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Competition Law of the European Union

Cases and Materials
Riga 2005

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Reading

- Alison Jones and Brenda Sufrin: EC Competition law, Text, Cases and Materials, Oxford University Press, 2001, p. 3-84

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Objectives of EU competition policy

- This session will concern economic goals and other policy goals, the development and historic background of EU competition law and policy, as well as the relationship between EU and national competition laws of Member States

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- Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) p. 009

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Sources of EU competition law

- This session will concern the institutional framework, an overview of the substantive competition rules of EU, the procedural framework, and the direct effect of competition rules

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- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty p. 029

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- This session will concern the special regulation of mergers that have a potential impact on the competition policy of the EU

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- Council Regulation 139/2004 on the control of concentrations between undertakings p. 095

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Mergers

- This session will concern work on a practical example related to mergers.

Materials

- Mergers – Practical case p. 125

Second weekend

State Aid

Reading

- Leigh Hancher, Tom Ottovanger and Piet Jan Slot: EC State Aids, Sweet & Maxwell 1999, p. 3-95

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Scope and application of the EU-rules on state aid

- This session will concern the purpose of the EU-rules on state aid and tendencies in the development of state aid policies and the state aid rules

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- Judgment of the Court (Fifth Chamber) of 22 March 2001, French Republic v Commission of the European Communities, Case C-17/99, p. i-2481 p. 130

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- This session will concern the obligation to notify, group-exemptions, de minimis aid, decisions by the Commission and on-site-monitoring, procedures for non-notified aid, and co-operation between national courts and the European Commission

Materials

- Judgment of the Court (Sixth Chamber) of 18 June 2002, Kingdom of Spain v Commission of the European Communities, Case C-398/00, ECR p. i-5643 p. 141

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Materials

- Judgment of the Court of 24 July 2003, Altmark Trans, Case C-280/00, ECR p. i-7747 p. 150

10.30 - 12.00 Session No. 9

Practical case example

- During this session, the participants will work on a practical example concerning state aid

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- Practical case - state aid p. 169

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- During this session, the participants will present the outcome of the work in the previous session on the practical example

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- Judgment of the Court of 13 March 2001, PreussenElektra, Case C-379/98, ECR p. i-2099 p. 174

Third weekend

Anti-Competitive Agreements

Reading

- Mark Furse: Competition Law of the EC And the UK, Oxford University Press 2004, p. 141-222

Friday 15 April 2005

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Scope and application of the EU-rules on anti-competitive agreements

- This session will introduce the treaty rules on anti-competitive agreements, de minimis provisions, and their legal effects in the international and national business environment

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- Judgment of the Court of 19 February 2002, Wouters, Case C-309/99, ECR p. i-1577 p. 192

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Vertical and horizontal agreements

- This session will introduce the regulation on vertical and horizontal agreements, as well as their practical application within the internal market

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Materials

- Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Official Journal L 336, p. 21 p. 216

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09.00 - 10.30 Session No. 13

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- This session will concern the practical enforcement of the prohibition on anti-competitive agreements, as well as the co-operation between national and EU authorities

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- Judgment of the Court of 28 February 1991, Delimitis, Case C-234/89, ECR p. i-935 p. 226

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- During this session, the participants will work on a practical example concerning state aid

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- Practical case - competition law p. 241

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Presentation and discussion

- During this session, the participants will present the outcome of the work in the previous session on the practical example

Materials

- Judgment of the Court of 27 September 1988, Ahlström, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, ECR p. 5193 p. 246

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Fourth weekend

Abuse of Dominant Positions

Reading

- Richard Wish: Competition Law, Lexis Nexis 2003, p. 653-732

Friday 22 April 2005

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Dominant positions and relevant markets

- This session will concern the definition of dominant positions and the use of the concept of the relevant market

Materials

- Case/Legislation to be handed out separately

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- This session will concern the abuse of dominant positions by restricting trade by means of parallel importation

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- Case/Legislation p. 000

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- This session will concern the special field of network industries, using the Microsoft case to illustrate the problems specific to this field

Materials

- Microsoft case to be handed out separately

Fifth weekend

Exam

- Friday 29 April 2005
- Saturday 30 April 2005

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Commission Notice on the definition of relevant market for the purposes of Community competition law

purposes of Community competition law (97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement (1). Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved (2) face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use`.

8. 'Relevant geographic markets` are defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area`.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 and 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (3). Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

Basic principles for market definition

Competitive constraints

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary

force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other than those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially

increased will be taken into account.

Supply substitution

20. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term (4) without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

Potential competition

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. It is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

Geographic dimension

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or

production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

The process of gathering evidence

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:

Evidence to define markets - product dimension

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics

and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:

38. Evidence of substitution in the recent past. In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

39. There are a number of quantitative tests that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities (5) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

40. Views of customers and competitors. The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. Consumer preferences. In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. Marketing studies that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out ad hoc by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. Barriers and costs associated with switching demand to potential substitutes. There are a number of barriers and costs that might prevent the Commission from considering two *prima facie* demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive

list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

43. Different categories of customers and price discrimination. The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

Evidence for defining markets - geographic dimension

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. Past evidence of diversion of orders to other areas. In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.

46. Basic demand characteristics. The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. Views of customers and competitors. Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. Current geographic pattern of purchases. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. Trade flows/pattern of shipments. When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. Barriers and switching costs associated to divert orders to companies located in other areas. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to

identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.

52. The paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.

IV. CALCULATION OF MARKET SHARE

53. The definition of the relevant market in both its product and geographic dimensions allows the identification of the suppliers and the customers/consumers active on that market. On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area. In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations. When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares.

54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.

55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.

V. ADDITIONAL CONSIDERATIONS

56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

- (1) The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.
- (2) For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.
- (3) Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, and confirmed in subsequent judgments.
- (4) That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).
- (5) Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-price elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

purposes of Community competition law (97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement (1). Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved (2) face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that

are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

8. 'Relevant geographic markets' are defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 and 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement

of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (3). Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

Basic principles for market definition

Competitive constraints

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other than those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

Supply substitution

20. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term (4) without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

Potential competition

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. It is often the case that the inclusion of product B would be enough to

remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

Geographic dimension

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artificially isolated from each other because of the existence of

legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

The process of gathering evidence

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:

Evidence to define markets - product dimension

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:

38. Evidence of substitution in the recent past. In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

39. There are a number of quantitative tests that have specifically been designed for the purpose

of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities (5) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

40. Views of customers and competitors. The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. Consumer preferences. In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. Marketing studies that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out ad hoc by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. Barriers and costs associated with switching demand to potential substitutes. There are a number of barriers and costs that might prevent the Commission from considering two prima facie demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

43. Different categories of customers and price discrimination. The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

Evidence for defining markets - geographic dimension

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. Past evidence of diversion of orders to other areas. In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.

46. Basic demand characteristics. The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. Views of customers and competitors. Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. Current geographic pattern of purchases. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. Trade flows/pattern of shipments. When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. Barriers and switching costs associated to divert orders to companies located in other areas. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.

52. The paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.

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54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.

55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.

V. ADDITIONAL CONSIDERATIONS

56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

- (1) The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements

of the approach outlined here might serve as a basis for the assessment of State aid cases.

- (2) For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.
- (3) Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, and confirmed in subsequent judgments.
- (4) That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).
- (5) Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-price elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

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**Council Regulation (EC) No 1/2003
of 16 December 2002**

**on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
(Text with EEA relevance)**

Council Regulation (EC) No 1/2003

of 16 December 2002

on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

- (1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.
- (2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.
- (3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.
- (4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.
- (5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the

required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

- (6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.
- (7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.
- (8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.
- (9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.
- (10) Regulations such as 19/65/EEC(6), (EEC) No 2821/71(7), (EEC) No 3976/87(8), (EEC) No 1534/91(9), or (EEC) No 479/92(10) empower the Commission to apply Article 81(3) of the Treaty

by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called "block" exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.

- (11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.
- (12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.
- (13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.
- (14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.
- (15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.
- (16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different

outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

- (17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.
- (18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.
- (19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.
- (20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.
- (21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

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- (22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.
- (23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.
- (24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.
- (25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.
- (26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.
- (27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.
- (28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.
- (29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable

by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

- (30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.
- (31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74(11), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.
- (32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.
- (33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.
- (34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.
- (35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.
- (36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17(12) should

therefore be repealed and Regulations (EEC) No 1017/68(13), (EEC) No 4056/86(14) and (EEC) No 3975/87(15) should be amended in order to delete the specific procedural provisions they contain.

- (37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.
- (38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

HAS ADOPTED THIS REGULATION:

CHAPTER I

PRINCIPLES

Article 1

Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.
3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2

Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3

Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning

of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II

POWERS

Article 4

Powers of the Commission

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5

Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6

Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III

COMMISSION DECISIONS

Article 7

Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9

Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10

Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV

COOPERATION

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.
3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.
4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case

that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12

Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13

Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14

Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).
2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.
3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.
4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.
5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.
7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15

Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16

Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V

POWERS OF INVESTIGATION

Article 17

Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply *mutatis mutandis*.

Article 18

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.
2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.
2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:
 - (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
 - (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
 - (c) to take or obtain in any form copies of or extracts from such books or records;
 - (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
 - (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.
3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.
4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.
6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.
7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.
8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.
2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.
3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority,

for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply *mutatis mutandis*.

Article 22

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI

PENALTIES

Article 23

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

- (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
- (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
- (c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

- (d) in response to a question asked in accordance with Article 20(2)(e),
- they give an incorrect or misleading answer,
 - they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
 - they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
- (e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.
2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:
- (a) they infringe Article 81 or Article 82 of the Treaty; or
 - (b) they contravene a decision ordering interim measures under Article 8; or
 - (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24

Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

- (a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;
- (b) to comply with a decision ordering interim measures taken pursuant to Article 8;
- (c) to comply with a commitment made binding by a decision pursuant to Article 9;
- (d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
- (e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII

LIMITATION PERIODS

Article 25

Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

- (a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
- (b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

- (a) written requests for information by the Commission or by the competition authority of a Member State;
- (b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;
- (c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted:

- (a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
- (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

- (a) time to pay is allowed;
- (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 27

Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings.

They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28

Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX

EXEMPTION REGULATIONS

Article 29

Withdrawal in individual cases

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3)

of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X

GENERAL PROVISIONS

Article 30

Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.
2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32

Exclusions

This Regulation shall not apply to:

- (a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;
- (b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;
- (c) air transport between Community airports and third countries.

Article 33

Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, inter alia:

- (a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;
- (b) the practical arrangements for the exchange of information and consultations provided for in Article 11;
- (c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI

TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34

Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35

Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that

is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 36

Amendment of Regulation (EEC) No 1017/68

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is repealed;

2. in Article 3(1), the words "The prohibition laid down in Article 2" are replaced by the words "The prohibition in Article 81(1) of the Treaty";

3. Article 4 is amended as follows:

(a) In paragraph 1, the words "The agreements, decisions and concerted practices referred to in Article 2" are replaced by the words "Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty";

(b) Paragraph 2 is replaced by the following:

"2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease."

4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 30, paragraphs 2, 3 and 4 are deleted.

Article 37

Amendment of Regulation (EEC) No 2988/74

In Regulation (EEC) No 2988/74, the following Article is inserted:

"Article 7a

Exclusion

This Regulation shall not apply to measures taken under Council Regulation (EC) No [1/2003](#) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(16)."

Article 38

Amendment of Regulation (EEC) No 4056/86

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Breach of an obligation

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(17) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed."

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words "under the conditions laid down in Section II" are replaced by the words "under the conditions laid down in Regulation (EC) No 1/2003";

(ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:

"At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, inter alia, to obtaining access to the market for non-conference lines."

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words "pursuant to Article 10" are replaced by the words "pursuant to Regulation (EC) No 1/2003".

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words "Advisory Committee referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

(b) In paragraph 2, the words "Advisory Committee as referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words "the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)" are deleted.

Article 39

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

Article 40

Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

Article 41

Amendment of Regulation (EEC) No 3976/87

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:

"Article 6

The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No [1/2003](#) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(18) before publishing a draft Regulation and before adopting a Regulation."

2. Article 7 is repealed.

Article 42

Amendment of Regulation (EEC) No 479/92

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

"Article 5

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No [1/2003](#) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(19)."

2. Article 6 is repealed.

Article 43

Repeal of Regulations No 17 and No 141

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

2. Regulation No 141 is repealed.

3. References to the repealed Regulations shall be construed as references to this Regulation.

Article 44

Report on the application of the present Regulation

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

Article 45

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 December 2002.

For the Council

The President

M. Fischer Boel

- (1) OJ C 365 E, 19.12.2000, p. 284.
- (2) OJ C 72 E, 21.3.2002, p. 305.
- (3) OJ C 155, 29.5.2001, p. 73.
- (4) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.
- (5) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).
- (6) Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).
- (7) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original

reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

- (8) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.
- (9) Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).
- (10) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.
- (11) Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).
- (12) OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).
- (13) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.
- (14) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.
- (15) Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).
- (16) OJ L 1, 4.1.2003, p. 1.
- (17) OJ L 1, 4.1.2003, p. 1.
- (18) OJ L 1, 4.1.2003, p. 1.
- (19) OJ L 1, 4.1.2003, p. 1.

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MODIFIES 31962R0017..... Amendment.... Repeal ART 1 from 01/05/2004
 31962R0017..... Amendment.... Repeal ART 2 from 01/05/2004
 31962R0017..... Amendment.... Repeal ART 22 from 01/05/2004
 31962R0017..... Amendment.... Repeal ART 21 from 01/05/2004
 31962R0017..... Amendment.... Repeal ART 20 from 01/05/2004
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 31962R0017..... Amendment.... Repeal ART 18 from 01/05/2004
 31962R0017..... Amendment.... Repeal ART 17 from 01/05/2004
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31968R1017	Amendment	Repeal ART 5 from 01/05/2004
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31968R1017	Amendment	Repeal ART 7 from 01/05/2004
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31968R1017	Amendment	abolition ART 30.4 from 01/05/2004
31968R1017	Amendment	abolition ART 30.3 from 01/05/2004
31968R1017	Amendment	abolition ART 30.2 from 01/05/2004
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31968R1017	Amendment	Repeal ART 27 from 01/05/2004
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31968R1017	Amendment	Repeal ART 9 from 01/05/2004
31968R1017	Amendment	Repeal ART 10 from 01/05/2004
31968R1017	Amendment	Repeal ART 11 from 01/05/2004
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31968R1017	Amendment	Repeal ART 13.1 from 01/05/2004
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31968R1017	Amendment	Repeal ART 15 from 01/05/2004
31968R1017	Amendment	Repeal ART 16 from 01/05/2004
31968R1017	Amendment	Repeal ART 17 from 01/05/2004
31971R2821	Amendment	Repeal ART 7 from 01/05/2004
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31986R4056	Amendment	Repeal ART 17 from 01/05/2004
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31986R4056	Amendment	Repeal ART 15 from 01/05/2004
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 31986R4056..... Amendment..... Repeal ART 11 from 01/05/2004
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 31987R3976..... Amendment..... Repeal ART 7 from 01/05/2004
 31991R1534..... Amendment..... Repeal ART 7 from 01/05/2004
 31992R0479..... Amendment..... Replacement ART 5 from 01/05/2004
 31992R0479..... Amendment..... Repeal ART 6 from 01/05/2004
 52000PC0582..... Adoption.....

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**Judgment of the Court
of 14 February 1978**

**United Brands Company and United Brands Continentaal BV v Commission of the European
Communities.**

Chiquita Bananas.

Case 27/76.

1 . COMPETITION - DOMINANT POSITION - THE RELEVANT MARKET - DELIMITATION -
CRITERIA

(EEC TREATY , ART. 86)

2 . COMPETITION - DOMINANT POSITION ON THE MARKET - CONCEPT

(EEC TREATY , ART. 86)

3 . COMPETITION - DOMINANT POSITION - FACTOR AFFORDING EVIDENCE - MARKET
SHARE

(EEC TREATY , ART. 86)

4 . COMPETITION - DOMINANT POSITION - CRITERIA FOR DETERMINING WHETHER THERE
IS A DOMINANT POSITION - PROFITABILITY OF THE UNDERTAKING

(EEC TREATY , ART. 86)

5 . COMPETITION - DOMINANT POSITION - ABUSE - DISTRIBUTORS FORBIDDEN TO RESELL

(EEC TREATY , ART. 86)

6 . COMPETITION - DOMINANT POSITION FOR THE PURPOSE OF MARKETING A PRODUCT -
REFUSAL TO SELL - CONDITIONS - ABUSE

(EEC TREATY , ARTS. 3 (7) AND 86)

7 . COMPETITION - DOMINANT POSITION - ABUSE - ELIMINATION OF A COMPETITOR -
WHETHER TRADE BETWEEN MEMBER STATES AFFECTED - TRADE AFFECTED TO A
NEGLIGIBLE EXTENT

(EEC TREATY , ART. 86)

8 . COMPETITION - DOMINANT POSITION - ABUSE - CHARGING DISCRIMINATORY PRICES

(EEC TREATY , ART. 86)

9 . COMPETITION - DOMINANT POSITION - ABUSE - UNFAIR SELLING PRICES - CONCEPT

(EEC TREATY , ART. 86)

1 . THE OPPORTUNITIES FOR COMPETITION UNDER ARTICLE 86 OF THE TREATY MUST BE
CONSIDERED HAVING REGARD TO THE PARTICULAR FEATURES OF THE PRODUCT IN
QUESTION AND WITH REFERENCE TO A CLEARLY DEFINED GEOGRAPHIC AREA IN WHICH
IT IS MARKETED AND WHERE THE CONDITIONS OF COMPETITION ARE SUFFICIENTLY
HOMOGENEOUS FOR THE EFFECT OF THE ECONOMIC POWER OF THE UNDERTAKING
CONCERNED TO BE ABLE TO BE EVALUATED. FOR THE PRODUCT TO BE REGARDED AS
FORMING A MARKET WHICH IS SUFFICIENTLY DIFFERENTIATED FROM OTHER FRUIT
MARKETS IT MUST BE POSSIBLE FOR IT TO BE SINGLED OUT BY SUCH SPECIAL FEATURES
DISTINGUISHING IT FROM OTHER FRUITS THAT IT IS ONLY TO A LIMITED EXTENT
INTERCHANGEABLE WITH THEM AND IS ONLY EXPOSED TO THEIR COMPETITION IN A
WAY THAT IS HARDLY PERCEPTIBLE .

2 . THE DOMINANT POSITION REFERRED TO IN ARTICLE 86 RELATES TO A POSITION

OF ECONOMIC STRENGTH ENJOYED BY AN UNDERTAKING WHICH ENABLES IT TO PREVENT EFFECTIVE COMPETITION BEING MAINTAINED ON THE RELEVANT MARKET BY GIVING IT THE POWER TO BEHAVE TO AN APPRECIABLE EXTENT INDEPENDENTLY OF ITS COMPETITORS , CUSTOMERS AND ULTIMATELY OF ITS CONSUMERS . IN GENERAL A DOMINANT POSITION DERIVES FROM A COMBINATION OF SEVERAL FACTORS WHICH , TAKEN SEPARATELY , ARE NOT NECESSARILY DETERMINATIVE.

3 . A TRADER CAN ONLY BE IN A DOMINANT POSITION ON THE MARKET FOR A PRODUCT IF HE HAS SUCCEEDED IN WINNING A LARGE PART OF THIS MARKET. HOWEVER AN UNDERTAKING DOES NOT HAVE TO HAVE ELIMINATED ALL OPPORTUNITY FOR COMPETITION IN ORDER TO BE IN A DOMINANT POSITION.

4 . AN UNDERTAKING ' S ECONOMIC STRENGTH IS NOT MEASURED BY ITS PROFITABILITY ; A REDUCED PROFIT MARGIN OR EVEN LOSSES FOR A TIME ARE NOT INCOMPATIBLE WITH A DOMINANT POSITION , JUST AS LARGE PROFITS MAY BE COMPATIBLE WITH A SITUATION WHERE THERE IS EFFECTIVE COMPETITION. THE FACT THAT AN UNDERTAKING ' S PROFITABILITY IS FOR A TIME MODERATE OR NON-EXISTENT MUST BE CONSIDERED IN THE LIGHT OF THE WHOLE OF THAT UNDERTAKING ' S OPERATIONS.

5 . THE FACT THAT AN UNDERTAKING FORBIDS ITS DULY APPOINTED DISTRIBUTORS TO RESELL THE PRODUCT IN QUESTION IN CERTAIN CIRCUMSTANCES IS AN ABUSE OF THE DOMINANT POSITION SINCE IT LIMITS MARKETS TO THE PREJUDICE OF CONSUMERS AND AFFECTS TRADE BETWEEN MEMBER STATES , IN PARTICULAR BY PARTITIONING NATIONAL MARKETS.

6 . AN UNDERTAKING IN A DOMINANT POSITION FOR THE PURPOSE OF MARKETING A PRODUCT - WHICH CASHES IN ON THE REPUTATION OF A BRAND NAME KNOWN TO AND VALUED BY THE CONSUMERS - CANNOT STOP SUPPLYING A LONG- STANDING CUSTOMER WHO ABIDES BY REGULAR COMMERCIAL PRACTICE , IF THE ORDERS PLACED BY THAT CUSTOMER ARE IN NO WAY OUT OF THE ORDINARY. SUCH CONDUCT IS INCONSISTENT WITH THE OBJECTIVES LAID DOWN IN ARTICLE 3 (F) OF THE TREATY , WHICH ARE SET OUT IN DETAIL IN ARTICLE 86 , ESPECIALLY IN PARAGRAPHS (B) AND (C) , SINCE THE REFUSAL TO SELL WOULD LIMIT MARKETS TO THE PREJUDICE OF CONSUMERS AND WOULD AMOUNT TO DISCRIMINATION WHICH MIGHT IN THE END ELIMINATE A TRADING PARTY FROM THE RELEVANT MARKET.

7 . IF THE OCCUPIER OF A DOMINANT POSITION , ESTABLISHED IN THE COMMON MARKET , AIMS AT ELIMINATING A COMPETITOR WHO IS ALSO ESTABLISHED IN THE COMMON MARKET , IT IS IMMATERIAL WHETHER THIS BEHAVIOUR RELATES TO TRADE BETWEEN MEMBER STATES ONCE IT HAS BEEN SHOWN THAT SUCH ELIMINATION WILL HAVE REPERCUSSIONS ON THE PATTERNS OF COMPETITION IN THE COMMON MARKET.

8 . THE POLICY OF DIFFERING PRICES ENABLING UBC TO APPLY DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS WITH OTHER TRADING PARTIES , THEREBY PLACING THEM AT A COMPETITIVE DISADVANTAGE IS AN ABUSE OF A DOMINANT POSITION.

9 . CHARGING A PRICE WHICH IS EXCESSIVE BECAUSE IT HAS NO REASONABLE RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED MAY BE AN ABUSE OF A DOMINANT POSITION WITHIN THE MEANING OF SUBPARAGRAPH (A) OF ARTICLE 86 ; THIS EXCESS COULD , INTER ALIA , BE DETERMINED OBJECTIVELY IF IT WERE POSSIBLE FOR IT TO BE CALCULATED BY MAKING A COMPARISON BETWEEN THE SELLING PRICE OF THE PRODUCT IN QUESTION AND ITS COST OF PRODUCTION , WHICH WOULD DISCLOSE THE AMOUNT OF THE PROFIT MARGIN .

IN CASE 27/76

UNITED BRANDS COMPANY , A CORPORATION REGISTERED IN NEW JERSEY , UNITED STATES OF AMERICA ,

AND

UNITED BRANDS CONTINENTAAL B.V., A NETHERLANDS COMPANY HAVING ITS REGISTERED OFFICE AT 3 VAN VOLLENHOVENSTRAAT , 3002 ROTTERDAM , REPRESENTED AND ASSISTED BY IVO VAN BAELE AND JEAN-FRANCOIS BELLIS OF THE BRUSSELS BAR , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF MR ELVINGER AND MR HOSS , 84 GRAND RUE ,

APPLICANTS

V

COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ITS LEGAL ADVISERS , ANTONIO MARCHINI-CAMIA AND JOHN TEMPLE LANG , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF MR MARIO CERVINO , BATIMENT JEAN MONNET ,

DEFENDANT ,

APPLICATION FOR THE ANNULMENT OF DECISION ' ' IV/26.699 CHIQUITA ' ' (OFFICIAL JOURNAL L 95 OF 9 APRIL 1976 , P. 1 ET SEQ.) WHEREBY THE COMMISSION , ON 17 DECEMBER 1975 , FOUND THAT THE MARKETING OF BANANAS GROWN AND IMPORTED BY THE APPLICANTS INFRINGED ARTICLE 86 OF THE EEC TREATY , AND ALSO FOR PAYMENT OF DAMAGES AS WELL AS FOR THE CANCELLATION OR REDUCTION OF THE FINE IMPOSED UPON THEM BY THE COMMISSION ,

COSTS

305 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY SHALL BE ORDERED TO PAY THE COSTS IF THEY HAVE BEEN ASKED FOR IN THE SUCCESSFUL PARTY ' S PLEADING.

306 UNDER PARAGRAPH (3) OF THIS ARTICLE WHEN EACH PARTY SUCCEEDS ON SOME AND FAILS ON OTHER HEADS OR WHERE THE CIRCUMSTANCES ARE EXCEPTIONAL THE COURT MAY ORDER THAT THE PARTIES BEAR THEIR OWN COSTS IN WHOLE OR IN PART.

307 WITH REGARD TO THE COSTS OF THE PROCEEDINGS IN THE MAIN ACTION THE COMMISSION HAS FAILED ON ONE OF THE COMPLAINTS MADE AGAINST THE APPLICANT AS A RESULT OF THE ANNULMENT OF THE CORRESPONDING PART OF THE DECISION.

308 EACH PARTY SHALL BEAR ITS OWN COSTS.

309 FURTHERMORE AN ORDER MUST BE MADE FOR PAYMENT OF THE COSTS OF THE APPLICATION FOR THE ADOPTION OF AN INTERIM MEASURE.

ON THOSE GROUNDS ,

THE COURT

HEREBY ;

1 . ANNULS ARTICLE 1 (C) OF COMMISSION DECISION OF 17 DECEMBER 1975 ' ' IV/26699 - CHIQUITA ' ' , (OFFICIAL JOURNAL L 95 OF 9 APRIL 1976) .

2 . REDUCES THE AMOUNT OF THE FINE IMPOSED ON UBC AND UBCBV TO 850 000 (EIGHT

HUNDRED AND FIFTY THOUSAND) UNITS OF ACCOUNT , TO BE PAID IN THE NATIONAL CURRENCY OF THE APPLICANT UNDERTAKING WHOSE REGISTERED OFFICE IS SITUATE IN THE COMMUNITY , THAT IS TO SAY 3 077 000 NETHERLANDS GULDERS (THREE MILLION SEVENTY SEVEN THOUSAND NETHERLANDS GULDERS).

3 . DISMISSES THE REST OF THE APPLICATION.

4 . ORDERS EACH PARTY TO BEAR ITS OWN COSTS INCLUDING THE COSTS OF THE APPLICATION FOR THE ADOPTION OF AN INTERIM MEASURE.

1UNITED BRANDS COMPANY (HEREINAFTER REFERRED TO AS ' ' UBC ' ') OF NEW YORK AND ITS REPRESENTATIVE UNITED BRANDS CONTINENTAL B.V. (HEREINAFTER REFERRED TO AS ' ' UBCBV ' ' BY AN APPLICATION REGISTERED AT THE COURT ON 15 MARCH 1976 PETITIONED THE COURT TO SET ASIDE THE COMMISSION DECISION OF 17 DECEMBER 1975 WHICH WAS LATER PUBLISHED IN OFFICIAL JOURNAL L 95 OF 9 APRIL 1976 TO WHICH THE QUOTATIONS IN THIS JUDGMENT REFER.

2FOR PRACTICAL REASONS IN THE ARGUMENTATION WHICH FOLLOWS THE SINGLE EXPRESSION UBC WILL BE USED TO REFER TO THE APPLICANTS.

3ARTICLE 1 OF THE DECISION DECLARES THAT UBC HAS INFRINGED ARTICLE 86 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY :

- (A) BY REQUIRING ITS DISTRIBUTOR/RIPENERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION , DENMARK , GERMANY , IRELAND AND THE NETHERLANDS TO REFRAIN FROM RESELLING ITS BANANAS WHILE STILL GREEN ;
- (B) BY , IN RESPECT OF ITS SALES OF CHIQUITA BANANAS , CHARGING OTHER TRADING PARTIES , NAMELY DISTRIBUTOR/RIPENERS OTHER THAN THE SCIPIO GROUP IN THE MEMBER STATES REFERRED TO ABOVE , DISSIMILAR PRICES FOR EQUIVALENT TRANSACTIONS ;
- (C) BY IMPOSING UNFAIR PRICES FOR THE SALE OF CHIQUITA BANANAS ON ITS CUSTOMERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION , DENMARK , THE NETHERLANDS AND GERMANY (OTHER THAN THE SCIPIO GROUP) ;
- (D) BY REFUSING FROM 10 OCTOBER 1973 TO 11 FEBRUARY 1975 TO SUPPLY CHIQUITA BANANAS TO TH. OLESEN A/S , VALBY , COPENHAGEN , DENMARK.

4UNDER ARTICLE 2 A FINE OF ONE MILLION UNITS OF ACCOUNT IS IMPOSED ON UBC IN RESPECT OF THE INFRINGEMENT REFERRED TO IN ARTICLE 1.

5ARTICLE 3 ORDERS UBC :

- (A) TO BRING TO AN END WITHOUT DELAY THE INFRINGEMENTS REFERRED TO IN ARTICLE 1 HEREOF , UNLESS IT HAS ALREADY DONE SO OF ITS OWN ACCORD
- (B) (I) TO INFORM ALL ITS DISTRIBUTOR/RIPENERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION , DENMARK , GERMANY , IRELAND AND THE NETHERLANDS THAT IT HAS CEASED TO APPLY THE PROHIBITION ON THE RESALE OF GREEN BANANAS AND INFORM THE COMMISSION THAT IT HAS DONE SO BY NOT LATER THAN 1 FEBRUARY 1976 ;
- (II) TO INFORM THE COMMISSION BY 20 APRIL 1976 AND THEREAFTER TWICE YEARLY NOT LATER THAN 20 JANUARY AND 20 JULY FOR A PERIOD OF TWO YEARS OF THE PRICES CHARGED DURING THE PREVIOUS SIX MONTHS TO CUSTOMERS IN THE BELGO-LUXEMBOURG ECONOMIC UNION , DENMARK , GERMANY , IRELAND AND THE NETHERLANDS.

6UBC ' S MAIN CLAIMS IN ITS APPLICATION ARE THAT THE COURT SHOULD SET ASIDE THE DECISION OF 17 DECEMBER 1975 AND ORDER THE COMMISSION TO PAY UBC MORAL DAMAGES IN THE AMOUNT OF ONE UNIT OF ACCOUNT AND , IN THE ALTERNATIVE , SHOULD , IF THE DECISION BE UPHELD , CANCEL OR AT LEAST REDUCE THE FINE.

7IT PUTS FORWARD EIGHT SUBMISSIONS IN SUPPORT OF ITS CONCLUSIONS :

- (1) IT CHALLENGES THE ANALYSIS MADE BY THE COMMISSION OF THE RELEVANT MARKET , AND ALSO OF THE PRODUCT MARKET AND THE GEOGRAPHIC MARKET ;
- (2) IT DENIES THAT IT IS IN A DOMINANT POSITION ON THE RELEVANT MARKET WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY ;
- (3) IT CONSIDERS THAT THE CLAUSE RELATING TO THE CONDITIONS OF SALE OF GREEN BANANAS IS JUSTIFIED BY THE NEED TO SAFEGUARD THE QUALITY OF THE PRODUCT SOLD TO THE CONSUMER ;
- (4) IT INTENDS TO SHOW THAT THE REFUSAL TO CONTINUE TO SUPPLY THE DANISH FIRM TH. OLESEN WAS JUSTIFIED ;
- (5) IT TAKES THE VIEW THAT IT HAS NOT CHARGED DISCRIMINATORY PRICES
- (6) IT TAKES THE VIEW THAT IT HAS NOT CHARGED UNFAIR PRICES ;
- (7) IT COMPLAINS THAT THE ADMINISTRATIVE PROCEDURE WAS IRREGULAR ;
- (8) IT DISPUTES THE IMPOSITION OF THE FINE AND , IN THE ALTERNATIVE , ASKS THE COURT TO REDUCE IT.

8UBC , AFTER BRINGING THIS ACTION , BY A SEPARATE DOCUMENT MADE AN APPLICATION DATED 18 MARCH 1976 FOR THE ADOPTION OF AN INTERIM MEASURE UNDER ARTICLE 185 OF THE TREATY REQUESTING THE PRESIDENT OF THE COURT TO SUSPEND THE ENFORCEMENT OF ARTICLE 3 (A) AND (B) , PARAGRAPH 1 OF THE DECISION UNTIL A DECISION ON THE APPLICATION FOR ANNULMENT PENDING BEFORE THE COURT HAS BEEN MADE.

9BY AN ORDER OF 5 APRIL 1976 THE PRESIDENT TOOK NOTE OF THE PARTIES ' STATEMENTS CONCERNING THE AMENDMENT OF THE CLAUSE RELATING TO THE RESALE OF BANANAS WHILE STILL GREEN AND MADE THE FOLLOWING ORDER :

' ' THE SUSPENSION OF THE OPERATION OF ARTICLE 3 (A) AND THE FIRST INDENT OF ARTICLE 3 (B) OF THE DECISION OF THE COMMISSION OF 17 DECEMBER 1975 (IV / 26699) IS GRANTED UNTIL JUDGMENT IS GIVEN ON THE SUBSTANCE OF CASE [27/76](#) , IN SO FAR AS THE APPLICANTS HAVE NOT ALREADY OF THEIR OWN ACCORD BROUGHT TO AN END THE INFRINGEMENTS REFERRED TO BY THE COMMISSION IN ARTICLE 1 OF THE SAID DECISION ' ' .

CHAPTER I - THE EXISTENCE OF A DOMINANT POSITION

SECTION 1 - THE RELEVANT MARKET

10IN ORDER TO DETERMINE WHETHER UBC HAS A DOMINANT POSITION ON THE BANANA MARKET IT IS NECESSARY TO DEFINE THIS MARKET BOTH FROM THE STANDPOINT OF THE PRODUCT AND FROM THE GEOGRAPHIC POINT OF VIEW.

11THE OPPORTUNITIES FOR COMPETITION UNDER ARTICLE 86 OF THE TREATY MUST BE CONSIDERED HAVING REGARD TO THE PARTICULAR FEATURES OF THE PRODUCT IN QUESTION AND WITH REFERENCE TO A CLEARLY DEFINED GEOGRAPHIC AREA IN

WHICH IT IS MARKETED AND WHERE THE CONDITIONS OF COMPETITION ARE SUFFICIENTLY HOMOGENEOUS FOR THE EFFECT OF THE ECONOMIC POWER OF THE UNDERTAKING CONCERNED TO BE ABLE TO BE EVALUATED.

PARAGRAPH 1. THE PRODUCT MARKET

12AS FAR AS THE PRODUCT MARKET IS CONCERNED IT IS FIRST OF ALL NECESSARY TO ASCERTAIN WHETHER , AS THE APPLICANT MAINTAINS , BANANAS ARE AN INTEGRAL PART OF THE FRESH FRUIT MARKET , BECAUSE THEY ARE REASONABLY INTERCHANGEABLE BY CONSUMERS WITH OTHER KINDS OF FRESH FRUIT SUCH AS APPLES , ORANGES , GRAPES , PEACHES , STRAWBERRIES , ETC . OR WHETHER THE RELEVANT MARKET CONSISTS SOLELY OF THE BANANA MARKET WHICH INCLUDES BOTH BRANDED BANANAS AND UNLABELLED BANANAS AND IS A MARKET SUFFICIENTLY HOMOGENEOUS AND DISTINCT FROM THE MARKET OF OTHER FRESH FRUIT .

13THE APPLICANT SUBMITS IN SUPPORT OF ITS ARGUMENT THAT BANANAS COMPETE WITH OTHER FRESH FRUIT IN THE SAME SHOPS , ON THE SAME SHELVES , AT PRICES WHICH CAN BE COMPARED , SATISFYING THE SAME NEEDS : CONSUMPTION AS A DESSERT OR BETWEEN MEALS.

14THE STATISTICS PRODUCED SHOW THAT CONSUMER EXPENDITURE ON THE PURCHASE OF BANANAS IS AT ITS LOWEST BETWEEN JUNE AND DECEMBER WHEN THERE IS A PLENTIFUL SUPPLY OF DOMESTIC FRESH FRUIT ON THE MARKET.

15STUDIES CARRIED OUT BY THE FOOD AND AGRICULTURE ORGANIZATION (FAO) (ESPECIALLY IN 1975) CONFIRM THAT BANANA PRICES ARE RELATIVELY WEAK DURING THE SUMMER MONTHS AND THAT THE PRICE OF APPLES FOR EXAMPLE HAS A STATISTICALLY APPRECIABLE IMPACT ON THE CONSUMPTION OF BANANAS IN THE FEDERAL REPUBLIC OF GERMANY.

16AGAIN ACCORDING TO THESE STUDIES SOME EASING OF PRICES IS NOTICEABLE AT THE END OF THE YEAR DURING THE ' ' ORANGE SEASON ' ' .

17THE SEASONAL PEAK PERIODS WHEN THERE IS A PLENTIFUL SUPPLY OF OTHER FRESH FRUIT EXERT AN INFLUENCE NOT ONLY ON THE PRICES BUT ALSO ON THE VOLUME OF SALES OF BANANAS AND CONSEQUENTLY ON THE VOLUME OF IMPORTS THEREOF.

18THE APPLICANT CONCLUDES FROM THESE FINDINGS THAT BANANAS AND OTHER FRESH FRUIT FORM ONLY ONE MARKET AND THAT UBC ' S OPERATIONS SHOULD HAVE BEEN EXAMINED IN THIS CONTEXT FOR THE PURPOSE OF ANY APPLICATION OF ARTICLE 86 OF THE TREATY.

19THE COMMISSION MAINTAINS THAT THERE IS A DEMAND FOR BANANAS WHICH IS DISTINCT FROM THE DEMAND FOR OTHER FRESH FRUIT ESPECIALLY AS THE BANANA IS A VERY IMPORTANT PART OF THE DIET OF CERTAIN SECTIONS OF THE COMMUNITY .

20THE SPECIFIC QUALITIES OF THE BANANA INFLUENCE CUSTOMER PREFERENCE AND INDUCE HIM NOT TO READILY ACCEPT OTHER FRUITS AS A SUBSTITUTE.

