale of motor vehicles, b) for spare parts which the dealer can only obtain through the distribution network, and c) for other spare parts which are also available from independent suppliers. This is to avoid that manufacturers give higher discounts on aggregated quantities of goods purchased, so that no other spare-part producer or supplier could compete.

The rights granted by the Regulation to independent suppliers of spare parts, to resellers belonging to the same distribution network, and to resellers using spare parts for repair and maintenance, are safeguarded by the "black list" of Article 6. The manufacturer may not restrict spare-part producers from supplying products of matching quality to dealers and resellers, nor hinder such producers to place their trade mark or logo on their products.

Easier access by independent repairers to technical information

In order to enable independent garage owners to better compete with members of the manufacturer's network in the area of repair and maintenance, the manufacturers will now be obliged to make relevant technical information accessible, provided that this information is not protected by intellectual property rights, and does not constitute identified, substantial and secret know-how. The necessary technical information may not be withheld in a discriminatory or abusive manner. The manufacturer may request a reasonable payment for this information.

Right of a consumer to buy a motor vehicle in any Member state

The consumers' freedom to purchase anywhere in the Common Market is one of the fundamental achievements of the European Community. The Commission's experience shows, however, that consumers often face difficulties in buying a car elsewhere in the Common market. Intra-brand competition has therefore remained largely non-efficient.

Since it should be in the interest of any dealer to maximise sales, a dealer may not refuse to sell, or ask for a higher price, simply because the consumer is a resident of another Member state. The consumer may also not be obliged to complete more documentation than is normally and lawfully required in the Member state where the vehicle is to be bought. A final consumer who authorises an intermediary to act on his behalf, is given the same rights as if he personnally concluded a contract. The required written mandate must enable the dealer to identify the final consumer, and shall, on the dealer's request, enable identification of the intermediary.

The manufacturer, supplier or other undertaking within the manufacturer's network who directly or indirectly restricts the freedom of final consumers, authorised intermediaries or authorised dealers to obtain a new motor vehicle from whichever authorised dealer they choose within the Common Market will automatically lose the benefit of the exemption. A final consumer may sell the motor vehicle at any time, provided that he is not a disguised independent reseller. A manufacturer may consequently not impose any restrictions on the consumer in this respect.

Dealers are free to fix resale prices and discounts. If a manufacturer interferes with such freedom, he automatically loses the benefit of the exemption. Additionally, a manufacturer may not base rebates or other discounts to the dealer on the destination of the sale, without having objective reasons.

As one of the basic aims of the new Regulation is the promotion of flexible supply and demand, dealers must be free to attract customers from outside their contract territory. The manufacturer may only prevent the dealer from personalised advertising outside his contract territory.

Finally, the dealer is entitled to offer leasing contracts to customers under the provisions of the Regulation. The manufacturer may however prevent the dealer from supplying vehicles to leasing companies which are disguised resellers. Since leasing contracts which involve a transfer of ownership are in reality sales contracts, the leasing company are in such cases treated as a reseller.

Honouring of producer's warranty and normal servicing

Any undertaking belonging to the network which distributes a vehicle has to carry out warranty and servicing works, irrespective of where the vehicle was bought, provided it originated from the network within the Common Market. It has to be noted that the manufacturer's warranty begins to run after the vehicle has left the distribution network. Consequently, a consumer purchasing a vehicle from an independent reseller should be aware that part of the warranty period may already have expired. Any impedement to honour warranty and normal servicing leads to the automatic loss of the benefit of the exemption.

Explanatory Brochure

Finally, attention shall be drawn to the "Explanatory Brochure" on the new Regulation, available in all Community languages from DG IV/F-2 and the Commission Offices in the different Member States. This guide is designed to promote a better understanding of the provisions of the new Regulation by all interested parties, and to facilitate the adaptation of existing contracts or the drafting of new contract in accordance with the requirements of the new Regulation. To date, about 6,800 copies of the brochure have been sent out.

It is also intended to provide consumers with information on how the Regulation guarantees their freedom to buy a car anywhere in the Common Market in accordance with the principles of the single market.

The brochure has been prepared in a 40 questions-and-answers format in non-technical language intended to respond to practical questions which may arise while applying the Regulation. Comments made by interested parties, who were invited by the Commission to send in their queries, were very helpful in the preparation of the brochure (to obtain the brochure see the *Documentation Section* for details).

Future outlook

The Commission will regularly **monitor** the implementation of the Regulation, notably as to its effects on car price differences between Member states. In any event, the Commission is required to produce a report on the **functioning** of the Regulation at the latest by 31 December 2000, that is two years before its expiry.

ANTI-TRUST RULES

Application of Articles 85 & 86 EC and 65 ECSC
Main developments between 1st August and 31st December 1995

Summary of the most important recent developments

by Joos STRAGIER, DG IV-A-1

CERTIFICATION : THE DUTCH CRANE-HIRE CASE

In its decision of 29 November 1995, the Commission imposed fines (The immunity from fines resulting from the notifications by FNK and SCK in early 1992 was withdrawn under Articles 15 (6) by Commission Decision 94/272/EC of 13 April 1994, OJ L 117 of 7.5.1994) on FNK and SCK for infringements of Article 85 (1) on the Dutch crane-hire market.

FNK (Federatie van Nederlandse Kraanverhuurbedrijven - Federation of Dutch Crane-hire companies) is an association of Dutch firms which hire out mobile cranes. SCK (Stichting Certificatie Kraanverhuurbedrijf - Foundation Certification crane-hire business) was set up on the initiative of FNK in order to guarantee, through a certification system, the quality of cranes and equipment used in the crane-hire business. Most of the near 200 firms which participate in SCK, are also members of FNK.

Crane-hirers hire themselves at a large scale extra cranes from other crane-hirers as a means of equipment rationalization and optimum capacity utilization. FNK members and SCK certificate-holders represent between 50% and 80% of the Dutch market.

The Commission has been concerned about two elements of FNK/SCK's crane-hire business.

In the first place, until 1992, FNK's rules contained a system of recommended prices for the hiring out of cranes. Furthermore, these prices and the prices which were applied between members for the hiring of extra cranes, were regularly discussed between companies hiring out cranes of certain categories. FNK was involved in these discussions. The Commission found that FNK's system of jointly recommended and internal prices clearly infringes Article 85 (1).

Secondly, the SCK certificate-holders were prohibited to hire cranes from firms which are not affiliated to SCK. The Commission considered that if such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services. However, it was found that, in this case, the hiring ban is caught by the prohibition of Article 85 (1) since the SCK system was not really open and does not permit the acceptance of equivalent guarantees of other systems. The Commission concluded that the ban not only restricted the freedom of action of affiliated firms, but also considerably impeded access by third parties to the Dutch market.

In its decision, the Commission indicated that while the Commission's policy on certification allows scope for private-law certification systems that are designed to provide supplementary monitoring of compliance with statutory provisions, such systems should be in accordance with the competition rules. Restrictions of competition that are caught by Article 85 (1) cannot therefore be justified solely on the grounds that the introduction of a certification system as such fits in with the Commission certification policy.

PARALLEL IMPORTS OF PHARMACEUTICAL PRODUCTS : ORGANON

ORGANON is a British subsidiary of AKZO (Netherlands) which specializes in the manufacture and marketing of contraceptive pills.

On 4 Mai 1994, ORGANON changed the price regime applicable to MERCILON and MARVELON, the latter being one of the best known contraceptive pills in the world with substantial market shares throughout the European Union. Before that date, ORGANON applied a discount of 12.5 % on all products supplied to its customers irrespective of their final destination. The new price regime differentiated between those pills to be sold in the UK and those intended for export. Only the former ones could further benefit from the 12.5 % discount rate.

ORGANON informed all British wholesalers with export activities of these new price conditions. In fact, wholesalers could only receive the rebate if they were able to prove that the relevant orders were destinated for the local market and that they would not be reexported. Wholesalers with distribution activities mainly on the sole British market, were also invited by letter not to supply products at the British price including the rebate to other wholesalers which may reexport these products.

Following three complaints and ORGANON's notification of the new pricing system, the Commission initiated proceedings against Organon on 24

August 1995 and sent a Statement of Objections. In particular, the Commission found that the new price regime, which forms part of continuous business relations between ORGANON and its wholesalers, and therefore constitutes an agreement in the meaning of Article 85 (1), clearly constitutes a serious infringement of Community competition rules in that it created a discrimination in the prices of the products according to their geographical destination. The Commission indicated that it intends to adopt a decision pursuant to Article 15 (6) of Regulation 17 withdrawing the immunity from fines brought about by notification.

For the Commission, the discriminatory pricing behaviour of ORGANON has important effects, in particular on the sales of MARVELON in the Netherlands. In this country, the MARVELON pill of Dutch origin is not fully reimbursed by the social security scheme, while the British MARVELON pill, given its lower price, is fully reimbursable. Dutch consumers can take advantage of this price difference by opting for UK MARVELON, which relieves them from paying an extra amount above the reimbursement price.

However, by letter of 28 September 1995, ORGANON informed the Commission that it was withdrawing the new price regime which the Commission had opposed to and that the previous price conditions would apply from 1 October 1995. While disagreeing with the Commission's findings, the company indicated that, in the meantime, it is in the process of preparing a future new pricing system.

The Commission therefore suspended its proceedings and reserved the right to examine ORGANON's forthcoming pricing system with the competition rules. By its proceedings, the Commission has been able to restore the status quo ante. Consumers can thus once again enjoy the benefits of parallel trade within the European Union, as they were able to do before Organon introduced its discriminatory pricing scheme.

COMMISSION APPROVES REGIONAL AIRCRAFT JOINT VENTURE

Aérospatiale and Alenia, already integrated within ATR, and British Aerospace notified to the Commission an agreement on the setting-up of a joint venture. The ultimate objective of the project is to merge the parties' regional-aircraft activities. These include the product range manufactured by ATR (Avions de Transport Régional), in particular the ATR 42 and 72 turboprops, and BAe's Jetstream turboprop operation and the Avro regional jets business.

The Commission concluded first that the operation was not a concentration covered by the Merger Regulation, but that it would be examined under Regulation 17.

In the first stage of the operation, the parties will pool and rationalize services provided direct to customers, such as marketing and after-sales service. In addition, the parties have set up a single pilot-instruction centre in Naples and will jointly carry out feasibility studies for new aircraft in this sector. The joint venture is also responsable for R&D activities.

The Commission authorized the joint venture agreement on 18 August by means of a comfort letter which is valid for a period of five years.

Improvement of production or distribution and promotion of technical or economic progress

The improvement of production and distribution and the promotion of technical or economic progress is essentially linked with the final stage of full financial and industrial integration of the parties' businesses, and the development and production of new regional aircraft.

In that respect, the joint venture represents an important stage in the process of restructuring the regional aircraft industry in Europe which is characterised by existing overcapacity. The joint venture will present an industrial and financial structure which is healthier and better adapted to the exigencies of the market.

The unified and rationalised marketing, sales and customer support teams for the existing regional aircraft of the parties and the creation of a single integrated European training centre for pilots, together with the rationalisation of spare logistics services during the pre-merger period are to be considered as important steps to the proposed merger. Already in that stage the development of technical progress will be attained by the pooling of engineering and technical knowledge from different design offices for the preliminary design, which will be managed by the engineering team of the joint venture in the predevelopment phase.

Fair share of the resulting benefit for consumers

The level of customer service will improve through integration of the existing teams and through assimilation of "best practice" operations, which will also enhance the safety of the passengers.

A wider package of aircraft types will be offered which presents opportunities for consequential commercial benefits in negotiations between the sales force and their customers. Moreover the customer will benefit from the harmonisation of training systems in a single facility, the harmonised spare logistics system, the larger experience in product development and support activities and a wider network of market representation.

Indispensable restrictions

The integration of the marketing aspects of the existing businesses is necessary to create the operating structure needed for gradual full industrial integration, including the development and production in common of new aircraft, which the parties plan for a later stage of the joint venture. As such, the commercial integration in the first stage is an indispensable restriction of competition for the attainment of the benefits which will result from the fuller integration process.

The same is valid for the non-competition clause, whereby the parties refrain from activities competing with the joint venture in the regional aircraft business.

Elimination of competition

The formation of the joint venture does not significantly change the existing market situation, as the product range of the parties is complementary. Hence, no elimination of competition arises in relation to the overall market.

However, in the 60+ seat turboprop segment the joint venture will be offering 100% of the planes now available, because the only model now offered in this segment is the ATR 72. This is the result of the announcement by BAe in January 1995 of the cessation of the ATP/J61 programme. The evidence given to the Commission allows it to conclude that the withdrawal of British Aerospace's ATP/J61 aircraft was, for commercial reasons, unavoidable.

Furthermore, it should be taken into consideration that this segment accounts for only 10% of the orders for turboprops. In the segment itself, new entries into the market are expected. One prospective entrant was present at the last Paris Airshow (De Havilland Dash 8-400).

For all these reasons, the Commission authorized the cooperation for a limited period ending on 6 June 2000, thus allowing itself to review the situation if, following the feasibility studies, the parties decide not to develop, produce or launch the programmes for new aircraft, maintaining their cooperation in the areas of sales and after-sales service.

TELECOMS

The ongoing liberalisation and deregulation processes of the telecommunications sector, together with the increasing convergence of telecommunications, information technologies and media, have resulted in a wave of new alliances and partnerships that have been announced or implemented.

Strategic alliances, between incumbent Telecommunications Operators (TOs) moving into global markets, are one type of such alliances. The Concert joint venture between British Telecommunications and the US MCI Corporation was the first major telecoms strategic alliance which the Commission dealt with and it was granted an exemption under Article 85 (3). [Commission Decision of 27 July 1994, OJ L 223 of 27.8.94]

ATLAS/PHOENIX

On 15 December 1995, the Commission published two Notices pursuant to Article 19 (3) of Regulation 17 [OJ C 337 of 15.12.95] indicating that it intends to take a favourable position and inviting third parties to send their observations with respect to the Atlas and Phoenix strategic alliances.

The Atlas agreement, notified to the Commission on 16 December 1994, differs from the BT-MCI alliance in two important ways : firstly, the domestic component of the services offered is much stronger than the global elements planned, and secondly, the home markets of the parties (France and Germany) are less liberalised than the home markets of BT and MCI (UK and US).

The Atlas transaction brings about a joint venture between the French and German public telecommunications operators, France Telecom (FT) and Deutsche Telekom (DT) respectively. Atlas is also the instrument of DT and FT's participation in the second transaction, named Phoenix, with Sprint Corporation, which was notified on 29 June 1995.

Atlas targets on two separate product markets for value-added telecommunications services, namely the market for advanced telecommunications services to corporate users and the market for standardized low-level packet-switched data communications services. The broader Phoenix alliance will address the same markets for value-added telecommunications network services and also the market for traveller services and the market for so-called carrier's carrier services.

The Atlas/Phoenix arrangements raised a number of concerns from a competition point of view, in particular with respect to the home markets of the EU partners to the transactions, where FT and DT hold legal and de facto dominant positions with respect to a number of telecommunications services and the provision of infrastructure. It was argued therefore that competition could be eliminated and the positive effects of future full liberalization be endangered. In response hereto, the parties to the alliances as well as the French and German Governments have undertaken certain amendments and commitments to address these concerns. They relate amongst others to the non-integration into Atlas of the domestic French and German public switched data networks before full liberalization of the telecommunications infrastructure and services markets, the non-discriminatory access to these

networks, and the avoidance of cross-subsidization. However, the main commitment made by the governments was that the use of alternative telecommunications infrastructure for the provision of liberalized telecommunications services (i.e. not basic voice) will be liberalized as of 1 July 1996. Without such liberalization, competition in the area of data communications would also be endangered or eliminated in other Member States by the alliance between the Union's largest telecommunications organizations. Full liberalization, i.e. including basic voice and infrastructure, will take place on 1 January 1998.

On the basis hereof, the Commission indicated that it is ready to take a positive view to the Atlas and Phoenix agreements.

Global Mobile Satellite Systems

Another form of strategic alliance in the telecoms sector are the big consortia which are formed to offer mobile satellite telecommunications services on a worldwide basis.

The Commission has launched an in-depth and comprehensive examination of these newly emerging global satellite systems.

In this sector it is unlikely that there will be more than a few market players, all of which are consortia whose members are sharing the risks involved. It is therefore essential that competition in safeguarded in the downstream markets involved, namely local service provision, distribution and equipment supply. Examples of these consortia which the Commission is screening are Inmarsat-P, Iridium, Globalstar and Odyssey.

With respect to Inmarsat-P - a system sponsored by the International Maritime Satellite Organization and a large number of its Signatories, including several EU public TOs - the Commission indicated in a Notice pursuant to Article 19 (3) of Regulation 17 [OJ C 304 of 15.11.95] that it intends to take a positive attitude towards the creation of a joint venture which will finance, construct and operate the Inmarsat-P system as well as towards the services agreement governing the relationship between Inmarsat and the joint venture.

ETSI IPR Policy

The Commission issued a negative clearance-type comfort letter with respect to ETSI's (European Telecommunications Standards Institute) Interim IPR Policy.

The intellectual property rights arrangements which ETSI developed and notified to the Commission, provided that members would agree in advance to allow their IPRs to be included in a given ETSI standard, unless the IPR owner had identified any IPR it wished to withhold within a fixed period. In addition, the arrangements contained specific provisions regarding the terms of the licenses to be granted, such as the obligation for licensors to accept monetary compensation, unless the licensee agreed to grant cross-licenses.

However, following a complaint alleging that the arrangements amounted to a compulsory licensing system, ETSI modified its arrangements which do not any longer contain provisons relating to compulsory or automatic licensing, or to specific licensing terms.

After having published a Notice pursuant to Article 19 (3) of Regulation 17 [OJ C 76 of 28.3.95] with respect to the modified Interim IPR Policy, the Commission concluded this case positively.

SECONDARY MARKETS : PELIKAN/KYOCERA

This case arose from a complaint by Pelikan, a German manufacturer of, inter alia, toner cartridges for printers and photocopiers against Kyocera, a Japanese manufacturer of computer printers. Pelikan manufactures and sells toner cartridges for use with Kyocera's printers which compete directly with the cartridges produced by Kyocera itself. Pelikan's complaint alleged a number of practices by Kyocera to drive Pelikan out of this market and alleged that these constituted restrictive arrangements between Kyocera and its dealers and/or abuses of a dominant position by Kyocera.
By a decision of 22 September 1995, this complaint was rejected. The Commission found that Kyocera did not infringe Article 85 nor Article 86.

With respect to Article 86, the Commission found that Kyocera did not enjoy a dominant position on any relevant market and that even if it did there was no evidence of behaviour that could then be considered abusive. It is of particular interest to note that the Commission did not find that Kyocera enjoyed a dominant position in the market for consumables for Kyocera printers despite its large market share on this market. This was because Kyocera was subject to intense competition on the "primary" market - that for printers- and circumstances on the market were such that this competition also restrained its behaviour on the "secondary" market for printer consumables. Purchasers of printers were well informed about the price charged for consumables and appeared to take this into account in their decision to purchase a printer. The useful life of a printer and the balance between the capital cost of a printer and the total cost of consumables for that printer over its useful life were such that consumers would have a strong incentive to switch printer brand if the price of consumables for that brand were raised. The complexity and cost of printers was such that the costs of switching from one brand to another are not excessive.

This analysis obviously implies that there are circumstances where a manufacturer may enjoy a dominant position in a

secondary market for consumables or services for its own primary products.

CROSS-BORDER CREDIT TRANSFERS

In September the Commission adopted a notice on the application of the EC competition rules to cross-border credit transfers [OJ C 322 of 19.11.95].

In general, the Commission takes a positive view to cooperation agreements between banks that in particular enable them to improve the cross-border credit transfer services offered by banks to their customers. This cooperation should not, however, go so far as to eliminate competition between banks.

The notice addresses two issues : market entry, and price competition.

Concerning market entry, the Commission wishes to ensure that smaller banks are not unfairly excluded from systems which are an essential facility to be able to offer cross-border credit transfers to their customers.

With respect to price competition, the notice distinguishes between agreements between banks fixing the level of customer fees, and inter-bank pricing agreements. The former are not allowed, while multilaterally agreed interchange fees ie, collectively agreed transaction fees paid by one bank (here typically the sender's bank or its correspondent bank) to another bank (the beneficiary's bank) fall under Article 85 (1), but they can be exempted under certain conditions.

LENIENCY PROGRAM

The Commission has indicated that it intends to issue a notice concerning the non-imposition or mitigation of fines in cases where undertakings cooperate in the preliminary investigation or proceedings in respect of an infringement. Before adopting the notice, the Commission invited all interested persons to submit their observations on the Commission's draft notice [OJ C 341 of 19.12.95].

The Commission considers that the interests of consumers and citizens in ensuring that secret price-fixing and market-sharing cartels are detected and prohibited outweigh the interest in fining those companies which cooperate with the Commission, thereby enabling or helping it to detect and prohibit a cartel.

Press releases issued on the most important developments

BOSMAN CASE

Speaking to the Social Affairs Committee of the European Parliament Commissioner Flynn set out the Commission's position on the European Court of Justice ruling in the Bosman case (see also IP/95/1411).

In particular, he commented on press reports on UEFA's reaction concerning the impact of the judgement on the European-level club competitions that it organises. He said "the Court's ruling was clear. The restrictions on the number of EU players that clubs can play - the so called 3+2 rule - are outlawed.

I have been surprised to read in the press the view that the 3+2 rule may remain valid for the European-level club competitions. This interpretation seems to me to be clearly contrary to the Court's ruling."

The Court ruled that: "Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States".

The Court also said that nationality restrictions can be accepted only for matches between national teams, on grounds which are of sporting interest.

Mr Flynn said: "It is clear to me that, from now on, nationality restrictions are illegal in European-level club competitions. I expect those affected to take the necessary steps to change their rules to comply with the Court's ruling. In any event, all those affected should be aware that this ruling has immediate and direct effect." [IP/95/1425]

PROFESSIONAL FOOTBALL : EUROPEAN COURT RULES IN THE BOSMAN CASE : FIRST REACTION BY COMMISSIONERS PADRAIG FLYNN AND KAREL VAN MIERT

The Commission has just received the Court's ruling in the Bosman case. The Court

concludes that the restrictions imposed by UEFA regarding the number of foreign players that may be fielded (the so-called '3+2' rule) are contrary to the free movement of workers and that they cannot be justified on grounds of general interest. The exclusion of foreign players is only considered justifiable in the context of national teams, thus confirming the earlier position already taken by the Court in 1976 (the Dòna case).

This ruling has confirmed the relation between the rules applied in professional sports and the EC Treaty. The Court concludes that such rules should respect the basic provisions of the Treaty concerning the free movement of workers .

The Court also ruled that the transfer system of UEFA is contrary to the free movement of workers.

In August of this year UEFA finally notified its transfer rules to the Commission with a view to obtaining an exemption from the Treaty rules on competition policy (Art. 85 of the Treaty). It appears that they cannot in their present structure be exempted from competition rules. Moreover, it must be clearly stated that even if transfer rules were to be substantially changed, the Commission cannot exempt clauses which are in breach of Art 48 of the Treaty, which provides for free movement.

The Commission has also received several individual complaints against the UEFA rules. It will now quickly take a position on these complaints in the light of the Court's judgment.

It is now up to the sports federations to bring their rules into line with the Court's ruling.

They must take immediate action to amend the existing transfer system and to stop discriminating on the grounds of nationality which impedes the free movement of EU citizens.

Background note - the Bosman case

The Court of Justice has been asked to take a position (Bosman case C- 415/93) concerning the conformity of two major issues in professional football, the transfer system and the nationality clauses, with specific Treaty provisions, the free movement of workers (Article 48) and the competition rules (Articles 85/86). As Advocate General (AG) Lenz said in his conclusions these issues are of decisive influence for the future of professional football. The Court has delivered its ruling on Friday 15.12.95.

The issues at stake

Transfer system

International transfers of football players are governed by a combination of FIFA and UEFA rules. The FIFA rules establish the right of a ceding football club to compensation of training/development costs to be paid by the acquiring football club in case a player changes from one club to another club when his contract has expired. The FIFA rules also stipulate that a player can play with his new club as of the moment that a contract has been signed, even if the clubs in question have not yet agreed on the level of the transfer amount. Finally the FIFA rules oblige clubs to submit disputes concerning the level of the transfer fee to arbitration. The UEFA rules in particular provide for such an arbitration procedure as well as for pre-fixed calculation scheme for transfer fees (gross salary multiplied by an age coefficient).

Before 1991 a player could not play for his new club as long as the old and new club had not agreed on the level of the transfer compensation. Following discussions with the Commission the transfer rules were changed (part of the "gentleman's agreement" of the Commission with UEFA in 1991): a player can play for his new club from the moment that a contract is signed.

Nationality clauses

The nationality clauses are included in UEFA rules. They limit the number of foreign football players that may be fielded during football matches. Such clauses are applied in various ways both in national and international professional club football competitions. As far as UEFA competitions are concerned - i.e. so called European Cup matches - a maximum of 3 foreign players and 2 so-called assimilated players (foreign players that have already played 5 years in the country in question, of which at least 3 years in youth teams) may be fielded (the so-called 3+2 rule). Although for national competitions some federations apply more "liberal" rules, generally speaking the 3+2 rule applies.

In the past UEFA also limited the number of foreign football players that could be recruited. Following discussions with the Commission in 1978, UEFA changed its rules: clubs were allowed to recruit as many foreign players as they like, only the number of foreign players that could be fielded was restricted.

Earlier Court rulings and follow up

In two rulings (Walrave/UCI of 1973 and Donà/Mantéro of 1976) the Court has taken the position that nationality clauses in sports can only be justified on sporting grounds, e.g. for national teams.

Following these rulings, the Commission was asked by MEP's and individuals to intervene against football federations restricting the number of EC players who can be recruited. Moreover, the question of transfer fees was also raised. The Commission took the line that, although discriminatory rules on the grounds of nationality were in conflict with Community law, that it would be difficult to initiate infringement proceedings.

In 1978 the Commission invited UEFA to make its rules compatible with the Court's rulings. In return the Commission would allow a transitional period during which it would not take any legal action against the federations. Most national football federations were reluctant to apply the compromise. The rules remained unchanged.

In 1982 the Commission launched an inquiry in the form of a letter sent by Commissioner Richard to the UEFA and to the national football federations. At the end of 1984 a

meeting was held with UEFA. The national federations had interpreted the 1978 compromise as granting them an indefinite transitional period. The Commission invited national federations to submit amendments to their regulations before 1/7/85, which would have had to be implemented before the start of the 1986/87 football season. In 1985, however, the Conference of national football federations decided not to respond to the Commission's invitation and, instead, adopted binding rules limiting the number of foreign players that could be fielded.

In 1989, the European Parliament adopted a report on the free movement of professional football players within the Community. The EP strongly invited the Commission to take all necessary steps to enforce Community law against the UEFA and the national football federations.

On 31 January 1990, the UEFA member federations agreed in Stockholm that the 3+2 rule would apply as of 1.1.93 for all first League clubs, if the Commission would guarantee that that rule would not be challenged in the future.

In March 1990, a mandate was given to Ms. Papandreou, Mr. Bangemann and Mr. Dondelinger to start negotiations with UEFA. These negotiations finally led to the so-called Gentlemen's agreement (1991) which stipulated, among others, that:

- the 3+2 rule would be implemented by all UEFA member federations as of 1.1.1992 and that
- disputes regarding the level of the amount of the transfer compensations should not impede a player from playing for his new club.

The Bosman case

In 1990 the contract of Bosman, a professional football player, with his Belgian football club (RFC Liège) expired. Bosman wanted to be transferred to a French club (Dunkerque), mainly because his old club had offered him a salary that was substantially less than his earlier salary. RFC Liège and the Belgian football association blocked the transfer of Bosman for various reasons. Bosman refused to sign the new contract offered by RFC Liège and was consequently suspended. Bosman then addressed the Belgian court and was granted interim measures. Later on he has played for several clubs of minor importance.

The Belgian courts dealing with the Bosman case have asked for preliminary rulings of the Court of Justice regarding the conformity of the transfer rules and the nationality clauses with the free movement of workers (Art.48) and the competition rules (Articles 85 and 86).
Pending competition cases

In total the Commission services have received three formal complaints of professional football players of which the one from Bosman is the most prominent. UEFA recently notified its transfer rules. The Commission services have not actively dealt with the complaints, because of the pending proceedings before the Court..

Observations of the Commission regarding the Bosman case

Free movement of workers

At the hearing of the Court of Justice concerning the Bosman case the Commission has taken the preliminary view that the nationality clauses applied to EU citizens clearly infringe Article 48. The same position was taken regarding the transfer rules. Although the transfer rules do not discriminate on the basis of nationality they are still considered to be contrary to Art. 48, because they clearly restrict the free movement of workers.

Competition

The Commission has also taken the position that the nationality clauses and the transfer rules restrict competition between clubs, because they impede clubs from fielding/recruiting new players. The Commission has not taken any position regarding their exemptibility of these rules under Article 85(3).

The conclusions of AG Lenz

The conclusions of AG Lenz were presented on 20.9.95.

Nationality clauses

The AG concluded that the rules limiting the number of foreign players that may be fielded (the so-called '3+2' rule) infringe Article 48 and Article 85(1). He concluded that exclusion of foreign players is only justifiable for national teams.

Transfer rules

The AG concluded that the transfer rules also infringe Articles 48 and 85(1). He rejected the argument put forward by UEFA that the transfer rules are in fact pro-competitive, because they keep small clubs alive. Nevertheless, he agreed with the goal pursued by UEFA: small clubs should be supported in order to maintain a sporting/economic equilibrium between clubs, which is considered indispensable for keeping football attractive for spectators. In the AG's opinion, however, the current transfer system is a disproportionate and ineffective means to achieve that goal. He took the view that the sharing of revenues (from ticket sales and/or the sale of broadcasting rights) would be a less restrictive and more effective method to achieve that goal.

Exemptibility

The AG took the position that an exemption under 85(3) for the transfer rules or the nationality clauses was theoretical. Referring to the need for a coherent interpretation of the treaty provisions, the AG concluded that an agreement which infringes Article 48 cannot be justified on grounds of general interest and cannot be exempted under Article 85(3).

The AG did, nevertheless, consider that it is legitimate for clubs to receive some transfer compensation but only for initial training costs. [IP/95/1411]

NETHERLANDS: COMMISSION IMPOSES FINES ON CRANE-HIRE CARTEL

Acting on a proposal from Mr Karel Van Miert, the European Commission has imposed a fine of ECU 11.5 million on the Dutch crane-hire association "Federatie van NederlandseKraanverhuurbedrijven"(FNK) which for more than twelve years - from December 1979 to April 1992 - engaged in unlawful price-fixing agreements in the Netherlands.

A dozen Dutch and Belgian firms lodged a complaint with the Commission in January 1992. The FNK comprises about 75% of Dutch crane-hire firms.

In addition, the Commission has imposed a fine of ECU 300 000 on the Dutch crane certification association "Stichting Certificatie Kraanverhuurbedrijf" (SCK) for having prohibited - from 1991 to 1992 - the hiring of extra cranes from non-affiliated firms, on pain of withdrawal of certification and the suspension of the firm through the publication of an announcement by the SCK in the specialized press.

A market totally closed to competition

The severity of the fine imposed on the FNK is due not only to the fact that its 200 or so members had a combined turnover in 1992 of some ECU 230 million, but also to the fact that the recommended prices were at least 10% higher than the market price.

