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PO Box 3, Fairford GL7 4YF, UK

Tel & Fax (44) (0) 1451 861 464

P O Box 323, Eliot ME 03903-0323, USA

Tel & Fax (1) (207) 439 5932

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Law and Economics

One of the many differences between European and American lawyers is a tendency for the American lawyers' education and training to be more broadly based and often to follow a university education in business studies or economics. As a large generalisation, the European lawyer is less familiar with economic and commercial language and techniques than his American counterpart. In the field of competition law, this can have its drawbacks. The rules on competition, more than most bodies of law, reflect the application in law of economic concepts, some of them rather refined and arcane.

In the Commission's Communication on the application of the Community competition rules to vertical restraints, of which we published extracts in our December and February issues, there is a perceptible dividing line between the Sections of the Communication dealing with legal problems and proposals and the Section on "Economics of Verticals". It is a serious disadvantage of this otherwise interesting Section that it is almost entirely theoretical: it does not illustrate, as most lawyers - European or American - might wish, the theoretical points by reference to actual cases. Here was an excellent opportunity to bridge the gap between legal experience and economic concepts; but it was not taken.

For example, the Section suggests that, to analyse the negative effects which may result from vertical restraints, it "is appropriate to divide vertical restraints into four groups: an exclusive distribution group, a single-branding group, a resale price maintenance group and a market-partitioning group". Although this is not indisputable, it is a fair enough starting-point; but, in the paragraphs which follow, it is wholly unrelated to the practical considerations which have arisen in the voluminous case-law. It also serves as a Procrustes' bed. Where licensing fits into this bed, or the ice-cream cases, is far from self-evident; yet these are the very cases in which vertical restraints have been found to result in serious distortions of competition.

There is an irony here, in that the Commission is right, in what it calls its more economics-oriented approach to competition problems generally and the problems of vertical restraints in particular, to focus on the importance of market power. Yet it is easier for a medium-sized trader to recognise and probably suffer from a competitor's market power than for him to analyse and quantify it. There are questions on the form of notification which, in the last event, it is wholly unrealistic to expect medium-sized firms to be in a position to answer. Officials and economists probably think it absurd for businesses to enter markets unless they have an exact appreciation of market power, market shares and the like; but, unless firms can afford sophisticated economic analyses, they may well base their appreciation on experience and instinct. They may be right: it is notoriously difficult to pin down an objective test of market power. "Somewhere between 20% and 40%" is vague for lawyers and economists alike. □

JOINT VENTURES (FINANCIAL SERVICES): HALIFAX/CETELEM/DAWN

Subject: Joint ventures
Turnover

Industry: Financial services

Parties: Halifax plc
Cetelem SA
Harry Dawn Ltd

Source: Commission Statement IP/99/138, dated Ist March 1999

(Note. This is one of the rapidly increasing number of cases involving banks and financial institutions under the Merger Regulation. It is noticeable that, while the turnover figures are, by the standards of commerce generally, rather high, there is no finding of a dominant position being created or strengthened as a result of the establishment of the joint venture.)

The European Commission has authorised Halifax Plc, which main activity is retail banking within the United Kingdom and Cetelem SA, controlled by Paribas, principally active in providing consumer loans for household equipment in France, Belgium, The Netherlands, Italy, Spain and Portugal, to establish joint control of the newly created Harry Dawn Ltd. The operation will have no impact on competition in the European Economic Area.

Halifax's main activity is retail banking within the United Kingdom. On a minor scale, it carries on retail banking activities in Spain and insurance activities in Luxemburg. Worldwide turnover was €11,940 million in 1997.

Paribas, the French banking and financial services group, is the holding company of Cetelem SA, a company mainly active in France but also in Belgium, Netherlands, Italy, Spain and Portugal. Cetelem's principal activities are mainly consumer loans for household equipment. It also provides finance leases, operating leases and home loans. Its worldwide turnover was €19,476 million in 1997.

Halifax and Cetelem will each hold 50% of the shares of the joint venture. As a result of the joint venture, the parties will be able to offer financial products in the United Kingdom, which neither offers at present. The five largest competitors in these segments are: First National Bank, HFC/Beneficial Bank, Lombard Direct, GE Capital and Capital Bank.

In view of the market position of the parties to the concentration, it appears that the operation will not have impact on competition in the common market and consequently does not create or strengthen a dominant position. For those reasons the Commission has decided to declare the operation compatible with the common market and with the EEA Agreement. □

JOINT VENTURES (FINANCIAL SERVICES): BNP / COFINOGA / CREATION

Subject: Joint ventures

Industry: Financial services; store cards

Parties: Banque Nationale de Paris SA
Groupe Cofinoga
Galeries Lafayette
Creation Financial Services Ltd
Sears Group

Source: Commission Statement IP/99/129, dated 23rd February 1999

(Note. Another case involving financial services has been approved by the Commission. In this instance, the turnover is not quantified; nor is the market share. The Commission attaches importance to the fact that the operation does not affect the financial services market in the United Kingdom.)

The Commission of the European Communities has authorized an operation whereby Banque Nationale de Paris SA (BNP) and Groupe Cofinoga, which is controlled by Galeries Lafayette, acquire joint control of Creation Financial Services Ltd (Creation) by way of purchase of shares from the Sears Group. The market shares increase through the joint venture is limited and does not therefore raise objections from a competitive point of view.

Cofinoga is the leading issuer of private label credit cards (or store cards) in France and has other significant business activities in the consumer credit sector involving personal loans and other financial products. It operates on a minor scale in Belgium, Italy, Spain, and Portugal. It has no presence or operations in the United Kingdom. Creation's principal business is the provision of consumer credit by means of storecards for customers of its retailer clients. Creation currently provides storecards services to the six Sears' clothing chains, to Selfridges and others.

Neither Cofinoga nor BNP has any operations in the UK consumer credit segment. In view of the market position of the parties to the concentration, it appears that the notified operation will have no impact on competition in the European Economic Area (EEA). Consequently, the Commission has decided not to oppose the operation and to declare it compatible with the common market and with the EEA agreement. □

The Court cases reported in this issue are taken from the web-site of the Court of Justice of the European Communities. They are not definitive texts and may be subject to linguistic and other amendments. They are freely available for public use.

TYING AGREEMENTS (BREWERIES): THE WHITBREAD CASE

Subject: Tying agreements
Exemption
Complaints

Industry: Breweries

Parties: Whitbread plc

Source: Commission Statement IP/99/104, dated 11th February 1999

(Note. This is, on the face of it, an unsatisfactory decision. If the full text of the decision, not yet available, modifies our view, we shall publish it in due course, or the relevant extracts from it. The Commission rightly treats the tying arrangements as restrictive of competition, rightly treats them as outside the scope of the block exemption regulation, but questionably regards exemption as justified. The Commission Statement makes no reference to the interests of consumers; this may be covered in the full text.)

