COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Financial Services

In recent years increasing numbers of competition cases being handled by the Commission of the European Communities concern banking and other financial services; and although, as we point out in our comment on the *Bagnasco* case, reported on page 31 of this issue, banking does in some respects enjoy special treatment, the activities of banks and other financial and credit institutions are coming under increasingly close attention. The case reported in this issue is mainly concerned with the use by banks of "standard conditions". Cases which we expect to report in our next issue are mainly concerned with the mergers, acquisitions and joint ventures taking place in this field and with the problems of banks which receive, or are the instruments for disbursing, various kinds of state aid.

Car Manufacturers

At the time of writing, two reports have appeared in the press of new developments in the car manufacturing industry. One is the proposed acquisition by the recently merged Chrysler-Mercedes Benz group of the Japanese manufacturer Nissan. If this goes through, it will reflect precisely the type of global operation which, in terms of world trade, is so much preferable to the policy of encouraging the creation of "local giants". (Before World War I, some economists believed that progress in industrial integration at the international level was a guarantee that individual states could never make war. They were wrong, but only because they were nearly a century ahead of their time.) The second report in the press concerns the plans by Ford to take over the car manufacturing division of Volvo, leaving the truck manufacturing division to carry on as before. If these two proposals go ahead, they would appear on the face of it to require clearance by their respective authorities. The outcome remains to be seen.

Commission Documents

In the last two or three months a spate of documents issued by the Commission has reflected a deplorable tendency to resort to brutally fractured English whose meaning is often obscured by sheer misuse. Sometimes this is due to poor translation: it is possible to detect the literal transposition of French or German words and sentence structures. But in all cases the real culprit is the invention of bureaucratic jargon which is probably as painful to a literate Frenchman or German as it is to a literate Englishman. Where the text is not sacred, as in a Commission press statement, we do our best, against heavy odds, to turn it into a readable form; but sometimes we have to reproduce the actual words of a document or risk changing its meaning. It is a pity that a document as important as the proposals on vertical restraints, on page 42 of this issue, is written in such execrable prose. In a Union which has eleven official languages, not everyone is going to be pleased: but the Commission is urged to improve its respect for the English language versions of its texts. □

SPORTS: COMMISSION STATEMENT

Subject: Abuse of dominant position
Restrictive agreements
Exemption
De minimis rules
Relevant markets

Industry: Sports

Source: Commission Statement IP/99/133, dated February 24th, 1999

(Note. According to the Court of Justice in the Bosman judgment, referred to in the Commission's Statement, "sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the [EC] Treaty": Case C-415/93, Union Royale Belge des Societes de Football Association v Bosman, paragraph 73. This case was mainly concerned with the free movement of workers; but the Commission rightly takes the view that, if the sport in question is an economic activity, then it should on the face of it be subject to the competition rules as well. The Statement does not add a great deal to what was already known; but it is interesting to see that the Commission has a surprisingly large number of sports cases to be dealt with under the rules on competition.)

Commission policy on sport and competition

The Member of the Commission responsible for competition policy has informed the Commission about his services' preliminary conclusions on the application to sports of the European Community's competition rules. These conclusions do not prejudge the Commission's current examination of sixty-odd pending cases, in whose context the Commission intends to address certain sensitive issues. Final conclusions will not he drawn up until after finalising a process of discussions with the sports world. The Commission's aim is to guarantee the consistency of its various actions and policies which have an impact on the sport, including the guarantee of free movement of persons within the European Union, the defence of competition and cultural and audio-visual policies.

European institutions do not have any general authority as regards sport. It is primarily for sporting organisations and for Member States to take responsibility for sporting matters. However, on the one hand the international dimension of sporting phenomena increasingly limits the ability of these authorities to cope with the problems arising. On the other hand, the European Union could in certain cases, without going beyond the bounds of its existing legal powers, contribute to solving some of these problems.

The European Council requests a dialogue with the sports world

The Vienna European Council asked the Commission to submit reports to the Helsinki European Council both on safeguarding current sport structures and on

doping issues. The latter were the subject of an informal meeting of sport ministers in Bonn on January 18th, 1999. This initiative follows the declaration on sport annexed to the Treaty of Amsterdam, which stresses the need to take account of the impact of Commission policies on the world of sport and asks the Commission to consult sporting organisations before taking action likely to affect them.

The four main topics which the Commission will address are:
(I) the application of European Community competition rules (see below);
(ii) the European sport model, an issue closely linked to the relationship between sport and television;
(iii) sport as an instrument of social and employment policies; and
(iv) the fight against doping.

These issues will be on the agenda of four seminars of the European Sports Conference scheduled to take place in Olympia in May 1999. The seminar's results will enable the Commission to prepare more fully the report requested by the European Council. The seminars are also a means to comply with the Amsterdam declaration, which encouraged the Commission to hear sporting organisations before taking any decisions which would concern them.

Among its legal powers, the Commission attaches special importance to the fundamental freedoms under the Treaty establishing the European Community (in particular freedom of movement as enshrined in Article 48 of the Treaty), to competition policy (Articles 85 and 86 of the Treaty), and to the audio-visual sector.

Free movement of persons

The Court of Justice's Bosman judgement confirmed that the free movement principle applies to a professional player who is a national of a European Economic Area (EEA) Member State and whose contract comes to an end (Article 48 of the Treaty). The Court held that an obligation, imposed by regulations falling within the scope of Article 48, to pay transfer fees, was unlawful if applied to international transfers inside the EEA of a professional player or a player becoming a professional of EEA Member State nationality and at the end of his/her contract. Likewise, it is unlawful to limit the number of players from other EEA Member States who can play inter-club competitions.

In the Commission's opinion, the principles and legitimate objectives recognised in this judgement, that is, the balance between large and small clubs and the fostering and training of young players, can also be ensured applying the competition rules of the Treaty.

Competition

The Commission notes that sport comprises two levels of activity:
(I) the sporting activity itself, which fulfils a social, integrating and cultural role which must be preserved and to which in theory the competition rules of the EC Treaty do not apply; and
(ii) a series of economic activities generated by the sporting activity, to which

the competition rules of the EC Treaty apply, albeit taking into account the specific requirements of this sector.
The interdependence and indeed the overlap between these two levels render the application of competition rules more complex.

Sport also has features, in particular the interdependence of competitors and the need to guarantee the uncertainty of results of competitions, which could justify sporting organisations implementing a specific framework, in particular on the markets for the production and the sale of sport events.