It should also be pointed out that the complainants had also instituted proceedings before the Dutch courts: on 11 February 1992, the Utrecht District Court ordered the FNL to suspend the system of recommended prices, while on 28 October 1993 the Amsterdam Court of Appeal ordered the SCK to suspend the prohibition on hiring cranes from non-affiliated firms.
Certification called into question?

Do the fines mean that the Commission is calling certification into question?

No. The Commission's intention is to oppose certification activities which in practice do not confer any benefit in terms of quality standards, distribution or production.

The SCK did not meet the criteria of openness and transparency and, by refusing to accept equivalent guarantees from other systems, it impeded access of foreign firms in particular to the Dutch crane-hire market.

However, certification systems which meet such criteria and accept equivalent guarantees from other systems may in future qualify for exemption under Article 85 of the Treaty. [IP/95/1306]

COMPETITION GUIDELINES FOR CROSS-BORDER TRANSFER SYSTEMS

The Commission has today adopted guidelines for the application of the European Community competition rules to cross-border credit transfer systems. These systems are used by banks and other financial institutions to transfer money between different countries in the Union. The notice containing these guidelines is closely linked with the proposed directive on cross-border credit transfers on which the Council of Ministers is expected to adopt a common position next week. The proposed directive requires banks to provide more information to their customers. It also provides that the costs arising from the cross-border character of the credit transfer should be borne by the sender unless he or she instructs otherwise. When the sender bears these costs, one talks about an OUR-payment (costs supported by the originator of the payment).

The notice provides a framework allowing banks to set up cooperation arrangements which aim at more efficient ways of handling cross-border credit transfers without unduly restricting competition. In the notice, the Commission addresses two main issues. The first one is about market entry, the second one about price competition.

The Commission wishes to ensure that smaller banks are not unfairly excluded from systems to which they must belong if they are in practice to be able to offer cross-border credit transfers to their customers. Conversely, smaller systems developed by groups of banks may be justified in limiting their membership. In the notice, the Commission focuses on payment systems which constitute an essential facility i.e. a system access to which is crucial for banks wishing to handle the credit transfers concerned. The conditions for access to such a systems should be objectively justified and applied in a non-discriminatory manner.

As far as price competition is concerned, the Commission in the notice states once more that banks are not allowed to conclude agreements among themselves fixing the level of client fees or the way in which they will charge such fees.

A key question, however, is about multilaterally agreed interchange fees, i.e. fees paid by one bank (here typically the sender's bank or its correspondant bank) to another bank (the beneficiary's bank). The Commission accepts that such multilaterally agreed interchange fees can in certain circumstances be exempted from the prohibition of price agreements contained in Article 85(1) of the EC Treaty. In the case of OUR-payments, a beneficiary's bank cannot charge the beneficiary a fee for handling a cross- border credit transfer. In such a case, the Commission takes the view that beneficiary's banks are entitled to a multilaterally agreed interchange fee if that fee covers the costs they actually and necessarily incur when handling a cross-border credit transfer. As to the level of the agreed fee, the Commission specifies that it should not exceed the average real costs incurred by beneficiary's banks when they handle cross-border credit transfers.

Banks remain free to notify their arrangements to the Commission, for clearance or exemption under the competition rules. [IP/95/958]

THE EUROPEAN COMMISSION AUTHORISED A JOINT VENTURE AGREEMENT BETWEEN AVIONS DE TRANSPORT REGIONAL (ATR) AND BRITISH AEROSPACE (BAE)

- Article 85
- Sector : regional aircraft
- ATR (F) and its parent companies Aérospatiale (F) and Alenia (Finmeccanica) (I) / BAe (UK).

The Commission has authorised the joint venture between Aérospatiale, Alenia and British Aerospace in the sector of regional aircraft for a transition period of 5 years. In fact the Commission has sent a comfort letter, which outlines that the Commission is of the opinion that competition within this sector would not be seriously reduced or eliminated by this joint venture.

Last month, the Commission decided that the operation in question does not constitute a concentration under the Merger Regulation (IP/95/849).

The final objective of this project is the concentration of the parties' activities in the regional aircraft sector. At the moment these activities include the products of ATR (turboprop jets ATR 42 and 72) as well as those of BAe (turboprops Jetstream and regional jets Avro and BAe).
During the first stage of the cooperation the parties will pool and rationalise customer service resources such as marketing, sales and after- sales service. Moreover, they will create a single integrated training centre in Naples for pilots and will jointly undertake feasibility studies for new aircrafts in the sector. The joint venture will also undertake research and development activities. It is this first stage with a duration of five years to which the Commission's decision refers.

In the Commission's analysis, the present situation in the relevant market was an essential factor.

The market

The market for regional aircraft has a worldwide dimension. The main manufacturers operate in all continents.

A distinction should be made between jet and turboprop aircraft. In its 1991 "de Havilland" decision the Commission distinguished between three segments within turboprop aircraft according to their seating capacity (20 to 39 seats; 40 to 59 seats; 60+ seats).

In the regional aircraft market for jets (up to 125 seats) a distinction between segments has not been made.

The Commission has based its comfort letter on the same distinction and has taken into account the observations of third parties, including those of competitors of the parties and Member States.

While one cannot speak of a high level of substitutability as between turboprop aircraft and jet aircraft because of substantially differing operating costs, nevertheless a certain evolution in the market should be noted. In particular, if an aircraft with a capacity of more than 60 seats is required to cover relatively long distances, purchasers, mindful of passenger comfort, will be inclined to purchase a jet rather than a turboprop aircraft.

Market share

Through the creation of the joint venture, the number of competitors who offer a product in this sector will be reduced, but the market share will not increase in such a way to distort the existing structure. Following the cooperation between the first and the sixth placed competitors, the number of competitors has been reduced from 7 to 6.

1) In the market for regional jets ATR does not operate and BAe occupies approximately 24 %. The main competitors are Boeing (34 %) and Fokker (31 %).

2) In the segments of the turboprop aircraft market the situation is as follows :

- 20 to 39 seats : BAe holds 8 % (Jetstream J41); ATR does not operate; the main competitors are Saab 340 (33 %), Embraer 120 (28 %), de Havilland Dash 8-100/200 (24 %), and Dasa-Dornier 328 (6 %);

- 40 to 59 seats : BAe does not operate; ATR holds 43 % (ATR 42); the main competitors are Fokker F50 (27 %), de Havilland Dash 8-300 (17 %), Casa-IPTN (8 %) and Saab 2000 (6 %);

- 60+ seats : BAe stopped production of its J61 aircraft at the beginning of 1995 and the only model offered in this segment is the ATR 72 (100 %); it should be noted, however, that this segment only accounts for 10 % of the overall market for turboprop aircraft and that new entrants are expected.

Therefore, the operation leads neither to a cumulation of high market shares in the sector as a whole nor in its segments.

The joint venture does not create a dominant group being the sole operators present in all market segments. At least one competitor (de Havilland) also offers a wider range of turboprop aircraft and is preparing to enter the market for regional jets.

For these reasons the Commission has authorised the joint venture for a period of five years, reserving the right to reconsider the case if the merger project does not materialise. [IP/95/952]

FIGHT AGAINST CARTELS: COMMISSION PROPOSES TO THE MEMBER STATES THAT FIRMS WHICH REPORT UNLAWFUL AGREEMENTS BE TREATED LENIENTLY

Obtaining irrefutable proof of a cartel remains a well-nigh impossible task for Commission inspectors and their colleagues in the fifteen Member States, especially

nowadays since a number of firms do not hesitate to organize "red alert" exercises to instruct their staff in how to make life difficult for European inspectors on unannounced visits.

Mr Van Miert, the Member of the Commission with special responsibility for European competition policy, is proposing a solution: in normal circumstances no fines, or at least considerably reduced fines, will be imposed on firms which report unlawful agreements.

Cartels - concerning prices or market shares - are one of the most serious breaches of European competition rules. These practices have adverse effects not only on consumers but also on customer-firms, which are faced with an artificial increase in the prices of the raw materials or parts that they need. For them, the result is reduced competitiveness in an increasingly global market.

Mr Van Miert essentially takes the view that it is better to have instruments for putting a stop to such practices than having to impose substantial fines after the damage has been done.

The system proposed by the Commission is based largely on the practices adopted by the authorities in the United States and in Canada. On the other side of the Atlantic, this policy has been immediately successful:

- one case per month is now reported compared to one case per year beforehand;
- investigations are now completed much more quickly;
- the deterrent effect is such that it sows doubt among potential cartel members.

Instances where there would be no fines

Under Mr Van Miert's proposal, which has been backed by his colleagues, under normal circumstances the Commission will no longer impose fines on a firm that provides it with detailed information on an unlawful agreement, provided that four conditions are met:

1. When the firm takes the initiative, the Commission has not received any information concerning the reported agreement or, if it has information but has not yet visited the firms concerned, it does not have sufficient proof to impose fines.
2. The firm is the first one to cooperate.
3. The firm provides the Commission with all the documents and evidence in its possession concerning the agreement and gives permanent and full cooperation throughout the investigation.
4. The firm was not one of the instigators of the cartel, did not play a decisive role and did not force another firm to join it.

Substantial reductions in fines

Confirming an existing practice, the Commission also envisages substantial reductions in fines, which could amount to 50% of the usual amount, in cases where, once the investigations on suspect firms' premises have been completed, the firms are the first to cooperate, have not played a decisive role, provide evidence which confirms the infringement or admit the substance of the accusations.

It should be stressed that when a firm has enjoyed favourable treatment with regard to its fine it will not necessarily be protected from the civil-law consequences of its participation in any form of cartel.

[IP/95/1355]

Other relevant Press releases

The full texts of Commission's Press releases are available on-line from the RAPID database, on the day of their publication by the Commission's Spokesman's Service. To obtain access to RAPID, please write to ***EUR-OP Information, Marketing and Public Relations (OP/4B)*** *2 rue Mercier L-2985 Luxembourg tel. +352 2929 42455, fax +352 2929 42763*

IP/95/1036 : CAR DISTRIBUTION - THE COMMISSION PUBLISHES A GUIDE IN QUESTION-AND-ANSWER-FORMAT

IP/95/1001 : THE COMMISSION SURVEYS THE EUROPEAN ONLINE MARKET [95/09/19]

IP/95/1345 : CONTRACEPTIVE PILLS: COMMISSION PUTS AN END TO DISCRIMINATORY PRICING PRACTICES BETWEEN THE UNITED KINGDOM AND THE NETHERLANDS [95/12/05]

IP/95/1138 : ATLAS-PHOENIX: CLEARANCE POSSIBLE BY MID-1996 [95/10/18]

Court Judgements

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

JUDGMENT OF THE COURT OF 19 OCTOBER 1995 IN CASE C-19/93 P, RENDO NV ET AL. V COMMISSION

On October 19, 1995 the Court partly set aside the judgment of the Court of First Instance of November 18, 1992 (Case T-16/91) and referred the case back to the Court of First Instance. In a proceeding for infringement of Art. 85 of the EEC Treaty the Commission followed an application filed under Art. 3(2) of Council Regulation No 17/62 of 6 February 1962 by local electricity distribution companies operating in the Netherlands. The applicants, who then challenged the Commission decision later adopted in this matter in the Court of First Instance and, on appeal, in the Court of Justice, were restricted to receiving their electricity solely from four electricity producers in the Netherlands, who had formerly set up a pooling company named "Samenwerkende Elektriciteitsproduktiebedrijfen NV" (hereinafter named "SEP"). SEP supplied its electricity to the applicants through a regional distribution company called "Ijsselcentrale" (hereinafter named "IJC") and in 1986 concluded with its shareholders, the said electricity producing companies, the so-called "OVS" agreement ("Overeenkomst van Samenwerking"), which restricted all imports and exports of electricity exclusively to SEP and imposed on all parties the obligation to ensure this exclusivity by adjusting their supply contracts, including those with IJC and the applicants.

The import and export of electricity in the Netherlands is subject to special national legislation. At the time the OVS was concluded, only imports of electricity into the Netherlands by non-supplier companies were subject to an easily obtainable authorization. In 1989 and 1990, the new Netherlands Electricity Law entrusted the four electricity producers and SEP with ensuring the national public electricity supply. The SEP was given the exclusive right to import electricity with a view to public supply, prohibiting the applicants from doing so. Nevertheless, some final consumers of electricity were given the right to import electricity for their own use without any further authorization. The export of electricity according to the new law was unrestricted.

The Commission examined the OVS agreement as far as it imposed an import ban on the private consumers exempted by the new Netherlands Electricity Law and prohibited exports by both final customers and the applicant distribution companies. It found the OVS, as applied by the SEP, to infringe Art. 85 in the aforementioned areas. Applying Art. 90, the Commission took the preliminary view that SEP and the electricity generating companies were entrusted companies in the meaning of par. 2 of Art. 90, but the exclusive position of SEP was not necessary for the performance of its tasks. Nevertheless, the Commission found the exclusivity now to be provided for by virtue of the new Electricity Law.

Given the different lines of investigation, the Commission gave preference to the evaluation of the new Electricity Law pursuant to Art. 90 of the Treaty and saw itself not in a position to make a final decision on a possible justification under art. 90(2). Accordingly, the Commission confined itself to "the scope of this [reg. 17] proceeding" and refused to assess the import ban and the export ban on Electricity generating companies in the field of public supply. As for the export ban on distribution companies in and outside the field of public supply, the Commission found these provisions not to be in compliance with the new Electricity law. The Commission therefore found the ban on imports by private industrial consumers and on exports outside the field of public supply by distribution companies and private consumers to violate Art. 85(1) of the Treaty and ordered the parties to end the infringement.

The applicants appealed to the Court of First Instance, requesting to annul the Commission decision as far as it refused to rule on the agreement's import and export restrictions imposed on distribution companies in the field of public supply and to order the Commission to take a decision under Reg. 17.

The Court of First Instance found that the Commission had not ruled at all on the import restrictions imposed prior to the enactment of the new Electricity Law and found no decision with legal effects in that regard. Accordingly, the Court of First Instance held the applicant's complaint inadmissible as far as it concerned this time period. As to the time period after enactment of the new Electricity Law, the Court of First Instance held the Commission, after finding an infringement, to be free in a decision pursuant to Art. 3(1) of reg. 17 whether to order undertakings to end an infringement. Moreover, so the Court of First Instance, Art. 3(2) confers certainly no right to obtain a Commission decision as to whether an alleged infringement actually exists if the Commission, as in applying Art. 90 (2) first sentence, has no exclusive competence in the subject-matter.

The Court of First Instance pointed out that, since the import restrictions are governed by both the contested agreement and the new electricity law, the examination of compatibility with the Treaty - subject of a proceeding under Art. 169 of the Treaty - takes precedence over the - "still pending" - evaluation of the agreement (see Judgment of the Court of First Instance in Case T-16/91, Rendo and Others v Commission, [1992] ECR II-2417, par. 111) . The Court found it - even where an infringement of Art. 85 by undertakings was established - impossible to require undertakings to behave contrary to national law without first assessing that law with regard to the Treaty (idem, par. 105-107). Accordingly, the Court of First Instance upheld the Commission decision.

The judgment of the Court of Justice

Procedural issues

On appeal, the Court of Justice confirmed the Court of First Instance's view that adopting Commission decision on the OVS agreement would not have been practically possible until the assessment of compatibility of the new electricity law with the Treaty. The Court held "the proper procedure to establish the inconsistency of that Law with the Treaty" to be "that provided for in Art. 169 of the Treaty" (Judgment par. 22). However, the Court of Justice found the reasoning of the Court of First Instance not "to establish an order of priority as between the procedure provided for in Reg. No 17 and the procedure against the State for failure to fulfil its obligations" - which the Court pointed out to relate to "separate persons and separate acts" and found the Commission merely to be "entitled to take the view" of a procedure of examination "most appropriate" (Judgment par. 23).

The Court of Justice found, however, the ruling of inadmissibility of the applicant's complaint by the Court of First Instance with regard to the Commissions refusal to rule on restrictions imposed in the time prior to the enactment of the new law to be erroneous. The Court held that, even where the Commission is not obliged to adopt a decision, it produces - like any other institution "empowered to find [...] an infringement and to impose a sanction [...] and to which private persons may make complaints" - legal effects when adopting a measure terminating an investigation initiated upon complaint (Judgment par. 28, citing the judgment in Case C-39/93 P SFEI and Others v Commission [1994] ECR I-2681, par. 27, with references). Accordingly, the Court of Justice found the contested Commission decision to have legal effects even as to the part refusing to rule on restrictions imposed prior to the enactment of the new law and the complaint to be admissible in that regard. In doing so, the Court, as opposed to the Court of First Instance, saw the adopted decision to be an "implied rejection of the applicant's complaint" (Judgment par. 25).

Main Points:

Analysing the Court's judgment, the Commission is still unrestricted in the area of evaluations under Art 169 and Art. 85/86 to adopt whatever decision it deems appropriate - subject simply to judicial review. The Court's effort - by setting aside the verdict of inadmissibility - to include the factual situation prior to the enactment of the Netherlands electricity law does not challenge the Commissions investigational prerogative but simply extends, in this special case, the scope of the evaluation to a different subject-matter, to different circumstances in this case represented by different periods in time. This also explains the twisted opinion of the two European Courts on whether the investigation pursuant to Reg. 17 was still pending: for purposes of judicial review, the applicant's complaint was held to be rejected.

Aside from this, the Court of Justice has challenged the attempt of the Court of First Instance - aside from factual and practical considerations applying to the respective case - to set up a system of preference for investigations with regard to Art.169 and 85/86. Such an attempt can be seen in the Court of First Instance's reasoning that even where an infringement of Art. 85 was found, undertakings cannot be ordered to adopt a conduct complying with Art. 85 but thereby violating national law without a prior evaluation of the national law (see Judgment of the Court of First Instance, par. 106). The separate lines of investigation under the respective articles, as the Court of Justice now points out correctly, instead concern different findings towards different persons. Therefore, the Commission is also free to split up proceedings and to adopt an independent decision under Arts. 85/86 where appropriate, of course subject to judicial review. [693J0019]

M. WUNDERLICH and
P. ADAMOPOULOS

JUDGMENT OF THE COURT OF FIRST INSTANCE ("CFI") (FOURTH CHAMBER) OF 8 MARCH 1995 (T-34/93) SOCIÉTÉ GÉNÉRALE - V- COMMISSION

In this case the applicant, Société générale ("SG"), sought the annulment of Commission decision C(93)746 of 1 April 1993 which, pursuant to Article 11(5) of Regulation N° 17, required SG to supply within two weeks information which it had refused to supply following an Article 11(3) request for information, and which imposed periodic penalty payments thereafter at a rate of ECU 1000 per diem. SG also sought damages of 1FF.

The facts may be briefly summarised. The Commission's request for information had been made following the receipt of a complaint from a French citizen who had

been charged commission of 92,50FF by SG to cash a Eurocheque made out to her for 4710FF. The Eurocheque had been originally issued by a German bank. The complaint was received whilst the Commission was considering a request from Eurocheque for the renewal of an individual exemption previously granted to the "Package Deal" agreement (OJ L35/43, 07.02.85), an agreement between the banks participating in the Eurocheque system which regulated the conditions on which commission should be charged for Eurocheques used abroad.

The Commission's request for information dated 12 September 1992 referred both to Case IV/30.717-B Eurocheque : Package Deal (which resulted in the exemption referred to above) and to Case IV/30.717-A Eurocheque : Helsinki agreement, an agreement which the Commission found to be inconsistent with the Package Deal agreement and void under Article 85(2), since it involved an agreement by French banks to charge no more commission for Eurocheques than was charged within the Carte Bleue and Eurocard systems. Fines were imposed by the Commission in respect of this agreement by a decision of 25th March 1992 (OJ L95/50, 09.04.92). The request also reminded SG that the Commission considered that there was no justification for differentiating, for the purposes of commission charges, between different uses of Eurocheques (i.e. depending upon whether the Eurocheque was cashed at a bank or used to pay a French trader, and upon whether or not such a trader was a member of the Carte Bleue system).

SG refused to supply the requested information and the Commission sent a further letter dated 23 October 1992 giving SG three weeks to comply. SG again refused and the Commission therefore adopted the decision contested in these proceedings. SG claimed that the decision was void on three grounds, all of which were rejected by the CFI.

Violation of Article 11 of Regulation N° 17

SG claimed that the request for information failed to indicate clearly and precisely the legal basis and the purpose of the request as required by Article 11(3), and that it did not establish the link between the questions asked and the alleged infringement.

The CFI began from the premise that Article 11(3) set down a fundamental requirement, by analogy with the judgment of the Court of Justice in Joined Cases 46/87 & 227/88 Hoechst (ECR 1989, p.2859, para 29) in relation to Article 14 of Regulation N° 17. The CFI however rejected SG's claim that the Commission had modified the purpose of its request since the letter dated 12 September 1992 had referred only to the complaint received, the end of the Helsinki agreement and the need for information in order to assess any act or agreement under the competition rules, whilst the letter dated 23 October 1992 asked for information in the context of the possible renewal of the Package Deal exemption. The CFI found that the second letter was intended to prevent confusion on the part of SG and that, read together, the two letters made it clear that the Commission wished to verify the factual and legal situation regarding Eurocheque commissions only in the context of the Package Deal exemption renewal.

In this context, the Commission was quite entitled to request information as to the commission charged by SG when processing foreign Eurocheques. Furthermore, the references to the Helsinki agreement and to the earlier Package Deal agreement had to be considered simply as an evocation of the historical context of the new Package Deal agreement, and did not modify the purpose of the request for information. The CFI added that SG was not entitled to rely on its own interpretation of the new Package Deal agreement, to the effect that it did not apply to Eurocheques made out in favour of individuals, in order to refuse to answer a request for information : it was for the Commission alone to assess the validity of this argument.

Violation of Article 190 EC

SG argued that the reasons given for the request for information were insufficient and contradictory.

The CFI recalled that according to the Court of Justice in Case 136/79 National Panasonic (ECR 1980, p. 2033, para 10), the essential elements of reasoning in a request for information are set out on Article 11(3) of Regulation N° 17: it must state the legal basis and purpose of the request and the sanctions set out in Article 15(1)(b). However, the Commission is not obliged to give the addressee all the information which it has regarding the alleged infringements, nor to give a precise legal qualification of such infringements, although it must clearly indicate the presumptions which it intends to verify (Hoechst, cited above, para 41). In this case, the CFI found that the Commission had clearly indicated the legal basis as the competition rules, and the object of the request by stating that it was made in the context of the request for renewal of the Package Deal exemption. The CFI also gave short shrift to SG's argument that the reasoning in the two letters was contradictory, and accordingly dismissed SG's ground of appeal under Article 190 EC.

Violation of the rights of the defence

SG argued that it was not able from the request for information to assess the scope of its duty to cooperate nor the scope of the questions, and that the Commission had infringed the privilege against self-incrimination by asking SG to admit to differentiating between different uses of Eurocheques.

The CFI reiterated the judgment of the Court of Justice in Case 374/87 Orkem (ECR 1989, p. 3283, para 26) that Regulation N° 17 recognises only certain specific guarantees for the benefit of an undertaking which is subject to an investigation, and that these do not include a right to evade the investigation on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, there is a duty of active cooperation. The rights of the defence must nevertheless be respected during preliminary inquiry procedures, which may result in decisive evidence of unlawful behaviour.

Accordingly, whilst the useful effect of Articles 11(2) and (5) of Regulation N° 17/62 entitles the Commission to require an undertaking to provide all necessary information, and to disclose related documents, even if these provide evidence of an infringement, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

In contrast to the Orkem case, the CFI found on the instant facts that all the questions were purely factual, even if the answers thereto might imply a certain interpretation of the Package Deal agreement on the part on the part of SG. The answers given by SG were not self-incriminating.

The CFI therefore continued the distinction made by the Court of Justice in Orkem between the production of incriminating documents, which may be compelled, and the admission of an infringement, which may not. This distinction supports the fundamental importance of the rights of the defence, and in particular the burden of proof, whilst preserving the efficacy of the Commission's investigative powers. The judgment is a useful reminder that requests for information must be drafted with as much specificity as possible, and should be confined to purely factual questions, in order to avoid any potential problems relating to the limited privilege against self-incrimination which the Court of Justice and the CFI have recognised. Finally, the CFI also rejected SG's argument that the Commission was not entitled to gather information concerning the abandoned Helsinki agreement when an appeal against fines imposed by the Commission in relation to that agreement was pending before the CFI. The Commission should not be deprived of its right to investigate facts subsequent to those sanctioned in a decision, even if identical to those judged in the decision. In any event, if information was illegally obtained by the Commission, it would be struck out by the CFI in those subsequent proceedings.

Accordingly, SG's appeal and claim for damages was dismissed.

[693a0007] G. TAYLOR

JUDGMENTS OF THE COURT OF FIRST INSTANCE OF 8 JUNE 1995 IN CASE T-7/93, LANGNESE-IGLO GMBH V COMMISSION, AND CASE T-9/93, SCHÖLLER LEBENSMITTEL GMBH & CO KG V COMMISSION

On June 8, 1995, the Court of First Instance partially granted the request of two undertakings to annul the prohibitive Commission decisions adopted against them in proceedings pursuant to Art. 85 of the EEC Treaty. The two German applicant undertakings in the business of producing ice-cream, Langnese-Iglo GmbH (hereinafter "Langnese") and Schöller Lebensmittel GmbH (hereinafter "Schöller"), had established a comprehensive distribution network in Germany, binding retailers with exclusive purchasing agreements linked with the obligation to borrow special freezer cabinets from the distributor and to exclusively use those freezers for the undertakings' products.

On December 23, 1992, the Commission adopted final decisions against Langnese (OJ 1993 L 183/19) and Schöller (OJ 1993 L 183/1), mainly prohibiting the undertakings to impose exclusive purchase obligations on retailers with respect to so-called single-item ice-cream, refusing to grant exemption pursuant to Art. 85(3) of the Treaty and prohibiting the undertakings to conclude similar agreements until 1998. In combination with taking interim measures, the Commission on March 25, 1992, had withdrawn the benefit of the application of Commission Regulation (EEC) No 1984/83 of 22 June 1983 (hereinafter "Reg. No 1984/83") regarding exclusive purchasing agreements with regard to the agreements concluded by the two undertakings. About seven years ago, however, in September 1985, the Commission had previously issued a comfort letter addressed to Schöller with respect to notified similar standard distribution agreements but later reopened investigations as to both undertakings after a complaint by Mars GmbH (hereinafter "Mars") pursuant to Art. 3 of Council Regulation No 17/62 (hereinafter "Reg. No 17").

The judgments of the Court of First Instance

Law

Procedural issues

In a annulment procedure pursuant to Art. 173, par. 4 of the Treaty, both undertakings first raised the argument of protection of legitimate expectations with regard to the comfort letter previously issued by the Commission to Schöller in September 1985. The Court of First Instance, however, noted that by issuing the said comfort letter, the Commission neither gave negative clearance nor adopted a decision pursuant to Art. 2 and

6 of Reg. No 17. Accordingly, so the Court of First Instance, the comfort letter was not "adopted in accordance with the provisions of that regulation" (T-7/93, par. 36) and could not hinder the pursuit of Mars' complaint (citing the Court of Justice's judgments in Joined Cases 253/78 and 1 to 3/79 Guerlain and Others [1980] ECR I-2327; Case 99/79 Lancôme [1980] ECR I-2511; Case 37/79 Marty [1980] ECR I-2481 and Case 31/80 L'Oréal [1980] ECR I-3775). The Court of First Instance found comfort letters merely to give a "provisional analysis" based on the facts available at that time (T-7/93, par. 37/38), which were in the present case changed by Mars' subsequent entry into the market and which had to be carefully investigated by the Commission (T-7/93, par. 39, 41).

On the merits

With regard to the relevant product market, The Court of First Instance first confirmed the Commission's opinion that several partial market segment had to be excluded from the evaluation, basing its analysis - in accordance with case law of the Court of Justice - on the concept of a "sufficient degree of interchangeability between all products forming part of the same market" and on the "competitive conditions and the structure of supply and demand on the market" (T-7/93, par. 61). According to the Court of First Instance, it was therefore correct to exclude "ice-cream offered as part of a catering service" because such marketing of ice-cream involved providing services and was less dependent on economic factors (T-7/93, par. 63, relying on the Court of Justice's judgment in Case 234/89 Delimitis [1991] ECR I-935). The Court also found it necessary to exclude from the relevant market "ice-cream stored in private freezers at consumer's homes" and sold in "multipacks" since it was not meant to satisfy the "impulse needs" of customers relevant to this case (T-7/93, par. 64/65). Additionally, the Court confirmed the Commmission's view to exclude "craft-trade ice-cream as a whole" because it was not affected by the contested supply agreements.

With regard to "industrial ice-cream for bulk-buying customers intended for sale in individual portions ('scooping' ice-cream)", however, the Court of First Instance found that the Commission had not met its burden of putting forward evidence that there were in fact different patterns of demand within the meaning of the Court of Justice's judgment in Case 322/81 Michelin [1983] ECR 3461 (T-7/93, par. 69). To the opposite, the Court of First Instance held scooping ice-cream sold in the street to fall into the same category as the remainder of the decisive impulse ice-cream distributed by Schöller, Langnese and Mars - especially since the Commission itself had seen the two categories of ice-cream as equivalent products from the consumer's point of view. Since the different product technology was no sufficient distinction, the Court of First Instance viewed scooping ice-cream sold otherwise than through catering services as to be necessarily included in the relevant market applicable to the Commission's decisions (T-7/93, par. 70).

However, since scooping ice-cream was distributed under exclusive agreements, inclusion of scooping ice-cream, in the opinion of the Court of First Instance, would have had no substantial effect on the Commission's assessment. Accordingly, the Court of First Instance found it unnecessary to annul the contested decisions because of the Commissions's failure to include scooping ice-cream into the relevant product market.

As to the relevant geographical market, the Court of First Instance confirmed the Commission's view that, since distribution of industrial ice-cream is organized nationally and certain national characteristics apply, the relevant geographical market had to be Germany (T-9/93, par. 54).

With regard to the contested agreements' effect on competition within the meaning of Art. 85(1) of the Treaty, the Court of First Instance first made reference to the agreements requiring retailers to exclusively sell products purchased from the applicant undertakings and found the agreements to contain "both an exclusive purchasing obligation and a prohibition of competition" (T-7/93, par. 94). The Court of First Instance analyzed Schöller's and Langnese's position on the market and found the respective market share to be sufficiently high. In its determination, the Court of First Instance looked to the number of sales outlets tied to the applicants and the turnover achieved through those outlets (T-7/93, par. 96/97). Relying on Delimitis (see above), the Court of First Instance then stressed the need to determine the cumulative effect of "all the similar agreements entered into in the relevant market" together with "the other features of the economic and legal context" with regard to restriction of market access, the extent of tying-in sales outlets being only one factor relevant to that economic and legal context (T-7/93, par. 99-101). With regard to the present agreements the Court of First Instance held that the Commission had sufficiently established market-entry barriers trough the cumulative effect of the contested bundle of distribution agreements, especially since Schöller and Langnese widely imposed the obligation on

retailers to borrow their freezer cabinets and to use them exclusively for the applicants' products. Given the limited space in sales outlets, the Court of First Instance viewed this obligation as an additional factor limiting market access (see T-7/93, par. 107/108). The Court of First Instance further took into account the need for a profitable distribution system due to the low average turnover of many small retailers and the popularity of the undertakings' brand names (T-7/93, par. 110) as limiting market access. Accordingly, the Court of First Instance found the bundle of agreements to have appreciable effect on competition. As to the effect on Trade between Member States, the Court of First Instance found it sufficient for the network of agreements to have the tendency of insulating the German market from products from other Member States (T-7/93, par. 121).

