COMPETITION LAW IN THE EUROPEAN COMMUNITIES

December, 2000

Volume 23, Issue 12

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, N. H.
JAN 17 2001

FAIRFORD PRESS *Publisher and Editor: Bryan Harris*	**Fairford Review : EU Reports : EU Services : Competition Law in the European Communities**
58 Ashcroft Road, Cirencester GL7 1QX, UK P O Box 323, Eliot ME 03903-0323, USA www.fairfordpress.com	Tel & Fax (44) (0) 1451 861 464 Tel & Fax (1) (207) 439 5932 Email: anharr@cybertours.com

December, 2000

Volume 23 Issue 12

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

Copyright © 2000 Bryan Harris
ISSN 0141-769X

CONTENTS

Notification and Exemption

In our October issue, we carried a short report about the Commission's plans for a new regulation to replace Regulation 17 of 1962, which sets out many of the principles and procedures for the enforcement of the EC rules on competition. The Commission has since published the text of its proposed regulation, together with an Explanatory Memorandum; and, in a series of three or four reports, starting with the present issue, we shall be covering the memorandum and text of what is bound to be a profoundly important development in the way in which competition is promoted in the European Union.

There are several important respects in which the legal scene will change. Probably the most important is in the proposal for abolishing the notification of restrictive agreements and for introducing the principle that exemption should be "directly applicable" and no longer subject to a formal procedure. In other words, there is to be a presumption that agreements are lawful. They are presumed either to escape the prohibition under Article 81(1) of the EC Treaty or, if they are covered by Article 81(1), to be covered by the exemption provisions of Article 81(3). The presumption may be rebutted; and the responsibility for deciding whether the presumption is to be rebutted or upheld will in future be shared between the national competition authorities, the national courts and the Commission. Thus, exemption will no longer be the exclusive prerogative of the Commission; and the assessment of the legality or illegality of an agreement will lie in the first place with the parties to it and not be a matter for prior administrative decision. A greater responsibility for compliance will therefore rest on the undertakings concerned; and a wider share of jurisdiction will go to the Member States' tribunals.

From the Commission's point of view, the proposal makes good sense. "Experience in the last decades has shown that notifications do not bring to the attention of the Commission serious violations of the competition rules. The handling of a large number of notifications prevents the Commission from focusing on the detection and the punishment of the most serious restrictions such as cartels, foreclosure of the market and abuses of dominant positions. In the proposed system, the abolition of the notification and authorisation system will allow the Commission to focus on complaints and own-initiative proceedings that lead to prohibition decisions, rather than establishing what is not prohibited." (In referring to abuses of a dominant position, the Commission is not suggesting that, under existing rules, these have to be notified; they do not. On the contrary, the Commission is at pains to point out that the new proposals will bring the Article 81 procedure more closely in line with the procedure for dealing with cases under Article 82.) ■

ABUSE OF DOMINANT POSITION (PRESCRIPTION DATA): THE IMS CASE

Subject: Abuse of a dominant position
Discounts
Complaints

Industry: Data on prescriptions and sales of pharmaceutical products

Parties: Intercontinental Marketing Services

Source: Commission Statement IP/00/1207, dated 24 October 2000

(Note. Complaints about special discounts for favoured customers are not as common as they used to be; but they are still, in principle, a method employed by companies occupying or seeking a dominant position on the market.)

The Commission has sent Intercontinental Marketing Services Health (IMS), the world leader in collecting data on prescriptions and sales of pharmaceutical products, a statement of objections informing it that some of its commercial practices could constitute an abuse of a dominant position. Following two complaints, the Commission investigated IMS's sales practices, especially the loyalty discounts, and reached the preliminary conclusion that such practices made it very difficult for new competitors to enter or stay on the market in question.

IMS, a US company, is the world's leading company in tracking sales and prescriptions in the pharmaceutical industry. These services are essential to pharmaceutical laboratories to assess the market share of their medicines compared with competitors, and the performance of their medical representatives. IMS is present in 100 countries worldwide and had a turnover in 1999 of $1.4b. It supplies pharmaceutical firms with information on the performance of pharmaceutical products in terms of sales by pharmacies to patients and on doctors' prescriptions.

In the course of its investigation, the Commission noted that IMS made the sale of certain services subject to the prior purchase of other services, either on a single geographic market or on different geographic markets. In addition, IMS grants certain pharmaceutical laboratories so-called loyalty discounts and global or international discounts that are not based on objective and transparent criteria, as well as free products that go beyond simple trials of a new service. This type of practice by a firm in a dominant position distorts competition between rival operators and forms a solid barrier to potential entrants.

The statement of objections concludes that the practices in question are abuses of a dominant position within the meaning of Article 82 of the European Treaty. IMS has two months after receiving the statement of objections to answer in writing. ■

IMPLEMENTING RULES: COMMISSION PROPOSAL

Subject: Implementing rules (EC Rules on competition)

Industry: All industries

Source: Commission Proposal for a COUNCIL REGULATION on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87

(Note. The Commission's paper, containing its proposal for a Council Regulation, replacing Regulation 17 of 1962, has two parts: an explanatory memorandum and the text of the proposed regulation. The memorandum is itself divided into two parts: a general explanation of the principles and a detailed explanation of each of the proposed articles. The report which follows is the first part of the general explanation; the second part will appear in our next issue and will cover: the consistent application of Community competition law; legal certainty for companies and a reduction of bureaucracy; and subsidiarity and proportionality. The Commission's aims are in general admirable, though some of the interests consulted while the proposal was in course of preparation have expressed concern about the legal certainty of any new regime. Fewer rules may lead to less bureaucracy but may leave uncertain areas. Whether the new regime really involves fewer rules is not entirely self-evident; they are different and they relieve the burden created by the duty to notify. But a great deal depends on how they are applied and how far the Commission will in practice take the initiative in looking for possible infringements. It may not need to: the number of complaints from traders aggrieved by alleged infringements has been steadily rising in recent years.)

EXPLANATORY MEMORANDUM

General

The Community competition rules were established in its founding Treaty of 1957. Article 81 sets out the rules applicable to restrictive agreements, decisions and concerted practices, while Article 82 concerns abuses of dominant positions.