The Commission has decided to grant a retroactive - back to 1990 - exemption to the standard pub leases used by Whitbread pic, the UK's third largest brewer. This conclusion follows an examination by the Commission services of the way in which Whitbread has operated the contractual agreements with its lessees. The Commission considers that the tied lessees can compete on a level playing field with their "free trading" competitors, and that an exemption from EC competition rules is justified.

The Commission's involvement in UK public houses leases stems from the fact that the Commission considers that the specification of the beer tie as it is commonly used in the UK does not fulfil the requirements of the so-called beer block exemption (Title 11 of Regulation No 1984/83). Due to the price differential between beer sold to tied and free-of-tie public houses, extensive litigation was initiated in the UK. This led UK brewers to notify their standard lease agreements to the Commission.

Whitbread notified its standard leases on 24 May 1994: it was the first case for which the Commission was able to make its preliminary assessment of the price differential and countervailing benefits. The Notice under Article 19(3), published in September 1997, was the first to announce that the Commission intended to exempt the notified leases, based upon a calculation of the net benefits of the standard lease for the whole estate. The Commission received 135 observations, 92 of which requested that their observations be also registered as a formal complaint against Whitbread.

The Whitbread standard lease is a typical UK property tie agreement. In other words, a company, in this case a national brewer, owns a retail outlet which it does not operate itself, but the company rents it out to an independent business man in exchange for a contractual rent and the obligation to buy all his beer, of certain specified types. from the landlord-brewer.

Such leases fall within the scope of Article 85(1) if they meet two conditions set down in the *Delimitis* judgment (Case C-234/89, *Stergios Delimitis v. Henninger Brau*):
(a) if the national on-trade beer market is foreclosed and
(b) if the agreements of the brewer in question contribute significantly to that foreclosure.

The Commission considers that the UK on-trade beer market is foreclosed in view of the totality of on-trade beer throughput covered by the property tied, managed houses and loan tied outlets of all the brewers operating in the UK and the beer which non-brewing pub companies are obliged to buy from local brewers, and also other factors relating to the opportunities for access to, and the competitive forces on, the market.

The Commission also considers that Whitbread's tied network, which consists of Whitbread's property tied, managed houses and loan tied outlets, plus, in principle, the beer which its wholesale partners such as non-brewing pub companies are under an obligation to buy, contributes significantly to that foreclosure, as it accounted for 7.6% of volume-throughput in 1990/91 and 6.1% in 1996/97. In contrast, the tied leases of small and regional brewers fall outside the scope of EC competition rules as they do not significantly contribute to the foreclosure of the UK on-trade beer market: see the Greene King / Roberts case, 1998. The analysis can also be applied to non-brewing pub companies supplied by more than one brewer.

The Commission has found that, on average, the lessees which are tied to Whitbread pay more for their beer purchases than individual operators who buy the same beer from the same brewer (so-called free traders). However, Whitbread lessees benefit, inter alia, from lower rents, professional assistance, capital investment and bulk purchasing rebates which are not readily available to these free traders and which compensate more or less for the price differential.

Moreover, the Commission considers that the specification of tie by type enables a more practical operation of beer supply arrangements in the UK than the specification provided for in the beer block exemption. The specification of tie by type makes it easier to introduce the brands of foreign or new brewers to Whitbread's price lists. This is important in view of the high percentage of all beer sold in the UK as draught beer in public houses and the difficulties faced by foreign and new brewers to penetrate the UK market independently.

The Commission has therefore decided to grant an individual exemption to the standard leases of Whitbread. This exemption will be limited. The Commission has decided to let the exemption take effect from I January, 1990, the date of the first introduction of the standard Whitbread agreements until 31 December 2008, to enable Whitbread to base its decisions to invest in its estate with a reasonable level of legal security.

As the decision also addresses the complaints made by lessees it also constitutes a rejection of these complaints and therefore the remaining complainants will shortly receive a copy of the decision. □

TARIFFS (AIRPORTS): PORTUGUESE AND FINNISH AIRPORTS CASE

Subject: Tariffs
Discounts
Price differentiation
Abuse of dominant position

Industry: Airports

Parties: Aeroportos e Navegacao Aerea-Empresa Publica (ANA)
Ilmailulaitos Luftvartsferket (CAA)

Source: Commission Statement IP/99/101, dated 10 February 1999

(Note. As the Commission reminds us in the report which follows, the Court of Justice has held that airports may constitute a substantial part of the common market, that they are therefore subject to the provisions of Article 86 of the EC Treaty and that Article 86 prohibits the application of dissimilar conditions to equivalent transactions with other trading parties. It follows that where airports pursue a policy of price differentiation according to the origin of flights, they run the risk of infringing the rules on the abuse of a dominant position. We have carried reports in earlier issues on the problems involved with the Brussels, Paris and Frankfurt airports; according to the Commission, the determination of the problems involving the Portuguese and Finnish airports substantially completes the process throughout the European Union.)

Commission demand

The Commission has called on Portugal to bring to an end the system of discounts and differentiated landing charges linked to the origin of flights in operation at the airports of Lisbon, Oporto and Faro. It has also asked the Finnish civil aviation authority to bring to an end the system of differentiated landing charges by flight origin in operation at the airports of Helsinki, Vaasa, Turku, Pori and Tampere. Article 86 of the EC Treaty prohibits airport authorities from discriminating between different airlines as regards equivalent services, without any objective justification. Aircraft handling services are identical, regardless of whether the aircraft is the first or the hundredth flight by a particular airline and irrespective of the airport of origin, be it another Portuguese or Finnish airport or an airport in any other Member State.

Finnish airports

As regards the Finnish airports, domestic flights benefit from a discount of 60% as compared with intra-Community flights, for no objective reason. The airports administrator, Ilmailulaitos Luftvartsferket (the Finnish Civil Aviation Administration, or CAA) has been unable to demonstrate that a cost differential exists between the two types of flight. In any event, even if the costs for certain intra-Community flights really were different from those incurred for certain domestic routes, the CAA has admitted that the difference bears no relation to the discounts.

Portuguese airports

This Decision concerns the charges levied for services, such as the maintenance and operation of runways, and approach control, provided by the Portuguese airports administrator Aeroportos e Navegacao Aerea-Empresa Publica (ANA). The Commission is calling for two elements of the charges structure applied by ANA to be abolished: the 50% discount on landing charges for domestic flights compared with intra-Community services, and the volume-based discount ranging between 7% and 32%, depending on the number of monthly landings. As in the Finnish case, discrimination between domestic flights and other flights has the effect of artificially modifying the cost structure of certain airlines, without any objective justification. Nor have the Portuguese authorities provided any justification for the existence of the frequency-based discounts.

Additional information

Airport authorities hold a monopoly position. The European Court of Justice has, in several judgments, held that a port or an airport does indeed constitute a substantial part of the common market, to which, therefore, Article 86 of the EC Treaty is applicable. The Court has also explicitly condemned the practice of applying dissimilar conditions to equivalent transactions with other trading parties. The Portuguese and Finnish cases follow a general investigation by the Commission into discounts and differentiation of landing charges, launched in the wake of the Commission Decision of 28 June 1995 concerning Brussels-Zaventem airport.

