COMPETITION LAW IN THE EUROPEAN COMMUNITIES

November, 2002

Volume 25, Issue 11

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
PO Box 323, Eliot ME 03903-0323, USA

www.competition-law.com

Tel (44) (0) 1285 656 999
Tel & Fax (1) (207) 439 5932

Email: alanbharris@netzero.net

November, 2002

Volume 25 Issue 11

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

ISSN 0141-769X

CONTENTS

Comment

Commission Setbacks in Merger Cases

When opening a speech in Brussels on November 7th, the Commissioner for Competition Policy, Mario Monti, prefaced his review of merger control by a reference to some of the setbacks which the Commission had recently experienced in the Courts. He was speaking about the plans he intended to submit to the Council "before the end of this year" for a far-reaching reform of European merger control. However, before describing the proposed reforms, he turned briefly to matters which had been drawing a lot of his attention in recent weeks, and no doubt had caught many other people's eyes too.

He noted that the Commission had faced unprecedented criticism in the wake of three judgments of the Court of First Instance over-turning on appeal the prohibition decisions the Commission had taken in *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*. Two of those judgments had been delivered only a fortnight ago: and the Commission was still studying them carefully before deciding whether or not to lodge an appeal to the European Court of Justice in either or both cases. In the meantime, the Commission might well decide, with more hindsight, that these judgments, no matter how painful, came at the right moment. Indeed, there were no doubt lessons to be drawn from the judgments: in particular, it was clear that the Court of First Instance was now holding the Commission to a very high standard of proof, and that this had clear implications for the way in which investigations were conducted and decisions drafted. The Commission has taken into account the shortcomings in its procedures, highlighted in the judgments, by strengthening its reforms even further.

While the judgments were sharply critical of the Commission in some respects, they also confirmed some of the Commission's views. In *Schneider/Legrand*, the Commission's decision was overturned by the Court on account of a procedural error by the Commission. The Court did, however, confirm that the operation would have engendered serious competition problems in France. And in *Tetra Laval/Sidel*, the Court upheld the principle that conglomerate mergers could, in certain circumstances, fall under the Merger Regulation. The Commission bravely comments that these setbacks should not distort the Community's merger control policy, but should provide an opportunity for even deeper reform. ■

Editor's Note. The Airtours case was reported in our June 2002 issue, on page 138. At the time of writing, the Schneider case is available only in French; and we have therefore reproduced in the present issue the Court's press statement on the case; if appropriate, a future issue will contain extracts from the judgment. As for the Tetra Laval case, this is available in English but is so long that in this issue we are publishing only the Court's press statement on the case and looking at the possibility of editing the judgment in a suitable form in a future issue.

EXPORT RESTRICTIONS (VIDEO GAMES): THE NINTENDO CASE

Subject: Export restrictions
Parallel trade
Differential pricing
Fines

Industry: Video games
(Some implications for other industries)

Parties: Nintendo (Japan) and seven European distributors

Source: Commission Statement IP/02/1584, dated 30 October 2002

(Note. It is not unusual for suppliers of goods and services to sell at prices "which the market can bear"; but, when this leads to differential pricing in the Member States of the European Union, and when suppliers attempt to restrict supplies by direct or parallel trade from being exported to high-priced from low-priced countries, there is on the face of it an infringement of the rules on competition. This has been the principle applied by the Court and the Commission since the early Court case Consten and Grundig and the Commission Decision in the Konica case. The fines imposed on Nintendo and its principal distributors were heavy.)

The Commission has imposed a total fine of €167.8 million on Japanese video games maker Nintendo and seven of its official distributors in Europe for colluding to prevent exports to high-priced from low-priced countries. The fine on Nintendo alone was calculated at €149 million to reflect its size in the market concerned, the fact that it was the driving force behind the illicit behaviour and also because it continued with the infringement even after it knew the investigation was going on. Prices for play consoles and games differed widely from one European Union country to another during the period investigated by the Commission, with the United Kingdom up to 65 percent cheaper than Germany and the Netherlands. Every year, millions of European families spend large amounts of money on video games. They have the right to buy the games and consoles at the lowest price the market can possibly offer and we will not tolerate collusive behaviour intended to keep prices artificially high," Competition Commissioner Mario Monti said.

The decision concerns Nintendo and seven distributors of Nintendo products, namely John Menzies plc (Nintendo's distributor for the United Kingdom), Concentra - Produtos para crianças S.A. (Portugal), Linea GIG. S.p.A. (Italy), Bergsala AB (Sweden), the Greek unit of Japan's Itochu Corp, Nortec A.E. (Greece), and the Belgian unit of Germany's CD-Contact Data GmbH.

The Commission has collected evidence showing that Nintendo and its distributors colluded to maintain artificially high price differences in the

European Union between January 1991 and 1998. According to the arrangements, each distributor was under an obligation to prevent parallel trade from its territory, that is, exports from one country to another by way of unofficial distribution channels. Under the leadership of Nintendo, the companies intensively collaborated to find the source of any parallel trade. Traders who allowed parallel exports to occur were punished by being given smaller shipments or by being boycotted altogether.

The investigation showed that during the seven-year period price differences in the European Economic Area (EEA, the European Union plus Norway, Iceland and Liechtenstein) were frequent and significant. The United Kingdom usually had the lowest prices by far, which understandably tempted traders into re-exporting cheap goods to high-price countries.

The most striking price differences were observed in early 1996, when certain Nintendo products were up to 65% cheaper in the UK when compared with the Netherlands and Germany. They were also more affordable than in Spain (up to 67% more expensive than the UK), Italy (54%) and Sweden (39%). The difference narrowed but remained significant in 1997, when the UK price for all N64 game consoles and game cartridges was 33% lower (in October) than everywhere else in the EEA.

A Memo written by John Menzies for Nintendo on 11 April 1996 which was volontarily submitted to the Commission outlined the strategy and steps to maintain the huge price differences: "I fully understand the difficulty that this differential pricing creates for other mainland European countries where the market can clearly stand a much higher price than that which the market can stand here in the UK. [...] I am sure that we can, by working closely together, better control the situation on grey imports and find a much better way of isolating our products and our prices to within the shores of the UK, thus reducing the impact that this differential pricing has upon mainland Europe".

Subsequently, John Menzies took action, as a letter obtained after a formal request for information to Nintendo explained: "I can tell you that a significant amount of activity has been undertaken by THE (John Menzies's subsidiary called THE Games Ltd) since January/February this year [1996] with a view to stopping the grey exporting of products from the UK into the continental European market. Our major activities in this regard have been to either shut off supplies completely or to really control/restrict the supply of product into the UK market place, to certain questionable retailers". It should be noted that, before this happened, John Menzies itself had been boycotted by Nintendo to force it to collaborate better with the infringement.