However, these specific features do not warrant an automatic exemption from the EC Treaty competition rules of any economic activities generated by sport, due in particular to the increasing economic importance of such activities. The general principles which are at the core of any application of EC Treaty competition rules to economic activities generated by the sport are:

(1) safeguarding the general interest in relation to the protection of private interests;

(2) restricting Commission action solely to cases which are of Community interest;

(3) applying the so-called *de minimis rules*, according to which agreements of minor importance do not significantly affect trade between Member States;

(4) applying the 4 authorisation criteria laid down in Article 85(3) of the EC Treaty, but also refusing an exemption to any agreements which infringe other provisions of the EC Treaty and in particular freedom of movement for sportsmen;

(5) defining reference markets pursuant to the applicable general rules but adapted to the features specific to each sport.

The Commission's decision-making and administrative practice in this field is not yet sufficiently developed to answer all the important issues on the agenda. These issues concern in particular the principle of organising sports on a national territorial basis, the creation of new sporting organisations, club relocation, the ban on organising competitions outside a given territory, the regulatory role of sporting event organisers, the transfer systems applying to team game players, nationality clauses, selection criteria for athletes, the agreements governing ticket sales for the 1998 football world cup, broadcasting rights, sponsorship and the prohibition for clubs belonging to one and the same owner to take part in the same competitions.

In the light of these issues, the Commission has taken note of certain preliminary conclusions on the application of the competition rules in the sport sector by debating examples of sporting organisations' practices grouped in four categories:

(1) rules to which, in principle, Article 85(1) of the EC Treaty does not

apply, given that such rules are inherent to sport and/or necessary for its organisation;

(2) rules which are, in principle, prohibited if they have a significant effect on trade between Member States;

(3) rules which are restrictive of competition but which in principle qualify for an exemption, in particular rules which do not affect a sportsman's' freedom of movement inside the European Union and whose aim is to maintain the balance between clubs in an proportioned way by preserving both a certain equality of opportunities and the uncertainty of results and by encouraging recruitment and training of young players; and

(4) rules which are abusive of dominant position under Article 86 of the EC Treaty.

It is not the power to regulate a given sporting activity as such which might constitute an abuse but rather the way in which a given sporting organisation exercises such power. A sporting organisation would infringe Article 86 of the EC Treaty if it used its regulatory power to exclude from the market, without an objective reason, any competing organiser or indeed any market player who, even meeting justified quality or safety standards, failed not obtain from said sporting organisation a certificate of quality or of product safety. □

Dagenham Motors / Polar Motors / Jardine Motors

The Commission of the European Communities has given the green light to the acquisition of Dagenham Motors Group plc by Polar Motors Group Ltd, both companies being active in the retailing and servicing of Ford motor vehicles in the United Kingdom. Polar Motor Group Ltd is jointly controlled by Ford Motor Company Ltd and Jardine Motors Group plc, the latter being active in motor vehicle retailing in the UK. The acquisition affects the retailing and servicing of Ford motor vehicles in the UK. The Commission found that the combined market shares of the parties to the concentration on both the passenger car and commercial vehicle markets in the UK were not such as to raise competition concerns. Moreover, Dagenham Motor Group's retail network was already reserved exclusively for Ford and will remain so after the acquisition, so no additional foreclosure effects are created. Therefore the Commission has decided not to oppose the concentration. (Source: Commission Statement IP/99/135, dated 25th February 1999.)

Competition and Intellectual Property Rights

Readers are reminded that, starting on 1 March, 1999, an Internet Conference on this subject is being held, at no charge to participants. Check in at the following web-site: *www.ipconference.com*

STANDARDISATION (BANKING): THE BAGNASCO CASE

Subject: Standardisation
Abuse of dominant position
Concerted practices
Trade between Member States

Industry: Banking
(Some implications for other industries)

Parties: Carlo Bagnasco and others
Banca Popolare di Novara
Cassa di Risparmio di Genova e Imperia
Commission of the European Communities (Intervening)
The Italian Government (Intervening)

Source: Judgment of the Court of Justice of the European Communities in Joined Cases C-215/96 and C-216/96 (*Carlo Bagnasco et al v Banca Popolare di Novara soc. coop. arl and Cassa di Risparmio di Genova e Imperia SpA*), dated 21 January 1999

(Note. Although it would be going too far to say that banking receives special treatment from the authorities under the EC rules on competition, there are certain respects in which banking is a special case. For example, one of the few exceptions to the principle that price-fixing is an unacceptable restriction of competition was made in the Eurocheques case, on the reasonable enough basis that a standard charge was essential to make the whole system work at all. By the same token, a certain degree of standardisation is necessary for the conduct of bank business; and the present case turns on the validity of the standard banking conditions operating in Italy. These conditions could easily have found the participating banks involved in prohibited concerted practices or in an abuse of a dominant position. However, the case brought by a borrower, Bagnasco, and his guarantors failed on two counts: first, because the standard conditions were not inherently unreasonable; and, second, because there was insufficient evidence of their substantially affecting trade between Member States.)

Judgment

1 By two orders of 15 May 1996, received at the Court Registry on 21 June 1996, the Tribunale di Genova (Genoa District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Articles 85 and 86 of that Treaty concerning certain standard bank conditions ('Norme Bancarie Uniforme', hereinafter "NBU" or "standard bank conditions") which the Associazione Bancaria Italiana (Italian Banking Association, hereinafter "the ABI") imposes on its members when contracts are concluded for current-account credit facilities and the provision of general guarantees.

2 Those questions were raised in two actions brought by Carlo Bagnasco and Others against Banca Popolare di Novara sec. coop. arl (hereinafter "BPN")

and by Carlo Bagnasco and Others against Cassa di Risparmio di Genova e Imperia SpA (hereinafter "Carige") concerning the repayment of loans granted by those banking establishments.

3 The plaintiffs in the main proceedings, Mr Bagnasco, as principal debtor, and his sureties, as joint and several debtors, appealed against two provisionally enforceable orders made by the President of the Tribunale di Genova on I June 1992 on application by BPN and Carige, requiring them to pay to BPN the sum of ITL 222 440 332, made up as follows ...

4 The orders addressed to the plaintiffs in the main proceedings, who are joint and several debtors, were obtained by reason of the specific guarantee which they had given for the unpaid promissory notes and of the 'general guarantee' *(fidejussione omnibus)* which they had signed for up to ITL 300 000 000 (Case C-215/96) and ITL 195 000 000 (Case C-216/96).

5 The plaintiffs have asked the national court to declare the orders at issue invalid or unenforceable or - in the alternative - to determine precisely what amount is owed to the two banks. They plead, in particular, that the NBU, on which the claims of the defendants in the main proceedings are based, are incompatible with Articles 85 and 86 of the Treaty.

6 According to the Tribunale di Genova, it is undisputed that Articles 85 and 86 of the Treaty confer rights on individuals which they may rely on before national courts. Similarly, the NBU imposed by the ABI on its member banks and applied as such by all Italian banks in their dealings with customers constitute a concerted practice and, in particular, a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty.

