COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Multilateral Competition Rules

We welcome the following comments by the Commissioner for Competition Policy. "In spite of the considerable progress that has been made at the bilateral level, the fact must be faced that arrangements for international cooperation in compet-ition policy based solely on a bilateral approach entail major short-comings. It is evident that bilateral cooperation will inevitably take into account only the interests of the countries involved and, as a result, the interests of third countries are likely to be neglected. Moreover, many still have no competition legislation at all. Despite a marked increase in enthusiasm for introducing competition rules over the past decade, still only about half the WTO's member countries have competition laws. The substance of these rules, and the zeal with which they are enforced in the various countries, show wide divergence.

"The OECD's 1995 recommendation concerning competition cooperation, and the recommendation on "hard core" cartels which it adopted earlier this year, represent important guidelines for the shape which bilateral cooperation should take, particularly when several member countries are grappling with the threat posed by an international cartel. The recommendations are addressed only to OECD member countries, however, and are not binding even on them. Nor are the current WTO rules adequate for dealing with competition problems. The WTO Panel's ruling in April 1998 on the dispute between the USA and Japan, which involved allegations of anti-competitive behaviour by Fuji aimed at denying its US rival Kodak access to the Japanese market for photographic film and paper, provided a clear illustration of this inadequacy.

"A comprehensive worldwide multilateral framework, providing for the application of a basic set of common competition rules, needs to be established as a necessary complement to trade liberalisation. Because of this complementary relationship between trade and competition policy, the WTO would appear to be the multilateral organisation best suited to house such a framework. The idea of creating a supranational structure of this kind was the subject of a Commission Communication to the Council in 1996, which proposed that the WTO should set up a working group with a remit to explore the desirability of going down that path. This proposal, which was endorsed by the Council, provided the principal inspiration for the ministerial decision, taken in Singapore in December 1996, to establish a WTO working group to study the interaction between trade and competition policy. This group has already met on a number of occasions and will continue its deliberations in 1999. Although the degree of interest shown by both the industrialised and the developing countries (including some countries which have no domestic competition rules) in the discussions is very encouraging, it is too early to say whether they will ultimately lead to the launching of formal negotiations between the members of the WTO. I hope that they will, as part of the next Round of multilateral negotiations." □

COOPERATION AGREEMENTS (INSURANCE): COMMISSION STATEMENT

Subject: Cooperation agreements
Information agreements
Standardisation
Tariffs

Industry: Insurance

Source: Commission Statement IP/99/360, dated 27 May 1999

(In insurance, as in banking, there are certain respects in which the industry needs to standardise procedures, cooperate in their implementation, exchange information about market conditions and, to a limited extent, settle tariffs. This was recognised in a block exemption regulation in 1992. However, the regulation was incomplete, due to the Commission's self-confessed lack of experience in the problems of this sector; and the Commission has accordingly issued a report on the practice it has adopted since the regulation came into force. It has invited comments on the report. A statement summarising the report is set out below.)

The Commission has just sent to the European Parliament and the Council the report it adopted on 12 May last on the operation of the Community regulations authorising certain types of cooperation between insurers with regard to the rules of competition in the EC Treaty. The Commission also describes in this report how it assesses agreements of this type which do not meet the conditions for application of these general rules. In particular it explains how it examines agreements setting up insurance or reinsurance pools. The Commission calls on the national competition and supervisory authorities and the insurance industry to present their observations with a view to revision of the regulations in four years' time.

Background

In 1991 the Council empowered the Commission to adopt a regulation authorising six types of agreement in the field of insurance subject to certain conditions. The agreements concerned are: (a) the joint establishment of tariffs of risk premiums; (b) the establishment of standard insurance conditions; (c) the joint coverage of certain types of risk (pools); (d) verification and approval of safety equipment; (e) settlement of claims and (f) registers and information systems concerning aggravated risks.

In 1992 the Commission adopted its block exemption regulation. This regulation does not cover the last two of the above types of agreement as the Commission did not have sufficient experience in the matter.

Report

In its report the Commission reviews its administrative practice over the last six years and outlines future prospects.

The assessment of pools (such as those covering aviation risks) has proved the most complex. It will continue to be a priority in the years ahead, in particular with the examination of pools covering environmental and nuclear risks. The Commission concludes that the minimum size of pool that is required to cover the risks in question is never restrictive of competition. On the other hand, the legality of the other pools will in principle depend on the market shares and, where these exceed the shares stipulated in the regulation (10% for co-insurance and 15% for co-reinsurance), the arguments put forward.

It has also been difficult to determine whether cooperation agreements on premiums remain within the limits of what is necessary for statistical purposes. The examination in some cases requires expert appraisal that Commission departments could not undertake without causing the regulation to lose its raison d'etre (that is, to restrict the examination of agreements to individual cases). They are therefore more concerned with measuring the concrete effects of such agreements on the pricing policy that insurers apply to their customers. If commercial premiums differ substantially, the agreement will be deemed not to cause any appreciable restriction of competition.

As regards standard policy conditions, the Commission has concentrated on "black" clauses (in principle banned) such as that excluding certain risks from cover. Under the regulation, standard policy conditions, including certain "black" clauses, are authorised provided that the national associations stipulate that the relevant recommendations are not binding on their members. In future they should nevertheless check more carefully whether or not the insurers respect these recommendations.

As regards security equipment (such as car alarms) the regulation authorises insurers to impose technical specifications, in particular where these are to become European standards. There is little evidence that the regulation has prompted insurers to impose such specifications. Some thought must be given to what operational conclusions can be drawn from this finding.