In 1962, the Council adopted Regulation No 17, which sets out the rules of procedure for the application of Articles 81 and 82 of the Treaty which have been applied till today without any significant modifications. Regulation No 17 was based on direct applicability of the prohibition rule of Article 81(1) and prior notification of restrictive agreements and practices for exemption under Article 81(3). While the Commission, national courts and national competition authorities can all apply Article 81(1), the power to apply Article 81(3) was granted exclusively to the Commission. Regulation No 17 thus established a

highly centralised authorisation system for all restrictive agreements requiring exemption. In contrast, Article 82 has always been enforced in parallel by the Commission, nationalcourts and national authorities.

This system was well suited for a Community of six Member States in which there was little competition culture. It allowed the development of Community competition law and its consistent application throughout the Community. However, today the context has changed fundamentally. The European Union now has 15 Member States, whose markets have already been extensively integrated, 380 million inhabitants, and 11 official languages. National competition authorities have been set up in the Member States and national competition laws have been enacted, many reflecting the content of Articles 81 and 82.

In this new context, the current system presents two major deficiencies. First, it no longer ensures the effective protection of competition. The Commission's monopoly on the application of Article 81(3) is a significant obstacle to the effective application of the rules by national competition authorities and courts. And in a wide Community, the Commission alone cannot bear the responsibility for enforcing the competition rules throughout the Union. Furthermore, the notification regime no longer constitutes an effective tool for the protection of competition. It only rarely reveals cases that pose a real threat to competition. In fact, the notification system prevents the Commission's resources from being used for the detection and punishment of serious infringements.

The second deficiency of the current system is that it imposes an excessive burden on industry by increasing compliance costs and preventing companies from enforcing their agreements without notifying them to the Commission even if they fulfil the conditions of Article 81(3). This is particularly detrimental to SMEs for whom the cost of notification and in the absence of notification, the difficulty of enforcing their agreements can constitute a competitive disadvantage compared with larger firms.

The perspective of the enlargement of the Community makes it even more urgent to proceed with a reform of Regulation No 17. A Union with 25 or even more Member States is now in prospect. A notification system with prior authorisation by one administrative body would be completely unsustainable in an enlarged Community, since, potentially, thousands of agreements would require administrative clearance in order to be enforceable. Direct application of Article 81(3) would ensure that agreements fulfilling the conditions of that provision were legally enforceable without recourse to an administrative body being necessary.

The White Paper and the consultation process

In order to prepare Community competition law for the challenges of the coming years, the Commission initiated the reform process by adopting and publishing in 1999 a White Paper on modernisation of the rules implementing Articles 81 and

82 of the EC Treaty.

The White Paper examines various options for reform and proposes the adoption of a fundamentally different enforcement system called a directly applicable exception system. Such a system is based on the direct applicability of the exception rule of Article 81(3), implying that the Commission and national competition authorities and courts would apply Article 81(3) in all proceedings in which they are called upon to apply the prohibition rule of Article 81(1), which is already directly applicable.

The White Paper was adopted on 28 April 1999. Interested parties were invited to submit comments by 30 September 1999. The European Parliament organised a public hearing on 22 September 1999. It adopted a resolution on 18 January 2000. The Economic and Social Committee adopted an opinion on 8 December 1999. The Commission has received and carefully examined submissions from all Member States and more than 100 interested parties, including submissions from EFTA countries, the ESA, and competition authorities from Estonia, Hungary and the Czech Republic. A working group composed of Commission officials and experts from the national competition authorities has discussed the content of the White Paper in a number of meetings.

The European Parliament and the Economic and Social Committee support the Commission's proposal while insisting on the importance of ensuring consistent application of Community competition law in a system of parallel powers and of maintaining an adequate level of legal certainty.

The positions of industry associations and lawyers are varied. Many welcome the Commission's approach as a more efficient and less bureaucratic alternative to the present system of implementation, which is almost universally considered unsatisfactory. However, many also stress the need to ensure that the reform does not lead to inconsistent application and renationalisation of Community competition law and that the reform does not reduce legal certainty for companies.

The proposal for a new regulation is in its main parts based on the White Paper, taking due account, however, of the major preoccupations expressed in the consultation process. The question of extending the procedures of the Merger Regulation to partial-function production joint ventures, that was also raised in the White Paper (nos. 79-81), will be further examined in the context of forthcoming reflections on the revision of that regulation.

Subject

The subject of the proposal is the reform of the implementing regulations for Articles 81 and 82 of the EC Treaty, that is, Regulation No 17 and the corresponding transport regulations. It is proposed to create a new enforcement system referred to as a directly applicable exception system. In such a system, both the prohibition rule set out in Article 81(1) and the exception rule contained in Article 81(3) can be directly applied by not only the Commission but also

national courts and national competition authorities. Agreements are legal or void depending on whether they satisfy the conditions of Article 81(3). No authorisation decision is required for enforcing agreements complying with Article 81 as a whole. This is already the existing enforcement system for Article 82 of the EC Treaty.

Legal basis

The legal basis for the present proposal is Article 83 of the EC Treaty. Article 83 empowers the Council to lay down the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82. In a non-exhaustive list, Article 83(2) mentions elements that should in particular be covered by implementing rules created on this basis.

The legal basis in Article 83 covers the application of Articles 81 and 82 in general. In particular, it is not limited to the application of the rules by specific decision-makers. The Community legislature, within the limits of the general principles of the Treaty, is therefore empowered to lay down rules on the application of Articles 81 and 82 by bodies other than the Community institutions as well as rules on the interaction between the different decision-makers. Accordingly, the proposed Regulation provides for certain rules to be respected by national competition authorities and/or courts when applying Articles 81 and 82 as well as rules on cooperation between them and with the Commission.

Article 83(2)(b) expressly provides for the Community legislature to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest extent possible on the other. The legal basis in Article 83 thereby enjoins the Community legislature to fill a lacuna left by Article 81. Leaving aside Article 81(2), Article 81 is divided into a prohibition rule (Article 81(1)) and a rule according to which the prohibition may be declared inapplicable if stated conditions are satisfied (Article 81(3)). It does not, however, lay down by what procedure the prohibition may be declared inapplicable, and by whom. In particular, the words 'may be declared inapplicable', unlike the words 'the High Authority shall authorise' used by the ECSC Treaty (see Article 65 of the ECSC Treaty), do not define a specific procedure.