7 The national court considers, however, that the compatibility with Articles 85 and 86 of the Treaty of certain clauses of the contracts for the opening of a current-account credit facility and the provision of general guarantees is questionable.

8 As regards the contracts for current-account credit facilities, that court states that the contracts concluded by Mr Bagnasco with BPN provide, in paragraph 2, for the application of annual interest rates of 17% and 17.5%, plus commission of 0.125% on the highest debit balance for each calendar quarter or part thereof.

9 Paragraph 2 also provides that "interest rates ... may be increased or decreased by reason of changes occurring on the money market". Paragraph 12 of the contract provides that "the banks shall be entitled at any time to vary interest rates ... by means of a notice displayed at their premises or in such manner as they consider most appropriate". Clauses of that kind, included in the ABI standard contract, also appear in Mr Bagnasco's contract with Carige.

10 According to the national court, only the initial determination of the debit rate reflects direct negotiation between the parties: any further increase in the interest rate following changes in the money market is unforeseeable or, at least, difficult for average customers of the bank to foresee. Thus, the bank's

right to decide when both changes are to be made to that rate and what procedure is to be followed for notifying them to customers is strengthened.

[Paragraph 11 gives details of the clauses.]

12. With respect to all those clauses, the national court considers that a decision from the Court of Justice is needed as regards the sums which BPN and Carige consider are due to them under the current-account contracts concluded by Mr Bagnasco and under the guarantee in respect of those sums given by the other plaintiffs in the main proceedings. It therefore stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

> (1) Whether the Norme Bancarie Uniforme (Standard Bank Conditions) laid down by the ABI for its members in relation to contracts for the opening of current-account credit facilities - since they are laid down and applied in a uniform and binding manner by the banks belonging to the ABI - are compatible with Article 85 of the Treaty, where they make the credit facility subject to conditions for determination of an interest rate which is not previously determined and is not determinable by the customer, and they are liable adversely to affect trade between the Member States and have as their object and effect the prevention, restriction or distortion of competition within the common market;
>
> (2) What effects any finding of incompatibility of the kind referred to in Question 1 may have on the corresponding clauses of the contracts for the opening of a current-account credit facility, concluded "downstream" by member banks with individual customers, since, as a group, the banks belonging to the ABI may be regarded, within the meaning and for the purposes of Article 86 of the Treaty, as holding a joint dominant position in the national credit market, whose specific application of the rules in question (in connection with determination of the interest payable on the loan) is regarded as an abuse;
>
> (3) Whether the NBU laid down by the ABI for its members in relation to the "general" guarantee covering the credit facility - since they are applied in a uniform and binding manner by the member banks - are, taken as a whole, compatible with Article 85 of the Treaty, as regards the individual clauses discussed in the grounds of this order, in that they are liable adversely to affect trade between the Member States and have as their object and effect the prevention, restriction or distortion of competition within the common market;
>
> (4) What effects any finding of incompatibility of the kind referred to in Question 3 may have on the corresponding clauses of the "general" guarantee agreements and on the agreements themselves concluded "downstream" by individual banks, since, as a group, the banks belonging to the ABI may be regarded, within the meaning and for the purposes of Article 86 of the Treaty, as holding a joint dominant position in the national credit market, whose specific application of the rules in question

is regarded as an abuse.

13 It must first be noted that, after the contracts at issue were concluded, the Italian rules applicable to the opening of current-account credit facilities and the provision of general guarantees were amended. Law No 154/92 changed the rules on general guarantees by requiring banks to determine in advance the maximum amount secured by the guarantee.

14 Furthermore, by memorandum dated 22 February 1993 the ABI decided to notify its standard banking conditions to the Commission for examination by the latter for the purposes of Article 85 of the Treaty. The same documents were forwarded to the Banca d'Italia (hereinafter "the Bank of Italy") as the competent national authority for application of the rules on protection of competition and of the market in the credit sector.

15 By letter of 7 July 1993 the Commission informed the Bank of Italy that it had decided to examine only 3 of the 26 agreements notified. Without expressing a view as to the existence or otherwise of any restriction of competition, the Commission stated that the majority of the agreements, including those for the opening of current-account credit facilities and the provision of general guarantees, did not appear capable of affecting, entirely or appreciably, trade between Member States. In that connection, it pointed out, first, that the banking services in question are limited to national territory and involve economic activities which, under contractual provisions or by reason of their very nature, must be carried on only within Italian territory or have a very limited influence on trade between Member States and, second, that the participation of subsidiaries or branches of non-Italian financial establishments is limited. It therefore stated that it did not intend undertaking any further examination of those agreements, taking the view that Article 85 of the Treaty was not applicable to them.

16 The only agreements which the Commission considered as falling within its terms of reference deal with the conditions for current accounts incorporating a foreign-currency credit facility and with the conditions governing the collection or acceptance of negotiable instruments or letters of credit payable in Italy or abroad.

[Paragraphs 17 and 18 indicate the subsequent amendments of the standard conditions. The Court noted in paragraph 18: "Those amendments do not, however, operate retroactively so as to affect existing contracts."]

The admissibility of the reference for a preliminary ruling

19 The BPN submits, first, that the questions referred to the Court are not relevant to the decision to be given in the main proceedings. In its view, it is clear from the contractual documents and from the summary payment order that, as far as contracts granting credit facilities are concerned, the clauses and, therefore, the measures imposed by the ABI relate not to the interest rates which may be varied or are influenced by market conditions but rather to the rates agreed *a priori* on a fixed basis and that, as far as guarantees are concerned, the contract is one in which any clause liable to involve infringement of

Articles 85 and 86 of the Treaty is entirely irrelevant.

20 According to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court: see Case C-472/93 *(Spano and Others v Fiat Geotech and Fiat Hitachi)* paragraph 15, and Case C-373/95 *(Maso and Others v INPS and Italian Republic)*, paragraph 26. A request for a preliminary ruling may be rejected as inadmissible only where it is plain that the interpretation or the examination of the validity of a Community rule requested by the national court has no bearing on the actual facts or subject-matter of the case before the national court: see, in particular, Case C-472/93 *(Spano and Others)*, cited above, paragraph 15, and Case C-415/93 *(Union Royale Belge des Societes de Football Association and Others v Bosman and Others)*, paragraph 61.

21 In this case it need merely be observed that the contracts concluded by the parties to the main proceedings contain clauses relating to the NBU regarding which the national court has considered it necessary to seek from the Court of Justice guidance as to the interpretation of Community law in order to enable it to appraise their compatibility with Articles 85 and 86 of the Treaty.

22 In those circumstances, the objections raised by BPN regarding the admissibility of the questions submitted cannot be upheld and an answer must be given to those questions.