The Commission has no plans for extending the regulation to the two types of agreement not covered at present. There is still not sufficient experience of settlement of claims, while registers of aggravated risks do not, as such, seem to restrict competition. The Commission wishes to receive the written observations of interested parties within three months. It is also asking national courts, competition authorities and supervisory authorities to provide information and comments. A hearing may be held subsequently. The observations and information collected will help the Commission in planning the revision of the regulation, which remains valid until March 2003. □

ACQUISITIONS (SOFT DRINKS): THE COCA-COLA CASE

Subject: Acquisitions

Industry: Soft drinks

Parties: Coca-Cola Company
Cadbury Schweppes plc

Source: Commission Statement IP/99/344, dated 25 May 1999

(Note. Coca-Cola has dropped its controversial plan to acquire the soft drinks business of Cadbury Schweppes. The Commission is relieved.)

Mr Van Miert, the Commission member responsible for competition policy, has welcomed the Coca-Cola Company's recent decision to drop its plans to acquire the soft drinks business of Cadbury Schweppes plc in continental Europe. Earlier this month he had warned of the possible anti-competitive effects of the purchase and had asked the companies to notify the acquisition to the Commission. Coca-Cola and Schweppes had just announced a radical restructuring of their purchase agreement. The original agreement, signed last December, provided for Coca-Cola to acquire all of the Schweppes soft drinks business world-wide, with the exception of the US, France and South Africa. Now, the companies have excluded from the deal all European Union (EU) Member States with the exception of the UK, Ireland and Greece.

The original operation was notified in eleven Member States. However, there were strong indications that the transaction might have had a Community dimension, falling within the scope of the EC Merger Regulation. Therefore, the Commission recently launched an investigation on the competitive effects of the transaction under the EC Merger Regulation by sending requests for information to competitors and customers of Coca-Cola and Schweppes throughout Europe. The Commission had also received several complaints about the effects of the deal. As a consequence of the modification of the purchase agreement, the Commission intends to close its investigation of the case if it is confirmed that the remaining transaction does not have a Community dimension. The companies had argued that the Commission did not have jurisdiction over the deal. The Belgian competition authority had already prohibited the acquisition; and other Member States had opened in-depth investigations into the notified agreements. The Commissioner said that he was pleased with the excellent co-operation between his services and the Member States' competition authorities throughout the investigation and that, as to the substance of the case, the companies' decision to drop their initial plans was judicious. □

ACQUISITIONS (MOTOR VEHICLES): THE RENAULT / NISSAN CASE

Subject: Acquisitions

Industry: Motor vehicles

Parties: Renault
Nissan Motor

Source: Commission Statement IP/991331, dated 17 May 1999

(Note. Although this operation strengthens Renault's market share in France, the Commission regards the overall effect in the EEA as acceptable.)

The Commission has cleared the concentration by which the French car manufacturer Renault acquires shareholdings in the Japanese Nissan Motor, Nissan Diesel and Nissan European Financing Subsidiaries. The operation mainly affects the passenger car sector where the product lines of Renault and Nissan overlap in certain respects. Although the operation will lead to further concentration in this sector, the Commission concluded that the merger would not create a dominant position given the strength of existing competitors on the market. Renault is a diversified automobile group which mainly designs, produces and sells cars, light commercial vehicles, farm machinery, trucks, buses, coaches, military vehicles and special transport vehicles. Nissan Motor manufactures and distributes vehicles and vehicle components and parts. Nissan is also engaged in certain vehicle financing activities and sells other products such as rockets, forklifts and boats. Nissan Diesel manufactures and markets a wide range of light, medium and heavy trucks as well as buses and bus chassis, engines, vehicle components and special-purpose vehicles.

In the overall market for passenger cars in the European Economic Area (EEA), the parties' combined share would be less than 15%. At national level, the parties' combined share would significantly exceed 20% only in France. Where there is an overlap, combined market shares are in general highest in France, notably for small cars, medium cars, large cars, executive cars and multi-purposes vehicles. However, the concentration will not create a dominant position, particularly in view of the relatively minor presence of Nissan in each sector and the presence in all these sectors of strong competitors such as Peugeot, BMW, Mercedes, Audi or Ford. As far as commercial vehicles are concerned, the highest combined market share will be reached in Spain for medium trucks; but, again, the new entity will have to face competition from many strong manufacturers such as Iveco, MAN or Mercedes. For these reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market. □

ACQUISITIONS (MOTOR VEHICLE COMPONENTS): THE FORD / KWIK-FIT CASE

Subject: Acquisitions

Industry: Motor vehicles

Parties: Ford Motor Company
Kwik-Fit plc

Source: Commission Statement IP/99/363, dated 1 June 1999

(Note. Since the Commission's Statement does not quantify the market shares in the sector concerned, it is harder to judge the effect of this acquisition than, for example, in the Renault case on page 130. However, if there had been any strong objections to the operation, other parties would probably have made known their reasons for objecting.)

The Commission has approved the acquisition by the US company Ford Motor Company of the UK based company Kwik-Fit plc. The operation concerns the sector for repair and maintenance of motor vehicles. However, given the minor overlaps between the parties' activities, their limited market shares and the existence of a sufficient number of competitors, the operation does not raise competition concerns.

Kwik-Fit is a UK based company active in the repair and maintenance of motor vehicles, in particular fast-fitting of tyres, exhausts and brakes, under the brand names "Kwik-Fit" (UK, Ireland, Belgium and the Netherlands), "Speedy" (France, Belgium, Spain and Switzerland) and "Pit-Stop" (Germany). Similar types of service can be performed by authorised Ford dealers acting as independent businesses. Ford is present on the market for repair and maintenance of motor vehicles through a limited number of fully-owned or jointly-owned dealerships. The parties have overlapping activities only in Belgium, Germany and the United Kingdom.

Given the minor overlaps and the parties' limited market shares, as well as the existence of a sufficient number of competitors, the Commission's view is that the operation will not create a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area. For these reasons the Commission has decided not to oppose this operation and to declare it compatible with the common market. □

ACQUISITIONS (MOTOR VEHICLE COMPONENTS): THE UBS / VALFOND CASE

Subject: Acquisitions
Ancillary restrictions

Industry: Motor vehicle components

Parties: Union Bank of Switzerland AG
Groupe Valfond

Source: Commission Decision in Case IV/M.1521, dated 19 May 1999

Commission Note: In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...] Where possible the information omitted has been replaced by ranges of figures or a general description.