21THE COMMISSION DRAWS THE CONCLUSION FROM THE STUDIES QUOTED BY THE APPLICANT THAT THE INFLUENCE OF THE PRICES AND AVAILABILITIES OF OTHER TYPES OF FRUIT ON THE PRICES AND AVAILABILITIES OF BANANAS ON THE RELEVANT MARKET IS VERY INEFFECTIVE AND THAT THESE EFFECTS ARE TOO BRIEF AND TOO SPASMODIC FOR SUCH OTHER FRUIT TO BE REGARDED AS FORMING PART OF THE SAME MARKET AS BANANAS OR AS A SUBSTITUTE THEREFOR.

22FOR THE BANANA TO BE REGARDED AS FORMING A MARKET WHICH IS SUFFICIENTLY DIFFERENTIATED FROM OTHER FRUIT MARKETS IT MUST BE POSSIBLE FOR IT TO BE SINGLED OUT BY SUCH SPECIAL FEATURES DISTINGUISHING IT FROM OTHER FRUITS THAT IT IS ONLY TO A LIMITED EXTENT INTERCHANGEABLE WITH THEM AND IS ONLY EXPOSED TO THEIR COMPETITION IN A WAY THAT IS HARDLY PERCEPTIBLE.

23THE RIPENING OF BANANAS TAKES PLACE THE WHOLE YEAR ROUND WITHOUT ANY SEASON HAVING TO BE TAKEN INTO ACCOUNT.

24THROUGHOUT THE YEAR PRODUCTION EXCEEDS DEMAND AND CAN SATISFY IT AT ANY TIME .

25OWING TO THIS PARTICULAR FEATURE THE BANANA IS A PRIVILEGED FRUIT AND ITS PRODUCTION AND MARKETING CAN BE ADAPTED TO THE SEASONAL FLUCTUATIONS OF OTHER FRESH FRUIT WHICH ARE KNOWN AND CAN BE COMPUTED

26THERE IS NO UNAVOIDABLE SEASONAL SUBSTITUTION SINCE THE CONSUMER CAN OBTAIN THIS FRUIT ALL THE YEAR ROUND.

27SINCE THE BANANA IS A FRUIT WHICH IS ALWAYS AVAILABLE IN SUFFICIENT QUANTITIES THE QUESTION WHETHER IT CAN BE REPLACED BY OTHER FRUITS MUST BE DETERMINED OVER THE WHOLE OF THE YEAR FOR THE PURPOSE OF ASCERTAINING THE DEGREE OF COMPETITION BETWEEN IT AND OTHER FRESH FRUIT .

28THE STUDIES OF THE BANANA MARKET ON THE COURT ' S FILE SHOW THAT ON THE LATTER MARKET THERE IS NO SIGNIFICANT LONG TERM CROSS-ELASTICITY ANY MORE THAN - AS HAS BEEN MENTIONED - THERE IS ANY SEASONAL SUBSTITUTABILITY IN GENERAL BETWEEN THE BANANA AND ALL THE SEASONAL FRUITS , AS THIS ONLY EXISTS BETWEEN THE BANANA AND TWO FRUITS (PEACHES AND TABLE GRAPES) IN ONE OF THE COUNTRIES (WEST GERMANY) OF THE RELEVANT GEOGRAPHIC MARKET.

29AS FAR AS CONCERNS THE TWO FRUITS AVAILABLE THROUGHOUT THE YEAR (ORANGES AND APPLES) THE FIRST ARE NOT INTERCHANGEABLE AND IN THE CASE OF THE SECOND THERE IS ONLY A RELATIVE DEGREE OF SUBSTITUTABILITY

30THIS SMALL DEGREE OF SUBSTITUTABILITY IS ACCOUNTED FOR BY THE SPECIFIC FEATURES OF THE BANANA AND ALL THE FACTORS WHICH INFLUENCE CONSUMER CHOICE.

31THE BANANA HAS CERTAIN CHARACTERISTICS , APPEARANCE , TASTE , SOFTNESS , SEEDLESSNESS , EASY HANDLING , A CONSTANT LEVEL OF PRODUCTION WHICH ENABLE IT TO SATISFY THE CONSTANT NEEDS OF AN IMPORTANT SECTION OF THE POPULATION CONSISTING OF THE VERY YOUNG , THE OLD AND THE SICK.

32AS FAR AS PRICES ARE CONCERNED TWO FAO STUDIES SHOW THAT THE BANANA IS ONLY AFFECTED BY THE PRICES - FALLING PRICES - OF OTHER FRUITS (AND ONLY OF PEACHES AND TABLE GRAPES) DURING THE SUMMER MONTHS AND MAINLY IN JULY AND THEN BY AN AMOUNT NOT EXCEEDING 20%.

33ALTHOUGH IT CANNOT BE DENIED THAT DURING THESE MONTHS AND SOME WEEKS AT THE END OF THE YEAR THIS PRODUCT IS EXPOSED TO COMPETITION FROM OTHER FRUITS , THE FLEXIBLE WAY IN WHICH THE VOLUME OF IMPORTS AND THEIR MARKETING ON THE RELEVANT GEOGRAPHIC MARKET IS ADJUSTED MEANS THAT THE CONDITIONS OF COMPETITION ARE EXTREMELY LIMITED AND THAT ITS PRICE ADAPTS WITHOUT ANY SERIOUS DIFFICULTIES TO THIS SITUATION WHERE SUPPLIES OF FRUIT ARE PLENTIFUL.

34IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT A VERY LARGE NUMBER OF CONSUMERS HAVING A CONSTANT NEED FOR BANANAS ARE NOT NOTICEABLY OR EVEN APPRECIABLY ENTICED AWAY FROM THE CONSUMPTION OF THIS PRODUCT BY THE ARRIVAL OF OTHER FRESH FRUIT ON THE MARKET AND THAT EVEN THE PERSONAL PEAK PERIODS ONLY AFFECT IT FOR A LIMITED PERIOD OF TIME AND TO A VERY LIMITED EXTENT FROM THE POINT OF VIEW OF SUBSTITUTABILITY.

35CONSEQUENTLY THE BANANA MARKET IS A MARKET WHICH IS SUFFICIENTLY DISTINCT FROM THE OTHER FRESH FRUIT MARKETS.

PARAGRAPH 2. THE GEOGRAPHIC MARKET

36THE COMMISSION HAS TAKEN THE FEDERAL REPUBLIC OF GERMANY , DENMARK , IRELAND , THE NETHERLANDS AND THE BLEU AS THE GEOGRAPHIC MARKET AND IT IS IN RESPECT OF THIS MARKET THAT IT IS NECESSARY TO CONSIDER WHETHER UBC HAS THE POWER TO HINDER EFFECTIVE COMPETITION.

37IT TAKES THE VIEW THAT THE ECONOMIC CONDITIONS IN THIS PART OF THE COMMUNITY ALLOW IMPORTER/DISTRIBUTORS OF BANANAS TO MARKET THEIR PRODUCTS THERE IN THE ORDINARY COURSE WITHOUT THERE BEING ANY SIGNIFICANT ECONOMIC BARRIERS FOR UBC TO OVERCOME COMPARED WITH OTHER IMPORTER/DISTRIBUTORS.

38THE OTHER MEMBER STATES OF THE COMMUNITY (FRANCE , ITALY , THE UNITED KINGDOM) MUST HOWEVER BE EXCLUDED FROM THIS GEOGRAPHIC DEFINITION OF THE MARKET NOTWITHSTANDING THE SIGNIFICANT PRESENCE OF UBC IN THESE STATES , BECAUSE OF THE SPECIAL CIRCUMSTANCES RELATING TO IMPORT ARRANGEMENTS AND TRADING CONDITIONS AND THE FACT THAT BANANAS OF VARIOUS TYPES AND ORIGIN ARE SOLD THERE.

39THE APPLICANT POINTS OUT THAT THE GEOGRAPHIC MARKET WHERE AN UNDERTAKING ' S ECONOMIC AND COMMERCIAL POWER IS TAKEN INTO CONSIDERATION SHOULD ONLY COMPRISE AREAS WHERE THE CONDITIONS OF COMPETITION ARE HOMOGENEOUS.

40ALTHOUGH THE COMMISSION HAD GOOD REASON TO EXCLUDE FRANCE , ITALY AND THE UNITED KINGDOM FROM THE SAID MARKET IT FAILED TO TAKE ACCOUNT OF THE DIFFERENCES IN THE CONDITIONS OF COMPETITION IN THE OTHER MEMBER STATES WHICH SHOULD HAVE LED IT TO COME TO THE SAME CONCLUSIONS WITH REGARD TO THE LATTER AS IT CAME TO IN THE CASE OF THE THREE COUNTRIES REFERRED TO ABOVE.

41IN FACT THREE SUBSTANTIALLY DIFFERENT SYSTEMS OF CUSTOMS DUTY APPLY IN THE MEMBER STATES CONCERNED : A ZERO TARIFF IN GERMANY COVERING A BANANA QUOTA WHICH MEETS MOST OF THIS COUNTRY ' S REQUIREMENTS , A TRANSITIONAL TARIFF IN IRELAND AND DENMARK AND THE COMMON CUSTOMS TARIFF OF 20% FOR IMPORTS INTO BENELUX.

42THE COMMISSION HAS NOT EITHER TAKEN ACCOUNT OF THE CONSUMER HABITS OF THE MEMBER STATES CONCERNED THE ANNUAL CONSUMPTION OF FRESH FRUITS PER CAPITA IN GERMANY IS EQUAL TO 2.5 TIMES THAT OF IRELAND AND TWICE THAT OF DENMARK), DIFFERING COMMERCIAL PATTERNS , CONCENTRATIONS AND MONETARY POINTS OF VIEW.

43THE APPLICANT DRAWS THE CONCLUSION FROM ALL THESE FINDINGS THAT THE GEOGRAPHIC MARKET TAKEN BY THE COMMISSION INCLUDES AREAS IN WHICH THE CONDITIONS OF COMPETITION ARE SO DIFFERENT THAT THEY CANNOT BE CONSIDERED

AS CONSTITUTING A SINGLE MARKET.

44THE CONDITIONS FOR THE APPLICATION OF ARTICLE 86 TO AN UNDERTAKING IN A DOMINANT POSITION PRESUPPOSE THE CLEAR DELIMITATION OF THE SUBSTANTIAL PART OF THE COMMON MARKET IN WHICH IT MAY BE ABLE TO ENGAGE IN ABUSES WHICH HINDER EFFECTIVE COMPETITION AND THIS IS AN AREA WHERE THE OBJECTIVE CONDITIONS OF COMPETITION APPLYING TO THE PRODUCT IN QUESTION MUST BE THE SAME FOR ALL TRADERS.

45THE COMMUNITY HAS NOT ESTABLISHED A COMMON ORGANIZATION OF THE AGRICULTURAL MARKET IN BANANAS.

46CONSEQUENTLY IMPORT ARRANGEMENTS VARY CONSIDERABLY FROM ONE MEMBER STATE TO ANOTHER AND REFLECT A SPECIFIC COMMERCIAL POLICY PECULIAR TO THE STATES CONCERNED.

47THIS EXPLAINS WHY FOR EXAMPLE THE FRENCH MARKET OWING TO ITS NATIONAL ORGANIZATION IS RESTRICTED UPSTREAM BY A PARTICULAR IMPORT ARRANGEMENT AND OBSTRUCTED DOWNSTREAM BY A RETAIL PRICE MONITORED BY THE ADMINISTRATION.

48THIS MARKET , IN ADDITION TO ADOPTING CERTAIN MEASURES RELATING TO A ' ' TARGET PRICE ' ' (' ' PRIX OBJECTIF ' ') FIXED EACH YEAR AND TO PACKAGING AND GRADING STANDARDS AND THE MINIMUM QUALITIES REQUIRED , RESERVES ABOUT TWO THIRDS OF THE MARKET FOR THE PRODUCTION OF THE OVERSEAS DEPARTMENTS AND ONE THIRD TO THAT OF CERTAIN COUNTRIES ENJOYING PREFERENTIAL RELATIONS WITH FRANCE (IVORY COAST , MADAGASCAR , CAMEROON) THE BANANAS WHEREOF ARE IMPORTED DUTY- FREE , AND IT INCLUDES A SYSTEM THE RUNNING OF WHICH IS ENTRUSTED TO THE ' ' COMITE INTERPROFESSIONNEL BANANIER ' ' (' ' C.I.B. ' ').

49THE UNITED KINGDOM MARKET ENJOYS ' ' COMMONWEALTH PREFERENCES ' ' , A SYSTEM OF WHICH THE MAIN FEATURE IS THE MAINTENANCE OF A LEVEL OF PRODUCTION FAVOURING THE DEVELOPING COUNTRIES OF THE COMMONWEALTH AND OF A PRICE PAID TO THE ASSOCIATIONS OF PRODUCERS DIRECTLY LINKED TO THE SELLING PRICE OF THE GREEN BANANA CHARGED IN THE UNITED KINGDOM.

50ON THE ITALIAN MARKET , SINCE THE ABOLITION IN 1965 OF THE STATE MONOPOLY RESPONSIBLE FOR MARKETING BANANAS , A NATIONAL SYSTEM OF QUOTA RESTRICTIONS HAS BEEN INTRODUCED , THE MINISTRY FOR SHIPPING AND THE EXCHANGE CONTROL OFFICE SUPERVISING THE IMPORTS AND THE CHARTERPARTIES RELATING TO THE FOREIGN SHIPS WHICH CARRY THE BANANAS.

51THE EFFECT OF THE NATIONAL ORGANIZATION OF THESE THREE MARKETS IS THAT THE APPLICANT ' S BANANAS DO NOT COMPETE ON EQUAL TERMS WITH THE OTHER BANANAS SOLD IN THESE STATES WHICH BENEFIT FROM A PREFERENTIAL SYSTEM AND THE COMMISSION WAS RIGHT TO EXCLUDE THESE THREE NATIONAL MARKETS FROM THE GEOGRAPHIC MARKET UNDER CONSIDERATION.

52ON THE OTHER HAND THE SIX OTHER STATES ARE MARKETS WHICH ARE COMPLETELY FREE , ALTHOUGH THE APPLICABLE TARIFF PROVISIONS AND TRANSPORT COSTS ARE OF NECESSITY DIFFERENT BUT NOT DISCRIMINATORY , AND IN WHICH THE CONDITIONS OF COMPETITION ARE THE SAME FOR ALL.

53FROM THE STANDPOINT OF BEING ABLE TO ENGAGE IN FREE COMPETITION THESE SIX STATES FORM AN AREA WHICH IS SUFFICIENTLY HOMOGENEOUS TO BE CONSIDERED

IN ITS ENTIRETY.

54UBC HAS ARRANGED FOR ITS SUBSIDIARY IN ROTTERDAM - UBCBV - TO MARKET ITS PRODUCTS. UBCBV IS FOR THIS PURPOSE A SINGLE CENTRE FOR THE WHOLE OF THIS PART OF THE COMMUNITY.

55TRANSPORT COSTS DO NOT IN FACT STAND IN THE WAY OF THE DISTRIBUTION POLICY CHOSEN BY UBC WHICH CONSISTS IN SELLING F.O.R. ROTTERDAM AND BREMERHAVEN , THE TWO PORTS WHERE THE BANANAS ARE UNLOADED .

56THESE ARE FACTORS WHICH GO TO MAKE RELEVANT MARKET A SINGLE MARKET

57IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT THE GEOGRAPHIC MARKET AS DETERMINED BY THE COMMISSION WHICH CONSTITUTES A SUBSTANTIAL PART OF THE COMMON MARKET MUST BE REGARDED AS THE RELEVANT MARKET FOR THE PURPOSE OF DETERMINING WHETHER THE APPLICANT MAY BE IN A DOMINANT POSITION .

SECTION 2 - UBC ' S POSITION ON THE RELEVANT MARKET

58THE COMMISSION BASES ITS VIEW THAT UBC HAS A DOMINANT POSITION ON THE RELEVANT MARKET ON A SERIES OF FACTORS WHICH , WHEN TAKEN TOGETHER , GIVE UBC UNCHALLENGEABLE ASCENDANCY OVER ALL ITS COMPETITORS : ITS MARKET SHARE COMPARED WITH THAT OF ITS COMPETITORS , THE DIVERSITY OF ITS SOURCES OF SUPPLY , THE HOMOGENEOUS NATURE OF ITS PRODUCT , THE ORGANIZATION OF ITS PRODUCTION AND TRANSPORT , ITS MARKETING SYSTEM AND PUBLICITY CAMPAIGNS , THE DIVERSIFIED NATURE OF ITS OPERATIONS AND FINALLY ITS VERTICAL INTEGRATION.

59HAVING REGARD TO ALL THESE FACTORS THE COMMISSION TAKES THE VIEW THAT UBC IS AN UNDERTAKING IN A DOMINANT POSITION ENJOYING A DEGREE OF GENERAL INDEPENDENCE IN ITS BEHAVIOUR ON THE RELEVANT MARKET WHICH ENABLES IT TO HINDER TO A LARGE EXTENT ANY EFFECTIVE COMPETITION FROM COMPETITORS WHO CAN ONLY IF NEED BE SECURE THE SAME ADVANTAGES AFTER GREAT EXERTIONS SPREAD OVER SEVERAL YEARS , A PROSPECT WHICH DOES NOT ENCOURAGE THEM TO EMBARK UPON SUCH A COURSE , ESPECIALLY AFTER FAILING SEVERAL TIMES TO OBTAIN THESE ADVANTAGES.

60UBC DOES NOT ACCEPT THIS CONCLUSION AND STATES THAT IT STEMS FROM AN ASSERTION UNSUPPORTED BY ANY EVIDENCE.

61IT STATES THAT IT ONLY ENGAGES IN FAIR COMPETITION IN TERMS OF PRICE , QUALITY AND SERVICES.

62ACCORDING TO UBC AN OBJECTIVE EVALUATION OF ITS MARKET SHARE , THE OPPORTUNITIES FOR PROCURING SUPPLIES , THE ' ' AGGRESSIVE ' ' COMPETITION OF OTHER UNDERTAKINGS , THEIR RESOURCES , THEIR METHODS AND DEGREE OF INTEGRATION , THE RELATIVE FREEDOM OF DISTRIBUTOR/RIPENERS , THE APPEARANCE OF NEW COMPETITORS ON THE MARKET , THE STRENGTH AND SIZE OF CERTAIN CUSTOMERS , THE LOW PRICE AND INDEED THE FALL IN THE PRICE OF THE BANANA , THE LOSSES WHICH IT HAS MADE FOR THE LAST FIVE YEARS , WOULD HAVE PERMITTED THE CONCLUSION TO BE DRAWN THAT , ON THE BASIS OF A PROPER ANALYSIS , NEITHER THE SET UP NOR THE BEHAVIOUR OF ITS UNDERTAKING PRESENT THE PARTICULAR FEATURES OF A FIRM IN A DOMINANT POSITION ON THE RELEVANT MARKET.

63ARTICLE 86 IS AN APPLICATION OF THE GENERAL OBJECTIVE OF THE ACTIVITIES OF THE COMMUNITY LAID DOWN BY ARTICLE 3 (F) OF THE TREATY : THE INSTITUTION OF A SYSTEM ENSURING THAT COMPETITION IN THE COMMON MARKET IS NOT DISTORTED.

64THIS ARTICLE PROHIBITS ANY ABUSE BY AN UNDERTAKING OF A DOMINANT POSITION IN A SUBSTANTIAL PART OF THE COMMON MARKET IN SO FAR AS IT MAY AFFECT TRADE BETWEEN MEMBER STATES.

65THE DOMINANT POSITION REFERRED TO IN THIS ARTICLE RELATES TO A POSITION OF ECONOMIC STRENGTH ENJOYED BY AN UNDERTAKING WHICH ENABLES IT TO PREVENT EFFECTIVE COMPETITION BEING MAINTAINED ON THE RELEVANT MARKET BY GIVING IT THE POWER TO BEHAVE TO AN APPRECIABLE EXTENT INDEPENDENTLY OF ITS COMPETITORS , CUSTOMERS AND ULTIMATELY OF ITS CONSUMERS .

66IN GENERAL A DOMINANT POSITION DERIVES FROM A COMBINATION OF SEVERAL FACTORS WHICH , TAKEN SEPARATELY , ARE NOT NECESSARILY DETERMINATIVE.

67IN ORDER TO FIND OUT WHETHER UBC IS AN UNDERTAKING IN A DOMINANT POSITION ON THE RELEVANT MARKET IT IS NECESSARY FIRST OF ALL TO EXAMINE ITS STRUCTURE AND THEN THE SITUATION ON THE SAID MARKET AS FAR AS COMPETITION IS CONCERNED.

68IN DOING SO IT MAY BE ADVISABLE TO TAKE ACCOUNT IF NEED BE OF THE FACTS PUT FORWARD AS ACTS AMOUNTING TO ABUSES WITHOUT NECESSARILY HAVING TO ACKNOWLEDGE THAT THEY ARE ABUSES.

PARAGRAPH 1. THE STRUCTURE OF UBC

69IT IS ADVISABLE TO EXAMINE IN TURN UBC ' S RESOURCES FOR AND METHODS OF PRODUCING , PACKAGING , TRANSPORTING , SELLING AND DISPLAYING ITS PRODUCT.

70UBC IS AN UNDERTAKING VERTICALLY INTEGRATED TO A HIGH DEGREE.

71THIS INTEGRATION IS EVIDENT AT EACH OF THE STAGES FROM THE PLANTATION TO THE LOADING ON WAGONS OR LORRIES IN THE PORTS OF DELIVERY AND AFTER THOSE STAGES , AS FAR AS RIPENING AND SALE PRICES ARE CONCERNED , UBC EVEN EXTENDS ITS CONTROL TO RIPENER/DISTRIBUTORS AND WHOLESALERS BY SETTING UP A COMPLETE NETWORK OF AGENTS.

72AT THE PRODUCTION STAGE UBC OWNS LARGE PLANTATIONS IN CENTRAL AND SOUTH AMERICA.

73IN SO FAR AS UBC ' S OWN PRODUCTION DOES NOT MEET ITS REQUIREMENTS IT CAN OBTAIN SUPPLIES WITHOUT ANY DIFFICULTY FROM INDEPENDENT PLANTERS SINCE IT IS AN ESTABLISHED FACT THAT UNLESS CIRCUMSTANCES ARE EXCEPTIONAL THERE IS A PRODUCTION SURPLUS.

74FURTHERMORE SEVERAL INDEPENDENT PRODUCERS HAVE LINKS WITH UBC THROUGH CONTRACTS FOR THE GROWING OF BANANAS WHICH HAVE CAUSED THEM TO GROW THE VARIETIES OF BANANAS WHICH UBC HAS ADVISED THEM TO ADOPT.

75THE EFFECTS OF NATURAL DISASTERS WHICH COULD JEOPARDIZE SUPPLIES ARE GREATLY REDUCED BY THE FACT THAT THE PLANTATIONS ARE SPREAD OVER A WIDE GEOGRAPHIC AREA AND BY THE SELECTION OF VARIETIES NOT VERY SUSCEPTIBLE TO DISEASES.

76THIS SITUATION WAS BORN OUT BY THE WAY IN WHICH UBC WAS ABLE TO REACT TO THE CONSEQUENCES OF HURRICANE ' ' FIFI ' ' IN 1974.

77AT THE PRODUCTION STAGE UBC THEREFORE KNOWS THAT IT CAN COMPLY WITH ALL THE REQUESTS WHICH IT RECEIVES.

78AT THE STAGE OF PACKAGING AND PRESENTATION ON ITS PREMISES UBC HAS AT

ITS DISPOSAL FACTORIES , MANPOWER , PLANT AND MATERIAL WHICH ENABLE IT TO HANDLE THE GOODS INDEPENDENTLY.

79THE BANANAS ARE CARRIED FROM THE PLACE OF PRODUCTION TO THE PORT OF SHIPMENT BY ITS OWN MEANS OF TRANSPORT INCLUDING RAILWAYS.

80AT THE CARRIAGE BY SEA STAGE IT HAS BEEN ACKNOWLEDGED THAT UBC IS THE ONLY UNDERTAKING OF ITS KIND WHICH IS CAPABLE OF CARRYING TWO THIRDS OF ITS EXPORTS BY MEANS OF ITS OWN BANANA FLEET.

81THUS UBC KNOWS THAT IT IS ABLE TO TRANSPORT REGULARLY , WITHOUT RUNNING THE RISK OF ITS OWN SHIPS NOT BEING USED AND WHATEVER THE MARKET SITUATION MAY BE , TWO THIRDS OF ITS AVERAGE VOLUME OF SALES AND IS ALONE ABLE TO ENSURE THAT THREE REGULAR CONSIGNMENTS REACH EUROPE EACH WEEK , AND ALL THIS GUARANTEES IT COMMERCIAL STABILITY AND WELL BEING .

82IN THE FIELD OF TECHNICAL KNOWLEDGE AND AS A RESULT OF CONTINUAL RESEARCH UBC KEEPS ON IMPROVING THE PRODUCTIVITY AND YIELD OF ITS PLANTATIONS BY IMPROVING THE DRAINING SYSTEM , MAKING GOOD SOIL DEFICIENCIES AND COMBATING EFFECTIVELY PLANT DISEASE.

83IT HAS PERFECTED NEW RIPENING METHODS IN WHICH ITS TECHNICIANS INSTRUCT THE DISTRIBUTOR/RIPENERS OF THE CHIQUITA BANANA.

84THAT IS ANOTHER FACTOR TO BE BORNE IN MIND WHEN CONSIDERING UBC ' S POSITION SINCE COMPETING FIRMS CANNOT DEVELOP RESEARCH AT A COMPARABLE LEVEL AND ARE IN THIS RESPECT AT A DISADVANTAGE COMPARED WITH THE APPLICANT.

85IT IS ACKNOWLEDGED THAT AT THE STAGE WHERE THE GOODS ARE GIVEN THE FINAL FINISH AND UNDERGO QUALITY CONTROL UBC NOT ONLY CONTROLS THE DISTRIBUTOR / RIPENERS WHICH ARE DIRECT CUSTOMERS BUT ALSO THOSE WHO WORK FOR THE ACCOUNT OF ITS IMPORTANT CUSTOMERS SUCH AS THE SCIPIO GROUP .

86EVEN IF THE OBJECT OF THE CLAUSE PROHIBITING THE SALE OF GREEN BANANAS WAS ONLY STRICT QUALITY CONTROL , IT IN FACT GIVES UBC ABSOLUTE CONTROL OF ALL TRADE IN ITS GOODS SO LONG AS THEY ARE MARKETABLE WHOLESALE , THAT IS TO SAY BEFORE THE RIPENING PROCESS BEGINS WHICH MAKES AN IMMEDIATE SALE UNAVOIDABLE.

87THIS GENERAL QUALITY CONTROL OF A HOMOGENEOUS PRODUCT MAKES THE ADVERTISING OF THE BRAND NAME EFFECTIVE.

88SINCE 1967 UBC HAS BASED ITS GENERAL POLICY IN THE RELEVANT MARKET ON THE QUALITY OF ITS CHIQUITA BRAND BANANA.

89THERE IS NO DOUBT THAT THIS POLICY GIVES UBC CONTROL OVER THE TRANSFORMATION OF THE PRODUCT INTO BANANAS FOR CONSUMPTION EVEN THOUGH MOST OF THIS PRODUCT NO LONGER BELONGS TO IT.

90THIS POLICY HAS BEEN BASED ON A THOROUGH REORGANIZATION OF THE ARRANGEMENTS FOR PRODUCTION , PACKAGING , CARRIAGE , RIPENING (NEW PLANT WITH VENTILATION AND A COOLING SYSTEM) AND SALE (A NETWORK OF AGENTS) .

91UBC HAS MADE THIS PRODUCT DISTINCTIVE BY LARGE-SCALE REPEATED ADVERTISING AND PROMOTION CAMPAIGNS WHICH HAVE INDUCED THE CONSUMER TO SHOW A PREFERENCE FOR IT IN SPITE OF THE DIFFERENCE BETWEEN THE PRICE OF LABELLED AND UNLABELLED BANANAS (IN THE REGION OF 30 TO 40 %) AND ALSO OF CHIQUITA BANANAS AND THOSE

WICH HAVE BEEN LABELLED WITH ANOTHER BRAND NAME (IN THE REGION OF 7 TO 10%).

92IT WAS THE FIRST TO TAKE FULL ADVANTAGE OF THE OPPORTUNITIES PRESENTED BY LABELLING IN THE TROPICS FOR THE PURPOSE OF LARGE-SCALE ADVERTISING AND THIS , TO USE UBC ' S OWN WORDS , HAS ' ' REVOLUTIONIZED THE COMMERCIAL EXPLOITATION OF THE BANANA ' ' (ANNEX II A TO THE APPLICATION , P. 10).

93IT HAS THUS ATTAINED A PRIVILEGED POSITION BY MAKING CHIQUITA THE PREMIER BANANA BRAND NAME ON THE RELEVANT MARKET WITH THE RESULT THAT THE DISTRIBUTOR CANNOT AFFORD NOT TO OFFER IT TO THE CONSUMER.

94AT THE SELLING STAGE THIS DISTINGUISHING FACTOR - JUSTIFIED BY THE UNCHANGING QUALITY OF THE BANANA BEARING THIS LABEL - ENSURES THAT IT HAS REGULAR CUSTOMERS AND CONSOLIDATES ITS ECONOMIC STRENGTH.

95THE EFFECT OF ITS SALES NETWORKS ONLY COVERING A LIMITED NUMBER OF CUSTOMERS , LARGE GROUPS OR DISTRIBUTOR/RIPENERS , IS A SIMPLIFICATION OF ITS SUPPLY POLICY AND ECONOMIES OF SCALE.

96SINCE UBC ' S SUPPLY POLICY CONSISTS - IN SPITE OF THE PRODUCTION SURPLUS - IN ONLY MEETING THE REQUESTS FOR CHIQUITA BANANAS PARSIMONIOUSLY AND SOMETIMES INCOMPLETELY UBC IS IN A POSITION OF STRENGTH AT THE SELLING STAGE.

PARAGRAPH 2. THE SITUATION WITH REGARD TO COMPETITION

97UBC IS THE LARGEST BANANA GROUP HAVING ACCOUNTED IN 1974 FOR 35% OF ALL BANANA EXPORTS ON THE WORLD MARKET.

98IN THIS CASE HOWEVER ACCOUNT MUST ONLY BE TAKEN OF ITS OPERATIONS ON THE RELEVANT MARKET.

99AS FAR AS THIS MARKET IS CONCERNED THE PARTIES DISAGREE AS TO THE EXTENT OF UBC ' S MARKET SHARE IN THE FEDERAL REPUBLIC OF GERMANY AND AS TO THE APPLICANT ' S ENTIRE SHARE OF THE WHOLE OF THE RELEVANT MARKET .

100IN THE FIRST PLACE UBC DOES NOT INCLUDE IN ITS ENTIRE SHARE OF THE WHOLE OF THE RELEVANT MARKET THE PERCENTAGE ATTRIBUTED TO THE SCIPIO UNDERTAKING WHICH BUYS ITS BANANAS F.O.B. IN CENTRAL AMERICA.

101HOWEVER IT MUST BE INCLUDED , BECAUSE ALMOST ALL THE BANANAS RIPENED BY SCIPIO ARE ' ' CHIQUITA ' ' BANANAS THE SHIPMENT OF WHICH TO EUROPE IS COORDINATED BY THE SVEN SALENE COMPANY , BECAUSE SCIPIO SUBMITS TO UBC ' S TECHNICAL SUPERVISION , BECAUSE THESE TWO GROUPS HAVE ENTERED INTO SUPPLY AND PRICE AGREEMENTS WITH EACH OTHER , BECAUSE SCIPIO ABIDES BY THE OBLIGATION NOT TO RESELL ' ' CHIQUITA BANANAS ' ' WHILE STILL GREEN AND BECAUSE FOR THE LAST 30 YEARS IT HAS NEVER ATTEMPTED TO ACT INDEPENDENTLY OF UBC.

102THERE ARE WORKING ARRANGEMENTS BETWEEN SCIPIO AND UBC AND THERE IS JOINT ACTION ON PRICES AND ALSO ON MAKING POINTS OF SALE ATTRACTIVE AND IN CONNEXION WITH ADVERTISING CAMPAIGNS.

103IT MUST FURTHERMORE BE RECORDED THAT THE SALE PRICES CHARGED BY SCIPIO ARE THE SAME AS THOSE OF THE OTHER SUPPLIERS SUPPLIED BY UBC.

104CONSEQUENTLY UBC AND SCIPIO ARE NOT IN COMPETITION WITH EACH OTHER .

105IN THE SECOND PLACE THE COMMISSION STATES THAT IT ESTIMATES UBC ' S MARKET SHARE AT 45%.

106HOWEVER UBC POINTS OUT THAT THIS SHARE DROPPED TO 41% IN 1975.

107A TRADER CAN ONLY BE IN A DOMINANT POSITION ON THE MARKET FOR A PRODUCT IF HE HAS SUCCEEDED IN WINNING A LARGE PART OF THIS MARKET.

108WITHOUT GOING INTO A DISCUSSION ABOUT PERCENTAGES , WHICH WHEN FIXED ARE BOUND TO BE TO SOME EXTENT APPROXIMATIONS , IT CAN BE CONSIDERED TO BE AN ESTABLISHED FACT THAT UBC ' S SHARE OF THE RELEVANT MARKET IS ALWAYS MORE THAN 40% AND NEARLY 45%.

109THIS PERCENTAGE DOES NOT HOWEVER PERMIT THE CONCLUSION THAT UBC AUTOMATICALLY CONTROLS THE MARKET.

110IT MUST BE DETERMINED HAVING REGARD TO THE STRENGTH AND NUMBER OF THE COMPETITORS.

111IT IS NECESSARY FIRST OF ALL TO ESTABLISH THAT ON THE WHOLE OF THE RELEVANT MARKET THE SAID PERCENTAGE REPRESENTS GROSSO MODO A SHARE SEVERAL TIMES GREATER THAN THAT OF ITS COMPETITOR CASTLE AND COOKE WHICH IS THE BEST PLACED OF ALL THE COMPETITORS , THE OTHERS COMING FAR BEHIND .

112THIS FACT TOGETHER WITH THE OTHERS TO WHICH ATTENTION HAS ALREADY BEEN DRAWN MAY BE REGARDED AS A FACTOR WHICH AFFORDS EVIDENCE OF UBC ' S PREPONDERANT STRENGTH.

113HOWEVER AN UNDERTAKING DOES NOT HAVE TO HAVE ELIMINATED ALL OPPORTUNITY FOR COMPETITION IN ORDER TO BE IN A DOMINANT POSITION.

114IN THIS CASE THERE WAS IN FACT A VERY LIVELY COMPETITIVE STRUGGLE ON SEVERAL OCCASIONS IN 1973 AS CASTLE AND COOKE HAD MOUNTED A LARGE-SCALE ADVERTISING AND PROMOTION CAMPAIGN WITH PRICE REBATES ON THE DANISH AND GERMAN MARKETS.

115AT THE SAME TIME ALBA CUT PRICES AND OFFERED PROMOTIONAL MATERIAL

116RECENTLY THE COMPETITION OF THE VILLEMANN ET TAS FIRM ON THE NETHERLANDS MARKET HAS BEEN SO LIVELY THAT PRICES HAVE DROPPED BELOW THOSE ON THE GERMAN MARKET WHICH ARE TRADITIONALLY THE LOWEST.

117IT MUST HOWEVER BE RECORDED THAT IN SPITE OF THEIR EXERTIONS THESE FIRMS HAVE NOT SUCCEEDED IN INCREASING THEIR MARKET SHARE APPRECIABLE ON THE NATIONAL MARKETS WHERE THEY LAUNCHED THEIR ATTACKS

118IT MUST BE NOTED THAT THESE PERIODS OF COMPETITION LIMITED IN TIME AND SPACE DID NOT COVER THE WHOLE OF THE RELEVANT MARKET.

119EVEN IF THE LOCAL ATTACKS OF SOME COMPETITORS CAN BE DESCRIBED AS ' ' FIERCE ' ' IT CAN ONLY BE PLACED ON RECORD THAT UBC HELD OUT AGAINST THEM SUCCESSFULLY EITHER BY ADAPTING ITS PRICES FOR THE TIME BEING (IN THE NETHERLANDS IN ANSWER TO THE CHALLENGE FROM VILLEMANN ET TAS) OR BY BRINGING INDIRECT PRESSURE TO BEAR ON THE INTERMEDIARIES.

120FURTHERMORE IF UBC ' S POSITION ON EACH OF THE NATIONAL MARKETS CONCERNED

IS CONSIDERED IT EMERGES THAT , EXECPT IN IRELAND , IT SELLS DIRECT AND ALSO , AS FAR AS CONCERNS GERMANY , INDIRECTLY THROUGH SCIPIO , ALMOST TWICE AS MANY BANANAS AS THE BEST PLACED COMPETITOR AND THAT THERE IS NO APPRECIABLE FALL IN ITS SALES FIGURES EVEN WHEN NEW COMPETITORS APPEAR ON THESE MARKETS.

121UBC ' S ECONOMIC STRENGTH HAS THUS ENABLED IT TO ADOPT A FLEXIBLE OVERALL STRATEGY DIRECTED AGAINST NEW COMPETITORS ESTABLISHING THEMSELVES ON THE WHOLE OF THE RELEVANT MARKET.

122THE PARTICULAR BARRIERS TO COMPETITORS ENTERING THE MARKET ARE THE EXCEPTIONALLY LARGE CAPITAL INVESTMENTS REQUIRED FOR THE CREATION AND RUNNING OF BANANA PLANTATIONS , THE NEED TO INCREASE SOURCES OF SUPPLY IN ORDER TO AVOID THE EFFECTS OF FRUIT DISEASES AND BAD WEATHER (HURRICANES , FLOODS) , THE INTRODUCTION OF AN ESSENTIAL SYSTEM OF LOGISTICS WHICH THE DISTRIBUTION OF A VERY PERISHABLE PRODUCT MAKES NECESSARY , ECONOMIES OF SCALE FROM WHICH NEWCOMERS TO THE MARKET CANNOT DERIVE ANY IMMEDIATE BENEFIT AND THE ACTUAL COST OF ENTRY MADE UP INTER ALIA OF ALL THE GENERAL EXPENSES INCURRED IN PENETRATING THE MARKET SUCH AS THE SETTING UP OF AN ADEQUATE COMMERCIAL NETWORK , THE MOUNTING OF VERY LARGE-SCALE ADVERTISING CAMPAIGNS , ALL THOSE FINANCIAL RISKS , THE COSTS OF WHICH ARE IRRECOVERABLE IF THE ATTEMPT FAILS .