The first question

23 By its first question, the national court wishes essentially to ascertain whether the NBU, in so far as they allow banks, in contracts for current-account credit facilities, to change the interest rate at any time by reason of changes on the money market, and to do so by means of a notice displayed on their premises or in such manner as they consider most appropriate, have as their object or effect a restriction of competition or may affect trade between Member States within the meaning of Article 85(1) of the Treaty.

24 The plaintiffs in the main proceedings consider that a concerted practice exists in Italy for determination of the interest rates applied by banks to their debtors and that there are even agreements and/or concerted practices relating to the general conditions in contracts, drawn up within the ABI and set out in the NBU, which banks systematically include in the standard contracts which they offer to their customers. Under those clauses, the position of principal debtors and of guarantors, of any nationality, who are under an obligation to an Italian bank is weaker than that of any other debtors or guarantors dealing with a bank in another Member State.

25 Even the base rate is not the outcome of free negotiation between parties since the banks affiliated to the ABI are required to comply with the decisions of the cartel; the customer will not therefore find any significant differences

between the rates applied by the various credit establishments.

26 According to the plaintiffs in the main proceedings, the banks are also unilaterally empowered to change rates, prices and other conditions. The only protection available to the customer lies in cancellation of the contract. However, that possibility is purely hypothetical since it will be very difficult for the customer to find any credit establishment which applies different interest rates, precisely because the banks form a cartel. A customer who needs to open a current-account credit facility is therefore in a position of absolute subjection to the banks affiliated to the ABI.

27 The BPN contends that the view that its contracts are subject to constraints and obligations imposed by the ABI, such as the situation envisaged in the order for reference, has no basis in fact and is inconceivable. Moreover, an analysis of the relevant market - as regards both the product and the geographical area involved - shows that there is not a sufficiently large margin in the banking business for it to be possible to apply a uniform banking policy in such a way as to prevent, restrict or distort competition.

28 Carige submits that the rules applicable to interest rates which are not entirely determined or determinable are not incompatible with Article 85 of the Treaty in that they are not the result of agreements between undertakings which are liable appreciably to affect competition on the market in services involving transfers of capital.

29 The Italian Government observes that, by memorandum of 22 February 1993, the ABI notified to the Commission the circulars containing the NBU sent to its members so that the Commission could examine them in the light of Article 85 of the Treaty. The same documents were sent to the Bank of Italy, the competent national authority for application of the rules on protection of competition and of the market in the credit sector.

30 The Italian Government considers that the only agreements which the Commission regarded as falling within its terms of reference relate to the conditions for current accounts incorporating a cash credit facility, conditions for current accounts incorporating a credit facility in foreign currency and conditions governing services for collection or acceptance of negotiable instrlunents or letters of credit payable in Italy or abroad. Those agreements have no bearing on the present case.

31 According to the Commission, whilst it cannot be ruled out that the clauses in question might be restrictive of competition in so far as they involve some limitation of the contractual freedom of member banks of the ABI, those clauses are nevertheless not incompatible with Article 85 of the Treaty in the absence of any appreciable effect on trade between Member States.

32 It must be home in mind that, under Article 85(l) of the Treaty, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market are incompatible with the common market.

33 According to settled case-law of the Court, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute: see Case C-7/95 P *(Deere v Commission)*, paragraph 76, and Case C-8/95 P *(New Holland Ford v Commission)*, paragraph 90.

34 While Article 85(1) of the Treaty does not restrict such an assessment to actual effects alone, in so far as it must also take account of the agreement's potential effects on competition within the common market, an agreement will nevertheless fall outside the prohibition in Article 85 if it has only an insignificant effect on the market *(Deere v Commission*, cited above, paragraph 76, and *New Holland Ford v Commission*, cited above, paragraph 91).

35 In that connection, it must be stated that the opening of a current-account credit facility is a banking transaction which, by its nature, is linked with the right of the bank to change the agreed rate of interest by reference to factors such as, in particular, the conditions for re-financing of the loan by banks. Although that right means that the bank's customer runs the risk of paying more interest during the currency of the contract, it also offers a chance of lower interest. Since, as in this case, any variation of the interest rate depends on objective factors, such as changes occurring in the money market, a concerted practice which excludes the right to adopt a fixed interest rate cannot have an appreciable restrictive effect on competition.

36 As regards the clause under which banks notify changes in interest rates by means of a notice displayed in their premises or in such manner as they consider most appropriate, it need merely be pointed out that that clause does not prohibit the banks from arranging for a more appropriate means of notifying their customers.

37 The answer to the first question must therefore be that standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility, to change the interest rate at any time by reason of changes occurring in the money market, and to do so by means of a notice displayed on their premises or in such manner as they consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty.

The third question

38 By its third question, the national court seeks essentially to ascertain whether standard bank conditions relating to the provision of general guarantees required to secure the opening of a current-account credit facility, as described in paragraph 11 of this judgment, have as their object or effect, when taken together, a restriction of competition or whether they may affect trade between Member States within the meaning of Article 85(1) of the Treaty.

39 The plaintiffs in the main proceedings observe that a person who has given a guarantee to a bank operating in Italy is required, by virtue of Italian case-law, to pay all sums claimed by the bank in respect of both present and

future banking transactions carried out by the bank for the benefit of the principal debtor, whether they are habitual, incidental or occasional, even where those transactions involve, as a result of the discretion enjoyed by the bank, an unforeseeable increase in the customer's total indebtedness to that bank in the course of his relationship with it.

40 In support of that argument, the plaintiffs in the main proceedings refer to paragraph 7(5) of the guarantee contract, under which the commitment given remains wholly effective even if the principal obligation is invalid for any reason whatsoever, the guarantor being deemed, in the event of the principal obligation being declared void or annulled, to have given the commitment as if acting on his own account.

41 Carige submits, on the other hand, that the rules imposed by the ABI in relation to the general guarantee contract concluded to secure the opening of a credit facility are compatible with Article 85 of the Treaty since they are not liable appreciably to affect competition in the market by reason of the nature of the services provided.

42. The Commission emphasises that, according to the information at present available to it concerning cross-frontier supply of and demand for bank services in respect of current-account credit facilities and the provision of general guarantees, the services in question do not appear to be of decisive importance as regards access to the Italian financial market for banks from other Member States. Referring to the reasoning given in its letter of 7 July 1993, the Commission submits that the NBU on the basis of which the contracts at issue in the main proceedings were concluded do not fulfil one of the necessary conditions for the application of Article 85(1) of the Treaty, namely that of being liable appreciably to affect trade between Member States.

43 It must be noted, at the outset, that the provision of a guarantee is a traditional form of surety which may be used, in particular, to secure a current-account debit balance. Under Italian law, sureties are governed by specific rules in the Civil Code, from which derogations are available under certain conditions.