The existing Regulation No 17 granted exclusive power to the Commission to apply Article 81(3) in the framework of an administrative procedure aiming at an authorisation decision. Article 81(3) is however suitable for direct application. While leaving a certain margin of appreciation as to its interpretation, Article 81(3) does not imply discretionary powers that could only be exercised by an administrative body. A limited margin of appreciation does not make a Treaty provision unsuitable for direct application, as is clear from the case-law on for instance Article 81(1) and Article 82, which are already directly applied by national courts.

There is no indication in the Treaty to contradict this conclusion. In particular, the words "to simplify administration to the greatest extent possible" in Article

83(2)(b), while imposing on the legislature the objective of a minimum of procedural bureaucracy, do not exclude the application of Article 81(3) by courts in addition to administrative bodies. Under the powers granted to it by Article 83, the Community legislature can choose an implementing system that is based on direct application of Article 81(3).

Article 83(2)(e) states that the Community legislature is also empowered to define the relationship between national laws and the Community rules on competition. Regulation No 17 refrained from regulating this relationship, which has led to long-standing debates and to legal uncertainty. The Court of Justice was able to clarify some of the issues involved by applying the principle of primacy of Community law over national law. Given the specificity of Article 81 in particular, the solutions found on that basis do not, however, cover the entirety of cases in which conflicts can arise. In addition, the change to a new implementing system risks to reopening the debate and creating new legal uncertainties as to this fundamental issue. The proposed Regulation therefore lays down a rule regulating the relationship between Community competition law and national law.

Finally, Article 83 is also the appropriate legal basis for regulating the application of Articles 81 and 82 to the transport sector. This was not yet clear when Regulation (EEC) No 1017/68 was adopted: it had two legal bases, the former Articles 75 and 87, now Articles 71 and 83. However, the Court of Justice has since held that the Community competition rules apply in full to the transport sector. [See Joined Cases 209 to 213/84, *Nouvelles Frontières*, and Case 66/86, *Ahmed Saeed*.] The Community legislature can therefore provide that the application of Articles 81 and 82 to agreements and decisions presently governed by Regulation (EEC) No 1017/68 is integrated into the proposed Regulation on the legal basis of Article 83. The same goes for the application of Articles 81 and 82 to the maritime transport sector presently governed by Regulation (EEC) No 4056/86. The latter regulation, although adopted subsequently to the abovementioned case-law of the Court of Justice, and in contrast to the Commission proposal (based on Article 87 (now 83) alone), was also based by Council on the former Article 84(2) (now 80(2)), owing to the inclusion of Article 9 of that Regulation concerning relations with third countries. The difference of opinion between the Council and the Commission does not need to be resolved in the present instance, as the proposed Regulation leaves Article 9 of Regulation (EEC) No 4056/86 untouched.

More efficient protection of competition

The proposal aims at increasing the protection of competition in the Community. This will be achieved by the proposal in three ways.

More enforcers

The proposed system will result in increased enforcement of Community competition rules, as in addition to the Commission, national competition authorities and national courts will also be able to apply Articles 81 and 82 in

their entirety.

National competition authorities, which have been set up in all Member States, are generally well equipped to deal with Community competition law cases. In general, they have the necessary resources and are close to the markets.

As regards the applicant countries, considerable progress has already been made in establishing national competition authorities. Even if initially they may not all possess sufficient resources to ensure the effective protection of competition, the proposed reform will allow the Commission to step up enforcement in those parts of the enlarged Community. The proposed discontinuation of the notification and exemption system ensures that all available resources can be used for the effective protection of competition.

It is a core element of the Commission's proposal that the Commission and the national competition authorities should form a network and work closely together in the application of Articles 81 and 82. The network will provide an infrastructure for mutual exchange of information, including confidential information, and assistance, thereby expanding considerably the scope for each member of the network to enforce Articles 81 and 82 effectively. The network will also ensure an efficient allocation of cases based on the principle that cases should be dealt with by the best placed authority.

National courts will also play an important and enhanced role in the enforcement of Community competition rules. Unlike national authorities or the Commission, which act in the public interest, the function of national courts is to protect the rights of individuals. They can grant damages and order the performance or non-performance of contracts. They are the necessary complement to action by public authorities.

The Commission's proposal aims at promoting private enforcement through national courts. Both Article 81(1) and Article 81(3) confer rights on individuals, which should be protected by national courts. The present division of powers under Article 81 is not in line with the important role that national courts play in the enforcement of Community law in general. In the present Regulation No 17 the authorisation system and the Commission's monopoly on the application of Article 81(3) make application of Article 81(1) by national courts very difficult. The fact that the elimination of this obstacle may lead to more application of Article 81 and thereby increase the case load on national courts is not a valid argument against the reform. Such considerations should not be allowed to hamper the implementation of a reform that aims at strengthening the enforcement of the rules and at enhancing the protection of individual rights.

Refocusing the Commission's action

The second way in which the proposal will increase the protection of competition is by allowing the Commission to concentrate on the detection of the most serious infringements. Experience in the last decades has shown that notifications do not bring to the attention of the Commission serious violations of the competition

rules. The handling of a large number of notifications prevents the Commission from focusing on the detection and the punishment of the most serious restrictions such as cartels, foreclosure of the market and abuses of dominant positions. In the proposed system, the abolition of the notification and authorisation system will allow the Commission to focus on complaints and own-initiative proceedings that lead to prohibition decisions, rather than establishing what is not prohibited. The Commission intends to issue a notice providing potential complainants with guidance on the treatment of complaints. The notice will inter alia set a deadline within which the Commission should inform the complainant whether it intends to deal with its complaint.

Increased powers of investigation for the Commission

In order to guarantee the protection of competition, it is also necessary to ensure that the Commission's powers of investigation are sufficient and effective. Under the existing Regulation No 17, the Commission can conduct inspections on the premises of companies and make written requests for information. It can fine companies for infringements of substantive and procedural rules and impose periodic penalty payments.

Three main improvements of the current system are required to ensure a more effective application of Articles 81 and 82.

First, the rules governing the obtaining of judicial orders at national level in order to overcome any opposition on the part of an undertaking to an inspection should be codified. This will clarify the intervention of national judges in accordance with the limits established by the Court of Justice.