123THUS , ALTHOUGH , AS UBC HAS POINTED OUT , IT IS TRUE THAT COMPETITORS ARE ABLE TO USE THE SAME METHODS OF PRODUCTION AND DISTRIBUTION AS THE APPLICANT , THEY COME UP AGAINST ALMOST INSUPERABLE PRACTICAL AND FINANCIAL OBSTACLES.

124THAT IS ANOTHER FACTOR PECULIAR TO A DOMINANT POSITION.

125HOWEVER UBC TAKES INTO ACCOUNT THE LOSSES WHICH ITS BANANA DIVISION MADE FROM 1971 TO 1976 - WHEREAS DURING THIS PERIOD ITS COMPETITORS MADE PROFITS - FOR THE PURPOSE OF INFERRING THAT , SINCE DOMINANCE IS IN ESSENCE THE POWER TO FIX PRICES , MAKING LOSSES IS INCONSISTENT WITH THE EXISTENCE OF A DOMINANT POSITION.

126AN UNDERTAKING ' S ECONOMIC STRENGTH IS NOT MEASURED BY ITS PROFITABILITY ; A REDUCED PROFIT MARGIN OR EVEN LOSSES FOR A TIME ARE NOT INCOMPATIBLE WITH A DOMINANT POSITION , JUST AS LARGE PROFITS MAY BE COMPATIBLE WITH A SITUATION WHERE THERE IS EFFECTIVE COMPETITION.

127THE FACT THAT UBC ' S PROFITABILITY IS FOR A TIME MODERATE OR NON-EXISTENT MUST BE CONSIDERED IN THE LIGHT OF THE WHOLE OF ITS OPERATIONS .

128THE FINDING THAT , WHATEVER LOSSES UBC MAY MAKE , THE CUSTOMERS CONTINUE TO BUY MORE GOODS FROM UBC WHICH IS THE DEAREST VENDOR , IS MORE SIGNIFICANT AND THIS FACT IS A PARTICULAR FEATURE OF THE DOMINANT POSITION AND ITS VERIFICATION IS DETERMINATIVE IN THIS CASE.

129THE CUMULATIVE EFFECT OF ALL THE ADVANTAGES ENJOYED BY UBC THUS ENSURES THAT IS HAS A DOMINANT POSITION ON THE RELEVANT MARKET.

CHAPTER II - ABUSE OF THIS DOMINANT POSITION

SECTION 1 CONDUCT VIS-A-VIS THE RIPENERS

PARAGRAPH 1. THE CLAUSE PROHIBITING THE RESALE OF BANANAS WHILE STILL

GREEN

130THE COMMISSION TAKES THE VIEW THAT THE APPLICANT HAS ABUSED ITS DOMINANT POSITION VIS-A-VIS RIPENER/DISTRIBUTORS IN THE FIRST PLACE BY USING A CLAUSE INCORPORATED IN ITS GENERAL CONDITIONS OF SALE FORBIDDING ITS DISTRIBUTOR / RIPENERS TO RESELL ITS BANANAS WHILE STILL GREEN , TO SELL BANANAS OTHER THAN THOSE SUPPLIED BY UBC WHILE THEY WERE DISTRIBUTORS OF UBC ' S BANANAS AND TO RESELL UBC ' S BANANAS TO COMPETING RIPENERS.

131THE COMMISSION IN THE SECOND PLACE BLAMES UBC FOR HAVING INSISTED THAT ITS RIPENER/DISTRIBUTORS SHOULD NOT SELL BANANAS TO DEALERS FROM OTHER COUNTRIES AND GIVING THEM AN ASSURANCE THAT IT HAD IMPOSED THE SAME REQUIREMENT ON ITS DISTRIBUTOR/RIPENERS IN OTHER COUNTRIES.

132THIS ABUSE WAS BROUGHT INTO PRACTICE IN JANUARY 1967 WHEN UBC WAS ENDEAVOURING TO LAUNCH IN EUROPE THE NEW ' ' CAVENDISH VALERY ' ' BANANA UNDER THE ' ' CHIQUITA ' ' BRAND NAME WHICH WAS TAKING THE PLACE OF THE GROS MICHEL VARIETY KNOWN UNDER THE ' ' FYFFES ' ' LABEL

133THE PROHIBITION ON RESELLING OF BANANAS WHILE STILL GREEN HAS BEEN APPLIED STRICTLY SINCE 1967 , ALTHOUGH IT DOES NOT ALWAYS APPEAR IN A WRITTEN DOCUMENT , IN ALL THE MEMBER STATES FORMING THE RELEVANT MARKET TO UBC ' S IMPORTER/RIPENER/DISTRIBUTORS INCLUDING THE SCIPIO GROUP .

134THERE WAS AN EXAMPLE OF THIS PROHIBITION IN DECEMBER 1973 WHEN UBC REFUSED TO SELL TO THE DANISH FIRM OLESEN WHICH FOUND THAT ALL THE DISTRIBUTORS (INCLUDING THE SCIPIO GROUP) WHOM IT HAD REQUESTED TO SUPPLY IT WITH GREEN BANANAS TURNED DOWN ITS REQUESTS BECAUSE THEY WERE PREVENTED FROM DOING SO UNDER THEIR CONTRACTS.

135APART FROM THE FACT THAT THIS OBLIGATION INDIRECTLY HELPS TO STRENGTHEN AND CONSOLIDATE UBC ' S DOMINANT POSITION , IT MAKES ANY TRADE IN UBC ' S GREEN BANANAS WHETHER BRANDED OR NOT , EITHER WITHIN A SINGLE STATE OR BETWEEN MEMBER STATES , ALMOST IMPOSSIBLE. THUS THIS CLAUSE HAS A SIMILAR EFFECT AS A PROHIBITION OF EXPORTS.

136THE EFFECT OF THIS CLAUSE IS FURTHER INCREASED BY THE POLICY ADOPTED BY UBC OF ONLY SUPPLYING ITS CUSTOMERS WITH SMALLER QUANTITIES OF BANANAS THAN THOSE WHICH THEY HAVE ORDERED AND THIS MAKES IT IMPOSSIBLE FOR THEM TO TAKE ANY COMPETITIVE ACTION AGAINST THE DIFFERENCE IN PRICES FROM ONE MEMBER STATE TO ANOTHER AND FORCES THEM TO CONFINE THEMSELVES TO THEIR ROLE OF RIPENERS.

137ACCORDING TO THE COMMISSION THESE PROHIBITIONS AND PRACTICES ARE BOTH THE ESSENTIAL CONSTITUENT OF AN OVERALL SYSTEM ENABLING THE APPLICANT TO CONTROL THE ENTIRE MARKETING OF ITS PRODUCT AND TO RESTRICT COMPETITION AND ALSO FORM THE BASIS OF THE THREE OTHER ABUSES FOR WHICH UBC IS BLAMED.

138IT WAS NOT UNTIL THE MONTH (31 JANUARY 1976) FOLLOWING THE DECISION OF 17 DECEMBER 1975 , WHICH FOUND THAT THE APPLICANT HAD INFRINGED ARTICLE 86 OF THE TREATY , (AND THEREFORE BEFORE 1 FEBRUARY 1976 , THE LAST DATE FIXED BY THE COMMISSION BY WHICH THE APPLICANT HAD TO INFORM IT THAT IT HAD CEASED TO APPLY THE PROHIBITION ON THE RESALE OF GREEN BANANAS) THAT THE APPLICANT SENT A CIRCULAR LETTER TO ALL ITS ESTABLISHED CUSTOMERS

ON THE RELEVANT MARKET TO THE EFFECT THAT THE OBJECT OF THE CLAUSE HAD NEVER BEEN TO FORBID THE SALE BY A DULY APPOINTED RIPENER TO ANOTHER CHIQUITA RIPENER OF GREEN CHIQUITA BANANAS OR THE RESALE OF UNBRANDED GREEN BANANAS.

139THE APPLICANT POINTS OUT IN ANSWER TO THESE COMPLAINTS THAT THE CLAUSE AT ISSUE WAS WORDED AS FOLLOWS FOR BELGIUM , DENMARK AND THE NETHERLANDS : ' ' BANANAS CAN ONLY BE RESOLD WHEN THEY ARE RIPE ' ' (THE DANISH CLAUSE STATES THAT ONLY BANANAS OF PICTURE NO 3 CAN BE RESOLD).

140THE CLAUSE RELATING TO THE NETHERLANDS WAS NOTIFIED TO THE COMMISSION ON 15 NOVEMBER 1968 AS FOLLOWS : ' ' THE SALE OF BANANAS SUPPLIED BY US TO COMPETING RIPENERS IS NOT ALLOWED ' '.

141THE APPLICANT IS SURPRISED THAT THE COMMISSION DID NOT REQUEST IT TO GIVE THE WORDING OF THE CONDITIONS OF SALE AND IF NECESSARY AMEND IT FOR THE PURPOSE OF CONSIDERING WHETHER THE APPLICANT COULD BE EXEMPTED UNDER ARTICLE 85/3 AND THAT IT TOOK THE COMMISSION SEVEN YEARS TO PREPARE AND FINALIZE ITS DECISION FINDING THAT THERE HAD BEEN AN INFRINGEMENT.

142THE ONLY PURPOSE OF THIS CLAUSE WAS TO PROTECT THE BRAND NAME AND THEREFORE ULTIMATELY THE CONSUMERS BY ENSURING THAT THE QUALITY OF THE PRODUCTS - SELECTED AND LABELLED IN THE TROPICS - IS EXEMPLARY , BY RESERVING THEM FOR EXPERIENCED RIPENERS WHO HAVE ADEQUATE RIPENING INSTALLATIONS , APPLY ADVANCED TECHNICAL METHODS PERFECTED BY UBC ' S ENGINEERS AND ACCEPT THEIR SUPERVISION , AND TO BRING ' ' CHIQUITA ' ' BANANAS ON TO THE MARKET WHEN THEIR QUALITY IS AT ITS PEAK.

142THIS CLAUSE HAS NEVER BEEN UNDERSTOOD AS BEING A PROHIBITION OF EXPORTS AND HAS NEVER BEEN APPLIED NOR ENFORCED AS SUCH.

144THE APPLICANT NEVER INTENDED TO IMPOSE SANCTIONS IN THE EVENT OF NON-COMPLIANCE.

145FURTHERMORE DEALERS IN BANANAS SELL AN EXTREMELY PERISHABLE SEMI-FINISHED PRODUCT WHICH OWING TO ITS NATURE MUST BE RIPENED IMMEDIATELY RATHER THAN DEALT IN HORIZONTALLY AND TRADE IN RIPE BANANAS - IF THERE WAS ANY - COULD ONLY BE MARGINAL.

146THE RIPENER ' S FUNCTION IS ONLY TO RIPEN THE BANANAS AND DISTRIBUTE THEM TO THE RETAILERS.

147MOREOVER THE RIPENER ' S GROSS PROFIT MARGIN IS GREATER THAN THE PROFITS WHICH HE COULD MAKE BY SPECULATING ON THE AVERAGE PRICE DIFFERENCES BETWEEN THE VARIOUS MARKETS EXCEPT FOR SOME WEEKS EACH YEAR AND IT IS NOT THEREFORE IN HIS INTEREST TO EFFECT HORIZONTAL SALES OF GREEN BANANAS.

148THE OLESEN CASE IS THE ONLY ONE IN WHICH IT WOULD APPEAR THAT THE CLAUSE WAS INVOKED.

149THIS WAS AN EXCEPTIONAL CASE WHICH AROSE OUT OF A DISPUTE BETWEEN UBC AND THIS DANISH RIPENER IN CIRCUMSTANCES DIFFERENT FROM THOSE IN WHICH THE PROHIBITION OF THE SALE OF GREEN BANANAS IS APPLIED.

150IN ANY CASE THE ORDER TO DELETE THE CLAUSE , WHICH WAS IMPOSED ON THE APPLICANT , APPEARS TO IT TO BE ' ' UNREASONABLE AND UNJUSTIFIED ' ' , BECAUSE , SINCE IT DOES NOT HAVE ANY RIPENING INSTALLATION OF ITS OWN - EXCEPT

SPIERS IN BELGIUM REPRESENTING. 3.3% OF THE RIPENING CAPACITY OF THE ' ' RELEVANT MARKET ' ' - IT WOULD BE UNABLE TO GUARANTEE THE QUALITY OF ITS BANANAS TO THE CONSUMER AND THIS WOULD LEAD TO THE COLLAPSE OF ITS ENTIRE COMMERCIAL POLICY.

151THE COURT ' S EXAMINATION MUST BE LIMITED TO THE CLAUSE RELATING TO THE PROHIBITION OF THE RESALE OF GREEN BANANAS IN THE FORM IN WHICH IT WAS NOTIFIED TO THE COMMISSION ON 15 NOVEMBER 1968 WITHOUT IT BEING NECESSARY TO CONSIDER THE CLAUSE AS DRAWN UP BY UBC ON 31 JANUARY 1976 , THAT IS TO SAY AT A DATE SUBSEQUENT TO THE COMMISSION ' S DECISION.

152THE CLAUSE APPLIED IN BELGIUM , DENMARK AND THE NETHERLANDS , IN SO FAR AS IT HAS BEEN DRAWN UP IN WRITING , PROHIBITED THE RESALE OF BANANAS WHILE STILL GREEN WHETHER BRANDED OR UNBRANDED AND EVEN BETWEEN RIPENERS OF CHIQUITA BANANAS.

153SINCE UBC THOUGHT IT SHOULD STATE IN THE CIRCULAR LETTER OF 31 JANUARY 1976 , WHICH IT SENT TO ALL RIPENER/DISTRIBUTORS INCLUDING THOSE ESTABLISHED IN GERMANY , THAT THE CLAUSE HAD NOT BEEN PUT IN WRITING FOR GERMANY , IT THEREBY IMPLIEDLY ACKNOWLEDGES THAT THE SAID CLAUSE WAS IN FORCE ON THE GERMAN MARKET , SINCE IT HAD CLEARLY BEEN IMPLIED OR MENTIONED ORALLY.

154UNDER THE TERMS OF THE CLAUSE UBC ' ' REQUIRED THEIR CUSTOMERS TO ENSURE FORTHWITH THAT THE BANANAS IN THEIR POSSESSION ARE NOT RESOLD TO FOREIGN DEALERS ; IT HAD IMPOSED THE SAME REQUIREMENT ON ITS FOREIGN CUSTOMERS AS FAR AS THE NETHERLANDS ARE CONCERNED. IT WOULD NOT HESITATE TO TAKE SUCH STEPS AS IT DEEMS TO BE NECESSARY IF THE FOREGOING IS NOT COMPLIED WITH IN SOME WAY OR OTHER ' '.

155THIS WORDING IMPLIES THAT UBC , FAR FROM REJECTING THE IDEA OF IMPOSING SANCTIONS ON DULY APPOINTED RIPENER/DISTRIBUTORS WHICH DO NOT COMPLY WITH ITS DIRECTIONS , HELD OUT THIS POSSIBILITY AS A THREAT.

156MOREOVER OLESEN UNQUESTIONABLY EXPERIENCED THE HARSH EFFECTS OF THIS CLAUSE AFTER UBC REFUSED TO SUPPLY IT AND IT WANTED TO OBTAIN SUPPLIES OF CHIQUITA BANANAS FROM SCIPIO AND THE DULY APPOINTED DANISH DISTRIBUTORS.

157TO IMPOSE ON THE RIPENER THE OBLIGATION NOT TO RESELL BANANAS SO LONG AS HE HAS NOT HAD THEM RIPENED AND TO CUT DOWN THE OPERATIONS OF SUCH A RIPENER TO CONTACTS ONLY WITH RETAILERS IS A RESTRICTION OF COMPETITION .

158ALTHOUGH IT IS COMMENDABLE AND LAWFUL TO PURSUE A POLICY OF QUALITY , ESPECIALLY BY CHOOSING SELLERS ACCORDING TO OBJECTIVE CRITERIA RELATING TO THE QUALIFICATIONS OF THE SELLER , HIS STAFF AND HIS FACILITIES , SUCH A PRACTICE CAN ONLY BE JUSTIFIED IF IT DOES NOT RAISE OBSTACLES , THE EFFECT OF WHICH GOES BEYOND THE OBJECTIVE TO BE ATTAINED .

159IN THIS CASE , ALTHOUGH THESE CONDITIONS FOR SELECTION HAVE BEEN LAID DOWN IN A WAY WHICH IS OBJECTIVE AND NOT DISCRIMINATORY , THE PROHIBITION ON RESALE IMPOSED UPON DULY APPOINTED CHIQUITA RIPENERS AND THE PROHIBITION OF THE RESALE OF UNBRANDED BANANAS - EVEN IF THE PERISHABLE NATURE OF THE BANANA IN PRACTICE RESTRICTED THE OPPORTUNITIES OF RESELLING TO THE DURATION OF A SPECIFIC PERIOD OF TIME - WHEN WITHOUT ANY DOUBT AN ABUSE

OF THE DOMINANT POSITION SINCE THEY LIMIT MARKETS TO THE PREJUDICE OF CONSUMERS AND AFFECTS TRADE BETWEEN MEMBER STATES , IN PARTICULAR BY PARTITIONING NATIONAL MARKETS

160THUS UBC ' S ORGANIZATION OF THE MARKET CONFINED THE RIPENERS TO THE ROLE OF SUPPLIERS OF THE LOCAL MARKET AND PREVENTED THEM FROM DEVELOPING THEIR CAPACITY TO TRADE VIS-A-VIS UBC , WHICH MOREOVER TIGHTENED ITS ECONOMIC HOLD ON THEM BY SUPPLYING LESS GOODS THAN THEY ORDERED .

161IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT THE CLAUSE AT ISSUE FORBIDDING THE SALE OF GREEN BANANAS INFRINGES ARTICLE 86 OF THE TREATY .

162ON THIS POINT THE CONTESTED DECISION IS THEREFORE JUSTIFIED.

PARAGRAPH 2. THE REFUSAL TO CONTINUE SUPPLIES TO OLESEN

163THE COMMISSION IS OF THE OPINION THAT UBC HAS INFRINGED ARTICLE 86 OF THE TREATY BY REFUSING TO CONTINUE SUPPLIES OF CHIQUITA BANANAS TO OLESEN FROM 10 OCTOBER 1973 TO 11 FEBRUARY 1975

164ACCORDING TO A TELEX MESSAGE OF 11 OCTOBER 1973 FROM UBC TO OLESEN THESE SUPPLIES WERE DISCONTINUED BECAUSE THE RIPENER/DISTRIBUTOR TOOK PART IN AN ADVERTISING CAMPAIGN MOUNTED DURING OCTOBER 1973 IN DENMARK FOR DOLE BANANAS.

165FOLLOWING THIS DISCONTINUANCE OF SUPPLIES OLESEN APPLIED IN VAIN TO UBC ' S SEVEN OTHER RIPENER/DISTRIBUTORS IN DENMARK AND ALSO TO A COMPANY OF THE SCIPIO GROUP IN HAMBURG FOR GREEN CHIQUITA BANANAS.

166IT HAS SUFFERED CONSIDERABLE DAMAGE AS A RESULT OF THIS SITUATION DUE TO LOSSES OF SALES AND SEVERAL IMPORTANT CUSTOMERS INCLUDING L ' ASSOCIATION DES COOPERATEURS (F.D.B.) WHICH BOUGHT 50% OF ITS BANANAS

167ON 11 FEBRUARY 1975 UBC AND OLESEN ENTERED INTO AN AGREEMENT UNDER WHICH UBC UNDERTOOK TO RESUME SUPPLIES OF BANANAS TO OLESEN AND THE LATTER WITHDREW THE COMPLAINT WHICH IT HAD LODGED WITH THE COMMISSION .

168THE COMMISSION REGARDS THIS REFUSAL TO CONTINUE SUPPLIES TO OLESEN , WHICH CANNOT BE JUSTIFIED OBJECTIVELY , AS AN ARBITRARY INTERFERENCE IN THE MANAGEMENT OF THE OLESEN BUSINESS WHICH HAS CAUSED IT TO SUFFER DAMAGE AND WAS DESIGNED TO DISSUADE UBC ' S RIPENERS FROM SELLING BANANAS BEARING COMPETING BRAND NAMES OR AT LEAST FROM ADVERTISING THEM AND THESE ARE FACTS WHICH AMOUNT TO AN INFRINGEMENT OF ARTICLE 86 OF THE TREATY.

169THE APPLICANT CLAIMS THAT THE MARKETING POLICY IT PURSUES IS MORE LIBERAL THAN THAT OF ITS COMPETITORS.

170ITS RIPENERS ARE FREE TO SELL PRODUCTS BEARING COMPETING BRAND NAMES , TO ADVERTISE THESE PRODUCTS , TO REDUCE THEIR ORDERS , TO CANCEL THEM AND TO TERMINATE THEIR RELATIONS WHEN THEY THINK FIT.

171THE OLESEN INCIDENT MUST BE SEEN IN THIS SETTING.

172IN 1967 , SINCE THE LATTER HAD BECOME THE LARGEST IMPORTER OF ' ' CHIQUITA ' ' BANANAS IN DENMARK , IT PUT PRESSURE ON UBC TO GIVE IT PREFERENTIAL TREATMENT COMPARED WITH THE SEVEN OTHER DANISH RIPENERS DULY APPOINTED BY THE APPLICANT.

173WHEN UBC REFUSED TO DO SO , OLESEN BECAME IN 1969 THE EXCLUSIVE IMPORTER / DISTRIBUTOR OF THE STANDARD FRUIT COMPANY.

174IN 1973 STANDARD FRUIT ANNOUNCED AT A PRESS CONFERENCE THAT THE DOLE BANANA WAS GOING TO OUST THE ' ' CHIQUITA ' ' BANANA THROUGHOUT THE WORLD .

175OLESEN THEN SOLD LESS AND LESS CHIQUITA BANANAS AND DELIBERATELY PUSHED THE SALE OF DOLE BANANAS. IT DID NOT TAKE THE SAME AMOUNT OF TROUBLE WHEN RIPENING CHIQUITA BANANAS AS IT DID WHEN RIPENING BANANAS BEARING OTHER BRAND NAMES.

176THE BREACH , WHICH WAS NOT UNEXPECTED AND UNFORESEEABLE , AROSE IN THESE CIRCUMSTANCES , PUNCTUATED BY DISCUSSIONS SPREAD OVER A LONG PERIOD .

177THIS BREACH WAS THEREFORE FULLY JUSTIFIED BY THE FACT THAT IF A FIRM IS DIRECTLY ATTACKED BY ITS MAIN COMPETITOR WHO HAS SUCCEEDED IN MAKING ONE OF THAT FIRM ' S MOST IMPORTANT LONG STANDING CUSTOMERS HIS EXCLUSIVE DISTRIBUTOR FOR THE WHOLE OF THE COUNTRY , THAT FIRM IN ITS OWN INTEREST AND THAT OF COMPETITION HAS NO OPTION BUT TO FIGHT BACK OR ELSE DISAPPEAR FROM THIS NATIONAL MARKET.

178THE APPLICANT GOES ON TO SAY THAT THIS REFUSAL TO SELL TO OLESEN , WHICH WAS JUSTIFIED , WAS NOT AN ABUSE , BECAUSE IT DID NOT AFFECT THE ACTUAL COMPETITION ON THE DANISH MARKET WHICH RECORDED A FALL OF 40% IN TWO WEEKS AT THE END OF 1974 IN THE RETAIL PRICE OF CHIQUITA BANANAS AS A RESULT OF THE COMPETITION BETWEEN COMPETITORS WHICH WAS GENERATED BY THESE CIRCUMSTANCES.

179FINALLY THE REFUSAL TO SELL TO OLESEN DID NOT AFFECT TRADE BETWEEN MEMBER STATES , BECAUSE DOLE BANANAS ONLY PASS THROUGH GERMANY FROM HAMBURG AND CHIQUITA BANANAS FROM BREMERHAVEN.

180THESE TRANSACTIONS ARE NOT THEREFORE INTRA-COMMUNITY TRADE BUT ARE IN FACT TRADE BETWEEN DENMARK AND THE THIRD COUNTRIES WHERE THE BANANAS COME FROM.

181FOR ALL THESE REASONS , SINCE THE REFUSAL TO SELL TO OLESEN IS NOT IN ITSELF A SPECIFIC BREACH , THE APPLICANT TAKES THE VIEW THAT THE FINDING OF AN INFRINGEMENT UNDER THIS HEAD IS UNJUSTIFIED.

182IN VIEW OF THESE CONFLICTING ARGUMENTS IT IS ADVISABLE TO ASSERT POSITIVELY FROM THE OUTSET THAT AN UNDERTAKING IN A DOMINANT POSITION FOR THE PURPOSE OF MARKETING A PRODUCT - WHICH CASHES IN ON THE REPUTATION OF A BRAND NAME KNOWN TO AND VALUED BY THE CONSUMERS - CANNOT STOP SUPPLYING A LONG STANDING CUSTOMER WHO ABIDES BY REGULAR COMMERCIAL PRACTICE , IF THE ORDERS PLACED BY THAT CUSTOMER ARE IN NO WAY OUT OF THE ORDINARY.

183SUCH CONDUCT IS INCONSISTENT WITH THE OBJECTIVES LAID DOWN IN ARTICLE 3 (F) OF THE TREATY , WHICH ARE SET OUT IN DETAIL IN ARTICLE 86 , ESPECIALLY IN PARAGRAPHS (B) AND (C) , SINCE THE REFUSAL TO SELL WOULD LIMIT MARKETS TO THE PREJUDICE OF CONSUMERS AND WOULD AMOUNT TO DISCRIMINATION WHICH MIGHT IN THE END ELIMINATE A TRADING PARTY FROM THE RELEVANT MARKET.

184IT IS THEREFORE NECESSARY TO ASCERTAIN WHETHER THE DISCONTINUANCE OF SUPPLIES BY UBC IN OCTOBER 1973 WAS JUSTIFIED.

185THE REASON GIVEN IS IN THE APPLICANT ' S LETTER OF 11 OCTOBER 1973 IN WHICH IT UPBRAIDED OLESEN IN NO UNCERTAIN MANNER FOR HAVING PARTICIPATED IN AN ADVERTISING CAMPAIGN FOR ONE OF ITS COMPETITORS.

186LATER ON UBC ADDED TO THIS REASON A NUMBER OF COMPLAINTS , FOR EXAMPLE , THAT OLESEN WAS THE EXCLUSIVE REPRESENTATIVE OF ITS MAIN COMPETITOR ON THE DANISH MARKET.

187THIS WAS NOT A NEW SITUATION SINCE IT GOES BACK TO 1969 AND WAS NOT IN ANY CASE INCONSISTENT WITH FAIR TRADE PRACTICES.

188FINALLY UBC HAS NOT PUT FORWARD ANY RELEVANT ARGUMENT TO JUSTIFY THE REFUSAL OF SUPPLIES.

189ALTHOUGH IT IS TRUE , AS THE APPLICANT POINTS OUT , THAT THE FACT THAT AN UNDERTAKING IS IN A DOMINANT POSITION CANNOT DISENTITLE IT FROM PROTECTING ITS OWN COMMERCIAL INTERESTS IF THEY ARE ATTACKED , AND THAT SUCH AN UNDERTAKING MUST BE CONCEDED THE RIGHT TO TAKE SUCH REASONABLE STEPS AS IT DEEMS APPROPRIATE TO PROTECT ITS SAID INTERESTS , SUCH BEHAVIOUR CANNOT BE COUNTENANCED IF ITS ACTUAL PURPOSE IS TO STRENGTHEN THIS DOMINANT POSITION AND ABUSE IT.

190EVEN IF THE POSSIBILITY OF A COUNTER-ATTACK IS ACCEPTABLE THAT ATTACK MUST STILL BE PROPORTIONATE TO THE THREAT TAKING INTO ACCOUNT THE ECONOMIC STRENGTH OF THE UNDERTAKINGS CONFRONTING EACH OTHER.

191THE SANCTION CONSISTING OF A REFUSAL TO SUPPLY BY AN UNDERTAKING IN A DOMINANT POSITION WAS IN EXCESS OF WHAT MIGHT , IF SUCH A SITUATION WERE TO ARISE , REASONABLY BE CONTEMPLATED AS A SANCTION FOR CONDUCT SIMILAR TO THAT FOR WHICH UBC BLAMED OLESEN.

192IN FACT UBC COULD NOT BE UNAWARE OF THAT FACT THAT BY ACTING IN THIS WAY IT WOULD DISCOURAGE ITS OTHER RIPENER/DISTRIBUTORS FROM SUPPORTING THE ADVERTISING OF OTHER BRAND NAMES AND THAT THE DETERRENT EFFECT OF THE SANCTION IMPOSED UPON ONE OF THEM WOULD MAKE ITS POSITION OF STRENGTH ON THE RELEVANT MARKET THAT MUCH MORE EFFECTIVE.

193SUCH A COURSE OF CONDUCT AMOUNTS THEREFORE TO A SERIOUS INTERFERENCE WITH THE INDEPENDENCE OF SMALL AND MEDIUM SIZED FIRMS IN THEIR COMMERCIAL RELATIONS WITH THE UNDERTAKING IN A DOMINANT POSITION AND THIS INDEPENDENCE IMPLIES THE RIGHT TO GIVE PREFERENCE TO COMPETITORS ' GOODS.

194IN THIS CASE THE ADOPTION OF SUCH A COURSE OF CONDUCT IS DESIGNED TO HAVE A SERIOUS ADVERSE EFFECT ON COMPETITION ON THE RELEVANT BANANA MARKET BY ONLY ALLOWING FIRMS DEPENDANT UPON THE DOMINANT UNDERTAKING TO STAY IN BUSINESS.

195THE APPLICANT ' S ARGUMENT THAT IN ITS VIEW THE 40% FALL IN THE PRICE OF BANANAS ON THE DANISH MARKET SHOWS THAT COMPETITION HAS NOT BEEN AFFECTED BY THE REFUSAL TO SUPPLY OLESEN CANNOT BE UPHELD.

196IN FACT THIS FALL IN PRICES WAS ONLY DUE TO THE VERY LIVELY COMPETITION - CALLED AT THE TIME THE ' ' BANANA WAR ' ' - IN WHICH THE TWO TRANSNATIONAL COMPANIES UBC AND CASTLE AND COOKE ENGAGED.

197THE APPLICANT SUBMITS THAT THE REFUSAL TO SUPPLY OLESEN COULD NOT HAVE

ANY EFFECT ON INTRA-COMMUNITY TRADE BECAUSE IN ITS VIEW ALL THOSE BANANAS COMING FROM THIRD COUNTRIES (LATIN AMERICA) AND MERELY TRANSITING THE COMMON MARKET COUNTRIES BEFORE THEY REACH THE MEMBER STATE WHERE THEY ARE CONSUMED ARE NOT PART OF INTRA-COMMUNITY TRADE.

198IF THIS ARGUMENT WAS VALID THE WHOLE OF UBC ' S EUROPEAN TRADE IN GOODS OF THIRD COUNTRIES WOULD NOT BE GOVERNED BY COMMUNITY LAW.

199IN FACT WHEN OLESEN ' S SUPPLIES WERE CUT OFF IT WAS UNABLE TO BUY CHIQUITA BANANAS AT BREMERHAVEN AND THEREFORE HAD TO IMPORT INTO DENMARK THE SAME QUANTITIES OF BANANAS AS IT DID BEFORE THIS STEP WAS TAKEN .

200IT WAS FORCED TO BUY BANANAS BEARING OTHER BRAND NAMENS OUTSIDE DENMARK AND TO IMPORT THEM INTO DENMARK.

201FURTHERMORE , IF THE OCCUPIER OF A DOMINANT POSITION , ESTABLISHED IN THE COMMON MARKET , AIMS AT ELIMINATING A COMPETITOR WHO IS ALSO ESTABLISHED IN THE COMMON MARKET , IT IS IMMATERIAL WHETHER THIS BEHAVIOUR RELATES TO TRADE BETWEEN MEMBER STATES ONCE IT HAS BEEN SHOWN THAT SUCH ELIMINATION WILL HAVE REPERCUSSIONS ON THE PATTERNS OF COMPETITION IN THE COMMON MARKET.

202CONSEQUENTLY THE REFUSAL TO SUPPLY A LONG STANDING REGULAR CUSTOMER WHO BUYS WITH A VIEW TO RESELLING IN ANOTHER MEMBER STATE HAS AN INFLUENCE ON THE NORMAL MOVEMENT OF TRADE AND AN APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES.

203THE FINDING IN THE DECISION THAT UBC HAS INFRINGED ARTICLE 86 OF THE TREATY BY REFUSING TO SUPPLY OLESEN IS THEREFORE JUSTIFIED.

SECTION 2 - THE PRICING PRACTICE

PARAGRAPH 1. DISCRIMINATORY PRICES

204ALL THE BANANAS MARKETED BY UBC UNDER THE BRAND NAME ' ' CHIQUITA ' ' ON THE RELEVANT MARKET HAVE THE SAME GEOGROPHIC ORIGIN , BELONG TO THE SAME VARIETY (CAVENDISH VALERY) AND ARE OF ALMOST THE SAME QUALITY .

205THEY ARE UNLOADED IN TWO PORTS , ROTTERDAM AND BREMERHAVEN , WHERE UNLOADING COSTS ONLY DIFFER BY A FEW CENTS IN THE DOLLAR PER BOX OF 20 KILOGRAMMES , AND ARE RESOLD , EXCEPT TO SCIPIO AND IN IRELAND , SUBJECT TO THE SAME CONDITIONS OF SALE AND TERMS OF PAYMENT AFTER THEY HAVE BEEN LOADED ON THE BUYERS ' WAGONS OR LORRIES , THE PRICE OF A BOX AMOUNTING ON AVERAGE TO BETWEEN 3 AND 4 DOLLARS AND GOING UP TO 5 DOLLARS IN 1974.

206THE COSTS OF CARRIAGE FROM THE UNLOADING PORTS TO THE RIPENING INSTALLATIONS AND THE AMOUNT OF ANY DUTY PAYABLE UNDER THE COMMON CUSTOMS TARIFF ARE BORNE BY THE PURCHASER EXCEPT IN IRELAND.

207THIS BEING SO ALL THOSE CUSTOMERS GOING TO ROTTERDAM AND BREMERHAVEN TO OBTAIN THEIR SUPPLIES MIGHT BE EXPECTED TO FIND THAT UBC OFFERS THEM ALL THE SAME SELLING PRICE FOR ' ' CHIQUITA ' ' BANANAS .

208THE COMMISSION BLAMES THE APPLICANT FOR CHARGING EACH WEEK FOR THE SALE OF ITS BRANDED BANANAS - WITHOUT OBJECTIVE JUSTIFICATION - A SELLING PRICE WHICH DIFFERS APPRECIABLY ACCORDING TO THE MEMBER STATE WHERE ITS CUSTOMERS ARE ESTABLISHED.

209 THIS POLICY OF CHARGING DIFFERING PRICES ACCORDING TO THE MEMBER STATES FOR WHICH THE BANANAS ARE INTENDED HAS BEEN APPLIED AT LEAST SINCE 1971 IN THE CASE OF CUSTOMERS OF THE FEDERAL REPUBLIC OF GERMANY , THE NETHERLANDS AND THE BLEU AND WAS EXTENDED IN JANUARY 1973 TO CUSTOMERS IN DENMARK AND IN NOVEMBER 1973 TO CUSTOMERS IN IRELAND.

210 THE MAXIMUM WEEKLY DIFFERENCES RECORDED BETWEEN TWO DESTINATIONS WERE ON AVERAGE DURING THE WHOLE OF 1971 , 17.6% - IN 1972 , 11.3% - IN 1973 , 14.5% - IN 1974 , 13.5%.

211 THE HIGHEST WEEKLY DIFFERENCES (PER BOX) WERE RESPECTIVELY BETWEEN CUSTOMERS IN GERMANY ON THE ONE HAND AND BELGO-LUXEMBOURG AND NETHERLANDS CUSTOMERS ON THE OTHER HAND :

- IN 1971 : 32% AND 37%
- IN 1972 : 21% AND 30%
- IN 1973 : 18% AND 43%
- IN 1974 : 25% AND 54%

AND BETWEEN CUSTOMERS IN DENMARK ON THE ONE HAND AND BELGO-LUXEMBOURG AND NETHERLANDS CUSTOMERS ON THE OTHER HAND :

- IN 1973 : 24% AND 54%
- IN 1974 : 16% AND 12%

212 THE PRICE CUSTOMERS IN BELGIUM ARE ASKED TO PAY IS ON AVERAGE 80% HIGHER THAN THAT PAID BY CUSTOMERS IN IRELAND.

213 THE GREATEST DIFFERENCE IN PRICE IS 138% BETWEEN THE DELIVERED ROTTERDAM PRICE CHARGED BY UBC TO ITS CUSTOMERS IN IRELAND AND THE F.O.R . BREMERHAVEN PRICE CHARGED BY UBC TO ITS CUSTOMERS IN DENMARK , THAT IS TO SAY THE PRICE PAID BY DANISH CUSTOMERS IS 2.38 TIMES THE PRICE PAID BY IRISH CUSTOMERS.

214 THE COMMISSION TREATS THESE FACTS AS AN ABUSE OF A DOMINANT POSITION IN THAT UBC HAS APPLIED DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS WITH THE OTHER TRADING PARTIES , THEREBY PLACING THEM AT A COMPETITIVE DISADVANTAGE.

215 THE APPLICANT STATES THAT ITS PRICES ARE DETERMINED BY MARKET FORCES AND CANNOT THEREFORE BE DISCRIMINATORY.

216 FURTHER THE AVERAGE DIFFERENCE IN THE PRICE OF ' ' CHIQUITA ' ' BANANAS BETWEEN THE NATIONAL MARKETS IN QUESTION WAS ONLY 5% IN 1975.

217 THE PRICE IN ANY GIVEN WEEK IS CALCULATED SO AS TO REFLECT AS MUCH AS POSSIBLE THE ANTICIPATED YELLOW MARKET PRICE IN THE FOLLOWING WEEK FOR EACH NATIONAL MARKET.

218 THIS PRICE IS FIXED BY THE ROTTERDAM MANAGEMENT AFTER DISCUSSIONS AND NEGOTIATIONS BETWEEN THE APPLICANT ' S LOCAL REPRESENTATIVES AND THE RIPENER / DISTRIBUTORS MUST PERFORCE TAKE INTO ACCOUNT THE DIFFERENT COMPETITIVE CONTEXT IN WHICH RIPENER/DISTRIBUTORS IN THE DIFFERENT COUNTRIES ARE OPERATING.

219 IT FINDS ITS OBJECTIVE JUSTIFICATION IN THE AVERAGE ANTICIPATED MARKET

PRICE.