As a result of the illicit behaviour of Nintendo and its official distributors, families on continental Europe had to put up with high prices. To measure the harm caused to consumers it is sufficient to note that Nintendo sold five million game consoles and 12 million games in Europe in 1997 alone.

Article 81 of the EU treaty specifically prohibits agreements and concerted practices "which may affect trade between Member States and which may have as their object or effect the prevention, restriction or distortion of competition within the common market". Restrictions of parallel trade represent a serious infringement of Article 81: this was confirmed by the European Courts as early as 1966 in the landmark *Grundig-Consten* case and, more recently, in the 1998 Volkswagen decision. The seriousness of the infringement and the harm caused to end-consumers led the Commission to impose a total fine of €167.843 million, which is the fifth largest ever imposed for any anti-trust infringement. It is also by far the largest fine ever imposed for a so-called vertical infringement, in this case, between a producer and its distributors as opposed to a horizontal cartel between manufacturers of the same product. The fine on Nintendo is also the fourth largest ever imposed on an individual firm for a single infringement.

Individual fines

The following is a breakdown of the fines per company (all figures expressed in € million):
Nintendo Corporation and Nintendo of Europe GmbH (jointly liable): 149.128
John Menzies plc: 8.64
Concentra - Produtos para crianças S.A.: 0.825
Linea GIG. S.p.A.: 1.5
Bergsala AB: 1.25
Itochu Corporation: 4.5
Nortec A.E.: 1.0
CD-Contact Data GmbH: 1.0
The amounts reflect the real impact of the offending conduct of each firm on competition as well as their different size to ensure a sufficient deterrent effect. Nintendo, John Menzies and Itochu are much bigger than the others.

Nintendo was the instigator and the leader of the infringement and carried on with the illicit behaviour even after the Commission had started its investigation, as did John Menzies. This constitutes an aggravating circumstance. The latter also tried to mislead the Commission with regard to the real scope of the infringement in mid-1997. These aggravating factors were duly balanced with the fact that, after December 1997, John Menzies and Nintendo co-operated with the Commission. Similarly, in setting the final fine on Nintendo, the Commission also took into consideration its decision to offer substantial financial compensation to third parties, which suffered material harm. Nintendo and John Menzies were, nevertheless, granted large reductions, which stresses the importance the Commission attaches to co-operation by companies that have infringed EC competition law even if this was not through participation in a 'classic' horizontal cartel. (Because this is a vertical infringement, the 1996 Leniency Notice does not apply. However, the 1998 Method on how to calculate fines in antitrust infringements does also afford the opportunity to take into account co-operation in an investigation outside the scope of the 1996 Leniency Notice.) The small fine on Concentra reflects its passive role in the illicit agreement.

Nintendo produces game consoles and games compatible with those consoles. The products concerned by this decision are the static NES and SNES consoles, the N64 game console that superseded them and the 'hand-held' Game Boy. In some Member States, Nintendo acts as the official importer and distributes its products to wholesalers and retailers itself. This is the case in Germany, the Netherlands, France, and Spain. At the beginning of the investigation period, Nintendo also distributed its products itself in Belgium, the UK and Ireland, but later appointed independent official importers for these countries. The Games Ltd, part of John Menzies, became Nintendo's official distributor for the UK and Ireland in 1995. CD-Contact Data GmbH became Nintendo's official importer for Belgium in 1997. In Portugal, Italy and the Scandinavian countries the official importers are or were Concentra, Linea GIG Spa and Bergsala AB. In Greece, Nintendo products were distributed by Itochu Hellas EPE, a subsidiary of Itochu, until 1997. At that point, the distribution was taken over by Nortec EA. After the investigation period, Nintendo reorganised its distribution system.

The Commission's investigation started in 1995 but gained momentum when, in December 1997, John Menzies and, subsequently, Nintendo began to co-operate with the Commission. On 25 April 2000, the Commission issued a Statement of Objections. All the companies replied in writing but did not request an oral hearing. They were also given the right of access to the Commission's file. ■

Limitations: The Carlsberg / Heineken Case

A useful reminder that there is a "statute of limitations" in competition cases has been provided by the Carlsberg / Heineken case. The Commission has closed its investigation into an alleged market sharing agreement between Carlsberg of Denmark and the Dutch company Heineken, two large international brewers, since the Commission did not find evidence to prove that the suspected infringement continued after May 1995. Under EU rules, the Commission cannot fine companies for infringements for which it has no evidence that they continued in the five years preceding the start of its investigation, which in this case was 2000. Council Regulation EEC/2988/74 of 26 November 1974 sets out the Commission's procedural framework with respect to limitation periods in competition cases. It requires that, for fining purposes, the Commission must give evidence that an infringement of the competition rules was not terminated five years before its first intervention. In this case the first relevant intervention was in May 2000. As evidence of the kind sought was not found, the Commission came to the conclusion that any possible infringement arising in this case would fall outside the time limit for fines. Therefore the Commission informed the companies that no further action would be taken with respect to its investigation and that the case had been closed.

Source: Commission Statement IP/02/1603, dated 4 November 2002

COOPERATION AGREEMENTS (AIRLINES): THE KLM CASE

Subject: Cooperation agreements

Industry: Airlines

Parties: KLM / North West
Lufthansa / SAS / United

Source: Commission Statement IP/02/1569, dated 29 October 2002

(Note. Both the Commission and the US anti-trust authorities are concerned about the risks that transatlantic airline alliances may have on routes and slots; and this report brings readers up-to-date on the current situation not only of the airlines listed above, but also British Airways, American Airlines, Swissair, Austrian Airlines, Delta, Air France, Alitalia, CSA, Korean Air and AerMexico.)

The Commission has decided to close its investigations into the alliances between KLM and NorthWest, on the one hand, and between Lufthansa, SAS and United Airlines, on the other. In the latter case, the airlines successfully addressed concerns about reduced competition on a number of routes between the German airport of Frankfurt and US destinations. In the case of KLM/NorthWest no remedies were held necessary.

In July 1996 the Commission decided to open, on its own initiative, proceedings involving a number of transatlantic alliances in the aviation sector, including the Wings alliance between KLM and NorthWest and the Star Alliance between Lufthansa (LH), Scandinavian Airlines System (SAS) and United Airlines (UAL). The Commission points out that, while it has powers in connection with alliances between carriers within the European Union, the Commission does not have specific enforcement powers to rule on air transport between the European Union and non-member states. (The scope of Regulation EEC/3975/87, laying down rules for the application of Article 81 and 82 of the Treaty to the air transport sector, is limited to transport services between Community airports.) This includes alliances between EU and US carriers for which the Commission uses Article 85 of the EU Treaty, which allows it to take steps to have Member States put an end to infringements of EU competition law.