44 To the extent to which they lay down "rules concerning guarantees to secure banking transactions", by a way of derogation from the rules in the Civil Code, the NBU are intended to secure the claims of banks in the most effective manner.

45 On the other hand, since those rules are, according to the findings of the national court, binding on the members of the ABI, they limit the contractual freedom of the banks by preventing them from offering to customers who apply for a credit facility more favourable conditions for the associated guarantee contract. The latter, however, is merely ancillary to the principal contract, of which in practice it is usually a precondition: see Case C-45/96 *(Dietzinger)*, paragraph 18.

46 In those circumstances, rather than examining at the outset the question whether that limitation of contractual freedom involves appreciable effects on

competition, it is appropriate first to consider what effects clauses such as those contained in the general guarantee contracts at issue in the main proceedings might possibly have on trade between Member States.

47 In that regard, the Court has consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States: Case 42/84 (*Remia and Others v Commission*, paragraph 22). Accordingly, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive: Case C-250/92 (*Gottrup-Klim v Dansk Landbrugs Grovvareselskab*, paragraph 54).

48 It is also settled case-law that, while Article 85(1) of the Treaty does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect: Case C-219/95P (*Ferriere Nord v Commission*, paragraph 19).

49 In this case, as far as the effects of the rules on the provision of general guarantees on intra-Community trade are concerned, it is conceivable that the subsidiaries or branches of banks of other Member States which are established in Italy might be obliged, in order to benefit from the advantages of membership of the ABI, to apply the NBU and thus forgo the possibility of applying more favourable conditions. Similarly, having regard to the fact that the great majority of Italian banks are members of the ABI, customers wishing to conclude a contract for a current-account credit facility might find that their choice of bank was restricted where the conclusion of such a contract depended upon the provision of a surety governed by the NBU, to which, for the most part, no exceptions are possible.

50 It is true that, in principle, the answer to the question whether or not the conditions for the application of Article 85(1) of the Treaty are fulfilled depends on complex economic assessments which it is for the national court to undertake, if appropriate, in accordance with the criteria laid down by a the case-law of the Court of Justice. However, in certain circumstances, and having regard to the indications given by the Court, no such analysis appears necessary: see Case C-250/92 *Gottrup-Klim v Dansk Landbrugs Grovvareselskab*, cited above, paragraph 55). Such is the position in the present case.

51. It must be borne in mind that the Commission, when approached by the ABI concerning the compatibility of the clauses governing the provision of general guarantees in relation to Article 85 of the Treaty, found that the banking service in question involved economic activities which have a very limited impact on trade between Member States and that the participation of the subsidiaries or branches of non-Italian financial establishments was limited (see paragraph 15 of this judgment). Moreover, the Commission has made clear, in reply to a question put to it by the Court, that potential recourse to contracts

for credit facilities and contracts for the provision of general guarantees by the main customers of foreign banks, that is to say large undertakings and foreign economic operators, is not great and, in any event, is not a factor of decisive importance in the choice made by foreign banks as to whether or not to establish themselves in Italy, in so far as contracts of the kind at issue in the main proceedings are only rarely used by customers of that kind. The Commission's findings to that effect have not been called in question in the present proceedings.

52 Moreover, there is nothing else in the documents before the Court to justify the conclusion, with a sufficient degree of probability, that the reservations entertained by customers wishing to conclude a current-account credit facility contract regarding their choice of bank by reason of the existence of standard bank conditions relating to the provision of general guarantees is of such a kind as to have an appreciable effect on intra-Community trade.

53 The answer to the third question must therefore be that standard bank conditions relating to the provision of general guarantees to secure current-account credit facilities, which derogate from the general law concerning guarantees, such as the rules in the main proceedings, are not, taken as a whole, liable to affect trade between Member States within the meaning of Article 85(1) of the Treaty.

The second and fourth questions

54 By its second and fourth questions, the national court seeks first to ascertain whether the application of the NBU constitutes an abuse, as contemplated by Article 86 of the Treaty, of a collective dominant position by the banks belonging to the ABI. It then asks what effects any incompatibility of the NBU with Articles 85 and 86 of the Treaty might have on the corresponding clauses of the contracts concluded between banks and their customers.

55 The BPN does not see in what way the clauses in question might constitute a manifestation of a dominant position since the self-imposed limitation deriving from the ceiling on overdrafts and the clauses granting the sureties specific rights concerning cancellation, information, and other matters belies the hypothesis that clauses of uniform content or "concerted practices" are used to give effect to a contractual intent on the part of persons unconnected with the direct contractual relationship in question to limit or restrict freedom of competition.

56 The Commission states first, referring to the case-law of the Court: see Joined Cases C-140/94 to C-142/94 (*DIP and Others v Comune di Bassano del Grappa and Comune di Chioggia*, paragraphs 26 and 27), that the mere fact that the ABI's membership includes almost all Italian banks is not a sufficient reason to conclude that its members together hold a collective dominant position.

57 Nor, in its view, could it be contended, even if it were conceded that the member banks of the ABI together held a collective dominant position, that the conduct described by the national court constituted an abuse of that dominant

position.

58 It must be borne in mind that, under Article 86 of the Treaty, the abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is incompatible with the common market and is prohibited in so far as it may affect trade between Member States.

59 Without its being necessary to consider whether the banks which are members of the ABI hold a collective dominant position within the meaning of Article 86 of the Treaty, it need merely be stated that, since, as is clear from consideration of the first question, any change in the interest rate for a current-account credit facility depends on objective factors, such as changes occurring in the money market, that conduct cannot, in any circumstances, constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty.

60 As regards the NBU relating to the provision of general guarantees to secure the opening of a current-account credit facility, it is clear from consideration of the third question that the application of those NBU, taken as a whole, is not liable appreciably to affect trade between Member States.

61. In those circumstances, the answer to the second and fourth questions must be that the application of the said NBU does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.

62 In view of the answers given to the foregoing questions, it is unnecessary to answer the question concerning the effects which any incompatibility of the aforesaid NBU with Articles 85 and 86 of the Treaty might have on the corresponding clauses of the contracts concluded by banks with their customers.

[Paragraph 63 concerned the costs: these are to be determined by the national court.]

Court's ruling

The Court hereby rules:

1 Standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility, to change the interest rate at any time by reason of changes occurring in the money market, and to do so by means of a notice displayed on their premises or in such manner as they consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of Article 85(1) of the EC Treaty.

2 Standard bank conditions relating to the provision of general guarantees to secure current-account credit facilities, which derogate from the general law concerning guarantees, such as the rules in the main proceedings, are not, taken as a whole, liable to affect trade between Member States within the meaning of Article 85(1) of the EC Treaty.