Secondly, it is necessary to adapt the powers vested in Commission officials during inspections: they must be empowered, subject to judicial authorisation, to search private homes if professional documents are likely to be kept there. The experience of the national competition authorities and the Commission shows that incriminating documents are ever more frequently kept and discovered in private homes. Commission inspectors should also be empowered to seal cupboards or offices in order to ensure that documents are not removed and destroyed. Finally, they should be entitled to ask oral questions relating to the subject matter of the inspection.

Thirdly, the fines for breaches of procedural rules and the periodic penalty payments, which were set in absolute terms in the sixties, must be increased. A system based on turnover percentage figures is considered the appropriate solution.

Competition laws have an immediate impact on the commercial activities of companies, as they have to adapt to the prevailing standard in any given area. For companies that engage in activities having cross-border effects it is therefore important that there be a level playing field throughout the European Union, allowing them to reap the full benefits of the single market.

The present proposal will create a more level playing field in two ways. First, Community competition law will be applied to more cases, thereby limiting the scope for inconsistencies caused by differences in national competition laws. Secondly, a number of measures will ensure that Articles 81 and 82 are applied in a consistent manner by the various decision-makers involved in their application.

Wider application of Community competition law

In the present enforcement system, several national systems of competition law and Community competition law may apply concurrently to the same transaction to the extent that an agreement or practice is capable of affecting trade between Member States. The application of national law is constrained only by the principle of primacy of Community law.

Several national systems of competition law have been modelled on Articles 81 and 82. However, no formal harmonisation is in place, and differences remain both in law and practice. Such differences can lead to different treatment of agreements and practices that affect trade between Member States.

In order to promote a level playing field for companies that engage in agreements or practices that have a cross-border effect, it is necessary to regulate the relationship between national law and Community law, as provided in Article 83(2)(e) of the EC Treaty. Accordingly, Article 3 of the proposed Regulation provides that only Community competition law applies when an agreement, decision or concerted practice within the meaning of Article 81 or abusive conduct within the meaning of Article 82 is capable of affecting trade between Member States. This rule ensures in a simple and effective way that all transactions with a cross-border effect are subject to a single body of law.

The proposal not only creates a level playing field throughout the European Union, it also facilitates an efficient allocation of cases within the network of competition authorities, the aim being that cases should be dealt with by the best placed authority. In several Member States the competition authority, once seized of a case, is obliged to come to a formal decision. Such obligations may hinder reallocation of cases to a better placed authority. To overcome this problem in respect of the application of Articles 81 and 82 the Regulation empowers a competition authority to suspend a proceeding or reject a complaint on grounds that another competition authority is dealing with or has dealt with the case. However, the scope of this provision is limited to the application of Community competition law. Article 3 of the proposed Regulation ensures that an efficient allocation of cases is not hindered by simultaneous application of national law in respect of which a national competition authority may remain bound to come to a formal decision. Parallel application of national and Community competition law should be avoided because it leads to unnecessary parallel proceedings. ■

The full text of the Bayer case, reported on page 291, is freely available on the website of the Court of Justice of the European Communities; the text is not definitive.

ENVIRONMENTAL AGREEMENTS: COMMISSION GUIDELINES

Subject: Environmental agreements
Relevant market
Market entry
Exemption

Industry: Most industries

Source: Commission paper entitled Draft Guidelines on the Application of Article 81 to horizontal cooperation

(Note. This is the last in the series of extracts from the Commission's paper, whose value to industry is that it sets out clearly the Commission's policy towards the different types of horizontal agreements and is therefore helpful to those drafting these agreements and implementing them. On the face of it, the types of agreement which are partly or mainly directed towards environmental protection or improvement are highly desirable from a social point of view. However, it is not too difficult to imagine circumstances, such as a collective boycott of a given product, in which environmental considerations are offered as a justification for anti-competitive trading or, as the Commission puts it, "if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel". The Commission's guidelines indicate the boundaries between what is permissible and what is not on the basis of the same classification as in other sections of the guidelines: that is, agreements which are not covered by Article 81(1), agreements which are almost always covered and agreements which may be covered. The section of the guidelines on environmental agreements is a little short on examples: the one example set out here illustrates only too well the uncertainty arising in specific cases. "On the one hand, the agreement restricts competition and causes price increases; on the other hand, this may result in the development of new and better products, so that the agreement should be exempted.")

7. ENVIRONMENTAL AGREEMENTS

7.1. Definition

171. Environmental agreements are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set forth in Article 174 of the EC Treaty. (The term "agreement" is used in the sense defined by the European Community Counts in the case law on Anticle 81. It does not necessarily correspond to the definition of an "agreement" in Commission documents dealing with environmental issues such as the Communication on environmental agreements, COM (96) 561 final of 27 November, 1996.) Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. For instance, a national agreement phasing out a pollutant

or waste identified as such in relevant community directives may not be assimilated to a collective boycott on a product which circulates freely in the community. This excludes agreements that trigger pollution abatement as a by-product of other measures.

172. Environmental agreements may set forth standards on the environmental performance of products (inputs or outputs), or production processes. To the extent that some environmental agreements could be assimilated to standardisation, the same assessment principles for standardisation apply to them. Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.

173. Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character. To the extent that these arrangements contain vertical restraints they are not subject to these guidelines.

7.2. Relevant markets

174. The effects are to be assessed on the markets to which the agreement relates, which will be defined according to the relevant notice. When the pollutant is not itself a product, the relevant market encompasses that of the product into which the pollutant is incorporated. As for collection/recycling agreements, in addition to their effects on the market on which the parties are active as producers or distributors, the effects on the market of collection services potentially covering the good in question must be assessed as well.

7.3. Assessment under Article 81(1)

175. Some environmental agreements may be encouraged or made necessary by State authorities in the exercise of their public prerogatives. The present guidelines do not deal with the question of whether such State intervention is in conformity with the Member State's obligations under the EC Treaty. They only address the assessment that must be made as to the compatibility of the agreement with Article 81.

7.3.1. Nature of the agreement

7.3.1.1. Agreements that do not fall under Article 81(1)

176. Some environmental agreements are not likely to fall within the scope of the prohibition of Article 81(1), irrespective of the aggregated market share of the parties.