With regard to the LH/SAS/UA Alliance, the Commission in 1998 informed the three partners that it had serious concerns that the Star alliance would have significantly reduced competition on four transatlantic routes, on which the partners held combined market shares of between 56% and 95%. The affected city pairs were Frankfurt-Chicago, Frankfurt-Washington, Frankfurt-Los Angeles and Frankfurt-San Francisco.

The Commission also took the view then that the alliance was unlikely to feel the competitive pressure of rivals due to significant regulatory and structural market

entry barriers. National governments still impose price controls on indirect services and landing and take off slots are in shortage at Frankfurt. But, after receiving comments from the alliance partners and other interested parties and after an additional market investigation, the Commission concluded that indirect flights, under certain conditions, could constitute suitable alternatives to non-stop services on long haul routes. This reassessment and a close co-operation with the EU Member States concerned to reduce the market entry barriers has allowed the Commission to adopt a more positive approach on this alliance.

The Commission's fears were assuaged when the three Star alliance partners offered to surrender slots at Frankfurt airport to allow new air services (either direct or indirect) on the routes concerned. The parties have offered to surrender sufficient slots to allow two additional daily competing air services on the Frankfurt-Washington route and one additional daily competing air service on each of the other three routes. In addition, new entrants using the slots, if they operate a non-stop service, will be admitted to the parties' frequent flyer programme and offered interlining facilities; and the German Government has agreed not to apply restrictive price control measures on competitive indirect services (so-called sixth freedom services) on the routes concerned. The Commission considers the proposed commitments and the declaration by the German Government address possible entry barriers for competitors and remove the risk that competition would be eliminated. The Commission also took the view that the alliance brought benefits to consumers in terms of increased frequencies and reduced fares.

As to the KLM/NW alliance, the Commission was initially concerned by the parties' high position on the Amsterdam-Detroit and Amsterdam-Minneapolis/St Paul routes where they hold 88 % and 78% combined market shares respectively. But after further reflection it concluded that although the parties have high market shares on the routes concerned, the alliance would face competition from competitors providing substitutable indirect services. The Commission also concluded that there were no structural barriers to entry in terms of slot constraints or regulatory barriers. Like the Star alliance, the KLM-Northwest agreement also brings benefits for consumers in terms of increased frequencies and reduced fares.

When the Commission initiated its proceeding into the LH/SAS/UA and KLM/NW Alliances in July 1996, it also looked at the planned link between British Airways and American Airlines and an alliance between Swissair, Austrian Airlines and Delta. The first was abandoned (twice) by the parties, most recently at the beginning of this year, after the US Department of Transportation requested the divestiture of 224 slots to address the competition concerns. Consequently the Commission's case was closed without the need to take any further action. The alliance between Swissair/AuA and Delta, in which the Commission opened a proceeding in 1996, no longer exists in that form. The Commission is, however, currently investigating the Skyteam Alliance, between Air France, Alitalia, Delta, CSA, Korean Air and AerMexico, which was officially launched in July 2000. ■

LICENSING (BROADCASTING): THE IFPI CASE

Subject: Licensing

Industry: Broadcasting; music

Parties: The International Federation of the Phonographic Industry (IFPI)

Source: Commission Statement IP/02/1436, dated 8 October 2002

(Note. There are some odd features of this case. Granted that the exemption – the Statement does not specify from exactly what – may well be justified by the greater convenience to the music industry and to broadcasters of respectively granting and obtaining licences for "simulcasting", the Commission's statement raises more questions than it answers. If the full Decision, when it is published, clears up these points, it may justify a further report. The exemption appears to apply to an agreement between "the copyright administration societies of music record companies", but "does not concern authors' rights". In a comment on the exemption, the Commissioner for Competition Policy says, among other things, that "the framework put in place ensures that the rights-holders will be properly paid"; this is an unusual objective of an exemption. The Commission describes the exemption as "contributing to the completion of a European single market"; yet France and Spain are outside the scheme. Finally, while it is appropriate that the parties to the agreement "have undertaken to increase transparency as regards the fees charged for a copyright license", it is not clear whether this is a condition of exemption, nor why implementation of the condition is delayed.)

An exemption granted by the Commission is intended to facilitate arrangements for European television and radio companies, which simultaneously broadcast music shows on the Internet, to obtain a single "one-stop shop" licence from royalty collecting agencies to cover Internet broadcasts across most of the 18-nation European Economic Area (EEA). This will replace the old system under which they need to secure a license from each national copyright administration and from national collecting societies. The Commission hopes that the new system will also boost competition among the societies collecting the royalties on behalf of the music industry, notably in terms of the fees they charge.

This is the first decision by the Commission concerning the collective management and licensing of copyright for the purposes of commercial exploitation of musical works on the Internet.

Radio and television broadcasters have in the last few years begun to broadcast their programmes via the Internet along with the traditional terrestrial or cable transmission to European homes. This practice, known as simulcasting, requires broadcasters to obtain international licenses from music rights owners. Broadcasters traditionally operate on a national or regional basis under limited

territorial copyright licences. Therefore, because of its global nature, the Internet poses a new challenge in the way those rights are acquired.

The present case stems from a notification by the International Federation of the Phonographic Industry (IFPI). The notification was made in the name of the copyright administration societies of music record companies. It does not concern authors' rights, which are collected by different agencies. The notified agreement is intended to facilitate the creation of a new category of copyright licence with a multi-territorial scope, taking into consideration the global reach of the Internet.

Following the Commission's observations, the collecting societies have agreed to grant "one-stop" licences covering all the territories in which the local record producers' society is a party to the agreement. In effect this includes the whole of the EEA (which comprises the fifteen Member States of the European Union, plus Norway, Iceland and Liechtenstein), except for Spain and France. The agreement also includes societies from Central and Eastern Europe, Asia, South America, Australia and New Zealand.

This means that, rather than being obliged to obtain a licence from the local collecting society in every country in which their Internet transmissions are accessed, broadcasters whose signals originate in an EEA member State will be able, for the first time, to approach any EEA-based collecting society of their choice for the simulcast license. This, the Commission hopes, will allow for competition between EEA societies to grant these new multi-territorial licenses, thereby contributing to the completion of a European single market.