Discussing the separate assessment of individual agreements, which was demanded by the applicant undertakings, the Court of First Instance held that a bundle or network of similar agreements established by the same undertaking "must be considered as a whole" in the course of evaluating "the actual details of the case" instead of "hypothetical situations" (T-7/93, par. 129, 131). Accordingly, the Court of First Instance found the Commission's evaluation to be without error in this regard.

With regard to an alleged infringement of Art. 85(3) of the Treaty, the Court of First Instance first restated the well-established principle that, in European competition law, agreements limited in time which are automatically renewed upon termination have the same legal effects as agreements concluded for indefinite time (T-7/93, par. 137). Accordingly, even those agreements concluded by the applicants which were limited in duration could not qualify for exemption under Reg. No 1984/83.

The Court of First Instance then rejected the applicants' claim that, with regard to agreements concluded for no longer than five years and qualified for block exemption under Reg. No 1984/83, the Commission was not allowed to withdraw the benefits of this block exemption because Art. 14(a) and (b) of the respective Reg. No 1984/83 are inapplicable for lack of legal authorization. Since, so the Court of First Instance, the benefits of a block exemption can be withdrawn whenever the conditions of Art. 85(3) of the Treaty are not fulfilled, and the conditions laid down in paragraphs (a) and (b) of Art. 14 of Reg. No 1984/83 are included as mere exemplifications, the Commission is not bound by additional considerations. The provision of Art. 14(b) of Reg. No 1984/83 is, however, by way of identical legislative content, covered by the authority granted by Art. 7 of Council Regulation (EEC) No 19/65 of 2 March 1965 on the application of Art. 85(3) of the Treaty (T-7/93, par. 145-148, 153).

Additionally, the Court of First Instance held the undertaking concerned to be responsible to present evidence that the conditions of an individual exemption pursuant to Art. 85(3) of the Treaty are fulfilled. As to the Commission's refusal to grant such an exemption towards the undertakings concerned, the Court of First Instance found that the undertakings arguments fell short of presenting facts to "compensate for the disadvantages which [the agreements] cause in the field of competition" (T-7/93, par. 181). The Court also confined the scope of judicial review with regard to the application of Art. 85(3) of the Treaty by the Commission to an examination of the relevant facts and "the legal inferences drawn by the Commission from them" and noted a "considerable latitude" of the Commission (T-7/93, par. 178). The Court of First Instance further confirmed that - despite the applicants' contentions - a block exemption is not subject to case-by-case verification towards the standards of the Treaty and therefore, vice versa, benefits of block exemption may be withdrawn without limitation by Art. 8(3)(a) of Reg. No 17 (T-7/93, par. 174/175). In sum, the Court of First Instance found no error in the Commission's refusal to grant individual exemption with respect to the contested agreements.

Since the undertakings concerned have the burden of establishing evidence for fulfilment of the conditions of Art. 85(3) of the Treaty, the Court of First Instance also found no violation of the principle of proportionality by the Commission. The Court of First Instance confirmed that the Commission is, although bound by the principle not to exceed appropriate and necessary measures, "under no legal obligation" to suggest "possible alternative solutions" to the undertakings which would not interfere with EC competition rules (T-7/93, par. 192/193).

Finally, the Court of First Instance examined alleged infringements of Art. 3 of Reg. No 17 by the Commission's orders to the applicant undertakings not to conclude similar agreements until 1998. According to the applicants, the respective part of the Commission decisions was without legal basis. The Court of First Instance confirmed that the Commission, pursuant to Art. 3 of Reg. No 17, is only empowered to prohibit existing agreements (T-7/93, par. 205). Since Art. 85(1) of the Treaty does not, so the Court of First Instance, generally prohibit exclusive purchasing agreements regardless of

their impact on the market, Art. 14 of Reg. No 1984/83 equally does not authorize to withhold the benefits of a block exemption from agreements concluded in the future (T-7/93, par. 207/208). The Court of First Instance also found it to be a violation of the principle of equal treatment to prohibit future agreements concluded by the applicants: other undertakings not engaged in a prior proceeding could "continue to conclude exclusive purchase agreements such as those prohibited [...]" (T-7/93, par. 209). Accordingly, the Court of First Instance found the respective Arts. 4 of the Commission decisions to exceed the Commission's authority and annulled them.

Main points:

The Court of First Instance allows the Commission to limit the scope of its comfort letters to a legal assessment of the facts currently available, thereby leaving it up to the Commission to reopen procedure at any time: a possibly different outcome itself warrants the new investigation. The nature of comfort letters only changes when expressly adopted as decision pursuant to Art. 2 or 6 of Reg. No 17. However, it seems impossible that non-addressees could ever legitimately rely on the contents of a comfort letter. The Court of First Instance could have more easily rejected Langnese's respective plea simply because Langnese was such a non-addressee - instead of leaving this question unanswered (see T-7/93 at par. 35, at the beginning).

The Court of First Instance acknowledged that exclusivity agreements of the kind contested in this procedure are generally capable of giving rise to a restriction of competition within the meaning of Art. 85(1) of the Treaty as to both inter- and intrabrand competition. This actually confirmes the Commission's position that these agreeements, such as those in the Delimitis case, have the objective to foreclose access to the market As to the infringement of Art. 85(1) in each case, the actual effect will not be exclusively determined by the Commission's de minimis notice. However, it is important to note that the Court of First Instance, in applying Art. 85(1), places the test of a "realistic" market assessment requested by the Court of Justice in Delimitis within the finding of an effect on competition and requires the Commission, in this specific regard and context only, to "establish the requisite factual and legal standard" (T-7/93 at par. 94/95). In its market analysis the Court of First Instance accordingly followed the Court of Justice in Delimitis and focuses on a consumer's demand-oriented evaluation of the whole bundle of agreements and its impact on market entry conditions through tied-in retailers.

Although the Commission decisions in their operative parts simply prohibited the contested agreement's exclusive purchasing provisions, the Court includes the freezer-exclusivity imposed on retailers by the applicants to support its finding that the agreements restrict competition and finds freezer-exclusivity, as the Commission does, to "[make] access to the market more difficult" (T-7/93, par. 107/108). In its determination, the Court of First Instance looked to the effects of the bundle of agreements as a whole, since this is the way the market is affected by distribution networks.

As to the prohibition of concluding similar agreements, the Court of First Instance has not accepted Commission orders with respect to the future. Art. 3 of Reg. No 17 could have been interpreted otherwise to ensure both effective enforcement of EC competition law and effective administrative procedure. The Court of First Instance simply leaves new agreements to future investigations.

[693a0007] M. WUNDERLICH
P. ADAMOPOULOS

JUDGMENT OF THE COURT OF FIRST INSTANCE OF 18 SEPTEMBER 1995 IN CASE T-548/93, LADBROKE RACING LTD V COMMISSION

On September 18, 1995, the Court of First Instance annulled a Commission decision rejecting the applicant's complaint under Art. 3 of Council Regulation 17/62 of 6 February 1962 and under Art. 90 of the Treaty. The applicant, a UK based corporation in the business of providing betting services for horse-races, alleged violations of, inter alia, Arts. 85(1), 86 and 90(1) of the Treaty in the field of so-called "of-course totalizator betting" in the French Republic. With respect to this market, the ten main racing companies ("sociétes des courses") have pooled their managerial rights in organizing off-course totalizator betting in France in the group Pari Mutuel Urbain (thereafter named "PMU") Both, racing companies and PMU also have, by virtue of French Law, the exclusive right to organize such off-course totalizator betting.

Since 1891, several decrees of the French Republic have extended the position of the "sociétes des courses" and the PMU from exclusivity in organizing betting on their respective racecourses only towards - in 1974 - an express prohibition of accepting bets on horse-races taking place in France, as well as accepting bets within France for races taking place outside the French Republic, by any other person than the PMU (see legislation cited in Judgment par. 3).

The applicant, who seek access to the French market, requested the Commission to take action against the "sociétes des courses" and the PMU for restrictive agreements or concerted practices and abuse of a dominant position, and against the French Republic for enacting and maintaining the legislation granting exclusivity.

After nearly four years of investigation and the applicant's request to define the Commission's position as well as an unsuccessful action before the Court of First Instance for failure to act pursuant to Art. 175 of the Treaty (Case T-32/93, Ladbroke Racing v Commission, [1994] ECR II-1015), the Commission rejected Ladbroke's complaint solely with regard to the alleged infringement of Art. 85 and 86. As to Art. 90, the Court of First Instance in the said proceeding had denied a right of applicants to request the Commission to take action under Art. 90(3) and, accordingly, to bring a follow-up lawsuit before the Court of First Instance for failure to do so (see Judgement in Case T-32/93, cited above, par. 37). The Commission instead continued to investigate this part of the applicant's complaint.

The Commission found Art. 85(1) to be inapplicable since, due to French legislation, in 1891 all competition in taking bets on horse-races was abolished. Subsequent legislation, so the Commission, had no further restrictive effects. Due to the legally ordered isolation of the respective French market, so the Commission, interstate commerce could not be possibly affected by the alleged agreements or practices. Outside France, however, PMU did allegedly nothing else but exercising its intellectual property rights. Similar to this analysis, the Commission rejected the an infringement of Art. 86 for lack of affect on interstate commerce due to the French monopoly and found PMU simply to be a rationalization of the racing companies's services.

Finally, the Commission found the crucial time period to be, at most, from 1962 to 1974 as from the adoption of Regulation 17/62 to the adoption of the 1974 French law finally converting PMU's relationships into a legal obligation. As later acknowledged in the proceeding before the Court of First Instance, the Commission continued instead to concentrate on the procedure under Art. 90 since the players on the French market, especially after 1974, were merely fulfilling their obligations imposed on the them by the French Republic (Judgment, par. 39).

The judgment of the Court of First Instance

Procedural questions

On appeal, the Court of First Instance examined the Commission's two-tier investigation of the case, separating the assessment of compatibility of the French legislation with the Treaty from the adoption of any decision under Arts. 85 and 86. The Court of First Instance confirmed the Commission's "liberty to determine the priority to be given to [the] complaint in the light of the Community Interest", relying on its decision in Case T-24/90 Automec v Commission [1992] ECR II-2223, par. 85 (Judgment, par. 44). It also reiterated the principle that "the Commission [...] cannot be obliged to take action, at an individual's request, on the basis of Art. 90(3) of the Treaty, as previously held in the action brought by the applicants for failure to act (Judgment, par. 45).

However, with its still ongoing investigation of the Commission to assess the compatibility of the French legislation under Art. 90, the Court of First Instance held that the Commission was wrong to "definitively reject the applicant's complaint under Arts. 85 and 86 without having previously completed its examination of the complaint under Art. 90" (Judgment, par. 46 and 51). The Court of First Instance found that no assessment under Arts. 85 and 86 could have been made without first deciding whether the respective provisions of French law were compatible with the Treaty and that the Commission therefore violated its "duty to examine carefully the factual and legal issues brought to its attention by the complainants" (Judgment, par. 47 and 50). Accordingly, the Commission decision was annulled.

Laying out its analysis, the Court of First Instance went on to present a system of decision-taking with regard to Arts. 85, 86 and 90 applicable to the case:

If the national legislation would be found consistent with the Treaty and the conduct of undertakings in compliance therewith, no infringement of Art. 85 and 86 could possibly be found. In case of non-compliance by undertakings, the finding of an Arts. 85 and 86 infringement would be possible. If, however, the national legislation would be found to be inconsistent with the Treaty, measures could be taken against complying undertakings pursuant to Arts. 85 and 86 (Judgment, par. 48/49).

Main points:

Analysing the judgment, the Court's decision-making guide for Arts. 85, 86 and 90 may simply be taken as applying to the case before the Court, a case with a priority for the evaluation of national law alleged by the Commission. However, the Court of First Instance's judgment in Rendo (Case T-16/9, Rendo and Others v Commission, ECR II-2417 at par. 105-107) may suggest an effort of the Court of First Instance to establish a general priority for the evaluation of national law before any decision under Art. 85/86 could possibly be taken. Such a general approach raises concerns as to the scope of its applicability since in Rendo and Ladbroke the factual situation was paramount and at least in Ladbroke the Commission itself alleged the priority of an Art. 90 evaluation. Nevertheless, as a matter of everyday practice, it seems difficult to handle complicated and very different factual situations by adopting clear-cut but very general rules. Moreover; the Court of Justice in Case C-19/93 P, Rendo v Commission, has, aside from logical and factual arguments, already rejected any notion "to establish an order of priority as between the procedure provided for in Reg. No 17 and the procedure against a State for failure to fulfil its obligations" (see judgment in Rendo, par. 23). [693A0548] M. WUNDERLICH and P. ADAMOPOULOS

Other Judgements and Opinions of Advocates-General

Extracts are published in the weekly publication " Les activités de la Cour de Justice et du Tribunal de Première Instance des Communautés Européennes", available on-line from the RAPID database, a few days after its publication by the Court. To obtain access to RAPID please write to: ***EUR-OP Information, Marketing and Public Relations (OP/4B)*** *2 rue Mercier L-2985 Luxembourg tel. +352 2929 42455, fax +352 2929 42763*

Arrêt de la Cour du 18 septembre 1995: Aff. T-548/93 Ladbroke Racing Ltd / Commission des Communautés européennes: 'Concurrence - Articles 85 et 86 du traité - Prise de paris sur les courses hippiques - Droits exclusifs d'un groupement d'entreprises national - Ententes - Abus de position dominante -Article 90 du traité - Absence d'intérêt communautaire - Anciennes infractions aux règles de concurrence' (Première chambre élargie)

Conclusions de Monsieur l'Avocat général G. Tesauro présentés à la Cour plénière du 12 septembre 1995: Aff.jtes C-319/93, C-399/93, C-40/94 et C-224/94 Hendrik Evert Dijkstra / Friesland (Frico Domo) Coöperatie B.A. : 'Préjudicielle - Gerechtshof te Leeuwarden - Interprétation de l'art. 2 du règlement nu 26/62 du Conseil portant application de certaines règles de concurrence à la production et au commerce des produits agricoles - Présomption de validité d'un accord ou d'une décision d'une coopérative agricole'

Conclusions de Monsieur l'Avocat général C.O. Lenz présentés à la Cour plénière du 20 septembre 1995: Aff. C-415/93 ASBL Union royale belge des sociétés de football association e.a. / Jean-Marc Bosman: 'Préjudicielle - Cour d'appel de Liège - Interprétation des articles 48, 85 et 86 du traité CE - Règles et pratiques des fédérations européennes de football professionnel - Indemnité de transfert - Système par lequel le transfert, vers un autre club, d'un joueur professionnel de football, arrivé au terme du contrat le liant à son employeur, est subordonné au paiement d'une somme d'argent entre les deux clubs - Restrictions à l'engagement de joueurs étrangers ressortissants communautaires'

Conclusions de Monsieur l'Avocat général G. Cosmas présentés à l'audience de la sixième chambre du 28 septembre 1995: Aff. C-134/94 Esso Española S.A. / Comunidad Autónoma de Canarias: 'Préjudicielle - Tribunal Superior de Justicia de Canarias - Interprétation des articles 3, sous c), 5, 6, 30, 36, 52, 53, 56, 85 et 102, paragraphe 1, du traité CE - Réglementation nationale en matière d'approvisionnement énergétique dans le domaine des produits pétroliers - Activité des grossistes en produits pétroliers dans les îles Canaries - Obligation d'assurer le ravitaillement dans un minimum des 4 îles'

Arrêt de la Cour du 5 octobre 1995: Aff. C-96/94 Centro Servizi Spediporto Srl / Spedizioni Marittima del Golfo Srl Concurrence; Préjudicielle: 'Transports routiers - Tarifs - Réglementation étatique - Concurrence' (Sixième chambre)

Arrêt de la Cour du 17 octobre 1995: Aff.jtes C-140/94, C-141/94 et C-142/94 DIP SpA e.a. / Comune di Bassano del Grappa e.a.; Préjudicielle: 'Réglementation du commerce - Autorisation d'établissement - Concurrence' (Deuxième chambre)

Arrêt de la Cour du 19 octobre 1995: Aff. C-19/93 P Rendo NV e.a. / Commission des Communautés européennes: 'Concurrence - Accord entravant l'importation et l'exportation d'électricité - Décision de la Commission - Abstention partielle de statuer sur la compatibilité dudit accord avec l'article 85, paragraphe 1, du traité' (Sixième chambre)

Arrêt de la Cour du 24 octobre 1995: Aff. C-70/93 Bayerische Motorenwerke AG / ALD Auto-Leasing D GmbH; Préjudicielle: 'Système de distribution sélective - Véhicules automobiles - Refus de livraison - Protection territoriale - Interprétation de l'article 85, paragraphe 1, du traité CEE et du règlement (CEE) nu 123/85' (Cour plénière)

Arrêt de la Cour du 24 octobre 1995: Aff. C-266/93 Bundeskartellamt / Volkswagen AG et VAG Leasing GmbH; Préjudicielle: 'Leasing en matière d'automobile - Activité d'agence exclusive des distributeurs pour la filiale du constructeur spécialisée dans le leasing - Interprétation de l'article

85, paragraphe 1, du traité CEE et du règlement (CEE) nu 123/85' (Cour plénière)

Arrêt de la Cour du 9 novembre 1995: Aff. C-91/94 Thierry Tranchant e.a.; Préjudicielle: 'Directive 88/301/CEE de la Commission - Indépendance des entités chargées de contrôler l'application des spécifications techniques - Laboratoires d'essais' (Cour plénière)

Arrêt de la Cour du 16 novembre 1995: Aff. C-244/94 Fédération française des sociétés d'assurance e.a. / Ministère de l'Agriculture et de la Pêche; Préjudicielle: 'Articles 85 et suivants du traité CE - Notion d'entreprise - Organisme chargé de la gestion d'un régime complémentaire facultatif de sécurité sociale' (Cour plénière)

Conclusions de Monsieur l'Avocat général N. Fennelly présentés à l'audience de la sixième chambre du 7 décembre 1995: Aff. C-18/94 Barbara Hopkins e.a. / National Power plc et Powergen plc en présence de British Coal Corporation: 'Préjudicielle - High Court of Justice (Queen's Bench Division) - Interprétation des articles 4 et 63, paragraphe 1, du traité CECA et/ou de l'article 86 du traité CEE - Producteur vendant son charbon à un opérateur indépendant qui le mélange à du charbon d'autres provenances afin d'obtenir un mélange qu'il vend lui-même à l'acheteur - Existence d'une discrimination quant aux conditions d'achat du charbon - Existence d'une obligation vis-à-vis des producteurs de charbon dont l'exécution pour être poursuivie devant les juridictions nationales'

Arrêt de la Cour du 12 décembre 1995: Aff.jtes C-319/93, C-40/94 et C-244/94 Hendrik Evert Dijkstra e.a. / Friesland (Frico Domo) Coöperatie BA Agriculture; Préjudicielle: 'Concurrence - Statuts des coopératives laitières - Régime d'indemnité de départ - Interprétation de l'article 2 du règlement nu 26' (Cour plénière)

Arrêt de la Cour du 12 décembre 1995: Aff. C-399/93 H.G. Oude Luttikhuis e.a. / Verenigde Coöperatieve Melkindustrie Coberco BA Agriculture; Préjudicielle: 'Concurrence - Statuts des coopératives laitières - Régime d'indemnité de départ - Article 85 du traité et règlement nu 26' (Cour plénière)

Arrêt de la Cour du 14 décembre 1995: Aff. C-387/93 Giorgio Domingo Banchero Libre circulation des marchandises; Préjudicielle: 'Articles 5, 30, 37, 85, 86, 90, 92 et 95 du traité CEE' (Cour plénière)

Arrêt de la Cour du 14 décembre 1995: Aff.jtes C-430/93 et C-431/93Jeroen van Schijndel e.a. / Stichting Pensioenfonds voor Fysiotherapeuten; Préjudicielle: 'Qualification comme entreprise d'un fonds professionnel de pension - Affiliation obligatoire à un régime professionnel de pension - Compatibilité avec les règles de concurrence - Possibilité d'invoquer pour la première fois en cassation un moyen de droit communautaire impliquant un changement de l'objet du litige et en examen des faits' (Cour plénière)

Arrêt de la Cour du 15 décembre 1995: Aff. C-415/93 Union Royale belge des Sociétés de football association ASBL e.a. / Jean-Marc Bosman e.a. Libre circulation des personnes; Préjudicielle: 'Libre circulation des travailleurs - Règles de concurrence applicables aux entreprises - Joueurs professionnels de football - Réglementations relatives aux transferts de joueurs - Clauses de nationalité' (Cour plénière)

Conclusions de Monsieur l'Avocat général D. Ruiz-Jarabo Colomer présentés à l'audience de la deuxième chambre du 14 décembre 1995: Aff. C-226/94 Grand Garage Albigeois e.a. / Garage Massol Sàrl; Préjudicielle - Tribunal de commerce d'Albi - Interprétation du règlement (CEE) nu 123/85 de la Commission concernant l'application de l'article 85, paragraphe 3, du traité CEE à des catégories d'accords de distribution et de service de vente et d'après-vente de véhicules automobiles - Licité de l'activité d'un revendeur d'automobiles hors du réseau de distribution

Conclusions de Monsieur l'Avocat général D. Ruiz-Jarabo Colomer présentés à l'audience de la deuxième chambre du 14 décembre 1995: Aff. C-309/94 Nissan France SA e.a. / Jean Luc Dupasquier e.a.; Voir affaire C-226/94.

MERGERS

Application of Council Regulation 4064/89
Main developments between 1st August and 31st December 1995

Summary of the most important recent developments

by Jon DENNESS and John GATTI, DG IV-B

APPLICATION OF COUNCIL REGULATION 4064/89

The final five months of 1995 has seen a continuation of the high levels of notifications made under the Merger Regulation and consequently high number of decisions were taken. During the period 50 notifications were received and 46 decisions adopted taking the totals for the year 112 and 109 respectively. This represents an increase of over 20% compared to 1994, itself a record year. In the Crown Cork and Seal/Carnaud MetalBox, Kimberley Clark/Scott Paper and Gencor/Lonrho cases the Commission opened in depth investigations. In addition, a number of cases discussed in the previous edition were the subject of Commission decisions, Orkla/Volvo, ABB/Daimler Benz, RTL/Veronica/Endemol.

Orkla/Volvo

The Commission approved the proposed beverage joint venture between ORKLA and VOLVO after the partners amended their original proposals. As a condition for this approval the parties agreed to sell the Hansa brewery business, as a going, concern during 1996.

During its investigation the Commission established that the joint venture as originally proposed would have a very large (in excess of 75%) share of the market for beer in Norway. In the individual, relevant product markets, beer sold to retailers and beer sold to the hotel and catering industry, the market shares were estimated to be at similar levels.

Neither the retail trade nor the hotel and catering industry was considered able to offer any countervailing purchasing power to the proposed joint venture. In addition it was considered that, given the environmental and alcohol legislation currently in force in Norway, there was little opportunity for increased import penetration or the establishment of new brands to counteract the presence of the joint venture on the market for beer.

The Commission concluded that the proposed concentration would create a dominant position through which effective competition in a substantial part of the territory covered by the EEA Agreement would be significantly impeded.

ABB/Daimler Benz

In the proposed joint venture ABB and Daimler Benz intended to combine their worldwide activities in the field of rail transportation. The merger will lead to the world´s largest firm in this sector. In Europe, Daimler´s and ABB´s activities complement each other geographically. The only overlap in the parties' activities is in Germany where a detailed investigation of the competitive impact has been necessary.

The Commission carried out in-depth investigations into eight markets, mainline train sets (eg high speed inter-city trains like the ICE and TGV), electrical locomotives, electrical and diesel regional trains, catenaries, traction power systems and trams and metros. The Commission concluded that the operation would not give rise to the creation or strengthening of a dominant duopoly in any of these markets except that for trams and metros (local trains).

The markets for local trains have remained national in Germany, although in some other member states the lack of major national rail transportation industries has already led to wider markets. The proposed operation would have led to the creation of a dominant duopoly in the German markets for local trains. The major suppliers in Germany, with the exception of the parties and Siemens, are primarily producers of the mechanical parts of a rail vehicle, consequently they need partners or suppliers for the electrical parts. The concentration would also have impeded market entry by foreign suppliers by eliminating independent German suppliers of electrical components. Local train buyers voiced concerns on this issue.

To eliminate the Commission's concerns the parties have agreed to the sale of Kiepe Elektrik GmbH (a Daimler-Benz subsidiary). Kiepe Elektrik GmbH is a firm specialised in electrical supplies for local trains. As a result of this divestiture a competent producer of electrical components, independent of the parties, remains on the German market and will be able to supply or cooperate with suppliers of the mechanical components of local trains. Kiepe is an established and successful supplier. It has also played an important role in helping to open up the German market through its cooperation with the Canadian firm, Bombardier. This divestiture structurally underpins the

continued opening-up of the German market .

RTL/Veronica/Endemol

The Commission decided that the Dutch tv joint venture Holland Media Groep SA (HMG) cannot be approved under the EC Merger Regulation. As a result the creation of HMG has been declared incompatible with the common market.

HMG is a joint venture between RTL4 SA (RTL), Vereniging Veronica Omroeporganisatie (Veronica) and Endemol Entertainment Holding BV (Endemol). The parent companies of RTL are the Luxembourg broadcasting group CLT and the Dutch publishing group VNU. RTL has transferred its broadcasting activities in the Netherlands to HMG, in particular the two commercial tv channels RTL4 and RTL5. A third channel has been brought into HMG by Veronica which became a fully-fledged commercial channel as from 1 September 1995. The other main parent, Endemol, is the largest independent producer of tv programmes in the Netherlands.

On the basis of its investigation the Commission has concluded that, with its three channels HMG will achieve a very strong position on the Dutch market for tv broadcasting, which is likely to result in an audience share of more than 40%. As a consequence, the audience share of the public broadcasters will be substantially reduced. HMG therefore will become the largest tv broadcaster in the Netherlands.

The market position of broadcasters in the tv advertising market is largely determined by their audience shares. As a result of its high audience shares therefore HMG will become by far the strongest player on the Dutch tv advertising market. In 1994 the two RTL channels had a market share of around 50% in tv advertising although their share of the viewers' market was only 32%. With the addition of the Veronica channel, HMG's market share is likely to be at least 60%. A particular strength of HMG as compared with its competitors is that it is able to cover the most important target groups for advertisers by coordinating the programme scheduling of its three channels. By contrast, given the complex structure of the Dutch public broadcasting system, it is more difficult for the three public channels to act in the same way. The market power of HMG is also likely to have an adverse effect on the opportunities for the small competitors to compete and for potential new entrants on this market. As a result the Commission has concluded that HMG will obtain a dominant position on the market for tv advertising in the Netherlands.

The Commission considers that Endemol, by far the largest independent Dutch tv producer, already has a dominant position on the Dutch tv production market. Apart from Endemol this market is highly fragmented with only a few producers of any size which are nevertheless very small compared with Endemol. Through its participation in HMG Endemol has obtained a structural link to the leading broadcaster in the Netherlands by providing it with preferential access to the largest customer in the Dutch tv production market. As a result Endemol's already dominant position on this market will be further strengthened.

The Commission's examination of this case was initiated following a request from the Dutch government to this effect, in the absence of which the Commission would have had no jurisdiction to deal with the case since the requisite turnover thresholds set out in the Merger Regulation were not attained by the parties concerned and jurisdiction rests with the Member States. However, in this situation a Member State is entitled under Article 22 of the Regulation to request the Commission to take over the case. Since there is no suspension effect for cases under Article 22 the parties have been entitled to complete the operation.

The present decision does not prevent HMG from continuing its activities. The measures needed to restore effective competition on the Dutch tv advertising and production markets will be adopted at a later date. In the meantime, the parties have been invited by the Commission to propose appropriate measures within three months to this effect.

Crown Cork and Seal/Carnaud MetalBox

The Commission authorised the proposed acquisition of Carnaud Metalbox S.A. by Crown Cork & Seal, Inc., subject to the fulfilment of divestiture commitments made by Crown in order to meet the competition concerns identified by the Commission. Following a detailed second phase investigation, the Commission concluded that Crown's commitment to divest a specified group of tinplate aerosol can operations would be sufficient to overcome the competition concerns raised by the proposed operation in the EEA market for the production and sale of tinplate aerosol cans. The concentration will create the world's largest packaging company.

In the EEA, both parties produce and sell tinplate aerosol cans and food cans, as well as certain closures for beverage cans and bottles, including beverage can ends, metal crowns and plastic and aluminium caps. After extensive analysis of both the horizontal and vertical issues raised, the Commission determined that the only market in which the proposed concentration threatened to create a dominant position was the market for tinplate aerosol cans.

In the market for food cans, the Commission noted that Crown is only present to a minor degree in the various national food can markets, with the exception of the Benelux region where both parties have a substantial presence. However, the Commission concluded that the parties' combined share would not create or strengthen a dominant position in

Benelux and it would not significantly change the preexisting competitive position of Carnaud Metalbox in the remaining Member States.

The investigation led the Commission to conclude that the planned concentration would have a negative impact on competition in the EEA market for the production and sale of tinplate aerosol cans. In that market, the combined market share of the two market leaders (CMB with 40% and Crown with 25%) would exceed 60% in the EEA. The closest competitor, Schmalbach-Lubeca (a subsidiary of Continental Can of Europe), would have a market share of 15% to 20% and no other competitor would have more than 5% of this market. Furthermore, Crown and CMB are the two market leaders in know-how, R&D and technology and uniquely have European-wide plant coverage from which they serve the full range of aerosol can customers. Thus, the combined entity would have been in a unique position and could have behaved independently of competition in the tinplate aerosol can market.

The Commission determined that the new firm would not be constrained from exercising market power. The remaining competitors have neither the necessary production capacity, the geographical flexibility, nor the technical abilities to qualify as a primary supplier for most customers. In addition, the countervailing power of customers would be inadequate, as they would have no credible alternative to the new group. Finally, there is no substantial potential competition, as there are significant barriers to entry created by know-how requirements and the large excess capacity in the hands of the parties. Thus, the Commission concluded that the proposed merger would create a dominant position for the parties in this market.

In order to eliminate the Commission's competition concerns regarding the loss of one of the major operators in the tinplate aerosol can market, Crown proposed to modify the original concentration plan by offering to divest certain overlapping plants in a divestiture package. Specifically, Crown will sell its aerosol plant in Southall and supporting operations in Tredegar (UK) and its aerosol assets and operations in Voghera (Italy), as well as the CarnaudMetalbox plants in Laon (France), Reus (Spain) and Schwedt (Germany).

Kimberly-Clarke/Scott Paper

The Commission decided to initiate proceedings under the Merger Regulation in relation to the proposed merger between Kimberly-Clark Corporation and Scott Paper Company on 12 September 1995. Both companies are based in the United States. Kimberly-Clark produces and sells a wide range of paper and related products worldwide. The majority of its turnover is generated by tissue and related products designed for both consumer and industrial (away-from-home) use. Scott is active worldwide primarily in the manufacture and sale of tissue products for consumer and away-from-home use.