177. This may arise if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide

environmental target. In this latter case, the assessment will focus on the discretion left to the parties as to the means that are technically and economically available in order to attain the environmental objective agreed upon. The more varied such means, the less appreciable the potential restrictive effects.

178. Similarly, agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions do not fall under Article 81(1). Where some categories of a product are banned or phased out from the market, restrictions cannot be deemed appreciable insofar as their share is minor in the relevant geographic market or, in the case of EU-wide markets, in all Member States.

179. Finally, agreements which give rise to genuine market creation, for instance recycling agreements, will not generally restrict competition, provided that and as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist.

7.3.1.2. Agreements that almost always come under Article 81(1)

180. Environmental agreements come under Article 81(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, or if the co-operation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors.

7.3.1.3. Agreements that may fall under Article 81(1)

181. Environmental agreements covering a major share of an industry at national or EC level are likely to be caught by Article 81(1) where they appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each others production or sales. In addition to restrictions between the parties, an environmental agreement may also reduce or substantially affect the output of third parties, either as suppliers or as purchasers.

182. For instance, environmental agreements, which may phase out or significantly affect an important proportion of the parties' sales as regards their products or production process, may fall under Article 81(1) when the parties hold a significant proportion of the market. The same applies to agreements whereby the parties allocate individual pollution quotas.

183. Similarly, agreements whereby parties holding important market shares in a substantial part of the common market appoint an undertaking as exclusive provider of collection and/or recycling services for their products, may also appreciably restrict competition, provided other actual or realistic potential providers exist.

7.4. Assessment under Article 81(3)

7.4.1. Economic benefits

184. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the EC Treaty as well as in Community environmental action plans (Vth Environmental Action Programme (OJ C 138, 17.5.1993, p.1); EP and Council Decision 2179/98/EC of 24.9.1998 (OJ L 275 of 10.10.1998, p.1)), provided such agreements are compatible with competition rules. (Communication on environmental agreements, COM (96) 561 final of 27.11.1996, §§ 27-29 and Article 3(1)(f) of Decision 2179/98/EC. The Communication ineludes a "Checklist for Environmental Agreements" identifying the elements that should generally be included in such an agreement.)

185. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs. (This is consistent with the requirement to take account of the potential benefits and costs of action or lack of action set forth in Article 174(3) of the EC Treaty and Article 7(d) of Decision 2179/98/EC.)

186. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.

7.4.2. Indispensability

187. The more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision may be deemed to be indispensable to the attainment of the environmental goal within its economic context.

188. An objective evaluation of provisions which *prima facie* may be deemed not to be indispensable must be supported with a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits, would be more economically or financially costly, under reasonable assumptions. For instance, it should be very clearly demonstrated that a uniform fee, charged irrespective of individual costs for waste collection, is indispensable for the functioning of an industry-wide collection system.

7.4.3. No elimination of competition

189. Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run. For instance, in case of exclusive collection rights granted to a collection/recycling operator with potential competitors, the duration of such rights should take into account the possible emergence of an alternative to the operator.

7.5. Examples

190. Example. *Situation:* Almost all EU producers and importers of a given domestic appliance (e.g. washing machines), agree, with the encouragement of a public body, to no longer manufacture and import into the EU products which do not comply with certain environmental criteria (e.g. energy efficiency). Together, the parties hold 90% of the EU market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g. electric utilities, suppliers of components incorporated in the products phased out). *Analysis:* The agreement grants the parties control of individual production and imports, concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Consumer choice, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is caught by Article 81(1). The involvement of the public authority is irrelevant for this assessment. However, newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environmentally friendly products have lower running costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Varied technical means are economically available to the parties in order to manufacture products which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the conditions for an exemption under Article 81(3) are fulfilled. ■

On 26 October 2000, the Court of First Instance gave judgment in Case T-154/98, *Asia Motor France SA, in liquidation, and others v Commission of the European Communities*. This was the latest, and possibly the last, of the stages in litigation which began with a complaint to the Commission in 1985. In the course of previous litigation, the Commission was criticized by the Court for failing to treat correctly a number of complaints. This time, the Commission's defence was upheld and the case dismissed.

ANNULMENT (CHEMICALS): THE BAYER CASE

Subject: Annulment (of Commission Decision)
Fines
Distribution arrangements
Parallel exports

Industry: Chemicals; pharmaceuticals
(Implications for other industries)

Parties: Bayer AG
European Federation of Pharmaceutical Industries' Associations
Commission of the European Communities
Bundesverband der Arzneimittel-Importeure eV
(The EFPIA intervened in support of Bayer, the BAI in support of the Commission)

Source: Judgment of the Court of Justice of the European Communities in Case T-41/96, (Bayer v Commission), dated 26 October 2000; Court of Justice press release 78/00

(Note. This is a comparatively rare type of case, in which the Decision of the Commission has been annulled in its entirety. As the Court's press release points out, the case was decided largely on the facts: the Commission simply failed to persuade the Court that it could provide adequate evidence of the existence of an infringement. For this reason, the judgment is not reproduced in full in the report which follows. However, there are several passages in the Court's judgment in which the law is reviewed, with particular reference to the standard of proof required and the extent to which an agreement may be inferred from the parties' conduct, in the absence of a clear indication that an agreement was signed or intended.)

Press Release

The Commission has not proved the existence of an agreement between Bayer and its Spanish and French wholesalers. The fine of €3m is annulled. The continuance of commercial relations between, on the one hand, a manufacturer who unilaterally changes his distribution policy and, on the other, wholesalers who are clearly opposed to that new practice, does not amount to an acquiescence by the wholesalers in that policy, and is therefore not in itself sufficient to establish the existence of an agreement prohibited by Community competition law.

The Bayer Group is one of the main European chemical and pharmaceutical groups, represented in all Member States by national subsidiaries. It produces and markets a range of medicinal products for treating cardio-vascular disease under the trade name "Adalat" or "Adalate". In most Member States, the price of

medicinal products is fixed, directly or indirectly, by the competent national authorities. Between 1989 and 1993, the price of Adalat in France and Spain was much lower than that in the United Kingdom. Those price differences of about 40% caused Spanish wholesalers (from 1989) and then French wholesalers (from 1991) to export that medicinal product in large quantities to the United Kingdom. That practice of parallel imports caused a loss of turnover of DM 230m for Bayer's British subsidiary.