The parties have also undertaken to increase transparency as regards the fees charged for a copyright license. A set of proposals will be presented to the Commission by the end of 2003, aimed at separating the copyright royalty from the fee meant to cover the licensing administration costs of each society. The two elements will be separately identified upon the granting of a licence. In this way, TV and radio broadcasters are expected to be able to recognise the most efficient societies in the EEA and to seek their licenses from the societies providing them at the lowest cost. The licences will also include the repertoires of all societies party to the agreement. ■

Deutsche Post / DHL

For once, the news is good for Deutsche Post: the Commission has cleared an agreement giving Germany's Post Office sole control of Bermuda-based express mail company DHL International Ltd. The operation will not significantly affect competition, since Deutsche Post is already closely linked to DHL, of which it has hitherto shared control of with Lufthansa.

Source: Commission Statement IP/02/1533, dated 22 October 2002

PRICE FIXING (AUCTIONS): THE CHRISTIE'S / SOTHEBY'S CASE

Subject: Price fixing

Industry: Auction houses

Parties: Christie's (a subsidiary of Artemis SA)
Sotheby's

Source: Commission Statement IP/02/1585, dated 30 October 2002

(Note. Where there are two leading contenders in a given market, and the competition in that market grows increasingly fierce, there is often a temptation for the two parties to come to terms. This is what happened with the two auction houses. Christie's was the first to give details to the Commission of its collusion with Sotheby's; and it escaped a fine. Sotheby's cooperated with the Commission but too late to escape a heavy, though reduced, fine.)

The Commission has found that Christie's and Sotheby's, the world's two leading fine arts auction houses, breached the EC rules on competition by colluding to fix commission fees and other trading terms between 1993 and early 2000. The Commission consequently fined Sotheby's €20.4 million, representing 6% of its worldwide turnover. Christie's, on the other hand, escaped a fine because it was the first to provide crucial evidence, which enabled the Commission to prove the existence of the cartel. The Commission noted that the case showed that illegal cartels could appear in any sector, from basic industries to high profile service markets. There was valuable cooperation between the US Department of Justice, which had pursued the same cartel for its effects in the United States, and the Commission. This cooperation was made easier by the fact that both Christie's and Sotheby's granted waivers as regards the exchange of confidential information.

Based on evidence provided by Christie's to the US and EU competition authorities and confirmed by both auction houses during the proceedings, the Commission has concluded that Sotheby's and Christie's entered into an anti-competitive cartel agreement in the course of 1993 which lasted until early 2000, when the parties recovered their freedom to set prices individually. The purpose of the cartel agreement was to reduce the fierce competition between the two leading auction houses that had developed during the 1980's and early 1990's. The most important aspect of the agreement consisted of an increase in the commission paid by sellers at auction (the so-called vendor's commission). But the collusive agreement also concerned other trading conditions, such as advances paid to sellers, guarantees given for auction results and payment conditions.

According to the Commission's findings laid down in today's decision, the collusive behaviour found its origins at the top levels of both companies. In 1993 Alfred Taubman and Anthony Tennant, the chairmen of Sotheby's and Christie's

respectively, entered into secret discussions at their respective private residences in London or New York. These first high-level meetings were followed by regular gatherings and contacts between the companies' chief executive officers at the time, D D Brooks of Sotheby's and Christopher Davidge of Christie's.

The Commission's investigation started in January 2000, when Christie's approached both the United States Department of Justice and the Commission with proof relating to a cartel between itself and Sotheby's and applied for leniency in both jurisdictions. The evidence consisted mainly of documents that Christopher Davidge, former CEO of Christie's, had gathered about contacts between the two auction houses. Sotheby's subsequently also applied for leniency in Europe and provided further evidence to the Commission.

In 1996 the Commission had adopted rules providing partial or full immunity from fines for companies unveiling or providing decisive information on price-fixing, market-sharing or other anti-competitive agreements. These rules were updated in February 2002; but the old leniency rules applied to this case because the application for leniency dated from 2000. The Commission considered that, according to the 1996 guidelines, Christie's ought to benefit from full immunity because it provided decisive proof at a time when the Commission had no investigation open and because it was the first to come in with such evidence.

The cartel agreement was considered a very serious violation of Article 81(1) of the EC Treaty, banning agreements or concerted practices, which have the effect of fixing prices, limiting production or sharing out markets. The calculation of the fines for both companies took place according to the 1998 method on the calculation of fines for cartel behaviour and abuse of market power. That calculation, based on the gravity of the offence and its duration, resulted in fines close to or exceeding the maximum fine that the Commission can legally impose, namely 10% of world-wide turnover as laid down in Regulation 17/62, which sets out the rules and procedures to apply Articles 81 and 82, the latter covering abuses of dominant positions. The amount of the fine imposed on Sotheby's includes a 40% reduction for its co-operation in the investigation. Christie's received full leniency.

Christie's and Sotheby's are the world's leading players in the art auction market. Christie's was established in 1766 and has its headquarters in London, but has been a subsidiary of French company Artémis SA since 1998. Sotheby's was also founded in the 18th century but has since become a publicly listed company both on the New York and London stock exchanges and has its headquarters in New York. Its majority shareholder is American entrepreneur A. Alfred Taubman, who was also its chairman during the entire period of the suspected cartel activity. Companies fined in cartel proceedings have 3 months to pay the fines and 2 months to decide whether to appeal to the Court of First Instance, which has full discretion on the issue of the fine. If they do appeal, they may choose between paying the fine or providing a bank guarantee. If they choose the latter, interest payment is due. ■

MERGERS (PACKAGING): THE TETRA LAVAL CASE

Subject: Mergers
Prohibition
Annulment (of Commission Decision)

Industry: Packaging; carton packaging; plastic bottles; eqipment
(Some implications for other industries)

Parties: Tetra Laval BV Group
Sidel

Source: Court Press Release 87/02, dated 25 October 2002, referring to Judgments of the Court of First Instance in Case T-5/02 and Case T-80/02, *Tetra Laval BV v Commission*

(Note. In this case, the Court of First Instance annulled a Commission decision prohibiting the merger of Tetra Laval and Sidel, as well as the related divestiture decision. The Court took the view that the economic analysis of the immediate anti-competitive effects, of conglomerate effects and of the foreseeable conduct of the companies in question was based on insufficient evidence and some errors of assessment. However, Tetra Laval's argument concerning infringement of the right of access to the file was rejected.)