(Note. This case is reported for the purposes of comparison with the Ford / Kwik-Fit case, reported on page 131 in this issue. There is one point of comparison, in that the summary of the Ford case gave no quantifying figures, while the UBS case, though given in full, omits many significant figures from the text for the reasons given in the Commission's note above. There are two points on which the cases differ. In the Ford case, the acquiring party is itself a manufacturer of motor vehicle components, while in the UBS case the acquiring party is a bank which already has a controlling interest in two such manufacturers. Then, in the UBS case, there is an additional factor in the form of ancillary restrictions: not, as sometimes happens, in connection with patent or other intellectual property rights, but in the form of a non-competition clause.)

1 On 14.04.1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) 4064/89 by which the undertaking Union Bank of Switzerland AG (UBS) acquires sole control of the Groupe Valfond (France).

The parties' activities and the operation

2 The Group Valfond, which has its main manufacturing facilities in France and Germany, produces ferrous light alloy castings as well as undertaking machining activities. It supplies components to the automotive industry.

3 UBS is an international banking group. The principal activity of UBS is the provision of financial services. UBS controls Triplex Ltd (UK) and Peak Automotive Ltd (UK). Both companies are involved in the manufacture and supply of automotive components.

4 The concentration involves the acquisition by UBS of sole control of Groupe Valfond by way of acquisition of shares. The transaction involves a change of control, thus constituting a concentration within the meaning of Article 3(1) of the Merger Regulation.

Community dimension

5 The UPS group and the Groupe Valfond have a combined aggregate worldwide turnover in excess of €5,000m (UBS group, €15,591m; and Groupe Valfond €819m). Each of them has a Community-wide turnover in excess of €250m (UBS group, €1,084m; and Groupe Valfond €802 m), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

Competitive assessment

6 UBS, through its subsidiaries Triplex Ltd (UK) and Peak Automotive Ltd (UK), and Groupe Valfond are both active in the manufacture and supply of automotive components. The two UBS subsidiaries operate mainly in the UK while Valfond operates in several mainland European countries.

Relevant product market

7 The notifying party states that there are no relevant product markets, that is there are no markets in which both parties are active and where the concentration would lead to a combined share of 15% or more. The activities where there are overlaps are ferrous castings, light alloy castings and machining where the combined market shares after the concentration would be [between 0% and 10%] at EU level.

8 If specific products are considered there are *de minimis* overlaps for exhaust manifolds and intake manifolds and a small overlap in turbocharger housings, albeit with a combined market share below 15% at EU level.

9 It is not necessary to delineate further the relevant product markets because, in all alternative market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

Relevant geographic market

10 The notifying party states that the markets for automotive components are European, if not world wide, as car manufacturers obtain their supplies from sources all over Europe and from further afield. In previous cases (most recently, *TRW / Lucas Varity*, decision of 11.03.1999; and DURA / ADWEST, decision of 10.03.1999), the Commission has already defined the geographical scope of the markets for car components as European-wide.

11 It is not necessary to delineate further the relevant geographic markets because, in all alternative geographic market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

Assessment

12 The parties' operations are to a certain extent complementary. In the areas where the parties' activities overlap the shares of the EU market are below 15%. In view of the market position of the parties to the concentration, it appears that the notified operation will not have a significant impact on competition in the EEA and that the proposed concentration will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

Ancillary restrictions

13 The notifying party has requested that non-competition clause contained in the Article V of the "Protocole d'Acquisition d'Actions" be considered as an ancillary restriction. This clause provides that, to ensure the transfer of the full value of the assets acquired including good will and know how, the vendor undertakes not to compete with the acquirer in the business transferred for a period of [between 1 and 5 years]

14 The Commission notice regarding restrictions ancillary to concentrations (Chapter III, letter A), provides that such a non-competition clause may be considered as an ancillary restriction directly related to the concentration and necessary for its implementation. Therefore the clause is covered by the present decision.

Conclusion

15 For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market arid with the EPA Agreement. This decision is adopted in application of Article 6(l)(b) of Council Regulation (EEC) 4064/89. □

PRICE FIXING (POLYVINYLCHLORIDE): THE LVM CASE

Subject: Price fixing
Quotas
Concerted practices
Fines
Procedure
Delays

Industry: Polyvinylchloride (PVC)
Some implications for most industries)

Parties: Limburgse Vinyl Maatschappij NV
Elf Atochem SA
BASF AG
Shell International Chemical Company Ltd
DSM NV and DSM Kunststoffen BV
Wacker-Chemie GmbH
Hoechst AG
Société Artésienne de Vinyle
Montedison SpA
Imperial Chemical Industries plc
Hüls AG
Enichem SpA
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 20 April 1999, in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *(Limburgse Vinyl Maatschappij NV et al v Commission of the European Communities)*; press statement by the Court dated 20 April 1999

(Note. This application to the Court of First Instance for the annulment of the Commission's decision in the PVC cases resulted in the Court generally confirming the Commission decision fining the twelve PVC producers for participating in an illegal cartel. However, the Commission fines, which amounted in all to €19,250,000 were reduced in respect of three undertakings.