The merger would create the largest manufacturer of tissue products in the world as well as in Europe with more than twice the worldwide capacity of the next largest competitor. It would combine the marketing and technical strengths of Kimberly-Clark and Scott as well as their brands Kleenex (Europe), Scottex (the continent), and Andrex (United Kingdom)

In its preliminary enquiry the Commission identified several markets where the combined shares enjoyed by the parties, especially with regard to branded consumer tissue products, gave rise to concern that the merger would create or strengthen a dominant position which would substantially impede competition. In particular the parties have extremely high combined shares in the United Kingdom consumer markets for toilet tissue, kitchen towels and hankies/facials, as well as a strong position in the overall UK tissue market including away-from-home products; for example, the combined market share of the parties would appear to exceed 75 per cent for branded toilet tissue and branded hankies/facials and 50 per cent for branded kitchen towels. The parties also enjoy strong positions in Ireland and Italy and their brand strengths may give rise to competition concerns in other member states of the European Union.

On 12 December 1995 the Commission granted to Kimberly-Clark and Scott Paper Company a partial derogation from the suspension of the implementation of the proposed merger between them it had imposed in September. The effect of the derogation was that the parties were able to complete the merger following meetings of their shareholders but that they must hold separate the EEA business of Scott pending the Commission's final decision.

In granting the derogation the Commission took into account the fact that the parties had proposed a remedy, involving the divestment of specified assets relating to consumer tissue markets in the United Kingdom and Ireland, to the concerns which the Commission had expressed about the effects of the merger.The Commission also took into account the loss of staff and the fall in revenue which Scott's business had experienced since the merger was announced and the safeguards incorporated into the derogation which included the appointment by the parties of an independent oversight person to monitor their compliance with the hold-separate undertaking. The Commission must take a final decision on the merits of the merger and its effects on the relevant EEA markets no later than 22 January 1996.

Gencor/Lonrho

The Commission decided on 22 December to initiate a detailed investigation into the proposed merger of the PGM (platinum

group metals) interests of Gencor and Lonrho which are located in South Africa. Both Gencor and Lonrho have substantial operations in the European Union, and at this stage of its investigation the Commission considers that the scope of the geographic market for PGMs is worldwide.

The merger involves share exchanges between the two companies with respect to Impala Platinum Holdings Limited, Eastern Platinum Limited and Western Platinum Limited.

The operation will result in Lonrho receiving new shares in Impala. These shares would be listed on the Johannesburg Stock Exchange and the International Stock Exchange in London. Following the issue of new shares Gencor and Lonrho will each hold about 32% of the shares in Impla. The remaining shares will be held by the public.

The Commission has decided to initiate the second phase, four month investigation into the effects of the operation because of concerns that the merged company may have an adverse effect on competition in the PGM market. A final decision must be taken before 7 May 1996.

Repola/Kymmene

The Commission approved an operation by which Repola Corporation and Kymmene Corporation enter into a full merger. Repola and Kymmene are large international companies active in the fields of printing paper and packaging materials. The operation involves among others the product markets of newsprint, magazine paper and paper sacks.

In paper sacks the Commission's investigation lead to the conclusion that there is a separate Finnish market for this product and that the concentration would lead to the creation of a dominant position on the Finnish market. Repola and Kymmene have dominated the Finnish market for several years and by the operation the new company would be nearly the sole provider of paper sacks to Finnish customers.

However, Repola and Kymmene have entered into commitments vis a vis the Commission which remove the serious doubts as to the proposed operations compatibility with the common market. The commitments involve divestiture of some of Repola and Kymmene's paper sack capacity on the Finnish market.

The markets for newsprint and magazine paper are at least Western European in scope and Repola/Kymmene as well as all the other major European paper producers transport and market their products in almost all Member States. Due to the operation the new company will be the major European player in newsprint and magazine paper. However, their combined market shares will not exceed approximately 20% in any of the two product markets and several other competitors have strong positions.

Repola is, together with five other Finnish paper producers, a member of Finnpap Marketing Association. Finnpap is a joint sales organisation which markets the paper products of the members on a world wide basis. Kymmene has its own sales network and is not a member of Finnpap. The parties have committed themselves within a given date not to sell paper products through the Finnpap joint sales agency.

For the above reasons, and the commitments given by Repola and Kymmene, the Commission has concluded that the concentration does not create or strengthen a dominant position and has decided not to oppose it and declare it compatible with the common market.

PHARMACEUTICAL INDUSTRY

In 1995 there was a marked increase, to six, in the number of cases involving pharmaceutical companies compared to previous years. In 1993 and 1994 respectively there were two and three notifiable cases in the sector.

There appear to be two main driving forces towards increased concentration in the sector. Research and development is essential for the future of these companies. Only very large companies can now support the costs of research necessary to ensure a continued flow of new products. The cost of research is escalating, patent protection is limited in time while the approval procedures for new products are becoming more stringent and time consuming.

The second reason is that companies wish to provide a wider range of products. This enables the merged group to become a more competitive supplier to wholesalers, hospitals and pharmacy chains. A wider product range also reduces the risk that the demise of a single product has a disproportionate effect on the company's future.

This search for complementary partners means that although the result of a merger between pharmaceutical companies may be a very large undertaking there are often only minimal increases in market share for individual products. The merger between Glaxo and Welcome which created the world's largest pharmaceutical company gave rise to competition concerns only in relation to anti-migraine drugs. Similarly in Rhône Poulenc/Fisons and Upjohn/Pharmacia the areas of overlap were very limited.

The Commission has also examined the pharmaceutical companies' "pipelines", ie potential new products at various states of development, in its evaluation of mergers. It was particularly concerned that a merger which did not give rise to competition concerns at the time of notification would not give rise to problems in the future. This requires careful evaluation as a large majority of products in development do not reach the market place. In this respect only products in the final stages of clinical trials and close to the market and were considered.

▹ MERGERS

REVIEW OF THE MERGER REGULATION

The introduction of Community merger control procedures in 1990 established the powers of the Commission to appraise concentrations between large companies with operations falling within the European Union. The Commission's "one-stop shop" to multi-national merger control, has been widely heralded as a success.

After five years' experience the Commission is required, by a 1993 Council resolution, to examine the operation the Merger Regulation particularly the level of the turnover thresholds, above which concentrations are notifiable to the Commission and the way in which transactions are referred to and from the Commission and the Member States. The Commission is, in addition, taking the opportunity to respond to other shortcomings in the Regulation and to criticisms of its operation to date. A Green Paper which will be published shortly will launch a widespread consultation process regarding various elements of possible reform in this area.

APPLICATION OF ARTICLE 66 OF THE ECSC TREATY

In the period under consideration the Commission took two decisions on concentrations under the merger provisions of the ECSC Treaty making seven in all for the year. These decisions concerned the establishment of joint ventures between USINOR SACILOR and HOOGOVENS and between RIVA and FREIRE which respectively acquired SN-PLANOS and SN-LONGOS thereby effecting the privatisation of the Portuguese steel industry. ■

Press releases

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BIO/95/360 : CARNAUD METALBOX, CROWN, CORK & SEAL CASE: COMMENTS OF MR VAN MIERT [95/10/10]

IP/95/881 : COMMISSION AUTHORIZES ACQUISITION OF KLEINWORT BENSON BY DRESDNER BANK [95/08/01]

IP/95/893 : COMMISSION APPROVES ACQUISITION BY JEFFERSON SMURFIT OF MUNKSJO [95/08/01]

IP/95/922 : COMMISSION APPROVES ESTABLISHMENT OF CABLE AND WIRELESS AND VEBA TELE-COMMUNICATIONS JOINT VENTURES [95/08/18]

IP/95/928 : COMMISSION CLEARS THE THOMSON-CSF / TENEO / INDRA JOINT VENTURE [95/08/23]

IP/95/929 : COMMISSION CLEARS ACQUISITION OF SOLE CONTROL OF SUN LIFY BY UAP [95/08/23]

IP/95/930 : COMMISSION APPROVES ACQUISITION BY CREDIT LOCAL DE FRANCE OF BERLIN-BASED HYPOTHEKENBANK [95/08/24]

IP/95/931 : COMMISSION GIVES GO-AHEAD TO TAKEOVER OF FRANCE VIE AND FRANCE IARD BY GENERALI [95/08/24]

IP/95/932 : COMMISSION CLEARS CAPITAL INJECTION BY NORDIC CAPITAL INTO THE SWEDISH TRAVEL GROUP TRANSPOOL [95/08/24]

IP/95/935 : COMMISSION APPROVES JOINT VENTURE IN THE FIELD OF FLEXIBLE PACKAGING [95/08/29]

IP/95/950 : THE COMMISSION CLEARS PROPOSED JOINT VENTURE BETWEEN NORANDA FOREST INC AND GLUNZ AG IN THE SECTOR OF WOOD BASED AND BOARD PRODUCTS [95/09/11]

IP/95/952 : THE EUROPEAN COMMISSION AUTHORISED A JOINT VENTURE AGREEMENT BETWEEN AVIONS DE TRANSPORT REGIONAL (ATR) AND BRITISH AEROSPACE (BAE) [95/09/11]

IP/95/968 : COMMISSION OPENS FULL INVESTIGATION INTO PROPOSED MERGER BETWEEN KIMBERLY-CLARK AND SCOTT PAPER [95/09/12]

IP/95/978 : COMMISSION APPROVES THE ACQUISITION BY RICOH OF GESTETNER [95/09/14]

IP/95/984 : COMMISSION FINDS BANCA NAZIONALE DEL LAVORO/BT TELECOMS JOINT VENTURE ALBACOM TO BE OUTSIDE THE JURISDICTION OF THE MERGER REGULATION [95/09/21]

IP/95/985 : THE COMMISSION CLEARS THE ACQUISITION OF CREDIT

▹ MERGERS

LYONNAIS BANK NEDERLAND N.V. BY GENERALE BANK N.V. [95/09/27]

IP/95/995 : HOLLAND MEDIA GROUP - DUTCH TV JOINT VENTURE CANNOT BE CLEARED IN ITS CURRENT FORM. - COMMISSION & PARTIES POSITIVELY DISCUSS SOLUTIONS [95/09/20]

IP/95/1021 : ORKLA/VOLVO : COMMISSION ACCEPTS JOINT VENTURE AFTER COMMITMENT TO SELL THE HANSA BREWERY [95/09/20]

IP/95/1024 : COMMISSION DECIDES THAT TAKEOVER OF FISONS BY RHONE POULENC DOES NOT RAISE COMPETITION ISSUES [95/09/22]

IP/95/1059 : COMMISSION APROVES THE MERGER OF UPJOHN AND PHARMACIA [95/10/02]

IP/95/1085 : COMMISSION APPROVES A JOINT VENTURE BETWEEN KNP BT AND SOCIETE GENERALE IN THE FIELD OF DISTRIBUTION, MAINTENANCE, ENGINEERING AND TRAINING IN THE PROFESSIONAL PC MARKET. [95/10/04]

IP/95/1126 : COMMISSION CLEARS RAIL TRANSPORTATION JOINT VENTURE BETWEEN ABB AND DAIMLER- BENZ [95/10/18]

IP/95/1154 : COMMISSION APPROVES TAKEOVER OF SCHWARZKOPF BY HENKEL [95/10/19]

IP/95/1164 : COMMISSION AUTHORISES THE ACQUISITION OF CONTROL OF SOCIETE NATIONALE DE CREDIT A L'INDUSTRIE BY CAISSE GENERALE D'EPARGNE ET DE RETRAITE BANQUE [95/10/24]

IP/95/1165 : COMMISSION APPROVES CREATION OF A JOINT VENTURE BY RHONE- POULENC CHIMIE AND ENGELHARD S.A. [95/10/24]

IP/95/1174 : THE COMMISSION AUTHORISES THE ACQUISITION BY SWISS LIFE OF A CONTROLLING INTEREST IN THE CAPITAL OF I.N.C.A. [95/10/26]

IP/95/1177 : THE COMMISSION CLEARS THE MERGER BETWEEN CHEMICAL BANKING CORPORATION AND THE CHASE MANHATTAN CORPORATION. [95/10/27]

IP/95/1182 : FINNISH PAPER INDUSTRY: COMMISSION CLEARS FULL MERGER BETWEEN REPOLA AND KYMMENE [95/10/30]

IP/95/1245 : CROWN CORK & SEAL/CARNAUDMETALBOX: THE COMMISSION IMPOSES STRICT CONDITIONS [95/11/14]

IP/95/1282 : COMMISSION CLEARS THE ACQUISITION OF SOVAC BY GE CAPITAL [95/11/22]

IP/95/1290 : THE COMMISSION CLEARS THE MERGER BETWEEN SEAGATE TECHNOLOGY INC.AND CONNER PERIPHERALS INC. [95/11/24]

IP/95/1323 : COMMISSION APPROVES A JOINT VENTURE BETWEEN MCDERMOTT AND ETPM IN THE FIELD OF THE PROVISION OF MARINE CONSTRUCTION SERVICES TO THE OFFSHORE AND GAS INDUSTRIES [95/11/30]

IP/95/1327 : COMMISSION AUTHORIZES CEP COMMUNICATION (A HAVAS SUBSIDIARY) TO ACQUIRE CONTROL OF GROUPE DE LA CITE, L'EXPRESS AND LE POINT [95/12/01]

IP/95/1335 : THE COMMISSION CLEARS THE PROPOSED ENTRY OF BERTELSMANN INTO THE CONTROLLING BLOCK OF TELE MONTE CARLO [95/12/04]

IP/95/1354 : COMMISSION OPENS AN ENQUIRY ON THE ALLIANCE AMERICA ONLINE / BERTELSMANN / DEUTSCHE TELEKOM [95/12/06]

IP/95/1379 : MINING SECTOR : COMMISSION CLEARS THE MERGER BETWEEN RTZ AND CRA [95/12/11]

IP/95/1382 : COMMISSION AUTHORIZES THE ACQUISITION OF ROTH FRERES BY JOHNSON CONTROLS [95/12/12]

IP/95/1383 : THE COMMISSION CLEARS THE ACQUISITION BY MONTEDISON OF GARDINI'S SHAREHOLDING IN SCI [95/12/12]

IP/95/1385 : COMMISSION GRANTS PARTIAL DEROGATION FROM SUSPENSION ON COMPLETION OF MERGER BETWEEN KIMBERLY-CLARK AND SCOTT PAPER [95/12/12]

IP/95/1449 : COMMISSION INITIATES DETAILED INVESTIGATION INTO THE MERGER OF THE PLATINUM OPERATIONS OF GENCOR AND LONRHO [95/12/21]

IP/95/1467 : COMMISSION DECIDES THAT ACQUISITION OF UBS BY SWISS LIFE IS NOT OF COMMUNITY LEVEL [95/12/22]

IP/95/1468 : THE COMMISSION APPROVES CREATION OF A JOINT VENTURE BETWEEN BAYERISCHE LANDESBANK AND AUSTRIAN TRADE UNIONS [95/12/22]

IP/95/1469 : COMMISSION APPROVES TAKEOVER OF NORTHUMBRIAN WATER BY LYONNAISE [95/12/22]

IP/95/1470 : COMMISSION CLEARS HYDRAULIC EXCAVATOR JOINT VENTURE BETWEEN MANNESMANN DEMAG AND KOMATSU [95/12/22]

IP/95/1471 : THE COMMISSION CLEARS THE PROPOSED ACQUISITION OF ALUMIX BY ALCOA [95/12/22]

IP/95/1472 : COMMISSION AUTHORIZES THE ACQUISITION OF HARTMANN & BRAUN BY ELSAG BAILEY [95/12/22]

LIBERALISATION & STATE INTERVENTION

Application of Article 90 EC
Main developments between 1st August and 31st December 1995

Summary of the most important recent developments

by José-Luis BUENDIA, DG IV-A-1

GÉNÉRAL

Pendant le deuxième semestre de l'année, la Commission a poursuivi ses efforts visant à introduire la concurrence dans des secteurs traditionnellement monopolisés, comme les télécommunications, l'énergie, les services postaux ou les transports.

Elle a eu recours, selon les cas, aux différents instruments que le Traité lui offre, tant dans le cadre de ses fonctions d'initiative législative que dans le cadre de sa mission de surveillance du Droit communautaire.

Ainsi, par exemple, des propositions de directives du Conseil et du Parlement concernant les secteurs de l'énergie et de l'assistance aéroportuaire sont en discussion à l'heure actuelle au sein du Conseil. Il faut constater que, si l'évolution du dossier assistance en escale a été assez satisfaisante, la situation du dossier énergie ne l'est pas du tout, après plusieurs années de blocage au sein du Conseil.

Dans d'autres cas, la Commission s'est vue obligée de poursuivre des infractions aux règles du Traité. A cet effet, elle a parfois eu recours aux instruments prévus à l'article 90§3 du Traité CE. Elle a ainsi adopté, entre août et décembre 1995, deux décisions et une directive fondées sur cette disposition. L'adoption de deux autres directives de l'article 90§3 est envisagée pour le début de l'année 1996.

Lorsque la Commission a considéré nécessaire d'adopter des mesures générales comme des directives article 90§3, elle l'a fait dans le cadre d'une procédure transparente comportant des consultations des Etats membres et des institutions et parties concernées.

Dans l'exercice de ses compétences, la Commission a toujours accordé une attention particulière au maintien des objectifs d'intérêt économique général prévus à l'article 90§2 du Traité. Elle a donc adopté les mesures nécessaires à la compatibilité entre l'ouverture à la concurrence et le maintien des services publics au bénéfice des consommateurs.

TÉLÉCOMMUNICATIONS

Directive Art. 90§3 sur l'ouverture des réseaux de TV par câble pour la fourniture de services de télécommunications

La Commission a adopté le 18.10.1995 la directive 95/51/CE (JOCE n° L 256 du 26.10.1995, p. 49-54) qui vise à permettre, à partir du 1er janvier 1996, l'utilisation des réseaux de télévision par câble pour la fourniture des services de télécommunications déjà libéralises, tels que le multi-media, le téléshopping, les services éducatifs, les bases de données "on-line", les transactions à distance, etc.

L'adoption par la Commission de cette directive sur la base des pouvoirs reconnus par l'article 90§3 du Traité CE fait suite au processus de consultation préalablement entamé sur le projet (publié au JOCE n° C 76 du 28.03.1995, p. 8-12) auquel ont participé les autres Institutions communautaires, les Autorités des Etats membres, les opérateurs du secteur et les représentants des consommateurs (voir EC Competition Policy Newsletter, vol. 1, n. 4, p. 40-41).

En effet, dans la majorité des Etats membres, les législations nationales en vigueur limitent l'utilisation de réseaux de TV par câble aux seuls services de diffusion de programmes télévisés. Ces dispositions réglementaires empêchent donc les opérateurs de TV par câble d'offrir des services interactifs nouveaux. L'objectif essentiel de la Commission est de lever ces restrictions afin d'encourager l'investissement et de susciter des projets pilotes et des nouvelles initiatives dans ce domaine.

En outre, cette initiative devrait également mettre à la disposition de tous les fournisseurs de services de télécommunication des moyens alternatifs pour atteindre le consommateur final - plutôt que de devoir transiter exclusivement par les opérateurs de télécom qui disposent encore généralement d'un monopole - et engendrer ainsi une baisse des coûts.

Comme c'est le cas pour la récente directive sur les satellites, la directive sur le câble entraîne une modification de la directive 90/388/CEE sur les services de télécommunication, en ce sens que les fournisseurs de services auront désormais le choix de recourir aux réseaux de télévision par câble.

Cette nouvelle directive ne change en rien les droits des Etats membres de maintenir le monopole en matière de téléphonie vocale de base jusqu'en 1998. En effet, la Commission a considéré que le maintien de ces derniers services sous monopole peut être justifié à l'heure actuelle en raison du fait que les revenus qu'ils génèrent sont encore nécessaires pour le

développement d'un réseau universel de télécommunications, objectif qui est considéré comme étant d'intérêt économique général au sens de l'acception de l'article 90§2 du Traité CE.

Au cours de la consultation engagée sur le projet de directive, le Parlement européen et d'autres parties ont proposé d'étendre la portée du texte de manière à permettre aux opérateurs de télécommunications d'offrir des services de télévision par câble. La Commission n'a pas considéré envisageable d'intégrer ce concept de réciprocité dans la directive sur la libéralisation du câble. Elle estime toutefois qu'il est tout à fait envisageable d'évoquer cette possibilité dans le contexte de la libéralisation totale des télécommunications prévue pour 1998.

La directive offre la possibilité de recourir sans restriction aux capacités des réseaux de TV par câble pour tous les services de télécommunications, à l'exception de la téléphonie vocale de base, et ce, à partir du 1er janvier 1996. Ceci couvre, en particulier, les communications de données, les réseaux de communications "fermés" d'entreprises et les services multi-media. Enfin, les réseaux de TV par câble peuvent d'une part se connecter au réseau public national de télécommunication et d'autre part s'interconnecter entre eux .

La directive traite également les cas où certains opérateurs de télécommunication sont en même temps propriétaires de sociétés de TV par câble. Il est, dans ces cas, demandé aux Etats membres d'assurer la transparence et la séparation des comptes des deux activités à partir d'un chiffre d'affaires de 50 millions d'Ecus dans le marché des services de télécommunications autres que la distribution des services de radio et de télévision dans la zone géographique concernée. La Commission vérifiera, avant le 1er janvier 1998, si cette séparation comptable est suffisante pour éviter des pratiques abusives.

Il convient de signaler que la Commission a envoyé des demandes d'information aux opérateurs de télécommunications italien, irlandais et espagnol afin de vérifier, soit de sa propre initiative, soit sur la base d'une plainte (le cas espagnol), la portée juridique et les effets sur la concurrence de l'entrée de ces détenteurs d'un monopole en matière d'infrastructure de télécommunications sur le marché de la TV par câble.

Projet de directive Art. 90§3 sur la téléphonie mobile

Suite à la consultation sur le projet publiée en juin dernier (voir EC Competition Policy Newsletter, vol. 1, n. 5, p. 37-38), la Commission européenne a marqué, dans sa réunion du 20.12.1995, son accord de principe sur une directive article 90§3 ouvrant à la concurrence le marché de la téléphonie mobile. L'adoption définitive de la directive par la Commission est envisagée pour le début de l'année 1996. L'objectif de la Commission est d'assurer un niveau de concurrence équitable tant pour l'octroi des licences aux opérateurs que pour la gestion des réseaux de téléphonie mobile dans l'Union européenne. Cela doit favoriser l'entrée sur le marché de nouveaux entrants et faciliter l'interconnexion des réseaux nationaux.

Décision article 90§3 sur les conditions d'octroi de la deuxième licence de téléphonie mobile GSM en Italie

La Commission européenne a adopté, le 04.10.1995 une décision 95/489/CE (JOCE n° L 280 du 23.11.1995, p. 49-57), fondée sur l'article 90§3 du Traité CE, exigeant du gouvernement italien que le deuxième opérateur GSM en Italie, à savoir Omnitel Pronto Italia, soit traité de manière équitable. La Commission demande aux autorités italiennes de mettre fin, en effet, à ce qu'elle juge être une distorsion de concurrence, en raison du "droit d'entrée" - en l'occurrence 750 milliards de LIT - que doit acquitter uniquement le deuxième opérateur GSM en Italie.

La Commission veut que des conditions équitables soient rétablies :
- soit en exigeant un paiement similaire de la part du premier opérateur GSM;
- soit, après accord de la Commission, en adoptant des mesures correctives équivalentes, en termes économiques, au paiement effectué par le second opérateur.

Cela étant, la Commission note que des progrès ont été accomplis dans ce dossier en Italie: ainsi, récemment, un projet de loi a été présenté qui comporte des éléments de réformes fondamentales du marché italien des télécommunications. Ce projet prévoit, entre autres, la libéralisation des infrastructures alternatives pour les communications mobiles.

Un des problèmes majeurs identifiés par la Commission européenne est celui des procédures d'enchère que certains Etats membres, dont l'Italie, ont incluses dans les critères de sélection du second opérateur GSM. Dans ce cas, la licence est accordée non seulement sur la base d'une comparaison des éléments qualitatifs présentés par les candidats, à savoir la couverture géographique, l'expertise dans le secteur, les tarifs envisagés, mais également sur la base d'une offre financière dépassant un seuil déterminé. La Commission a critiqué cette pratique d'enchère dans son livre vert de 1994 sur les communications mobiles estimant que cela constitue une charge supplémentaire à l'égard de technologies innovantes qui auront des répercussions également pour les futurs utilisateurs.

De l'analyse que la Commission a faite jusqu'à présent des procédures de sélection, il ressort clairement que le recours à des enchères pour la sélection du second opérateur GSM débouche sur des dangers de distorsion de concurrence.

Au mois de décembre 1994 la Commission avait décidé d'entamer une action au titre de l'art.90 du Traité à l'égard de l'Italie : elle annonçait à cette occasion qu'elle mettrait un terme à cette procédure si l'Italie supprimait le "droit d'entrée" ou imposait un même droit d'entrée à l'opérateur en place ou encore en appliquant des mesures de compensation adéquates en faveur du second opérateur.

Autres initiatives dans le secteur des télécommunications

A la suite de l'ouverture de la procédure prévue à l'article 90 du traité CE par la Commission, le ministère allemand des postes et télécommunications a octroyé une nouvelle licence en vue de la création et l'exploitation d'un nouveau réseau important de télécommunications.

Vebacom est une filiale de VEBA AG, un holding allemand de services publics. En avril 1995, elle a déposé plainte auprès de la direction générale de la concurrence de la Commission, après plusieurs tentatives infructueuses d'obtenir une licence pour un réseau de télécommunications à large bande utilisant la technologie HNS, qui permettrait la transmission de données entre 36 sites différents de la chaîne publique de télévision allemande ARD.

La Commission a considéré que la plainte était fondée, en particulier en raison du fait que Vebacom envisage d'offrir un service basé sur une technologie nouvelle (HNS) non proposée par Deutsche Telekom AG, qui détient le monopole de l'infrastructure en Allemagne. Le refus d'autoriser ce nouveau service constitué dès lors un frein au progrès technique.

Après des discussions informelles avec la Commission, le ministère allemand des postes et télécommunications vient d'accepter d'octroyer la licence réclamée.

Par ces nouvelles infrastructures de télécommunications, on entend généralement les réseaux de télécommunications possédés et gérés par des entreprises autres que les opérateurs de télécommunications traditionnels, tels que les distributeurs d'électricité et les chemins de fer. Actuellement, des restrictions réglementaires limitent, dans la plupart des Etats membres, l'utilisation de ces réseaux aux besoins internes de l'entreprise à laquelle ils appartiennent. Ces entreprises ne sont donc pas autorisées à louer les capacités disponibles à des tiers. Ces limitations constituent un obstacle majeur à l'introduction, d'ici à 1998, d'un environnement réglementaire totalement libéralisé pour le secteur des télécommunications; en effet, la demande de location de ces capacités est très forte, mais ne peut généralement être satisfaite que par l'entreprise qui détient le monopole.

Pour éviter notamment une multiplication de procédures d'infraction dans des cas similaires, la Commission a adopté le 19 juillet 1995 en première lecture un projet de directive fondée sur l'article 90§3 du Traité CE, en vue de la libéralisation générale des infrastructures. Cette directive vise aussi la libéralisation totale pour 1998 des services de télécommunication non encore libéralisés (la téléphonie vocale). Ce projet a été publié au JOCE n° C 263 du 10.10.1995, P. 6-17, aux fins d'une consultation publique similaire à celle réalisée pour le projet de directive concernant la téléphonie mobile.

ENERGIE

Les ministres européens de l'Energie réunis à Bruxelles le 20.12.1995 ont constaté la persistance de leurs désaccords sur le projet de directive de libéralisation du marché de l'électricité, qui repousse une fois de plus l'échéance d'une directive sur ce thème.

Les ministres n'ont pas pu se mettre d'accord sur un relevé de conclusions communes de leurs débats du jour. Seul un texte de la présidence espagnole estimant que les négociations en étaient arrivées au stade final rendant possible l'adoption d'une position commune à un prochain conseil des ministres de l'énergie début 1996, a été publié à l'issue des travaux.

Même si le principe de la coexistence de deux systèmes, celui de "l'accès des tiers au réseau" et celui de "l'acheteur unique", a été accepté en juin dernier, ceci a été fait sous certaines conditions. Celles-ci portent notamment sur la transparence des prix de transport et l'absence de discrimination, l'introduction d'un système d'autorisations accordées à des producteurs indépendants parallèlement aux procédures de mise en concurrence dans la zone couverte par l'acheteur unique, la négociation des contrats de fourniture à l'étranger pour les consommateurs éligibles à l'intérieur du système d'acheteur unique, la possibilité pour les producteurs non liés par contrat à l'acheteur unique de pouvoir exporter leur électricité via le réseau de l'acheteur unique. Par ailleurs, des conditions appropriées de transparence dans le transport et la distribution doivent être définies dans les deux systèmes afin d'éviter toute sorte de discrimination ou de comportements prédateurs, et des mécanismes de régulation, de contrôle et de règlement des conflits doivent être introduits dans les deux systèmes afin d'éviter tout abus de position dominante.

Les discussions se sont poursuivies tout au long de l'année sans qu'une position commune n'ait été encore atteinte. Des divergences importantes existent encore entre les Etats membres sur la définition des consommateurs éligibles et l'inclusion dans cette catégorie des distributeurs.

SERVICES POSTAUX

Ainsi qu'il a été annoncé dans le numéro précédent de cette publication (voir EC Competition Policy Newsletter, vol. 1, n. 5, p. 40-41), la Commission avait adopté, le 26.07.1995, un ensemble de mesures

composé d'une proposition de directive du Parlement européen et du Conseil concernant les règles communes pour le développement des services postaux ainsi que d'un projet de communication de la Commission sur l'application des règles de concurrence au secteur postal. L'objectif de ces initiatives est de garantir la fourniture d'un service universel ainsi que simultanément l'ouverture du marché postal à une plus grande concurrence.

Ces deux textes viennent maintenant d'être publiés au *Journal Officiel*. Le projet de Communication de la Commission sur l'application des règles de la concurrence au secteur postal et, notamment, sur l'évaluation de certaines mesures d'Etat relatives aux services postaux, a été publié au JOCE n° C 322 du 02.12.1995, p. 3-14. Dans ce texte, la Commission présente les principes qui la guideront dans l'application, au secteur postal, des règles de concurrence du traité, en vue de faciliter la libéralisation progressive et contrôlée du marché postal. Elle décrit l'approche qu'elle entend adopter en ce qui concerne l'analyse des mesures d'Etat limitant la libre prestation de services ou la libre concurrence sur les marchés postaux, par rapport aux règles du traité.

La Commission aborde, notamment, les questions relatives à la non-discrimination en matière d'accès au réseau postal, à l'identification des subventions croisées et à la définition des protections réglementaires nécessaires à la garantie d'une concurrence loyale. Avant l'adoption définitive de cette communication, la Commission invite les parties intéressées à transmettre leurs observation éventuelles dans les deux mois suivant la date de publication.

La proposition de directive du Parlement européen et du Conseil "concernant des règles communes pour le développement des services postaux communautaires et l'amélioration de la qualité du service", a été publiée aussi au JOCE n° C 322 du 02.12.1995, p. 22-30.