Nine months after the cases were lodged by the Tetra Laval BV group, the world leader in carton packaging, the Court of First Instance, ruling in an expedited procedure, delivered two judgments. The cases concern, first, the Commission's decision to prohibit a merger between the Tetra Laval group, the world leader in the field of carton packaging, and the French company Sidel, which is active in the design and manufacture of equipment and of polyethylene terephthalate (PET) plastic bottles and, second, a related decision of the Commission ordering the separation of the two companies. The merger at issue concerns the liquid food packaging sector and, according to the Commission, could have negative repercussions on competition in several overall markets in that sector: the PET packaging machines market, on which Sidel holds a leading position, the market for aseptic production machines and aseptic carton packaging, on which Tetra Laval holds a dominant position and the one for high-density polyethylene (HDPE) plastic and the machines which produce HDPE packaging.

In the judgment annulling the first decision, the Court finds, notwithstanding Tetra Laval's claims, that the Commission did not infringe its right of access to the file. However, Tetra Laval's arguments regarding the substance of the case are upheld. The Court holds, first, that the anti-competitive effects of the merger were overestimated on the markets identified by the Commission, in so far as the Commission justifies its prohibition, at least in part, by the likely immediate horizontal (control of the PET equipment market) and vertical (risk of creation of a vertically-integrated structure) effects resulting from the merger. The Court then

examines the Commission's analysis of the merger's conglomerate effects, that is, the effects of the merger of undertakings which are basically active on different markets (carton and PET) and which do not compete directly with each other. The Commission argued, in support of the core justification for its prohibition, that it could not be ruled out that the merger would give rise to anti-competitive repercussions in future. Its reasoning is based on leveraging, elimination of potential competition and strengthening of the merged entity's overall position. The Court, however, although confirming that it is permissible for the Commission to examine future conglomerate effects created by a new structure when assessing whether competition would be seriously impeded by a merger, disagrees with the conclusions reached by the Commission in this particular case.

As regards leveraging, the Commission starts from the premise that the current overlaps in the markets in question will, in the medium- to long-term, have a tendency to grow, so that Tetra Laval, from its strong dominant position on the carton market, will probably put pressure on its current carton packaging and packaging equipment customers wishing to switch over to PET packaging to use equipment produced by Sidel when they make that switch. The Court agrees, in principle, that putting the merger into effect could allow such leveraging to occur, but finds that the Commission has not proved that the merged entity would have an incentive to use that possibility. In this regard, the Court rejects inter alia the Commission's forecast of strong growth in the PET market, because analysis of the liquid dairy products (LDP) segment does not support it and because the Commission's analyses in regard to fruit juices were inadequate to support a finding that the glass containers currently used would be replaced by other packaging materials in PET rather than in carton or HDPE. The Court also finds that the Commission does not provide sufficiently convincing evidence in its examination of the potential leveraging methods which, according to the Commission, if exercised between now and 2005 from the aseptic carton markets, would enable the merged entity to acquire a dominant position on the various markets for PET packaging equipment. As for the market for high-capacity Stretch Blow Moulding (SBM) machines, where Sidel is by far the market leader, the Commission's prohibition is undermined by certain defects in its analysis.

As regards the elimination of potential competition on the aseptic carton markets represented by indirect competition from undertakings active on the PET equipment markets, the Court finds that the evidence provided is insufficient to support the Commission's conclusion that Tetra Laval's dominant position will be strengthened. As regards the strengthening of the merged entity's overall position, the Court finds that this basis for the prohibition cannot be separated from the Commission's reasoning relating to leveraging and the elimination of potential competition, and, therefore, rejects it without going into a detailed examination.

Case T-80/02 concerns the Commission's second decision ordering the separation of Tetra Laval and Sidel, which has as its legal basis the earlier decision prohibiting the merger. The annulment of the prohibition decision leads in consequence to the annulment of the second decision, since it deprives it of any legal basis. ■

MERGERS (ELECTRICAL EQUIPMENT): THE SCHNEIDER CASE

Subject: Mergers
Prohibition
Annulment (of Commission's Decision)
Procedure
Statement of Objections

Industry: Electrical equipment
(Some implications for other industries)

Parties: Schneider Electric SA
The Commission of the European Communities

Source: Court Press Release 84/02, dated 22 October 2002, relating to Judgments in Cases T-310/01 and T-77/02, *Schneider Electric SA v Commission*

(Note. The Court of First Instance has annulled the Commission's Decisions prohibiting the concentration between Schneider and Legrand and ordering them to separate accordingly. According to the Court, the Commission's economic analysis is vitiated by errors and omissions which deprive it of probative value, save in relation to French sectoral markets. With regard to French sectoral markets, while acknowledging the anti-competitive effects of the operation, the Court of First Instance finds a serious infringement of the rights of the defence, based on a discrepancy between the Commission's Statement of Objections and the terms of its final Decision, leading the Court to annul the prohibition decision.)

The Court of First Instance delivered two judgments on 22 October 2002, in relation to the actions brought by the French group Schneider Electric against the Commission's veto of its merger with Legrand, another French producer of low-voltage electrical equipment, and against a second Commission decision ordering that the two companies should accordingly be separated. Only a little more than three months have elapsed between the hearings and today's judgments, as a result of the expedited procedure obtained by Schneider in May 2002 in consideration of its reducing the number of arguments in its application. The Commission had postponed the date by which the two undertakings had to be separated, in order to allow the Court of First Instance to rule in time.

According to the Commission, the effects of this operation on competition affect all materials used for the distribution of electricity and the control of electric circuits at various levels (household, office, factory). That covers a large range of products from distribution panels to cable supports to power points and switches.

The annulment of the Commission's first decision results from a twofold assessment by the Court of First Instance:

- in the first part of its assessment, it challenges the Commission's economic analysis in support of its banning of the merger, accepting that analysis only in relation to French sectoral markets;
- in the second part, concerning those markets alone, it considers the procedure followed by the Commission when examining the proposal and finds a procedural irregularity which constitutes an infringement of defence rights, having regard to the discrepancy between the Statement of Objections and the Commission's Decision.

First, the Court of First Instance finds several obvious errors, omissions and contradictions in the Commission's economic reasoning. For example, having cited the national dimension of the geographical markets in order to demonstrate the strengthening or the creation of a dominant position for the merged entity, the Commission bases its assessment of the impact of the concentration operation on transnational, global considerations, extrapolated from a single market without demonstrating its relevance at the national level. Similarly, its demonstration of the key position in relation to wholesalers generated by the merger of the two companies is supported only by general data, whereas more precise analyses on the national scale would have been more relevant and convincing.