In October 1983, following investigations conducted in the polypropylene sector, the Commission of the European Communities opened a file concerning polyvinylchloride (PVC); and, in March 1988, the Commission initiated proceedings against 14 PVC producers which resulted in the adoption of a decision by the Commission on 21 December 1988 penalising those 14 producers for infringement of the Community prohibition on cartels. The Court of First Instance, in its judgment of 27 February 1992, and the Court of Justice, in its

judgment on appeal of 15 June 1994, found serious procedural errors in the adoption of the 1988 decision, which was therefore annulled. Following the judgment of the Court of Justice, the Commission adopted a fresh decision on 27 July 1994 against 12 of the producers concerned by the initial decision, correcting the procedural defects found by the Court of Justice. In its decision, the Commission found that those companies had infringed the Community prohibition on cartels by participating in an agreement and/or a concerted practice from August 1980, the producers having taken part in regular meetings in order to fix target prices and quotas, plan concerted initiatives to raise price levels and monitor the operation of those collusive arrangements. The table at the end of this report shows the amount of the Commission fines for each undertaking.

The 12 undertakings concerned brought new actions before the Court of First Instance for annulment of the 1994 decision. They made a total of nearly 80 pleas, set out in over 2 000 pages of pleadings and examined by the Court of First Instance in a judgment of over 220 pages. The parties raised a large number of procedural issues, especially whether the Commission was entitled to adopt a new decision in 1994 when the initial decision of 1988 had been annulled by the Court of Justice for formal defects. The Court of First Instance rejected all those procedural claims. On the merits, the Court has confirmed the existence of the infringement found by the Commission and the participation of the 12 undertakings in that infringement. As to the fines, the Court rejected in their entirety the pleas of nine of the applicants. The fines on those undertakings were therefore confirmed.

However, the Court accepted in part the arguments of three undertakings, whose fines were accordingly reduced. In the case of Societe Artesienne de Vinyle (SAV), the Court found that, contrary to the applicant's submissions, the documents produced by the Commission were sufficient to establish that the company participated in the infringement. For the purposes of determining the fine, however, it held that such participation should be taken into account only in respect of the period from August 1980 to June 1981, and not in respect of the period between August 1980 and April 1983. Therefore, the Court of First Instance reduced the fine imposed on SAV from €400,000 to €135,000.

In the case of Elf Atochem SA and Imperial Chemical Industries Plc (ICI), the Court held that, in determining the fine to be imposed on each producer, the Commission was entitled to take into account both the volume and the value of the goods which were the subject-matter of the infringement and the size and economic strength of the undertakings concerned. The Court's investigation of the case showed that, in fixing the amount of the fine, the Commission took account of each undertaking's market share to ensure a proportionate allocation of the total fine between the various undertakings. The Court's analysis of the average market shares of Elf Atochem SA and ICI for the period between 1980 and 1983 led it to conclude that the Commission had exaggerated their market share and accordingly imposed too high a share of the fine upon them. The Court of First Instance therefore reduced the fine on Elf Atochem SA

from €3,200,000 to €2,600,000, and reduced the fine on ICI from €2,500,000 to €1,550,000.

As the Court says, this was an unusually complex case; and many pleas were submitted. Not all of these were of great interest; but, considering the length of the proceedings, it was not perhaps surprising that the Court was called on to give an explanation, with particular reference to the recently decided SCK case. The passage in the Court's judgment in which this aspect is considered - paragraphs 120 to 127 - are therefore set out below. So, too, is Article 1 of the Commission's contested decision, since this shows the grounds on which the infringements were determined and the fines imposed.)

Facts

[Following the annulment of the original decision by the Commission:]

10 The Commission thereupon adopted a fresh decision on 27 July 1994 in relation to the producers who had been the subject of the original decision, with the exception, however, of Solvay and Norsk Hydro AS (Commission Decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC)

11 The Decision contains the following provisions: "*Article 1* BASF AG, DSM NV, Elf Atochem SA, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Montedison SpA, Société Artésienne de Vinyle SA, Shell International Chemical [Company] Ltd and Wacker Chemie GmbH infringed Article 85 of the EC Treaty (together with Norsk Hydro ... and Solvay ...) by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in about August 1980 by which the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements ..."

[The following paragraphs concern the delays in the whole procedure]

120 The Community judicature has consistently held that fundamental rights form an integral part of the general principles of Community law whose observance it ensures (see, in particular, Opinion 2/94, paragraph 33; Case C-299/95 *Kremzow* v *Austria*, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance rely on the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (Case 222/84 *Johnston* v *Royal Ulster Constabulary*, paragraph 18; *Kremzow*, paragraph 14). Moreover, Article F.2 of the Treaty on European Union states that "[the Union shall respect fundamental rights, as

guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

121 It is therefore necessary to examine whether in the light of those considerations the Commission has infringed the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time (Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*, paragraph 56).

122 Infringement of that principle, if established, would justify the annulment of the Decision however only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature in the context of an action based on Article 178 and the second paragraph of Article 215 of the Treaty.

123 In this case, the administrative procedure before the Commission lasted for a total of some 62 months. The period during which the Community judicature examined the legality of the 1988 decision and the validity of the judgment of the Court of First Instance cannot be taken into account in determining the duration of the procedure before the Commission.

124 In order to determine whether the administrative procedure before the Commission was reasonable, a distinction must be made between the procedural stage opening with the November 1983 investigations in the PVC sector, based on Article 14 of Regulation No 17, and the procedural stage which started on the date of receipt of notification of the statement of objections by the undertakings concerned. Whether the time taken for each of those two stages was reasonable will be assessed separately.

125 The first period of 52 months elapsed between the first investigations carried out in November 1983 and the initiation of the procedure by the Commission in March 1988 on the basis of Article 9(3) of Regulation No 17, pursuant to Article 3 of that regulation.

126 Whether the time taken for a procedural stage is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity.

127 In the light of all the information on the file, the Court considers that in the particular cases submitted to it for review the length of that inquiry procedure was reasonable ...