AÉROPORTS

La Commission poursuit ses efforts pour assurer que la libéralisation du transport aérien dans l'Union européenne n'est pas mis en danger par des pratiques anticoncurrentielles dans le domaine aéroportuaire.

Décision art.90§3 sur les redevances d'atterrissage à l'aéroport de Bruxelles

Ainsi, la Commission a adopté le 28.06.1995 une décision 95/364/CE au titre de l'article 90(3) (JO L216 du 12 septembre 1995) à l'encontre du système de rabais sur les taxes d'atterrissage, mis en place à l'aéroport de Bruxelles-National par l'Arrêté Royal du 22 décembre 1989. British Midland, la compagnie aérienne qui avait porté plainte estimait que ce système permettait à la compagnie aérienne Sabena, sa principale concurrente sur la ligne Bruxelles-Londres, de bénéficier d'un rabais de 18% sur ses charges d'atterrissage alors qu'aucune compagnie aérienne n'était en mesure de bénéficier de rabais.

Après instruction de la plainte, la Commission a considéré que ce système constituait une mesure étatique au sens de l'article 90(1) en liaison avec l'article 86, car il a pour effet d'appliquer à l'égard de compagnies aériennes des conditions inégales à des prestations liées à l'atterrissage et au décollage équivalentes en infligeant de ce fait un désavantage dans la concurrence. La Commission a estimé qu'un tel système ne pourrait se justifier que par des économies d'échelle équivalentes qui seraient réalisées pour le gestionnaire de l'aéroport. Ces économies d'échelle n'existent pas dans le cas d'espèce. La Commission a donc demandé aux autorités belges de mettre fin à ce système.

Projet de directive du Conseil et du Parlement sur la libéralisation des services d'assistance en escale

Le Conseil, lors de sa réunion du 08.12.1995, est parvenu à un accord de principe sur les éléments essentiels de sa position commune concernant la proposition de directive relative à la libéralisation des services de l'assistance en escale dans les aéroports de la Communauté. Cette proposition avait été présentée par la Commission en décembre 1994 (voir EC Competition Policy Newsletter, vol. 1, n. 4, p. 45).

L'assistance en escale est une activité connexe au transport aérien indispensable pour permettre aux transporteurs de se livrer à leur activité. Sa libéralisation s'inscrit dans le cadre des mesures d'accompagnement de la réalisation du marché unique dans le transport aérien et fait suite notamment à l'adoption de la réglementation communautaire en matière d'allocation des créneaux horaires et du fonctionnement des systèmes informatisés de réservation. En outre, il s'agit de permettre aux compagnies aériennes européennes de mieux maîtriser leurs coûts d'exploitation et de mieux adapter leurs services aux besoins de leur clientèle.

Le texte prévoit une période transitoire pour l'adaptation du marché. Plusieurs délais d'entrée en vigueur sont envisagés en fonction de certains seuils de référence.

Ainsi, pour ce qui est de l'auto-assistance (les services que chaque compagnies aérienne réalise pour elle-même avec ses propres moyens), elle sera libéralisée à partir du 1er janvier 1998. Il faut néanmoins distinguer entre les services "côté-aérogare", qui seront libéralisés dans tous les aéroports, indépendamment de leur volume de trafic, et les services "côté-piste", dont la libéralisation n'interviendra que pour les aéroports dont le trafic est supérieur ou égal à un million de passagers par an.

En ce qui concerne l'assistance aux tiers (les services offerts par des prestataires spécialisés aux compagnies aériennes), elle sera libéralisée dès le 1er janvier 1999 pour tout aéroport dont le trafic annuel est supérieur ou égal à 3 millions de passagers. L'ouverture à la concurrence interviendra le 1er janvier 2001 pour les aéroports ayant un trafic annuel supérieur ou égal à 2 millions de passagers.

Pour certaines catégories de services (assistance bagages, assistance opérations en piste, assistance carburant, assistance fret et poste) le projet de position commune prévoit la possibilité de limiter à deux le nombre des prestataires autorisés. Dans le cas de limitation à deux prestataires, au moins l'un de ces prestataires devrait être indépendant à la fois de l'autorité aéroportuaire et du transporteur dominant à partir du 1er janvier 2001. Toutefois, cette obligation pourrait être étendue jusqu'au 31 décembre 2002 à la demande d'un Etat membre, après examen par la Commission assistée par un comité consultatif.

Le projet admet certaines dérogations en raison des contraintes d'espace et de capacité. Ces dérogations seront octroyées par les Etats membres pour une période de trois ans renouvelable. La durée d'une dérogation, permettant l'exercice par un seul prestataire des activités côté-piste, ne peut pas excéder deux ans. Toutefois, il sera possible d'étendre la durée de cette dérogation pour une seule nouvelle période de deux ans, à la demande d'un Etat membre et à la suite d'une prise de décision de la Commission assistée par le comité consultatif sus-mentionné.

Pour toute entité gestionnaire d'un aéroport, usager ou prestataire de services, la séparation comptable selon les pratiques commerciales en vigueur est prévue entre les activités liées à la fourniture des services d'assistance en escale et les autres activités.

Le Conseil a chargé le Comité des représentants permanents de finaliser les travaux en vue de permettre l'adoption de la position commune dans les meilleurs délais. Une fois adoptée formellement, elle sera transmise au Parlement dans le cadre de la procédure de coopération. ■

Court Judgements

Arrêt du Tribunal du 18.09.1995, aff. T-548/93, "Ladbroke Racing c. Commission"

Arrêt de la Cour du 05.10.1995, aff. C-96/94, "Centro Servizi Spediporto Srl c. Spedizioni Marittima del Golfo Srl"

Arrêt de la Cour du 19.10.1995, aff C-19/93, "Rendo NV e.a. c. Commission"

Arrêt de la Cour du 09.11.1995, aff C-91/94, "Procureur de la République c. Thierry Tranchart"

Arrêt de la Cour du 16.11.1995, aff. C-244/94, "Fédération française des sociétés d'assurance e.a. c. Ministère de l'Agriculture et de la Pêche"

Arrêt de la Cour du 14.12.1995, aff. C-430/93 et C-431/93, "Jeroen Van Schijndel et Johannes Nicolaas Cornelis van Veen c. Stichting Pensioenfonds voor Fysiotherapeuten"

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MEMO/95/158 : TELECOMMUNICATIONS LIBERALISATION : STATE OF PLAY [95/11/27]

IP/95/959 : AS GSM MOBILE COMMUNICATIONS MARKET IS OPENED TO COMPETITION THE COMMISSION SCREENS THE LICENSING PROCEDURES [95/09/13]

IP/95/1093 : GSM ITALY : COMMISSION ASKS FAIR TREATMENT FOR OMNITEL [95/10/04]

IP/95/1102 : THE COMMISSION OPENS CABLE TV NETWORKS TO LIBERALISED TELECOMS SERVICES [95/10/11]

IP/95/1275 : ALTERNATIVE TELECOMS NETWORK AUTHORISED IN GERMANY AFTER COMMISSION INTERVENTION [95/11/22]

IP/95/1353 : START OF CONSULTATION ON THE DRAFT POSTAL NOTICE [95/12/06]

STATE AID

Main developments between 1st August and 31st December 1995

Summary of the most important recent developments

by Henrik MØRCH, DG IV-G-1 with Vittorio VERDUN di CANTOGNO, DG-G-2 (for the R & D Framework)

THE COMMISSION ADOPTS NEW COMMUNITY FRAMEWORK ON STATE AID FOR RESEARCH AND DEVELOPMENT

Article 130f of the EC Treaty outlines the Community objective of strengthening the scientific and technological bases of Community industry and encourage it to become more competitive internationally. The Maastricht Treaty confirmed that objective.

In the light of these objectives the Commission has traditionally adopted a favourable approach towards aid for research and development. Thus, in its White Paper on Growth, Competitiveness and Employment (see EC-Bulletin 6/93) the Commission recognizes the important contribution research and technological development can make to renewing growth, strengthening the competitiveness of European industry and boosting employment in the Community. However, the Commission considers that European research and development suffers from a series of weaknesses, in particular an insufficient level of funding, lack of coordination and cooperation and a limited application of the results of the research, which work against the achievement of the aforementioned objectives. In the White Paper the Commission submits a number of proposal to remedy this situation. In line with these considerations the 4th Community programme (1994-1998) adopted by the European Parliament and the Council (see OJ L 126 of 18 May 1994) puts emphasis on cooperation between firms and research institutes and between the Community and third countries/ international organisations, the dissemination and application of the results of R&D projects and training and mobility.

To take account of these developments and the new provisions on state aid for R&D contained in the GATT Agreement on Subsidies and Countervailing Measures (the Agreement SCM) signed by the Commission in 1994, which among other things allows higher aid intensities for R&D compared to the existing Community Framework on state aid for R&D (see OJ C 83 of 11.4.1986), in December the Commission adopted a new R&D Framework. The new Framework will be in force for a period of five years and lays down the criteria the Commission will apply during this period to assess the compatibility of state aid for R&D with the common market. The main criteria are as follows:

- The new Framework, like the previous one, is based on the principle that as the activity being aided gets nearer to the market-place the potential distortion of competition and affection of trade between Member States due to the aid increases. In its examination and evaluation of national aid proposals the Commission will look in principle for lower levels of aid for R&D activities nearer to the market-place.

  To determine the proximity of R&D activities to the market-place the new Framework makes a distinction between "industrial research" and "pre-competitive development activity". As the latter category is considered to be nearer to the market-place the Commission will authorize lower levels of aid for such activities.

- The definition of the R&D activities eligible for state aid and the division of the R&D activities into "industrial research" and "pre-competitive development activity" corresponds to those contained in the Agreement SCM. Similarly, the definition of the eligible costs is changed in the new Framework so as to comply with the definition in the Agreement SCM.

- The Framework provides criteria to assess to what extend the public financing of R&D activities carried out by universities or non-profit public research institutes in collaboration or on behalf of private or public firms constitute state aid within the meaning of Article 92(1);

- Aid for R&D should create an incentive for the recipient firm to carry out R&D activities in addition to those carried out by the firm in the normal course of business and without public support. If it is not clear that the aid will provide an incentive for the recipient firm the Commission could adopt a less favourable position in respect of the aid.

  In order to asses whether the aid creates an incentive for the recipient firm the Commission will look upon facts which may be quantified, such as the development in the costs of R&D, number of persons involved in R&D etc. The Commission may presume that in respect of aid for R&D to the benefit of SMEs the incentive effect exists.

  The Commission attaches particular importance to the incentive effect of the

aid in case of aid for big firms carrying out close-to-the-market research. and in cases where a significant proportion of the R&D expenditure for a given project has been made prior to the application for aid.

- Under the new Framework aid for pre-competitive development may, as a general rule, not exceed 25% of the eligible costs (as defined in Annex II to the Framework) whereas aid for industrial research may go up to 50%. However, these basic aid intensities may be increased if justified on the basis of the common interest. Thus, it will be possible to grant a "bonus" on top of these figures in respect of R&D projects involving SMEs (+10 points), if the projects is carried out in regions eligible for regional aid (+5 or 10 points) or the R&D project is a priority under a Community R&D programme (+15 points).

  Moreover, the aid intensity may be increased by 10 points in respect of projects involving crossboarder cooperation between independent enterprises, coorperation between universities and industry or when the results and intellectual property rigths of the project are widely disseminated;

- To take account of the competitiveness of European industry on a global level the new Framework stipulates that firms within the Community may benefit from aid for R&D up to the maximum aid intensity allowed under the GATT Agreement on Subsidies and Countervailing Measures, i.e. 75% of eligible costs for industrial research and 50% for pre-competitive development activity. This is the case in respect of cumulation of aid from the Community and the Member State concerned for the same project, projects linked to relevant Community projects or programmes involving crossboarder cooperation between firms or between firms and public research institutes and a wide dissemination of the results achieved and important projects of a common European interest. Moreover, the aforementioned aid intensities may be authorized if firms located outside the Community has received (within a period of three years) or may receive an equivalent level of aid for similar projects;

- With regard to technical feasibility studies prior to the industrial research or the pre-competitive activities the Framework allows aid intensities up to 75% and 50% respectively;

- In order to promote the dissemination of the results of the R&D project the Commission has a favourable approach to aid for the costs involved in the patent application and renewals. Such aid may be granted up to the level of the aid granted for the R&D activities which are the origin of the patents. However, under the Framework the aid for this purpose is limited to SMEs.

With a view to streamlining procedures the new Framework contains certain important provisions in respect of notification requirements:

- Notification of aid proposal for R&D should be submitted to the Commission on the standardized notification form which was sent to Member States by letter dated 22 February 1994, as modified by letter to Member States of 2 August 1995. In this way it is hoped that the Commission will dispose of all the information necessary to assess the compatibility of the notified aid measure at a very early stage, thereby shortening the period needed for a final decision. Similarly, the annual reports on approved schemes must be submitted in the form prescribed by the aforementioned letters to Member States;

- The Framework underlines that the accelerated procedure for aid schemes for small and medium-sized enterprises and certain modifications of existing schemes as well as the "de minimis" rule (see the SME Aid Guidelines, OJ C 213 of 19.8.1992) also applies to aid for R&D;

- The Commission receives a considerable number of notifications from Member States concerning the refinancing or prolongation of R&D aid schemes already approved by the Commission under the current R&D Framework. The Commission has never raised any objections to these notifications.

  Therefore, the Framework stipulates that Member States will not be required to notify to the Commission increases in the annual budget of a R&D aid scheme already approved provided this increase does not exceed 100% of the annual budget originally approved and concerns the period for which the scheme has been approved. Similarly, a prolongation of an approved scheme not exceeding 5 years and without any modifications in respect of the conditions for the application of the scheme does not need to be notified to the Commission, if the scheme complies with the new Framework. Member States will however be required to inform the Commission of such measures prior to their implementation;

- In principle aid granted under an approved R&D aid scheme for an individual project does not need to be notified to the Commission. However, the Commission wants to reserve its right to examine important individual grants of aid under an approved scheme. The Framework requires therefore that Member States notify all individual grants of aid under an approved scheme for projects exceeding ECU 25 million where the aid exceeds ECU 5 million gross.

  The Commission is asking agreement from Member States to this proposal

pursuant to Article 93(1) of the EC Treaty.

NOTICE ON COOPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

It follows from Article 93(3) of the EC Treaty that Member States are under an obligation to notify all aid measures within the meaning of Article 92(1) to the Commission and may not put the aid measure into effect before the Commission has adopted a decision approving it. Non-notified aid is illegal and the obligation to notify has direct effect and may thus be relied upon by individuals in national courts. National courts must use all appropriate devices and remedies of national law to enforce the direct effect of the notification obligation and any deficiency of these national rules which denies the "effet utile de l'effet direct" of Article 93(3) must be set aside as a matter of Community law. The national court may, as appropriate, grant interim relief, order the freezing or return of aid illegaly paid and award damages to parties whose interest are harmed.

Concern is often expressed that the Commission's final decision in State aid cases are reached some time after the distortions of competition have damaged the interest of third parties. The Commission believes that national courts may be better placed to ensure that breaches of the obligation to notify in individual cases are dealt with and remedied and the Commission intends to assist national courts in this task, thereby reinforcing the rights of third parties and in particular the competitors of undertakings in receipt of non-notified aid. Thus, in October the Commission adopted a Notice on Cooperation with national courts in the state aid field (see C(95) 2436 final, not yet published) setting out the legal position and offering assistance to judges on questions of fact, economic analysis and law. It is expected that national courts may benefit from such assistance in respect of the notion of aid in particular. In this context it is important to note that a clear distinction must be drawn between the competence of national courts and the Commission in the field of state aid. It follows from the European Court of Justice's ruling in the "Salmon"-case (see case C-354/90, 1991 I-5505) that at present national courts have the competence to rule on the legality of the aid only, i.e. whether the aid has been notified under Article 93(3) of the Treaty, whereas the Commission has the exclusive competence to examine the compatibility of the aid with the common market, i.e. whether the aid may be approved pursuant to one of the exemption clauses in the Treaty.

EXPORT AID

Export aid, that is aid linked to the quantity of goods sold in other Member States/EEA States or aid closely linked to the marketing and sale of goods in these countries, such as aid for the setting-up or operation of distribution networks or sales agencies of goods and services within the Community and the EEA, is clearly contrary to the objective of an internal market. Such aid does not promote any Community objective which may justify the direct distortive effects on competition it causes. Thus, the Commission will not authorize export aid. In line with this policy DG IV states in an explanatory note of March 1993 to the Member States that the "de minimis" rule (See the Community Guidelines on state aid to small and medium-sized companies, OJ C 213 of 19.8.1992) does not apply to export aid. Moreover, in view of the WTO Agreement on Subsidies and Countervailing Measures signed by the Commission in 1994, which explicitly prohibits export aid, the Commission is considering to include an explicit exemption in respect of export aid in the "de minimis" rule under revision.

However, in line with its favourable approach towards financial assistance to SMEs, in particular in view of their limited know-how and difficulties in raising external financing, the Commission may authorize soft aid in favour of SMEs related to the development of export markets, such as aid for consultancy and marketing research, provided the aid is a one-off operation and limited to the entrance on new markets. The Commission may, under the same circumstances, approve aid to SMEs for participation in trade fairs.

Aid for internationalisation

European companies are not only in competition within the EC/EEA but also compete for investment on foreign markets, such as Eastern-Europe, Russia and South-East Asia. The Commission believes that aid to firms for investments on foreign markets may distort competition and affect trade within the Community and therefore falls under the state aid rules in the EC Treaty. The Commission is concerned that such investment aid measures may lead to delocalisation and be available predominantly in the central and most developed regions of the Community, thereby working against the efforts made under the Community's cohesion policy to reduce the gap between the more and less prosperous regions of the Community. On the other hand these aid measures may assist countries in Eastern-Europe, the Baltic States and Russia in their efforts to convert to a market economy and may, therefore, be justified in certain cases. To establish a clear policy in this field the Commission decided in a number of internationalisation schemes to open the Article 93(2) procedure and invite Member States and third parties to submit their comments.

REGIONAL AID

The Commission adopted a number of important decision in the field of regional aid.

Thus, in July the Commission approved the new regional aid map for Belgium (apart from the region of Hainaut) and decided that the only legal basis for approving regional aid in Belgium would be Article 92(3)(c). In other words, no region in Belgium fulfilled the criteria for being eligible for regional aid under Article 92(3)(a) on the basis of which higher aid intensities may be authorized. The aid intensity for regional aid in Belgium remains unchanged, i.e. 15% and 20% net grant equivalent, but is decreased in relative terms. The coverage is the same compared to the existing map, i.e. 34.97% (Hainaut included). The decision confirms the objectives pursued by the Commission in this field, in particular a greater coherency in terms of geografical coverage and period of validity with the Community aid programmes under the Structural Funds, a limitation in the aid intensity and a more favourable treatment of SMEs.

In July the Commission moreover proposed appropriate measures pursuant to Article 93(1) of the EC Treaty in the context of the revision of the Spanish regional aid map. Spain complied with the proposed measures in September 1995. The most significant modification compared to the old regional aid map is the reduction in the maximum aid intensity from 75% to 60% net grant equivalent (the aid after deduction of tax). Moreoevr, due to the particularly serious socio-economic problems in certain zones the new regional aid map allows up to 60% aid intensity although these particular zones are located in areas not eligible for the maximum aid intensity.

TREUHANDANSTALT

In January the Commission decided on the terms applicable for 1995 for privatization aid in the new Länder. Such terms had previously been defined in 1991 (see Twenty-first Competition Report, point 249) and in 1992 (see Twenty-second Competition Report, point 349). Further to the dissolution of the Treuhandanstalt the Commission decided that the procedures and assessment criteria applying to privatization in 1995 should be more in line with those applicable for other Member States. After the transition year 1995 no special rules would exist.

The Commission investigated several individual cases of aid for the privatization of companies in the new Länder. By far the most important was the privatization of the petrochemical plants of BSL (Buna, Sächsische Olefinwerke, Leuna) to Dow Chemical. In November the Commission took a final decision allowing for ECU 5 billion aid for the restructuring of BSL as an integrated complex.

SECTORAL AID

Shipbuilding

In December the Council adopted a Regulation (no reference yet) implementing an OECD agreement respecting normal competitive conditions in commercial shipbuilding and shiprepair, including the elimination of production subsidies. The new Regulation will be applicable as from the entry into force of the OECD agreement. This has been due on 1 January 1996, but although the European Union ratified the agreement in December, entry into force was delayed because of hold-ups in the ratification process among other parties to the agreement. The Council has therefore decided that the rules of the Seventh Directive on aid to shipbuilding (Council Directive 90/684/EEC, as amended by Directive 94/73/EEC) should continue to apply ad interim and at the latest until 1 October 1996. Against this background the Commission decided to maintain the common production aid ceiling as from 1 January 1996 at 9% for large vessels and 4.5% for vessels costing less than ECU 10 million an for conversions.

The motor-vehicle sector

The reintroduction of the Framework

In view of the legal vacuum created by the judgment of the European Court of Justice of 29 June 1995, which states that the 1992 review of the Framework on aid to the motorvehicle sector could not extend the Framework for an indefinite period, the Commission decided to reintroduce the Framework pursuant to Article 93(1) of the EC Treaty and to introduce interim measures in the form of retroactive prolongation of the original Framework until the end of 1995 pending the reintroduction of the Framework under Article 93(1) EC (see for more detail the last number of the Competition Policy Newsletter).

All Member states apart from Spain agreed unconditionally to reintroduce the Framework for two years as from 1 January 1996. The Commission considered that the arguments put forward by the Spanish government did not justify its refusal to accept the reintroduction of the Framework and as the Commission cannot accept the non-applicability of the Framework in one Member State only, unless exceptional circumstances would occur in that Member State (which is not the case in Spain), in September the Commission decided to open the Article 93(2) procedure in respect of all aid schemes in operation in Spain.

In December the Commission took a final decision in respect of this procedure requiring existing state aid schemes in Spain to be altered so to comply with the obligations to notify and submit annual reports contained in the new Framework. In other words, the Spanish government is required to notify all aid measures to be granted for projects costing more than ECU 17 million under any existing or approved aid schemes to undertakings operating in the motorvehicle sector as defined in the Framework.

▹ STATE AID

Cases

The Commission took a number of important decisions in respect of aid for the motorvehicle sector. Thus, in July the Commission approved aid totalling ECU 16.1 million in favour of Opel Austria, a wholly owned subsidiary of General Motors Corp., to support its R&D, environmental and training expenditure in Aspern/Vienna. In July the Commission moreover approved regional and environmental aid to Ford Werke AG in support of its investment plans in Genk, Belgium. The aid takes the form of a grant of ECU 24.1 million and an exemption from property tax for a period of 5 years with a value of ECU 4.5 million.

In September the Commission took a partly negative decision in respect of the two Article 93(2) procedures opened in 1993 to examine the compatibility of state aid elements contained in the public intervention of the Dutch State and the Region of Flanders in favour of the truck producer DAF, before and after its bankruptcy. The Commission required the Dutch State to recover from DAF a total of ECU 17.9 million of aid which did not comply with the Framework on state aid to the motorvehicle sector, in particular because the aid (ECU 17.7 million) qualified as a rescue and restructuring aid was granted without being linked to a restructuring plan ensuring the long-term viability of the company. Finally, the Commission required the Belgian authorities to recover a non-notified aid of ECU 200 000 from the new DAF company, as this aid constituted operating aid. Under the Framework operating aid is not allowed in the motorvehicle sector.

In October the Commission took a final conditional decision in respect of an aid package of ECU 283 million awarded by the Spanish authorities in support of the restructuring plan of SEAT S.A., a motorvehicle manufacturer subsidiary of the Volkswagen Group.

The service sector

The relationship between Article 90(2) and Articles 92-94 EC - the postal sector

For the first time the Commission applies the state aid rules in Articles 92-93 in conjunction with Article 90(2) of the EC Treaty.

The Commission considers that the postal sector is of essential importance for the realisation of social and economic activities in any country, but the Commission must at the same time take account of the caselaw of the European Court of Justice which recognizes that the competition rules in the EC Treaty also apply to this sector. This is without prejudice, however, to Article 90(2) which stipulates that undertakings entrusted with the operation of services of general economic interest or having the character of a revenu-producing monopoly shall be subject to the rules on competition only in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

On the basis of complaints the Commission examined whether certain tax reliefs in favour of the French Post constituted state aid within the meaning of Article 92(1) wich distorts competition on competitive markets where the French Post operates, and if so, whether they may be compatible with the common market. In its decision the Commission noted that pursuant to Article 90(2) the postal sector is subject to the rules on competition in the EC Treaty, including the state aid rules in Articles 92-94, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In light of this and in conjunction with Article 92(1) the Commission considered that the tax reliefs in favour of French Post constitute an economic advantage for French Post which, in order to benefit from the exemption in Article 90(2), must not exceed what is necessary to accomplish the operation of services of general interest imposed on the French Post, i.e.an obligation to be present with post offices throughout the country and a requirement to deliver mail throughout the territory of France irrespective of the fact that the prices for this service may not always correspond to the costs. In other words, the economic advantage derived from the tax reliefs must not benefit the activities carried out by French Post on competitive markets.

As the Commission established that the value of these tax reliefs is inferior to the costs of the public service obligations imposed on French Post the Commission considered that the tax reliefs in favour of French Post do not go beyond what is necessary to provide the service of general interest entrusted with French Post. Therefore, it was decided pursuant to Article 90(2) that the tax reliefs do not constitute state aid within the meaning of Article 92(1).

The audiovisual sector

Whether there exists a level playing field on which public and private broadcasters compete and, if not, what needs to be done to make it so is the subject of increasing debate in the Community. This is further accentuated by the receipt of complaints from private broadcasters in Spain, France, Portugal and Italy alleging that public broadcasters benefit from public funding going far beyond the costs of public service obligations imposed on them, in particular when coupled with the right to compete for advertising. The complainants allege that the public funding constitute state aid within the meaning of Article 92(1) of the EC Treaty which distorts competition on the television market within the EC. In return, public broadcasters argue that the public funding is justified by special or more onerous public service obligations placed on them, and by existing restrictions on their advertising.

Before attempting to resolve these complaints the Commission wished to obtain information about the competitive starting position of public and private broadcasters in these areas in all Member States of the EC. Thus, in 1993 the Commission appointed a firm of consultants to undertake a study on "The balance between the respective rights and obligations and financial resources of public and private television in the Member States of the EC." Briefly, the purpose of the study was to obtain information about the television market in each Member State, in particular whar are the public service obligations imposed on public broadcasters, how much do they cost and how much subsidy do the public broadcasters receive.

The consultants submitted the final report end October and the report will be send to Member States for comments. In respect of the new Member States (Sweden, Finland and Austria) and the EFTA States, signatories to the EEA Agreement, the Commission has issued a tender for a similar study to be carried out.

HORIZONTAL AID

Rescue and restructuring aid

The purpose of a rescue aid is to maintain a firm in operation temporarily while an appropriate restructuring plan is drawn up. A rescue aid may therefore only be granted for a limited period of time, normally not longer than 6 months. The Commission considered that the guarantee with a duration of 18 months granted by the Spanish government to the company "Gutierrez Asunce Corporacion" for commerial loans did not meet the conditions of rescue aid.

Aid for environmental protection

The Community guidelines on aid for environmental protection (see OJ C 72 of 10.3.1994) stipulate that, although operating aid is normally considered to be incompatible with the common market, in exceptional cases the Commission may authorize operating aid, in particular in the form of relief from environmental taxes, provided the aid is necessary to achieve the environmental objectives sought. Thus, the Commission considered that the relief from new energy taxes on CO2- and SO2-emission in favour of energy-intensive firms in Denmark and the Netherlands and the relief from tax on groundwater and waste in favour of certain firms in the Netherlands could be approved, as they must be regarded as the inevitable price to be paid for being among the first countries to introduce a tax that will be beneficial for the global environment. Without some relief these taxes would seriously damage the competitiveness of energy-intensive firms in the countries going ahead with the tax, in this case Denmark and the Netherlands, so as to be politically impracticable. However, to ensure that these tax reliefs do not distort competition unduly and to give an incentive for the aid recipients to implement measures to reduce pollution, the Commission will always require that the tax relief is temporary and, in principle, degressive.

The Commission examines an increasing number of systems for the collection and disposal of products or substances which are dangerous to the environment. Under those systems the Member State normally imposes a charge on the sale of the products or substances concerned, be it imported or produced domestically, and the proceeds of the charge are used to pay companies for the collection and disposal of the products after use. The Commission considers that these systems do not involve state aid provided the charge is imposed on all importers/producers of the products concerned in a non-discriminatory way, the payment to the collecting firms is based on normal commercial terms and the system does not allow, directly or indirectly, the collecting companies to sell the collected products to prices below market price. As these conditons were fulfilled with regard to a Danish scheme for the collection and disposal of used batteries and a Dutch scheme for the collection and disposal of car wrecks the Commission decided that no aid was involved in these systems.

PROCEDURES

In the automn of 1995 the Court of First Instance has issued a judgment of potential significant importance in respect of the rights of complainants in state aid procedures and a judgment giving support to the Commissions attempt to enforce the order to recover incompatible aid from firms.

SYTRAVAL

In its judgment of 28 September 1995 in case T-95/94 "SYTRAVAL" v. Commission the Court of First Instance (CFI) annulled the Commission's decision of 31 December 1993 rejecting a complaint in respect of alleged state aid in favour of "Sécuripost", a subsidairy of the state-owned French Post, which is operating on competitive markets. The CFI considered that the Commission had provided insufficient reasoning for the rejection of a series of allegations by the complainants concerning preferential treatment of Sécuripost by the State through French Post.

However, in the absence of clear rules concerning state aid procedures the significance of this judgment lies with the statements made by the CFI in respect of the rights of complainants in state aid procedures. The CFI makes it clear that the Commission must examine impartially and exhaustively all the allegations made by complainants and cannot impose the burden of proof concerning the existence and (in)compatibility of a state aid on the complainant. Otherwise, complainants would be required to obtain information in support of their allegations which in most

cases they would not be able to collect without the Commission as an intermediary. Therefore, the Commission cannot justify the lack of sufficient reasoning or the failure to examine certain allegations by referring to the scarce information provided by the complainant. The conclusionsin SYTRAVAL confirm the CFI's judgment of 18 September 1995 in case T-49/93 SIDE v. Commission.

The procedure for the Commission's examination of state aid measures is characterized by two stages, i.e. the preliminary examination of the measure and the opening of the procedure provided for in Article 93(2) EC in cases where the Commission, following the preliminary examination, still has doubts about the compatibility of the measure with the common market. Whereas the Treaty provides for a procedure to invite third parties to submit their comments in the procedure opened under Article 93(2), this is not the case in respect of the preliminary examination. When the compatibility of an aid with the common market can be established without further examination, it does not appear necessary to alert third parties before the decision of the Commission. It has been the consistent practice of the Commission, therefore, not to grant a right to be heard to third parties, including complainants, during the preliminary examination. The European Court of Justice has supported this position in a number of judgments (see in particular case 84/82 Germany v. Commission, ECR 1984 page 1451). However, further to the requirement to examine impartially and exhaustively all the allegations made by the complainant and to state the reasons for its decision in SYTRAVAL the CFI moreover imposes an obligation on the Commission, under certain circumstances, to initiate a contradictory procedure with complainants in cases involving difficult questions as to the qualification of certain measures as state aid even before the Article 93(2) procedure has been opened. As this judgment seems to impose additional obligations on the Commission in its examination of complaints, at least in cases giving rise to doubts about the existence of aid, and goes against the established caselaw of the European Court of Justice (ECJ), the Commission intends to appeal this judgment to the ECJ.