The Bayer Group then unilaterally changed its supply policy so as to fulfil orders from Spanish and French wholesalers only at the level of their habitual needs. On 10 January 1996, following complaints by some of the wholesalers concerned, the Commission adopted a decision requiring Bayer to amend its practice, which the Commission held to be contrary to Community competition law, and fined it €3m.

The Court of First Instance has annulled that decision, following an action brought by Bayer against it. The Court considers that the Commission has not proved that Bayer and its Spanish and French wholesalers made an agreement to limit parallel exports of Adalat to the United Kingdom. In the eyes of the Court, neither the conduct of the Bayer Group nor the attitudes of the wholesalers constitute elements of an agreement between undertakings. None of the documents submitted by the Commission contains evidence of an intention by Bayer to prohibit exports by wholesalers or evidence that it sought to obtain their agreement to its new supply policy designed to limit parallel exports. Nor has the Commission demonstrated that the wholesalers adhered to that policy, their reaction indicating, on the contrary, an attitude of opposition.

The Commission has therefore not proved the existence of acquiescence by the wholesalers, express or implied, in the attitude adopted by the manufacturer. Finally, the Court of First Instance rejects the argument that the Commission may legitimately consider it sufficient, for the purposes of proving the existence of an agreement, to find that the parties have continued to maintain their commercial relations, and points out that the very concept of an agreement is based on a concurrence of wills between economic operators.

Judgment

62. It is settled case-law that, where it hears an action for the annulment of a decision applying Article 85(1) of the Treaty, the Court of First Instance must undertake a comprehensive review of the question whether or not the conditions for applying Article 85(1) are met (Case 42/84, *Remia* v *Commission*, paragraph 34; Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 62).

63. Under the first paragraph of Article 85(1) of the Treaty:
"[T]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which

have as their object or effect the prevention, restriction or distortion of competition within the common market ..."

64. It is clear from the wording of that article that the prohibition thus proclaimed concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings, decisions by associations of undertakings and concerted practices.

65. In this case, it is found in the Decision that there is an agreement between undertakings within the meaning of that article. The applicant maintains, however, that the Decision penalises unilateral conduct on its part that falls outside the scope of the article. It claims that the Commission has given the concept of an agreement within the meaning of Article 85(1) of the Treaty an interpretation which goes beyond the precedents in the case-law and that its application to the present case infringes that provision of the Treaty. The Commission contends that it has fully followed the case-law in its evaluation of that concept and has applied it in a wholly appropriate manner to the facts of this case. It therefore needs to be determined whether, having regard to the definition of that concept in the case-law, the Commission was entitled to perceive in the conduct established in the Decision the factors constituting an agreement between undertakings within the meaning of Article 85(1) of the Treaty.

The concept of an agreement under Article 85(1) of the Treaty

66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 85(1) of the Treaty (Case 107/82, *AEG* v *Commission*, paragraph 38; Joined Cases 25/84 and 26/84, *Ford and Ford Europe* v *Commission*, paragraph 21; Case T-43/92, *Dunlop Slazenger* v *Commission*, paragraph 56).

67. It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69, *ACF Chemiefarma* v *Commission*, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78, *Van Landewyck and Others* v *Commission*, paragraph 86; Case T-7/89, *Hercules Chemicals* v *Commission*, paragraph 256).

68. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, *ACF Chemiefarma*, paragraph 112, and *Van Landewyck*, paragraph 86), without its having to constitute a valid and binding contract under national law (Case C-277/87, *Sandoz*, paragraph 13).

69. It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is

manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

70. In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article 85(1) of the Treaty (Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; Case 75/84 *Metro* v *Commission* ('*Metro II* [1986] ECR 3021, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; Case C-70/93 *BMW* v *ALD* [1995] ECR I-3439, paragraphs 16 and 17).

71. That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. While the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.

72. It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer (*BMW Belgium*, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; *BMW* v *ALD*, paragraphs 16 and 17).

...

[The Commission compared the circumstances of the present case to those of the Sandoz case.]

163. Although the two cases resemble each other in that they concern attitudes of pharmaceutical groups designed to prevent parallel imports of medicinal products, the concrete circumstances characterising them are very different. In the first place, unlike the situation in the present case, the manufacturer in *Sandoz* had expressly introduced into all its invoices a clause restraining competition, which, by appearing repeatedly in documents concerning all transactions, formed an integral part of the contractual relations between Sandoz and its wholesalers. Second, the actual conduct of the wholesalers in relation to the clause, which they complied with *de facto* and without discussion, demonstrated their tacit acquiescence in that clause and the type of commercial relations underlying it. On

the facts of the present case, however, neither of the two principal features of *Sandoz* is to be found; there is no formal clause prohibiting export and no conduct of non-contention or acquiescence, either in form or in reality.

164. Second, the Commission relies on the judgment in *Tipp-Ex* v *Commission*, cited above, in which the Court of Justice confirmed its decision penalising an agreement designed to prevent exports and in which, unlike the situation in *Sandoz*, there had not been a written stipulation concerning the export ban. It claims that Tipp-Ex, like the applicant in this case, had also argued before the Court of Justice that this was a unilateral measure that did not fall within the scope of Article 85(1) of the Treaty, and that, since the supplies from the distributor to the parallel exporter had actually taken place, there was no common interest in parallel exports being terminated.

165. That case concerned an exclusive distribution agreement between Tipp-Ex and its French distributor, DMI, which had complied with the manufacturer's demand that the prices charged to a customer should be raised so far as was necessary to eliminate any economic interest on his part in parallel imports. Moreover, it had been established that the manufacturer carried out subsequent checks so as to give the exclusive distributor an incentive actually to adopt that conduct (recital 58 of Commission Decision 87/406/EEC of 10 July 1987 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1987 L 222, p. 1). Paragraphs 18 to 21 of the judgment show the reasoning followed by the Court of Justice, which, after finding the existence of a verbal exclusive distribution agreement for France between Tipp-Ex and DMI and recalling the principal facts, wished to examine the reaction of and, therefore, the conduct adopted by the distributor following the penalising conduct adopted by the manufacturer. The Court of Justice then found that the distributor 'reacted by raising by between 10 and 20% the prices charged only to the undertaking ISA France. After the interruption of ISA France's purchases from DMI during the whole of 1980, DMI refused at the beginning of 1981 itself to supply Tipp-Ex products to ISA France. It was only after those findings with regard to the conduct of the manufacturer and the distributor that the Court of Justice arrived at its conclusion as to the existence of an agreement within the meaning of Article 85(1) of the Treaty: "it is therefore established that DMI acted upon the request of Tipp-Ex not to sell to customers who resell Tipp-Ex products in other Member States" (Case C-279/87, *Tipp-Ex* v *Commission,* paragraph 21).