3 The application of the above-mentioned standard bank conditions does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty. □

VERTICAL RESTRAINTS: COMMISSION COMMUNICATION

Subject: Vertical restraints
Block exemption

Industry: All industries

Source: Communication from the Commission on the application of the Community competition rules to vertical restraints; published in the Official Journal of the European Communities, C.365, 26.11.98

(Note. In our December, 1998, issue we reported on this Communication, commenting on its importance for the future of block exemption regulations, particularly in the field of distribution; and we reproduced Sections I and II of the Communication, with a promise to reproduce as much of the remainder as space permitted. In our view, what is important now is to have before us the Commission's policy proposals, which are set out in Section V, all of which, apart from the introductory paragraphs, repeating much of the material printed in December, is reproduced below. Sections III and IV of the Communication, on the "economics of verticals" and "market-share thresholds" have a great deal of economic interest. It is in fact the Commission's aim to reshape the law to reflect a more "economic based system". This will involve, among other things, a change in the principle enshrined in Regulation 17 of 1962, to the effect that the earliest date upon which an individual exemption can have effect, subject to certain limited exceptions, is the date of notification and not the date of the agreement. In the interests of legal certainty, and to avoid the use of procedural requirements as "strategic tools", instead of being used to promote competition, businesses need more latitude; and this is one of the objectives of the two proposed Council Regulations and the proposed Commission Regulation designed to give effect to the changes.)

SECTION I - INTRODUCTION [reproduced in our December issue]

SECTION II - SUMMARY OF REACTIONS TO THE GREEN PAPER [reproduced in our December issue]

SECTION III - ECONOMICS OF VERTICALS [omitted]

SECTION IV - MARKET-SHARE THRESHOLDS [omitted]

SECTION V - POLICY PROPOSAL [reproduced below]

SECTION VI - PROCEDURE [reproduced below]

1 Different Options [omitted]

2 The proposed new policy

As was explained in the introduction, future policy should avoid the three major shortcomings of current policy. The new policy should first and foremost

protect competition and market integration. It should also provide a reasonable level of legal certainty for business, result in acceptable enforcement costs for industry and the competition authorities and increase decentralisation.

In order to avoid the shortcomings and strike the right balance between these different objectives, a profound change of policy is necessary. The main characteristics of the proposed policy are the following.

First, the basis is one, very wide, Block-Exemption regulation ("the Block-Exemption") that covers all vertical restraints concerning intermediate and final goods and services, except for a limited number of hardcore restraints. This solves the shortcoming of block exemptions which are too narrow.

Second, it is based mainly on a black-clause approach, that is, defining what is not block-exempted instead of defining what is exempted. This removes the straitjacket effect.

Third, it makes use of market-share caps to link the exemption to market power. The issue of whether one or two market-share thresholds should be used has not yet been decided. A single-threshold system has advantages in terms of clarity and simplicity (In the course of consultation on this document a majority of the Member States expressed a preference for a single-threshold system.). A dual-threshold system allows an economically justified gradation in the treatment of vertical restraints reflecting differences in their likely anti-competitive effects. Below such thresholds it is assumed that vertical restraints have no significant net negative effects. This means that the agreements either fall outside Article 85(1) or, when falling within Article 85(1), with the exception of the hardcore restraints, may be block-exempted. The hardcore restraints are mainly related to resale price maintenance and to restrictions on resale which are deemed not to justify block-exemption in the light of the market integration objective.

Fourth, in the case of a single-threshold system the threshold would lie in the range of 25-35% market share, clearly below what is usually perceived as the level of dominance. In the case of a dual-threshold system the first and main market-share cap would be around 20%. Above the 20% threshold there is room to exempt certain vertical restraints up to a higher level of around 40%. Such an approach with market share(s) takes away the shortcoming of neglect of market power and, by eliminating the vast majority of notifications, probably 80 to 90% of all cases, it will allow the Commission and the national competition authorities to concentrate on the important cases.

Fifth, it will create a safe harbour to distinguish the agreements that are presumed to be legal from those which may require individual examination. Vertical restraints falling outside the safe harbour will not be presumed to be illegal but may need individual examination. In respect of agreements which fall outside the Block Exemption, the Commission will continue to bear the burden of proof that the agreement in question does infringe Article 85(1) and will have to examine whether the agreement does fulfil the conditions of Article 85(3). This is the normal situation for an agreement not covered by a block-exemption regulation. Above the threshold, three situations may arise:

negative clearance, individual exemption or prohibition if the conditions of Article 85(3) are not fulfilled. The proposed policy will provide for guidelines detailing the Commission's policy concerning individual negative clearance, exemption or prohibition above the market-share thresholds and possible withdrawal of the Block Exemption below the thresholds.

Sixth, there will be a number of flanking measures as outlined in the previous section. The most important one is the extension of Article 4(2) of Regulation 17 to all vertical distribution agreements. Taken together as a package with the other elements of the proposal (namely, the fact that this very wide Block - Exemption will cover many agreements that are not presently covered by a block exemption, the possible gradation in exemption, and guidelines), the overall level of legal certainty for industry will be improved.

Seventh, it will be compatible with improved decentralisation. National courts and national competition authorities will be able to apply the Block Exemption, and, with the help of guidelines, apply Article 85(1) above the market-share thresholds. Furthermore, if Article 85(1) is not applicable because there is no appreciable effect on trade between the Member States or on competition, the Block Exemption will not apply. It is also proposed that the national competition authorities, on the basis of clear and well specified criteria, would have the power to withdraw the benefit of the Block Exemption Regulation in respect of their territory.

This more economic approach is based upon the investigations made for the Green Paper, a careful analysis of all the comments received on the Green Paper, the Commission's experience in past vertical cases, Court judgments and study of the relevant economic and legal literature.

3 Specific points

The following specific points can be made about the proposed new policy.

The proposal will contain a list of hardcore restrictions that always fall outside the Block Exemption. This list will in any event include agreements concerning minimum and fixed resale prices and absolute territorial protection. In addition, the Commission proposes to protect the possibility of arbitrage by intermediate and final purchasers to a greater extent and therefore to blacklist more generally resale restrictions in so far as these restrictions result from factors under the control of the parties. The following may then be defined as hardcore restrictions that would fall outside the Block Exemption:

(a) fixed resale prices or minimum resale prices;

(b) maximum resale prices or recommended resale prices which in reality amount to fixed or minimum resale prices as a result of a pressure exercised by any of the parties;

(c) the prevention or restriction of active or passive resales, imports or exports to final or non-final buyers, other than (i) the restriction on active sales in the territory of an exclusive distributor, (ii) the restriction on active sales to

exclusively allocated customers, (iii) the restriction on members of a selective distribution system from selling to unauthorised distributors and (iv) the restriction on the buyer of intermediate goods and/or services from selling these to other direct or indirect buyers of the supplier;

(d) the prevention or restriction of cross-supplies between distributors at the same or different levels of distribution in an exclusive or selective distribution system or between distributors of these different systems of distribution: that is, exclusive or selective distribution combined with exclusive purchasing;

(e) the combination, at the same level of distribution, of selective distribution and exclusive distribution containing a prohibition or restriction on active selling;

(f) the combination, at the same level of distribution, of selective distribution and exclusive customer allocation;

(g) an obligation on the supplier of an intermediate good not to sell the same good as a repair or replacement good to the independent aftermarket.