These two cases round off Commission competition policy as regards airports. Following the decision on Frankfurt airport regarding access to the market for ground-handling services, and the decision on the Paris airports regarding the commercial policy of airports, the issue at stake here is the cost of access to airport facilities and, more particularly, non-discrimination in the setting of such costs. This issue was dealt with in an initial Decision on the airport at Zaventem. This has now been supplemented by the two new decisions concerning the differentiation of landing charges according to origin of flight (i.e. domestic or non-domestic). The discounts of 50% and 60% respectively for domestic flights granted in Portuguese and Finnish airports are completely at odds with the principle of a single market for transport. In the case of the Portuguese airports, the system was established by virtue of a state measure, and the Commission decision in this case was therefore adopted under Articles 90 and 86 of the Treaty. As regards the Finnish airports, the system is based on an autonomous measure taken by the CAA. The Commission decision in this case was adopted under Article 86 of the EC Treaty. As it is the first decision dealing with the cost of access to airport facilities under Article 86 of the EC Treaty and in view of the fact that, since the case was opened, CAA has dismantled part of the system of discounts and reduced the gap between charges for domestic flights and those for intra-Community flights, the Commission has not imposed a fine. Commission competition policy on airports is now clear and well-established. In order to avoid significant fines when the Commission is next called upon to deal with any cases in this area, the other airports in the Community should adopt pricing policies in line with these rulings. □

CONCENTRATIONS: THE MOLLER CASE

Subject: Concentrations
Fines

Industry: Implications for all industries

Parties: AP Moller

Source: Commission Statement IP/99/100, dated 10th February 1999

(Note. This second case involving a fine for failing to notify a concentration - the first being the Samsung case - emphasises the Commission's readiness to impose penalties in these circumstances.)

The Commission has decided to impose a total fine of € 219,000 on the Danish company AP Moller for failing to notify, and for putting into effect, three concentrations. In its decision the Commission has taken into account in particular the fact that both infringements lasted for a significant period, and that AP Moller should have been aware of its obligation to notify the respective transactions under the Merger Regulation. This is only the second time that the Commission has imposed a fine under the Merger Regulation since 1990.

The three transactions in question had previously been cleared by the Commission in accordance with the Merger Regulation. However, in its decisions the Commission noted that the transactions had been concluded and put into effect several months before they were notified and that it would therefore have to consider a possible application of Article 14 of the Merger Regulation. On completing its investigation, the Commission confirmed that AP Moller had clearly breached its obligation to notify the transactions in due time as well as its obligation not to implement them without the Commission's authorisation. The infringements lasted for a significant period of time. The relatively moderate amount of the fine can be explained mainly by the fact that AP Moller (i) recognised the breach; (ii) did no damage to competition; (iii) voluntarily informed the Commission of its failure to notify the transactions in question before the Commission discovered the infringements itself, and (iv) infringed its obligations at a time when the Commission had not yet adopted its first decision imposing fines under the Merger Regulation (that is, in the Samsung/AST case).

The Commission attaches great importance to the obligation of prior notification of concentrations which fall within the scope of the Merger Regulation. This requirement prevents companies from implementing a concentration before the Commission takes a final decision, thereby avoiding irreparable and permanent harm to competition. Indeed, the effectiveness of the merger control provisions would otherwise be undermined. Therefore, the Merger Regulation explicitly provides that fines can be imposed in cases where companies do not respect EU rules on notification of mergers and acquisitions, and the Commission will fully apply such measures where appropriate. □

ACQUISITIONS (RETAIL FOOD): THE REWE / MEINL CASE

Subject: Acquisitions

Industry: Retail food
(Implications for other industries)

Parties: Julius Meinl AG
Rewe-Zentralfinanz eG and Rewe Zentral AG

Source: Commission Statement IP/99/83, dated February 3rd, 1999

(Note. In many concentration cases, the parties secure Commission approval by some kind of divestiture of their interests, to ensure fair competition. In the present case, there is an element of divestiture; but it is more like a re-shuffling of the interests in such a way as to balance the various retail outlets among the retail competitors.)

Following a four-month in-depth investigation, the Commission decided to approve the Rewe / Meinl merger following significant changes proposed by the parties. The merger as originally notified included the acquisition of sole control of Julius Meinl AG (Meinl) by Rewe-Zentralfinanz eG and Rewe ZentralAG (Rewe). To avoid a prohibition decision, the parties proposed to limit their operation to the acquisition of 162 Meinl outlets by Rewe. On the basis of the modified operation Meinl will continue to be active in Austria. The Commission had come to the conclusion that the concentration would create a dominant position on the Austrian food retail market and would also create or strengthen dominant positions on nine Austrian procurement markets for daily consumer goods. To eliminate the competitive concerns Rewe and Meinl committed themselves to limiting the operation to the acquisition of 117 Meinl outlets outside Eastern Austria (that is, Vienna, Lower Austria and Northern Burgenland) and of 45 Meinl outlets in the whole of Austria which will be converted into drugstores. The Commission came to the conclusion that this commitment would remedy the competition concerns on the Austrian food retail and procurement markets and therefore approved the operation.

Rewe is the leading food retailer in Germany. In Austria, Rewe has traded since 1996 through its BML ("Billa") subsidiary. Billa operates a food retail chain including hypermarkets (Merkur), supermarkets (Billa), smaller self-service shops (Emma) and discounters (Mondo) as well as a drugstore chain (Bipa). Billa already is the leading food retailer in Austria. Meinl is an Austrian food retail chain which operates hypermarkets (PamPam), supermarkets (Julius Meinl and Meinl Gourmet) and discounters (Jeee). Not involved in this operation are Meinl Bank AG, Julius Meinl International AG, which is engaged in food retail outside of Austria, and Meinl Austria Industrie GmbH, which comprises the group's production business. The proposed concentration affects the food retail market and several procurement markets for daily consumer goods in Austria. Rewe/Billa is already the leading operator on the Austrian food retail market. Through the proposed concentration its market share would increase from 30% to at least 37% while its closest

competitor (Spar) has a market share of 26%. Furthermore, Rewe/Billa already has specific strengths as compared to its competitors such as in particular its market leadership in the key region of Eastern Austria, the best-developed chain of highly-productive large outlets, a strong position in urban centres and the advantage of a centralised structure.