TWD Textilwerke Deggendorf GmbH

In May 1986 the Commission adopted a negative decision in respect of non-notified aid granted by the German authorities to the company TWD Textilwerke Deggendorf and imposed on the German authorities to recover the aid already paid to the company. In October 1989 and 1991 the German Government notified a new package of aid to the company which the Commission authorized. However, as the incompatible aid had not yet been recovered from the company at the time the Commission authorized the new aid package, the Commission made its authorization of the new aid package subject to a suspension of the payment of that aid until the incompatible aid had been recovered.

In its judgment in joined cases T-244/93 and T-486/93 TWD Textilwerke Deggendorf GmbH v. Commission the CFI upheld the Commission's decision to make its authorization of the new aid package subject to a suspension of the payment of that aid until the incompatible aid had been recovered, because it was clear from the Commission's decision that the cumulation of the incompatible aid and the new aid package would render the totality of the aid incompatible.

Application of the "Boussac" - injunction

The Commission has the power to issue an injunction ordering Member States to suspend payment of an aid pending the outcome of the investigation and/or to supply information needed for the Commission to take a decision on a case, which has not been forthcoming despite requests (see the "Boussac"-judgment, case C 301/87 France v. Commission, ECR 1990 I-307). As the German authorities, despite several written requests, had not submitted information to the Commission with regard to aid to the new investment projects of the Volkswagen Group (VW) in the new German Länder, i.e. the car plant Mosel II and the engine plant Chemnitz II in Sachsen, the Commission in October decided to enjoin the German government to provide all documentation , information and data on these investment projects. Should the German Government fail to provide the requested information the Commission could take a final decision with respect to any aid granted to VW for these projects on the basis of the information available to it.

MULTILATERAL MEETING WITH MEMBER STATES

A multilateral meeting with Member States was held in December 1995 to discuss future state aid control within the synthetic fibres sector, a first draft on Horizontal guidelines for regional aid in favour of large investment projects and an update of the reference rates.

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Press releases

The full texts of Commission's Press releases are available on-line from the RAPID database, on the day of their publication by the Commission's Spokesman's Service. To obtain access to RAPID, please write to ***EUR-OP Information, Marketing and Public Relations*** *(OP/4B) 2 rue Mercier L-2985 Luxembourg tel. +352 2929 42455, fax +352 2929 42763*

BIO/95/475 : CREDIT LYONNAIS: COMMENTS OF MR KAREL VAN MIERT [95/12/08]

IP/95/1004 : REGIONAL LAW OF 11 MAY 1994 : AID TO AGRICULTURAL COOPERATIVES AND FARMS FOR FUNDING THEIR DEBTS (AND REGIONAL LAW NO 52 OF 31 OCTOBER 1994) [95/09/21]

IP/95/1002 : COMMISSION AUTHORIZES TWO DUTCH SUBSIDIES TO DEVELOP COMBINED ROAD/RAIL TRAVEL [95/09/21]

IP/95/1006 : COMMISSION CLOSES 93(2) PROCEDURE AND APPROVES AID TO TUBES PRODUCER IN GERMANY [95/09/21]

IP/95/1007 : COMMISSION OPENS INVESTIGATION INTO SPANISH AID SCHEMES TO THE MOTOR VEHICLE INDUSTRY [95/09/21]

IP/95/1008 : COMMISSION AUTHORIZE AID TO THE CLOCK MANUFACTURING AND JEWELLERY INDUSTRY IN FRANCE [95/09/21]

IP/95/1009 : THE COMMISSION APPROVES THE RELEASE OF A FURTHER TRANCHE OF INVESTMENT AID FOR MTW-SCHIFFSWERFT GMBH IN WISMAR IN MECKLENBURG--VORPOMMERN [95/09/21]

IP/95/1010 : THE COMMISSION APPROVES THE RELEASE OF A FURTHER TRANCHE OF INVESTMENT AID FOR THE WARNOW WERFT IN WARNEMUNDE IN MECKLENBURG-VORPOMMERN [95/09/21]

IP/95/1011 : COMMISSION DOES NOT OBJECT TO RESTRUCTURING AID IN FAVOUR OF A MANUFACTURER OF CERAMICS IN BAVARIA [95/09/21]

IP/95/1012 : COMMISSION APPROVES AID TO HARJEDALENS MINERAL AB IN SWEDEN [95/09/21]

IP/95/1013 : THE COMMISSION APPROVES THE RELEASE OF A NEW TRANCHE OF 500 000 DM CLOSURE AID FOR THE ELBEWERFT BOIZENBURG IN MECKLENBURG-VORPOMMERN [95/09/21]

IP/95/1014 : COMMISSION DOES NOT RAISE OBJECTIONS TO SHIPBUILDING AID IN GREECE [95/09/21]

IP/95/1015 : COMMISSION APPROVES WASTE MANAGEMENT SCHEME IN BAVARIA. [95/09/21]

IP/95/1016 : COMMISSION APPROVES AID FOR IMPROVING THE QUALITY OF THE ENVIRONMENT [95/09/21]

IP/95/1017 : COMMISSION RAISES NO OBJECTION TO FRENCH AID FOR EUREKA R&D PROJECT INVOLVING DEFINITION AND DEVELOPMENT OF EXCIMER LASER [95/09/21]

IP/95/1076 : COMMISSION APPROVES PRIVATISATION OF COMPANHIA NACIONAL PETROQUIMICA [95/10/05]

IP/95/1077 : COMMISSION DECIDES THAT THERE IS NO PRODUCTION AID IN SECURITY BOND TO MCTAY SHIPYARD [95/10/05]

IP/95/1081 : FRANCE: THE COMMISSION APPROVES THREE AID PACKAGES FOR EUREKA PROJECTS [95/10/05]

IP/95/1086 : COMMISSION TAKES FINAL DECISION ON STATE AID TO THE TRUCK PRODUCER DAF. [95/10/05]

IP/95/1091 : COMMISSION OPENS INVESTIGATION INTO TAX CREDITS AWARDED TO ITALIAN ROAD HAULIERS [95/10/04]

IP/95/1101 : IRISH STEEL [95/10/11]

IP/95/1124 : STATE AID FOR THE CONSTRUCTION OF FISHING VESSELS IN SPAIN (ASTURIAS) [95/10/18]

IP/95/1130 : COMMISSION AUTHORISES DUTCH SCHEME TO PROMOTE INLAND WATERWAYS [95/10/18]

IP/95/1131 : COMMISSION AUTHORISES FRENCH AID WORTH 115 MILLION FF FOR THE REORGANISATION OF THE ROAD TRANSPORT SECTOR [95/10/18]

IP/95/1132 : COMMISSION AUTHORISES UK PROPOSAL TO EXTEND TAX RELIEF SCHEME FOR SHIPOWNERS [95/10/18]

IP/95/1133 : COMMISSION AUTHORIZES A LOAN OF US$ 500 MILLION GUARANTEED BY THE ITALIAN STATE TO FERROVIE DELLO STATO S.P.A [95/10/18]

IP/95/1137 : NEUE MAXHUTTE STAHLWERKE GMBH: COMMISSION DECIDES THAT STATE AID HAS TO BE REPAID [95/10/18]

▹ STATE AID

IP/95/1140 : COMMISSION APPROVES GERMAN AID TO RAPE SEED OIL METHYLESTER PILOT PLANT [95/10/18]

IP/95/1141 : COMMISSION APPROVES FORESTRY EXPLOITATION AID IN ASTURIAS [95/10/18]

IP/95/1142 : COMMISSION APPROVES GERMAN SHIPBUILDING DEVELOPMENT AID [95/10/18]

IP/95/1143 : COMMISSION DOES NOT OBJECT TO INVESTMENT AID IN FAVOUR OF A COMPANY IN THE CONSTRUCTION SECTOR IN BRANDENBURG. [95/10/18]

IP/95/1144 : COMMISSION APPROVES PACKAGE OF EMPLOYMENT-BOOSTING MEASURES IN SICILY [95/10/18]

IP/95/1145 : COMMISSION RAISES NO OBJECTIONS TO FRENCH AID FOR EUREKA R&D PROJECT CONCERNING MACHINE TRANSLATION SYSTEM [95/10/18]

IP/95/1159 : COMMISSION OPENS ARTICLE 93 (2) PROCEDURE TO STUDY AID GRANTED BY THE FRENCH GOVERNMENT TO COMPAGNIE GENERALE MARITIME (CGM) [95/10/31]

IP/95/1185 : DECREE-LAW NO 149 OF 20 MAY 1993 (EX AID NO NN 96/B/93) AND REGIONAL LAW (SICILIA) NO 37/94 (EX AID NO 707/94) - HELP FOR COOPERATIVES [95/10/31]

IP/95/1186 : STATE AID DECISIONS [95/10/31]

IP/95/1187 : COMMISSION URGES GERMAN GOVERNMENT TO PROVIDE ALL EVIDENCE ON SCHEDULED AID TO VOLKSWAGEN IN SAXONY [95/10/31]

IP/95/1188 : COMMISSION APPROVES AID TO VOLKSWAGEN AND SEAT IN SUPPORT OF THE 1994-1997 RESTRUCTURING PLAN OF SEAT [95/10/31]

IP/95/1189 : COMMISSION TAKES FINAL DECISION ON AID TO PRIVATISE AND RESTRUCTURE PETROCHEMICAL INDUSTRY IN EASTERN GERMANY [95/11/08]

IP/95/1193 : COMMISSION APPROVES FRENCH SCHEME TO PROMOTE INLAND WATERWAYS [95/11/14]

IP/95/1207 : COMMISSION APPROVES DUTCH SHIPBUILDING DEVELOPMENT AID IN FAVOUR OF INDIA AND TUNISIA [95/11/08]

IP/95/1208 : COMMISSION APROVES STATE AID TO STERLING TUBES, UK [95/11/08]

IP/95/1215 : HAMBURGER STAHLWERKE GMBH: COMMISSION DECIDES THAT STATE AID MUST BE REPAID [95/11/10]

IP/95/1236 : DECISIONS ON STATE AID SCHEMES IN THE AGRICULTURAL SECTOR [95/11/15]

IP/95/1250 : FURTHER TO A COURT RULING THE COMMISSION ENLARGENS THE SCOPE OF ITS PROCEEDINGS AGAINST AID TO A GREEK MANUFACTURER OF CEMENT. [95/11/15]

IP/95/1252 : THE COMMISSION APPROVES A MANAGEMENT BUY-OUT OF SHIPYARD "LUIGI ORLANDO" IN LIVORNO [95/11/15]

IP/95/1253 : THE COMMISSION APPROVES THE RELEASE OF A FURTHER TRANCHE OF INVESTMENT AID FOR THE VOLKSWERFT IN STRALSUND IN MECKLENBURG-VORPOMMERN [95/11/15]

IP/95/1254 : COMMISSION APPROUVES DUTCH SCHEME FOR THE DISPOSAL OF CAR WRECKS [95/11/15]

IP/95/1255 : GRUPO DE EMPRESAS ALVAREZ : COMMISSION INITIATES PROCEEDINGS ON AWARDED STATE AID [95/11/15]

IP/95/1304 : ITALIAN STEEL - THE BRESCIANI CASE: COMMISSION APPROVES A LIT 258 BILLION CLOSURE AID [95/11/29]

IP/95/1305 : COMMISSION AUTHORIZES AUSTRIAN STATE AID TO VOEST-ALPINE ERZBERG GMBH [95/11/30]

IP/95/1311 : AID FOR AGRICULTURE AND A LEVY ON PESTICIDES TO FURTHER ENVIRONMENTAL PROTECTION [95/11/29]

IP/95/1312 : EXCEPTIONAL AID IN THE CATTLE SECTOR TO MAKE UP FOR FARMERS' LOSS OF INCOME AS A RESULT OF MONETARY DISTURBANCES [95/11/29]

IP/95/1313 : STATE AID DECISIONS [95/11/30]

IP/95/1319 : COMMISSION SAYS PROPOSED SALE OF BRITISH ROLLING STOCK COMPANIES IS NOT STATE AID [95/11/30]

IP/95/1326 : COMMISSION APPROVES STATE AID MEASURES [95/11/30]

IP/95/1329 : GERMANY ASKED NOT TO PROLONG A TAX SYSTEM RELATED TO THE ACCELERATED DEPRECIATION FOR AIRLINE INVESTMENTS [95/12/01]

IP/95/1351 : STATE AID FOR RESEARCH AND DEVELOPMENT: COMMISSION DRAWS UP A TRANSPARENT AND DYNAMIC SYSTEM FOR THE UNION [95/12/06]

IP/95/1392 : COMMISSION INVESTIGATES ALLEGED AID TO GILDEMEISTER AG [95/12/13]

IP/95/1407 : AGREEMENT IN PRINCIPLE ON A CAPITAL INCREASE

IN THE IBERIA AIRLINE ON COMMERCIAL GROUNDS [95/12/14]

IP/95/1424 : DECISIONS ON STATE AID SCHEMES [95/12/20]

IP/95/1428 : DECISIONS ON STATE AIDS [95/12/20]

IP/95/1429 : AID FOR A SUGAR PLANT AT OSTELLATO [95/12/20]

IP/95/1431 : COMMISSION APPROVES #IRL 50 MILLION THIRD TRANCHE OF STATE AID FOR IRISH CARRIER AER LINGUS [95/12/20]

IP/95/1432 : COMMISSION EXTENDS 93 (2) PROCEDURE OPENED IN OCTOBER TO STUDY AID GRANTED BY THE FRENCH GOVERNMENT TO COMPAGNIE GENERALE MARITIME (CGM) [95/12/20]

IP/95/1442 : COMMISSION TO BE NOTIFIED BY SPAIN OF ALL STATE AID MEASURES TO THE MOTOR VEHICLE SECTOR [95/12/20]

IP/95/1443 : COMMISSION OPENS THE PROCEDURE ON THE CAPITAL INJECTIONS BY AUSTRIA TABAKWERKE INTO HEAD TYROLIA MARES [95/12/20]

IP/95/1444 : COMMISSION APPROVES AID TO FORD ESPANA, S.A.FOR NEW ENGINE PLANT [95/12/20]

IP/95/1445 : COMMISSION FIXES SHIPBUILDING PRODUCTION AID CEILING [95/12/20]

IP/95/1446 : COMMISSION APPROVES AID MEASURES CONTAINED IN DUTCH ENERGY TAX [95/12/20]

IP/95/1447 : SPANISH SHIPBUILDING - COMMISSION TAKES PARTIAL DECISION: AID TO COVER PAST LOSSES AUTHORISED; INVESTIGATION OPENED ON FUTURE TAX CREDITS [95/12/20]

Court Judgements

Arrêt du Tribunal du 13 septembre 1995: Aff.jtes T-244/93 et T-486/93 TWD Textilwerke Deggendorf GmbH / Commission des Communautés européennes Aides d'Etat: 'Aides d'Etat - Décisions de la Commission suspendant le versement de certaines aides jusqu'au remboursement d'aides illicites antérieures' (Troisième chambre élargie)

Arrêt du Tribunal du 18 septembre 1995: Aff. T-49/93 Société internationale de diffusion et d'édition (SIDE) / Commission des Communautés européennes Aides d'Etat: 'Aides d'Etat - Articles 92 et 93 - Recours en annulation - Aides à l'exportation dans le secteur du livre' Première chambre élargie)

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Conclusions de Monsieur l'Avocat général N. Fennelly présentés à l'audience de la cinquième chambre du 28 septembre 1995: Aff. C-56/93 Royaume de Belgique / Commission des Communautés européennes: Annulation de la communication de la Commission au titre de l'article 93, paragraphe 2, du traité CEE, adressée aux Etats membres et autres intéressés, concernant un système tarifaire préférentiel appliqué par les Pays-Bas pour les livraisons de gaz naturel aux fabricants néerlandais d'engrais azotés

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INTERNATIONAL DIMENSION OF COMPETITION POLICY

Main developments between 1st August and 31st December 1995

Summary of the most important recent developments

by Claude RAKOVSKY, Stefaan DEPYPERE, Thinam JAKOB and Brona CARTON, DG IV-A-3

RELATIONS AVEC LE JAPON

Visite de M. Van Miert

Le 22 novembre, le Commissaire Van Miert s'est rendu à Tokyo où, après avoir inauguré un séminaire sur la politique de concurrence (voir plus bas), il a eu une série d'entretiens avec de hauts responsables japonais, en particulier avec M. Hashimoto, Ministre du MITI, M. Inoue, Ministre des Télécommunications, M. Nakayama, Directeur Général de la Management and Coordination Agency, ainsi qu'avec une commission de parlementaires des partis de la majorité gouvernementale associée à l'élaboration du programme de déréglementation. M. Van Miert a également eu des contacts avec les milieux d'affaires européens basés à Tokyo (European Business Community) et japonais (Keidanren).

Les interlocuteurs du Commissaire ont, dans le cadre de leurs compétences respectives, fourni des informations sur l'état du processus de déréglementation (Le terme de déréglementation devant, ici, être entendu dans un sens large, allant au-delà de la seule démonopolisation des "utilities" pour couvrir toutes les mesures visant à alléger les contraintes administratives de toutes sortes qui brident les forces du marché) fondé sur le programme rendu public par le Gouvernement japonais en mars denier, ainsi que sur les mesures envisagées dans le cadre de la mise à jour de ce programme.

M. Van Miert a mis l'accent sur l'importance de renforcer la politique de concurrence en parallèle avec la levée des obstacles législatifs ou réglementaires au libre-jeu des forces du marché. Les projets d'amendement de la loi antimonopole visant à renforcer le statut de l'autorité de concurrence (da façon, notamment, à lui permettre de limiter le nombre et d'endiguer la portée des mesures dirigistes et/ou restrictives de la concurrence mises en oeuvre par d'autres branches de l'administration) constitueraient une avancée positive à cet égard. M. Van Miert a également souhaité que l'actuel exercice de réexamen des actuelles immunités à l'application des règles de concurrence dont bénéficient certains secteurs d'activités (que ces immunités résultent de la loi antimonopole elle-même ou de dispositions législatives sectorielles) conduise à l'élimination de, virtuellement, toutes ces immunités.

Sur ces différents points, ainsi que sur la portée du processus de déréglementation lui-même, les responsables japonais ont émis des positions dans l'ensemble positive.

Des convergences de plus en plus large, en faveur de la déréglementation, apparaissent ainsi entre l'autorité de concurrence, certains instances gouvernementales (MITI ...) et les milieux d'affaires, soutenue par une évolution sensible des comportements des consommateurs japonais (plus grande attention aux prix, succès de la grande distribution progressivement déréglementée, etc...).

Toutefois, s'ils ont confirmé ces évolutions positives, les interlocuteurs de M. Van Miert se sont montrés, dans l'ensemble, prudents sur la nature des nouvelles mesures à adopter et sur le calendrier de leur mise en oeuvre.

Séminaire conjoint

Pour la troisième fois depuis 1993, l'autorité japonaise de concurrence et la DG IV ont tenu, cette année à Tokyo, le 22 novembre, un séminaire public conjoint sur le droit et la politique de concurrence. Avec la participation active d'un public composé de dirigeants politiques et administratifs, de représentants du monde des affaires, des milieux universitaires, d'associations de consommateurs et en présence de journalistes, le séminaire introduit par MM. Van Miert et Kogayu, Président de la Japanese Fair Trade Commission (JFTC) a permis un large échange de vues sur :

- l'application de la politique de la concurrence dans le contexte de la mondialisation de l'économie

- la portée (légale et réelle) des politiques de concurrence et la réduction des immunités et exceptions à leur application.

De même que pour le 2ème séminaire tenu à Bruxelles en 1994, il sera procédé (cette fois à l'initiative de la JFTC) à une publication des minutes des débats de ce 3ème séminaire.

Réunion bilatérale

La réunion annuelle à haut niveau entre la Japanese Fair Trade Commission et la DG IV s'est tenue à Tokyo le 24 novembre sous la coprésidence de MM. Kogayu, Président de la JFTC, et Schaub, Directeur Général de la DG IV.

Au cours des entretiens, les deux autorités se sont informées mutuellement sur les développements récents de la mise en

oeuvre de la politique de concurrence dans leurs juridictions respectives. La JFTC a, en particulier, mis l'accent sur les efforts réalisés au Japon dans la lutte contre les cartels (notamment sous la forme de bid-rigging). Cet effort s'est traduit par un relèvement des amendes infligées et, en 1995, un cas de poursuites pénales engagées par la JFTC. La JFTC a, par ailleurs, fait état des initiatives en cours visant à réduire le nombre des immunités et exceptions à l'application de la loi antimonopole. La position de la JFTC en faveur de l'élimination des systèmes encore en vigueur de prix imposés (secteurs des livres, journaux, disques et cassettes) a également été explicitée.

La DG IV a fait part des principaux développements intervenus en Europe et en particulier des cas d'application de la politique de concurrence liés aux problèmes d'accès au marché et/ou à des infrastructures essentielles. La DG IV a, également, apporté des précisions sur l'avancement du processus de libéralisation (télécommunication, transport maritime).

Enfin, les deux autorités de concurrence ont envisagé les moyens de rendre leur coopération plus étroite et plus opérationnelle à travers, notamment, un renforcement des échanges d'information, et des consultations en particulier sur les "projets horizontaux" (guidelines, livres verts, règlements d'exemption, etc...). La DG IV a indiqué son intention de soumettre formellement à la JFTC des cas dans lesquels l'accès au marché japonais semblerait entravé par des comportements d'entreprises restrictifs de la concurrence.

Elle a émis le souhait que la JFTC donne suite à ces requêtes en procédant à un examen de la situation du secteur considéré en vue, si nécessaire, de l'adoption de mesures de redressement.

REPORT OF GROUP OF EXPERTS ON COMPETITION POLICY IN THE NEW TRADE ORDER

The successful conclusion of the Uruguay Round negotiations in December 1993 and the gradual reduction of state imposed trade barriers has put the spotlight firmly on related areas which could have the effect of distorting trade between countries. The Ministerial Conference in Marrakesh in April 1994, at the formal conclusion of the Uruguay Round and the launch of the WTO, identified a number of areas which required further examination. Competition policy was explicitly mentioned as one such area.

In a world where business activities are increasingly being carried on a global scale, and where the ability of governments or even regional organizations, such as the EU, to monitor the activity of multinational companies is severely limited, there is a greater need to address private anti-competitive practices at the international level. Competition authorities themselves are all too aware of the problems of trying to address international business operations through laws intended for national (or regional) application.

Business activity may be organized in a way which brings it beyond the reach of any competition authority and so anti-competitive practices escape review and, more importantly, sanction.

Alternatively, the same business activity can fall within the jurisdiction of two or more competition authorities, each applying their own national rules. The possibility for conflict is all too apparent. International cooperation between competition authorities serves two main objectives.

On the one hand, it provides a means of making competition policy more effective by working closely with those countries which have in place and enforce developed competition policies and with which the EU does not necessarily have major trade frictions linked to anti-competitive conduct.

The Community has already concluded an agreement of this type with the USA and is currently negotiating one with Canada.

On the other hand, international cooperation can also address the trade problems which result from a combination of private anti-competitive conduct and poor enforcement of competition rules. In this context multilateral cooperation has a particular attraction for the Community as it allows us to implicate all our trade partners in the cooperation process.

The barriers to trade represented by anti-competitive conduct are difficult to measure, but they are not of recent origin. In 1948, the Havana Charter attempted to introduce competition principles into the international arena. Since then we have had the OECD competition policy guidelines (first adopted in 1967 and revised several times since, most recently in July 1995) and the UNCTAD Set of Multilaterally Agreed Equitable principles and Rules for the Control of Restrictive Business Practices (1980). It is reasonable to suppose that the removal of state protection resulting from the implementation of the Uruguay Round will encourage, rather than discourage, companies to take measures to exclude new competitors from their traditional markets.

The lessons learned from the EU's own experience is that the removal of public trade barriers between Member States has not lessened the need for an effective competition policy in order to address the market restrictions resulting from private anti-competitive behaviour.

A common set of competition policy principles, accepted and enforced by all countries, would go a long way to achieving a more coherent approach to addressing anti-competitive activity at international level.

In mid-1994, Commissioner Van Miert invited three outside experts, Professors Immenga, Jenny and Petersmann, to lead a group, which also included Commission officials participating in a personal capacity, to reflect on the EU's needs in relation to international cooperation. Last June the group presented its final report entitled "Competition policy in the new

trade order: strengthening international cooperation and rules".

Although the report is the work of an independent group, and so does not bind the Commission, both Commissioners Van Miert and Brittan, with the support of Commissioner Bangemann, considered the subject to be of sufficient importance to ask the Commission to send this independent report to the European Parliament and to Council in order to stimulate a serious debate within the Community and beyond at the earliest possible stage.

On 12 July 1995, the Commission agreed to make the report public.

The report

The report begins with an analysis of recent economic developments which the experts consider make necessary improved cooperation between competition authorities. Following the positive conclusion of the Uruguay Round and the consequent progressive reduction of state-imposed trade barriers, there is a risk that they will be replaced by other obstacles to international trade. In particular the behaviour of companies, through both vertical and horizontal arrangements, could limit market access. If widespread, this would compromise the expected benefits of liberalized international trade in terms of growth and employment.

At the same time, there is a contradiction between increasingly international economic activity and limited territorial enforcement of competition rules by national (or regional in the case of the Commission) authorities.

For example, company behaviour on the market of a particular country could raise questions under that country's competition rules. Yet the evidence that would allow the competition authority to act against the companies concerned might be located within the territory of a neighbouring state and thus be inaccessible. This is not unusual in the case of export cartels.

Another problem can arise when same company behaviour affects several national markets and is reviewed by the various competition authorities responsible. Conflicts could arise between them on the action to be taken. Developments such as these call for strengthening links between the authorities charged with enforcing competition rules.

The authors of the report then went on to make an inventory of the forms of cooperation already existing between competition authorities. These forms of cooperation consist mainly of mechanisms, based on bilateral relations, which favour the exchange of information (while respecting of the rights of companies to protect their business secrets) as well as consultation with a view to accommodating the concerns of each of the parties and their respective competition rules.

The recommendations

The largest section of the report is given over to the recommendations of the group of experts.

First, they propose that countries should be encouraged to ensure that they have in place an adequate set of competition rules and that these are effectively enforced. Technical assistance should be provided to developing countries requiring it.

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

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

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

1. An instrument enabling the exchange of information between competition agencies, including business secrets, but with watertight guarantees with respect to the protection of their confidential nature;

2. A "positive comity instrument", by which one competition agency can ask another to investigate and if necessary act against a practice that harms its important interests yet falls outside its jurisdiction, that would be binding in nature;

3. A set of appropriate substantive rules, with tougher disciplines as practices are considered to have more pronounced anti-competitive effects (i.e stronger rules against hard core cartels than against vertical restrictions);

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

The follow-up

The Commission has launched a debate on the report with the other institutions of EU and with the Member States. The Directors General of the Member State competition authorities, at their annual meeting of 17 October, set up a working group to consider in more detail the technical aspects of some of the report's recommendations.

At the same time the report has been presented to the representatives of the Member States in the Council of Minister's Article 113 trade committee with a view to considering whether trade and competition policy should be proposed as an item on the agenda of the WTO's Ministerial Conference in December 1996. The work of the Article 113 Committee on this topic will continue in 1996 under the Italian presidency.

Commissioners Van Miert and Brittan also presented the report to the European Parliament's Committee on External Economic Relations on 18 December and have committed themselves to keeping the Committee informed of future developments.

The Commission has also had the opportunity to present the report in international fora, specifically, at a number OECD meetings, including a meeting of the Committee on Competition Law and Policy and at the third UNCTAD conference to review all aspects of the agreed equitable principles and rules for the control of restrictive business practices. Discussion of the report will be continued in the OECD in 1996 The report has also been discussed during various bilateral meetings held in November with representatives of competition authorities from countries outside the EU.

1996 will see the continuation of the discussions at Community and international level when and it is also hoped to have the reactions of the European business community to the report.

MOST RECENT DEVELOPMENTS IN RELATIONS WITH NORTH AMERICA

United States

During the second half of 1995 the European Commission redoubled its efforts under the EC/US bilateral agreements on competition laws. Since the Council of Ministers' approval of the Agreement on 10 April 1995, thus removing the question marks regarding its position under Community law, some thirty-three notifications have been made to the United States competition authorities, bringing the total for the year to forty-two. Thirty of these notifications were made in merger cases. Thirty-five notifications were received from the US, twenty-one of these being in merger cases.

The competition authorities also cooperated in a number of cases of joint interest to their mutual benefit and to the benefit of the companies involved.

The twice yearly high level meetings between the Commission and the US competition authorities were also revived and a meeting was held on 13 November. The participants took the opportunity of the renewal of these formal high level contacts as an opportunity to examine the day to day working of the agreement with a view to improving its functioning. The discussion also extended to broader issues of international cooperation and in view of the Federal Trade Commission's current hearings on globalization and innovation, the participants exchanged views on issues relating to the application of competition policy to sectors characterized by rapid innovation.

The Commission will be preparing a report to Council and Parliament on the application of the agreement during the first half of 1996.

Canada

The negotiation of the bilateral cooperation agreement with Canada was put on hold temporarily during the earlier part of the year pending the resolution of the North Atlantic fishing dispute. By autumn normal relations had been restored and there were some informal exchanges on the draft agreement. These will be pursued with a view to concluding the agreement in 1996.

An informal high level meeting took place in Brussels on 14 November and representatives of the Commission and the Canadian Bureau of competition policy were able to exchange views on recent developments in competition policy and on individual cases where the Commission had taken decisions during the previous twelve months.

OECD RECOMMENDATION ON COOPERATION

The Commission contributed to the work of the OECD Committee on Competition Law and Policy during the year and in particular to the revision of the Recommendation on Cooperation between Member Countries on anti-competitive practices affecting international trade. The final text was adopted by the Council of the OECD in July 1995.

The recommendation takes account of recent trends in economic behaviour, in particular globalization, and experience in concrete cases also inspired the changes. The notification provisions have been significantly reinforced, both in the terms of the criteria for notification and the information provided by a notifying country. The recommendations as regards coordination and cooperation between competition authorities have also been substantially modified and new text introduced, with a potential for greater assistance being provided by Member Countries in information gathering.

CENTRAL AND EASTERN EUROPE: PREACCESSION STRATEGY TOWARDS THE CEC

The Commission services continued to prepare the accession of the Central European Countries (including the Baltic States).

DG IV participated actively. In broad terms it is fair to state that cooperation in the area of antitrust is well-advanced. At least all structural elements are in place. With some extra effort, it should be possible to achieve a similar result for state aid monitoring and monopolies and special rights . We now have to see how the practical cooperation (exchange of information and consultation) develops.

In the antitrust field training and cooperation efforts have been stepped up. DG IV and the Member States authorities aim at pooling their resources. The collective training that was organised as a joint event was deemed very successful (Competition Policy Newsletter no. 5). The response from the participants was very encouraging. One main result beside the purely technical training aspect was to establish good human relations between officials from all authorities involved. Both in the perspective of accession and with the view of executing the implementing rules of the Europe Agreements this is an important achievement.