Where a *single-threshold* system is chosen, all the non-hardcore vertical restraints are covered below this threshold.

Where a *dual-threshold* system is chosen, the non-hardcore vertical restraints including the more serious ones are subject to the first and main threshold of 20% market share. These include the restraints that lead to a form of exclusivity like exclusive supply, exclusive customer allocation and non-compete. As explained in section III, exclusive vertical restraints are in general more likely to have significant anti-competitive effects than non-exclusive restraints, while the latter may often achieve the same efficiencies. To the extent that selective distribution falls within Article 85(1), it is also subject to this threshold in view of its considerable potential to reduce both intra- and inter-brand competition. Tying also falls under this threshold. The first threshold covers all possible vertical restraints and combinations of vertical restraints unless otherwise stated.

Again assuming a dual-threshold system, the second threshold of 40% would cover vertical restraints which, on the basis of the economic thinking or past policy experience, lead to less serious restrictions of competition. First, one finds here the non-exclusive type of agreements such as quantity forcing on buyer or supplier. As they leave room for dealing with others, they are less serious than their exclusive counterparts. Two exclusive types of agreement are also subject to this threshold: (i) exclusive distribution, as it does not directly harm inter-brand competition and often has efficiencies, and (ii) exclusive purchasing, as it does not lead to foreclosure or a direct reduction of inter-brand competition. Lastly, this threshold would also apply to agreements between SMEs.

It is proposed to impose a duration limit on non-compete agreements in view of the possible serious foreclosure effects connected with non-compete obligations. The Commission is also considering imposing a duration limit for

exclusive purchasing combined with quantity forcing on the buyer. The Commission is further considering dispensing with the duration limits in the particular cases where the supplier owns the premises from which the buyer operates or in equivalent situations. The guidelines will take account of the particular relationship between long term investments and duration limits.

There are a number of vertical agreements that are generally considered or would in the future be considered to fall outside Article 85. These include qualitative selective distribution, service requirements and maximum and recommended resale prices if they do not amount to fixed RPM.

As was indicated at the end of Section III, the possible negative effects of vertical restraints are reinforced when a number of suppliers and their buyers practise a certain vertical restraint. These cumulative effects may be a problem in a number of sectors. Making a valid assessment of the effects of such a cumulation of vertical agreements may require a sector-wide investigation and overview. In general only a competition authority can be expected to gather such sector-wide information, as it may not be readily available to individual companies. It also seems fair to treat all companies the same if they add significantly to the total effect. Such cases of cumulative effect, where the individual suppliers are covered by the Block Exemption, will be addressed by withdrawal of the Block Exemption with effect for the future. It is proposed that not only the Commission but also the national competition authorities will have the power to withdraw the benefits of the Block Exemption.

The Commission will indicate when withdrawal is unlikely and when withdrawal is likely. It is proposed that withdrawal would be unlikely when less than a certain proportion of the market is foreclosed through similar agreements and would also be unlikely when the individual firm's market share is below a certain level.

According to the Commission's experience, the possible negative outcome resulting from the cumulative effect of the same type of vertical restraints are especially at issue in the field of selective distribution. To address this problem, it is proposed that the Block Exemption may be declared inapplicable to companies operating a selective distribution system on a market where more than two-thirds of the total sales are channeled through parallel networks of selective distribution. As the companies concerned may not be in possession of such a sector-wide information, it is proposed that this condition would not operate automatically. The future Block Exemption Regulation would provide that the Commission would, on its own initiative, establish that the aforesaid condition is fulfilled in respect of a specific market and fix a transition period at the expiry of which the Block Exemption would no longer be applicable to selective distribution agreements relating to that market. Such a transitional period should not be shorter than six months. The Commission will publish a decision to this effect in the *Official Journal of the European Communities*.

The choice has been made to propose one wide block exemption regulation instead of different regulations for specific forms of vertical restraints or sectors. It thus treats different forms of vertical restraints having similar effects in a similar way, preventing unjustified differentiation between forms or sectors. In

this way it is avoided, to the greatest extent possible, to have a policy bias in the choice companies make concerning their formats of distribution. The company's choice should be based on commercial merit and not on unjustified differences in exemptability. This has a number of consequences that are spelled out in the next points.

It is proposed to cover selective distribution in the Block Exemption regulation. Care has been taken to stay as close as possible to the current policy as formulated in past Commission decisions and Court judgments. This means that the supplier, in order to be covered by the Block Exemption, may not exclude *a priori* certain forms of distribution and may apply selective distribution only on condition that the nature of the good or service requires such a type of distribution and the selection criteria are implemented objectively and in a non-discriminatory manner. The supplier may also not specify the identity of competing brands to be sold by the authorised distributor.

Vertical agreements relating to the manufacture of goods, in particular when they involve the use of know-how or patents, are not covered. Licence agreements covered by Regulation (EEC) No 240/96 on the transfer of technology will be outside the scope of the future Block Exemption regulation.

The subject matter of the 1979 Notice on sub-contracting also remains outside the scope of the Block Exemption regulation. However, vertical agreements relating to the supply of goods, produced on the basis of specifications given by the buyer to the supplier, but not involving the use of know-how or patent rights of the buyer for the manufacture of these goods, will be covered.

As regards vertical agreements relating to the distribution or supply of goods or services, it is proposed that the Block Exemption regulation cover intellectual property rights to the extent that these do not relate to the manufacture of goods and are (i) indispensable for and complementary to those agreements which are exempted, and (ii) contain obligations which are not more restrictive of competition than those vertical restraints which are exempted under the draft Block Exemption Regulation. This relates to restrictions on the use and application of intellectual property rights in the context of vertical agreements covered by the future block exemption regulation.

Agreements where the buyer of software on-sells this software to the final consumer without obtaining any copyright over it are considered as agreements for the supply of goods for resale for the purposes of this Block Exemption. The treatment of software agreements beyond this requires further consideration.