Moreover, in the absence of a precise country-by-country examination of the markets affected, the argument based on potential portfolio effects of brands and an unequalled range of products does not convince the Court of First Instance. The fact that Schneider holds large shares in post-terminal wiring accessories markets in Nordic countries, and that Legrand is more established in the South of Europe does not permit the inference that the products of the Schneider-Legrand group will cover all electric products. That led the Commission to overestimate the economic power of the group. Similarly, the Court finds, the Commission overestimated the economic power of the merged entity when assessing the group's market shares in relation to the underestimated shares of its two main competitors (Siemens and ABB), without taking into account the internal sales of components for electric panels which the latter carry out with their specialised subsidiaries.

The figures and data concerning the Italian and Danish markets combine to cast doubt on the Commission's conclusions.

Notwithstanding the gaps found in the assessment of the impact of the operation, the Court of First Instance acknowledges that, in relation to the French sectoral markets where the two companies hold considerable shares, the Commission's conclusion as to the dominant position and the elimination of competition may be accepted, having regard to the factual evidence produced.

It is thus solely in relation to the French markets affected by the concentration that, in the second part of its assessment, the Court of First Instance examines Schneider's argument that there was a substantial change in the nature of the Commission's objections between the statement of those objections which it gave to the parties and the final decision which is being challenged here. The Statement of Objections is designed to allow the undertaking to propose solutions

to the problems identified and to make its defence known before the Commission adopts a final decision. In the Statement of Objections which was notified, the emphasis was placed on the 'overlapping' of Schneider-Legrand's activities in certain markets and the strengthening of Schneider in relation to wholesalers resulting therefrom. In the decision which forms the subject-matter of the dispute, the Commission uses the term 'association', which refers to two preponderant positions held in a single country by two undertakings in two distinct but complementary sectoral markets. The sense of the objection being different, Schneider found itself unable to propose appropriate corrective measures. By proceeding in that way and not allowing Schneider to make appropriate offers to withdraw, the Commission infringed defence rights.

This judgment therefore annuls the prohibition decision. The Court of First Instance adds that, if the issue of the compatibility were to be re-examined (if Schneider maintains its wish to acquire Legrand), the procedure must recommence with the drawing up of a precise Statement of Objections and relate only to French markets, which are the only markets to have been identified as being affected by the implementation of the merger.

As for Case T-77/02, concerning the second Commission decision, requiring Legrand and Schneider to separate and legally based on the decision prohibiting the merger, the annulment of that latter decision automatically entails the annulment of the second decision which is devoid of foundation. ■

BOC / Air Liquide

A curious feature of this case is that it refers to a deal, cleared by the Commission, which will have no impact in Europe: it involves the creation of a joint venture between Air Liquide SA of France and Britain's BOC Group Plc, whereby the two industrial gases companies will merge part of their activities in Japan. In September 2002, the two companies announced that they intended to merge part of the activities of their Japanese subsidiaries: Air Liquide Japan and BOC's Osaka Sanso Kogyo. The joint venture, which will be called Japan Air Gases Ltd, will be active in the manufacturing and sales of industrial or medical gases in tonnage, bulk or cylinders as well as electronic specialty gases. The combined sales of the merged activities amounted to €1.2 billion in 2001. The analysis carried out by the Commission showed that the deal will have no impact in Europe since industrial gases markets are mostly national in scope: this is the case, in particular, of bulk and cylinder sales. The operation has, however, been notified to Japan's competition authority.

Source: Commission Statement IP/02/1455, dated 10 October 2002

ABUSE OF DOMINANT POSITION (AIRPORTS): THE AdP CASE

Subject: Abuse of dominant position
Discrimination
"Undertakings".

Industry: Airport management
(Some implications for other industries)

Parties: Aéroports de Paris
Commission of the European Communities
Alpha Flight Services SAS (intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 24 October 2002, in Case C-82/01 P, Aéroports de Paris v Commission of the European Communities

(Note. This case has a number of points of interest; but the most important, from a legal point of view, is the definition of an undertaking, within the meaning of Article 82 (formerly 86) of the EC Treaty. If the airport authority in question is not an "undertaking", then it is not covered by the rules on competition. However, the definition of undertakings in the case-law is extensive; and, in the present case, the Court reviews the relevant case-law and comes to the conclusion that, although AdP is a public corporation governed by French law and enjoys financial independence, it is nevertheless an undertaking and that it cannot therefore escape the Commission's claim that it has abused a dominant position. AdP submitted a number of other pleas to the Court; they were largely rejected. The extract from the judgment reported below concerns the issue of undertakings and mainly comprises paragraphs 68 to 83.)

Judgment

1. By application lodged at the Registry of the Court of Justice on 17 February 2001, Aéroports de Paris ('ADP') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 12December 2000 in Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929 ('the contested judgment'), in which the Court of First Instance dismissed ADP's application for annulment of Commission Decision 98/513/EC of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 - Alpha Flight Services/Aéroports de Paris) (OJ 1998 L 230, p. 10, 'the contested decision').

Facts giving rise to the dispute in the main proceedings

2. It is stated in the contested judgment that:
'1 The applicant, ADP, is a public corporation governed by French law and enjoying financial independence which, pursuant to Article L. 251-2 of the

French Civil Aviation Code, is responsible for the planning, administration and development of all the civil air installations which are centred in the Paris region and which seek to facilitate the arrival and departure of aircraft, to control traffic and to load, unload and groundhandle passengers, goods and mail carried by air, and also of all associated installations.

2 ADP is responsible for the running of Orly and Roissy-Charles-de-Gaulle (hereinafter Roissy-CDG) airports...

17 On 11 June 1998, the Commission adopted [the contested decision], which states:

Article 1

[ADP] has infringed Article 86 of the EC Treaty by using its dominant position as manager of the Paris airports to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-Charles de Gaulle on suppliers or users engaged in ground handling or self-handling activities relating to catering (including the loading and unloading of food and beverages on aircraft), to the cleaning of aircraft and to the handling of cargo.

Article 2

[ADP] shall put an end to the infringement referred to in Article 1 by applying to the suppliers of ground handling services concerned a non-discriminatory scheme of commercial fees within two months of the date of notification of this Decision.'

The contested judgment

3. On 7 August 1998, ADP brought an action for annulment of the contested decision before the Court of First Instance.

4. By the contested judgment, the Court of First Instance rejected ADP's various pleas in law alleging, first, procedural irregularity; second, breach of the rights of defence; third, failure to comply with the obligation to state reasons; fourth, infringement of Article 86 of the EC Treaty; fifth, infringement of Article 90(2) of the EC Treaty (now Article 86(2) EC); sixth, infringement of Article 222 of the EC Treaty (now Article 295 EC) and seventh, misuse of powers...