166. In *Tipp-Ex*, therefore, unlike the situation in the present case, there was no doubt as to the fact that the policy of preventing parallel exports was established by the manufacturer with the cooperation of the distributors. As indicated in that judgment, that intention was already manifest in the oral and written contracts existing between the two parties (see paragraphs 19 and 20 concerning the distributor DMI and 22 and 23 concerning the distributor Beiersdorf) and, if there were any remaining doubt, analysis of the behaviour of the distributors, pressed by the manufacturer, showed very clearly their acquiescence in the intentions of Tipp-Ex in restriction of competition. The Commission had proved not only that the distributors had reacted to threats and pressure on the part of the manufacturer, but also the fact that at least one of them had sent the

manufacturer proof of its cooperation. Finally, the Commission itself observes in this case that, in *Tipp-Ex*, in order to determine whether an agreement existed, the Court of Justice took the approach of analysing the reaction of the distributors to the conduct of the manufacturer running counter to parallel exports and that it was in assessing that reaction of the distributor that it concluded that there must be an agreement in existence between it and Tipp-Ex designed to prevent parallel exports.

167. It follows that that judgment, like *Sandoz*, merely confirms the case-law to the effect that, although apparently unilateral conduct by a manufacturer may lie at the root of an agreement between undertakings within the meaning of Article 85(1) of the Treaty, this is on condition that the subsequent conduct of the wholesalers or customers may be interpreted as *de facto* acquiescence. As that condition is not fulfilled in this case, the Commission cannot rely on the alleged similarity between these two cases in support of its argument that acquiescence existed in this case.

168. For the same reasons, neither the Commission nor BAI may validly rely on the assessments carried out by the Court of Justice in *BMW Belgium*, *AEG* and *Ford and Ford Europe* in support of their argument that acquiescence by the wholesalers exists in this case.

169. In *BMW Belgium*, in order to determine whether there was an agreement within the meaning of Article 85(1) of the Treaty between BMW and its Belgian dealers, the Court of Justice examined the measures capable of demonstrating the existence of an agreement, in that case circulars sent to BMW dealers, 'according to their tenor and in relation to the legal and factual context in which they [were] set, and concluded that the circulars in question indicate[d] an intention to put an end to all exports of new BMW vehicles from Belgium (paragraph 28). It added that in sending those circulars to all the Belgian dealers, BMW Belgium played the leading role in the conclusion with those dealers of an agreement designed to halt such exports completely (paragraph 29). Paragraph 30 of that judgment shows that the Court of Justice intended to confirm the existence of acquiescence by the dealers.

170. In *AEG*, in which the respective intentions of the manufacturer and the distributors do not appear clearly and in which the applicant expressly relied on the unilateral nature of its conduct, the Court of Justice considered that, in the context of a selective distribution system, a practice whereby the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refused to approve distributors who satisfied the qualitative criteria of the system did 'not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempt from the prohibition contained in Article 85(1) of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers (paragraph 38). The Court of Justice then sought to determine the existence of acquiescence by the distributors by stating: 'Indeed, in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires inter alia the exclusion from the

network of all distributors who are qualified for admission but are not prepared to adhere to that policy (paragraph 38). That approach has been confirmed in the other selective-distribution cases decided by the Court of Justice (*Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *BMW* v *ALD*, paragraphs 16 and 17).

171. It follows that the Commission cannot rely on the case-law precedents which it has cited in order to establish the existence of an agreement in this case.

The Commission's argument that, in order to prove the existence of an agreement, it is sufficient to find that the parties maintain their commercial relations

172. The Commission's reasoning shows that it maintains, albeit ambiguously (see the structure of the Decision summarised in recitals 155 and 156 and developed in recitals 171 to 188), that the mere finding of fact that the wholesalers did not interrupt their commercial relations with Bayer after the latter established its new policy designed to restrain exports is a sufficient ground for it to hold that the existence of an agreement between undertakings within the meaning of Article 85(1) of the Treaty is established.

173. Such an argument cannot be accepted. The proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed (see, in particular, *ACF Chemiefarma*, paragraph 112; *Van Landewyck and Others*, paragraph 86). The Commission misjudges that concept of the concurrence of wills in holding that the continuation of commercial relations with the manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by the wholesalers in that policy, although their *de facto* conduct is clearly contrary to that policy.

174. Moreover, in accordance with the general scheme of the Treaty, an undertaking may be penalised under Community competition law only if it has infringed prohibitions contained in Article 85(1) or Article 86 of the Treaty. In that respect, it should be noted that the applicability of Article 85(1) is based on a number of conditions, namely that, (a) there must be an agreement between at least two undertakings or a similar arrangement such as a decision of an association of undertakings or a concerted practice between undertakings, (b) that arrangement must be capable of affecting trade within the Community, and (c) that it must have as its object or effect the restriction of competition to an appreciable extent. It follows that, in the context of that article, the effects of the conduct of an undertaking on competition within the common market may be examined only if the existence of an agreement, a decision of an association of undertakings or a concerted practice within the meaning of Article 85(1) of the

Treaty has already been established (Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at p. 248 et seq.). It follows that the aim of that provision is not to 'eliminate obstacles to intra-Community trade altogether; it is more limited, since only obstacles to competition set up as a result of a concurrence of wills between at least two parties are prohibited by that provision.