220THESE PRICE DIFFERENCES ARE IN FACT DUE TO FLUCTUATING MARKET FACTORS SUCH AS THE WEATHER , DIFFERENT AVAILABILITY OF SEASONAL COMPETING FRUIT , HOLIDAYS , STRIKES , GOVERNMENT MEASURES , CURRENCY DENOMINATIONS.

221IN SHORT THE APPLICANT HAS BEEN ASKED BY THE COMMISSION TO TAKE APPROPRIATE STEPS TO ESTABLISH A SINGLE BANANA MARKET AT A TIME WHEN IT HAS IN FACT BEEN UNABLE TO DO SO.

222ACCORDING TO THE APPLICANT AS LONG AS THE COMMUNITY INSTITUTIONS HAVE NOT SET UP THE MACHINERY FOR A SINGLE BANANA MARKET AND THE VARIOUS MARKETS REMAIN NATIONAL AND RESPOND TO THEIR INDIVIDUAL SUPPLY/DEMAND SITUATIONS DIFFERENCES IN PRICES BETWEEN THEM CANNOT BE PROVENTED .

223UBC ' S ANSWERS TO THE COMMISSION ' S REQUESTS FOR PARTICULARS (THE LETTERS OF 14 MAY , 13 SEPTEMBER , 10 AND 11 DECEMBER 1974 AND 13 FEBRUARY 1975) SHOW THAT UBC CHARGES ITS CUSTOMERS EACH WEEK FOR ITS BANANAS SOLD UNDER THE CHIQUITA BRAND NAME A DIFFERENT SELLING PRICE DEPENDING ON THE MEMBER STATE WHERE THE LATTER CARRY ON THEIR BUSINESS AS RIPENER/DISTRIBUTORS ACCORDING TO THE RATIOS TO WHICH THE COMMISSION HAS DRAWN ATTENTION.

224THESE PRICE DIFFERENCES CAN REACH 30 TO 50% IN SOME WEEKS , EVEN THOUGH PRODUCTS SUPPLIED UNDER THE TRANSACTIONS ARE EQUIVALENT (WITH THE EXEPTION OF THE SCIPIO GROUP , SUBJECT TO THIS OBSERVATION THAT THE BANANAS FROM SCIPIO ' S RIPENING INSTALLATIONS ARE SOLD AT THE SAME PRICE AS THOSE SOLD BY INDEPENDENT RIPENERS)

225IN FACT THE BANANAS SOLD BY UBC ARE ALL FREIGHTED IN THE SAME SHIPS , ARE UNLOADED AT THE SAME COST IN ROTTERDAM OR BREMERHAVEN AND THE PRICE DIFFERENCES RELATE TO SUBSTANTIALLY SIMILAR QUANTITIES OF BANANAS OF THE SAME VARIETY , WHICH HAVE BEEN BROUGHT TO THE SAME DEGREE OF RIPENING , ARE OF SIMILAR QUALITY AND SOLD UNDER THE SAME ' ' CHIQUITA ' ' BRAND NAME UNDER THE SAME CONDITIONS OF SALE AND PAYMENT FOR LOADING ON TO THE PURCHASER ' S OWN MEANS OF TRANSPORT AND THE LATTER HAVE TO PAY CUSTOMS DUTIES , TAXES AND TRANSPORT COSTS FROM THESE PORTS .

226THIS POLICY OF DISCRIMINATORY PRICES HAS BEEN APPLIED BY UBC SINCE 1971 TO CUSTOMERS OF GERMANY , THE NETHERLANDS AND THE BLEU AND WAS EXTENDED AT THE BEGINNING OF 1973 TO CUSTOMERS IN DENMARK AND IN NOVEMBER 1973 TO CUSTOMERS IN IRELAND.

227ALTHOUGH THE RESPONSIBILITY FOR ESTABLISHING THE SINGLE BANANA MARKET DOES NOT LIE WITH THE APPLICANT , IT CAN ONLY ENDEAVOUR TO TAKE ' ' WHAT THE MARKET CAN BEAR ' ' PROVIDED THAT IT COMPLIES WITH THE RULES FOR THE REGULATION AND COORDINATION OF THE MARKET LAID DOWN BY THE TREATY .

228ONCE IT CAN BE GRASPED THAT DIFFERENCES IN TRANSPORT COSTS , TAXATION , CUSTOMS DUTIES , THE WAGES OF THE LABOUR FORCE , THE CONDITIONS OF MARKETING , THE DIFFERENCES IN THE PARITY OF CURRENCIES , THE DENSITY OF COMPETITION MAY EVENTUALLY CULMINATE IN DIFFERENT RETAIL SELLING PRICE LEVELS ACCORDING TO THE MEMBER STATES , THEN IT FOLLOWS THOSE DIFFERENCES ARE FACTORS WHICH UBC ONLY HAS TO TAKE INTO ACCOUNT TO A LIMITED EXTENT SINCE IT SELLS A PRODUCT WHICH IS ALWAYS THE SAME AND AT THE SAME PLACE TO RIPENER/DISTRIBUTORS

WHO - ALONE - BEAR THE RISKS OF THE CONSUMERS ' MARKET.

229THE INTERPLAY OF SUPPLY AND DEMAND SHOULD , OWING TO ITS NATURE , ONLY BE APPLIED TO EACH STAGE WHERE IT IS REALLY MANIFEST.

230THE MECHANISMS OF THE MARKET ARE ADVERSELY AFFECTED IF THE PRICE IS CALCULATED BY LEAVING OUT ONE STAGE OF THE MARKET AND TAKING INTO ACCOUNT THE LAW OF SUPPLY AND DEMAND AS BETWEEN THE VENDOR AND THE ULTIMATE CONSUMER AND NOT AS BETWEEN THE VENDOR (UBC) AND THE PURCHASER (THE RIPENER/DISTRIBUTORS).

231THUS , BY REASON OF ITS DOMINANT POSITION UBC , FED WITH INFORMATION BY ITS LOCAL REPRESENTATIVES , WAS IN FACT ABLE TO IMPOSE ITS SELLING PRICE ON THE INTERMEDIATE PURCHASER. THIS PRICE AND ALSO THE ' ' WEEKLY QUOTA ALLOCATED ' ' IS ONLY FIXED AND NOTIFIED TO THE CUSTOMER FOUR DAYS BEFORE THE VESSEL CARRYING THE BANANAS BERTHS.

232THESE DISCRIMINATORY PRICES , WHICH VARIED ACCORDING TO THE CIRCUMSTANCES OF THE MEMBER STATES , WERE JUST SO MANY OBSTACLES TO THE FREE MOVEMENT OF GOODS AND THEIR EFFECT WAS INTENSIFIED BY THE CLAUSE FORBIDDING THE RESALE OF BANANAS WHILE STILL GREEN AND BY REDUCING THE DELIVERIES OF THE QUANTITIES ORDERED.

233A RIGID PARTITIONING OF NATIONAL MARKETS WAS THUS CREATED AT PRICE LEVELS , WHICH WERE ARTIFICIALLY DIFFERENT , PLACING CERTAIN DISTRIBUTOR/RIPENERS AT A COMPETITIVE DISADVANTAGE , SINCE COMPARED WITH WHAT IT SHOULD HAVE BEEN COMPETITION HAD THEREBY BEEN DISTORTED.

234CONSEQUENTLY THE POLICY OF DIFFERING PRICES ENABLING UBC TO APPLY DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS WITH OTHER TRADING PARTIES , THEREBY PLACING THEM AT A COMPETITIVE DISADVANTAGE , WAS AN ABUSE OF A DOMINANT POSITION.

PARAGRAPH 2. UNFAIR PRICES

235THE COMMISSION IS OF THE OPINION THAT UBC HAS ALSO ABUSED ITS DOMINANT POSITION BY CHARGING ITS CUSTOMERS IN GERMANY (OTHER THAN THE SCIPIO GROUP) , DENMARK , THE NETHERLANDS AND THE BLEU UNFAIR PRICES , WHICH IN THE CIRCUMSTANCES IT CONSIDERS ARE ' ' EXCESSIVE IN RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED ' '.

236THE POLICY OF PARTITIONING THE RELEVANT MARKET HAS ENABLED UBC TO CHARGE PIRCES FOR CHIQUITA BANANAS WHICH ARE SHELTERED FROM EFFECTIVE COMPETITION AND WHICH , BEARING IN MIND THAT BANANAS ARE A FOOD PRODUCT THAT IS WIDELY CONSUMED , OFTEN AMOUNT TO WIDE DIFFERENCES IN PRICE WHICH CANNOT BE JUSTIFIED OBJECTIVELY.

237THESE PRICE DIFFERENCES SHOW THAT THE HIGHEST PRICES ARE EXCESSIVE COMPARED WITH THE LOWEST PRICES , MORE ESPECIALLY AS THE LATTER YIELD A PROFIT.

238FOLLOWING A LETTER FROM UBC OF 10 DECEMBER 1974 IT APPEARED TO THE COMMISSION TO BE JUSTIFIABLE , WITHOUT ANALYSING UBC ' S COSTS STRUCTURE , TO TREAT THE PRICES CHARGED TO IRISH CUSTOMERS AS REPRESENTATIVE AND THE DIFFERENCES BETWEEN THE PRICES C.I.F. DUBLIN DELIVERED ROTTERDAM AND THE OTHER PRICES CHARGED BY UBC FOR ITS SALES F.O.R . ROTTERDAM OR BREMERHAVEN SHOW PROFITS

OF THE SAME ORDER OF MAGNITUDE AS THESE DIFFERENCES.

239THE PRICES CHARGED BY UBC TO ITS CUSTOMERS IN GERMANY (OTHER THAN THE SCIPIO GROUP), DENMARK , THE NETHERLANDS AND THE BLEU ARE CONSIDERABLY HIGHER , SOMETIMES BY AS MUCH AS 100% , THAN THE PRICES CHARGED TO CUSTOMERS IN IRELAND AND PRODUCE FOR IT A SUBSTANTIAL AND EXCESSIVE PROFIT IN RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED .

240THE SIGNIFICANCE OF THESE OBSERVATIONS IS ACCENTUATED BY THE FACT THAT THERE IS A 20 TO 40% DIFFERENCE BETWEEN THE PRICE OF CHIQUITA AND UNBRANDED BANANAS , EVEN THOUGH THE QUALITY OF THE LATTER IS ONLY SLIGHTLY LOWER THAN THAT OF LABELLED BANANAS AND BY THE FACT THAT THE PRICE OF UNBRANDED BANANAS OF SIMILAR QUALITY SOLD BY ITS PRINCIPAL COMPETITORS IS LOWER EVEN THOUGH THEIR UNDERTAKINGS ARE RUNNING AT A PROFIT .

241HAVING REGARD TO THIS SITUATION THE COMMISSION CONSIDERS A REDUCTION BY UBC OF ITS PRICE LEVELS TO PRICES AT LEAST 15% BELOW THE PRICES IT CHARGES ITS CUSTOMERS IN THE RELEVANT MARKET , EXCEPT IN IRELAND , TO BE APPROPRIATE , SINCE THE UNFAIR PRICES CHARGED CURRENTLY ARE AN ABUSE BY UBC OF ITS DOMINANT POSITION.

242THE APPLICANT , WHICH DOES NOT ACCEPT THE COMMISSION ' S ARGUMENT , LAYS STRESS ON THE VERY LOW PRICE OF BANANAS AT ALL STAGES OF THE BANANA CHAIN AND ILLUSTRATES THIS BY THE EXAMPLE OF A METRIC TON OF BANANAS WHICH COULD BE IMPORTED INTO GERMANY IN 1956 FOR DM 697 , THE PRICE WHEREOF FELL IN 1973 TO DM 458 , THE DIFFERENCE CORRESPONDING TO A 50% REDUCTION IN REAL TERMS.

243THE ARGUMENT PUT FORWARD BY THE COMMISSION TO PROVE THAT UBC CHARGES EXCESSIVE PRICES IS WRONG BECAUSE IT IS BASED ON THE LETTER OF 10 DECEMBER 1974 POINTING OUT ' ' THAT UBC SOLD BANANAS TO IRISH RIPENERS AT PRICES ALLOWING IT A CONSIDERABLY SMALLER MARGIN THAN IN SOME OTHER MEMBER STATES ' ' , THE WORDING OF WHICH , SETTLED BEFORE 31 DECEMBER 1974 , THE DATE OF THE END OF THE FINANCIAL YEAR , HAS BEEN RETRACTED ON TWO DIFFERENT OCCASIONS BY THE APPLICANT AND IT APPEARS FROM A DOCUMENT ANNEXED TO THE APPLICATION THAT THE PRICES CHARGED IN IRELAND PRODUCED A LOSS FOR UBC.

244IT IS THEREFORE ARBITRARY FOR THE COMMISSION TO PROCEED ON THE BASIS OF THE PRICES CHARGED IN IRELAND FOR A FEW MONTHS FOR THE PURPOSE OF ACCESS TO THE IRISH MARKET , WHICH ONLY REPRESENTED 1.6% OF THE TOTAL VOLUME OF BANANAS IMPORTED DURING 1974 INTO THE WHOLE OF THE RELEVANT MARKET , IN ORDER TO CALCULATE THE PROFITS WHICH HAVE BEEN MADE ON THE REMAINDER OF THE RELEVANT MARKET AND DURING THE PREVIOUS YEARS WHEN THE PRICES CHARGED DID NOT ALLOW ANY PROFITS TO BE MADE FROM 1970 TO 1974 INCLUSIVE ON THE RELEVANT MARKET.

245THE APPLICANT TAKES THE VIEW THAT THE DIFFERENCE IN THE PRICE OF BRANDED AND UNLABELLED BANANAS IS JUSTIFIED , BECAUSE THE PRECAUTIONS TAKEN BETWEEN CUTTING AND SALE TO THE CONSUMER FULLY EXPLAIN THIS DIFFERENCE .

246IT ENDEAVOURS TO PROVE BY ANOTHER WAY THAT THERE ARE GENUINE DIFFERENCES IN THE QUALITY OF CHIQUITA BANANAS AND THOSE BEARING OTHER BRAND NAMES AND THAT THE PRICE DIFFERENCE - AVERAGING 7.4% BETWEEN 1970 AND 1974 - IS JUSTIFIED.

247IT SUBMITS THAT THE ORDER TO REDUCE ITS PRICES BY 15% IS UNINTELLIGIBLE

, SINCE THE PRICES IN QUESTION VARY EACH WEEK ON THE WHOLE OF THE RELEVANT MARKET , AND UNWORKABLE , BECAUSE A REDUCTION OF THIS SIZE WOULD CAUSE IT TO SELL A BANANA OF A HIGHER QUALITY THAN ITS COMPETITORS BELOW THE PRICES WHICH THEY CHARGE FOR THEIRS.

248THE IMPOSITION BY AN UNDERTAKING IN A DOMINANT POSITION DIRECTLY OR INDIRECTLY OF UNFAIR PURCHASE OR SELLING PRICES IS AN ABUSE TO WHICH EXCEPTION CAN BE TAKEN UNDER ARTICLE 86 OF THE TREATY.

249IT IS ADVISABLE THEREFORE TO ASCERTAIN WHETHER THE DOMINANT UNDERTAKING HAS MADE USE OF THE OPPORTUNITIES ARISING OUT OF ITS DOMINANT POSITION IN SUCH A WAY AS TO REAP TRADING BENEFITS WHICH IT WOULD NOT HAVE REAPED IF THERE HAD BEEN NORMAL AND SUFFICIENTLY EFFECTIVE COMPETITION.

250IN THIS CASE CHARGING A PRICE WHICH IS EXCESSIVE BECAUSE IT HAS NO REASONABLE RELATION TO THE ECONOMIC VALUE OF THE PRODUCT SUPPLIED WOULD BE SUCH AN ABUSE.

251THIS EXCESS COULD , INTER ALIA , BE DETERMINED OBJECTIVELY IF IT WERE POSSIBLE FOR IT TO BE CALCULATED BY MAKING A COMPARISON BETWEEN THE SELLING PRICE OF THE PRODUCT IN QUESTION AND ITS COST OF PRODUCTION , WHICH WOULD DISCLOSE THE AMOUNT OF THE PROFIT MARGIN ; HOWEVER THE COMMISSION HAS NOT DONE THIS SINCE IT HAS NOT ANALYSED UBC ' S COSTS STRUCTURE.

252THE QUESTIONS THEREFORE TO BE DETERMINED ARE WHETHER THE DIFFERENCE BETWEEN THE COSTS ACTUALLY INCURRED AND THE PRICE ACTUALLY CHARGED IS EXCESSIVE , AND , IT THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE , WHETHER A PRICE HAS BEEN IMPOSED WHICH IS EITHER UNFAIR IN ITSELF OR WHEN COMPARED TO COMPETING PRODUCTS.

253OTHER WAYS MAY BE DEvised - AND ECONOMIC THEORISTS HAVE NOT FAILED TO THINK UP SEVERAL - OF SELECTING THE RULES FOR DETERMINING WHETHER THE PRICE OF A PRODUCT IS UNFAIR.

254WHILE APPRECIATING THE CONSIDERABLE AND AT TIMES VERY GREAT DIFFICULTIES IN WORKING OUT PRODUCTION COSTS WHICH MAY SOMETIMES INCLUDE A DISCRETIONARY APPORTIONMENT OF INDIRECT COSTS AND GENERAL EXPENDITURE AND WHICH MAY VARY SIGNIFICANTLY ACCORDING TO THE SIZE OF THE UNDERTAKING , ITS OBJECT , THE COMPLEX NATURE OF ITS SET UP , ITS TERRITORIAL AREA OF OPERATIONS , WHETHER IT MANUFACTURES ONE OR SEVERAL PRODUCTS , THE NUMBER OF ITS SUBSIDIARIES AND THEIR RELATIONSHIP WITH EACH OTHER , THE PRODUCTION COSTS OF THE BANANA DO NOT SEEM TO PRESENT ANY INSUPERABLE PROBLEMS.

255IN THIS CASE IT EMERGES FROM A STUDY BY THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT OF 10 FEBRUARY 1975 THAT THE PATTERN OF THE PRODUCTION , PACKAGING , TRANSPORTATION , MARKETING AND DISTRIBUTION OF BANANAS COULD HAVE MADE IT POSSIBLE TO COMPUTE THE APPROXIMATE PRODUCTION COST OF THIS FRUIT AND ACCORDINGLY TO CALCULATE WHETHER ITS SELLING PRICE TO RIPENER/DISTRIBUTORS WAS EXCESSIVE.

256THE COMMISSION WAS AT LEAST UNDER A DUTY TO REQUIRE UBC TO PRODUCE PARTICULARS OF ALL THE CONSTITUENT ELEMENTS OF ITS PRODUCTION COSTS .

257THE ACCURACY OF THE CONTENTS OF THE DOCUMENTS PRODUCED BY UBC COULD HAVE BEEN CHALLENGED BUT THAT WOULD HAVE BEEN A QUESTION OF PROOF .

258THE COMMISSION BASES ITS VIEW THAT PRICES ARE EXCESSIVE ON AN ANALYSIS OF THE DIFFERENCES - IN ITS VIEW EXCESSIVE - BETWEEN THE PRICES CHARGED IN THE DIFFERENT MEMBER STATES AND ON THE POLICY OF DISCRIMINATORY PRICES WHICH HAS BEEN CONSIDERED ABOVE.

259THE FOUNDATION OF ITS ARGUMENT HAS BEEN THE APPLICANT ' S LETTER OF 10 DECEMBER 1974 WHICH ACKNOWLEDGED THAT THE MARGIN ALLOWED BY THE SALE OF BANANAS TO IRISH RIPENERS WAS MUCH SMALLER THAN IN SOME OTHER MEMBER STATES AND IT CONCLUDED FROM THIS THAT THE AMOUNT BY WHICH THE ACTUAL PRICES F.O.R. BREMERHAVEN AND ROTTERDAM EXCEED THE DELIVERED ROTTERDAM PRICES FOR BANANAS TO BE SOLD TO IRISH CUSTOMERS C.I.F. DUBLIN MUST REPRESENT A PROFIT OF THE SAME ORDER OF MAGNITUDE.

260HAVING FOUND THAT THE PRICES CHARGED TO RIPENERS OF THE OTHER MEMBER STATES WERE CONSIDERABLY HIGHER , SOMETIMES BY AS MUCH AS 100% , THAN THE PRICES CHARGED TO CUSTOMERS IN IRELAND IT CONCLUDED THAT UBC WAS MAKING A VERY SUBSTANTIAL PROFIT.

261NEVERTHELESS THE COMMISSION HAS NOT TAKEN INTO ACCOUNT IN ITS REASONING SEVERAL OF UBC ' S LETTERS IN WHICH WERE ENCLOSED A CONFIDENTIAL DOCUMENT RETRACTING WHAT IS SAID IN ITS LETTER OF 10 DECEMBER 1974 AND POINTING OUT THAT THE PRICES CHARGED IN IRELAND HAD PRODUCED A LOSS.

262THE APPLICANT ALSO STATES THAT THE PRICES CHARGED ON THE RELEVANT MARKET DID NOT ALLOW IT TO MAKE ANY PROFITS DURING THE LAST FIVE YEARS , EXCEPT IN 1975.

263THESE ASSERTIONS BY THE APPLICANT ARE NOT SUPPORTED BY ANY ACCOUNTING DOCUMENTS WHICH PROVE THE CONSOLIDATED ACCOUNTS OF THE UBC GROUP OR EVEN BY THE CONSOLIDATED ACCOUNTS FOR THE RELEVANT MARKET.

264HOWEVER UNRELIABLE THE PARTICULARS SUPPLIED BY UBC MAY BE (AND IN PARTICULAR THE DOCUMENT MENTIONED PREVIOUSLY WHICH WORKS OUT THE ' ' LOSSES ' ' ON THE IRISH MARKET IN 1974 WITHOUT ANY SUPPORTING EVIDENCE), THE FACT REMAINS THAT IT IS FOR THE COMMISSION TO PROVE THAT THE APPLICANT CHARGED UNFAIR PRICES.

265UBC ' S RETRACTION , WHICH THE COMMISSION HAS NOT EFFECTIVELY REFUTED , ESTABLISHES BEYOND DOUBT THAT THE BASIS FOR THE CALCULATION ADOPTED BY THE LATTER TO PROVE THAT UBC ' S PRICES ARE EXCESSIVE IS OPEN TO CRITICISM AND ON THIS PARTICULAR POINT THERE IS DOUBT WHICH MUST BENEFIT THE APPLICANT , ESPECIALLY AS FOR NEARLY 20 YEARS BANANA PRICES , IN REAL TERMS , HAVE NOT RISEN ON THE RELEVANT MARKET.

266ALTHOUGH IT IS ALSO TRUE THAT THE PRICE OF CHIQUITA BANANAS AND THOSE OF ITS PRINCIPAL COMPETITORS IS DIFFERENT , THAT DIFFERENCE IS ABOUT 7% , A PERCENTAGE WHICH HAS NOT BEEN CHALLENGED AND WHICH CANNOT AUTOMATICALLY BE REGARDED AS EXCESSIVE AND CONSEQUENTLY UNFAIR.

267IN THESE CIRCUMSTANCES IT APPEARS THAT THE COMMISSION HAS NOT ADDUCED ADEQUATE LEGAL PROOF OF THE FACTS AND EVALUATIONS WHICH FORMED THE FOUNDATION OF ITS FINDING THAT UBC HAD INFRINGED ARTICLE 86 OF THE TREATY BY DIRECTLY AND INDIRECTLY IMPOSING UNFAIR SELLING PRICES FOR BANANAS .

268ARTICLE 1 (C) OF THE DECISION MUST THEREFORE BE ANNULLED.

CHAPTER III - PROCEDURAL VALIDITY

SECTION 1 - COMPLAINTS RELATING TO DENIAL OF DUE PROCESS

269THE APPLICANT COMPLAINS OF THE SPEED WITH WHICH THE ADMINISTRATIVE PROCEDURE TOOK PLACE , OF MATERIAL ERRORS IN THE STATEMENT OF OBJECTIONS TO WHICH IT DREW THE COMMISSION ' S ATTENTION AND WHICH HAVE NOT BEEN RECTIFIED - FOR EXAMPLE THE PROFITS IT WAS ALLEGED TO HAVE MADE IN IRELAND - , OF THE BREVITY OR AMBIGUITY OF THE STATEMENT OF THE REASONS ON WHICH SOME OF THE OBJECTIONS SUCH AS THAT RELATING TO UNFAIR PRICES WERE BASED AND TAKES THE VIEW THAT THIS CONDUCT ON THE PART OF THE COMMISSION AMOUNTS TO A BREACH OF THE PRINCIPLE OF DUE PROCESS.

270ARTICLE 11 OF REGULATION NO 99/63/EEC OF THE COMMISSION OF 25 JULY 1963 STATES THAT THE LATTER ' ' SHALL HAVE REGARD... TO THE TIME REQUIRED FOR PREPARATION OF COMMENTS ' ' , ' ' THE TIME LIMITS SHALL BE NOT LESS THAN TWO WEEKS ' ' .

271FOLLOWING A PRELIMINARY INVESTIGATION LASTING ABOUT ONE YEAR THE ADMINISTRATIVE PROCEDURE WAS INITIATED ON 19 MARCH 1975.

272UBC HAD TWO MONTHS (FROM 11 APRIL 1975 TO 12 JUNE 1975) WITHIN WHICH TO SUBMIT ITS OBSERVATIONS AND IT IS UBC WHICH ASKED FOR THE HEARING WHICH TOOK PLACE ON 24 JUNE 1975 AS PROVIDED FOR IN ARTICLE 19 (2) OF REGULATION NO 17 OF THE COUNCIL (FIRST REGULATION IMPLEMENTING ARTICLES 85 & 86 OF THE TREATY) OF 6 FEBRUARY 1962.

273IT IS EVIDENT FROM THESE DATES THAT THE PROCEDURE WAS CARRIED OUT WITHIN NORMAL TIME PERIODS AND CANNOT BE CRITICIZED ON THE GROUND THAT IT WAS RUSHED.

274AS FAR AS CONCERNS THE ALLEGATION THAT THE STATEMENT OF THE REASONS UPON WHICH THE OBJECTIONS WERE BASED WAS INADEQUATE ARTICLE 4 OF THE SAID REGULATION NO 99/63 PROVIDES THAT THE COMMISSION IN ITS DECISIONS SHALL DEAL ONLY WITH THOSE OBJECTIONS RAISED UNDERTAKINGS IN RESPECT OF WHICH THEY HAVE BEEN AFFORDED THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS.

275THE STATEMENT OF OBJECTIONS SATISFIES THIS REQUIREMENT SINCE IT SETS OUT , SUMMARILY INDEED BUT CLEARLY , THE PRINCIPAL FACTS UPON WHICH THE COMMISSION RELIES.

276IN ITS COMMUNICATION OF 19 MARCH 1975 THE LATTER CLEARLY STATED THE PRINCIPAL FACTS UPON WHICH IT BASED THE OBJECTIONS MADE AND INDICATED TO WHAT EXTENT UBC IS IN A DOMINANT POSITION AND HAS ABUSED IT .

277IT DOES NOT THEREFORE SEEM THAT DURING THE PROCEDURE BEFORE THE COMMISSION THERE WAS ANY BREACH OF THE PRINCIPLE OF DUE PROCESS.

278AS FAR AS THE OTHER OBJECTIONS ARE CONCERNED THEY RELATE TO THE SUBSTANCE OF THE CASE.

279CONSEQUENTLY THIS SUBMISSION IS UNFOUNDED.

SECTION 2 - THE APPLICANT ' S CLAIM FOR DAMAGES

280THE APPLICANT COMPLAINS THAT THE COMMISSION ' S APPROACH TO THIS PROCEEDING WAS PERMEATED WITH BIAS.

281IN AN ENDEAVOUR TO JUSTIFY THIS COMPLAINT IT MENTIONS : THE EXAGGERATION OF THE DIFFERENCES IN PRICE BETWEEN THE STATES IN THE COMMISSION ' S FINDING , THE DESCRIPTION , WHICH UBC ASSERTS IS INCORRECT , OF UBC ' S PROGRESS ON THE IRISH MARKET , A MISLEADING PRESENTATION OF AN FAO STUDY ON COMPETITION BETWEEN BANANAS AND SUMMER FRUIT , THE ASSERTION THAT ' ' BANANAS CAN ONLY BE TRANSPORTED WHILE STILL GREEN ' ' , THE WRONG PRESENTATION OF THE REDUCTION OF SUPPLIES TO OLESEN .

282CONSIDERATION OF THE CORRECTNESS OF THESE COMPLAINTS GOES TO THE SUBSTANCE OF THE CASE AND THE PARTIES HAVE DEVELOPED THEIR VIEWS ON THEM AT GREAT LENGTH.

283THERE IS NO GROUND FOR SAYING THAT THE COMMISSION MENTIONED THESE MATTERS TENDENTIOUSLY.

284THE APPLICANT STATES THAT IT HAS SUFFERED MORAL DAMAGES OWING TO THE FACT THAT BEFORE THE COMMISSION ADOPTED THE DECISION , ONE OF ITS OFFICIALS MADE DENIGRATING COMMENT TO A NEWSPAPER ON UBC ' S COMMERCIAL CONDUCT WHICH WAS REPRODUCED BY THE WORLD PRESS AND GAVE THE IMPRESSION THAT THE ALLEGED INFRINGEMENTS HAD BEEN PROVED , WHEN IN FACT THE PARTIES CONCERNED HAD NOT YET DELIVERED THEIR DEFENCES.

285FOR THIS REASON THE COMMISSION WAS NO LONGER ABLE TO EVALUATE IMPARTIALLY THE FACTS OF THE CASE AND THE ARGUMENTS SUBMITTED BY THE APPLICANT .

286THERE IS NOTHING ON THE COURT ' S FILE TO JUSTIFY THE PRESUMPTION THAT THE CONTESTED DECISION WOULD NOT HAVE BEEN ADOPTED OR WOULD HAVE BEEN DIFFERENT HAD IT NOT BEEN FOR THESE DISPUTED STATEMENTS WHICH ARE IN THEMSELVES REGRETTABLE.

287HOWEVER THERE IS NOTHING TO INDICATE THAT THE COMMISSION ' S CONDUCT WAS SUCH AS TO HAVE AN ADVERSE EFFECT ON THE WAY THE PROCEDURE IS NORMALLY CARRIED OUT.

288IN THESE CIRCUMSTANCES THE CLAIM AGAINST THE COMMISSION FOR DAMAGES MUST BE REJECTED.

CHAPTER IV - THE SANCTIONS

289THE COMMISSION , FOR THE PURPOSE OF IMPOSING A FINE OF ONE MILLION UNITS OF ACCOUNT FOR THE FOUR INFRINGEMENTS WHICH IT FOUND UBC HAD COMMITTED , STATING THAT THE LATTER ' ' WERE AT THE VERY LEAST NEGLIGENT ' ' , HAD REGARD TO THEIR GRAVITY AND DURATION AND TO THE SIZE OF THE UNDERTAKING.

290AS FAR AS THEIR GRAVITY IS CONCERNED THE COMMISSION CONSIDERED THEM IN THEIR ECONOMIC AND LEGAL SETTING BY TAKING ACCOUNT OF THEIR COMBINED EFFECT AND OF THEIR CONSEQUENCES WHICH ARE MANIFESTLY INCONSISTENT WITH THE TREATY OBJECTIVES OF INTEGRATING MARKETS AND OF THE FACT THAT THE BANANA IS A PRODUCT WHICH IS WIDELY CONSUMED.

291AS FAR AS THE DURATION OF THE INFRINGEMENTS IS CONCERNED THE COMMISSION TOOK THE VIEW THAT THE PROHIBITION ON THE SALE OF BANANAS WHILE STILL GREEN ONLY HAD TO BE TAKEN INTO CONSIDERATION FROM JANUARY 1967 TO 15 NOVEMBER 1968 BEING THE DATE WHEN UBC NOTIFIED THE GENERAL CONDITIONS OF SALE FOR THE NETHERLANDS TO THE COMMISSION.

292IT FOLLOWS FROM THIS THAT , BY REASON OF UBC ' S ACTS AFTER 15 NOVEMBER 1968 WHICH HAVE REMAINED WITHIN THE SCOPE OF THE ACTIVITY DESCRIBED THEREIN , THERE HAS ACCORDINGLY BEEN NO NEGLIGENCE ON THE PART OF UBC AND NO FINE HAS BEEN IMPOSED ON ACCOUNT OF THESE LATER ACTS .

293FURTHERMORE DURING THE PROCEDURE FOR THE ADOPTION OF AN INTERIM MEASURE ON 5 APRIL 1976 THE COMMISSION TOOK NOTE OF THE AMENDMENT OF THE CLAUSE AT ISSUE WHILE EXPRESSING THE VIEW THAT IT SHOULD HAVE TAKEN ACTION EARLIER.

294ACCORDING TO THE COMMISSION THE REFUSAL BY UBC TO CONTINUE SUPPLIES TO OLESEN LASTED FROM 10 OCTOBER 1973 TO 11 FEBRUARY 1975 AND THE COMMISSION STATES THAT IT TOOK ACCOUNT OF THE FACT THAT UBC PUT AN END TO THIS INFRINGEMENT OF ITS OWN ACCORD.

295THE PRICING POLICY HAS BEEN APPLIED SINCE AT LEAST 1971 TO UBC ' S CUSTOMERS IN GERMANY , THE NETHERLANDS AND THE BLEU , SINCE JANUARY 1973 TO CUSTOMERS IN DENMARK AND SINCE NOVEMBER 1973 TO CUSTOMERS IN IRELAND .

296FINALLY ACCORDING TO THE COMMISSION THE AMOUNT OF THE FINE WAS FIXED AT ONE MILLION UNITS OF ACCOUNT IN THE LIGHT OF UBC ' S TOTAL ANNUAL TURNOVER OF ABOUT TWO THOUSAND MILLION DOLLARS AND ITS ANNUAL TURNOVER IN BANANAS OF FIFTY MILLION DOLLARS ON THE RELEVANT MARKET AND ALSO OF THE HIGH PROFITS MADE AS A RESULT OF ITS PRICING POLICY.

297FURTHERMORE IN ORDER TO COMPEL UBC TO PUT AN END TO THESE INFRINGEMENTS , IN SO FAR AS IT HAD NOT DONE SO OF ITS OWN ACCORD , THE COMMISSION ORDERED UBC , SUBJECT TO A PENALTY PAYMENT , TO INFORM ALL ITS DISTRIBUTOR/RIPENERS IN GERMANY , DENMARK , IRELAND , THE NETHERLANDS AND THE BLEU THAT IT HAS CEASED TO APPLY THE PROHIBITION ON THE RESALE OF GREEN BANANAS BY NOT LATER THAN 1 FEBRUARY 1976 AND TO INFORM THE COMMISSION TWICE YEARLY FOR A PERIOD OF TWO YEARS OF THE PRICES CHARGED DURING THE PRECEDING SIX MONTHS TO THE SAME CUSTOMERS.

298THE APPLICANT SUBMITS THAT IT DID NOT KNOW THAT IT WAS IN A DOMINANT POSITION , STILL LESS THAT IT HAD ABUSED IT , ESPECIALLY AS , ACCORDING TO THE CASE-LAW OF THE COURT TO DATE , ONLY UNDERTAKINGS WHICH WERE PURE MONOPOLIES OR CONTROLLED AN OVERWHELMING SHARE OF THE MARKET HAVE BEEN HELD TO BE IN A DOMINANT POSITION.

299UBC IS AN UNDERTAKING WHICH , HAVING ENGAGED FOR A VERY LONG TIME IN INTERNATIONAL AND NATIONAL TRADE , HAS SPECIAL KNOWLEDGE OF ANTI-TRUST LAWS AND HAS ALREADY EXPERIENCED THEIR SEVERITY.

300UBC , BY SETTING UP A COMMERCIAL SYSTEM COMBINING THE PROHIBITION OF THE SALE OF BANANAS WHILE STILL GREEN , DISCRIMINATORY PRICES , DELIVERIES LESS THAN THE AMOUNTS ORDERED , ALL OF WHICH WAS TO END IN STRICT PARTITIONING OF NATIONAL MARKETS , ADOPTED MEASURES WHICH IT KNEW OR OUGHT TO HAVE KNOWN CONTRAVENED THE PROHIBITION SET OUT IN ARTICLE 86 OF THE TREATY.

301THE COMMISSION THEREFORE HAD GOOD REASON TO FIND THAT UBC ' S INFRINGEMENTS WERE AT THE VERY LEAST NEGLIGENT.

302THE AMOUNT OF THE FINE IMPOSED DOES NOT SEEM TO BE OUT OF PROPORTION TO THE GRAVITY AND DURATION OF THE INFRINGEMENTS (AND ALSO TO THE SIZE OF THE UNDERTAKING).

303ACCOUNT MUST HOWEVER BE TAKEN OF THE PARTIAL ANNULMENT OF THE DECISION AND THE AMOUNT FIXED BY THE COMMISSION REDUCED ACCORDINGLY.

304A REDUCTION OF THE FINE TO 850 000 (EIGHT HUNDRED AND FIFTY THOUSAND) UNITS OF ACCOUNT , TO BE PAID IN THE NATIONAL CURRENCY OF THE APPLICANT UNDERTAKING WHOSE REGISTERED OFFICE IS SITUATE IN THE COMMUNITY , THAT IS TO SAY 3 077 000 NETHERLANDS GULDERS (THREE MILLION SEVENTY SEVEN THOUSAND NETHERLANDS GULDERS), APPEARS TO BE JUSTIFIED .

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**Council Regulation (EC) No 139/2004
of 20 January 2004
on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA
relevance)**

Council Regulation (EC) No 139/2004

of 20 January 2004

on the control of concentrations between undertakings

(the EC Merger Regulation)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

- (1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings(4) has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.
- (2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.
- (3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.
- (4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.
- (5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.
- (6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common

market is not distorted, in accordance with the principle of an open market economy with free competition.

- (7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.
- (8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.
- (9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.
- (10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.
- (11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.
- (12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.
- (13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.
- (14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to

the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

- (15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.
- (16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.
- (17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.
- (18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

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- (19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.
- (20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.
- (21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.
- (22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.
- (23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.
- (24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.
- (25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however,

not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

- (26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.
- (27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.
- (28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.
- (29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.
- (30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.
- (31) The Commission should have at its disposal appropriate instruments to ensure the enforcement

of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

- (32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.
- (33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.
- (34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.
- (35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.
- (36) The Community respects the fundamental rights and observes the principles recognised in particular

by the Charter of Fundamental Rights of the European Union(5). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

- (37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.
- (38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.
- (39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.
- (40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.
- (41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.
- (42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.
- (43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.
- (44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed,

and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.