Franchising, while being covered, will not be given any preferential treatment in the Block Exemption regulation as it is a combination of vertical restraints. Usually franchising is a combination of selective distribution and non-compete obligations in relation to goods which are the subject matter of the franchise. Sometimes, other elements like a location clause or territorial exclusivity are added. These combinations will be treated according to the general criteria set forth in the Block Exemption.

Certain distribution forms - in particular franchising - involve the licensing of

Intellectual Property Rights. In franchising, the transfer of intellectual property rights is an essential element of this distribution format and is used to assimilate the commercial practices of the franchisee as closely as possible to those of the franchisor. This licensing may include restrictions which are necessary or complementary to the vertical restraints placed on the sale of the goods or services. While vertical restraints on the goods or services are important from a competition perspective and may result in a franchise agreement falling within the scope of Article 85(i), these necessary or complementary restraints must be examined in the light of the need to protect the know-how provided or the maintenance of the network's identity and reputation (see Case 161/84, *Pronuptia v Schillgalis*).

The Block Exemption Regulation will not cover vertical agreements between actual or potential competitors except where the agreement is a non-reciprocal one and no party has an annual turnover exceeding 100m ECUs.

It is further proposed that the Block Exemption Regulation will cover the vertical agreements of associations of independent retailers when the individual members of the association are SMEs as defined in the Annex to Commission Recommendation 96/280/EC. In the case of a dual-threshold system these agreements would fall under the lower threshold. What is contemplated here are retailers who associate themselves under a common format to sell to final consumers. It is recognised that there are horizontal aspects to these associations and the coverage by the Block Exemption is subject to the proviso that these horizontal aspects do not infringe Article 85.

For reasons of coherence and unity of policy it is proposed not to retain sector-specific rules for beer and petrol (the block exemption regulation on car distribution, which expires in 2002, is not covered by the current proposal). There are insufficient economic or legal reasons to continue to have a special regime for these sectors. In as far as sector specific treatment is justified this will be taken into account in the guidelines.

It is proposed not to apply the role of severability but to make the exemption of agreements dependent on all the provisions in the Block Exemption being complied with.

A transitional period for the adaptation of existing agreements to the Block Exemption is anticipated but remains to be determined.

4 Conclusions

The proposed new policy will create a more efficient protection of competition by allowing the competition authorities to concentrate their efforts on those cases involving market power. It will do away with the straitjacket effect of current regulation and will reduce the enforcement costs imposed on industry. The smaller operators, especially, will benefit from this and from the enhanced level of legal certainty.

There are four pillars on which this new policy is based:

- one broad umbrella Block Exemption Regulation applying to both goods and services with
market-share threshold(s) and a black-list approach;

- guidelines detailing the policy above the thresholds and possible withdrawal of the Block Exemption;

- the adjustment of Article 4(2) of Regulation 17 to reduce the number of notifications, to stop artificial litigation before national courts and strengthen the civil enforceability of contracts;
- an increase in the role of national competition authorities and national courts in the application of Article 85(1) above the market-share thresholds and the withdrawal of the Block Exemption below the thresholds.

SECTION VI - PROCEDURE

1 Legislative changes

Implementation of the policy proposal outlined in Section V will require three new legislative texts, namely, two Council amending regulations extending the Commission's powers under Regulation No 19/65/EEC and amending Article 4(2) of Regulation No 17, and a Commission Block Exemption regulation covering all vertical restraints in almost all sectors of distribution.

The first Council amending regulation is required to grant the Commission the power to declare by way of a Block Exemption regulation that Article 85(1) shall not apply to certain categories of vertical agreements entered into between economic operators. This is because the current enabling regulation (Regulation No 19/65/EEC) is restricted to a limited number of vertical restraints, namely, exclusive distribution of goods for resale, exclusive purchase of goods for resale, obligations in respect of exclusive supply and exclusive purchase for resale, and restrictions imposed in relation to the assignment or use of industrial property rights. It is also limited to agreements entered into between two parties.

The second Council amending regulation relates to the amendment of Article 4(2) of Regulation No 17, the First Regulation implementing Articles 85 and 86 of the Treaty. This is necessary because under the current system the date upon which an exemption can enter into effect cannot precede the date of notification. The Commission wants to change that system so as not to punish those companies which under the new more economic based system working with market-share thresholds may make mistakes in the assessment of their market position. Section IV.5 of this policy paper outlines a number of measures which are necessary to create a reasonable level of legal certainty for economic operators. The proposed amendment to Article 4(2) of Regulation No 17 is the most important of the measures identified. This is because under Regulation No 17, as currently worded, the earliest date upon which an individual exemption can have effect, subject to certain limited exceptions, is the date of notification and not the date of the agreement. This has the effect that many vertical agreements falling under Article 85(1), despite fulfilling the requirements for exemption under Article 85(3), are automatically void under

Article 85(2) until they have been notified to the Commission. The fact that such agreements are automatically void, pending notification, has two negative effects. First, it results in an unnecessarily high number of notifications and secondly, it results in the competition rules being used as a strategic tool to avoid the enforcement of contracts, rather than as a means to address competition problems. The objective of the draft amending text is to enable the Commission to exempt retroactively when the notification takes place at a later date. The practical effect of such a legislative amendment is that companies would no longer have to notify vertical agreements which they do not believe to cause competition concerns, simply to ensure legal certainty. Instead, companies will place greater weight on their own analysis of the economic effects of the vertical restraints at issue, knowing that in the event of subsequent litigation it would not be too late to apply for an exemption under Article 85(3).

The current Commission Block Exemption regulations in the field of distribution, adopted pursuant to Council Regulation No 19/65/EEC, are limited to exclusive distribution (Commission Regulation 1983/83), exclusive purchasing (Commission Regulation 1984/83), franchising (Commission Regulation 4087/88), and motor vehicle distribution (Commission Regulation 1475/95). These regulations, with the exception of the Block Exemption on motor vehicle distribution, which has been excluded from the scope of the current review, cannot be satisfactorily amended to provide for the change in policy proposed in this Communication. Therefore, subject to the adoption of the two Council Regulations outlined above, a new Commission Regulation will be proposed. The Regulation will extend to all vertical restraints in all sectors of distribution other than motor vehicles, covering, *inter alia*, selective distribution, services, intermediate goods and agreements between more than two parties each operating at different levels in the distribution chain. In the light of the new regulation the *de minimis* notice may need to be reviewed.

2 Procedural steps and timing

The first procedural step will be the adoption by the Council of the two new Council Regulations. It is only following adoption of these two Regulations that work can commence on the procedural steps leading to the adoption by the Commission of a new group exemption regulation and a set of guidelines in the field of vertical restraints. The Commission will submit these two documents together for consultation with Member States, industry and other third parties. This being the case, all the legislative changes required to implement the policy proposals outlined in this Communication are envisaged to be in place by the year 2000. □

The 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.