Applicant	Commission fine (ECUs)	Revised fine (€)
Limburgse Vinyl Maatschappij NV	750,000	Unchanged
Elf Atochem SA	3,200,000	2,600,000
BASF AG	1,500.000	Unchanged
Shell International Chemical Co,, Ltd	850,000	Unchanged
DSM NV	600,000	Unchanged
Wacker-Chemie GmbH	1,500,000	Unchanged
Hoechst AG	1,500,000	Unchanged
Société Artésienne de Vinyle SA	400,000	135,000
Montedison SpA	1,750,000	Unchanged
Imperial Chemical Industries plc	2,500,000	1,550,000
Hüls AG	2,200,000	Unchanged
Enichem SpA	2,500,000	Unchanged

Commission investigation into State aid to Fiat Auto

On the basis of new information, the Commission has decided to extend its investigations, begun in February this year, in three cases of state aid which Italy plans to grant to Fiat Auto, for its Mirafiori, Carrozzeria, Mirafiori Meccanica and Rivalta plants. The Commission is also giving Italy one month to provide all the information required for examination of the cases. As part of its examination of the proposed aid for the Fiat Mirafiori Carrozzeria, Fiat Mirafiori Meccanica and Fiat Rivalta plants, the Commission has ascertained new facts. It is now apparent that the investment decisions in the three cases were certainly taken by Fiat in 1993/94, at a time when the Mirafiori and Rivalta plants were not situated in an assisted region. The Commission therefore doubts that Fiat should have included regional aid in the financing of the projects. The relevant investment at Mirafiori and Rivalta should not therefore need aid. The Italian Government notified six state aid proposals for Fiat Auto SpA between October and December 1997, including the three projects covered by this decision. Since it had difficulty assessing the compatibility of the aid, the Commission decided in February 1999 to initiate a detailed investigation in each of the cases.

Source: Commission Statement IP/99/352, dated 26 May 1999

FINES (STEEL): THE BRITISH STEEL CASE

Subject: Fines

Industry: Steel
(Some implications for other industries)

Parties: (See Table)

Source: Statement by the Court, 14/99, dated 11 March 1999

(Note. In the May 1999 issue, we carried a report on the British Steel case, in which the "Steel Beam Cartel" was involved. Since then we have received the Court statement about the fines imposed on each of the parties to the joined cases; and it is interesting to note the amounts and percentages of the reductions in fines - and to compare them with the reductions in the PVC cases. The text of the Court statement, which is headed "Fines Upheld" - though some of them were reduced by nearly one-third, - follows.)

The Court of First Instance has in the main upheld the Commission decision imposing fines for price-fixing, market-sharing and exchanges of confidential information by steel undertakings, contrary to the ECSC Treaty.

In a decision dated 16 February 1994 the Commission found that seventeen European steel undertakings and their trade association Eurofer had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the Community market for steel beams, which are essential components in steel structures. Under that decision the Commission imposed fines on fourteen of those undertakings, the total amount of the fines exceeding 104,000,000 ECUs.

Ten of those undertakings and Eurofer applied to the Court of First Instance for annulment of that decision or, alternatively, for a reduction in the amount of the fines imposed on them. In particular, the applicants submitted that their procedural rights had been infringed and that the Commission had misinterpreted the competition rules under the ECSC Treaty. They also claimed that the Commission had been implicated in the practices in question and that the fines were disproportionate. In the course of the Court's examination of the cases, the Commission lodged a total of some 11,000 documents relating to its decision. This volume of documentation and the complexity of the cases necessitated meticulous examination and made it necessary to adopt special measures of procedural organisation. In particular, the Court ordered the production of certain documents relating to the contacts established between the Commission and the steel industry during the period in question as well as summoning a number of witnesses to appear before it.

In its eleven judgments, the Court of First Instance upheld most of the Commission's findings of fact and their characterisation as infringements of Article 65 of the ECSC Treaty, while annulling a number of minor points in the decision because of insufficient evidence. The Court also rejected as unfounded the accusations that the Commission had been involved in the infringements.

While it took the view that the general level of the fines imposed was justified by reason of the serious nature of the infringements, the Court none the less considered that the Commission had to some extent exaggerated their anti-competitive effect and reduced the fines accordingly. The Court also concluded in three cases that the Commission had misapplied the concept of recidivist conduct, on the ground that the undertakings in question had never been penalised for similar infringements before the events at issue in the present cases.

The amounts of the fines imposed by the Commission and those set by the Court are indicated on the table attached. The Court ordered the applicants to pay their own costs and part of the costs incurred by the Commission.

Applicant	**Original fine (ECU)**	**Revised fine (€)**	**%age change**
NMH Stahlwerke GmbH	150,000	110,000	26.66
ARBED SA	11,200,000	10,000,000	10.71
Cockerill Sambre SA	4,000,000	3,580,000	10.50
Thyssen Stahl AG	6,500,000	4,400,000	32.31
Unimetal SA	12,300,000	8,300,000	32.52
Krupp Hoesch Stahl AG	13,000	9,000	30.77
Preussag-Stahl AG	9,500,000	8,600,000	9.47
Siderurgica Aristrain Madrid SL	10,600,000	7,100,000	33.02
Empresa Nacional Siderurgica SA	4,000,000	3,350,000	16.25
Eurofer ASBL	-	-	-

JOINT VENTURES (BROADCASTING): THE HOLLAND MEDIA GROEP CASE

Subject: Joint ventures
Concentrations
Compatibility with the common market
Relevant market

Industry: Broadcasting, publishing
(Some implications for most industries)

Parties: RTL 4 SA
Veronica Omroep Organisatie
Endemol Entertainment Holding BV
Holland Media Groep
(See also paragraph 10 of the Judgment)

Source: Judgment of the Court of First Instance, dated 28 April 1999, in Case T-221/95 (*Endemol Entertainment Holding BV v Commission of the European Communities*)

(Note. Cases before the Court of Justice involving concentrations are rare enough to justify a report, however attenuated. In accordance with the current trend in the Court of First Instance, the judgment is long - over 200 paragraphs, - and the text below is highly selective.