- (45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.
- (46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council,

acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
 - (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.
4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.
5. In making this appraisal, the Commission shall take into account in particular:
- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
 - whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

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- (a) the merger of two or more previously independent undertakings or parts of undertakings, or
- (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
3. Control is acquired by persons or undertakings which:
- (a) are holders of the rights or entitled to rights under the contracts concerned; or
- (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.
4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).
5. A concentration shall not be deemed to arise where:
- (a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;
- (b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- (c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies(6) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the

Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply *mutatis mutandis*.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may,

before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

- (a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC(7), after deduction of value added tax and other taxes directly related to those items, where appropriate:
 - (i) interest income and similar income;
 - (ii) income from securities;

- income from shares and other variable yield securities,
- income from participating interests,
- income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

- (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
- (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

- (c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

- (a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

- (b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

- (a) the concentration is notified to the Commission pursuant to Article 4 without delay; and
- (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

Article 8

Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article

81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

- (a) has already been implemented and that concentration has been declared incompatible with the common market, or
- (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

- (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;
- (b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;
- (c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

- (a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or
- (b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

- (a) it finds that a concentration has been implemented
 - (i) in contravention of a condition attached to a decision under Article 6(1)(b), or
 - (ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or
- (b) a decision has been revoked pursuant to paragraph 6.

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities

of the Member States without delay.

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

- (a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or
- (b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

- (a) it shall itself deal with the case in accordance with this Regulation; or
- (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

- (a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or
- (b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

Article 10

Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2) or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make

a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court

of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

Article 12

Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct

all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the

information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

- (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);
- (b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);
- (c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;
- (d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);
- (e) in response to a question asked in accordance with Article 13(2)(e),
 - they give an incorrect or misleading answer,
 - they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
 - they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);
- (f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

- (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
- (b) implement a concentration in breach of Article 7;
- (c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
- (d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

- (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
- (b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);
- (c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;
- (d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

2. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.
2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.
3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.
4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.
2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.
3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).
4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the Official Journal of the European Union.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003(8), (EEC) No 1017/68(9), (EEC) No 4056/86(10) and (EEC) No 3975/87(11) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

Article 22

Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission

informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23

Implementing provisions

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:

- (a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;
- (b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;
- (c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);
- (d) implementing provisions concerning hearings pursuant to Article 18.

2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.

- (a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.
- (b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.
- (c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

Relations with third countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.

2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having

their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

Article 26

Entry into force and transitional provisions

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 January 2004.

For the Council

The President

C. McCreevy

(1) OJ C 20, 28.1.2003, p. 4.

(2) Opinion delivered on 9.10.2003 (not yet published in the Official Journal).

(3) Opinion delivered on 24.10.2003 (not yet published in the Official Journal).

(4) OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in

OJ L 40, 13.2.1998, p. 17.

(5) OJ C 364, 18.12.2000, p. 1.

(6) OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

(7) OJ L 372, 31. 12. 1986, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council.

(8) OJ L 1, 4.1.2003, p. 1.

(9) OJ L 175, 23. 7. 1968, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

(10) OJ L 378, 31. 12. 1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.

(11) OJ L 374. 31. 12. 1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003.

ANNEX

Correlation table

>TABLE POSITION>

DOCNUM	32004R0139
AUTHOR	Council
FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2004 ; R
PUBREF	Official Journal L 024 , 29/01/2004 P. 0001 - 0022
DESCRIPT	merger control ; economic concentration ; competition policy ; competition ; competition law
PUB	2004/01/29
DOC	2004/01/20
INFORCE	2004/02/18=EV ; 2004/05/01=MA
ENDVAL	9999/99/99
LEGBASE	12002E083

	12002E308.....
LEGCIT	31968R1017..... 31978L0660..... 31986L0635..... 31986R4056..... 31987R3975..... 32000X1218(01)..... 12002E002..... 12002E003..... 12002E004..... 12002E005..... 12002E081..... 12002E082..... 12002E086..... 12002E202..... 12002E229..... 12002E296..... 12002E307..... 12002EN01..... 12002M002..... 32003R0001.....
MODIFIES	31989R4064..... Repeal..... 31997R1310..... Repeal..... 52002PC0711..... Adoption.....
MODIFIED	Implemented by 32004R0802..... from 01/05/2004
SUB	Competition ; Rules applying to undertakings - concentrations
REGISTER	08400000
PREPWORK	Proposal Commission;Com 2002/0711 Final ; OJ C 20/2003 P 4 Consultation procedure Opinion European Parliament;given on 09/10/2003 Opinion Economic and Social Committee;given on 24/10/2003
MISCINF	CNS 2002/0296 EEA relevance
DATES	of document: 20/01/2004 of effect: 18/02/2004; Entry into force Date pub. + 20 See Art 26.1 of effect: 01/05/2004; Implementation See Art 26.1 end of validity: 99/99/9999

EU Mergers – Practical case

Transaction and the parties involved

Orkla is a group mainly active in branded consumer goods, including food products such as frozen ready meals, potato products and seafood, detergents, personal care products and house textile. In addition, it has activities in media, chemicals and financial investments. Orkla achieved a turnover of Euro 3, 723 million world-wide in 2003, out of which more than of 75% related to sales in the Nordic countries.

Chips is a company active in the production and sales of snacks and food products mainly in the Nordic countries. Its world-wide turnover in 2003 was Euro 298 million and the Snacks business accounted for approximately 80% of Chips' total sales. Chips is the Nordic region's leading snacks company. Other food products such as frozen ready meals, potato products and seafood represent a small part of Chips' activities.

On 8 November 2004, Orkla and Chips signed an agreement pursuant to which Orkla shall launch a public tender offer for all the outstanding shares in Chips. The tender offer commenced on 5 January 2005. The Offer Period may in its entirety be three months at the most. If, however, there are particular obstacles to the completion of the Tender Offer, such as pending merger control proceedings, Orkla may extend the Offer Period until such obstacles have been removed.

Orkla currently owns 22.8% of the share capital and 18.3% of the voting rights in Chips. Shareholders representing approximately 47.9% of the share capital and 61.9% of the voting rights in Chips (including Orkla) have undertaken to accept the public tender offer. If successful, the transaction will confer to Orkla sole control over chips.

In Finland, Orkla supplies its ready meals products to the retail sector under the brands *Felix* and *Grandiosa* and Chips under the *Oolannin* and *Billy's* brands.

In Finland, the combined entity will be the largest player in a [tentative] frozen ready meals market to the retail trade sector (including producer and retailer branded products) with a market share of 35% (Orkla 20%, Chips 15%). The main competitors include Dr.Oetker of 20%, Lannen Tehtaat of 15% and Findus of 10% and other competitors supplying non-branded products or marketing their products under their retail brands such as Kesko (10%) and Inex Partners (10%). If only the producer branded frozen ready meals are considered, the combined share increases to approximately 35-45%.

The parties' combined market shares are even higher on a possible market for frozen pizzas in Finland, where it amounts to 50% for producer and retailer branded products (and respectively for Orkla, 35% and Chips, 15%) or even 60% (Orkla 40%, Chips 20%) for producer branded products only. The main competitor are Dr.Oetker (25%) and other competitors include Lannen Tehtaat (5%) and retailers such as Kesko (5%) and Inex Partners (5%).

It may be noted that the parties and Dr.Oetker have supplied between 75-80% of all frozen pizzas in Finland over the last four years, while there has been no significant new entry. Orkla, Chips and Dr.Oetker's brands are generally considered to be "must stock brands" by Finnish retailers.

Compared to some other food products, private label share is small for frozen pizzas (about 10%) and has been stable during the last four years. Retail sector is concentrated, the top two retail groups accounting for approximately 70% of the retail food market. However, the low share of private labels provides an indication that the relative buyer power of retailers is quite low for frozen pizzas. The market investigation has also shown that to successfully introduce a new brand on the Finnish frozen pizzas market requires substantial financial investment and time, and the size of the market is relatively limited.

Lastly, Chips currently distributes pizzas in Finland under the brand Billy's, which belongs to the Swedish Gunnar Dafgard company. Orkla and Dafgard are direct competitors in other Member States, notably, in Sweden.

On the market for the sale of frozen potato products (including the producer and retailer branded products) to the retail sector, the parties will achieve a combined market share of 50% (Orkla 40%, Chips 10%) in Sweden. Orkla sells its products under the Felix brand and Chips under Topp brand. The main competitors are two retail companies ICA (of 20%) and Coop Nordic Sverige (15%). These two competitors supply only private labels products and the parties' brands are the only significant suppliers active on this market as the presence of other suppliers of branded frozen potato products is rather marginal – Findus of 10% and Mc Cain 5%.

Frozen potato products are comparatively weakly differentiated products (by contrast to frozen ready meals). Felix enjoys significant brand recognition while Topp is generally seen as a weak brand barely distinguishable from private labels. New entrants in the market such as supermarkets expanding the market share of their private labels is possible.

The transaction will lead to a high combined market share of 65% with significant overlap on the market for the sale of herring, Baltic herring and anchovy to the food sector in Finland (Orkla 35%, Chips 30%).

The supply of herring, Baltic herring and anchovy constitutes only a small fraction of the total sale of seafood products in Finland. In 2003, the parties' aggregate sales in this market were less than Euro 2 million (total retailer sector sales amounted to 27 million). Orkla owns the famous Nordic seafood brand "Abba", however, Chips' sales relate almost entirely to the food services sector, while its retail market share is below 5%. By contrast, all the remaining suppliers of these products (Boyfood, Kesko Food, Fram Foods and Tuko Logistics) are also active in the retail market, in which Boyfood holds 15%, Kesko 10% and Inex Partners 5%. It is not excluded that the fraction of the retail sales of these competitors could be diverted to the food services market.

Additional information relating to the market definition

Relevant product market

In its past decisions in the food sector, the Commission distinguished the production and sale of food products dedicated to the retail sector from the production and sale of food products dedicated to the food service sector (COMP/M.2302 Heinz/CSM, COMP/M.1990 Unilever/Bestfoods and COMP/M.1802 Unilever/Amore – Maille). This distinction has been confirmed by all the respondents to the market investigation for the three product categories concerned by the transaction, the frozen ready meals, the frozen potato products and herrings, Baltic herrings and anchovies. The main argument put forward by third parties to distinguish sales to the retail sector from sales to the food service sector are that customers and their needs are different (retailers for the retail sector and wholesalers or end users for the food services sector), as well as the packaging, the size, the quality, and the prices of the products.

Snacks and salted biscuits markets

The market investigation to find out whether the salted biscuits produced by Orkla were competing with the snacks manufactured by Chips showed that these two products constitute different product markets in the Nordic countries. These markets are thus excluded from the further examination.

Frozen ready meals

The frozen ready meals include meat-, fish -, pasta- and vegetable-based ready meals, pizza, soups, crepes and other.

The market investigation showed that the overall market consists of producer branded products and retailer branded products (private label). Chilled foods exercise some competitive constraint on frozen food but are generally priced at a significantly higher price than comparable frozen foods.

In the case COMP/M.1740 Heinz/United Biscuits Frozen and chilled foods, the Commission considered whether there exists a separate market for frozen pizzas.

There are elements differentiating the pizzas from other ready meals in Finland such as product characteristics and the price. The prices of the two main types of frozen ready meals sold in Finland, namely pizzas and *pytt i panna* (a Nordic specialty) differ by approximately 40%. The market investigation has generally confirmed that in case of a 5 to 10% increase of the price to pizza product consumers would switch to other producer or retailer branded pizza rather than to other ready meals.

Frozen potato products

This category includes all side dishes based on potatoes such as French fries, potato wedges, potato burgers, potato grain etc. Market investigation showed that the frozen potato products are

close to commodity products for which price is a more important competitive factor than brand which is not much considered in the consumer's choice (at least in so far Finland is concerned).

Seafood – herring, Baltic herring and anchovy

Seafood products can be divided into four main segments: fresh fish, frozen fish, processed fish and other seafood products. The parties' activities lie mainly in the processed fish segments, namely sale of herring, Baltic herring and anchovy.

Geographic market

In past decisions in the food sector, the Commission has consistently held the relevant geographic market definition for food products to be national (COMP/M.1990 Unilever/Bestfoods, COMP/M.2817 Barilla/BPL/Kamps). The fact that markets are national is confirmed by the national sales channels, national distribution and logistics, different brands and national sales contracts. Brand reputation appears to be built on a country-by-country basis. A brand premium created in one Member State has virtually no effect on the brand's sales in any other Member State.

However, there is trend towards international brands, same customers in the different Member States and cross-borders trade.

Discuss the implications of EU competition regulation on the decision to transfer full control over Chips to Orkla.

1. Does ECMR 139/2004 apply?
 - a. Does Orkla-Chips transaction constitute a concentration within the meaning of ECMR?
 - b. Does Orkla-Chips transaction have a Community dimension?
 - c. Explain (briefly) the procedure the parties must follow if they suppose their transaction constitutes a merger.
2. How can the relevant product and geographic markets be defined in this case?
 - a. Identify the products sold by the parties and discuss whether they can constitute the same or separate relevant product markets.
 - b. Discuss the relevant geographic market definition in this case.
3. Discuss whether the proposed transaction is compatible with the Common market or not.
 - a. What concentrations raise concerns for EU merger control authorities?
 - b. Can this transaction hinder effective competition and, if yes, on what markets are such effects more likely?
4. In case the Commission has doubts about the compatibility of the transaction with the Common market, how can these doubts be cured?

**Judgment of the Court (Fifth Chamber)
of 22 March 2001**

French Republic v Commission of the European Communities.

State aid - Rescue and restructuring aid - Procedure for the examination of State aid - Failure to order a Member State to disclose the requisite information.

Case C-17/99.

1. Acts of the institutions Statement of reasons Obligation Scope Commission decision on State aid
Judicial review

(EC Treaty, Arts 190 (now Article 253 EC) and 92 (now, after amendment, Art. 87 EC))

2. State aid Prohibited Derogations Aid that may be considered compatible with the common market Aid for restructuring an undertaking in difficulty Conditions Absence of a credible restructuring plan when aid granted Consequences

(EC Treaty, Arts 92(3)(c) (now, after amendment, Art. 87(3)(c) EC) and 93(2) (now Art. 88(2) EC))

1. The obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The statement of reasons required by Article 190 of the Treaty (now Article 253 EC) must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. That requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

In considering fulfilment of the obligation to state the reasons for a decision on State aid, it would be inappropriate to examine the substantive legality of the reasons relied on by the Commission to justify the contested decision. That examination falls within the scope of the examination as to whether Article 92 of the Treaty (now, after amendment, Article 87 EC) has been infringed.

(see paras 35-36, 38)

2. As is clear from the Guidelines on State aid for rescuing and restructuring firms in difficulty, in order to be declared compatible with Article 92(3)(c) of the Treaty (now, after amendment, Article 87(3)(c) EC), aid to undertakings in difficulty must be bound to a restructuring programme designed to reduce or redirect their activities. Any such plan, which must be submitted to the Commission with all necessary clarifications, must make it possible to restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions whilst at the same time offsetting as far as possible adverse effects on competitors and ensuring that the aid is in proportion to restructuring costs and benefits. It is incumbent on the undertaking concerned to implement the restructuring plan, as accepted by the Commission, fully and the implementation and satisfactory progress of the plan must be monitored by the Commission, to which detailed annual reports must be submitted.

Consequently, in the absence of a credible restructuring plan, the Commission is justified in refusing to authorise the aid in question under the Guidelines.

(see paras 45, 49)

In Case [C-17/99](#),

French Republic, represented by K. Rispal-Bellanger and F. Million, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by G. Rozet, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 1999/378/EC of 4 November 1998 on aid granted by France to Nouvelle Filature Lainière de Roubaix (OJ 1999 L 145, p. 18),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), L. Sevón, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2001,

gives the following

Judgment

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the French Republic to pay the costs.

1 By application lodged at the Court Registry on 25 January 1999, the French Republic brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for annulment of Commission Decision 1999/378/EC of 4 November 1998 on aid granted by France to Nouvelle Filature Lainière de Roubaix (OJ 1999 L 145, p. 18, hereinafter the contested decision).

Legal background

2 When the contested decision was adopted, the Commission appraised State aid for rescuing and restructuring firms in difficulty by reference to the Community guidelines published in the Official Journal of the European Communities in 1994 (OJ 1994 C 368, p. 12, hereinafter the Guidelines).

3 Pursuant to point 3.2.1 of the Guidelines:

Aid for restructuring raises particular competition concerns as it can shift an unfair share of the burden of structural adjustment and the attendant social and industrial problems on to other producers who are managing without aid and to other Member States. The general principle should therefore be to allow restructuring aid only in circumstances in which it can be demonstrated that the approval of restructuring aid is in the Community interest. This will only be possible when strict criteria are fulfilled and full account is taken of the possible distortive effects of the aid.

4 Under point 3.2.2 of the Guidelines, in order for the Commission to approve aid, a restructuring plan must satisfy the general conditions relating inter alia to the long-term restoration of viability of the undertaking, avoidance of undue distortions of competition and the proportionality of the aid in relation to the restructuring costs and benefits.

5 With regard, first, to the restoration of viability, the first subparagraph of point 3.2.2(i) of the Guidelines states:

The sine qua non of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions....

6 Next, in order to avoid undue distortions of competition, measures must be taken to offset as far as possible adverse effects on competitors. In particular, the second subparagraph of point 3.2.2(ii) states:

Where on an objective assessment of the demand and supply situation there is a structural excess of production capacity in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market in the European Community by irreversibly reducing or closing capacity production....

7 Finally, with regard to the proportionality of the aid to the costs and benefits of restructuring, the first subparagraph of point 3.2.2(iii) states:

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. To limit the distortive effect, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. Nor should any of the aid go to finance new investment not required for the restructuring....

The facts

8 In May and September 1996, the Commission received several complaints concerning aid which had been or might be granted by the French Government to the company Nouvelle Filature Lainière de Roubaix for the purposes of court-supervised restructuring of the SA Filiature Lainière de Roubaix group (hereinafter the disputed aid). The complaints criticised the moratorium of eight years granted

to the group by the Inter-Ministerial Committee for Industrial Restructuring for the payment of its social-security and tax debt of FRF 82 000 000 and also an application for intervention by that committee to prevent that company from becoming insolvent.

9 In response to a request for information from the Commission, the French authorities informed it, by letters of 18 June and 15 July 1996, that the SA Filiature Lainière de Roubaix group had, since the early 1990s, been experiencing serious operational difficulties resulting in considerable cash-flow problems and arrears of social-security and tax payments. After being taken over in 1993 by Mr Verbeke, the group submitted a restructuring plan under which that debt would be paid in full, provided that the repayments were spread over a period of eight years. However, new economic and financial difficulties arose in and after 1995. The management was unable to make payments when they fell due and accordingly it lodged a declaration of cessation of payments with the Tribunal de Commerce (Commercial Court), Roubaix (France), which, on 30 April 1996, initiated the procedure for it to be placed under compulsory administration.

10 After determining that the group's economic and financial situation was such that no restructuring scheme was possible and after issuing a call for bids for acquisition of the business, the Tribunal de Commerce, Roubaix, by judgment of 17 September 1996, ordered transfer of the group to Mr Chapurlat for the price of FRF 4 278 866, the transferee having undertaken to honour the employment contracts of 225 of the 587 employees making up the workforce and to pay the sum of FRF 50 000 for each redundancy occurring in the year following the transfer. In addition, that court authorised the dismissal of 362 employees and appointed a liquidator to wind up the SA Filiature Lainière de Roubaix group, that being an automatic consequence of its judgment.

11 In September 1996, the French authorities notified the Commission of the restructuring measure which they envisaged adopting in favour of the new company set up by Mr Chapurlat under the name Nouvelle Filature Lainière de Roubaix, the capital of which was FRF 510 000. That aid measure, involving a total sum of FRF 40 000 000, was made up of an equity loan in the sum of FRF 18 000 000 and a grant in the sum of FRF 22 000 000.

12 At the Commission's request, the French Government then provided further information concerning the abovementioned aid measure.

13 By letter of 18 August 1997, the Commission notified the French Government of its decision to initiate the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC). That decision incorporated a detailed description of the facts and a provisional assessment thereof by the Commission by reference to the Guidelines. The Commission also referred to the inadequacy of the information provided with a view to its making a final assessment and, in particular, approving the disputed aid. Against that background, the absence of a restructuring plan complying with Community requirements was a matter to which the Commission specifically drew attention. In conclusion, the Commission formally called on the French authorities to send to it any further information which they considered relevant to appraisal of the disputed aid.

14 The French Republic submitted its observations in a letter dated 24 September 1997 and provided further information by letters of 8 May, 21 July, and 16 and 30 October 1998, which drew attention in particular to the fact that, in 1997, the company Nouvelle Filature Lainière de Roubaix incurred an operating loss of FRF 897 497.

15 The procedure under Article 93(2) of the EC Treaty concluded with the adoption of the contested decision, the operative part of which is worded as follows:

Article 1

The aid in the form of an investment premium granted by France to Nouvelle Filature Lainière de Roubaix amounting to FRF 7.77 million may be considered to be compatible with the common market on the basis of Article 92(3)(c) of the Treaty.

Article 2

The aid in the form of an investment premium granted by France to Nouvelle Filature Lainière de Roubaix amounting to FRF 14.23 million is incompatible with the common market.

Article 3

1. The equity loan of FRF 18 million constitutes aid in so far as the rate applied by France is lower than the reference rate of 8.28% applicable at the time the loan was granted.
2. The aid referred to in paragraph 1 granted by France to Nouvelle Filature Lainière de Roubaix is incompatible with the common market.

Article 4

1. France shall take all necessary measures to recover from the recipient, Nouvelle Filature Lainière de Roubaix, the aid referred to in Article 2 which has already been illegally paid.
2. Repayment shall be made in accordance with the procedures and provisions of French law. The amounts to be repaid shall bear interest from the date on which the aid was paid to the recipient until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.
3. France shall without delay abolish the aid referred to in Article 3 by applying normal market conditions corresponding at least to the reference rate of 8.28% applicable at the time the loan was granted.

Article 5

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply with it.

Article 6

This Decision is addressed to the French Republic.

16 It was in those circumstances that the French Republic brought the present action against the contested decision.

17 At the hearing on 23 November 2000, the agent for the French Republic informed the Court that, in the meantime, Nouvelle Filature Lainière de Roubaix had been wound up by court order.

Substance

18 In support of its action, the French Government relies upon three pleas in law, alleging, first, breach of the obligation to make an order prior to adopting a decision relating to State aid, second, breach of the obligation to state reasons and, third, infringement of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

Breach of the obligation to make a prior order

19 By its first plea, the French Government maintains that, throughout the administrative procedure, it cooperated fully with the Commission, systematically, responding in detail to all requests for information addressed to it and declaring its willingness to produce any further information sought by the Commission. Notwithstanding that attitude on the part of the French authorities, the contested decision was based mainly on the assertion that the French Government did not provide the Commission with a restructuring plan, with the result that the Commission did not have sufficient information to enable it to assess, in full knowledge of the facts, the long-term viability of the company to which the disputed aid was granted. In the French Government's view, even if that had been the case, the Commission should not have adopted a final decision but should have confined itself to adopting interim measures requiring the French authorities to provide it with all the information needed for the assessment in question.

20 By adopting the contested decision, the Commission failed to observe the case-law of the Court (Case C-301/87 *France v Commission* [1990] ECR I-307 the *Boussac Saint Frères* case and Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington v Commission* [1994] ECR I-1173) and departed from a rule by which it had nevertheless acknowledged itself to be bound, in particular in its publication *Competition law in the European Communities, Volume IIB, Explanation of the rules applicable to State aid: Situation in December 1996*, and from its decision-making practice.

21 The Commission maintains, first of all, that the premiss underlying the first plea in law is incorrect. The contested decision is certainly not based on the lack of a restructuring plan since the Commission referred to the lack of a plan only briefly in the preamble to the decision. The Commission states that the analysis contained in part IV.3 thereof shows that the decision was prompted by the absence of the factual circumstances under which, in accordance with the Guidelines, the disputed aid could be authorised and not by the absence, as such, of information relating to that aid.

22 Next, the Commission maintains, in the alternative, that the first plea is based on a legally incorrect interpretation of the procedural rules applicable to the monitoring of State aid.

23 The Commission argues that, according to settled case-law, a Member State wishing to be allowed to grant aid to an undertaking has a duty to provide all the information needed to enable the Commission to verify that the conditions for doing so are fulfilled (Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20). In that regard, in its judgment in *Boussac Saint Frères*, cited above, the Court responded to the Commission's argument that, if aid is unlawful through having been implemented by a Member State in breach of the procedure prescribed by Article 93(3) of the Treaty, the fact that such aid is compatible with the common market under Article 92(3) of the Treaty cannot expunge its unlawfulness and, accordingly, the Commission may order that the aid be recovered. According to the Commission, it was in that context that the Court observed that the Commission is empowered

to adopt conservatory measures in order to maintain the status quo where the effect of practices engaged in by certain Member States is to render nugatory the system established by Articles 92 and 93 of the Treaty. When adopting such measures, the Commission should nevertheless take care to protect the legitimate interests of the Member States. The Commission is thus entitled, but not required, to prescribe such conservatory measures. In the event of the Member State's refusing to provide the Commission with the information requested for the purposes of the decision it intends adopting, the Commission is empowered to terminate the procedure and make its final decision on the basis of the information available to it.

24 According to the Commission, the judgment in *Germany and Pleuger Worthington*, cited above, likewise does not support the interpretation, contended for by the French Government, of the rules governing the procedure for monitoring State aid since, first, in that case, by contrast with this one, the Member State concerned refused to cooperate with the Commission in any way and, second, that judgment related to the very existence of an aid programme and not to the Commission's assessment of the compatibility of the aid with the common market.

25 Finally, the Commission submits that the publication to which the French Government referred does not constitute an official statement of the Commission's position but was written by a lawyer and is certainly not binding on the Commission. Similarly, the contested decision does not conflict in any way with the Commission's decision-making practice in relation to State aid, in that the Commission has sent formal orders only to Member States which have refused to cooperate and to provide the substantive information necessary for it to give a decision as to the existence of aid.

26 It must be held, in that regard, that the first plea in law is based on a misreading of the contested decision.

27 Whilst it is true that the decision states that the French Government did not submit a restructuring plan, that statement forms part of a lengthy discussion specifically concerned with the compatibility of the disputed aid with Article 92(3)(c) of the Treaty. Accordingly, far from expressing the idea that the Commission did not have information needed to enable it to carry out that assessment, it emphasises that the conditions to be met if restructuring is to be approved in accordance with the Guidelines, in particular the very existence of a sound restructuring plan when the aid is granted, were not fulfilled in this case.

28 In those circumstances, it was not appropriate for the Commission, which was in a position to make a definitive assessment as to the compatibility of the disputed aid with the common market on the basis of the information available to it, to require the French Republic, by means of an interim decision, to provide it with further information which might have established the existence of an adequate restructuring plan at the date on which the disputed aid was granted.

29 As the Advocate General observes in points 49 and 50 of his Opinion, that is particularly so in view of the fact that, in its decision to initiate the procedure under Article 93(2) of the Treaty, the Commission specifically drew the attention of the French authorities to the fact that, in the light of the relevant information available to it, the only possible conclusion was that no credible restructuring plan existed.

30 In that connection, the French Government seeks specifically to assure the Court that, during the administrative procedure, it endeavoured to cooperate fully with the Commission and gave systematic and detailed answers to all requests for information made to it by the Commission. However, that argument bears out the fact that the contested decision was not taken by the Commission because of inadequate information, which the French authorities could have supplemented if the Commission had asked them to do so, but that the decision was adopted as a result of non-compliance by those authorities with the conditions laid down by the Guidelines, as is apparent from the information

provided by the French Government in the course of the administrative procedure, taken as a whole.

31 The first plea in law must therefore be rejected as unfounded.

Breach of the obligation to state reasons

32 By its second plea, the French Government maintains that the Commission breached its obligation to state reasons, as laid down in Article 190 of the EC Treaty (now Article 253 EC) by criticising the French authorities on numerous occasions for failing to provide it with the information needed for its assessment of the compatibility of the disputed aid with the common market. By so doing, the Commission sought manifestly to justify the many instances of a total lack, or inadequacy, of reasoning in the contested decision.

33 According to the French Government, the decision is also vitiated by a defective statement of reasons on specific points. That is so, first, where the Commission infers from the high prices charged by the recipient of the aid on the Lycra wool market that that company was among the least competitive in the market. Next, the Commission failed to take account of facts capable of confirming the long-term viability of that company, which were set out in the communication from the French Government of 30 October 1998. Finally, the Commission's decision is not sufficiently precise and detailed regarding the requirement of avoiding undue distortions of competition.

34 The Commission replies that the contested decision satisfies the requirements concerning statements of reasons laid down in the settled case-law of the Court (see, in particular, Case C-367/95 *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

35 In that connection, it must be borne in mind that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The statement of reasons required by Article 190 of the Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (*Commission v Sytraval and Brink's France*, cited above, paragraphs 67 and 63).

36 As the Commission has rightly pointed out, that requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, *Commission v Sytraval and Brink's France*, cited above, paragraph 63).

37 In this case, it is undisputed that the contested decision sets out the reasons for which the disputed aid was not justified under the Guidelines, namely, in essence, the lack of an adequate restructuring plan, the absence of sufficient proof of the long-term viability of the company *Nouvelle Filature Lainière de Roubaix*, and the lack of proportion between the aid and the contributions made by the beneficiaries thereof.

38 It would be inappropriate to examine, in considering fulfilment of the obligation to state reasons, the substantive legality of the reasons relied on by the Commission to justify the contested decision. That examination falls within the scope of the third plea, alleging infringement of Article 92 of the Treaty.

39 In those circumstances, the second plea in law must also be rejected.

Infringement of Article 92 of the Treaty

40 By its third plea in law, the French Government maintains that the Commission committed several manifest errors of assessment in declaring the disputed aid incompatible with the common market on the basis of Article 92(3)(c) of the Treaty. That applies in particular to the parts of the contested decision concerned with restoration of the long-term viability of the company which received the aid, the proportionality of the aid in relation to the costs and benefits of restructuring and the alleged distortions of competition resulting from the grant of such aid. It also misapplied the Guidelines. The French Government adds that the contested decision contains a number of contradictions which undermined the Commission's reasoning and that the statement of the reasons on which it is based is inadequate.

41 The Commission refutes the various criticisms made by the French Government and contends, first, that, in order to be declared compatible with Article 92(3)(c) of the Treaty, aid for undertakings in difficulty must be linked to a restructuring plan designed to reduce or redirect their activities (see Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 67; see also Joined Cases T-126/96 and T-127/96 *BFM and EFIM v Commission* [1998] ECR II-3437, paragraph 99). However, in this case, it was stated in part IV.3, fourth subparagraph, of the contested decision, that the French Government did not submit a credible restructuring plan to the Commission and [n]or has any such plan been submitted to the Commission by the French authorities since the proceedings were initiated.

42 The Commission states that, when promising the disputed aid in the course of the procedure which was to culminate in the judgment of the Tribunal de Commerce, Roubaix, the French authorities had not taken a decision in the context of a restructuring plan, as is clear from the fact that that same aid was also subsequently offered to support a competing restructuring proposal which was also regarded by the Tribunal de Commerce as not incorporating adequate guarantees.

43 According to the Commission, the absence of a restructuring plan conforming with the requirements of the Guidelines is, of itself, such as to justify the contested decision.

44 It must be borne in mind that, in the terms of Article 92(3)(c) of the Treaty, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered to be compatible with the common market.

45 As is clear from the Guidelines, in order to be declared compatible with Article 92(3)(c) of the Treaty, aid to undertakings in difficulty must be bound to a restructuring programme designed to reduce or redirect their activities (see *Commission v Spain*, cited above, paragraph 67). Any such plan, which must be submitted to the Commission with all necessary clarifications, must, in the terms of point 3.2.2(i) of the Guidelines, make it possible to restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions whilst at the same time offset[ting] as far as possible adverse effects on competitors (point 3.2.2(ii)) and ensuring that the aid is in proportion to restructuring costs and benefits (point 3.2.2(iii)). It is incumbent on the undertaking concerned to implement the restructuring plan, as accepted by the Commission, fully (point 3.2.2(iv)) and the implementation and satisfactory progress of the plan must be monitored by the Commission, to which detailed annual reports must be submitted (point 3.2.2(v)).

46 In that connection, it must be pointed out that neither the documents before the Court nor the explanations given at the hearing show conclusively that the French authorities actually possessed, when the disputed aid was granted, a restructuring plan meeting the requirements referred to in

the foregoing paragraph of this judgment which could be presented to the Commission, as the Commission had requested those authorities to do in its decision initiating the procedure under Article 93(2) of the Treaty.

47 In particular, as the Advocate General observes in points 57 and 58 of his Opinion, it is undisputed that the Commission was not supplied with any precise and reliable information concerning the long-term profitability of the recipient of the disputed aid on the basis of a restructuring plan facilitating an assessment of the restoration of the company's long-term viability and the need for such aid. On the contrary, it is clear from the documents before the Court that no figures were given for several headings of the restructuring project referred to by the French authorities and that, in relation to certain other headings, those authorities did not clearly indicate whether the burden of the costs of the project actually had to be borne by that company. As regards the evolution of the company's results, it was not possible, on the basis of the balance-sheet forecasts supplied, to see clearly how the figures given therein could have been achieved.

48 In any event, it is clear from the foregoing considerations that the French Republic has not established that the Commission committed any manifest error of assessment in that respect.

49 In those circumstances, the Commission was right, in the absence of a credible restructuring plan, to refuse to authorise the disputed aid under the Guidelines.

50 Consequently, the third plea must be rejected, it being unnecessary to examine the other charges made by the French Government in support of it.

51 Since none of the three pleas relied on by the French Republic is well founded, the application must be dismissed.

DOCNUM	61999J0017
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; J ; judgment
PUBREF	European Court reports 2001 Page I-02481
DOC	2001/03/22
LODGED	1999/01/25
JURCIT	11992E092-P3LC : N 27 11992E093-P2 : N 29 31994Y1223(02) : N 2 31999D0378 : N 1 - 51 61999C0017 : N 29
SUB	Competition ; State aids

AUTLANG	French
APPLICA	France ; Member States
DEFENDA	Commission ; Institutions
NATIONA	France
NOTES	Idot, Laurence: Europe 2001 Mai Comm. no 183 p.26-27
PROCEDU	Application for annulment - unfounded
ADVGEN	Alber
JUDGRAP	Wathelet
DATES	of document: 22/03/2001 of application: 25/01/1999

**Judgment of the Court (Sixth Chamber)
of 18 June 2002**

Kingdom of Spain v Commission of the European Communities.

**State aid - Plans notified - No decision by the Commission within the two-month time-limit -
Time-limit of 15 working days for initiating the formal investigation procedure - Calculation of the
time-limit - Conditions governing prior notice by the Member State and notification of the
Commission's decision - Service by fax.**

Case C-398/00.

1. State aid - Planned aid - Notification to the Commission - Prior notice under Article 4(6) of Regulation No 659/1999 - Probative value of a fax

(Council Regulation No 659/1999, Art. 4(6))

2. State aid - Planned aid - Notification to the Commission - Guide to procedures in State aid cases - Prior notice under Article 4(6) of Regulation No 659/1999 - Notification to the Directorate-General with responsibility for the matter

(Council Regulation No 659/1999, Art. 4(6))

3. State aid - Examination by the Commission - Prior notice under Article 4(6) of Regulation No 659/1999 - Decision to initiate the formal investigation procedure - Obligation to give notification of the decision within 15 working days following receipt thereof - Methods for calculating the time-limit

(Art. 254(3) EC, Council Regulation No 659/1999, Art. 4(6))

§§1. The probative value of a fax depends both on the degree of formality that the applicable provisions require for the act in question and the conditions governing the use of the fax transmission process, bearing in mind that, as a rule, the binding legal effects of the act are in no way affected by the fact that it is sent by fax. Thus, where the applicable provisions require a particular degree of procedural formality for certain acts, consideration must be given to whether sending such acts by fax is compatible with those provisions.

As regards prior notice under Article 4(6) of Regulation No 659/1999, the provisions applicable to pre-litigation proceedings for examining the compatibility with the Treaty of State aid do not require any particular procedural formality. Unlike the initial step of notifying new aid, receipt of which must, under Article 2 of the Regulation, be acknowledged by the Commission to the Member State in question, prior notice of implementation is not subject to any requirements beyond those relating to the various stages of the pre-litigation procedure before the Commission.

(see paras 21-23)

2. The Commission's Guide to procedures in State aid cases requires only that initial notification of aid from Member States be communicated to the General-Secretariat of the Commission. However, the Guide provides at paragraph 24 that replies to requests for further information from the Directorate-General concerned should be sent directly to that Directorate-General. It follows that the same must be true of prior notice under Article 4(6) of Regulation No 659/1999, which is given in the context of the ongoing exchange of information, needs to reach the department responsible for the file as soon as possible.

(see para. 26)

3. Article 254(3) EC clearly states that decisions...shall be notified to those to whom they are addressed and shall take effect upon such notification. Therefore, a decision whose purpose is to prevent the implementation of planned aid by a Member State cannot take effect before it becomes

enforceable against that Member State, which is on the date of its notification to that State. Article 4(6) of Regulation No 659/1999, therefore, which relates to decisions on prior notice by a State taken by the Commission within a period of 15 working days following receipt of the notice, cannot be interpreted as meaning that the mere adoption of such decisions interrupts that period, irrespective of when they are notified.

(see paras 31-33)

In Case C-398/00,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by G. Rozet and R. Vidal, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 17 August 2000, notified to the Kingdom of Spain by letter SG (2000) D/106322 of 22 August 2000 and published in the Official Journal of the European Communities of 18 November 2000 (OJ 2000 C 328, p. 19), to initiate the formal investigation procedure for assessing the compatibility with the EC Treaty of aid to Santana Motor SA, in respect of all measures therein referred to, other than the guarantee granted in June 1998,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, J-P Puissechet (Rapporteur), and V. Skouris, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs, and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls the Commission's decision of 17 August 2000, notified to the Kingdom of Spain by letter

SG (2000) D/106322 of 22 August 2000, to initiate the formal investigation procedure for assessing the compatibility with the EC Treaty of aid to Santana Motor SA, in respect of all measures therein referred to, other than the guarantee granted in June 1998;

2. Orders the Commission of the European Communities to pay the costs.

1 By application lodged at the Court Registry on 30 October 2000, the Kingdom of Spain brought an action under Article 230 EC for the annulment of the Commission's decision of 17 August 2000, notified to that Member State by letter SG (2000) D/106322 of 22 August 2000 and published in the Official Journal of the European Communities of 18 November 2000 (OJ 2000 C 328, p. 19), to initiate the formal investigation procedure for assessing the compatibility with the EC Treaty of aid to Santana Motor SA (hereinafter the contested decision), in respect of all measures therein referred to, other than the guarantee granted in June 1998.