Through the proposed concentration Rewe/Billa would, in addition to increasing its market share, further strengthen these specific competitive advantages. The proposed concentration would also further increase the existing high entry barriers to the Austrian food retail market. Therefore, the Commission concluded that the proposed concentration would have created a dominant position in the Austrian food retail market. The supply side in the Austrian procurement markets is much less concentrated than the demand side. This is particularly true for the food retail market channel, which is by far the most important one for food suppliers. The Commission's investigation established that after the concentration suppliers on the largest number of markets defined would depend on sales to Rewe/Billa/Meinl for an average of 29% of their turnover. For some product groups the degree of dependency would even be significantly higher. Other structural competitive advantages of Rewe/Billa, such as the centralised buying structure and the strong position in Eastern Austria, add to this high degree of dependency. The proposed concentration would therefore also have created dominant positions on several procurement markets.

In the course of the proceedings the parties committed themselves to limiting the operation to the acquisition of 137 Meinl outlets outside Eastern Austria, of which 20 will be converted into Bipa-drugstores, and to the acquisition of 25 outlets in Eastern Austria, all of which Rewe will also convert into Bipa-drugstores. Meinl will continue to run its remaining Eastern Austrian outlets as supermarkets and as hypermarkets. As a result of this commitment Rewe/Billa will acquire 34% of Meinl's food retail activities in terms of turnover. This will considerably limit the addition of market shares on the Austrian retail market, since the increase will be around 2.5% instead of 7% based on the concentration as originally notified. Given that none of the outlets acquired in Eastern Austria will be run as food retail stores, Rewe/Billa will not further strengthen its existing strong position in this key region. Meinl will remain active as an actual competitor there. Furthermore, Meinl will be able to invest the proceeds of the sale of its Western Austrian outlets into its Eastern Austrian business, thus improving its competitive situation in this region. Reducing Rewe/Billa's accrued market share in the retail market will also reduce the concentration's bearing on the dependency of suppliers in the procurement markets. Indeed, the demand potential added through the modified concentration will no longer have a significant impact on Rewe/Billa's position on the procurement markets. Finally, Rewe/Billa will not increase its strong position in Eastern Austria. Moreover, Meinl will remain active on the procurement markets as an alternative customer for suppliers, in particular because of its strong presence in the area of Vienna. For the above reasons, the Commission has concluded that the parties' commitments will prevent the creation of a dominant position on the Austrian retail market as well as the creation or strengthening of dominant positions on nine Austrian procurement markets for daily consumer goods and has therefore approved the concentration.

JOINT VENTURES (FERRIES): THE P & O / STENA CASE

Subject: Joint ventures

Industry: Ferry services

Parties: P & O
Stena

Source: Commission Statement IP/99/56, dated 28th January 1999

(Note. There is some irony in the fact that a year ago the Commission fined P & O, Stena and others for concerted practices in price-fixing - see the report in our April, 1998, issue on page 80 - while it is now sanctioning a cooperative joint venture between the two principal parties. An interesting reason for the Commission's approval is its belief that the combined ferry service and the Channel Tunnel service will compete with one another and not "act in parallel to raise prices". We shall see. Meanwhile, the Commission has wisely chosen to limit the duration of its approval, so that it can re-examine the situation in two years' time.)

The Commission has approved the joint venture between P & O and Stena operating cross-Channel ferry services. P & O and Stena have combined their respective ferry operations in a joint venture company, P & O Stena Line. The Commission's decision exempts the joint venture from the prohibition of anti-competitive agreements set out in Article 85(1) of the EC Treaty for the period ending on 9 March 2001.

On 31 October 1996, P & O and Stena notified their proposal to the Commission for an exemption under Article 85(3) of the EC Treaty. Following the publication of a summary of the proposal on 13 March 1997 in the Official Journal of the European Communities, the Commission on I0 June 1997 sent the parties a letter of serious doubts setting out reasons why it was continuing its investigation into the proposal. On 6 February 1998, the Commission published a notice in the Official Journal indicating its intention to exempt the joint venture.

The joint venture started operations on 10 March 1998. It operates a service between Dover and Calais, as well as P & O's former freight-only service on the Dover/Zeebrugge route, and Stena's former service on the Newhaven/Dieppe route.

The overall benefits to consumers of the creation of the joint venture arise even if, as it recently announced, it stops operating its Newhaven/Dieppe service. In this context, the Commission notes that the economic impact of the closure on the local economies at both ends of the route will be lessened by a new ferry service to be started on the route by another ferry operator from April and initially for the 1999 summer season.

In its letter of serious doubts the Commission set out its concern that the

creation of the joint venture could lead to a duopolistic market structure conducive to parallel behaviour of the joint venture and Eurotunnel on the short sea crossing tourist market. After further investigation, the Commission concluded that the characteristics of the market were such that the joint venture and Eurotunnel could be expected to compete with each other rather than to act in parallel to raise prices.

The case also posed difficulties because of uncertainties as to the future developments in market for cross-Channel ferry services, including the effects of the ending of duty free concessions in mid-1999. It is in view of these uncertainties that the Commission has decided to limit the duration of the exemption to three years from the date of implementation of the agreement, that is, until 9 March 2001. This will enable the Commission to re-examine the impact of the joint venture on the cross-Channel ferry market after the summer season in the year 2000.

The joint venture has also been approved under national merger control rules in France and in the United Kingdom. □

State aid to film production in the Netherlands

The Commission has decided not to raise any objections to aid of 6.275m ECUs to be granted to film production over a five-year period by the Dutch Government via a Mez-Stichting foundation which will administer a public shareholding in an operational company Film Investors Netherlands BV. It considers that the aid scheme does not affect trading conditions and competition to an extent contrary to the common interest. The project follows an integrated approach comprising a financing mechanism and tax measures, both of which contain aid elements. The tax measures are intended to promote film production in the Netherlands by attracting risk capital. The Ministry for Economic Affairs is setting up a Mez-Stichting foundation to administer a public shareholding in an operational company Film Investors Netherlands BV (Fine BV). The sum of 6.275m ECUs will be a one-off investment in this financing structure.

Fine BV will be accessible to any private producers or investors, including those from abroad, provided that they are taxable in the Netherlands. The aim of the Dutch authorities is to retain the shareholding for no more than five years. Within that time, the structure should become financially autonomous and profitable. In order to be eligible for financing, productions should have a net yield of around 15%. Fine BV's role would be restricted to that of a minority partner. Subsequent investments by the foundation would have to be financed exclusively out of the profits generated by previous productions. The Commission has decided not to raise any objections to the aid to be granted by the Dutch Government to film production since, in its view, the aid is compatible with Article 92(3)(d) of the EC Treaty. This was a provision introduced by the Treaty on European Union. Source: Commission Statement IP/98/1028.

ACQUISITIONS (ELECTRICITY): THE EdF / LE CASE

Subject: Acquisitions

Industry: Electricity supply
(Some implications for other industries)

Parties: Electricite de France
London Electricity

Source: Commission Statement IP/99/49, dated 27th January 1999

(Note. In approving this acquisition, the Commission took into account that the interests of small consumers would be protected by the existence, at least in the near future, of national rules giving them a free choice of supplier. In other words, consumers will not be protected by the EC rules on competition as such but by the national rules on electricity supply. This may prove adequate for consumer protection, but does call in question the extent to which the EC rules are applied with consumers' interests in mind. By the same token, the Commission refused to refer the case back to the UK authorities, saying in effect that UK rules on electricity supply met the UK interest and that it was up to the Commission to take the decision on the issue of EC rules on competition. The Commission is probably right; but the case is not entirely satisfactory.)