The appeal

The seventh plea in law, alleging infringement of Article 86 of the Treaty by the Court of First Instance in characterising ADP as an undertaking

68. By its seventh plea in law, ADP submits that the Court of First Instance infringed Article 86 of the Treaty in characterising, at paragraphs 120 to 126 of the contested judgment, ADP as an undertaking within the meaning of that provision. The administration of publicly owned property, the only activity in

issue in the present case, involves the exercise of official powers and therefore cannot constitute a business activity for the purposes of Article 86 of the Treaty.

69. ADP states in that connection that, according to the case-law of the Court, the activities of public bodies which depend on the exercise of their official powers are not undertakings (see, *inter alia*, Case 30/87, *Bodson*). Applying that case-law, the Court of First Instance ought to have found that ADP was not an undertaking within the meaning of Article 86 of the Treaty.

70. ADP further submits that the case-law cited by the Court of First Instance at paragraph 123 of the contested judgment cannot, on any view, alter the fact that the administration of publicly-owned property involves the exercise of official powers and does not therefore constitute a business activity within the meaning of Article 86 of the Treaty. First, the judgment in Case 41/83, *Italy* v *Commission*, concerned telecommunications services, matters unrelated to the administration of publicly owned property, and the judgment in Case T-229/94, *Deutsche Bahn* v *Commission*, concerned the supply of locomotives and rail services, and did not address the question whether the administration of publicly-owned property constituted an economic activity.

71. Furthermore, since the sole point of importance is to determine whether the administration of publicly-owned property involves the exercise of official powers, the Court of First Instance's observation that the fact that an activity may be exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity is irrelevant.

72. The Commission contends that that plea merely repeats the first part of the fourth plea in law raised by ADP before the Court of First Instance. It must therefore be declared inadmissible.

73. However, since the seventh plea raised in support of the appeal indicates precisely the contested elements of the judgment which it is sought to have set aside, and also the legal arguments specifically advanced in support of that application, it is admissible.

74. As regards the substance of the plea, as the Commission rightly submits, the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterised as an undertaking within the meaning of Article 86 of the Treaty.

75. In that regard, it must be borne in mind that, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, *inter alia*, Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, paragraph 17). In order to determine whether the activities in question are those of an undertaking within the meaning of Article 86 of the Treaty, it is necessary to establish the nature of those activities (see, *inter alia*, Case C-364/92, *SAT Fluggesellschaft*, paragraph 19).

76. At paragraph 112 of the contested judgment the Court of First Instance drew a distinction between, on the one hand, ADP's purely administrative activities, in particular supervisory activities, and, on the other hand, the management and operation of the Paris airports, which are remunerated by commercial fees which vary according to turnover.

77. At paragraph 120 of the contested judgment the Court of First Instance pointed out that the activity as manager of the airport infrastructures, through which ADP determines the procedures and conditions under which suppliers of ground handling services operate, cannot be classified as a supervisory activity. Nor has ADP raised any argument on the basis of which it could be concluded that relations with suppliers of ground handling services fall within the exercise by ADP of its official powers as a public authority or that those relations are not separable from ADP's activities in the exercise of such powers.

78. The Court of First Instance was thus entitled to find, at paragraph 121 of the contested judgment, that the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, constitutes an economic activity.

79. It is settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (see, *inter alia*, Case C-35/96, *Commission* v *Italy*, paragraph 36 and Case C-475/99, *Glöckner*, paragraph 19).

80. Contrary to ADP's contention, the Court of First Instance could properly refer to the judgments in *Italy* v *Commission* and *Deutsche Bahn* v *Commission*, cited above, which also concerned the provision of infrastructures by entities responsible for their management.

81. In *Bodson*, cited above, the Court of Justice did not refer specifically to the existence of official powers precluding the applicability of Article 86 of the Treaty. In its judgment in *SAT Fluggesellschaft*, cited above, the Court held that, taken as a whole, the various activities of the entity concerned, by their nature, their aim and the rules to which they were subject, were connected with the exercise of powers which are typically those of a public authority and that none of those activities were separable from the others. That is not so in the present case.

82. Furthermore, contrary to ADP's argument, the Court of First Instance was right to point out, at paragraph 124 of the contested judgment, that according to the case-law of the Court of Justice, the fact that an activity may be exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity.

83. Consequently, the seventh plea in law must be rejected as unfounded.

Court's Ruling

THE COURT (Sixth Chamber), hereby: 1. Dismisses the appeal;
2. Orders Aéroports de Paris to pay the costs. ■

PROCEDURE (GENERAL): THE ROQUETTE CASE

Subject: Procedure
Investigations
National authorities
European Convention on Human Rights

Industry: All industries

Parties: Roquette Frères SA
Directeur général de la concurrence, de la consommation et de la répression des frauds
Commission of the European Communities (intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 22 October 2002, in Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*

(Note. One of the tenets of the rules on competition is the necessity for cooperation between the Commission and national authorities in the investigation of alleged infringements. The general principles of cooperation were laid down in the Hoechst case in 1989; but the question has arisen in the present case, how far there should be protection against arbitrary or disproportionate intervention by public authorities in the private activities of a legal person. The question was prompted in part by the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms and case law in the Court of Human Rights and partly by consideration of the scope of the review which a competent national court is required to carry out for the purposes of authorising coercive measures against undertakings. The Court's ruling is slightly complicated but is an essential part of the interpretation of the procedural regulations.)

Judgment

1. By judgment of 7 March 2000, received at the Court on 13 March 2000, the French Court of Appeal (Cour de Cassation) referred to the Court for a preliminary ruling under Article 234 of the EC Treaty two questions on the interpretation of Article 14 of Council Regulation No 17 of 1962 and of the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission*.

2. Those questions have been raised in the context of an appeal by Roquette Frères SA against an order of the President of the Regional Court (Tribunal de grande instance), Lille (France), authorising entry upon and seizures at the premises of that company with a view to gathering evidence of its possible participation in agreements and/or concerted practices which may constitute an infringement of Article 85 of the EC Treaty (now Article 81 EC).

Legal framework

Regulation No 17

3. Article 14 of Regulation No 17 confers on the Commission investigatory powers to look into possible infringements of the competition rules applying to undertakings. It provides as follows:

> 1. ...
> ... the officials authorised by the Commission are empowered:
> (a) to examine the books and other business records;
> (b) to take copies of or extracts from the books and business records;
> (c) to ask for oral explanations on the spot;
> (d) to enter any premises, land and means of transport of undertakings.
> ...
> 3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject- matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice...
> 6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

National law

4. In France, investigation procedures in competition matters are governed by Order No 86-1243 of 1 December 1986 relating to free pricing and free competition (JORF of 9 December 1986, p. 14773, hereinafter the Competition Order).