Legal background

2 Article 88 EC provides as follows:

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

3 Article 89 EC provides as follows:

The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure.

4 Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), which is entitled Preliminary examination of the notification and decisions of the Commission, provides as follows:

1. The Commission shall examine the notification [of the proposed aid] as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

...

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88](2) of the Treaty...

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period

shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information...

6. Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.

5 Articles 17 to 19 of the regulation govern the detailed rules for the review by the Commission of existing aid schemes and provide, inter alia, that where the Member State concerned does not accept the measures proposed by the Commission to render the aid compatible with the common market, the Commission may initiate proceedings pursuant to Article 4(4).

6 Article 25 of the regulation provides as follows:

Decisions taken pursuant to [Regulation No 659/1999] shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay...

7 Article 2(2) of Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits (OJ, English Special Edition 1971 (II) p. 354) which, by virtue, inter alia, of Article 1, applies to acts of the Commission adopted pursuant to the Treaty, provides that for the purposes of this Regulation, "working days" means all days other than public holidays, Sundays and Saturdays. Article 3(1) of that regulation provides that the day during which the event occurs or action takes place that causes time to start running occurs is not to be considered as falling within the period in question.

Facts of the dispute

8 Following several exchanges of correspondence with the Commission concerning the award in June 1998 of a bank guarantee to Santana Motor SA, the Spanish Government informed the Commission in a letter of 1 July 1999 that, pursuant to Article 88(3) EC, it was going to notify the new aid which the Junta de Andalucía intended to award that company.

9 By letters of 30 July and 17 November 1999, both addressed to the Commission's Secretary-General and the Director-General for Competition, the Spanish authorities gave notice of a proposed increase in Santana Motor SA's capital and of various applications for regional aid received from that company in the context of its strategic plan for 1998-2006, and sought the Commission's permission to allow certain of the applications.

10 The Commission was sent supplementary information on those proposals on 4 January 2000. It took the view that notification was still not complete and on 22 March 2000 requested further details, which were dispatched to it on 24 May 2000.

11 By a letter of 28 July 2000, sent the same day by fax, the Spanish Government wrote to the Commission as follows: As two months have now elapsed since the information most recently requested by the Commission was provided (on 24 May 2000), we hereby give you notice that, pursuant to Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty, the Junta of Andalucía intends to implement the measures to support Santana previously notified..., namely the injection of capital and non-recoverable subsidy.

12 On 17 August 2000 the Commission decided to initiate a formal investigation procedure under Article 88(2) EC with regard to the notified aid. The Spanish authorities received notification of that decision on 23 August 2000 by a letter dated 22 August 2000.

The legality of the contested decision

13 The Kingdom of Spain submits that, unlike the bank guarantee awarded in June 1998, none of the aid in question, comprising an increase in capital and the payment of subsidies, has begun to be implemented. When the aid was notified to the Commission in letters dated 30 July and 17 November 1999, it therefore constituted a notified measure within the meaning of Article 4 of Regulation No 659/1999, and was subject to the periods allowed for examination laid down in Article 4(5) and (6). According to the Spanish Government, those periods of two months and 15 working days expired before the contested decision was adopted and the notified measures thus became existing aid. In the circumstances the Commission could not apply to that aid the Article 88(2) EC regime, which only applies to new aid, without erring in law.

14 In order to assess the merits of those arguments it is necessary to consider how the procedural time-limits laid down in Article 4(5) and (6) of Regulation No 659/1999 were applied in this case.

The two-month time-limit

15 It is clear from the documents in the file, and is not contested by the Commission, that the planned aid comprising the increase in capital and the payment of subsidies was validly notified to the Commission pursuant to Article 88(3) EC and was not implemented by the Spanish authorities. At the time of their notification, those measures therefore constituted new aid within the meaning of Article 2 of Regulation No 659/1999, for which the Commission's prior approval was required.

16 The Commission has an initial period of two months in which to investigate such applications for approval; if, at the end of that period, it has not made a decision under Article 4 of Regulation No 659/1999 and does not request any further information from the Member State concerned, the notification is, under Article 4(5) of the regulation, considered... complete. When that period expires, and subject to the same reservations, the Member State may implement its plans.

17 It is apparent from the account of the facts that the Spanish Government sent the Commission supplementary information on the same measures on 24 May 2000, and that the Commission did not ask for any further details after that time. Its silence during the two-month period following receipt of that information meant that notification of the aid had to be considered complete as from 25 July 2000, and that it was then open to the Spanish authorities to implement their plans, subject to giving the Commission prior notice.

18 The Commission does not challenge that finding but claims that the contested decision was taken during the period of 15 working days laid down by Article 4(6) of Regulation No 659/1999, thus precluding immediate implementation of the notified measures.

The 15-working-days time-limit

19 The Spanish Government submits that the period of the time-limit started running on 31 July 2000, being the first working day following the receipt, on 28 July 2000, by the Commission of a fax notifying it pursuant to Article 4(6) of Regulation No 659/1999 that the Spanish authorities were going to implement the notified measures.

20 The Commission, on the other hand, contends that the period only began to run on 1 August 2000. It claims that the letter of 28 July 2000 can only be deemed to have properly reached it on 31 July 2000. The fact that it was sent by fax on 28 July 2000 cannot be taken into account, first of all because it was not addressed to the Commission's General-Secretariat, as the Community State aid regime requires in the car sector, but to the Commission's Competition Directorate-General. Secondly, and in any event, a fax accompanied simply by a transmission report indicating the number of pages received and the recipient's number cannot serve to establish the contents of the document received. That is why the Court of Justice has held that applications may not be filed by fax.

Similar reasons of legal certainty preclude basing the calculation of time-limits on fax transmissions. In addition, receipt of the fax of 28 July 2000 could not be acknowledged because it was sent at 17.49 on a Friday, which is after the official working hours of the Commission's staff.

21 In that regard it must be emphasised that the probative value of a fax depends both on the degree of formality that the applicable provisions require for the act in question and the conditions governing the use of the fax transmission process, bearing in mind that, as a rule, the binding legal effects of the act are in no way affected by the fact that it is sent by fax (see, to that effect, Case C-170/89 BEUC v Commission [1991] ECR I-5709, paragraphs 9 to 11).

22 Where the applicable provisions require a particular degree of procedural formality for certain acts, consideration must be given to whether sending such acts by fax is compatible with those provisions.

23 As regards prior notice under Article 4(6) of Regulation No 659/1999, the provisions applicable to pre-litigation proceedings for examining the compatibility with the Treaty of State aid do not require any particular procedural formality. Unlike the initial step of notifying new aid, receipt of which must, under Article 2 of the Regulation, be acknowledged by the Commission to the Member State in question, prior notice of implementation is not subject to any requirements beyond those relating to the various stages of the pre-litigation procedure before the Commission. In a footnote to Annex I to its Guide to procedures in State Aid Cases, the Commission has expressly accepted that time-limits for the various kinds of action are started by the receipt of correspondence... or dispatch if the correspondence is faxed. Indeed the Court has held in an action for failure to act that a faxed request to the Commission to act was inadmissible not because it was sent by fax, but because the content of the document was inadequate (order of 18 November 1999 in Case C-249/99 P Pescados Congelados Jogamar v Commission [1999] ECR I-8333). Consequently the Commission cannot validly argue that the letter of 28 July 2000 cannot be taken into account on the sole ground that it was received by fax.

24 It is therefore necessary to determine whether the conditions under which that method of transmission was used in this case could have affected the Commission's knowledge of the content of the document or the date on which it was received.

25 The documents in the file do not suggest that that was the case. The Commission does not contend that the Kingdom of Spain's prior notice reached it on a later date by post. It merely states that, in the absence of its staff, receipt of the fax could not be recorded at 17.49 on Friday 28 July 2000, and it was not in fact possible to record it until Monday 31 July 2000. It is therefore common ground, first, that the document registered on 31 July 2000 was indeed the same as that received on 28 July 2000 and, second, that the Commission did receive the Spanish authorities' notice on 28 July 2000. The fact that the Commission's officials were unavailable when the fax was received cannot in the circumstances of this case cause the date of receipt or the content of the document transmitted to be called into question.

26 The argument that the Spanish Government's notice should have been sent to the Commission's General-Secretariat cannot affect the point at which the period of 15 working days starts to run. The Guide to procedures in State Aid Cases requires only that initial notification of aid from Member States be communicated to the General-Secretariat of the Commission, for internal coordination purposes. Where the Directorate-General of the Commission with responsibility for the matter has clearly been appointed by the General-Secretariat, the Guide provides at paragraph 24 that replies to requests for further information from the Directorate-General concerned should be sent directly to that Directorate-General. The same must be true of prior notice under Article 4(6) of Regulation No 659/1999, which is given in the context of the ongoing exchange of information, and, again in the interests of swift administrative processing, needs to reach the department responsible for the file as soon as possible.

27 It follows from all of the foregoing that it was on 28 July 2000, when the Commission received prior notice from the Spanish authorities, that the 15-working-days period was set in motion. Thus, under Articles 2 and 3 of Regulation No 1182/71 and Article 4(6) of Regulation No 659/1999, time started to run on 31 July 2000, the first working day following such receipt. The period therefore ended on 21 August 2000.

28 As regards, secondly, the matter of interruption of the 15-working-days period, which depends on the circumstances in which the contested decision was adopted, the Kingdom of Spain argues that the decision which the Commission claims was taken on 17 August 2000 was not notified to the Spanish authorities until 23 August, that is, after the end of that period. The material date can only be that on which the Commission's decision takes effect as against the Member State concerned, that is to say the date on which it is notified to that Member State, pursuant to Article 254(3) EC.

29 The Commission, on the other hand, submits that the relevant date is that when the decision to initiate the formal investigation procedure is taken, not when the decision is notified to the Member State concerned. Article 4(6) of Regulation No 659/1999 governs the decision which the Commission takes... within a period of 15 working days following receipt of the notice. In this case the Commission submits that the contested decision was adopted on 17 August 2000 in accordance with the written procedure laid down in Article 12 of the Commission's rules of procedure and that it was served without delay as required by Article 25 of Regulation No 659/1999. The contested decision therefore interrupted the period on 17 August 2000, and the Commission could then, without committing an error of law, initiate the formal investigation procedure into the notified aid.

30 It must be observed in that connection that the members of the Commission were effectively called upon to give a decision on 17 August 2000, under the accelerated written procedure, in receipt of the Directorate-General for Competition's proposal that the formal investigation procedure into the aid in question be initiated. Since no reservations were expressed in respect of that proposal, it was adopted on that date in accordance with Article 12 of the Commission's rules of procedure. The act was formally authenticated by signature of the Secretary-General the same day, and therefore became a decision of the Commission within the meaning of Article 249 EC. Consequently the letter addressed to the Kingdom of Spain of 22 August 2000, which set out the entire content of the proposal thus adopted and became the contested decision, must therefore be deemed to have notified the addressee of the decision of 17 August 2000 even though it makes no mention of a decision of that date.

31 However, contrary to the Commission's contentions, the adoption of the contested decision on that day could not have the effect of interrupting the 15-working-days time-limit. Article 254(3) EC clearly states that decisions...shall be notified to those to whom they are addressed and shall take effect upon such notification.

32 In this case, a decision whose purpose is to prevent the implementation of planned aid by a Member State cannot take effect, and thus interrupt the 15-working-days time-limit, before it becomes enforceable against that Member State, which is on the date of its notification.

33 Article 4(6) of Regulation No 659/1999, which relates to decisions taken by the Commission within a period of 15 working days following receipt of the notice, cannot therefore be interpreted as meaning that the mere adoption of such decisions interrupts that period, irrespective of when they are notified. That is borne out by Article 25 of the Regulation, which provides that decisions taken by the Commission under the Regulation are to be taken without delay, and by the reference, in recital 21 in the preamble to the Regulation, to the principle that decisions in State aid cases are addressed to the Member State concerned in the interests of transparency and legal certainty. That is the reason why failure to notify alone can in certain circumstances justify the annulment

of an act of a Community institution (see, to that effect, Case C-227/92 P Hoechst v Commission [1999] ECR I-4443, paragraph 68).

34 It follows from the foregoing that the contested decision taken on 17 August 2000 but not notified to the Spanish authorities until 23 August 2000 was adopted after the period of 15 working days referred to in Article 4(6) of Regulation No 659/1999. As from 21 August 2000, the date on which that period expired, the notified aid therefore became existing aid. The Commission was accordingly not entitled to found the contested decision on Article 88(3) EC, which applies only to new aid, and thus prevent implementation of the planned aid to Santana Motor SA (see, to that effect, Case C-99/98 Austria v Commission [2001] ECR I-1101, paragraphs 68 to 78 and, for facts that arose after the entry into force of Regulation No 659/99, Case C-400/99 Italy v Commission [2001] ECR I-7303, paragraph 48).

35 The contested decision is accordingly vitiated by an error of law and must on that ground alone be annulled.

36 In those circumstances there is no need to consider the Kingdom of Spain's alternative plea of faulty reasoning.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2000 ; J ; judgment
PUBREF	European Court reports 2002 Page I-05643
DOC	2002/06/18
LODGED	2000/10/30
JURCIT	31971R1182-A02 : N 27 31971R1182-A03 : N 27 61989J0170 : N 21 61989J0170 : N 21 61992J0227 : N 33 11997E088-P3 : N 15 34 11997E249 : N 30 11997E254-P3 : N 31 61998J0099 : N 34 31999R0659-A02 : N 15 31999R0659-A04 : N 16 31999R0659-A04P5 : N 14 16 31999R0659-A04P6 : N 14 31999R0659-A04P6 : N 18 21 - 23 26 - 27 33 - 34

31999R0659-A25 : N 33
61999J0400 : N 34
61999O0249 : N 23
32000Q3614-A12 : N 30

CONCERNS Declares void C2000/328/04

SUB Competition ; State aids

AUTLANG Spanish

APPLICA Spain ; Member States

DEFENDA Commission ; Institutions

NATIONA Spain

NOTES Joris, Tony: Tijdschrift voor bestuurswetenschappen en publiekrecht 2003
p.480-488

PROCEDU Application for annulment - successful

ADVGEN Alber

JUDGRAP Puissochet

DATES of document: 18/06/2002
of application: 30/10/2000

**Judgment of the Court
of 24 July 2003**

Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht.

Reference for a preliminary ruling: Bundesverwaltungsgericht - Germany.

Regulation (EEC) No 1191/69 - Operation of urban, suburban and regional scheduled transport services - Public subsidies - Concept of State aid - Compensation for discharging public service obligations.

Case C-280/00.

In Case C-280/00,

REFERENCE to the Court under Article 234 EC by the Bundesverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

[Altmark Trans GmbH](#), Regierungspräsidium Magdeburg

and

Nahverkehrsgesellschaft [Altmark GmbH](#),

third party:

Oberbundesanwalt beim Bundesverwaltungsgericht,

on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC), Article 77 of the EC Treaty (now Article 73 EC), and Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissechet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Head of Division, and subsequently H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- [Altmark Trans GmbH](#), by M. Ronellenfitsch, Rechtsanwalt,
- Regierungspräsidium Magdeburg, by L.-H. Rode, acting as Agent,
- Nahverkehrsgesellschaft [Altmark GmbH](#), by C. Heinze, Rechtsanwalt,
- the Commission of the European Communities, by M. Wolfcarius and D. Triantafyllou, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of [Altmark Trans GmbH](#), represented by M. Ronellenfitsch; Regierungspräsidium Magdeburg, represented by L.-H. Rode; Nahverkehrsgesellschaft [Altmark GmbH](#), represented by C. Heinze; and the Commission, represented by M. Wolfcarius and D. Triantafyllou, at the hearing on 6 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2002,

having regard to the order reopening the oral procedure of 18 June 2002,

after hearing the oral observations of [Altmark](#) Trans GmbH, represented by M. Ronellenfitsch; Regierungspräsidium Magdeburg, represented by S. Karnop, acting as Agent; Nahverkehrsgesellschaft [Altmark](#) GmbH, represented by C. Heinze; the German Government, represented by M. Lumma, acting as Agent; the Danish Government, represented by J. Molde, acting as Agent; the Spanish Government, represented by R. Silva de Lapuerta, acting as Agent; the French Government, represented by F. Million, acting as Agent; the Netherlands Government, represented by N.A.J. Bel, acting as Agent; the United Kingdom Government, represented by J.E. Collins, acting as Agent, and E. Sharpston QC; and the Commission, represented by D. Triantafyllou, at the hearing on 15 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2003,

gives the following

Judgment

Costs

110 The costs incurred by the German, Danish, Spanish, French, Netherlands and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Bundesverwaltungsgericht by order of 6 April 2000, hereby rules:

1. Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991, and more particularly the second subparagraph of Article 1(1) thereof, must be interpreted as allowing a Member State not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible, provided however that the principle of legal certainty is duly observed.

2. The condition for the application of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) that the aid must be such as to affect trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

3. Article 77 of the EC Treaty (now Article 73 EC) cannot be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation No 1191/69, as amended by Regulation No 1893/91.

1 By order of 6 April 2000, received at the Court on 14 July 2000, the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC), Article 77 of the EC Treaty (now Article 73 EC), and Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1).

2 The question arose in proceedings between [Altmark Trans GmbH](#) ('Altmark Trans') and [Nahverkehrsgesellschaft Altmark GmbH](#) ('Nahverkehrsgesellschaft') concerning the grant to the former by [Regierungspräsidium Magdeburg](#) (Magdeburg Regional Government, 'the Regierungspräsidium') of licences for scheduled bus transport services in the Landkreis of Stendal (Germany) and public subsidies for operating those services.

Legal context

Community law

3 Article 92(1) of the EC Treaty provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

4 Article 74 of the EC Treaty (now Article 70 EC), which appears in Title IV of Part Three, on transport, provides that the objectives of the Treaty are, in matters governed by that Title, to be pursued by the Member States within the framework of a common transport policy.

5 Article 77 of the EC Treaty, which appears in the said Title IV, provides that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

6 Regulation No 1191/69 is divided into six sections, the first of which contains general provisions (Articles 1 and 2), the second concerns common principles for the termination or maintenance of public service obligations (Articles 3 to 8), the third deals with the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of persons (Article 9), the fourth concerns common compensation procedures (Articles 10 to 13), the fifth concerns public service contracts (Article 14), and the sixth contains final provisions

(Articles 15 to 20).

7 Article 1 of the regulation provides:

1. This Regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway.

Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

2. For the purposes of this Regulation:

- "urban and suburban services" means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas,

- "regional services" means transport services operated to meet the transport needs of a region.

3. The competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

4. In order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking. The conditions and details of operation of such contracts are laid down in Section V.

5. However, the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV.

...

6. Furthermore, the competent authorities of a Member State may decide not to apply paragraphs 3 and 4 in the field of passenger transport to the transport rates and conditions imposed in the interests of one or more particular categories of person.'

8 Article 6(2) of Regulation No 1191/69 reads as follows:

'Decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation shall be determined in accordance with the common procedures laid down in Articles 10 to 13.'

9 Article 9(1) of that regulation provides:

'The amount of compensation in respect of financial burdens devolving upon undertakings by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person shall be determined in accordance with the common procedures laid down in Articles 11 to 13.'

10 Article 17(2) of the regulation provides:

'Compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community.

Member States shall promptly forward to the Commission details, classified by category of obligation, of compensation payments made in respect of financial burdens devolving upon transport undertakings

by reason of the maintenance of the public service obligations set out in Article 2 or by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person.'

National legislation

11 The Verordnung zur Festlegung des Anwendungsbereiches der Verordnung (EWG) Nr. 1191/69 in der Fassung der Verordnung (EWG) Nr. 1893/91 im Straßenpersonenverkehr (Regulation determining the scope of Regulation (EEC) No 1191/69 as amended by Regulation (EEC) No 1893/91 in passenger transport by road) of the Federal Minister for Transport of 31 July 1992 (BGBl. 1992 I, p. 1442), in the version as amended on 29 November 1994 (BGBl. 1994 I, p. 3630), excludes in general until 31 December 1995 the application of Regulation No 1191/69 to undertakings whose activity is confined exclusively to the operation of urban, suburban or regional services.

12 The provisions of Paragraph 2(1) in conjunction with Paragraph 1(1) of the Personenbeförderungsgesetz (Law on passenger transport, 'the PBefG') provide that the transport of passengers by road vehicles on scheduled services is subject in Germany to the grant of a licence. That licence requires the operator to charge only the fares authorised by the authority which issues the licence, to comply with the timetable which has been approved, and to observe his statutory obligations in respect of operation and transport.

13 Until 31 December 1995 the conditions for the grant of a licence for a scheduled bus transport service were determined solely by Paragraph 13 of the PBefG. That provision imposes conditions inter alia as to the financial solvency and the reliability of the transport undertaking and states that an application for a licence is to be refused if the service in question would affect the public interest in transport. If several undertakings wish to provide the same transport services, the authorities must, under Paragraph 13(3), take reasonable account of the circumstance that those services have been operated properly for many years by one of those undertakings.

14 By Paragraph 6(116) of the Eisenbahnneuordnungsgesetz (Law on reorganisation of the railways) of 27 December 1993 (BGBl. 1993 I, p. 2378), the German legislature introduced with effect from 1 January 1996 a distinction between transport operated on a commercial basis and transport operated in the public interest for the purpose of granting licences for urban, suburban and regional scheduled public transport services.

15 The first sentence of Paragraph 8(4) of the PBefG lays down the principle that urban, suburban and regional public transport services must be provided commercially.

16 The second sentence of that subparagraph defines commercially operated transport services as those whose costs are covered by operating receipts, income under statutory rules on compensation and reimbursement in connection with fares and timetables, and other income of the undertaking as defined in commercial law. The conditions for granting licences for commercially operated services are defined in Paragraph 13 of the PBefG, as stated in paragraph 13 above.

17 The third sentence of Paragraph 8(4) of the PBefG provides that Regulation No 1191/69 in the version in force from time to time must be referred to where an adequate transport service cannot be provided commercially. The conditions for granting licences for transport services provided in the public interest under that regulation are defined in Paragraph 13a of the PBefG.

18 According to that provision, a licence must be granted where this is necessary for the implementation of a transport service on the basis of an act of the authorities or a contract within the meaning of Regulation No 1191/69 and is the solution which entails the least cost to the community.

The main proceedings

19 The main proceedings concern the grant by the Regierungspräsidium to [Altmark](#) Trans of licences

for scheduled bus transport services in the Landkreis of Stendal.

20 Licences had originally been granted to [Altmark](#) Trans for the period from 25 September 1990 to 19 September 1994. By decision of 27 October 1994, it was granted new licences to run to 31 October 1996.

21 According to the order for reference, the Regierungspräsidium at the same time rejected the applications by Nahverkehrsgesellschaft for licences to operate those services. As grounds for its decision, the Regierungspräsidium stated that [Altmark](#) Trans satisfied the conditions for grant of a licence in points 1 and 2 of Paragraph 13(1) of the PBefG. As a long-standing operator, [Altmark](#) Trans enjoyed the protection of acquired status under Paragraph 13(3). That protection implies that the operation of a scheduled transport service by the existing operator may constitute a better offer of transport than an offer from a new applicant. In fact, there was no such new offer. With a shortfall of DEM 0.58 per timetabled kilometre, [Altmark](#) Trans required the lowest additional financing from the public authorities.

22 Following a complaint by [Altmark](#) Trans, the Regierungspräsidium extended the licences to 31 October 2002, by decision of 30 July 1996.

23 Nahverkehrsgesellschaft brought a complaint against the decision of 27 October 1994, submitting that [Altmark](#) Trans did not satisfy the requirements of Paragraph 13 of the PBefG. It was not an economically viable undertaking, since it was unable to survive without public subsidies. The licences granted to it were therefore unlawful. It was also not correct that [Altmark](#) Trans needed the least subsidy. By decision of 29 June 1995, the Regierungspräsidium rejected the complaint.

24 Nahverkehrsgesellschaft brought proceedings against the decisions of 27 October 1994 and 30 July 1996 before the Verwaltungsgericht Magdeburg (Administrative Court, Magdeburg) (Germany), which dismissed the action.

25 On appeal, the Oberverwaltungsgericht Sachsen-Anhalt (Higher Administrative Court of Saxony-Anhalt) (Germany) allowed Nahverkehrsgesellschaft's application and therefore set aside the issue of licences to [Altmark](#) Trans. It considered in particular that at the time when the decision of 30 July 1996 was taken the financial solvency of [Altmark](#) Trans was no longer guaranteed, as it needed subsidies from the Landkreis of Stendal for operating the services licensed. It further held that those subsidies were not compatible with Community law on State aid, in particular Regulation No 1191/69.

26 On this point, the Oberverwaltungsgericht observed that the Federal Republic of Germany had made use of the possibility allowed by Regulation No 1191/69 of excluding undertakings whose activities are confined exclusively to the operation of urban, suburban or regional transport services from the scope of the regulation only up to 31 December 1995. It therefore held that after that date the public subsidies in question were authorised only if the conditions laid down by that regulation were satisfied. Among those conditions was the need to impose public service obligations either by contract or by an act of the competent authorities. Since the Landkreis of Stendal had neither concluded a contract with [Altmark](#) Trans nor adopted an administrative act in accordance with the provisions of the regulation, the Oberverwaltungsgericht considered that, from 1 January 1996, the Landkreis had no longer been authorised to subsidise [Altmark](#) Trans to operate the services covered by the licences granted.

27 [Altmark](#) Trans appealed on a point of law (Revision) to the Bundesverwaltungsgericht against the decision of the Oberverwaltungsgericht. The Bundesverwaltungsgericht considers that the provisions of Paragraph 8(4) of the PBefG raise the question whether the operation of urban, suburban or regional scheduled transport services which cannot be operated profitably on the basis of operating income and therefore necessarily depend on public subsidies may, in national law, be regarded as commercial, or whether it must be regarded as operation in the public interest.

28 In this respect, the Bundesverwaltungsgericht considers that the public subsidies in question may be covered by the expression 'other income of the undertaking as defined in commercial law' in the second sentence of Paragraph 8(4) of the PBefG. Having recourse to the normal methods of interpreting national law, it reaches the conclusion that the fact that public subsidies are necessary does not exclude the possibility that the transport services are provided commercially.

29 However, that court expresses doubt as to whether Articles 77 and 92 of the Treaty and Regulation No 1191/69 necessarily lead to the interpretation of the second sentence of Paragraph 8(4) of the PBefG consistent with Community law followed by the Oberverwaltungsgericht. In view of the complexity of the system of prohibitions, exceptions and exceptions to the exceptions, it considers that the point needs to be clarified by the Court.

The question referred for a preliminary ruling

30 Since it considered that, in the case before it, the extent of the Community rules was uncertain and that a preliminary ruling was needed for it to give judgment in the main proceedings, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Do Articles [77 and 92 of the EC Treaty], read in conjunction with Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, preclude the application of a national provision which permits licences for scheduled services in local public transport to be granted in respect of services which are necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation?'

31 The Bundesverwaltungsgericht specified that the question was to be understood as comprising the following three parts:

'(1) Are subsidies to compensate for deficits in local public transport subject at all to the prohibition on aid contained in Article [92(1) of the EC Treaty] or are they incapable from the outset of affecting trade between Member States on account of their regional significance? Does this possibly depend on the specific location and significance of the relevant local transport area?

(2) Does Article [77 of the EC Treaty] generally enable the national legislature to permit public subsidies to compensate for deficits in local public transport without regard being had to Regulation (EEC) No 1191/69?

(3) Does Regulation (EEC) No 1191/69 enable the national legislature to permit the operation of a scheduled service in local public transport which is necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation, and to require application of those provisions only where adequate transport provision is otherwise impossible? Does the ability of the national legislature to do so derive in particular from the fact that under the second subparagraph of Article 1(1) of Regulation (EEC) No 1191/69, as amended in 1991, it has the right to exclude local public transport undertakings completely from the scope of the regulation?'

Preliminary observations

32 In the main proceedings, the grant of licences to [Altmark](#) Trans is challenged only to the extent that that company needed public subsidies to discharge the public service obligations deriving from those licences. The dispute thus relates essentially to the question whether the public subsidies thus received by [Altmark](#) Trans were lawfully granted.

33 Having found that the payment of subsidies to [Altmark](#) Trans for the commercial operation of the licences at issue in the main proceedings was not contrary to national law, the Bundesverwaltungsgericht considers the compatibility of those subsidies with Community law.

34 The main provisions of the Treaty governing public subsidies are those on State aid, namely Article 92 et seq. of the EC Treaty. Article 77 of the EC Treaty creates an exception in the field of transport to the general rules applicable to State aid, by providing that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

35 Regulation No 1191/69 was adopted by the Council on the basis of Articles 75 of the EC Treaty (now, after amendment, Article 71 EC) and 94 of the EC Treaty (now Article 89 EC), that is, on the basis both of the Treaty provisions relating to the common transport policy and of those relating to State aid.

36 Regulation No 1191/69 establishes a system of Community rules applicable to public service obligations in the field of transport. However, under the second subparagraph of Article 1(1) of the regulation, Member States may exclude from its scope any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

37 In those circumstances, the first point to examine is whether Regulation No 1191/69 is applicable to the transport services at issue in the main proceedings. Only if that is not the case will the application of the general provisions of the Treaty on State aid to the subsidies at issue in the main proceedings have to be considered. The third part of the national court's question should therefore be answered first.

The third part of the question referred for a preliminary ruling

38 By the third part of the question referred for a preliminary ruling, the national court essentially asks whether Regulation No 1191/69, and more particularly the second subparagraph of Article 1(1) thereof, may be interpreted as allowing a Member State not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible.

Observations submitted to the Court

39 [Altmark Trans](#), the *Regierungspräsidium* and *Nahverkehrsgesellschaft* submit that it cannot be deduced from Regulation No 1191/69 that public subsidies for transport undertakings are consistent with Community law only if public service obligations within the meaning of that regulation have been imposed or a public service contract has been concluded in accordance with that regulation.

40 They observe in particular that the German legislature has drawn a distinction between transport services operated commercially and those operated in the public interest. By virtue of Paragraph 8(4) of the *PBefG*, Regulation No 1191/69 applies only to transport services operated in the public interest. Transport services operated on a commercial basis do not therefore fall within the scope of the regulation.

41 Although since 1 January 1996 the German legislature no longer makes general use of the power to derogate provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69, it has indirectly made an exception to the application of that regulation for the benefit of urban, suburban and regional transport services which are provided commercially. Since that regulation authorises a general derogation, it was also open to the legislature to provide for a partial derogation. The principle that 'he who can do more, can do less' applies in this case.

42 The Commission submits that, where urban, suburban and regional transport services have not been excluded from the scope of Regulation No 1191/69 under the second subparagraph of Article 1(1), the national legislature must regulate the operation of a scheduled service either by imposing public service obligations, in accordance with Sections II to IV of the regulation, or by means

of contracts providing for those obligations and complying with the provisions of Section V of the regulation.

Findings of the Court

43 To answer this part of the question, it must first be determined whether Regulation No 1191/69 imposes binding rules which the Member States must comply with when they consider imposing public service obligations in the land transport sector.

44 It is clear both from the preamble and from the body of that regulation that it does indeed impose binding rules on the Member States.

45 According to the first recital in the preamble to Regulation No 1191/69, one of the objectives of the common transport policy is to eliminate disparities resulting from obligations inherent in the concept of a public service imposed on transport undertakings by Member States which are liable to cause substantial distortion to conditions of competition. The second recital states that it is therefore necessary to terminate the public service obligations defined in the regulation, although in certain cases it may be essential to maintain them in order to ensure the provision of adequate transport services.

46 Article 1(3) of Regulation No 1191/69 states that the competent authorities of the Member States are to terminate all obligations inherent in the concept of a public service, as defined in the regulation, imposed on transport by rail, road and inland waterway. Under Article 1(4), in order to ensure adequate transport services, taking into account in particular social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, those authorities may conclude public service contracts with a transport undertaking, in accordance with the conditions and details of operation laid down in Section V of the regulation. Article 1(5) then states, however, that the authorities may maintain or impose public service obligations for urban, suburban and regional passenger transport services, in accordance with the conditions and details of operation, including methods of compensation, laid down in Sections II to IV of the regulation.

47 Consequently, in so far as the licences at issue in the main proceedings impose public service obligations and are accompanied by subsidies to help finance the performance of those obligations, the grant of those licences and subsidies was subject in principle to the provisions of Regulation No 1191/69.

48 However, the second subparagraph of Article 1(1) of the regulation authorises Member States to exclude from the scope of the regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional transport services.

49 Originally, until 31 December 1995, the Federal Republic of Germany made use of the derogation in the second subparagraph of Article 1(1) of Regulation No 1191/69 by expressly excluding in national legislation the application of that regulation to urban, suburban and regional transport undertakings.

50 Since 1 January 1996, the German legislation no longer expressly provides for such a derogation. On the contrary, the regulation was declared applicable to the grant of licenses for bus transport in Germany operated in the public interest by the third sentence of Paragraph 8(4) and Paragraph 13a of the PBefG. However, the German legislation does not expressly determine whether the regulation also applies to the grant of licences for bus transport operated commercially.

51 It must be examined whether the fact that Regulation No 1191/69 does not apply to commercially operated services - assuming that to be the case - is contrary to that regulation.

52 [Altmark](#) Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that, since the second

subparagraph of Article 1(1) of Regulation No 1191/69 allows the application of that regulation to be excluded for an entire category of transport services, that provision must a fortiori allow a limited part of those services to be excluded from the application of the regulation.

53 It is to be remembered that, as explained in paragraphs 44 to 47 above, Regulation No 1191/69 establishes a system which the Member States must comply with when they consider imposing public service obligations on undertakings in the land transport sector.

54 However, Member States may, with respect to undertakings which operate urban, suburban or regional services, introduce a derogation from the provisions of Regulation No 1191/69, under the second paragraph of Article 1(1) of the regulation. The German legislature made general use of this derogation until 31 December 1995.

55 In those circumstances, it must be concluded that the amendment to the PBefG which took effect on 1 January 1996 contributes to the implementation of the objectives pursued by Regulation No 1191/69.

56 By that amendment, the German legislature introduced a distinction, as regards the grant of licences for passenger transport by bus, between commercial operation and operation in the public interest. By virtue of Paragraph 13a of the PBefG, Regulation No 1191/69 became applicable to the grant of licences for operation in the public interest. That amendment to the PBefG thus cut down the scope of the derogation provided for in the second subparagraph of Article 1(1) of the regulation. The German legislation thus came closer to the objectives pursued by that regulation.

57 It follows from those considerations that a Member State may legitimately, on the basis of the power to derogate provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69, not only exclude urban, suburban or regional scheduled services completely from the scope of that regulation, but may also apply that derogation in a more limited way. In other words, that provision in principle allows the German legislature to provide that, for transport services provided on a commercial basis, public service obligations may be imposed and subsidies granted without complying with the conditions and details of operation laid down in that regulation.

58 The national legislation must, however, clearly delimit the use made of that option of derogation, so as to make it possible to determine the situations in which the derogation applies and those in which Regulation No 1191/69 applies.

59 As the Court has consistently held, it is particularly important, in order to satisfy the requirement of legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7; Case C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 18; and Case C-236/95 *Commission v Greece* [1996] ECR I-4459, paragraph 13).

60 The order for reference contains a number of points which suggest that those requirements of clarity may not have been complied with in the present case.

61 Thus according to the order for reference, first, the commercial system of operation may apply also to undertakings which need public subsidies to operate licensed transport services. The national court stated, second, that 'this right to choose, which was conferred on the operator by the legislature, [is] removed in practice in the case of scheduled services in local public transport which are largely in deficit, the need for public subsidies automatically resulting in such services being classified as in the public interest'.

62 It appears to follow from the above that licences for transport services which need public subsidies

for their operation may be subject to either the commercial or the public interest rules. If that were indeed the case, the provisions of the national legislation concerned would not determine clearly and precisely the situations in which such licences fall within one or other category. In so far as Regulation No 1191/69 does not apply to commercial operations, any uncertainty as to the dividing line between that and operations in the public interest would extend also to the scope of that regulation in Germany.

63 It is for the national court to ascertain whether the application by the German legislature of the derogation provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69 satisfies the requirements of clarity and precision needed to comply with the principle of legal certainty.

64 The answer to the third part of the question referred for a preliminary ruling must therefore be that Regulation No 1191/69, and more particularly the second subparagraph of Article 1(1) thereof, must be interpreted as allowing a Member State not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible, provided however that the principle of legal certainty is duly observed.

65 It must further be stated that, should the national court decide that the principle of legal certainty was not complied with in the main proceedings, it will have to consider that Regulation No 1191/69 is fully applicable in Germany, and thus applies also to commercial operations. In that event, it will have to be ascertained whether the licences at issue in the main proceedings were granted in conformity with that regulation and, if so, whether the subsidies at issue in the main proceedings were granted in conformity with it. Where those licences and subsidies do not satisfy the conditions laid down by the regulation, the national court will have to conclude that they are not compatible with Community law, without it being necessary to consider them from the point of view of the provisions of the Treaty.

66 Consequently, it is only to the extent that the national court concludes that Regulation No 1191/69 does not apply to commercial operations and that the use made by the German legislature of the option to derogate provided for by that regulation complies with the principle of legal certainty that it will have to consider whether the subsidies at issue in the main proceedings were granted in conformity with the provisions of the Treaty relating to State aid.

The first part of the question referred for a preliminary ruling

67 By the first part of the question referred for a preliminary ruling, the national court essentially asks whether subsidies intended to compensate for the deficit in operating an urban, suburban or regional public transport service come under Article 92(1) of the Treaty in all circumstances, or whether, having regard to the local or regional character of the transport services provided and, if appropriate, to the significance of the field of activity concerned, such subsidies are not liable to affect trade between Member States.

Observations submitted to the Court

68 [Altmark](#) Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that the subsidies at issue in the main proceedings have no effect on trade between Member States within the meaning of Article 92(1) of the Treaty, since they concern local services only and, in any event, the amount is so small that they have no perceptible effect on such trade.

69 The Commission, by contrast, submits that since 1995 eight Member States have voluntarily opened certain urban, suburban or regional transport markets to competition from undertakings from other Member States and that there are a number of examples of transport undertakings from one Member

State pursuing activities in another Member State. That opening up of the market in certain Member States shows that intra-Community trade is not only a possibility but already a reality.

70 It should be recalled that the Court decided, by order of 18 June 2002, to reopen the oral procedure in the present case to give the parties to the main proceedings, the Member States, the Commission and the Council an opportunity to submit observations on the possible consequences of the judgment of 22 November 2001 in Case C-53/00 Ferring [2001] ECR I-9067 as regards the answer to be given to the national court's question in the present case.