After investigation under the Merger Regulation the Commission has cleared the acquisition of London Electricity by Electricite de France (EdF). EdF is a French wholly State-owned group, whose principal activity is the generation, transmission, distribution and supply of electricity in France. It also supplies a small part of United Kingdom (UK) demand for electricity, through the France / UK interconnector cable. London Electricity (LE) distributes and supplies electricity in England and Wales, principally in the London area. It is one of the twelve Regional Electricity Companies (RECs) operating in England and Wales.

The Commission found that the operation would not materially affect competition. The parties' activities overlapped only to a very small extent in generation, where EdF supplies less than 6% of UK demand, via the interconnector, and LE accounts for less than 0.5% of demand. Several other generators (such as National Power, Powergen and British Energy) were found to have substantially larger shares. Nor was the vertical integration between EdF as a generator and LE as a distributor and supplier likely to lead to anti-competitive effects. The Commission also took note of certain regulatory measures which had been agreed between the parties and the sectoral regulator for the UK's liberalised and privatised electricity industry, the Director General of Electricity Supply (DGES).

As well as the horizontal overlaps mentioned above, the Commission also examined the possibility that the vertical integration of the two firms might lead to adverse effects on competition, particularly for smaller customers in the

London area, where LE was dominant. Larger customers in the UK have for some time now been able to source their electricity needs from any of the various competing suppliers active in the market, instead of being tied to a single monopoly supplier for their region. The UK is in the process of extending this freedom to all customers, and will have completed this action by I June 1999. The Commission's examination took account, among other things, of the existing framework of sectoral regulation of the electricity industry in the UK, which includes the setting by the DGES of maximum prices for supplies to small customers, and found no grounds for concluding that anti-competitive effects were likely to arise from the vertical integration aspects of the merger.

At the same time, the Commission decided on requests from the UK authorities for the case to be referred back to them for examination under national competition law (Article 9 of the Merger Regulation), and for the recognition of certain public interest matters as "legitimate interests" not falling within the scope of European Community control under the Merger Regulation (Article 21.3 of the Merger Regulation). Both requests were made in the context of the system for the regulation of the electricity industry in the UK.

Briefly, the UK authorities were concerned that the DGES should remain able to take certain measures to ensure regulatory transparency and protect consumers and other small customers, in particular, from any adverse effects that might arise from the vertical integration between EdF and LE. These measures would, broadly:

- prevent internal trading between the generation and supply businesses involved;

- prevent the construction or acquisition of "embedded" generation plant without prior consent of the DGES;

- secure a regulatory "ring fence" around the electricity supply business of LE and the placing of generation outside it.

The Commission noted that these regulatory measures were similar to those which have been applied by the UK authorities in a number of previous cases in the sector which fell to be examined under national, rather than EU, merger control law. It also noted that the notifying party had reached agreement with the DGES on these modifications.

After examining the two requests, the Commission found that since, on the information available, the operation was not likely to lead to any adverse effects on competition, the criteria laid down in the Merger Regulation for a case to be referred back to the national authority were not met.

Moreover, the measures communicated to the Commission amounted to ongoing regulatory activity under the UK's existing system. Such activity was not precluded by the Regulation, so it was unnecessary for the Commission to recognize a "legitimate interest" in respect of them before they could be taken. Accordingly, the Commission has declared the operation compatible with the common market. □

STATE AIDS (AIRLINES): THE ADL CASE

Subject: State aids
Admissibility (of action)
Trade associations

Industry: Airlines
(Implications for many other industries)

Parties: Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen, representing:
- Aero Lloyd Flugreisen GmbH & Co Luftverkehrs KG
- Air Berlin GmbH & Co Luftverkehrs KG
- Condor Flugdienst GmbH
- Germania Fluggesellschaft mbH
- Hapag-Lloyd Fluggesellschaft mbH
- LTU Lufttransport Unternehmen GmbH & Co KG

Hapag-Lloyd Fluggesellschaft mbH
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities in Case T-86/96 (*Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen et al v Commission of the European Communities*), dated 11 February 1999, as summarised in WP 5/99

(Note. On two counts, this case represents a warning to those making a claim in an action before the Court of Justice under Article 173 of the EC Treaty that they may find it difficult to prove the "direct and individual concern". First, the individual company - in this case, Hapag Lloyd, which sued in its own name as well as in the name of the trade association to which it belonged, - was unable to show that the Commission's decision to prohibit the continuance of a state aid designed to help purchasers of new aircraft was of direct and individual concern to it, since all prospective purchasers were affected. Second, a trade association, though it might represent all or most potential purchasers under the state aid scheme, was not itself a party to which the Decision was of direct and individual concern. So both the action by the individual corporation and the action by the trade association representing various corporations were held to be inadmissible. The position of trade associations is discussed at some length in the full version of the judgment, which is at present available only in French. The text of Article 173, paragraph 4, of the EC Treaty is set out at the end of this report.)

Origin of the proceedings

By application lodged at the Court Registry on 31 May 1996, the applicants brought an action for annulment of Commission Decision 96/369, of 13 March 1996, concerning a state aid in the German airline sector in the form of a depreciation facility. By a separate document lodged on 16 September 1996, the Commission raised an objection of inadmissibility against this action.

Admissibility

The Commission argues that the action is inadmissible because the applicants are not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 173 of the Treaty.

According to the applicants, the locus standi of the applicant association Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen (ADL) must be distinguished from that of the applicant undertaking Hapag-Lloyd Fluggesellschaft mbH (HLF).

Findings of the Court

It is necessary to examine, first, the locus standi of HLF and, second, that of ADL.

Whether the action brought by HLF is admissible depends on whether the contested decision, which is addressed to Germany, is of direct and individual concern to HLF. In the present case, in prohibiting the extension of Paragraph 82f of the EStDV from 1 January 1995 to 31 December 1999, the contested decision affects the position of any natural or legal person acquiring a new aircraft registered in Germany and used commercially for the international transport of goods or persons or for other service activities performed outside Germany. Because it prohibits the extension of tax provisions having general application, the contested decision, although addressed to a Member State, appears, vis-a-vis the potential beneficiaries of those provisions, to be a measure of general application covering situations which are determined objectively and entailing legal effects for a class of persons envisaged in a general and abstract manner. HLF cannot therefore claim that the advantage of which the contested decision deprives it is individual in nature. Moreover, the fact that HLF is an interested third party within the meaning of Article 93(2) of the Treaty cannot confer on it locus standi entitling it to bring an action against the contested decision.