This was a challenge to the Commission's decision to refuse to clear a proposed concentration. The challenge failed. A refusal is relatively rare: fewer than 2% of the cases notified to the Commission each year are considered by the Commission to be "incompatible with the common market". Three legal issues predominated in the judgment: the relevant market for the purposes of the case; the market shares of the parties; and the degree of control exercised by the parties within the meaning of Article 3(3) of the Mergers Regulation. On the first of these points, the Court had to examine broadcasting practices to determine the identity of the relevant market and concluded that the Commission's assessment had been correct. On the question of the market share, the Court upheld the Commission's view that the market share was over 50%, calculated in two different ways, that competitors held relatively small market shares and that there would be a strengthening of the dominant position as a result of the concentration. As to the degree of control exercised by the parties, the Court confirmed, on the basis of the rules proposed under the agreement between the parties, the Commission's view that Endemol, Veronica and RTL exercised control over Holland Media Groep.)

Facts

[Paragraphs 1 to 8 are omitted]

9 By Decision 96/346/EC of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.553 — RTL / Veronica / Endemol) (OJ 1996 L 134, p. 32; hereinafter "the contested decision"), which was adopted under Article 8(3) of Regulation No 4064/89, the Commission declared the concentration in the form of the creation of the joint venture Holland Media Groep to be incompatible with the common market.

10 The parties to that concentration were Compagnie Luxembourgeoise de Télédiffusion SA (hereinafter "CLT"'), NV Verenigd Bezit VNU (hereinafter "VNU"), RTL 4 SA (hereinafter "RTL"), Endemol Entertainment Holding BV (hereinafter "Endemol") and Veronica Omroep Organisatie (hereinafter "Veronica").

11 CLT is a broadcasting company incorporated under Luxembourg law which is involved in radio, television, publishing and related businesses in various national markets.

12 VNU is a company incorporated under Netherlands law which is involved in the publishing of consumer media, professional media and data banks. It holds stakes in broadcasting companies, including an indirect minority shareholding of 44.4% of the Belgian commercial broadcaster VTM and an indirect 38% shareholding in RTL.

13 RTL is a company incorporated under Luxembourg law which supplies television and radio programmes, partly in Dutch. Those programmes are broadcast by CLT which holds - directly or indirectly - 47.27% of RTL's share capital. CLT ultimately controls RTL, which in turn held 51% of the shares in Holland Media Groep (hereinafter "HMG").

14 Veronica is an association established under Netherlands law which, until 1 September 1995, operated in the Netherlands television and radio market as a public broadcasting organisation. It was one of the four public broadcasting organisations whose programmes were broadcast on the public channel Nederland 2. On 1 September 1995 Veronica left the public broadcasting system to become a commercial television channel.

15 Endemol is a company incorporated under Netherlands law which was created in 1994 by the merger of JE Entertainment BV and John de Mol Communications BV. The centre of Endemol's activities is in the Netherlands, but it has businesses elsewhere in Europe. Its principal business activities are the production of television programmes, the operation of television studios, the exploitation of television formats (that is to say, original programme concepts which can be copied), the production and exploitation of theatrical programmes and the organisation of events.

16 For the purpose of the concentration, Veronica and Endemol set up Veronica Media Groep (hereinafter VMG'), a company incorporated under Netherlands law in which they respectively held 53% and 47% of the share

capital. VMG held 49% of the shares in HMG.

17 The objective of the concentration was to create HMG, whose business was the packaging and supply of television and radio programmes broadcast by itself, CLT, Veronica or others to the Netherlands and Luxembourg. All radio and television activities of the parties intended for the Netherlands were transferred to HMG. The assets transferred by RTL included the television channels RTL 4 and RTL 5, the assets related thereto and its rock music radio channel. RTL also assigned to HMG the benefit of CLT's broadcasting licence (the "concession"), its business consisting of the supply and packaging of radio and television programmes (mainly in Dutch) to be broadcast in the Netherlands and Luxembourg, and its 50% shareholding in IPN SA, the advertising agency which sells advertising time for the RTL 4 and RTL 5 television channels. The assets transferred by Veronica and Endemol included the Veronica television channel and related assets, and Endemol's radio activities (that is to say, its Holland FM Radio channel).

18 Endemol and HMG had also entered into a production agreement for a period of 10 years, corresponding to HMG's production needs for its three channels. Under that agreement, Endemol undertook to cover 60% of HMG's needs for Dutch-language productions. HMG agreed in return to buy from Endemol 60%, by value, of its needs for specific programmes. In addition, HMG was granted a right of first refusal with regard to new television programme formats and stars launched, bought or discovered by Endemol.

22 On 20 September 1995 the Commission adopted the contested decision, declaring that the agreement to create the joint venture HMG was incompatible with the common market because the concentration would lead to the creation of a dominant position in the television advertising market in the Netherlands and to the strengthening of Endemol's dominant position in the market for independent Dutch-language television production in the Netherlands, as a result of which effective competition in the Netherlands would be significantly impeded.

23 The Commission simultaneously invited the parties to propose, within a period of three months from notification of the contested decision, appropriate measures for restoring effective competition in the market for television advertising and independent Dutch television production in the Netherlands ...

The relevant market

106 Before considering the Commission's definition of the relevant market, it should be observed that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer a discretion on the Commission, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary

margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95, *France and Others v Commission*, paragraphs 223 and 224).

107 In the present case, the Commission defined the market correctly, in that it concluded that the independent production of Dutch-language television programmes was a separate market from the market for in-house productions of the public broadcasters.

108 First, programmes produced by independent producers can be substituted only in part for programmes produced by the public broadcasters. The public broadcasters produce themselves, for the most part, the programmes essential to their role as public broadcasters and the low-value filler programmes. By contrast, it is not disputed that the applicant, which is by far the most important independent producer in the Netherlands, is much stronger in the field of big entertainment programmes, which account for 35% of its production. According to the figures provided by the Commission, which the applicant has not contested, its hourly production costs are 42% higher than those in the rest of the market, a fact which clearly shows that its programmes have a different profile.