71 At the second hearing, on 15 October 2002, [Altmark](#) Trans, the Regierungspräsidium and Nahverkehrsgesellschaft and the German and Spanish Governments proposed essentially that the Court should confirm the principles it stated in the Ferring judgment. They therefore consider that State financing of public services constitutes aid within the meaning of Article 92(1) of the Treaty only if the advantages conferred by the public authorities exceed the cost incurred in discharging the public service obligations.

72 On this point, they submit principally that the concept of aid in Article 92(1) of the Treaty applies only to measures which provide a financial advantage for one or more undertakings. A State subsidy which does no more than offset the cost of discharging public service obligations which have been imposed does not confer any real advantage on the recipient undertaking. Moreover, in such a case competition is not distorted, since any undertaking can benefit from the public subsidy if it provides the public transport services imposed by the State.

73 At the second hearing, the Danish, French, Netherlands and United Kingdom Governments submitted essentially that the Court should adopt the approach of Advocate General Jacobs in his Opinion of 30 April 2002 in Case C-126/01 GEMO pending before the Court. Under that approach, a distinction should be drawn between two categories of situation. Where there is a direct and manifest link between State financing and clearly defined public service obligations, the sums paid by the public authorities do not constitute aid within the meaning of Article 92(1) of the Treaty. On the other hand, where there is no such link or the public service obligations are not clearly defined, the sums paid by the authorities constitute aid.

Findings of the Court

74 To answer the first part of the question, the various elements of the concept of State aid in Article 92(1) of the Treaty must be considered. It is settled case-law that classification as aid requires that all the conditions set out in that provision are fulfilled (see Case C-142/87 *Belgium v Commission* ('Tubemeuse') [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 20; and Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 68).

75 Article 92(1) of the Treaty lays down the following conditions. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.

76 The national court's question concerns more particularly the second of those conditions.

77 In this respect, it must be observed, first, that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States.

78 Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the

market in that Member State (see, to that effect, Case 102/87 France v Commission [1988] ECR 4067, paragraph 19; Case C-305/89 Italy v Commission [1991] ECR I-1603, paragraph 26; and Spain v Commission, paragraph 40).

79 In the present case, that finding is not merely hypothetical, since, as appears in particular from the observations of the Commission, several Member States have since 1995 started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin.

80 Next, the Commission notice of 6 March 1996 on the de minimis rule for State aid (OJ 1996 C 68, p. 9), as its fourth paragraph states, does not concern transport. Similarly, Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ 2001 L 10, p. 30), in accordance with the third recital in the preamble and Article 1(a), does not apply to that sector.

81 Finally, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see Tubemeuse, paragraph 43, and Spain v Commission, paragraph 42).

82 The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

83 However, for a State measure to be able to come under Article 92(1) of the Treaty, it must also, as stated in paragraph 75 above, be capable of being regarded as an advantage conferred on the recipient undertaking.

84 Measures which, whatever their form, are likely directly or indirectly to favour certain undertakings (Case 6/64 Costa [1964] ECR 585, at p. 595) or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions (Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 60, and Case C-342/96 Spain v Commission [1999] ECR I-2459, paragraph 41) are regarded as aid.

85 Mention should, however, be made of the Court's decision in a case concerning an indemnity provided for by Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23). That indemnity was able to be granted to waste oil collection and/or disposal undertakings as compensation for the collection and/or disposal obligations imposed on them by the Member State, provided that it did not exceed the annual uncovered costs actually recorded by the undertakings taking into account a reasonable profit. The Court held that an indemnity of that type did not constitute aid within the meaning of Articles 92 et seq. of the Treaty, but rather consideration for the services performed by the collection or disposal undertakings (see Case 240/83 ADBHU [1985] ECR 531, paragraph 3, last sentence, and paragraph 18).

86 Similarly, the Court has held that, provided that a tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 92 of the Treaty. The Court said that, provided there was the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors would not be enjoying any real advantage for the purposes of Article 92(1) of the Treaty, because the only effect of

the tax would be to put distributors and laboratories on an equal competitive footing (Ferring, paragraph 27).

87 It follows from those judgments that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty.

88 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied.

89 First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on [Altmark Trans](#) are clear from the national legislation and/or the licences at issue in the main proceedings.

90 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

91 Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty.

92 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.

93 Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

94 It follows from the above considerations that, where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with the conditions set out in paragraphs 89 to 93 above, such subsidies do not fall within Article 92(1) of the Treaty. Conversely, a State measure which does not comply with one or more of those conditions must be regarded as State aid within the meaning of that provision.

95 The answer to the first part of the question referred for a preliminary ruling must therefore be that the condition for the application of Article 92(1) of the Treaty that the aid must be such as to affect trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation

for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The second part of the question referred for a preliminary ruling

96 By the second part of the question referred for a preliminary ruling, the national court essentially asks whether Article 77 of the Treaty may be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation No 1191/69.

Observations submitted to the Court

97 [Altmark](#) Trans submits that the option available to the national legislature to authorise public subsidies intended to compensate for deficits resulting from the operation of urban, suburban or regional public transport without regard being had to Regulation No 1191/69 exists independently of Article 77 of the Treaty.

98 The *Regierungspräsidium* submits for its part that Article 77 of the Treaty does not confer power on the national legislature to authorise public subsidies without having regard to Regulation No 1191/69.

99 *Nahverkehrsgesellschaft* says that, in so far as the public subsidies at issue in the main proceedings fall under the prohibition in Article 92 of the Treaty, Article 77 excludes that application, since those subsidies meet the conditions laid down by the latter article. That being so, it submits that in this case Regulation No 1191/69 does not preclude the grant of such subsidies.

100 The Commission takes the view that, under Article 77 of the Treaty, the national legislature has power to grant public subsidies intended to compensate for deficits incurred in the field of urban, suburban or regional public transport without having regard to Regulation No 1191/69, but that those subsidies are then subject entirely to the prior notification procedure laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC) concerning the examination of State aid.

Findings of the Court

101 Article 77 of the EC Treaty provides that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

102 In paragraph 37 above, it was stated that, if there were no regulation applicable to the case

in the main proceedings, it would have to be examined whether the subsidies at issue in the main proceedings fell within the provisions of the Treaty concerning State aid.

103 It follows from paragraphs 65 and 66 above that Regulation No 1191/69 could be applicable to the case in the main proceedings to the extent that the German legislature has not excluded the application of that regulation to commercial operations or has not done so in compliance with the principle of legal certainty. If that proves to be the case, the provisions of that regulation will apply to the subsidies at issue in the main proceedings, and the national court will not have to consider whether they are consistent with the provisions of primary law.

104 If, however, Regulation No 1191/69 were not applicable to the case in the main proceedings, it follows from the answer to the first part of the question that, in so far as the subsidies at issue in the main proceedings are to be regarded as compensation for the transport services provided in order to discharge public service obligations and satisfy the conditions set out in paragraphs 89 to 93 above, those subsidies would not come under Article 92 of the Treaty, so that there would be no need to rely on the exception to that provision under Article 77 of the Treaty.

105 Consequently, the provisions of primary law concerning State aid and the common transport policy would be applicable to the subsidies at issue in the main proceedings only in so far as, first, those subsidies did not come under the provisions of Regulation No 1191/69 and, second, where they were granted to compensate for the additional costs incurred in discharging public service obligations, the conditions set out in paragraphs 89 to 93 above were not all satisfied.

106 However, even if the subsidies at issue in the main proceedings were to be tested against the Treaty provisions on State aid, the exception provided for in Article 77 could not be applied as such.

107 On 4 June 1970 the Council adopted Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway (OJ, English Special Edition 1970 (II), p. 360). Article 3 of that regulation provides that '[w]ithout prejudice to the provisions of ... Regulation (EEC) No 1192/69... and of... Regulation (EEC) No 1191/69 ... Member States shall neither take coordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 of the Treaty except in the following cases or circumstances'. It follows that Member States are no longer authorised to rely on Article 77 of the Treaty outside the cases referred to in secondary Community legislation.

108 So, to the extent that Regulation No 1191/69 does not apply in the present case and the subsidies at issue in the main proceedings fall within Article 92(1) of the Treaty, Regulation No 1107/70 lists exhaustively the circumstances in which the authorities of the Member States may grant aids under Article 77 of the Treaty.

109 Accordingly, the answer to the second part of the question referred for a preliminary ruling must be that Article 77 of the Treaty cannot be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation No 1191/69.

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CONCERNS	<p>Interprets 31969R1191-A01P1L2</p> <p>Interprets 11992E077</p> <p>Interprets 11992E092-P1</p>
SUB	Competition ; State aids ; Transport
AUTLANG	German
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ADVGEN LAñger
JUDGRAP Timmermans
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24 March 2005

Practical Case¹ - State Aid

Facts

Floriqua is a European state which acceded to the European Communities on 1 January 1975.

Forests, woodlands and lakes make up 50 percent of Floriqua's territory and provide ideal living conditions for some of Europe's rarest animal species. The temperate climate and diversity of plant life in Floriqua support also a seemingly infinite variety of insect life. Because of the unique flora and fauna Floriqua boasts 16 natural parks and reserves, of which five are in public ownership and placed under the administration of the Ministry for Nature and the Environment ('the Ministry').

Verdazorg AS ('Verdazorg') is a privately owned company established in Floriqua. Since 1915 it has specialised in the monitoring and conservation of wildlife inside the country. For decades, it has provided its services inside most of the Floriquan private natural parks and reserves, pursuant to individual contracts signed with the various private owners. As for the public natural parks and reserves, monitoring and conservation of wildlife has been the responsibility of a special 'Wildlife Unit' set up under the Ministry.

At the beginning of the 1990s the Floriquan authorities realised that wildlife in a number of the public natural parks and reserves was deteriorating. A once famous wetland had disappeared and several bird and butterfly habitats were severely endangered, prompting alarm from environmentalists inside and outside Floriqua. By contrast, the natural parks and reserves enjoying the services of Verdazorg were thriving. Upon closer investigation, the Ministry discovered that Verdazorg had developed special techniques in the monitoring and

¹ The case was originally used as the 2004-2005 moot court case of the European Law Moot Court Society

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conservation of Floriquan wildlife, unmatched in effectiveness by any other company or agency in Europe.

At the beginning of 1993, close negotiations were reported to be taking place between the Floriquan government and Verdazorg. In February 1994 the government adopted an ‘Order on the Conservation of Floriquan Natural Reserves’ (‘the 1994 Order’). The 1994 Order provided, inter alia, for the dismantling of the Wildlife Unit. It further provided that Verdazorg would be responsible for carrying out wildlife conservation services in all publicly owned natural parks and reserves for a period running from 1994 to 2014. To this end, the 1994 Order defined ‘wildlife conservation services’ as “all services which are necessary to protect and conserve endangered species and their habitats and to ensure a stable and durable development of Floriquan flora and fauna”. In addition the Order provided that:

- Verdazorg was to receive remuneration for its services through a special ‘Wildlife Conservation Fund’ set up for that purpose by the Ministry, the sole revenues of the Fund being voluntary donations from visitors to all Floriquan natural parks and reserves;
- the remuneration would be allocated every six months, calculated upon a basis of Verdazorg’s costs plus a 10 percent profit; and
- should the contributions made to the Wildlife Conservation Fund prove insufficient to cover Verdazorg’s remuneration, the Floriquan government would pay the remaining amount from general State revenues; conversely, any surplus generated by the Fund would revert to the State.

Verdazorg began monitoring the Floriquan State parks and reserves in May 1994. Soon there were reports of marked improvement. In 1996, the largest bird and butterfly park in Europe was opened in one of the public natural reserves and drew an unprecedented number of ornithologists and entomologists from all over the world. Voluntary contributions to the Wildlife Conservation Fund more than exceeded Verdazorg’s costs and agreed profit margin. In 1998 Verdazorg was appointed ‘Official Provider of Floriquan Wildlife Services’. Shortly thereafter, in recognition of its success, the private natural reserves inside Floriqua which had not yet done so entered into wildlife monitoring and conservation contracts with Verdazorg. Verdazorg’s success in turning around the Floriquan publicly owned natural parks and reserves was also noticed beyond the frontiers of Floriqua, and in particular in the neighbouring Republic of Bordania, where the government had struggled to reverse a

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dramatic decline in the population of seabirds along its extensive coastal marshlands. In 1999 Verdazorg and the Bordanian government entered into a wildlife monitoring and conservation agreement for a period of 10 years.

By letter of 1 October 1995, the European Commission asked the Floriquan government for information to enable it to come to a view on the possible state aid implications of the 1994 Order. By letter dated 23 December 1995, the government sent a formal notification to the Commission, pursuant to Article 88(3) of the EC Treaty, providing detailed information on the compensatory scheme set up under the 1994 Order. By letter of 13 February 1997 the Commission informed the Floriquan government that, following a preliminary examination, it was satisfied that the latter compensation measures did not constitute state aid.

On 8 January 2002, the Floriquan Government adopted an amendment to the 1994 Order (hereinafter ‘the 2002 Amendment’). Pursuant to the 2002 Amendment, “all companies carrying out wildlife conservation services inside Floriqua must set up a permanent watch which can provide urgent assistance to any Floriquan natural reserve within one hour between 8:00 hours and 23:00 hours and within two hours between 23:00 hours and 8:00 hours the following day. Any additional costs resulting from compliance with these service obligations are to be compensated directly through the Wildlife Conservation Fund or, should the monies available in the Fund be insufficient, by the State”.

During the course of 2002 the Ministry became aware that, despite a steady increase in voluntary contributions, the Wildlife Conservation Fund was being drained. It was soon discovered that a considerable proportion of the contributions made to the Fund was being used to underwrite Verdazorg’s costs in setting up a new research facility, intended to carry out research ‘into the breeding cycles of seabirds and butterflies’. On 10 January 2003, after the Wildlife Conservation Fund had recorded a deficit for the first time since 1995, the Floriquan government adopted a new amendment to the 1994 Order, by which the government reserved to itself the authority to reject claims for reimbursement presented by Verdazorg when such claims were based upon projects which had not been approved by the Ministry.

In 2002 GreenCare Inc, a United States-based company also specialising in the field of

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wildlife conservation services, established a subsidiary (GreenCare AS) in Floriqua. On 25 January 2004 GreenCare AS initiated proceedings against the State of Floriqua before the Floriquan High Court, claiming that its competitive position was fatally compromised by privileges afforded to Verdazorg under the 1994 Order and the 2002 Amendment. It submitted that the various remuneration and compensation measures constituted unlawful state aids and so sought by way of relief from the High Court (a) the immediate suspension of those measures and (b) an order for the recovery of all monies paid to Verdazorg.

In its defence, Floriqua argued that compensation for the services carried out by Verdazorg did not confer any economic advantage upon it since the compensation was limited to covering the costs incurred from complying with the public service obligations imposed by the State. Moreover, the compensation paid by the Wildlife Conservation Fund could be considered to constitute neither 'state resources' nor a 'grant by the State'. In any event, even if the compensation was a state aid, it could be justified by reference to Article 86(2) of the EC Treaty. As for the question of requiring the reimbursement of the alleged state aid, no recovery order could be issued since the 1994 Order had been duly notified to the Commission pursuant to Article 88(3). In any event, Verdazorg was entitled to entertain legitimate expectations as to the legality of the measure.

In the course of the summary proceedings before it, on 8 June 2004 the High Court decided to stay proceedings and refer the following questions to the European Court of Justice under Article 234 of the EC Treaty:

Questions

Question 1:

Does a national compensation scheme such as the one set up pursuant to the 1994 Order and/or the 2002 Amendment thereto constitute state aid within the meaning of Article 87(1) EC?

- A) In particular, does remuneration such as that granted by and from the Wildlife Conservation Fund constitute a 'grant by a Member State or through State resources'?
- B) If the answer to question (a) is in the affirmative, does a compensation mechanism

such as that set up under the 1994 Order and/or the 2002 Amendment confer an 'economic advantage' upon the recipient undertaking ?

Question 2_:

A) If the answer to question 1 is in the affirmative, is Article 86(2) EC applicable in the area of state aid to that effect that it may be invoked to justify a measure which constitutes state aid under Article 87(1) EC ?

B) If the answer to question (a) is in the affirmative, does Article 86(2) EC produce such direct rights and obligations that it may be applied directly by a national court to determine whether a national state aid measure is compatible with the EC Treaty ?

Question 3:

A) If the answer to question 1 is in the affirmative, in view of the notification made by the Floriquan government on 23 December 1995 and the Commission's response of 13 February 1997, has the compensation scheme set up under the 1994 Order and/or the 2002 Amendment been adopted in breach of Article 88(3) EC ?

B) If the answer to question (a) is in the affirmative, given the special circumstances in the case at hand, would an order for the recovery of the state aid alleged to be granted under the 1994 Order and the 2002 Amendment be contrary to a general principle of Community law, such as the principle of the protection of legitimate expectations?

In view of the pressing nature of the matter, the Floriquan High Court requests that the Court apply an expedited procedure (as provided for in Article 104a of the Rules of Procedure of the Court of Justice).

The order for reference is received by the Registrar of the Court, who has given it case number M-400/04. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified GreenCare AS (as applicant) and Floriqua (as defendant) and has invited them to submit written observations to the Court. Upon the proposal of the Judge-Rapporteur and after hearing the Advocate General, by order of 12 July 2004 the President of the Court orders the use of an expedited procedure. The parties are requested to lodge their observations by 15 November 2004 and to restrict the matters addressed in their submissions to the essential points of law raised by the questions referred.

**Judgment of the Court
of 13 March 2001**

PreussenElektra AG v Schleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein.

Reference for a preliminary ruling: Landgericht Kiel - Germany.

Electricity - Renewable sources of energy - National legislation requiring electricity supply undertakings to purchase electricity at minimum prices and apportioning the resulting costs between those undertakings and upstream network operators - State aid - Compatibility with the free movement of goods.

Case C-379/98.

1. Preliminary rulings Jurisdiction of the Court Limits Obviously irrelevant questions and hypothetical questions in a context which precludes any useful answer Questions not related to the purpose of the main proceedings

(EC Treaty, Art. 177 (now Art. 234 EC))

2. State aid Meaning Advantage granted to producers of electricity from renewable energy sources, resulting from the statutory obligation imposed on private electricity supply undertakings to buy their production at a minimum price higher than its value Advantage granted without transfer of public resources Excluded

(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC))

3. State aid Treaty provisions Scope Relationship between Article 92 of the Treaty (now, after amendment, Article 87 EC) and the second paragraph of Article 5 of the Treaty (now the second paragraph of Article 10 EC)

(EC Treaty, Art. 92 (now, after amendment, Art. 87 EC) and Article 5, second para. (now Art. 10, second para., EC))

4. Free movement of goods Quantitative restrictions Measures having equivalent effect Price systems Legislation requiring private electricity supply undertakings to purchase, at a minimum price higher than its value, electricity produced in their supply area from renewable energy sources Whether permissible

(EC Treaty, Art. 30 (now, after amendment, Art. 28 EC))

1. In the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty (now Article 234 EC), it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.

Nevertheless, the Court may in exceptional circumstances examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

(see paras 38-39)

2. Only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC). The distinction made in that provision between aid granted by a Member State and aid granted through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by that State.

Therefore, statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators do not constitute State aid within the meaning of Article 92(1) of the EC Treaty.

(see para. 58 and operative part 1)

3. Article 92 of the Treaty (now, after amendment, Article 87 EC) is in itself sufficient to prohibit the conduct by States referred to therein and Article 5 of the Treaty (now Article 10 EC), the second paragraph of which provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, cannot be used to extend the scope of Article 92 to conduct by States that does not fall within it, such as support measures decided upon by the State but financed by private undertakings.

(see paras 63, 65)

4. In the current state of Community law concerning the electricity market, statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators are not incompatible with Article 30 of the EC Treaty (now, after amendment, Article 28 EC), such provisions being useful for protecting the environment in so far as the use of renewable energy sources which they are intended to promote contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.

(see paras 73, 81 and operative part, 1-2)

In Case C-379/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landgericht Kiel (Germany) for a preliminary ruling in the proceedings pending before that court between

[PreussenElektra](#) AG

and

Schleswag AG,

in the presence of

Windpark Reußenköge III GmbH

and

Land Schleswig-Holstein,

on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93(3) of the EC Treaty (now Article 88(3) EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissechet, P. Jann, L. Sevón and R. Schintgen (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

[PreussenElektra](#) AG, by D. Sellner, Rechtsanwalt,

Schleswag AG, by M. Nebendahl, Rechtsanwalt,

Windpark Reußenköge III GmbH and Land Schleswig-Holstein, by W. Ewer, Rechtsanwalt,

the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

the Finnish Government, by H. Rotkirch and T. Pynnä, acting as Agents,

the Commission of the European Communities, by V. Kreuzschitz and P.F. Nemitz, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of [PreussenElektra](#) AG, Schleswag AG, Windpark Reußenköge III GmbH, Land Schleswig-Holstein, the German Government and the Commission at the hearing on 27 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2000,

gives the following

Judgment

Costs

82 The costs incurred by the German and Finnish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landgericht Kiel by order of 13 October 1998, hereby rules:

1. Statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators do not constitute State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

2. In the current state of Community law concerning the electricity market, such provisions are not incompatible with Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

1 By order of 13 October 1998, received at the Court on 23 October 1998, the Landgericht Kiel (Regional Court, Kiel) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93(3) of the EC Treaty (now Article 88(3) EC).

2 The questions were raised in proceedings between **PreussenElektra AG (PreussenElektra)** and Schleswig AG (Schleswig) concerning the repayment of sums paid by the former to the latter pursuant to Paragraph 4(1) of the Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz (Law on feeding electricity from renewable energy sources into the public grid) of 7 December 1990 (BGBl. 1990 I, p. 2633; the Stromeinspeisungsgesetz), as amended by Paragraph 3(2) of the Gesetz zur Neuregelung des Energiewirtschaftsrechts (New law for the energy industry) of 24 April 1998 (BGBl. 1998 I, p. 730; the 1998 Law).

Legislative background

3 The Stromeinspeisungsgesetz came into force on 1 January 1991. According to Paragraph 1, headed Scope of Application, it governed, in its initial version, the purchase by public electricity supply undertakings of electricity generated exclusively from hydraulic energy, wind energy, solar energy, gas from waste dumps and sewage treatment plants, or products or residues and biological waste from agriculture and forestry work, as well as the compensation payable for such electricity.

4 It is common ground that the term public electricity supply undertaking covers both private undertakings and undertakings belonging partially or wholly to the public sector.

5 The Gesetz zur Sicherung des Einsatzes von Steinkohle in der Verstromung und zur Änderung des Atomgesetzes und des Stromeinspeisungsgesetzes (Law ensuring the supply of coal to power stations and amending the Law on Nuclear Energy and the Stromeinspeisungsgesetz) of 19 July 1994 (BGBl. 1994 I, p. 1618; the 1994 Law) extended the scope of the Stromeinspeisungsgesetz, as defined in Paragraph 1 thereof, to electricity from the wood industry. The 1998 Law replaced the reference to products or residues and biological waste from agriculture and forestry and to the wood industry by the expression biomass and stated that the Stromeinspeisungsgesetz was to apply to electricity produced from the listed sources of renewable energy within the area of validity of this Law.

6 Paragraph 2 of the Stromeinspeisungsgesetz, headed Obligation to Purchase, provides that electricity supply undertakings are obliged to purchase the electricity produced in their area of supply from renewable energy sources and to pay for it in accordance with the provisions of Paragraph 3. As amended by the Law of 1998, which added a second and a third sentence, that article is worded as follows:

Electricity supply undertakings which operate a general supply network shall be obliged to purchase the electricity produced in their area of supply from renewable sources of energy and to pay compensation for those inputs of electricity in accordance with Paragraph 3. For production installations which are not situated within the area of supply of a grid operator, that obligation shall apply to the undertaking whose network suitable for the feeding in of the electricity is closest to the installation. For accounting purposes, the extra costs resulting from the application of Paragraphs 2 and 4 may be imputed to distribution or transmission and taken into account when determining compensation for transit.

7 Paragraph 3 of the Stromeinspeisungsgesetz, as amended by the 1998 Law, headed Amount of the compensation, provides:

1. In respect of electricity produced from hydraulic energy, from gas from waste dumps and sewage treatment plants and from biomass, the compensation shall amount to at least 80% of the average sales price per kilowatt hour of electricity supplied to all final customers by electricity supply undertakings. In the case of hydro-electric power stations or installations for the treatment of gas arising from waste dumps or sewage treatment plants the capacity of which exceeds 500 kilowatts, that rule shall apply only to that part of the total amount of electricity fed in during a given accounting year which corresponds to 500 divided by the capacity of the installation in kilowatts; the capacity is defined by the annual average of the maximum effective capacity measured for each month. The price of the surplus electricity shall amount to at least 65% of the average sales price within the meaning of the first sentence.

2. In respect of electricity produced from solar or wind energy, the compensation shall amount to at least 90% of the average sales price within the meaning of the first sentence of subparagraph 1.

3. The average sales price to be taken into account for the purposes of subparagraphs 1 and 2 shall be the value published each year by the Federal Statistics Office for the last calendar year but one, expressed net of turnover tax in pfennigs per kilowatt hour. In calculating the compensation pursuant to subparagraphs 1 and 2, figures are to be rounded to two decimal places.

8 Whereas, following the amendment made to the *Stromeinspeisungsgesetz* by the 1994 Law, the compensation fixed for the electricity referred to in Paragraph 3(1) rose from 75% to 80% of the average sales price per kilowatt hour of electricity supplied to all final customers, that fixed for electricity from solar and wind energy, referred to in Paragraph 3(2), has not varied since the entry into force of the *Stromeinspeisungsgesetz*.

9 In its initial version, Paragraph 4 of the *Stromeinspeisungsgesetz*, headed Hardship Clause, was worded as follows:

1. The obligations under Paragraphs 2 and 3 shall not apply where compliance with them would cause undue hardship, or would make it impossible for the electricity supply undertaking to comply with its obligations arising from the *Bundestarifordnung Elektrizität* of 18 December 1989 (BGBl. 1989 I, p. 2255). In such a case, the obligations are transferred to the upstream electricity supply undertaking.

2. There is undue hardship in particular where the electricity supply undertaking would be obliged to raise its prices to a level significantly higher than those of similar or upstream supply undertakings.

10 The 1998 Law made several amendments to Paragraph 4 of the *Stromeinspeisungsgesetz*. First, it added two new subparagraphs, which have become subparagraphs 1 and 4. It also made certain amendments to the former subparagraph 1, which became the new subparagraph 2. The former subparagraph 2, which remained unchanged, became the new subparagraph 3. Thus, as amended by the 1998 Law, Paragraph 4 of the *Stromeinspeisungsgesetz* is worded as follows:

1. In so far as the kilowatt hours to be compensated for exceed 5% of the total kilowatt hours supplied by the electricity supply undertaking through its network during a calendar year, the upstream network operator shall be obliged to reimburse the electricity supply undertaking in respect of the supplementary costs resulting from the kilowatt hours exceeding that share. In the case of upstream network operators, the burden constituted by the right to reimbursement within the meaning of the first sentence also forms part of those supplementary costs. If there is no such operator, the obligation laid down in the first sentence of Paragraph 2 ceases, as regards electricity supply undertakings in the circumstances referred to in the first and second sentences, at the beginning of the first calendar year after those circumstances arose, in the case of installations not yet essentially completed at that time. In the case of wind turbines, the relevant time is the installation

of the mast and the rotor.

2. The obligations laid down in Paragraphs 2 and 3 shall not exist where, even if the reimbursement clause in subparagraph 1 is applied, compliance with them would cause undue hardship. In such a case, the obligations are transferred to the upstream network operator.

3. There is undue hardship in particular where the electricity supply undertaking would be obliged to raise its prices to a level significantly higher than those of similar or upstream supply undertakings.

4. The Federal Minister for the Economy shall make a report to the Bundestag as to the effects of the hardship clause not later than 1999, and in any event in time for another compensatory provision to be adopted before the consequences referred to in the third sentence of subparagraph 1 arise.

11 The order for reference and the written observations submitted to the Court show that, by letter of 14 August 1990, the German Government notified to the Commission as a State aid the draft law which, after adoption, became the *Stromeinspeisungsgesetz*, in accordance with Article 93(3) of the Treaty. By letter of 19 December 1990, the Commission authorised the notified draft on the basis, first, that it was in accordance with the energy policy aims of the European Communities, and secondly that renewable sources of energy constituted only a small part of the energy sector and that the additional revenues and the repercussions on electricity prices were minor. The Commission nevertheless requested the German Government to send it information on the application of the *Stromeinspeisungsgesetz*, the latter having to be re-examined two years after its entry into force, and emphasised that any amendment or extension of that law should be subject to prior notification.

12 The order for reference and the written observations submitted to the Court also show that, following numerous complaints from electricity supply undertakings, the Commission informed the Federal Minister for the Economy in a letter of 25 October 1996 of its doubts as to whether, in view of the increase in the production of electricity derived from wind energy, the *Stromeinspeisungsgesetz* was still compatible with the aid provisions of the Treaty. In that letter, the Commission made several proposals for amendment in relation to the provisions on wind energy and stated that, if the Bundestag were not prepared to amend the *Stromeinspeisungsgesetz* in that respect, the Commission might find itself obliged to propose appropriate measures to the Federal Republic of Germany within the meaning of Article 93(1) of the Treaty, in order to make the Law compatible with Community rules on aid.

13 It is also apparent from the written observations of Windpark Reußenköge III GmbH (Windpark) and of Land Schleswig-Holstein, who intervened in the main proceedings, and from those of the Commission, that, at the request of the latter, the German Government informed the Commission of the progress of the work on the draft new law for the energy industry. In a letter of 29 July 1998, after the entry into force of the 1998 Law, the Commission informed the Federal Minister of the Economy that, having regard to current developments at Community level, concerning in particular possible proposals for harmonising the rules on the feeding in of electricity from renewable energy sources, it did not expect to take a formal decision concerning the *Stromeinspeisungsgesetz*, as amended by the 1998 Law, before the ministerial report on the effects of the hardship clause, provided for in Paragraph 4(4) thereof, was drawn up, even though the German legislature, at the time of the adoption of the 1998 Law, had not taken account of the proposals formulated in its letter of 25 October 1996.

14 Finally, a footnote published with the 1998 Law states that the latter, Paragraph 1 of which is headed *Gesetz über die Elektrizitäts- und Gasversorgung* (Law on the supply of electricity and gas), transposed into national law Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

15 The third recital in the preamble to that directive confirms that it in no way affects the application of the Treaty, in particular the provisions concerning the internal market and competition, and Article 8(3) and (4) in Chapter IV, Transmission system operation, provides as follows:

3. A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

4. A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

16 In addition, Article 11(3) in Chapter V, Distribution system operation, provides:

A Member state may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

The main proceedings and the questions referred

17 [PreussenElektra](#) operates more than 20 conventional and nuclear power stations in Germany as well as a maximum-voltage and high-voltage electricity distribution network, through which it feeds electricity to regional electricity suppliers, medium-scale local undertakings and industry.

18 Schleswag is a regional electricity supplier which buys electricity to supply to its customers in Schleswig-Holstein almost exclusively from [PreussenElektra](#).

19 [PreussenElektra](#) owns 65.3% of Schleswag's shares. The remaining 34.7% are held by various municipal authorities in Schleswig-Holstein.

20 By virtue of Paragraph 2 of the Stromeinspeisungsgesetz, Schleswag is obliged to purchase electricity from renewable sources produced within its area of supply, including wind-generated electricity. The order for reference shows that the proportion of wind-generated electricity in Schleswag's total turnover in electricity sales, which was 0.77% in 1991, has increased continuously to an estimated 15% in 1998. In consequence, the additional costs accruing to Schleswag on account of the obligation to purchase at the minimum price laid down by the Stromeinspeisungsgesetz rose from DEM 5.8 million in 1991 to an estimated DEM 111.5 million in 1998, of which only DEM 38 million remained the responsibility of Schleswag, taking into account the application of the compensation mechanism introduced into Paragraph 4(1) of the Stromeinspeisungsgesetz by the 1998 Law.

21 At the end of April 1998 Schleswag's purchases of electricity produced from renewable energy sources reached 5% of the total volume of electricity it had sold over the previous year. Schleswag therefore invoiced [PreussenElektra](#), pursuant to Paragraph 4(1) of the Stromeinspeisungsgesetz, as amended by the 1998 law (the amended Stromeinspeisungsgesetz), for the additional costs entailed by the purchase of electricity from renewable energy sources, initially claiming from it monthly instalments of DEM 10 million.

22 [PreussenElektra](#) transferred the instalment for May 1998, reserving the right to claim the money back at any time. That is what it did by making an application to the Landgericht Kiel for the repayment of DEM 500 000, representing the part of the sum paid to Schleswag in compensation for the additional costs entailed by the latter's purchase of wind-generated electricity. The Landgericht states, in its order for reference, that those additional costs cannot be passed on to Schleswag's customers since the Minister for Energy of Land Schleswig Holstein refused to approve an application by Schleswag to amend its tariffs.

23 Before the Landgericht, [PreussenElektra](#) argued that the sum claimed had been paid to Schleswig without a valid legal reason and should be recoverable, since Paragraph 4 of the *Stromeinspeisungsgesetz*, as amended, on which that payment was based, was contrary to the directly applicable provisions of the Treaty on State aid and could not therefore be applied. The plaintiff argued that prior to the entry into force of the 1998 Law it would have been necessary, in order to amend the scope of the *Stromeinspeisungsgesetz* and introduce a rule for sharing additional costs, as the 1998 Law did, to have recourse to the procedure laid down by Article 93 of the Treaty; this the Federal Republic of Germany had omitted to do. [PreussenElektra](#) therefore requested that Schleswig be ordered to repay to it the sum of DEM 500 000, together with interest at 5% as from 15 July 1998.

24 Schleswig contended that that claim should be dismissed. Whilst recognising that the *Stromeinspeisungsgesetz*, as amended, contained a modified aid scheme, it maintained that Paragraph 4 was merely a redistribution rule, intended to mitigate the consequences which electricity supply undertakings suffered by reason of Paragraphs 2 and 3 of the amended *Stromeinspeisungsgesetz*, and, taken on its own, was not therefore in the nature of aid within the meaning of Article 92 of the Treaty. In the first place, Paragraphs 2 and 3 of the amended *Stromeinspeisungsgesetz* did not affect the legal relationship between [PreussenElektra](#) and Schleswig, with the result that the Landgericht could not disapply them in the main proceedings. Secondly, the non-application of Paragraph 4 of the amended *Stromeinspeisungsgesetz* left intact the obligation of Schleswig to purchase electricity produced from renewable energy sources at fixed minimum prices. The penalty effect of the direct application of the third sentence of Article 93(3) of the Treaty did not, therefore, enable the unlawful aid constituted by Paragraphs 2 and 3 of the amended *Stromeinspeisungsgesetz* to be penalised or prevent the application of Paragraph 4 of the amended *Stromeinspeisungsgesetz*, so that the payment in question must be regarded as having been made on a sound legal basis.

25 The Landgericht found, first that the Commission had not been informed, in accordance with Article 93(3) of the Treaty, of the amendments made to the *Stromeinspeisungsgesetz* by the 1998 Law, and considered that the question whether the new version of the latter represented in whole or in part constituted State aid within the meaning of Article 92 of the Treaty remained relevant, even if the German Government and the Commission had already classified the original content of the *Stromeinspeisungsgesetz* as aid in the context of the notification made in 1990. The Landgericht considered that even if the amendments to the *Stromeinspeisungsgesetz* by the 1998 Law were to be regarded as modifying the original scheme, the procedure under Article 93(3) of the Treaty did not have to be applied to the modified scheme unless the latter itself constituted a system of aid within the meaning of Article 92 of the Treaty.

26 The Landgericht found, secondly, that the obligation to purchase electricity produced in Germany from renewable energy sources on conditions which could not be obtained on the open market might depress demand for electricity produced in other Member States, which might constitute an obstacle to trade between Member States prohibited by Article 30 of the Treaty.

27 In those circumstances, considering that interpretation of Articles 30, 92 and 93(3) of the Treaty was necessary to enable it to resolve the dispute before it, the Landgericht Kiel decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Do the rules on payment and compensation for supplies of electricity, laid down in Paragraph 2 or 3 or 4 or in Paragraphs 2 to 4 of the *Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz* of 7 December 1990 (BGBl. 1990 I, p. 2633), as amended by Article 3(2) of the *Gesetz zur Neuregelung des Energiewirtschaftsrechts* of 24 April 1998 (BGBl. 1998 I, p. 730 (734-736)) constitute State aid for the purposes of Article 92 of the EC Treaty?

Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid

also covers national rules for the benefit of the recipient of the payment, under which the costs entailed are not met, either directly or indirectly, from the public budget but are borne by individual undertakings in a sector, which have a statutory obligation to purchase at fixed minimum prices, and which are precluded by law and circumstance from passing those costs on to the final consumer?

Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules which merely govern the apportionment of the costs between undertakings at the various production levels which have arisen through purchasing obligations and minimum prices, where the legislature's approach creates in practice a permanent burden for which the undertakings affected obtain no consideration?

2. In the event that the [first] question is answered in the negative in respect of Paragraph 4 of the [amended] *Stromeinspeisungsgesetz*:

Is Article 93(3) of the EC Treaty to be interpreted as meaning that its restrictive effects apply not only to the benefit itself but also to implementing rules such as Paragraph 4 of the [amended] *Stromeinspeisungsgesetz*?

3. In the event that the first and second questions are answered in the negative:

Is Article 30 of the EC Treaty to be interpreted as meaning that a quantitative restriction on imports and/or a measure having equivalent effect as between Member States for the purposes of the aforementioned provision arises where a provision of national law places undertakings under an obligation to purchase electricity produced from renewable energy sources at minimum prices and requires grid operators to meet the costs entailed for no consideration?

Admissibility

28 Windpark and Land Schleswig-Holstein (the interveners in the main proceedings) and the German Government challenge the admissibility of all or part of the reference for a preliminary ruling.

29 First, the interveners in the main proceedings argue that there are a number of omissions or errors of fact in the order for reference.

30 They submit that the referring court was wrong to hold, first, that the Commission had not been informed of the amendments made to the *Stromeinspeisungsgesetz* by the 1998 Law and, secondly, that electricity supply undertakings could not, for practical and legal reasons, pass on to final consumers the expenses borne by them by way of the compensation referred to in Paragraph 3 of the amended *Stromeinspeisungsgesetz*.

31 Second, the interveners in the main proceedings and the German Government maintain that the dispute in the main proceedings is not a genuine dispute but a spurious one.

32 The plaintiff and the defendant in the main proceedings agree that the combined provisions of Paragraphs 2 to 4 of the amended *Stromeinspeisungsgesetz* are contrary to Community law. [PreussenElektra](#) nevertheless made the compensatory payment provided for in Paragraph 4 of the amended *Stromeinspeisungsgesetz*, but immediately demanded partial repayment. Furthermore, [PreussenElektra](#) is the main shareholder in Schleswig and therefore has a dominant influence on the decisions and legal positions of the latter.