In the field of state aid the proposed implementing rules are based on the structure that was laid down by the Council of Essen. Each CEC should entrust monitoring of the aid to a single authority. This authority should evaluate the aid measures pursuant to the relevant articles of the Europe Agreements (the numbering is different in the various Europe Agreements but the articles always boil down to a transposition of Art 92 and the guidelines, frameworks and decisions that follow from it). The authority should also be the main discussion partner for DG IV for cases that merit a joint analysis (between DG IV and the authority involved).The negotiations of the implementing rules have been completed with the Czech Republic and with Estonia. The conclusion of the technical negotiations with Hungary seems to be imminent. The proposed rules are now sent into the formal approval process that will lead to determining the position of the Union in the Association Council and the adoption of these rules by the Association Council.

Meanwhile technical cooperation programmes are being put in place to facilitate making the inventories of existing aid, developing mechanisms for collecting data on new aid and creating the necessary technical skills within the CEC monitoring authorities for assessing the competition distorting effects of the aid.

Certain countries have some difficulties in deciding which administration could play the role of monitoring authority.

The Council of Madrid having envisaged to start the concrete preparations for the accession viz. the drafting of opinions, the process of establishing state aid control will have to be accelerated.

The PHARE programme is adapting in a flexible manner to the evolutions regarding accession. A promising development is the increased availability of "horizontal" budget funds. "Horizontal" funds are oriented to actions supporting competition law and policy development throughout Central Europe without being tied to any particular country. Conferences with the CEC competition authorities (Visegrad 95 and Brno 96) are examples of such actions. Other actions that are now being scheduled consist of workshops for judges and for academics.

MEDITERRANEAN COUNTRIES

The first operational contacts with the competition authorities from the Mediterranean countries were established during a Workshop for African countries organised in Tunis by the Ministry for Commerce and the UNCTAD secretariat.

During two days high level presentations from various delegations (i.a. ten African countries) were made and technical topics were discussed.

The Commission supported the workshop financially and through its active contribution to the discussion. So did the French authorities. Germany offered financial support. The OECD and the World Bank participated in the workshop.

A main topic for discussions was the role of competition policy for developing countries that wish to participate fully in the global economy. Many developing countries have undertaken significant programmes of structural adjustment. A common feature of these programmes and transition programmes like in the CEC is that various instruments such as direct supply control or price control are dropped. Their role is taken over by the market mechanism and evidence abounds that there will be a great need to introduce competition law and enforced policy before these reforms can be really successful.

Hence the high demand on the Union on the Member States and on other countries having an experience in this field to provide guidance and technical assistance.

Despite the high strain on its limited resources, DG IV tries to accommodate such demands coming from Mediterranean countries. As for the CEC it seeks to join forces with the authorities of the Member States. These efforts are compatible with the conclusions of the Council in Cannes (June 95), of the Euro-Mediterranean conference in Barcelona (November 95) and of the Council in Madrid (December 95). To be remembered that the association agreements with the Mediterranean countries closely follow the CEC model. After the agreement with Tunisia, the agreements with Morocco and Israel have now also been signed. Egypt, Jordan and Lebanon are expected to follow soon.

To the extent possible requests for information coming from other countries in Africa, Asia and Latin America are also handled.

MERCOSUR

At the end of September a delegation of authorities dealing with competition issues

in Mercosur countries visited DG IV. The theoretical and practical problems of developing a competition policy between Mercosur countries and between them and the Union have been discussed. There was an agreement to continue the analysis.

Early November a large study group from IBRAC, a Brazilian study institute, visited DG IV for several days. Lectures and bilateral meetings were organised and highly interesting technical discussions took place.

DIRECTOR GENERAL FOR COMPETITION VISITS SOFIA

On the invitation of the Chairman of the Commission for the Protection of Competition the Director-General for Competition of the European Commission paid a visit to Bulgarian leaders in Government and National Assembly, involved in competition policy issues.

The main objectives of the visit were to pursue mutual efforts towards a rapid implementation of the competition provisions of the Europe Agreement concluded between the European Union and Bulgaria, and to further strengthen the cooperation with the Bulgarian Commission for the Protection of Competition.

In the course of the visit meetings took place with a number of leading politicians. Participants agreed that competition is an essential means to encouraging economic development. An effective competition policy which promotes the competitive process and prevents unfair behaviour in the market is one of the cornerstones for such development. This is why the Europe Agreement places high emphasis on competition matters, just as the European Commission's White paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union. Co-operation in the field of antitrust, state aid control and adjustment of monopolies is of high importance and in the mutual interest of the European Union and Bulgaria.

It was further agreed to concentrate joint efforts on achieving concrete progress in the implementation of the Europe Agreement.

Three issues should be treated :

1. Implementing rules for state aid, as foreseen by the competition provisions of the Europe Agreement : the Bulgarian side will quickly decide on the existing draft rules, including the identification of a future monitoring authority.

2. Transparency in the field of state aid and monopolies : the Bulgarian authorities will support the establishment of an inventory of state aids currently existing in Bulgaria as a first step towards transparency. The Bulgarian authorities will also provide a detailed description of the currently existing monopolies.

3. Electronic information exchange network between the European Commission and the Commission for the Protection of Competition : the European Commission is investigating the feasibility of such a project under the PHARE programme.

The visit took place before a background of the slowing down of developments in Bulgaria. Progress had been retarded particularly in the fields of state aid field and monopolies. As a consequence of the visit the process of the adoption of the implementing rules for state aid and the stock-taking of existing monopolies received a new impetus. A new technical cooperation programme under PHARE could also be launched. The relations with the CPC and the Secretariat for European Integration have taken on a new and dynamic dimension which should enable Bulgaria to rapidly catch-up with the other CEC.

APPROXIMATION OF LEGISLATION

Under the Europe Agreement and as laid down in the CEC White Paper, an approximation of legislation is taking place in the competition field. In the antitrust area, progress has been made. All CEEC save one have a competition law and an active enforcement authority. The laws are being revised or new legislation is being proposed in order to bring the systems closer to the EU rules. Most countries have laws that date from the early nineties. Some have been revised in recent years (the Czech and Slovak Republics, Poland), whereas others are still in the process of drafting new legislation. In this context one can speak of a "second generation approximation" : whereas earlier revisions have already taken account in different degrees of the approximation requirement, efforts now need to be made to step up the process and to provide for closer alignment in view of the accession perspective. In this context the current drafts are already more harmonised than the earlier revisions where work will have to be undertaken. In the field of state monopolies of a commercial character and in the field of undertakings with special and exclusive rights, a stock-taking exercise is currently under way to ensure transparency as a first step. Regarding state aid, work still needs to be done to ensure compliance with the Europe Agreements. Some of the CEC are now in the process of deciding on the establishment of a monitoring authority (as preconised in the Essen Conclusions and taken up in the draft implementing rules) and of developing a state aid system. This process should be taken up by all CEC and be monitored carefully. ■

SUMMARY OF THE MOST IMPORTANT RECENT DEVELOPMENTS IN RUSSIAN COMPETITION LEGISLATION

by Andrei B. KASHEVAROV and Andrei.G. TSYGANOV,
State Committee of the Russian Federation for Anti-Monopoly Policy and Promotion of New Economic Structures; seconded to DG IV for two months at the end of 1995.

The Law "On competition and limitation of monopolistic activity on commodity markets" was adopted in 1991 as one of the first market economy laws in Russia. The main change in Russian competition legislation is the entry into force on May 1995 many additions and amendments to this Law.

These developments reflect four years of practical carrying out of the Law by the State Committee of the Russian Federation for Anti-Monopoly Policy and Promotion of New Economic Structures (the Antimonopoly authority), its regional agencies, courts of law and arbitration courts.

Amendments are based on the constitutional ban on monopolisation, unfair competition and restriction of free movement of goods. New legislation is tailored according to the new Civil Code of Russian Federation. It must be noticed that the fundamental prohibitionbased principle of the Russian competition legislation is unchanged and additions and amendments are intended to clarify its basic ideas and procedures and to define the competence of the Federal antimonopoly authority.

Some new or revised definitions are included into the Law (art.4):

a) dominant position is defined as the exclusive position of an economic entity (undertaking) affording it the possibility of exerting a decisive influence on a market situation or of making access to the market difficult for other undertakings. Dominant position -.-should be determined based on a market share analysis. "It exists if the enterprise's share on the market of a particular commodity is more than 65%. If the share is less than 65% dominant position should be proved by the Antimonopoly authority. If the share is less than 35% the position of an economic entity shall not be deemed to/be dominant.

b) unfair competition - the definition is introduced for the first time. Art.10 of the Law consists the list of forms (cases) of unfair competition. The federal Law "On advertising" adopted in 1995 is a legal basis for the Antimonopoly authority in carrying out supervision of advertising as one of possible forms of unfair competition.

c) group of persons - according to the Law its provisions shall be applied to group,of persons in the same way as to economic entity. Group of persons in terms of the Law exists when one or several following conditions are met:

- direct or indirect (through third persons) control of more than 50% of the total number of votes by person or several persons by agreement; - right to determine the conditions of a business activity for any person by agreement of two or more persons;

- right to nominate more than 50% of the membership of an executive or supervisory body of a legal person; - membership of a stable group of natural persons in executive or supervisory bodies of two or more legal persons.

The list of prohibited cases of monopolistic activity and unfair competition (art.5-10) remains nearly the same in the amended Law. It means that the basic approach to possible cases and different kinds of violation of the competition legislation is comprehensive and practically useful.

In case of concerted practice (art.6) a new criterion is introduced. Agreements and concordant actions are a subject of the Antimonopoly authority investigation only if the aggregate market share of all participating parties is more than 35%.

Also this article gives the Antimonopoly authority the right to turn to a court with an appeal for liquidation of union or association of commercial organisations if it is proved that this union or association coordinate business activity of its participants and is deemed as .a form of concerted practice limiting competition.

The main feature of Russian competition legislation is that it is applied not only to enterprises but to State executive authorities. According to the Law (art.7, 8) acts, actions and agreements of the bodies of executive authority that limit the economic independence of enterprises, create favourable or discriminatory conditions for certain enterprises shall be prohibited. New addition to article 7 of the Law gives the Antimonopoly authority the power of preliminary control over adoption of decisions of the bodies of executive authority. Decisions on questions of establishing, reorganisation and liquidation of enterprises as well as on granting any privileges to a certain enterprise or group of enterprises shall be approved by the Antimonopoly authority. This is a legal basis for the State aid control and regulation in Russia.

The most important changes were made in articles 17 and 18 of the Law (the state control over concentration). The basic criterion for the state control is the value of total assets of enterprise (not the statute capital as it was before). For all quantitative measurements Via minimum amount of a month wage" (m.w.) is used. This is an officially determined figure periodically revised by the Government that lets minimise the influence of inflation.

Because of changing of the quantitative criteria and procedure, many enterprises now are released from the preliminary control of the Antimonopoly authority. Preliminary consent (approvement) is applied now only in following cases:

- the establishment of union (association) of commercial organisations;
- the merger of commercial organisation if their total assets exceed 100 000 m.w.;
- the liquidation of state-owned enterprise if its assets exceed 50 000 m.w. where this leads to the emergence of an economic entity with a market share more than 35%;
- the acquisition of shares that gives a person the right to dispose of more than 20% of the shares if a total assets of the buyer and of the commercial organisation which shares are bought exceed 100 000 m.w. or if the market share of one of the parties to this transaction is more than 35%.

In cases of the establishment of commercial organisation if the founders aggregate assets exceed 100 000 m.w., of the merger of commercial organisations if their total assets exceed 50 000 m.w., of the acquisition of shares if a total assets of the parties is from 50 000 m.w. to 100 000 m.w. a notification procedure is used. The time-limit of notification is 15 days after the official registration of the new legal person or after the transaction.

In cases of violation of the rules of antimonopoly control over concentration (e.c. the creation of commercial organisation without notification or the acquisition of shares without preliminary application) the Antimonopoly authority can bring the suit to a court for nullification of state registration or transaction and impose fines and penalties on legal and natural persons.

Liability for violation of the Law (art.22-24) was strengthened sufficiently. Main grounds for the Antimonopoly authority to impose fines are failure,to fulfil its order or decision, to submit applications, notifications and information, presentation of unauthentic data, obstructing the fulfilment by officials of the Antimonopoly authority of their duties. Amount of fines is measured in month wages (m.w.). Top limit of fines is 25 000 m.w. for legal person and 200 m.w. for natural person. Managers of commercial and non-commercial organisations and officials of State executive authorities who are found guilty of repeated violation of the Law shall bear criminal responsibility.

According to the Law (art.27) the procedure for investigation and examination of cases of violation of the Law shall be determined by the rules endorsed by the Antimonopoly authority. To exercise its powers the Antimonopoly authority shall have the right to obtain any information and persons authorized by the Antimonopoly authority shall have the right of free access to executive bodies and to enterprises and organisations in order to familiarize themselves with all necessary documents (art.13). Legal persons, executive authorities and natural persons must submit authentic ' documents, written and oral explanation and other information required by the Antimonopoly authority (art.14).

On the base of examination of facts of violation of the Law the Antimonopoly authority shall issue binding orders that shall be subject to carrying out within established time-limits (art.29).

Legal and natural persons have the right to turn to a court with an appeal to declare decisions (orders) of the Antimonopoly authority fully or partially invalid or to cancel and alter decisions on the imposition of a fine (art.28) .

Main figures of the Antimonopoly authority activities are shown in Annex 1-3.

ANNEX 1* :*Activity of the SCAP of russia in implementation of antimonopoly legislation

Number of applications: 1992 8620
1993 11470
1994 12152

Kinds of examined applications in 1994:
- facts of violation of antimonopoly legislation (art. 5-8, 10, 19) : 3720 (31%)
- state control over establishment, reorganisation and liquidation of commercial organisations and associations (art.17): 5364 (43%)
- state control over acquisition of stocks (shares) in the capital of commercial organisations (art.18): 2140 (18%)
- others (art.9, 16): 928 (8%)

ANNEX 2 : Distribution of cases of violation of antimonopoly legislation

- abuse of dominant position (art.5) : 2328 (62%)
- concerted practice (art.6) : 197 (5%)
- acts and actions of 'executive authorities directed towards limitation of competition (art.7): 881 (24%)
- unfair competition (art.10) : 175 (5%)
- others (art.8,9,19) : 139 (4%)

Total 3720 (100%)

ANNEX 3 : Results of examination of application by SCAP

- Violation is stopped without initiation of proceeding: 1300
- Proceeding is opened : 1467 (100%)

  under art.5 896 (61%)
  art.6 70 (5%)
  art.7 331 (23%)
  art.10 104 (7%)

- Orders are issued : 1353
- Administrative penalties and warnings are imposed 198
- Preliminary consents to the establishment, reorganisation and liquidation of commercial organisations are given : 4 100
- Rejects on applications for obtaining consent to creation etc. of commercial organisations are made: 550
- Preliminary consents to the acquisitions of shares are given: 1581

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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 some of these may be available from DGIV's Information Officer. Future issues of the newsletter will contain details of conferences on competition policy which have been brought to our attention. Organisers of conferences that wish to make use of this facility should refer to page 1 for the address of DGIV's Information Officer.

SPEECHES AND ARTICLES

L'encadrement communautaire des aides aux entreprises, Denis Leythienne, Commission Européenne, (sp95032)

Economic Assessment of Oligopolies under the Community Merger Control Regulation, in European Competition Law Review, Vol. 14, Issue 3, May/June 1993, Sweet & Maxwell Publ., ISSN 0144-3054, by Juan F. BRIONES ALONSO (sp95033)

Les règles communautaires applicables aux concentrations, dans Observateur de Bruxelles N 13, Dr. Georgios KYRIAZIS, (sp95034)

Oligopolistic dominance. Is there a common approach in different jurisdictions ? A review of decisions adopted by the Commission under the Merger regulation, speech by Juan Briones-Alonso, European Study Conference, 18/11/1995, Brussels. (sp95036)

International cooperation between competition authorities, by Jean-François PONS, Deputy Director-General for Competition of the European Commission, in Conference "Competition Policy in Transition Economies" 26 September 1995 - Moscow (sp95040)

Fordham Corporate Law Institute 22nd Annual Conference on International Antitrust Law & Policy, Fordham University School of Law, New York City, "**EU Competition Law in the Telecommunications, Media and Information Technology Sectors**", by Dr H. UNGERER (sp95041)

European Cable Communications '95, London, 23rd October 1995, **WHO SHOULD BE EUROPE'S DIGITAL GATE KEEPERS** ? Clarifying how recent EU policies and Decisions will foster effective competition , by Dr H. UNGERER (sp95042)

State aid control by the European Commission: the case of the automobile sector, by Geert Dancet and Manfred Rosenstock (sp95043)

Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law ? by Julian Mathic Joshua, (sp95044)

L'application des regles communautaires en matiere d'aides d'etat aux etablissements de credit, Projet d'article pour la revue "BANQUE". par Ronald Feltkamp et Nicola Pesaresi (sp950045)

Conférence Internationale Antitrust: Règles, Institutions et Relations internationales: Politique de concurrence et developpement des echanges: pour un renforcement significatif de la cooperation internationale, Rome, les 20 et 21 novembre 1995, Jean-François PONS, Directeur Général adjoint (sp95046)

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La politique européenne de concurrence face aux évolutions récentes de la distribution, Colloque International a Seville, les 24 et 25 novembre 1995, par Jean-François PONS, Directeur général adjoint (sp95048)

De verspreiding van de Europese Concurrentieregels buiten de Europese Unie, Stefaan Depypere (sp95049)

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OPENING ADDRESS TO THE THIRD, EUROPEAN UNION - JAPAN COMPETITION POLICY SEMINAR 22 NOVEMBER 1995, Tokyo, Japan, Delivered by Mr Karel Van Miert (sp95051)

THIRD EUROPEAN UNION - JAPAN COMPETITION POLICY SEMINAR, 22 NOVEMBER 1995, Tokyo, Japan, **Why do we need more cooperation in the field of competition policy** ? Speech delivered by Mr Jonathan Faull (sp95052)

THIRD EUROPEAN UNION - JAPAN COMPETITION POLICY SEMINAR, 22 NOVEMBER 1995, Tokyo, Japan, **Scope of application of the competition rules of the European Union**, Speech delivered by Mr Alexander Schaub, (sp95053)

"**EU Competition policy, the USA and the air transport sector**" Speech by Mr Karel Van MIERT to the Sabre World Cconference '95 DALLAS, 7-9/9/1995 (SPEECH/95/160)

Speech of Mr Karel Van MIERT at the "Verband Oeffentlicher Banken" - Bonn- Bad Godesberg, 19 october 1995: "**Competition policy and banking sector**" (SPEECH/95/212)

Analyse de l'arrêt de la Cour du 6 avril 1995: Aff. Jntes C-241/91 P et C-242/91 P: Radio Telefis Eeireann (RTE) et Independent Television Publications Ltd (itp) contre Commission (**Magill**) par Olivier Leurquin, (sp96001)

COMMUNITY PUBLICATIONS ON COMPETITION

Unless otherwise indicated, these publications are available through the Office for Official Publications of the European Communities, 2 rue Mercier, L 2985 Luxembourg - Tel.4992821 - Fax 488573, or its sales offices (see last page).; use ISBN or Catalogue Number to order.

LEGISLATION

Competition law in the European Communities - volume 1A 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: (xx=language code; 9 languages) CM 29-93-A01-xx-C

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Merger control in the European Union, catalogue No: (xx=language code; 9 languages) CV 88-95-428-xx-C

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Brochure explicative sur les modalités d'application du Règlement (CE) Nº 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)

Notice on the application of the competition rules to the **postal sector**: Note de l'Unité B-2 du 9/8/1992, disponible auprès du secrétariat de DG IV-F-2 (tel. +322-2951880, 2950479, fax. +322-2969800).

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COMPETITION DECISIONS

Reports of Commission Decisions relating to competition -Articles 85,86 and 90 of the EC Treaty. Catalogue numbers:
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* 73/80, in da, de, en, fr, it, nl: CM 76-92-988-xx-C
* 81/85, 7 languages: CM79-93-792-xx-C
* 86/88, 9 languages: CM 80-93-290-xx-C
* 89/90, 9 languages: CV 73-92-772-xx-C
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COMPETITION REPORTS

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XXIV Report on competition policy 1994, 11 languages, CM-90-95-283-xx-C

XXIIIeme Rapport sur la politique de concurrence 1993, 9 languages, CM 82-94-650-xx-C

XXIIe Rapport sur la politique de concurrence: 1992, 9 languages, CM 76-93-689-xx-C

XXIe Rapport sur la politique de concurrence: 1991, 9 languages, CM 73-92-247-xx-C

3ème rapport sur les aides d'Etat dans la Communaute europeenne dans le secteur des produits manufactures et certains autres secteurs dans la Communaute europeenne, 9 languages, CV 75-92-881-xx-C

4ème rapport sur les aides d'Etat dans l'Union Européenne dans le secteur des produits manufactures et certains autres secteurs, 11 languages, COM(95)365

Older annual reports are also available on request.

OTHER DOCUMENTS and STUDIES

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Competition Aspects of Interconnection Agreements in the Telecommunications Sector, CM-90-95-801-EN-C

The effect of conglomerate mergers on competition; CM-59-90-039-EN-C

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The geographical dimension of competition in the European single market, CV 78-93-136-EN-C

Copyright and information limits to the protection of literary and pseudo-literary works in the Member States of the EC, CM 75-92-049-EN-C

Evaluation of the Impact of European Community Research Programmes upon the Competitiveness of European Industry: Concepts and approaches, CD NA-14-198-EN-C

Competition and integration: Community merger control policy,CM AR-94-057-EN-C

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▹ INFORMATION SECTION

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The effects of intra-Community competition of export subsidies to third countries: The case of export credits, export insurance and official development assistance, CM 59-90-281-EN-C

Impediments to parallel trade in pharmaceuticals within the European Community, CM 73-91-489-EN-C

Aid element of government R&D contracts, CM 70-91-314-EN-C

Concurrence et cooperation dans le transport aerien en Europe, CV 74-92-815-FR-C

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European Economy,; "Competition and integration - Community merger control policy", Supplement A nr. 3/95, 9 languages, CM AS-95--005-xx-C,

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95/373/CE - Décision de la Commission, du 31 janvier 1995, relative à une procédure d'application des articles 85 et 86 du traité CE (IV/33.375 - PMI-DSV), JO L 221, 19/9/95

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95/551/CE - Décision de la Commission, du 29 novembre 1995, relative à une procédure d'application de l'article 85 du traité CE (IV/34.179, 34.202, 216 - Stichting Certificatie Kraanverhuurbedrijf et Federatie van Nederlandse Kraanverhuurbedrijven), JO L 312, 23/12/95

Proposition de règlement (CE) du Conseil sur les aides à la construction navale, JO C 304, 15/11/95

Communications

Communication relative faite en application de l'article 16 paragraphe 3 du règlement (CEE) no. 3975/87 du Conseil - Affaire IV/35.545 - Lufthansa/SAS, JO C 201 5/8/95

▹ INFORMATION SECTION

Communication faite en application de l'article 19 paragraphe 3 du règlement no. 17 du Conseil relative à la notification de l'affaire no. IV/35.436 - Van den Bergh Foods, JO C 211, 15/8/95

Communication faite conformément à l'article 19 paragraphe 3 du règlement no. 17 du Conseil concernant l'affaire no. IV/34.799/C-3 - CBA, JO C 211, 15/8/95

Communication faite conformément à l'article 19 paragraphe 3 du règlement du Conseil no. 17 concernant l'affaire no. IV/34.563 -Ecomet, JO C 223, 29/8/95

Communication relative à l'application des règles de concurrence de la Communauté européenne aux systèmes de virement transfrontaliers, JO C 251, 27/9/95

Communication faite conformément à l'article 12 par. 2 du règlement (CEE) no. 4056/86 concernant l'affaire no. IV/MAR/35.382 - Minoan Lines Shipping Company-Strintzis Lines Shipping Company, JO C 255, 30/9/95

Communication fondée sur l'article 5 par.2 du règlement (CEE) no. 3975/87 du Conseil concernant l'affaire no. IV/35.087 - Premiair - accord conclu entre le Scandinavian Leisure Group AB et Simon Spies Holding A/S sur la création d'une entreprise commune de transports aériens, JO C 262, 7/10/95

Communication faite conformément à l'article 19 par. 3 du règlement no. 17 du Conseil concernant une demande d'attestation négative ou d'exemption en vertu de l'article 85 par. 3 du traité CE - Affaire no. IV/35.296 - Inmarsat-P, JO C 304, 15/11/95

Communication faite conformément à l'article 19 par. 3 du règlement No. 17 du Consei relative à l'affaire IV/34.607 - Banque Nationale de Paris - Dresdner Bank, JO C 312, 23/11/95

Communication de la Commission sur l'application des règles de la concurrence au secteur postal et, notamment, sur l'évaluation de certaines mesures d'Etat relatives aux services postaux, JO C 322, 2/12/95

Communication faite en application de l'article 5 du règlement (CEE) no. 3976/87 du Conseil relatif à un projet de règlement modifiant le règlement (CEE) nO. 1617/93 concernant l'application de l'article 85 par. 3 du traité à certaines catégories d'accords, de décisions ou de pratiques concertées ayant pour objet la planification conjointe et la coordination des horaires, l'exploitation de services en commun, les consultations tarifaires our le transport de passagers et de fret sur les services aériens réguliers, et la répartition des créneaux horaires dans les aéroports, JO C 322, 2/12/95

Communication, faite conformément à l'article 19 par. 3 du règlement no. 17 du Conseil et à l'article 3 du protocole 21 de l'accord sur l'Espace économique européen, relative à une demande d'attestation négative ou d'exemption en vertu de l'article 85 par. 3 du traité CE et de l'article 53 par. 3 de l'accord sur l'EEE - Affaire no. IV/35.337 - Atlas, JO C 337, 15/12/95

Communication, en application de l'article 19 par. 3 du règlement no. 17 du Conseil et de l'article 3 du protocole 21 de l'accord sur l'EEE, concernant une demande d'attestation négative ou d'exemption en vertu de l'article 85 par. 3 du traité CE et de l'article 53 par. 3 de l'accord sur l'EEE - Affaire no IV/35.617 -Phoenix, JO C 337, 15/12/95

Communication faite conformément à l'article 12 par. 2 du règlement (CEE) no. 4056/86 du Conseil concernant l'affaire no. 35.202 - Accord concernant l'exploitation en commun du service de transbordemnt entre Dragør et Limhamn, JO C 350, 30/12/95

Information de la Commission européenne relative à sa politique en matière d'amendes pour infractions aux règles de concurrenc

Avis

Avis de la Commission concernant un projet de directive modifiant la directive 90/388/CEE concernant les communications mobiles et personnelles, JO C 197, 1/8/95

Notifications

Notification préalable d'une entreprise commune (Affaire no. IV/35640 - Cummins-Wärtsilä), JO C 200, 4/8/95

Notification d'un accord (Affaire no. IV/35.486 - La Poste (B)/Royale Belge), JO C 205, 10/8/95

Notification d'un accord (Affaire no. IV/35.491 - La Poste (B)/Générale de Banque), JO C 205, 10/8/95

Notification d'un accord concernant une entreprise commune (Affaire no. IV/35.625 - Saab AB/British Aerospace Defence Ltd), JO C 217, 22/8/95

Notification préalable d'une entreprise commune (Affaire no. IV/35.635 - Nippon Electric/Schott), JO C 226, 31/8/95

Notification préalable d'une entreprise commune (Affaire no. IV/35.738 - Uniworld), JO C 276, 21/10/95

Notification préalable d'une entreprise commune (Affaire no. IV/35.734 - Bayer/Monsanto), JO C 298, 11/11/95

Notification d'un accord concernant une entreprise commune (Affaire no. IV/35.645 - Warner-Ishi Europe), JO C 314, 25/11/95

▹ INFORMATION SECTION

Notification d'une entreprise commune (Affaire no. IV/E-3/35841), JO C 347, 28/12/95

Notification préalable d'une entreprise commune (Affaire no. IV/35.855/F3), JO C 350, 30/12/95

CONTROL OF CONCENTRATIONS/MERGER PROCEDURES

Decisions

95/354/CE - Décision de la Commission, du 14 février 1995, relative à une procédure d'application du règlement (CEE) no 4064/89 du Conseil (Affaire no. IV/M.477 - Mercedes-Benz/Kässbohrer), JO L 211, 6/9/95

95/421/CE - Décision de la Commission, du 21 décembre 1994, déclarant la compatibilité avec le marché commun d'une concentration (Affaire no. IV/M.484 - Krupp/Thyssen/Riva/Falck/Tadfin/AST), JO L 251, 19/10/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.596- Mitsubishi Bank/Bank of Tokyo, JO C 198, 2/8/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.616 - Swissair/Sabena), JO C 200, 4/8/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.583 - Inchcape plc/Gstetner Holdings PLC), JO C 201, 5/8/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.611 - Dresdner Bank/Kleinwort Benson), JO C 207, 12/8/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.612 - RWE-DEA/Enichem Augusta), JO C 207, 12/8/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.618 - Cable and Wireless/VEBA), JO C 231, 5/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.581 - Frantschach/Bischof + Klein), JO C 238, 13/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.617 - CLF/HBB), JO C 241, 16/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.568 - EDF/EDISON-ISE), JO C 241, 16/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.625 - Nordic Capital/Transpool), JO C 243, 20/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.614 - Generali/France Vie - France Iard), JO C 244, 21/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.585 - Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd), JO C 246, 22/9/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.613 - Jefferson Smurfit Group plc/Munksjo AB), JO C 252, 28/9/95

Non-opposition à une concentration notifiée (Affaire IV/M.620 - Thomson-CSF/Teneo/Indra), JO C 264, 11/10/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.622 - Ricoh/Gestetner), JO C 264, 11/10/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.600 - Employers Reinsurance Corp./Frankona Rückversicherungs AG) (Affaire no. IV/M.601 - Employers Reinsurance Corp./Aachener Rückversicherungs-Gesellschaft AG), JO C 272, 18/10/95

Non-opposition à une cocnentration notifiée (Affaire no. IV/M.640 - KNP BT/Société Générale), JO C 274, 19/10/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.598 - Daimler-Benz/Carl Zeiss), JO C 276, 21/10/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.627 - UAP/Sun Life), JO C 292, 7/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.615 - Rhône-Poulenc Chimie/Engelhard), JO C 293, 8/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.643 - CGER-Banque/SNCI), JO C 293, 8/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.631 - Upjohn/Pharmacia), JO C 294, 9/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.599 - Noranda Forest/Glunz), JO C 298, 11/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.630 - Henkel/Schwarzkopf), JO C 298, 11/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.644 - Swiss Life/INCA), JO C 307, 18/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.646 - Repola/Kymmene), JO C 318, 29/11/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.659 - GE Capital/Sovac), JO C 322, 2/12/95

▹ INFORMATION SECTION

Non-opposition à une concentration notifiée (Affaire no. IV/M.648 - McDermott/ETPM), JO C 330, 8/12/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.656 - Seagate/Conner), JO C 334, 12/12/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.665 - CEP/Groupe de la Cité), JO C 338, 16/12/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.544 - Unisource/Telefónica), JO C 344, 22/12/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.639 - Montedison/Groupe Vernes/SCI), JO C 347, 28/12/95

Non-opposition à une concentration notifiée (Affaire no. IV/M.669 - Charterhouse/Porterbrook), JO C 350, 30/12/95