5. Article 48 of the Competition Order provides:

> Investigators may enter any premises and seize documents only within the framework of investigations requested by the Ministre chargé de l'économie (Minister for Economic Affairs) or the Conseil de la concurrence (Competition Council), and upon judicial authorisation being granted by order of the President of the Tribunal de grande instance... The judge must verify whether the request for authorisation before him is justified; that request must contain all such information as may justify the entry... He shall appoint one or more senior law enforcement officers to assist in those operations and to keep him informed of their progress...

[The Commission applied to the French authorities, as required by Regulation 17 of 1962, for their cooperation.]

14. The President of the Regional Court of Lille granted that application by order likewise dated 14 September 1998 (the authorisation order).

15. The authorisation order was served on 16 September 1998 and the investigation took place on 16 and 17 September 1998. Roquette Frères cooperated in that investigation, while expressing reservations concerning the taking of copies of various documents.

16. In its appeal against the authorisation order, Roquette Frères asserts that it was not open to the President of the Regional Court of Lille to order entry onto private premises without first satisfying himself, in the light of the documents which the administrative authority was required to provide to him, that there were indeed reasonable grounds for suspecting the existence of anti-competitive practices such as to justify the grant of coercive powers.

17. In the judgment making the reference, the Court of Appeal states that no information or evidence justifying any presumption of the existence of anti-competitive practices was put before the President of the Regional Court of Lille, so that it was impossible for him to verify whether, in the specific circumstances, the application before him was justified. It further observes that, in the investigation decision of 10 September 1998, the Commission merely stated that it had information to the effect that Roquette Frères was engaging in the anti-competitive practices described by it, without however referring, even briefly, in its analysis to the information which it claimed to have and on which it based its assessment.

18. The Court of Appeal, having set out the characteristics of the review to be carried out by the competent French court under Article 48 of the Competition Order and the decision of the Constitutional Council of 29 December 1983 as referred to in paragraph 6 of this judgment, goes on to recall in that connection the principle established by the judgment in *Hoechst*, namely that, in exercising its investigatory powers, the Commission is required to respect the procedural guarantees laid down by national law.

19. In addition, the Court of Appeal refers to paragraphs 17 and 18 of the judgment in *Hoechst*, according to which there exists no general principle of Community law enshrining, with regard to undertakings, any right to the inviolability of the home, or any case-law of the European Court of Human Rights inferring the existence of any such principle from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), signed in Rome on 4 November 1950.

20. However, the Court of Appeal notes in that connection that, in the judgment of the European Court of Human Rights, judgment of 16 December 1992, in *Niemietz v. Germany*, postdating *Hoechst*, the European Court of Human Rights held that Article 8 of the ECHR may apply to certain professional or business activities or premises. The Court of Appeal also refers to Article 6(2) of the Treaty on European Union, which requires the European Union to respect as general principles of Community law the fundamental rights guaranteed by the ECHR,

and to Article 46(d) of the Treaty on European Union, which provides that Article 6(2) falls within the jurisdiction of the Court of Justice.

Questions for Preliminary Ruling

21. In those circumstances, the Court of Appeal stayed proceedings and referred the following questions to the Court for a preliminary ruling:
whether,
(1) having regard to the fundamental rights recognised by the Community legal order and to Article 8 of the European Convention for the Protection of Human Rights, the judgment in *Hoechst* of 21 September 1989 must be interpreted as meaning that a national court having jurisdiction under national law in competition matters to order entry upon premises and seizures there by officers of the administration, may not refuse to grant the authorisation requested where it considers that the information or evidence presented to it as providing grounds for suspecting the existence of anti-competitive practices on the part of the undertakings mentioned in the Commission's decision ordering an investigation is not sufficient to authorise such a measure or where, as in the present case, no information or evidence has been put before it;
(2) in the event that the Court of Justice declines to accept that the Commission is required to put before the competent national court the evidence or information in its possession which gives rise to a suspicion of anti-competitive practices, the national court is none the less empowered, given the abovementioned fundamental rights, to refuse to grant the application for entry and seizure if it considers, as in the present case, that the Commission decision does not state sufficient reasons and does not enable it to verify, in the specific circumstances, whether the application before it is justified, thereby making it impossible for it to carry out the review required by its national constitutional law.

Court's Ruling

The Court, in answer to the questions referred to it by the Court of Appeal by judgment of 7 March 2000, hereby rules:

1. In accordance with the general principle of Community law affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, a national court having jurisdiction under domestic law to authorise entry upon and seizures at the premises of undertakings suspected of having infringed the competition rules is required to verify that the coercive measures sought in pursuance of a request by the Commission for assistance under Article 14(6) of Council Regulation 17 of 1962 are not arbitrary or disproportionate to the subject-matter of the investigation ordered. Without prejudice to any rules of domestic law governing the implementation of coercive measures, Community law precludes review by the national court of the justification of those measures beyond what is required by the foregoing general principle.

2. Community law requires the Commission to ensure that the national court in question has at its disposal all the information which it needs in order to carry out

the review which it is required to undertake. In that regard, the information supplied by the Commission must in principle include:
- a description of the essential features of the suspected infringement, that is to say, at the very least, an indication of the market thought to be affected and of the nature of the suspected restrictions of competition;
- explanations concerning the manner in which the undertaking at which the coercive measures are aimed is thought to be involved in the infringement in question;
- detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;
- as precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators; and
- in the event that the assistance of the national authorities is requested by the Commission as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, explanations enabling the national court to satisfy itself that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement.

3. On the other hand, the national court may not demand that it be provided with the evidence in the Commission's file on which the latter's suspicions are based.

4. Where the national court considers that the information communicated by the Commission does not fulfil the requirements referred to in point 2 of this operative part, it cannot, without violating Article 14(6) of Regulation No 17 and Article 5 of the EC Treaty (now Article 10 EC), simply dismiss the application brought before it. In such circumstances, it is required as rapidly as possible to inform the Commission, or the national authority which has brought the latter's request before it, of the difficulties encountered, where necessary by asking for any clarification which it may need in order to carry out the review which it is to undertake. Not until any such clarification is forthcoming, or the Commission fails to take any practical steps in response to its request, may the national court in question refuse to grant the assistance sought on the ground that, in the light of the information available to it, it is unable to hold that the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of those measures.

5. The information to be provided by the Commission to the national court may be contained either in the investigation decision itself or in the request made to the national authorities under Article 14(6) of Regulation No 17, or indeed in an answer - even one given orally - to a question put by that court. ■