109 Second, although certain programmes produced by the public broadcasters are sold on the international market, those sales have no effect on the Netherlands market. The applicant concedes that, so far as concerns the Netherlands market, the in-house production of the public broadcasters is essentially intended for their own use. There is thus no direct competition between the in-house production of the public broadcasters, whose programmes are not, as a rule, offered to other broadcasters in the Netherlands market, and the programmes produced by the independent producers which are offered on that market.

110 Third, the Commission could reasonably conclude that a public broadcaster was generally not in a position to choose whether to produce a programme itself or to commission it from an independent producer.

111 On the one hand, the applicant has not refuted the Commission's argument that public broadcasters with significant in-house production activities have made substantial investment for that purpose, having, in particular, taken on the necessary production staff, a major element in the cost of producing a programme. In those circumstances, it was reasonable for the Commission to conclude that if public broadcasters were to increase significantly the number of commissions placed with independent producers, to the detriment of their in-house production, they would nevertheless have to bear the cost of their in-house production capacity without obtaining a return on the investment made in terms of programmes produced. Such a policy would not be commercially feasible, at least not in the long run.

112 On the other hand, the Commission's argument that, because of their

substantial investment, the public broadcasters have no choice but to produce their programmes themselves is not invalidated by the fact that certain broadcasters have only very modest production departments, because it is clear that such broadcasters, lacking means of production themselves, must therefore commission programmes from independent producers ...

Market share

129 It is appropriate to consider at the outset the method used by the Commission for calculating the applicant's share of the market for independent Dutch-language television production in the Netherlands.

130 First, the Commission was right to calculate the market shares of the various producers by reference to the value of programmes and not the number of hours produced. The applicant has not disproved the results of the Commission's investigation, which showed that the hourly value of television productions ranged from NLG 30,000 to NLG 300,000. In those circumstances, market share can be validly calculated only on the basis of value and not volume.

131 Second, the Commission's calculation of the applicant's market share is reasonable. It is clear from the written replies given by the Commission to the Court that the Commission had sent questionnaires to 84 independent producers, not only 75 as stated in the pleadings. Those 84 producers were all the producers referred to in the Handbook other than the applicant itself. According to notes made during the investigation of the case, the Commission received written information from 29 producers, which related, inter alia, to the number of hours of television programmes produced in 1994 and to the value in guilders of those programmes. It also obtained information by telephone from 37 other producers on those two matters. It thus received replies from 78% of the 84 producers. It then estimated the value of the hours produced by the 18 producers for which it had no information, on the basis of the information supplied by other producers with a similar number of employees. Finally, it took into account the data provided by the applicant itself in order to calculate the size of the total market and the market share held by the applicant.

132 The Commission thus did not err by stating in the contested decision that the applicant's market share was "clearly more than 50%".

133 Furthermore, the Commission has demonstrated in its reply to one of the Court's written questions that, even though it had to include an estimate of the value of the programmes produced by a producer which was among the 29 which had replied in writing but which had failed to supply the necessary figure, that would not have altered its estimate of the applicant's market share, which would still have been clearly more than 50%.

134 It is necessary to examine next whether the Commission was right to

conclude that, in this case, the applicant held a dominant position in the relevant market. According to settled case-law, a particularly high market share may in itself be evidence of the existence of a dominant position, in particular where, as here, the other operators on the market hold only much smaller shares (Case 85/76, *Hoffmann-La Roche v Commission*, paragraph 41; Case C-62/86, *Akzo v Commission*, paragraph 60; and Case T-30/89, *Hilti v Commission*, paragraphs 91 and 92).

135 The Commission found, on the basis of its investigations, that the second most important producer held a market share of between 5% and 10%, four other producers each held market shares of between 2% and 5%, and the five other largest producers each held market shares of between 1% and 2%, while all the other producers held a market share of less than 1% each. In those circumstances, the Commission did not manifestly err in its assessment when it concluded that the applicant held a dominant position in the relevant market.

136 The Commission also referred to the applicant's further strengths which gave it a position far superior to that of its competitors. The Court will consider those other factors in turn.

137 First, so far as concerns the applicant's preferential access to foreign formats, the applicant has not refuted the Commission's argument that it was in a strong position because of it its capital base, which enabled it to purchase programmes by entering into output deals. As the Commission explained at the hearing, it is easier for a producer to obtain the necessary formats when it has already signed a contract with a broadcaster for a specified volume of programmes. Contrary to the applicant's submission, that explanation is not invalidated by the fact that the contract generally does not specify the content of the programmes. The fundamental point is that the producer already has a contract with a broadcaster guaranteeing that it will be able to produce a certain number of hours of programmes.

138 As regards formats in general, the applicant has not disputed that in 1993/94 it produced half of the most popular non-sports entertainment programmes and that 24 of those 28 programmes were based on a format. In those circumstances, the Commission's conclusions are not affected either by the fact that a third of the programmes produced by the applicant in 1994 were not based on a format or by the fact that, according to the applicant, broadcasters, and not itself, owned other popular formats.

139 The Commission was also correct in its assertion that the applicant had produced more than 60 programmes based on foreign formats in the three years preceding the concentration, as was demonstrated by the list which the applicant had itself submitted to the Commission as an annex to its reply of 14 July 1995 to the Commission's request for information of 7 June 1995, and is included in Annex 11 to the application. It is clear from that list that the figure of 38 programmes mentioned by the applicant in fact refers to the number of foreign formats used during that period and not to the number of programmes

produced on the basis of those formats.

140 Nor could the Commission ignore the opinion of other producers, of broadcasters and of other private channels, which had considered that the applicant owned a large number of the most popular Dutch formats and enjoyed preferential access to foreign formats.