Non-applicabilité du règlement à une opération notifiée (Affaire no. IV/M.578 - Hoogovens/Klöckner)), JO C 243, 20/9/95

Non-applicabilité du règlement à une opération notifiée (Affaire no. IV/M.551 - ATR/BAe), JO 264, 11/10/95

Non-applicabilité du règlement à une opération notifiée (Affaire no. IV/M.604 - Albacom), JO C 278, 24/10/95

Avis du Comité consultatif en matière de concentrations sur une proposition de décision dans l'affaire no. IV/M.477 - Mercedes-Benz/Kässbohrer, JO C 232, 6/9/95

Avis du Comité consultatif en matière de concentrations sur l'avant-projet de décision concernant l'affaire no. IV/M.484 - Krupp/Thyssen/Riva/Falck/Tadfin/AST, JO C 274, 19/10/95

Notifications

Affaire no. IV/M.581 - Frantschach/Bischof + Klein, JO C 197, 1/8/95

Affaire no. IV/M.599 - Noranda Forest/Glunz, JO C 207, 12/8/95

Affaire no. IV/M.623 - Kimberly-Clark/Scott, JO C 212, 17/8/95

Affaire no. IV/M.622 - Ricoh/Gestetner, JO C 215, 19/8/95

Affaire no. IV/M.604 - Albacom, JO C 219, 24/8/95

Affaire no. IV/M.632 - Rhône Poulenc/Fisons, JO C 221, 26/8/95

Affaire no. IV/M.628 - Generale Bank/Credit Lyonnais Bank Nederland, JO C 226, 31/8/95

Affaire no. IV/M.631 - Upjohn/Pharmacia, JO C 232, 6/9/95

Affaire no. IV/M.640 - KNP BT/Société Générale, JO C 239, 14/9/95

Affaire no. IV/M.608 - Ericsson/Ascom, JO C 241, 16/9/95

Affaire no. IV/M.630 - Henkel/Schwarzkopf, JO C 247, 23/9/95

Affaire no. IV/M.615 - Rhône-Poulenc/Engelhard, JO C 255, 30/9/95

Affaire no. IV/M.643 - CGER-Banque/SNCI, JO C 255, 30/9/95

Affaire no. IV/M.644 - Swiss Life/INCA, JO C 258, 3/10/95

Affaire no. IV/M.646 - Repola/Kymmene, JO C 260, 5/10/95

Affaire no. IV/M.642 - Chase Manhattan/Chemical Banking, JO C 260, 5/10/95

Affaire no. IV/M.659 - GE Capital/Sovac, JO C 276, 21/10/95

Affaire no. IV/M.656 - Seagate/Conner, JO C 278, 24/10/95

Affaire no. IV/M.655 - Canal+/UFA/MDO, JO C 290, 1/11/95

Affaire no. IV/M.665 - CEP/Groupe de la Cité, JO C 292, 7/11/95

Affaire no. IV/M.660 - RTS/CRA, JO C 298, 11/11/95

Affaire no. IV/M.666 - Johnson Controls/Roth Frères, JO C 298, 11/11/95

Affaire no. IV/M.639 - Montedison/Groupe Vernes/SCI, JO C 302, 14/11/95

Affaire no. IV/M.669 - Charterhouse/Porterbrook, JO C 309, 21/11/95

Affaire no. IV/M.664 - GRS Holding, JO C 309, 21/11/95

Affaire no. IV/M.650 - SBG/Rentenanstalt, JO C 314, 25/11/95

Affaire no. IV/M.619 - Gencor/Lonrho, JO C 314, 25/11/95

Affaire no. IV/M.670 - Elsag Bailey/Hartmann & Braun AG, JO C 314, 25/11/95

Affaire no. IV/M.673 - Channel/Five, JO C 317, 28/11/95

Affaire no. IV/M.674 - Demag/Komatsu, JO C 318, 29/11/95

Affaire no. IV/M.675 - Alumix/Alcoa, JO C 318, 29/11/95

Affaire no. IV/M.621 - BLG/BAWAG, JO C 319, 30/11/95

▹ INFORMATION SECTION

Affaire no. IV/M.661 - Strabag/Bank Austria/Stuag, JO C 321, 1/12/95

Affaire no. IV/M.662 - Leisureplan, JO C 321, 1/12/95

Affaire no. IV/M.668 - Philips/Origin, JO C 322, 2/12/95

Affaire no. IV/M.567 - Lyonnaise des Eaux/Norhumbrian Water, JO C 322, 2/12/95

Affaire no. IV/M.678 - Minorco/Tilcon, JO C 322, 2/12/95

Affaire no. IV/M.657 - Röhm/Ciba-Geigy-TFL, JO C 324, 5/12/95

Affaire no. IV/M.595 - BT/VIAG, JO C 324, 5/12/95

Affaire no. IV/M.676 - Ericsson/Ascom II, JO C 324, 5/12/95

Affaire no. IV/M.677 - Skanska Fastigheter/Securum Förvaltning, JO C 325, 6/12/95

Affaire no. IV/M.680 - Kvaerner/Amec, JO C 325, 6/12/95

Engagement de procédure (Affaire no. IV/M.639 - Gencor/Lonhro), JO 347, 28/12/95

Retrait de la notification d'une opération de concentration (Affaire no. IV/M.608 - Ericsson/Ascom), JO C 292, 7/11/95

STATE AID

95/422/CECA - Décision de la Commission, du 4 avril 1995, relative à un projet d'octroi d'aides d'Etat par le Land de Bavière aux entreprises CECA Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, et Lech-Stahlwerke GmbH, Meitingen-Herbertshofen, JO L 253, 21/10/95

95/437/CECA - Décision de la Commission, du 1er février 1995, concernant une aide d'Etat de l'Allemagne à Georgsmarienhütte, JO l 257, 27/10/95

95/438/CE - Décision de la Commission, du 14 mars 1995, relative aux aides à l'investissement accordées par l'Espagne à l'entreprise Piezas y Rodajes SA, fonderie installée dans la province de Teruel, Aragon, Espagne, JO L 257, 27/10/95

95/455/CE - Décision de la Commission, du 1er mars 1995, relative aux dispositions en matière de réductions dans le Mezzogiorno des charges sociales grevant les entreprises et de prise en charge par le fisc de certaines de ces charges, JO L 265, 8/11/95

95/456/CE - Décision de la Commission, du 1er mars 1995 - Aide d'Etat C 1A/92 - Régime grec d'aide au secteur pharmaceutique financé à l'aide de taxes grevant les produits pharmaceutiques et d'autres produits apparentés, JO L 265, 8/11/95

95/466/CE - Décision de la Commission, du 26 juillet 1995, concernant l'aide accordée par la Région flamande à la compagnie belge Vlaamse Luchttransportmaatschappij NV, JO L 267, 9/11/95

95/524/CE - Décision de la Commission, du 7 juin 1995, relative à l'aide accordée par le gouvernement italien à l'entreprise Iritecna SpA, JO L 300, 13/12/95

95/547/CE - Décision de la Commission, du 26 juillet 1995, portant approbation conditionnée de l'aide accordée par la France à la banque Crédit Lyonnais

Communication de la Commission faite conformément à l'article 93 par. 2 du traité CE aux autres Etats membres et autres intéressés concernant l'aide accordée en faveur du plan de restructuration de Seat SA, suite à la nouvelle notification de l'aide par les autorités espagnoles - Aide d'Etat C 34/95 - Espagne, JO C 237, 12/9/95

Communication relative à la coopération entre la Commission et les juridictions nationales dans le domaine des aides d'Etat, JO C 312, 23/11/95

Aides d'Etat

- C 50/94 (ex NN 85/93) - France, JO C 200, 4/8/95
- C 6/95 (ex NN 124/94) - Allemagne, JO C 201, 5/8/95
- C 4/94, C61/94, C 62/94,NN2/95, NN 3/95 etN 467/95 - Allemagne, JO C 203, 8/8/95
- Aide d'Etat (95-002 - Norvège, Autorité de surveillance AELE), JO C212, 17/8/95
- C 44/93 (ex N 335/B/91) - Italie, JO C 215, 19/8/95
- C 16/95 (NN 50/94) - Allemagne, JO C 215, 19/8/95
- C 59/94 (NN 125/94) - Italie, JO C 220, 25/8/95
- NN 56/94 et C 4/94 (ex NN 103/93) - Allemagne, JO C 227, 1/9/95
- C34/95 (NN 63/94 et N 222/95) - Espagne, JO C 237, 12/9/95
- C 54/94 (ex NN 105/94 - Italie, JO C 242, 19/9/95
- C 19/95 - Allemagne, JO C 242, 19/9/95
- C 11/89 - Allemagne, JO C 251, 27/9/95
- C 56/94 (NN 86/93) - Espagne, JO C 253, 29/9/95
- C 65/94 (NN 79/93) - Italie, JO C 261, 6/10/95
- (NN 135/92) - France, JO C 262, 7/10/95
- C 7/95 (N 412/94) - Allemagne, JO C 262, 7/10/95
- C 22/94 (ex N 53/94) - Belgique, JO C 263, 10/10/95
- C 66/94 (ex NN 90/93) - Italie, JO C 267, 14/10/95
- C 2/95 (ex N 775/94 et N 776/94) - Allemagne, JO C 271, 17/10/95
- C 23/95 (NN 59/94) - Italie, JO C 271,

17/10/95
- C 60/94 (NN 29/93) - Grèce, JOP C 278, 24/10/95
- C 8/95 (ex NN 111/93) - France, JO C 279, 25/10/95
- C 9/95 (ex NN 121/94) - Espagne, JO C 282, 26/10/95
- C 29/93 (ex N 431/93 - Allemagne, JO C 282, 26/10/95
- C 20/94 (NN 27/94) - France, JO C 283, 27/10/95
- C 3/95 (ex NN 137/94) - Allemagne, JO C 283, 27/10/95
- C 22/95 (ex N 219/95) - Irlande, JO C 284, 28/10/95
- C 27/95 (NN 45/95) - France, JO C 284, 28/10/95
- C 28/95 (ex N 167/95) - Grèce, JO C 284, 28/10/95
- C 11/95 (ex N 777/94) - Allemagne, JO C 289, 31/10/95
- C 18/95 (NN 103/94) - France, JO C 289, 31/10/95
- C 20/95 (ex N 131/95° - Italie, JO C 289, 31/10/95
- C 11/95 (ex N 777/94) - Allemagne, JO C 289, 31/10/95
- C 18/95 (NN 103/94) - France, JO C 289, 31/10/95
- C 20/95 (ex N 131/95) - Italie, JO C 289, 31/10/95
- C 29/95 (NN 93/94) - Italie, JO C 290, 1/11/95
- C 38/92 - Italie, JO C 292, 7/11/95
- C 31/95 (ex NN 140/94) - Italie, JO C 292, 7/11/95
- C 13/95 (NN 9/95) - Italie, JO C 293, 8/11/95
- C 33/95 (ex NN 35/95) - Espagne, JO C 293, 8/11/95
- C 29/94 (ex NN 52/94) - Allemagne, JO C 294, 9/11/95
- C 33/94 (N 654/93) - Italie, JO c 294, 9/11/95
- C 24/95 (ex N 682/93) - Allemagne, JO C 294, 9/11/95
- C 25/95 (ex NN 101/94) - Italie, JO C 294, 9/11/95
- C 35/95 (ex NN 139/94) - Italie, JO C 294, 9/11/95
- C 38/95 (NN 70/95, ex N 510/94) - Belgique, JO C 294, 9/11/95
- C 23/94 - France, JO C 295, 10/11/95
- C 12/95 (ex NN 31/94)- Italie, JO C 295, 10/11/95
- C 30/95 (ex NN 113/B/93) et E 7/95 - Italie, JO C 295, 10/11/95
- C 32/95 (NN 59/95) - Allemagne, JO C 295, 10/11/95
- C 40/95 (ex N 353/95) - Allemagne (Basse-Saxe), JO C 295, 10/11/95
- C 44/95 (E 16/95) - Espagne, JO C 304, 15/11/95
- C 43/93 (ex NN 97/93) - France, JO C 309, 21/11/95
- C 41/95 (ex NN 83/95) - Allemagne, JO C 312, 23/11/95
- C 37/94 (NN 10/93) - Espagne, JO C 313, 24/11/95
- C 17/94 (ex NN 102/93) (ex N 335/91 et ex N 337/92) - Italie, JO C 319, 30/11/95
- C 28/93 (N 446/93) - Allemagne, JO C 327, 7/12/95
- C 43/95 (ex NN 73/94) - Italie, JO C 327, 7/12/95
- C 39/95 (ex NN 47/95) - Italie, JO C 344, 22/12/95

Autorisation des aides d'Etat dans le cadre des dispositions des articles 92 et 93 du traité CE - Cas à l'egard desquels la Commission ne soulève pas d'objection:
JO C 251, 27/9/95; JO C 265, 12/10/95; JO C 266, 13/10/95; JO C267, 14/10/95; JO C 272, 18/10/95; JO C 276, 21/10/95; JO C 290, 1/11/95; JO C 295, 10/11/95; JO C 298, 11/11/95; JO C 310, 22/11/95 (aides d'Etat N 135/95); JO C 312, 23/11/95; JO C 318, 29/11/95; JO C 324, 5/12/95; JO C 334, 12/12/95; JO C 335, 13/12/95; JO C 343, 21/12/95

WRITTEN QUESTIONS

E-99/95 de Manuel Porto (prix du papier journal)

E-540/95 de Amedeo Amadeo (entreprises en difficulté)

E-820/95 de Marie-Paule Kestelijn-Sierens (concurrence déloyale)

E-847/95 de Josu Imaz San Miguel (fermeture de l'entreprise TUDOR (Saragosse) en Espagne)

E-965/95 de Amedeo Amadeo (transfer de technologies)

P-1391/95 Yiannis Roubatis (prix du papier journal)

E-640/95 de Mark Watts (British Gas - Abus de position dominante aux termes de l'article 86 du traité)

E-642/95 de Mark Watts (validité de la nouvelle politique des prix discriminatoires de British Gas)

E-964/95 de Amedeo Amadeo (transfert de technologies)

E-533/95 de Josu Imaz San Miguel (pratiques monopolistiques dans le secteur espagnol de l'électricité)

E-836/95 de Glyn Ford (subventions d'Etat pour les producteurs norvégiens de produits de papeterie)

E-963/95 de Amedeo Amadeo (transfer de technologies)

E-1165/95 de Graham Mather (accords de transfer de technologie)

E-1553/95 de Francesco Baldarelli (accord entre Sabena et Swissair)

E-971/95 de Amedeo Amadeo (concurrence)

E-149/95 de Nel van Dijk (aide d'Etat dissimulée pour le chantier naval RDM)

E-966/95 de Amedeo Amadeo (transfert de technologies)

E-1045/95 de Nikitas Kaklamanis (condamnation de cimentiers grecs par la Commission)

E-1076/95 de Sergio Ribeiro (délocalisation d'entreprises (Renault-

Setubal) et information des autorités d'un Etat membre (Portugal))

E-1159/95 de Joaquín Sisó Cruellas (projet de règlement concernant la distribution d'automobiles)

E-1649/95, E-1650/95, E-1779/95 de Amedeo Amadeo (distribution dans le secteur automobile)

E-17714/95 de Riccardo Nencini (concurrence)

E-1768/95 de Joaquín Sisó Cruellas (absence de notification d'aides d'Etat)

E-1806/95 de Anne André-Léonard (renouvellement de la dérogation à l'art. 85 du traité, accordée à United International Pictures - UIP - en 1989 par la Commission)

P-1977/95 de Peter Skinner (fusion des entreprises Glaxo et Wellcome au Royaume-Uni)

E-1963/95 de Cristiana Muscardini (démantèlement des usines sidérurgiques Falck à Sesto San Giovanni)

E-2260/95 de Susanne Riess-Passer (aide à la presse en Autriche)

E-2106/95 de Amedeo Amadeo (coût du papier journal)

P-2498/95 de Christian Rovsing (respect des règles communautaires de concurrence)

E-2527/95 de Nel van Dijk (aide d'Etat dissimulée pour le chantier naval RDM)

E-2330/95 de Glyn Ford (B-SKY-B et NIREX/Télétravail)

E-2355/95 de Karla Peijs, Peter Pex et Bartho Pronk (aides à la construction navale allemande)

E-2499/95 de Amedeo Amadeo (prix des automobiles)

COURT OF JUSTICE/TRIBUNAL

Affaires introduites devant la Cour

Aff. C-264/95 P Commission / Union internationale des chemins de fer (UIC)
Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 6 juin 1995, dans l'affaire T-14/93 -Annulation de la décision 92/568/CEE de la Commission relative à une procédure au titre de l'art. 85 du traité CE - Distribution de billets de transports ferroviaires par les agences de voyages

Aff. C-278/95 P Siemens SA / Commission
Pourvoi contre l'arrêt du Tribunal (deuxième chambre), rendu le 8 juin 1995, dans l'affaire T-459/93 - Recours en annulation de la décision 92/483/CEE de la Commission relative à des aides accordées par la région de Bruxelles- Capitale (Belgique) en faveur des activités de Siemens SA dans le domaine de l'informatique et des télécommunications - Erreurs de droit

Aff. C-279/95 P Langnese-Iglo GmbH / Commission
Pourvoi contre l'arrêt du Tribunal (deuxième chambre élargie), rendu le 8 juin 1995, dans l'affaire T-7/93 -Recours en annulation contre la décision 93/406/CEE de la Commission relative à une procédure d'application de l'article 85 du traité CEE contre Langnese-Iglo GmbH (affaire IV/34.072)

Aff. C-280/95 Commission / Italie
Manquement d'Etat - Défaut de s'être conformé à la décision 93/496/CEE de la Commission relative à l'aide d'Etat C 32/92 (ex NN 67/92) - Italie (crédit d'impôt pour les transporteurs routiers professionnels)

Aff. C-282/95 P Guérin Automobiles / Commission
Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 27 juin 1995, dans l'affaire T-186/94 - Arrêt constatant le non lieu à statuer sur un recours en carence et rejetant comme irrecevables les conclusions subsidiaires en annulation

Aff. C-286/95 P Commission / Imperial Chemical Industries plc (ICI)
Pourvoi contre l'arrêt du Tribunal (première chambre élargie), rendu le 29 juin 1995, dans l'affaire T-37/91 - Annulation de la décision 91/300/CEE de la Commission relative à une procédure d'application de l'art. 86 du traité CE (IV/33.133-D: carbonate de soude - ICI)

Aff. C-287/95 P Commission / Solvay SA
Pourvoi contre l'arrêt du Tribunal (première chambre élargie), rendu le 29 juin 1995, dans l'affaire T-31/91 - Arrêt portant annulation de la décision 91/298/CEE de la Commission, relative à une procédure d'application de l'rticle 85 du traité CEE (IV/33.133 : Carbonate de soude) - Recevabilité d'un nouveau moyen - Conditions de l'authentification d'une décision adoptée par le collège des membres de la Commission

Aff. C-288/95 P Commission / Solvay SA
Pourvoi contre l'arrêt du Tribunal (première chambre élargie), rendu le 29 juin 1995, dans l'affaire T-32/91 - (Voir affaire C-287/95 P)

Aff. C-292/95 Espagne / Commission
Annulation de la décision de la Commission du 6 juillet 1995 prorogeant, avec effet rétroactif à partir du 1er janvier 1995, la décision du 23 décembre 1992 relative à l'encadrement communautaire des aides d'Etat dans le secteur de l'automobile

Aff. C-326/95 Banco de Fomento e Exterior, Sa / Amândio Maurício Martins Pechin e.a.
Préjudicielle - Tribunal de Comarca de Lisboa - Interprétation de l'art. 59 et des art. 90, par. 1, et 92, par. 1, et 92, par.

1, du traité CE - Privilèges attribués par l'Etat à une banque portugais majoritairement détenue par des actionnaires publics

Aff. C-339/95 Compagnia di navigazione marittima Srl e.a. / Compagnie Maritime Belge NV e.a.
Préjudicielle - High Court of Justice (Queen's Bench Division) - Interprétation de l'art. 85 du traité CE et des art. 1, par. 3, sous b), et 3, 4 et 5, par. 5, du règlement (CEE) nu4056/86 du Conseil déterminant les modalités d'application des articles 85 et 86 du traité aux transports maritimes - Compétences respectives de la Commission et d'une juridiction nationale appelée à exercer un contrôle judiciaire sur une sentence arbitrale - Conférence maritime (SUNAG) règlant le transport "door-to-door" entre l'Europe et le Golfe arabe

Aff. C-341/95 G. Bettati / Safety Hi-Tech Srl
Préjudicielle - Pretura circondariale di Avezzano - Validité, au regard des art. 3, 5, 30, 86, 92 et 130 R du traité CE, de l'art. 5 du règlement (CE) nu 3093/94 du Conseil relatif à des substances qui appauvrissent la couche d'ozone en ce qu'il interdit inconditionnellement l'emploi des hydrochlorofluorocarbures (HCFC) comme moyen anti-incendie à partir du 1er juin 1995

Aff. C-343/95 Diego Calí & Figli Srl / Servizi ecologici porto di Genova SpA (SEPG)
Préjudicielle - Tribunale di Genova - Interprétation de l'art. 86 du traité CE au regard d'une entreprise chargée, par l'autorité du Port de Gênes, de la surveillance et de l'intervention en matière de pollution - Monopole de services non désirés et rémunérés suivant un tarif obligatoire

Aff. C-353/95 P Tiercé Ladbroke SA / Commission
Pourvoi contre l'arrêt du Tribunal (première chambre élargie), rendu le 18 septembre 1995 dans l'affaire T-471/93 - Refus d'annuler la décision de la Commission du 18 janvier 1993 rejetant la plainte de la partie requérante sous les art. 92 et 93 du traité

Aff. C-355/95 P Textilwerke Deggendorf GmbH (TWD) / Commission
Pourvoi contre l'arrêt du Tribunal (troisième chambre élargie), rendu le 13 septembre 1995 dans les affaires jointes T-244/93 et T-486/93 - Recours en annulation contre les décisions 91/391/CEE et 92/330/CEE relatives à des aides à l'entreprise requérante en ce qu'elles suspendent le versement d'aides autorisées jusqu'au remboursement d'aides illicites antérieures

Aff. C-359/95 P Commission / Ladbroke Racing Ltd
Pourvoi contre l'arrêt du Tribunal (première chambre élargie), rendu le 18 septembre 1995 dans l'affaire T-548/93 - Annulation de la décision de la Commission relative à une procédure d'application des art. 85 et 86 du traité CE

Aff. C-367/95 P Commission / Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) e.a.
Pourvoi contre l'arrêt du Tribunal (quatrième chambre élargie), rendu le 28 septembre 1995, dans l'affaire T-95/94 - Arrêt faisant droit au recours d'un concurrent contre le rejet, par la Commission, de sa demande de voir constater que la République française a enfreint les art. 92 et 93 du traité CE en octroyant des aides à l'entreprise Sécuripost

Affaires introduites devant le Tribunal

Aff. T-140/95 Ryanair Ltd / Commission
Recours en annulation de la décision de la Commission d'autoriser le gouvernement irlandais à payer la deuxième tranche d'une aide en faveur de Aer Lingus, approuvée par décision du 21 décembre 1993, bien que la condition de réduction des coûts de 50 millions de livres irlandaises par an, prévue à l'article Ier point a) de ladite décision, n'ait pas été atteinte

Aff. T-149/95 J. Richard Ducros / Commission
Annulation de la décision de la Commission de clore la procédure d'application de l'article 93 paragraphe 2 du Traité et d'approuver les aides accordées par le gouvernement italien aux entreprises publiques CMF SUD et CMF, sous forme d'apports publics de capital, suite aux engagements pris par les autorités italiennes

Aff. T-150/95 BISPA / Commission
Annulation de la décision de la Commission déclarant conforme à l'article 3 de la décision de la Commission 3855/91/CECA du 27 novembre 1991, instituant des règles communautaires pour les aides à la sidérurgie, l'aide accordée par le Grand-Duché de Luxembourg à la société PROFILARBED aux fins de la construction d'une nouvelle installation électrique à Esch-Schifflange

Aff. T-155/95 LPN e.a. / Commission
Annulation de la décision de la Commission nu FC 94/10/65/005 relative à l'octroi d'un concours de l'instrument financier de cohésion pour un projet concernant la construction d'un pont sur le Tage dans la région de Lisbonne

Aff. T-157/95 EAMM e.a. / Commission
Annulation de la décision de la Commission, publiée par communiqué de presse nu IP/95/558, de ne pas s'opposer à une aide prévue par les autorités britanniques pour la construction d'une usine de production de mozzarella en Irlande du Nord (aide nu N 451/95)

Aff. T-175/95 BASF Lacke + Farben / Commission

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Annulation de la décision de la Commission, du 12 juillet 1995, relative à une procédure d'application de l'art. 85 du traité CE (IV/33.802 Lacke + Farben AG et SA Accinauto) ou, subsidiairement, annulation ou réduction de l'amende infligée à la requérante - Obligation imposée contractuellement par BASF à Accinauto, son distributeur exclusif pour la Belgique et le Luxembourg des produits de repeinture pour voitures de la marque "Glasurit", de transférer à BASF les demandes de clients provenant de l'extérieur du territoire contractuel

Aff. T-176/95 Accinauto / Commission
Voir affaire T-175/95

Aff. T-188/95 Waterleiding Maatschappij "Noord-West Brabant" / Commission
Annulation de la décision de la Commission SG(95)D/8442 du 3 juillet 1995, déclarant compatibles avec le marché commun, sur base de l'art. 92, par. 3, sous c), du traité et de l'art. 61, par. 3, sous c), de l'Accord EEE, les dispositions concernant les aides d'état contenues dans la loi néerlandaise sur le régime fiscal en matière de protection de l'environnement

Aff. T-189/95 SGA / Commission
Recours en carence tendant à faire constater que la Commission s'est illégalement abstenue de prendre une décision ainsi que d'adopter des mesures provisoires suite à la plainte déposée par la requérante sur le fondement de l'art. 85 du traité CE et de l'art. 3 point 11 du règlement (CEE) nu 123/85 de la Commission, et concernant les agissements de la société Peugeot auprès des concessionnaires de ses filiales étrangères afin de les empêcher d'accepter de vendre des véhicules aux intermédiaires français - Recours en indemnité en réparation du préjudice prétendument causé par le comportement de la Commission

Aff. T-190/95 Sodima / Commission
Recours en carence tendant à faire constater que la Commission s'est illégalement abstenue de prendre une décision suite à la plainte déposée par la requérante sur le fondement des art. 85 et 86 du traité ainsi que du règlement (CEE) nu 123/85 de la Commission et concernant l'imposition par la société Peugeot d'un régime de concession incompatible avec les conditions d'exemption établies par ledit règlement - Recours en indemnité en réparation du préjudice prétendument causé par le comportement de la Commission

Aff. T-193/95 Fintecna / Commission
Annulation de l'art. 1, par. 4, de la décision de la Commission relative à une aide accordée par le gouvernement italien afin de faciliter la restructuration et l'assainissement de la société Iritecna, en ce qu'il fixe les conditions auxquelles est soumise l'autorisation de l'aide

Aff. T-195/95 Guérin Automobiles / Commission
Recours en carence tendant à faire constater que la Commission s'est illégalement abstenue de prendre une décision suite à la plainte déposée par la requérante sur le fondement de l'art. 85 du traité CE et du règlement (CEE) nu 123/85 de la Commission et concernant l'imposition par la société Nissan France d'un régime de concession incompatible avec les conditions dudit règlement - Recours en indemnité en réparation du préjudice prétendument causé par le comportement de la Commission

Aff. T-199/95 Le Nouveau Garage e.a. / Commission
Recours en carence tendant à faire constater que la Commission s'est illégalement abstenue de prendre une décision suite aux plaintes déposées par les requérantes sur le fondement de l'art. 85 du traité CE et du règlement (CE) nu 123/85 et concernant l'imposition par la société VAG France d'un système de distribution exclusive et sélective de véhicules automobiles des marques Volkswagen et Audi et de leurs pièces de rechange incompatible avec les conditions dudit règlement

Aff. T-204/95 International Express Carriers Conference / Commission
Annulation de la décision de la Commission SG (95) D/10794 rejetant la plainte déposée par la requérante sur le fondement des art. 85 et 86 du traité CE (IV/32.791-Remail), relative aux entraves à la pratique du "remail" qui résultent des agissements des Administrations des postes de certains Etats membres

Aff. T-16/91 RV Rendo e.a. / Commission
Annulation de la décision 91/50/CEE de la Commission relative à une procédure d'application de l'art. 85 du traité CEE (IV/32.732 - IJsselcentrale (IJC) e.a.) - Entraves aux importations et exportations d'énergie électrique aux Pays-Bas (affaire renvoyée par la Cour après annulation partielle de l'arrêt du Tribunal du 18/11/92)

Aff. T-209/95 Windstar Sail Cruises e.a. / Commission
Annulation de la décision de la Commission considérant l'aide accordée par le gouvernement français pour la construction du navire "Tahiti Nui" comme une aide au développement, dans le sens de l'art. 4, par. 7, de la directive (CEE) nu 684/90 du 21 décembre 1990, concernant les aides à la construction navale

Aff. T-213/95 SCK e.a. / Commission
Recours en indemnité - Responsabilité non contractuelle de la Commission découlant de sa prétendue violation de l'art. 6 de la Convention des droits de l'Homme et des principes généraux du droit au cours d'une procédure d'application de l'art. 85, par. 1, du traité CE relative au marché des grues mobiles

Aff. T-214/95 Vlaamse Gewest / Commission
Annulation de la décision de la

Commission concernant l'aide accordée par la région flamande à la compagnie aérienne belge Vlaamse Luchttransportmaatschappij NV (VLM)

Aff. T-215/95 Telecom Italia / Commission
Annulation de la décision de la Commission relative aux conditions imposées au second opérateur de radiotéléphonie GSM en Italie

Coming up ....

The following publications are under preparation by DG IV:

EC Competition Policy Newsletter: Spring 1996, Summer 1996, Autumn/Winter 1996.

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

Repertory of Commission Decisions in the Competition field: 1993 to 1994.

Dealing with the Commission - notifications, complaints, inspections and fact-finding powers.

XXV Report on competition policy 1995.

Competition law in the European Communities - volume 3A International aspects of competition policy.

Actes Forum Européen de la Concurrence.

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

Recueil des décisions sur les aides d'Etat

Brochure sur la politique de la concurrence dans le Marché unique (concernant les art.85,86,90 et le règlement sur les concentrations)

Brochure sur la politique concernant les aides d'état

Brochure concernant des sujets présentant un intérêt pratique pour l'industrie de la Communauté et plus particulierement les PMEs

Video: Introduction to competition policy

New procedure for the dissemination of Merger decisions

In conformance with the rules that apply on public access to Commission documents (see *Commision decision of 8 February 1994 on public access to Commission documents (94/90/ECSC, EC, Euratom) in OJ L 46 of 18/02/1994 p. 58*), a new system of disseminating Commission's Merger Decisions based on Articles 6 (1) a) and b) of Regulation 4064/89 will be implemented as of the 1st of March 1996.

These decisions will be available:
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European Commission, Directorate General IV-Competition, Cellule Information,
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The members of the Cellule INFORMATION will endeavour to answer your enquiries. If they are unable to do so they will find someone who can. They will not, however, answer questions pertaining to ongoing cases.

Cases covered in this issue

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