A natural or legal person may be individually concerned by reason of its status as an interested third party only by a Commission decision refusing to open the examination stage provided for by Article 93(2) of the Treaty. In such a case, it can ensure that its procedural guarantees are complied with only if it is entitled to challenge that decision before the Community judicature. However, where, as in the present case, the Commission adopted its decision at the end of the examination stage, interested third parties did in fact avail of their procedural guarantees, so that they can no longer be regarded, by virtue of that status alone, as being individually concerned by that decision.

As for HLF's participation in the procedure under Article 93(2) of the Treaty, this circumstance of itself does not suffice to distinguish it individually as it would the person to whom the contested decision is addressed. It follows that HLF has failed to establish attributes peculiar to it or that it is in a special situation, which distinguishes it from any other potential beneficiary of the depreciation treatment introduced by Paragraph 82f of the EStDV.

It is established case-law that an association formed to further the collective interests of a category of persons cannot be considered to be individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty by a measure affecting the general interests of that category. (The Court referred to Cases C-321/95P, *Greenpeace Council et al v Commission*; C-409/96P, *Sveriges Betodlares et al v Commission*; T-447 to 9/93, *AITEC et al v Commission*; and C-313/90, *CIRFS et al v Commission*.)

According to that case-law, in the absence of special circumstances such as the role which it could have played in the procedure leading to the adoption of the measure in question, such an association is not entitled to bring an action for annulment where its members may not do so individually. In the present case, it has already been held that HLF, which is a member of ADL, was not individually concerned by the contested decision. Moreover, ADL has failed to furnish any evidence to support its contention that its other members are in a position to bring an admissible action.

It is thus necessary to examine whether it can justify its locus standi by virtue of special circumstances. Four of the points put forward in this connection simply show that ADL intervened with the Commission for the purpose of defending the collective interests of its members. They cannot therefore establish that ADL has specific locus standi in its own right to bring an action against the contested decision.

So far as its status as interlocutor of the German Government is concerned, it is clear from the documents submitted that ADL was requested by the Ministry of Transport to attend three meetings in order to exchange information and to define a common course of conduct vis-a-vis the Commission. Attendance at such meetings cannot confer on ADL the status of negotiator. ADL did not, in the present case, negotiate and sign any agreement establishing or extending the tax provisions challenged by the Commission, and is not required, in order to give effect to the contested decision, to initiate fresh negotiations or conclude a new agreement concerning those provisions. Similarly, ADL did not play any role in the restructuring of the air-transport sector by negotiating, with the Commission, the establishment, extension and adaptation of constraints on State aid in that sector. In those circumstances, the action must also be declared inadmissible in so far as ADL is concerned. To hold ADL's action admissible in the circumstance of this case, in which its members are not individually concerned and in which ADL has no locus standi of its own, would have the consequence of allowing natural and legal persons to circumvent the fourth paragraph of Article 173 of the Treaty by means of a collective action.

The Court therefore dismissed the action as inadmissible and ordered the applicants jointly and severally to pay the costs. □

Article 173, paragraph 4, of the EC Treaty reads as follows: Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former.

COMPLAINTS (COURIER SERVICES): THE UFEX CASE

Subject: Complaints
Community interest
Annulment

Industry: Courier services; parcel delivery services
(Some implications for all industries)

Parties: Union Francaise de l'Express (UFEX, formerly SFEI)
DHL Internationa;
Service CRIE
Commission of the European Communities
May Courier

Source: Judgment of the Court of Justice of the European Communities in Case C-119/97P *(Union Francaise de l'Express et al v Commission et al)*, dated 4 March 1999.

(Note. This case has two aspects which are of great interest and importance. The first is factual and makes entertaining reading: it concerns the terms in which the Commission dismisses a complaint that it has not acted to deal with alleged infringements of Articles 85 and 86 of the EC Treaty. The Commission's letter is set out in Article 9 of the Court's judgment and given in full in the report below. It is hard to read the letter without feeling how cavalier, how literally dismissive and how thoroughly self-satisfied the officials responsible for the letter seem to be; and this is discreetly reflected in the Court's view that the Commission's duties go beyond its own appreciation in that letter. This leads to the second point, which is one of law. It is set out in paragraphs 94 to 96 of the judgment and - to paraphrase it - makes clear that, if anti-competitive effects continue after the practices which caused them have ceased, the Commission still has power to act and cannot plead that it is unnecessary to do so unless it has examined their extent. The Court therefore annulled the decision of the Court of First Instance upholding the Commission's decision. It should just be added that the judgment of the Court is not, at the time of writing, available in English - a lamentable state of affairs - and has therefore been translated by ourselves. The warning about the status of judgments issued on the Internet applies a fortiori.)

Judgment

1 On 22 March 1997, the Union Francaise de l'Express (UFEX), formerly the Syndicat Francais de l'Express International (SFEI), lodged an appeal against the judgment of the Court of First Instance dated 15 January 1997 (Case T-77/95: *SFEI et al v Commission*), in which the Court had rejected their action for the annulment of the Commission Decision, dated 30 December 1994, rejecting their complaint under Article 86 of the EC Treaty.

2 On 21 December 1990, SFEI, DHL International, Service CRIE and May Courier had lodged a complaint with the Commission claiming that there had been an infringement of Article 86 of the EC Treaty by La Poste, the French

postal service.

3 With regard to Article 86, the complainants had criticised the logistical and commercial help which La Poste had given to its subsidiary, the Societe Francaise de Messageries Internationales (SFMI, which became GDEW France in 1992), which was operating in the international express courier sector. The abuse alleged against La Poste consisted of benefiting SFMI's infrastructure on conditions which were abnormally advantageous so as to extend to the connected market of international express courier service the dominant position which it already held in the market for a basic postal service.

4 In a letter dated 10 March 1992, the Commission informed the complainants that their complaint had been rejected.

5 In its judgment (in Case T-36/92: *SFEI et al v Commission*), dated 30 November 1992, the Court of First Instance had declared inadmissible the action for annulment which had been taken by [the four complainants]. However, the judgment was annulled by the Court of Justice (in Case C-39/93:*SFEI et al v Commission*), dated 16 June 1994, which had referred the case back to the Court of First Instance.

6 In a letter dated 4 August 1994, the Commission withdrew the Decision which had been the subject of proceedings in the Court of First Instance. In a judgment dated 3 October 1994, (Case T-36/92: *SFEI et al v Commission*), the Court of First Instance therefore decided that there was no case on which it needed to act.

7 On 29 August, 1994, SFEI called on the Commission to take action, in accordance with Article 175 of the EC Treaty.

8 On 28 October 1994, the Commission addressed a letter to SFEI, on the basis of Article 6 of Commission Regulation 99/63, ... informing SFEI of its intention to reject the complaint.