141 Second, the applicant's statement that a large number of television personalities are either linked to broadcasters or freely available to anyone is not sufficient to refute the Commission's assessment that it had a high number of the most popular Dutch television personalities under contract. So far as concerns the opportunities for those personalities to appear elsewhere than on television and the fact that the applicant has its own agency for stars, even if, as the Commission acknowledges, those are not important factors in establishing the applicant's dominant position, it cannot be ruled out that they may strengthen its position in the market to some extent.

142 Third, as regards activities outside the Netherlands, the applicant has not refuted the Commission's argument that the applicant's large-scale activities outside the Netherlands may strengthen its position in the Netherlands market, given that its subsidiaries give it preferential access to the international market and increase the resources of the group as a whole.

143 Fourth, the other facts put forward by the applicant do not substantiate its argument. While it is true that other companies entered the Netherlands production market during the years preceding the concentration, the applicant has not disproved that those new entrants needed an established partner in that market, at least initially. As regards the alleged boycott of the applicant by certain public broadcasters following the announcement of HMG's creation, it is to be observed that, as the applicant itself states, the applicant supplied 88.2% of its production in 1994 to the channels Veronica, RTL 4 and RTL 5, and it was therefore not unreasonable for the Commission to conclude that such a boycott would have only minor significance.

144 Nor has the applicant shown in what way the Commission was wrong in considering that Kindernet and Euro 7 would be very low budget channels, inasmuch as Kindernet planned to concentrate mainly on children's daytime programmes and Euro 7 was in essence to be a news and documentary channel, and that their production requirements would therefore be relatively insignificant in value. Furthermore, the programmes produced by the applicant are of no interest to Euro 7. Nor has the applicant disputed that Veronica's programme budget was almost three times the budget of SBS.

145 Moreover, the applicant has not proved that the Commission was wrong in considering that most of the additional demand for Dutch-language productions would come from Veronica, which would need programmes for four and a half days of extra broadcasting - while the public broadcasters would have to fill only two and a half days - following Veronica's departure as a public

broadcaster. Since the applicant was already Veronica's main supplier, it was also reasonable for the Commission to conclude that most of Veronica's additional programming would be supplied by it.

146 In view of all of the foregoing, the Commission correctly defined the relevant market and the applicant's share of it, and was right in concluding that the applicant held a dominant position in that market.

147. This argument must accordingly be rejected as unfounded ...

Acquisitions leading to "control"

159 Under Article 3(3) of Regulation No 4064/89, control is constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking.

160 In the light of the considerations of fact and law in this case, the Commission was correct in concluding that VMG (Veronica and the applicant) and RTL exercised joint control over HMG.

161 Under the merger agreement, the most important strategic decisions had to be approved by the general meeting of shareholders before being put before the managing board. Those decisions covered, in particular, the strategy of HMG, the three-year business plan and annual budget, important investments, the overall programming concept and the appointment and dismissal of the programme directors and of the Director/Secretary-General.

162 In accordance with clause 3.4 of the merger agreement, issues submitted to the general meeting had to be decided by consensus. The agreement of RTL and VMG had therefore to be sought for all those decisions and, if a consensus could not be obtained, a period of 15 days was laid down during which the representatives of RTL and VMG had to use all endeavours to reach such a consensus. Only after those two stages could a final decision be adopted by simple majority vote, when RTL, with 51% of the voting rights, had a majority.

163 Furthermore, the shareholders' committee, which took decisions by unanimous vote, had to give its prior approval to certain decisions of the managing board which went beyond what is necessary to protect the interests of a minority shareholder. Thus, a decision changing substantially the profile, positioning or programming format of any of the three channels could only be taken unanimously. The same was true of a decision creating a new channel which would compete directly with one of the three existing channels. Accordingly, those aspects of HMG's strategy and of its overall programming concept were necessarily subject to unanimous agreement between RTL and VMG.

164 It follows that the Commission could reasonably conclude that RTL and VMG had joint control over HMG, having regard to the provisions of the merger agreement. It is therefore unnecessary to consider the applicant's arguments concerning RTL's alleged exclusive control and the Philip Morris judgment.

167 The Commission did not err in its assessment by concluding that, because of the structural link created between the parties to the concentration and the joint control which the applicant was therefore to exercise with RTL over HMG, in agreement with Veronica, the applicant had henceforth ensured a vast market for its production. Without that structural link it would have been realistic to envisage the possibility of other producers providing a much larger proportion of HMG's additional programme requirements. It was not possible for any other producer in the Netherlands to benefit from a guaranteed outlet for its productions nor to influence a broadcaster's programme acquisition policy. That conclusion could only be reinforced by the terms of the production agreement (see paragraph 18 above).

168 Furthermore, the parties themselves had stated that the supply relationship linking the applicant to RTL and Veronica was a major factor in determining the image of RTL 4, RTL 5 and Veronica and that it would be equally important for the success of HMG. They had also acknowledged that the purpose of the concentration was partly to enable the applicant to reduce the risk to which it was exposed in producing new programme formats, in that the concentration would ensure that the applicant's income from the new formats was maximised. It was therefore reasonable for the Commission to conclude that the applicant would provide its most promising programmes or those of proven appeal to HMG, to the detriment of other broadcasters.

169 In those circumstances, the Court finds that the applicant has not proved that the Commission exceeded the limits of its discretion or that it manifestly erred when it concluded that the effect of the concentration would be to strengthen the applicant's dominant position in the market for independent Dutch-language television production in the Netherlands and that effective competition in the market would thus be significantly hindered.

170. It follows that this argument must be rejected and, therefore, that the application must be dismissed in its entirety. □

The Commission has adopted a Regulation which partly extends the validity of its group exemption Regulation in the air transport sector, Regulation EEC/1617/93. Agreements on joint planning and scheduling and on joint operations are rare and will no longer be covered. The investigation into passenger tariff consultations and slot allocation will continue so that the Commission can decide whether an exemption is still appropriate in the future. The Commission has decided to extend the application of the Regulation to these two issues until June 2001. Source: Commission Statement IP/99/362 of 31.5.1999.