175. That interpretation of Article 85(1) of the Treaty was followed by the Court of Justice in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 15 to 17, in which, upholding a judgment of the Court of First Instance, it held that the fact that the policy implemented by a parent company consisting essentially in dividing various national markets between its subsidiaries might produce effects outside the ambit of the group which were capable of affecting the competitive position of third parties could not render Article 85(1) of the Treaty applicable, even when read in conjunction with Article 2 and Article 3(c) and (g) of the EC Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application, as laid down in that article, were fulfilled.

176. Having regard to the foregoing considerations, and contrary to what the Commission and the BAI appear to maintain, the right of a manufacturer faced, as in this case, with an event harmful to his interests, to adopt the solution which seems to him to be the best is qualified by the Treaty provisions on competition only to the extent that he must comply with the prohibitions referred to in Articles 85 and 86. Accordingly, provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example, to hinder parallel imports, the implementation of that policy may entail restrictions on competition and affect trade between Member States.

177. The Commission relies in this respect on the judgment of the Court of Justice in Joined Cases C-267/95 and C-268/95, *Merck and Beecham*, as a basis for arguing that in all circumstances parallel imports must be protected. It maintains that, in that judgment, the Court of Justice put an end to speculation concerning the scope of the solution adopted in the judgment in Case 187/80, *Merck* v *Stephar and Exler*, by stating that the control of prices in certain Member States did not justify any derogation from the principle of the free movement of goods and that the possibility of preventing parallel imports entailed an undesirable partitioning of national markets. Therefore, the Commission maintains, even in the pharmaceutical sector, parallel imports may not be hindered either by national measures or by agreements between undertakings.

178. It should, however, be noted that, in that judgment, the Court of Justice limits itself to answering the question concerning, first, the expiry date of certain transitional provisions contained in the Act of Accession of the Kingdom of Spain and the Portuguese Republic (Articles 47 and 209 of the Act of Accession) which permitted the prevention of parallel exports of pharmaceutical products from those countries into other parts of the Community, and, second, the legal regime applicable to parallel imports after the expiry of the relevant transitional periods

and to the question whether the scope of the solution adopted in *Merck* v *Stephar and Exler* should be reconsidered. The reasoning of the Court of Justice in *Merck and Beecham* does not concern the issue in this case, which does not fall within the law on the free movement of goods under Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC), and, contrary to what the Commission claims, does not in any way presume a general prohibition on preventing parallel exports applying not only to Member States but also, and in all cases, to undertakings.

179. In reality, rather than supporting the Commission's argument, that judgment merely confirms that, under the system of the Treaty, it is not open to the Commission to attempt to achieve a result, such as the harmonisation of prices in the medicinal products market, by enlarging or straining the scope of Section 1 (Rules applying to undertakings) of Chapter 1 of Title VI of the Treaty, especially since that Treaty gives the Commission specific means of seeking such harmonisation where it is undisputed that large disparities in the prices of medicinal products in the Member States are engendered by the differences existing between the state mechanisms for fixing prices and the rules for reimbursement, as is the case here (see recitals 151 and 152 of the Decision). As the Court of Justice pointed out in paragraph 47 of the judgment in *Merck and Beecham*, it is settled case-law that distortions caused by different price legislation in a Member State must be remedied by measures taken by the Community authorities (see Case 16/74, *Centrafarm* v *Winthrop*, paragraph 17; *Musik-Vertrieb Membran and K-tel International* v *GEMA*, paragraph 24; Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others*, paragraph 46; *Merck and Beecham*, paragraph 47).

180. An extension of the scope of Article 85(1) of the Treaty, such as that proposed by the Commission, would lead to a paradoxical situation in which refusal to sell would be penalised more heavily in the context of Article 85(1) than in that of Article 86, since the prohibition in Article 85(1) would hit a manufacturer deciding to refuse or restrict future supplies but without terminating his commercial relations with his customers altogether, whereas, under Article 86, refusal to supply, even where it is total, is prohibited only if it constitutes an abuse. The case-law of the Court of Justice indirectly recognises the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without falling under the prohibition laid down in Article 86 (see Case 27/76 *United Brands* v *Commission* [1978] ECR I-207, paragraphs 182 to 191).

181. Nor, finally, can the Commission rely in support of its argument upon its conviction, which is, moreover, devoid of all foundation, that parallel imports will in the long term bring about the harmonisation of the price of medicinal products. The same applies to its claim that 'it is not acceptable for parallel imports to be hindered so that pharmaceutical undertakings may impose excessive rates in countries not applying any price control in order to compensate for lower profits in Member States which intervene more on prices.

182. It follows that the Commission could not legitimately regard an agreement between the wholesalers and the manufacturer as being established on the basis of the mere finding that pre-existing commercial relations continued.

Conclusion

183. It follows from the whole of the foregoing considerations that the Commission incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a common intention between Bayer and the wholesalers referred to in the Decision, which justified the conclusion that there was an agreement within the meaning of 85(1) of the Treaty,designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom.

184. As a result, the principal plea in law raised in this action must be declared to be well founded ... ■

The C3D / Rhone Capital / Go-Ahead Group Case

The Commission has decided to refer to the UK competition authorities part of the proposed takeover by French company C3D and Rhône Capital of the Go-Ahead Group Plc. The referral concerns the passenger transport by bus in the south or south-west of London where the transaction threatens to create a dominant position. The Commission has decided to clear the rest of the transaction. C3D is a France-based holding company. It is active in the London bus market via London United, London United Busways Ltd, Stanwell and Westlink. Rhône is a US based investment fund. Go-Ahead is a British transport company active in road and rail transport. It is present in the London bus market via London General, London Central and Metrobus.

In the present case, the UK competition authority informed the Commission that it had identified one market within the UK in which the conditions for such a referral existed. This market concerns the passenger transport by bus in the London area. The UK competition authority considers that, for a number of reasons, this market represents a distinct market within the UK territory and that the notified operation could lead to the creation of a dominant position in the south or south-west of London. The Commission considers that the UK is well placed to carry out the necessary review as it has recently investigated a number of operations in the London bus passenger transport market, namely Cowie/British Bus and Metroline/MTL North London. The UK has a maximum of four months to reach a final decision. The referral to the UK authorities relates only to the bus passenger market in London. The Commission has cleared those parts of the deal which relate to services to airports, rail transport and bus services outside London as its investigation showed that there were no competition concerns in these areas. (Source: Commission Statement IP/00/1195, 20 October 2000.)