9 After receiving the observations of SFEI, the Commission adopted the disputed Decision, which was in the following terms:

> The Commission refers to your complaint lodged with my services on 21 December 1990 to which was annexed a copy of a separate complaint lodged on 20 December 1990 with the French Competition Council. The two complaints concerned the express international services of the French postal administration.
>
> On 28 October 1994, the services of the Commission addressed a letter to you on the basis of Article 6 of Regulation 99/63, in which it was indicated that the elements contained in the initial proceedings did not allow the Commission to give a favourable response to your complaint about those aspects regarding Article 86 of the Treaty, and in which you were invited to submit your comments thereon.
>
> In your comments of 28 November last, you maintained your position on the abuse of the dominant position of the French Post Office and of SFMI.

On this basis and in the light of your comments, the Commission informs you in this letter of its final position on your complaint of 21 December 1990 concerning the opening of proceedings under Article 86.

The Commission considers, for the detailed reasons set out in its letter of 28 October last, that in the case in question there are insufficient elements proving that the alleged infringements continued to enable a favourable response to be given to your request. In this connection, your comments of 28 November last contain no new factor enabling the Commission to modify that conclusion, which is supported by the considerations set out below.

In the first place, the Green Paper relating to postal services in the single market, as well as the guidelines for the development of the Community's postal services, deal with among other things the main problems raised in SFEI's complaint. Although these documents contain propositions only *de lege ferenda*, they do have to be taken into account in evaluating the appropriateness of the use which it is making of its limited resources and particularly whether its services are employed in developing a regulatory framework for the future of the market for postal services rather than enquiring on its own initiative into alleged infringements brought to its notice.

In the second place, an enquiry conducted under Regulation 4064/89 concerning the joint venture (GD Net) created by TNT, La Poste and four other postal administrations, led to the Commission's publication of its Decision (IV.M.102) on 2 December 1991. In this decision, the Commission decided not to oppose the notified concentration and to declare it compatible with the common market. It attached particular importance to the evidence that, as regards the joint venture, "the proposed operation neither creates no strengthens a dominant position which would significantly restrict competition in the common market or in a significant part of it".

Several essential points in the Decision have a bearing on the impact which the former SFMI could have on competition: the exclusive access by SFMI to the facilities of La Poste were reduced within its field of activities and would come to an end within two years of the merger, thus being held at arm's length from any activity subordinate to those of La Poste. Any right of access granted by La Poste to SFMI would be offered, on the same terms, to any other express operator with which La Poste signed a contract.

This outcome combines in their entirety the solutions which you proposed for the future in your letter of 21 December 1990. You had insisted that SFMI should be required to pay for the services of the PTT at the same rate as if it bought them from a private company, assuming that SFMI chose to continue to use those services; that "there should be an end to all forms of aid and discrimination"; and that SFMI should adjust its prices according to the real value of the services offered by La Poste".

From then on, it is clear that the present and future competition

problems in the international express services were resolved in an adequate manner by the measures already taken by the Commission.

If you consider that the conditions imposed on La Poste in case IV.M.102 were not observed, particularly in the areas of transport and publicity, it is up to you to provide proof - so far as possible - and in that case to lodge a complaint on the basis of Article 3(2) of Regulation 17/62. However, statements "that at present the tariffs (leaving aside possible rebates) offered by SFMI remain substantially lower than those of members of SFEI" (page 3 of your letter of 28 November) and that "Chronopost uses P & T trucks as an aid to publicity" (statement annexed to your letter) must be supported by factual material to justify an enquiry by the Commission's services.

Action taken by the Commission under Article 86 of the Treaty aims to maintain genuine competition in the internal market. In the case of the Community market for express international services, taking into account the significant development set out in detail above, it would be necessary to provide new information about possible infringements of Article 86 to enable the Commission to justify its intention to investigate those activities.

Moreover, the Commission considers that it is not required to investigate possible infringements of the rules on competition which have taken place in the past if the sole object or effect of the investigation is to serve the individual interests of the parties. The Commission sees no point in undertaking an investigation under Article 86 of the Treaty.

For the reasons set out above, I am informing you that your complaint is rejected.

[Paragraphs 10 to 36 describe the application to the Court of First Instance to have the Commission's Decision annulled and the judgment of the Court of First Instance rejecting the application.]

The Appeal

37 In support of their appeal, the applicants rely on twelve pleas.

38 The first plea is that the Court of First Instance had distorted the contested Decision.

39 The second plea is that the Court of First Instance committed an error of law in stating that the Commission could base the contested Decision on another case concerning different parties, having a partly different subject and a separate legal basis.

40 The third and subsidiary plea is that the Court of First Instance, in proceeding in this way, introduced a contradiction in the reasoning of the disputed judgment.

41 The fourth plea is that the disputed judgment lacks a basis in law.

42 The fifth plea is that the Court of First Instance could not legally infer from the items in the file that the Commission could validly determine that the infringements had come to an end.

43 The sixth plea is that the Court of First Instance had misinterpreted the rules of law regarding the Community interest.

44 The seventh plea is that the Court of First Instance disregarded Article 86, read in conjunction with Articles 3(g), 89 and 155 of the EC Treaty.

45 The eighth plea is that the Court of First Instance misinterpreted the principles of equality, legal certainty and protection of legitimate expectations.

46 The ninth plea is that the Court of First Instance disregarded the notion of "comparable situations" in the context of its examination of the reasoning on the principle of equality.

47 The tenth plea is that the Court of First Instance misinterpreted the principle of good administration.

48 The eleventh plea is that the Court of First Instance failed to respond to a fundamental point in the applicants' case concerning the basis on which the Commission had rejected their complaint.

49 Finally, the Court of First Instance had committed errors of law in the application of the concept of misuse of powers in that it had not examined all the items referred to.

[Paragraphs 50 to 63 are concerned with the first three pleas, which were more or less summarily rejected. The fourth plea was also rejected; but the reasons were given in a little more detail.]

64 In their fourth plea, the applicants criticise the Court of First Instance for not having proceeded with the research necessary to establish whether the Commission was in a position to determine the alleged absence of subsidies passing between La Poste and its subsidiary.

65 It was their particular complaint not have taken into account a series of factors which they had brought to the Court's attention and which supported their thesis about the continuance of subsidies after 1991, such as the absence of any analytical accountability on the part of La Poste, the use of the latter's graphic mark by SFMI and an economic study submitted by the French government in the case which gave rise to the judgment dated 11 July 1996 (Case C-39/94, *SFEI et al v Commission*).

66 In this respect it is sufficient to recall that the appreciation by the Court of First Instance of evidence presented to it does not constitute a question of law subject to control by the Court in the context of an appeal, except where the evidence is distorted or where the material inexactitude of the Court's decisions results from documents in the file (see Case C-53/92, *Hilti v Commission*, paragraph 42; Case C-136/92, *Commission v Brazzelli Lualdi*, paragraphs 48 and 49; and Cases 241-2/91P, *ITP v Commission*, paragraph 67; see also the judgment of 17 September 1996 in Case 19/95P, *San Marco v*

Commission, paragraph 39). None of these supports the applicants.

67 The fourth plea is therefore inadmissible.

[In paragraphs 68 to 82, the fifth, sixth and eighth pleas are rejected.]

The seventh plea

83 In their seventh plea the applicants argue that the concept accepted by the Court of First Instance of the Commission's role in the context of enforcing Article 86 of the Treaty was mistaken. Contrary to what is said in paragraphs 56 to 58 of the contested judgment, the cessation of anti-competitive practices would not suffice to re-establish an acceptable competitive situation given the persistence of structural disequilibria which those practices had created. Intervention by the Commission in these circumstances would have been more consistent with its mission, which is to ensure the establishment and maintenance of a system of undistorted competition in the common market.

84 The applicants add that, in the case in point, the subsidies made over by La Poste to its subsidiary SFMI-Chronopost enabled the latter to enter the market for international express courier services and to acquire for itself in only two years a leading position. Even assuming that these subsidies had ceased, they would have altered the competitive situation and would necessarily have continued to distort it.

85 Determination of the infringements in question would have allowed the Commission to include in the contested Decision all measures tending towards the re-establishment of a healthy competitive situation.

86 It has to be remembered at the outset that, according to the settled case-law of the Court, the Commission is required to examine carefully the whole of the factual and legal matters brought to its attention by complainants (see Case 210/81, *Demo-Studio Schmidt v Commission*, paragraph 19; Case 298/83, *CICCE v Commission*, paragraph 18; and Cases 142 and 156/84, *BAT and Reynolds v Commission*, paragraph 20). Moreover, complainants are legally bound by the outcome of their complaint by a Commission Decision, which is capable of being the subject of jurisdictional proceedings (see Case C-282/95, *Guerin Automobiles v Commission*, point 36).

87 At the same time, Article 3 of Regulation 17/62 does not confer on the author of a demand submitted by virtue of that Article the right to insist on a definitive Commission Decision as to the existence or non-existence of the alleged infringement (see Case 125/78, *GEMA v Commission*, paras 17 and 18).

88 Indeed, the Commission, empowered under Article 89(1) of the EC Treaty to ensure the application of the principles laid down in Articles 85 and 86, is required to define and put in place the orientation of the Community's competition policy (see Case C-234/89, *Delimitis*, paragraph 44). To carry out this task efficiently, it has the right to award different degrees of priority to the complaints brought to its attention.

89 The Commission's discretionary power to this end is, however, not without limits.

90 On the one hand, the Commission is under an obligation to explain its reasons when it refuses to pursue the examination of a complaint.

91 Since the reasoning must be sufficiently precise and detailed to put the Court of First Instance in a position to exercise effective control of the Commission's exercise of its discretionary power to define its priorities (see Case C-19/93, Rendo et al v Commission, paragraph 27), that institution is required to set out the matters of fact on which depend the justification of the Decision and the legal considerations which led it to take that Decision (see *BAT and Reynolds v Commission*, cited above, paragraph 72; and Cases 43 and 63/82, *VBVB and VBBB v Commission*, paragraph 22).

92 On the other hand, the Commission cannot, when allocating priorities in the treatment of complaints referred to it, consider as excluded *a priori* from its field of activity certain situations which relate to the duties imposed on it by the Treaty.

93 In this context, the Commission is required to make an appreciation in each case of the gravity of the alleged restrictions on competition and the persistence of their effects. This obligations implies in particular that it should take account of the duration and importance of the infringements complained about, as well as their effects on the competitive situation within the Community.

94 When the anti-competitive effects continue after the cessation of the practices which caused them, the Commission therefore remains competent, by virtue of Articles 2, 3(g) and 86 of the Treaty, to act with a view to their elimination or neutralisation (see, in this respect, Case 6/72, *Europemballage and Continental Can v Commission*, paragraphs 24 and 25).

95 The Commission cannot therefore, solely on the fact that the practices alleged to be contrary to the Treaty have ceased, base its Decision on refusing to pursue, in the absence of a Community interest, a complaint against those practices, unless it has ascertained that the anti-competitive effects were not continuing and, as the case may be, that the gravity of the alleged restrictions of competition or the continuance of their effects were not of such a nature as to give the complaint a Community interest.

96 In view of the foregoing considerations, it has to be concluded that the Court of First Instance, in ruling, without making sure that it had ascertained that the anti-competitive effects were not continuing and, as the case may be, that the gravity of the alleged restrictions of competition or the continuance of their effects were not of such a nature as to give the complaint a Community interest, that the investigation of a complaint about past infringements was not one of the duties imposed on the Commission by the Treaty, but merely served to give the complainants evidence of a fault, so that they could obtain damages and interest before the national courts, represented an erroneous conception of the Commission's rile in the competition field.

97 The seventh plea is therefore well founded.

[Paragraphs 98 to 106 cover the ninth, tenth and eleventh pleas, which were rejected.]

107 In their twelfth plea, the applicants criticise the Court of First Instance for having ruled on the plea based on a misuse of power without having examined all the items of evidence on which they had relied.

108 Thus, in paragraph 117 of the contested judgment, the Court of First Instance had taken the view that a letter addressed by Sir Leon Brittan [then the Member of the Commission responsible for competition policy] to the President of the Commission did not constitute adequate evidence of a misuse of power because it had not been produced in the file and there was no way in which its existence could be confirmed.

109 When the applicants had expressly requested the Court of First Instance to order the production of the letter in question, the Court committed an error of law in as to the application of the principle of misuse of powers in ruling, without giving an opportunity to examine it, that it did not constitute adequate evidence.

110 It has to be pointed out that the Court of First Instance could not reject the applicants' request for production of a document apparently relevant to the outcome of the litigation for reasons that the document was not part of the file and that there was no way to confirm its existence.

111 Indeed, it is clear from paragraph 113 of the contested judgment that applicants had indicated the author, the addressee and the date of the letter whose production they had requested. Given these factors, the Court of First Instance could not simply reject the parties' allegations in the absence of proof when it was up to the Court, in meeting the applicants' request, to order the production of items bearing on the uncertainty which could exist as to the basis of these allegations or to explain the reasons for which such a document, in all the circumstances and whatever its contents, could not be relevant to the outcome of the case.

112 The twelfth plea is therefore well founded.

113 In view of the foregoing, it is appropriate to declare the seventh and twelfth pleas well founded and, consequently, to annul the contested judgment.

Reference back to the Court of First Instance

114 Under the first paragraph of Article 54 of the Statute of the Court of Justice, when the appeal is sustained, the Court of Justice annuls the decision of the Court of First Instance. It may also pass final judgment on the case itself, when there has been a judgment in the case or to refer the case back to the Court of First Instance for judgment. As there has not yet been a judgment in the case, it is referred back to the Court of First Instance.

Court's Ruling

The Court rules:

1 The judgment of the Court of First Instance of 15 January 1997 (Case T-77/95, *SFEI et al v Commission*) is annulled.

2 The case is referred back to the Court of First Instance.

3 Costs are reserved. □