33 Third, the interveners in the main proceedings and the German Government argue that the questions referred are not relevant for the purposes of resolving the dispute in the main proceedings.

34 As to the questions concerning the interpretation of Articles 92 and 93 of the Treaty, the interveners in the main proceedings point out that, in accordance with the case-law of the Court of Justice (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 9), it is for the internal legal system of every Member State to determine the legal procedure which will ensure that the third sentence

of Article 93(3) of the Treaty has direct effect. The referring court has not indicated whether, and on what conditions, *PreussenElektra* might be entitled in German law to repayment of the sums it claims, and has therefore not demonstrated the relevance of the questions referred in relation to national law.

35 The interveners in the main proceedings further argue that, according to settled case-law (see, in particular, Joined Cases C-72/91 and C-73/91 *Slooman Neptun* [1993] ECR I-887, paragraphs 11 and 12), the Court of Justice has jurisdiction to interpret the concept of aid within the meaning of Article 92 of the Treaty only where the preliminary examination procedure provided for in Article 93(3) of the Treaty has not been complied with. However, in the first place the initial version of the *Stromeinspeisungsgesetz* was notified to the Commission and authorised by it and in the second place the amendments made to it by the 1998 Law did not alter the aid within the meaning of Article 93(3) of the Treaty, which would have required fresh notification. In any event, the exchange of correspondence which took place before and after the adoption of the 1998 Law between the German authorities and the Commission was equivalent to, on the one hand, notification by the German Government of the amendments which that law had made to the *Stromeinspeisungsgesetz*, and, on the other, implied authorisation by the Commission of those amendments.

36 The German Government takes the view that a reply to the questions concerning Article 92 of the Treaty is not necessary in order to enable the referring court to give judgment because the only decisive question in the main proceedings was whether *Schleswag* was entitled to a compensatory payment under Paragraph 4 of the amended *Stromeinspeisungsgesetz*, a provision which, however, governed merely the distribution of the costs resulting from the payment of compensation for the feeding in of the electricity and did not include any aid for the benefit of the persons to whom that compensation was directed.

37 As for the question concerning Article 30 of the Treaty, the interveners in the main proceedings and the German Government argue that the dispute in the main proceedings has no cross-border element, and furthermore the plaintiff and the defendant in those proceedings have not demonstrated that the amended *Stromeinspeisungsgesetz* prevents them from importing electricity from other Member States.

38 It should be remembered that it is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

39 Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, *Bosman*, paragraph 61; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 17).

40 In this case, as regards, first, the alleged omissions and factual errors in the order for reference, it is sufficient to note that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, in particular, Case C-435/97 World Wildlife Fund [1999] ECR I-5613, paragraph 32).

41 Second, it should be noted that the action brought by [PreussenElektra](#) seeks repayment of the sum which it had to pay to Schleswig to compensate for the additional cost arising for the latter from the purchase of wind-generated electricity, made pursuant to the purchase obligation laid down by the amended Stromeinspeisungsgesetz, from producers of that type of electricity established in its area of supply.

42 The dispute in the main proceedings cannot, therefore, be regarded as hypothetical in character.

43 It is true that, like [PreussenElektra](#), Schleswig has an interest in Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, laying down that purchase obligation and fixing the price to be paid in consequence, being regarded as constituting unlawful aid, thereby enabling it to escape payment. However, the dispute in the main proceedings does not concern the aid which, pursuant to Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, Schleswig allegedly gives to the producers of electricity from renewable energy sources, but the part of that alleged aid which [PreussenElektra](#) has had to reimburse to Schleswig by virtue of Paragraph 4 of the amended Stromeinspeisungsgesetz.

44 Since those obligations on Schleswig and [PreussenElektra](#) flow directly from the amended Stromeinspeisungsgesetz, the dispute in the main proceedings between the plaintiff and the defendant cannot be regarded as a procedural device arranged by the parties to the main action in order to induce the Court of Justice to take a position on certain problems of Community law that do not serve any objective requirement inherent in the resolution of the dispute.

45 That conclusion is supported by the fact that the referring court allowed Windpark and Land Schleswig-Holstein to intervene in the main proceedings in support of Schleswig, arguing that Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz are lawful.

46 In those circumstances, the fact that [PreussenElektra](#) is Schleswig's main shareholder is not capable of depriving the dispute between them of its genuine character.

47 Finally, it should be noted that, in its order for reference, the Landgericht sufficiently defined the national legislative background and clearly explained why it considers that the questions which it raises are relevant and that a reply to those questions is necessary for resolving the dispute.

48 Concerning, first, the questions relating to Articles 92 and 93, the referring court has indicated in particular, as is apparent from paragraph 26 of this judgment, that the question whether the amended Stromeinspeisungsgesetz constitutes aid needs to be resolved before going on to consider whether the amendments which the 1998 Law made to the initial version of the Stromeinspeisungsgesetz constitute an alteration of aid, within the meaning of Article 93(3) of the Treaty, requiring implementation of the procedure laid down in that provision in order to adopt the alteration.

49 The referring court has also explained that if, wrongly, the preliminary examination procedure has not been complied with, it will be its responsibility, in accordance with its national law, to draw the consequences from the direct effect of the third sentence of Article 93(3) of the Treaty by holding the altered scheme in the Stromeinspeisungsgesetz inapplicable and ordering return of the payments made by [PreussenElektra](#) to Schleswig.

50 As the interveners in the main proceedings themselves acknowledge, the argument that the Court of Justice has jurisdiction to interpret the concept of aid within the meaning of Article 92 of the Treaty only when the preliminary examination procedure under Article 93(3) has not been complied

with requires an interpretation of the criterion of alteration of aid or of the scope of the suspensory effect of the third sentence of Article 93(3), and such interpretation is precisely the subject-matter of some of the questions referred.

51 The same applies to the argument of the German Government that a reply to the questions concerning Article 92 of the Treaty is unnecessary in so far as, in the main proceedings, only Paragraph 4 of the amended *Stromeinspeisungsgesetz* governs relations between *PreussenElektra* and Schleswig. Indeed, the questions concerning Article 92 of the Treaty concern precisely the point whether Paragraph 4 of the amended *Stromeinspeisungsgesetz* constitutes, on its own or in combination with Paragraphs 2 and 3, a system of aid for the purposes of that provision.

52 As for the question concerning Article 30 of the Treaty, suffice it to say that it is not obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose.

53 It follows from the above considerations that answers must be given to the questions referred.

The interpretation of Article 92 of the Treaty

54 It should be noted as a preliminary observation, first, that there is no dispute that an obligation to purchase electricity produced from renewable energy sources at minimum prices, such as that laid down by Paragraphs 2 and 3 of the amended *Stromeinspeisungsgesetz*, confers a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence.

55 In addition, as the reply by the German Government to a written question of the Court shows, the public authorities have a majority shareholding in only two of the eight main German undertakings which produce electricity and operate high-tension transmission networks, one of which is *PreussenElektra*. That reply also shows that *PreussenElektra* is a wholly-owned subsidiary of another company which is 100% privately owned. Moreover, as stated in paragraph 19 of this judgment, Schleswig is held as to 65.3% by *PreussenElektra* and as to only 34.7% by certain municipal authorities of Land Schleswig-Holstein.

56 In the light of the above, the first question referred should be understood as asking, essentially, whether legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, constitutes State aid within the meaning of Article 92(1) of the Treaty.

57 It should be recalled in that respect that Article 92(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

58 In that connection, the case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision between aid granted by a Member State and aid granted through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (see Case 82/77 *Van Tiggele* [1978] ECR 25, paragraphs 24 and 25; *Slooman Neptun*, paragraph 19; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 16; Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido* [1998] ECR I-2629, paragraph 13; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 35; Case C-295/97 *Piaggio* [1999] ECR I-3735,

paragraph 35).

59 In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.

60 Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.

61 In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.

62 That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, *Sloman Neptun*, paragraph 21, and *Ecotrade*, paragraph 36).

63 In the alternative, the Commission maintains that, in order to preserve the effectiveness of Articles 92 and 93 of the Treaty, read in conjunction with Article 5 of the EC Treaty (now Article 10 EC), it is necessary for the concept of State aid to be interpreted in such a way as to include support measures which, like those laid down by the amended *Stromeinspeisungsgesetz*, are decided upon by the State but financed by private undertakings. It draws that argument by analogy from the case-law of the Court of Justice to the effect that Article 85 of the EC Treaty (now Article 81 EC), read in conjunction with Article 5 of the Treaty, prohibits Member States from introducing measures, even of a legislative or regulatory nature, which may render the competition rules applicable to undertakings ineffective (see, in particular, Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14).

64 In that respect, it is sufficient to point out that, unlike Article 85 of the Treaty, which concerns only the conduct of undertakings, Article 92 of the Treaty refers directly to measures emanating from the Member States.

65 In those circumstances, Article 92 of the Treaty is in itself sufficient to prohibit the conduct by States referred to therein and Article 5 of the Treaty, the second paragraph of which provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, cannot be used to extend the scope of Article 92 to conduct by States that does not fall within it.

66 The answer to the first question referred must therefore be that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 92(1) of the Treaty.

67 In the light of that answer, there is no need to reply to the second question referred, which was raised only in so far as the obligation to purchase at minimum prices did constitute State aid, whereas the allocation of the resulting financial burden did not.

Interpretation of Article 30 of the Treaty

68 In its third question, the referring court asks in substance whether the rules concerned are compatible with Article 30 of the Treaty.

69 In that respect, it must first be borne in mind that, according to the case-law of the Court, Article 30 of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

70 Secondly, the case-law of the Court also shows that an obligation placed on traders in a Member State to obtain a certain percentage of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product by preventing those traders from obtaining supplies in respect of part of their needs from traders situated in other Member States (see, to that effect, Case 72/83 *Campus Oil* [1984] ECR 2727, paragraph 16; Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 11).

71 In this case, Paragraphs 1 and 2 of the amended *Stromeinspeisungsgesetz* expressly state that the purchase obligation imposed on electricity supply undertakings applies only to electricity produced from renewable energy sources within the scope of that statute and within the respective supply area of each undertaking concerned, and is therefore capable, at least potentially, of hindering intra-Community trade.

72 However, in order to determine whether such a purchase obligation is nevertheless compatible with Article 30 of the Treaty, account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market.

73 The use of renewable energy sources for producing electricity, which a statute such as the amended *Stromeinspeisungsgesetz* is intended to promote, is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.

74 Growth in that use is amongst the priority objectives which the Community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change, approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 (OJ 1994 L 33, p. 11), and by virtue of the Protocol of the third conference of the parties to that Convention, done in Kyoto on 11 December 1997, signed by the European Community and its Member States on 29 April 1998 (see inter alia Council Resolution 98/C 198/01 of 8 June 1998 on renewable sources of energy (OJ 1998 C 198, p. 1), and Decision No 646/2000/EC of the European Parliament and of the Council of 28 February 2000 adopting a multiannual programme for the promotion of renewable energy sources in the Community (*Altener*) (1998 to 2002) (OJ 2000 L 79, p. 1)).

75 It should be noted that that policy is also designed to protect the health and life of humans, animals and plants.

76 Moreover, as stated in the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies. The Treaty of Amsterdam transferred that provision, in a slightly modified form, to Article 6 of the Treaty, which appears in Part One, headed Principles.

77 In addition, the 28th recital in the preamble to Directive 96/92 expressly states that it is for reasons of environmental protection that the latter authorises Member States in Articles 8(3) and 11(3) to give priority to the production of electricity from renewable sources.

78 It should also be noted that, as stated in the 39th recital in its preamble, the directive constitutes

only a further phase in the liberalisation of the electricity market and leaves some obstacles to trade in electricity between Member States in place.

79 Moreover, the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced.

80 In that respect, the Commission took the view, in its Proposal for a Directive 2000/C 311 E/22 of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market (OJ 2000 C 311 E, p. 320), submitted on 10 May 2000, that the implementation in each Member State of a system of certificates of origin for electricity produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice.

81 Having regard to all the above considerations, the answer to the third question must be that, in the current state of Community law concerning the electricity market, legislation such as the amended Stromeinspeisungsgesetz is not incompatible with Article 30 of the Treaty.

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PROCEDU

Reference for a preliminary ruling

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**Judgment of the Court
of 19 February 2002**

J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap.

Reference for a preliminary ruling: Raad van State - Netherlands.

**Professional body - National Bar - Regulation by the Bar of the exercise of the profession - Prohibition of multi-disciplinary partnerships between members of the Bar and accountants - Article 85 of the EC Treaty (now Article 81 EC) - Association of undertakings - Restriction of competition - Justification - Article 86 of the Treaty (now Article 82 EC) - Undertaking or group of undertakings - Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 and 49 EC) - Applicability - Restrictions - Justification.
Case C-309/99.**

1. Competition - Community rules - Undertaking - Definition - Members of the Bar - Included
(EC Treaty, Arts 85, 86 and 90 (now Arts 81 EC, 82 EC and 86 EC))
 2. Competition - Agreements, decisions and concerted practices - Decisions taken by associations of undertakings - Definition - Regulation applicable to professional partnerships of members of the Bar with other professions adopted by the Bar of a Member State - Included
(EC Treaty, Art. 85 (now Art. 81 EC))
 3. Competition - Agreements, decisions and concerted practices - Prejudicial to competition - Partnerships of Members of the Bar with accountants prohibited by the Bar of a Member State - Assessed with regard to the overall context of the prohibition - Justification - Proper practice of the legal profession
(EC Treaty, Art. 85(1) (now Art. 81(1) EC))
 4. Competition - Dominant position - Collective dominant position - Definition - Bar of a Member State - Excluded
(EC Treaty, Art. 86 (now Art. 82 EC))
 5. Freedom of movement for persons - Freedom of establishment - Freedom to provide services - Treaty provisions - Scope - Rules which are not public in nature designed to regulate collectively self-employment and the provision of services - Included
(EC Treaty, Arts 52 and 59 (now, after amendment, Art. 43 EC and 49 EC))
 6. Freedom of movement for persons - Freedom of establishment - Freedom to provide services - Restrictions - Prohibition of partnerships of members of the Bar with accountants laid down by the Bar of a Member State - Justification - Proper practice of the legal profession
(EC Treaty, Arts 52 and 59 (now, after amendment, Arts 43 EC and 49 EC))
1. Members of the Bar carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty (now Articles 81 EC, 82 EC and 86 EC), and the complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion. Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.
- (see paras 48-49)

2. When it adopts a regulation concerning partnerships between Members of the Bar and members of other professions, the Bar of a Member State is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies, nor exercising powers which are typically those of a public authority. It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

The fact that the governing bodies of a Bar are composed exclusively of members of the Bar elected solely by members of the profession, and that in adopting acts such as that regulation, the Bar is not required to do so by reference to specified public-interest criteria, supports the conclusion that such a professional organisation with regulatory powers cannot escape the application of Article 85 of the Treaty (now Article 81 EC).

Moreover, having regard to its influence on the conduct of the members of the Bar on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, that regulation does not fall outside the sphere of economic activity.

It is, moreover, immaterial that the constitution of the Bar is regulated by public law. According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned.

It follows that a regulation concerning partnerships between members of the Bar and members of other liberal professions, adopted by a body such as the Bar, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty.

(see paras 58, 60-63, 65-66, 71, operative part 1)

3. Prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in a regulation adopted by the Bar of a Member State, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty (now Article 81(1)(b) EC).

However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects, and more particularly of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

Account must be taken of the legal framework applicable in the Member State concerned, on the one hand, to members of the Bar and to the Bar which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

A regulation concerning partnerships of members of the Bar with members of other liberal professions adopted by a body such as the Bar of a Member State thus does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

(see paras 90, 97-98, 110, operative part 2)

4. Since it does not carry on any economic activity, the Bar of a Member State is not an undertaking within the meaning of Article 86 of the Treaty (now Article 82 EC). Nor can it be categorised as a group of undertakings for the purposes of that provision, inasmuch as registered members of the Bar of a Member State are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated. The legal profession is not concentrated to any significant degree, is highly heterogenous and characterised by a high degree of internal competition. In the absence of sufficient structural links between them, members of the Bar cannot be regarded as occupying a collective dominant position for the purposes of Article 86 of the Treaty.

(see paras 112-114)

5. Compliance with Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 EC and 49 EC) is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.

(see para. 120)

6. It is not contrary to Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation concerning partnerships of members of the Bar with members of other liberal professions to prohibit any multi-disciplinary partnership between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

(see para. 123, operative part 4)

In Case C-309/99,

REFERENCE to the Court under Article 234 EC by the Raad van State for a preliminary ruling in the proceedings pending before that court between

J.C.J. [Wouters](#),

J.W. Savelbergh,

Price Waterhouse Belastingadviseurs BV

and

Algemene Raad van de Nederlandse Orde van Advocaten,

intervener:

Raad van de Balies van de Europese Gemeenschap,

on the interpretation of Articles 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), 5 of the EC Treaty (now Article 10 EC), 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric, and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet,

M. Wathelet (Rapporteur), R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr [Wouters](#), by H. Gilliams and M. Wladimiroff, advocaten,
- Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, by D. van Liedekerke and G.J. Kemper, advocaten,
- the Algemene Raad van de Nederlandse Orde van Advocaten, by O.W. Brouwer, F.P. Louis and S.C. van Es, advocaten,
- the Raad van de Balies van de Europese Gemeenschap, by P. Glazener, advocaat,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Danish Government, by J. Molde, acting as Agent,
- the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,
- the French Government, by K. Rispal-Bellanger, R. Loosli-Surrans and F. Million, acting as Agents,
- the Austrian Government, by C. Stix-Hackl, acting as Agent,
- the Portuguese Government, by L. Fernandes, acting as Agent,
- the Swedish Government, by A. Kruse, acting as Agent,
- the Government of the Principality of Liechtenstein, by C. Büchel, acting as Agent,
- the Commission of the European Communities, by W. Wils and B. Mongin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr [Wouters](#), represented by H. Gilliams, of Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, represented by D. van Liedekerke and G.J. Kemper, of the Algemene Raad van de Nederlandse Orde van Advocaten, represented by O.W. Brouwer and W. Knibbeler, advocaat, of the Raad van de Balies van de Europese Gemeenschap, represented by P. Glazener, of the Netherlands Government, represented by J.S. van den Oosterkamp, acting as Agent, of the German Government, represented by A. Dittrich, of the French Government, represented by F. Million, of the Luxembourg Government, represented by N. Mackel, acting as Agent, assisted by J. Welter, avocat, of the Swedish Government, represented by I. Simfors, acting as Agent, and of the Commission, represented by W. Wils, at the hearing on 12 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2001,

gives the following

Judgment

Costs

124 The costs incurred by the Netherlands, Danish, German, French, Luxembourg, Austrian, Portuguese and Swedish Governments, by the Government of the Principality of Liechtenstein and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Raad van State by judgment of 10 August 1999, hereby rules:

1. A regulation concerning partnerships between members of the Bar and other professionals, such as the Samenwerkingsverordening 1993 (1993 regulation on joint professional activity), adopted by a body such as the Nederlandse Orde van Advocaten (the Bar of the Netherlands), is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81 EC).
2. A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.
3. A body such as the Bar of the Netherlands does not constitute either an undertaking or a group of undertakings for the purposes of Article 86 of the EC Treaty (now Article 82 EC).
4. It is not contrary to Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

1 By judgment of 10 August 1999, received at the Court on 13 August 1999, the Raad van State (Netherlands Council of State) referred to the Court for a preliminary ruling under Article 234 EC nine questions on the interpretation of Articles 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), 5 of the EC Treaty (now Article 10 EC), 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2 Those questions were raised in proceedings brought by members of the Bar, among others, against the refusal of the Arrondissementsrechtbank te Amsterdam (Amsterdam District Court, the Rechtbank) to set aside the decisions of the Nederlandse Orde van Advocaten (Bar of the Netherlands) refusing to set aside the decisions of the Supervisory Boards of the Amsterdam and Rotterdam Bars prohibiting them from practising as members of the Bar in full partnership with accountants.

The relevant national legislation

3 Article 134 of the Constitution of the Kingdom of the Netherlands deals with the establishment of, and the legal rules governing, public bodies. It provides that:

- (1) Public professional bodies and other public bodies may be established and dissolved by or under statute.
- (2) The duties and organisation of such public bodies, the composition and powers of the governing bodies and public access to their meetings shall be governed by statute. Powers to adopt regulations may be granted to the governing bodies by or under statute.
- (3) Supervision of the governing bodies shall be governed by statute. Their decisions may be annulled only where they are contrary to law or to the public interest.

The Advocatenwet

4 Pursuant to that provision, a law was adopted on 23 June 1952 establishing the Bar of the Netherlands and laying down the internal regulations and the disciplinary rules applicable to advocaten and procureurs (the Advocatenwet, the Law on the Bar).

5 Article 17 of the Advocatenwet provides that:

- (1) The Bar of the Netherlands, based in The Hague, shall be composed of all members of the Bar registered in the Netherlands and shall be a public body within the meaning of Article 134 of the Constitution.
- (2) All members of the Bar registered with the same court shall form the Bar of the district concerned.

6 Articles 18(1) and 22(1) of the Advocatenwet provide that the governing bodies of the Bar of the Netherlands and the District Bars are to be the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Bar of the Netherlands, the General Council) and the Raden van Toezicht van de Orden in de Arrondissementen (Supervisory Boards of the District Bars, the Supervisory Boards) respectively.

7 Articles 19 and 20 of the Advocatenwet regulate the election of the members of the General Council. They are elected by the College van Afgevaardigen (College of Delegates), who are themselves elected at meetings of the various District Bars.

8 Article 26 of the Advocatenwet states that:

[T]he General Council and the Supervisory Boards shall ensure the proper practice of the profession and have the power to adopt any measures which may contribute to that end. They shall defend the rights and interests of members of the Bar as such, ensure that the obligations of the latter are fulfilled and discharge the duties imposed on them by regulation.

9 Article 28 of the Advocatenwet provides:

- (1) The College of Delegates may adopt regulations in the interests of the proper practice of the profession, including regulations concerning provision for members of the Bar affected by old age or total or partial incapacity for work, and provision for the next-of-kin of deceased members. Furthermore, the College shall adopt the necessary regulations concerning the administration and organisation of the Bar.
- (2) Draft regulations shall be submitted to the College of Delegates by the General Council or by at least five delegates. The General Council may invite the Supervisory Boards to state their views on a draft regulation before submitting it to the delegates.
- (3) As soon as they have been adopted, regulations shall be communicated to the Ministry of Justice and published in the Official Gazette.

10 Article 29 of the Advocatenwet states that:

- (1) Regulations shall be binding on the members of the Bar of the Netherlands and on visiting lawyers...
- (2) They may not contain any provision relating to matters governed by or under statute, nor may they concern matters which, on account of the differing situations in each district, do not lend themselves to uniform regulation.
- (3) Any provision in a regulation which applies to a matter governed by or under statute shall by operation of law cease to be valid.

11 According to Article 16b and 16c of the Advocatenwet, the term visiting lawyers means persons who are not registered as members of the Bar in the Netherlands but who are authorised to carry

on their professional activity in another Member State of the European Union under the title of advocate or an equivalent title.

12 Article 30 of the *Advocatenwet* provides:

- (1) Decisions adopted by the College of Delegates, the General Council or any other organs of the Bar of the Netherlands may be suspended or annulled by royal decree in so far as they are contrary to law or to the public interest.
- (2) Such suspension or annulment shall be effected within six months of the communication referred to in Article 28(3) or, where the decision was adopted by the General Council or another body of the Bar of the Netherlands, within six months of its notification to the Minister for Justice, by reasoned decree prescribing, where relevant, the duration of the suspension.
- (3) Suspension shall immediately cause the effects of the suspended provisions to lapse. The duration of the suspension may not be greater than one year, even after extension.
- (4) If the suspended decision is not annulled by royal decree within the period prescribed it shall be deemed to be valid.
- (5) Annulment shall entail annulment of all annulable effects of the annulled provisions, save as otherwise decided by royal decree.

The *Samenwerkingsverordening* 1993

13 Pursuant to Article 28 of the *Advocatenwet*, the College of Delegates adopted the *Samenwerkingsverordening* 1993 (Regulation on Joint Professional Activity 1993, the 1993 Regulation).

14 Article 1 of the 1993 Regulation defines professional partnership (*samenwerkingsverband*) as being any joint activity in which the participants practise their respective professions for their joint account and at their joint risk or by sharing control or final responsibility for that purpose.

15 Article 2 of the 1993 Regulation provides:

- (1) Members of the Bar shall not be authorised to assume or maintain any obligations which might jeopardise the free and independent exercise of their profession, including the partisan defence of clients' interests and the corresponding relationship of trust between lawyer and client.
- (2) The provision contained in subparagraph (1) shall also apply where members of the Bar do not work in professional partnership with colleagues or third parties.

16 Under Article 3 of the 1993 Regulation:

Members of the Bar shall not be authorised to enter into or maintain any professional partnership unless the primary purpose of each partner's respective profession is the practice of the law.

17 Article 4 of the 1993 Regulation provides:

Members of the Bar may enter into or maintain professional partnerships only with:

- (a) other members of the Bar registered in the Netherlands;
- (b) other lawyers not registered in the Netherlands, if the conditions laid down in Article 5 are satisfied;
- (c) members of another professional category accredited for that purpose by the General Council in accordance with Article 6.

18 According to Article 6 of the 1993 Regulation:

- (1) The authorisation referred to in Article 4(c) may be granted on condition that:

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- (a) the members of that other professional category practise a profession, and
 - (b) the exercise of that profession is conditional upon possession of a university degree or an equivalent qualification; and
 - (c) the members of that professional category are subject to disciplinary rules comparable to those imposed on members of the Bar; and
 - (d) entering into partnership with members of that other professional partnership is not contrary to Articles 2 or 3.
- (2) Accreditation may also be granted to a specific branch of a professional category. In that case, the conditions set out in (a) to (d) above shall be applicable, without prejudice to the General Council's power to lay down further conditions.
 - (3) The General Council shall consult the College of Delegates before adopting any decision as mentioned in the preceding subparagraphs of this Article.

19 Article 7(1) of the 1993 Regulation provides:

In their communications with other persons members of the Bar shall avoid giving any inaccurate, misleading or incomplete impression as to the nature of any form of joint activity in which they participate, including any professional partnership.

20 In accordance with Article 8 of the 1993 Regulation:

- (1) Every professional partnership must have a collective name for all communications with other persons.
- (2) The collective name must not be misleading.
- (3) Members of the Bar who are members of professional partnerships shall be required to supply, on request, a list of the partners' names, their respective professions and place of establishment.
- (4) Any written document produced by a professional partnership must include the name, status and place of establishment of the person who signs the document.

21 Finally, Article 9(2) of the 1993 Regulation provides:

Members of the Bar shall not set up, or alter the constitution, of a professional partnership until the Supervisory Board has decided whether the conditions on which that partnership is formed or its constitution is altered, including the way in which it presents itself to other parties, satisfy the requirements imposed by or under this Regulation.

22 According to the recitals of the 1993 Regulation, members of the Bar have already been authorised to enter into partnership with notaries, tax consultants and patent agents and authorisation for those three professional categories remains valid. On the other hand, accountants are mentioned as an example of a professional category with which members of the Bar are not authorised to enter into partnership.

The directives concerning professional partnerships between members of the Bar and other (authorised) practitioners

23 In addition to the 1993 Regulation, the Bar of the Netherlands has adopted directives concerning professional partnerships between members of the Bar and other (accredited) practitioners. Those directives are worded as follows:

1. Compliance with the rules of ethics and professional conduct

Rule No 1

Members of the Bar may not, as a result of participating in a professional partnership with a practitioner of another profession, limit or compromise compliance with the rules of ethics and professional practice applicable to them.

2. Separate files and separate management of files and archives

Rule No 2

Members of the Bar participating in a professional partnership with a practitioner of another profession are required, in respect of every case in which they act with that other practitioner, to open a separate file and to ensure, in relation to the professional partnership as such:

- that the management of the case file is kept separate from financial management;
- that files are kept in separate archives from those of practitioners of other professions.

3. Conflicts of interest

Rule No 3

Members of the Bar participating in a professional partnership with a practitioner of another profession may not defend the interests of a party where those interests are in conflict with those of a party who has been, or is being, assisted by that other practitioner or where there is a risk that such a conflict of interests may arise.

4. Professional secrecy and registration of documents

Rule No 4

Members of the Bar participating in a professional partnership with a practitioner of another profession are required, in respect of every case in which they act with that other practitioner, to keep an accurate register of all letters and documents which they bring to the attention of the practitioner of the other profession.

The disputes in the main proceedings

24 Mr **Wouters**, a member of the Amsterdam Bar, became a partner in the partnership Arthur Andersen & Co. Belastingadviseurs (tax consultants) in 1991. Late in 1994 Mr **Wouters** informed the Supervisory Board of the Rotterdam Bar of his intention to enrol at the Rotterdam Bar and to practise in that city under the name of Arthur Andersen & Co., advocaten en belastingadviseurs.

25 By decision of 27 July 1995, that Supervisory Board found that the members of the partnership Arthur Andersen & Co. Belastingadviseurs were in professional partnership, within the meaning of the 1993 Regulation, with the members of the partnership Arthur Andersen & Co. Accountants, that is to say with members of the profession of accountants. Accordingly, Mr **Wouters** was in breach of Article 4 of the 1993 Regulation. In addition, the Supervisory Board considered that Mr **Wouters** would contravene Article 8 of the 1993 Regulation if he entered into a partnership the collective name of which included the name of the natural person Arthur Andersen.

26 By decision of 29 November 1995 the General Council dismissed as unfounded the administrative appeals brought by Mr **Wouters**, Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants against the decision of 27 July 1995.

27 At the beginning of 1995 Mr Savelbergh, a member of the Amsterdam Bar, informed the Supervisory Board of the Amsterdam Bar of his intention to enter into partnership with the private company Price Waterhouse Belastingadviseurs BV, a subsidiary of the international undertaking Price Waterhouse, which includes both tax consultants and accountants.

28 By decision of 5 July 1995 the Supervisory Board declared that the proposed partnership was

contrary to Article 4 of the 1993 Regulation.

29 By decision of 21 November 1995, the General Council dismissed the administrative appeal brought by Mr Savelbergh and Price Waterhouse Belastingadviseurs BV against that decision.

30 Mr [Wouters](#), Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants, on the one hand, and Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, on the other, then appealed to the Rechtbank. They claimed, inter alia, that the decisions of the General Council of 21 and 29 November 1995 were incompatible with the Treaty provisions on competition, right of establishment and freedom to provide services.

31 By judgment of 7 February 1997 the Rechtbank declared inadmissible the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants, and dismissed as unfounded those brought by Mr [Wouters](#), Mr Savelbergh and Price Waterhouse Belastingadviseurs BV.

32 The Rechtbank considered that the Treaty provisions on competition did not apply to the cases. It pointed out that the Bar of the Netherlands is a body governed by public law, established by statute in order to further a public interest. For that purpose it makes use of the regulatory power conferred on it by Article 28 of the *Advocatenwet*. The Bar of the Netherlands is required to guarantee, in the public interest, the independence and loyalty to the client of members of the Bar who provide legal assistance. In the Rechtbank's view, the Bar of the Netherlands is not, therefore, an association of undertakings within the meaning of Article 85 of the Treaty, nor can it be regarded either as an undertaking or as an association of undertakings occupying a collective dominant position contrary to Article 86 of the Treaty.

33 Furthermore, according to the Rechtbank, Article 28 of the *Advocatenwet* does not transfer any powers to private operators in such a manner as to undermine the effectiveness of Articles 85 and 86 of the Treaty. As a result, that provision is not incompatible with the second paragraph of Article 5 of the Treaty, read in conjunction with Articles 3(g), 85 and 86 of the Treaty.

34 The Rechtbank also rejected the appellants' argument that the 1993 Regulation is incompatible with the right of establishment and the freedom to provide services enshrined in Articles 52 and 59 of the Treaty. In its view, there is no cross-border element in the cases in point, so that those provisions are not applicable. In any event, the prohibition on partnerships of members of the Bar and accountants is justified by overriding reasons relating to the public interest and is not disproportionately restrictive. In the absence of specific Community provisions in that field, it is open to the Kingdom of the Netherlands to make the exercise of the legal profession on its territory subject to rules intended to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance.

35 The five appellants appealed against the decision of the Rechtbank to the Raad van State.

36 The Raad van de Balies van de Europese Gemeenschap (the Council of the Bars and Law Societies of the European Community, the CCBE), an association established under Belgian law, was granted leave to intervene in support of the forms of order sought by the General Council.

37 By judgment given on 10 August 1999, the Raad van State confirmed that the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants were inadmissible. As regards the other appeals, it considered that the outcome of the dispute in the main proceedings depended on the interpretation of several provisions of Community law.

38 The Raad van State questions, first, whether by adopting the 1993 Regulation under its powers pursuant to Article 28 of the *Advocatenwet*, the College of Delegates has infringed Articles 85 and 86 of the Treaty and, second, whether by empowering that College under Article 28 of the *Advocatenwet* to adopt regulations, the national legislature has infringed Articles 5, 85 and 86 of the Treaty.

In addition, it enquires whether the Regulation is compatible with the right of establishment laid down in Article 52 of the Treaty and with the freedom to provide services in Article 59 of the Treaty.

39 Consequently, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1 (a) Is the term "association of undertakings" in Article 85(1) of the EC Treaty (now Article 81(1) EC) to be interpreted as meaning that there is such an association only if and in so far as it acts in the undertakings' interest, so that in applying that provision a distinction must be drawn between activities of the association carried out in the public interest and other activities, or is the mere fact that an association can also act in the undertakings' interest sufficient for it to be regarded as an association of undertakings within the meaning of the provision in respect of all its actions? Is the fact that the universally binding rules adopted by the relevant institution are adopted under a statutory power and in its capacity as a special legislature relevant as regards the application of Community competition law?

(b) If the answer to Question 1(a) is that there is an association of undertakings only if and in so far as it acts in the undertakings' interest, is the question of when the public interest is being pursued also governed by Community law?

(c) If the answer to Question 1(b) is that Community law is relevant, can the adoption under a statutory power by an institution such as the Bar of the Netherlands of universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships between members of the Bar and members of other professions be regarded for the purposes of Community law as pursuing the public interest?

2. If the answers to the first question indicate that a rule such as [the 1993 Regulation] is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC), is such a decision, in so far as it adopts universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships such as the one in question to be regarded as having as its object or effect the restriction of competition within the common market and in that respect affecting trade between the Member States? What criteria of Community law are relevant to the determination of that issue?

3. Is the term "undertaking" in Article 86 of the EC Treaty (now Article 82 EC) to be interpreted as meaning that where an institution such as the Bar of the Netherlands must be regarded as an association of undertakings, that institution must also be considered to be an undertaking or group of undertakings for the purposes of that provision, even though it pursues no economic activity itself?

4. If the previous question is answered in the affirmative and it must be held that an institution such as the Bar of the Netherlands enjoys a dominant position, does such an institution abuse that position if it regulates the relationships between its members and others on the market in legal services in a manner which restricts competition?

5. If an institution such as the Bar of the Netherlands is to be regarded in its entirety as an association of undertakings for the purposes of Community competition law, is Article 90(2) of the EC Treaty (now Article 86(2) EC) to be interpreted as extending to an institution such as the Bar of the Netherlands which lays down universally binding rules, designed to safeguard the independence and loyalty to the client of its members who provide legal assistance, on cooperation between its members and members of other professions?

6. If an institution such as the Bar of the Netherlands is to be regarded as an association of undertakings or an undertaking or group of undertakings, do Article 3(g) (now, after amendment, Article 3(1)(g) EC), the second paragraph of Article 5 and Articles 85 and 86 of the EC Treaty (now Articles 10 EC, 81 EC and 82 EC) preclude a Member State from providing that that institution (or one of its agencies) may adopt rules concerning inter alia cooperation between its members and members of other professions when review by the relevant public authority of such rules is limited to the power to annul such a rule without the authority's being able to adopt a rule in its stead?

7. Are both the Treaty provisions on the right of establishment and those on the freedom to provide services applicable to a prohibition on cooperation between members of the Bar and accountants such as that in question, or is the EC Treaty to be interpreted as meaning that such a prohibition must comply, depending for example on the way in which those concerned actually wish to model their cooperation, with either the provisions on the right of establishment or with those relating to the freedom to provide services?

8. Does a prohibition on multi-disciplinary partnerships including members of the Bar and accountants such as the one in question constitute a restriction of the right of establishment or the freedom to provide services, or both?

9. If it follows from the answer to the previous question that one or both of the abovementioned restrictions exists, is the restriction in question justified on the ground that it constitutes merely a "selling arrangement" within the meaning of the judgment in *Joined Cases C-267/91 and C-268/91 Keck and Mithouard* [1993] ECR I-6097, and that therefore there is no discrimination, or on the ground that it satisfies the criteria that have been developed in that respect by the Court of Justice in other judgments, in particular *Case C-55/94 Gebhard* [1995] ECR I-4165?

Request for reopening of the oral procedure

40 By document lodged at the Court Registry on 3 December 2001, the appellants in the main proceedings requested the Court to order the reopening of the oral procedure pursuant to Article 61 of the Rules of Procedure.

41 In support of that request, the appellants in the main proceedings claim that in paragraphs 170 to 201 of his Opinion, delivered on 10 July 2001, the Advocate General gave his opinion on a question which had not been expressly raised by the national court.

42 The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order in *Case C-17/98 Emesa Sugar* [2000] ECR I-665, paragraph 18).

43 In the circumstances of this case, however, the Court, after hearing the Advocate General, considers that it is in possession of all the facts necessary for it to answer the questions referred by the national court and observes that those facts were the subject of argument presented to it at the hearing.

Question 1(a)

44 By Question 1(a) the national court is in substance asking whether a regulation concerning partnerships between members of the Bar and other professionals, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, is to be regarded as a decision taken by an association of undertakings within the meaning of Article 85(1) of the Treaty. It seeks in particular to ascertain whether the fact that power was conferred by statute on the Bar of the Netherlands to adopt rules universally binding both on registered members of the Bar in the Netherlands and lawyers who are

authorised to practise in other Member States and come to the Netherlands in order to provide services there has any bearing on the application of Community competition law. It also asks whether the mere fact that the Bar of the Netherlands may act in the interests of its members is sufficient for it to be regarded as an association of undertakings in respect of all its activities or whether, for Article 85(1) of the Treaty to be applicable, special treatment must be reserved for the Bar's public-interest activities.

45 In order to establish whether a regulation such as the 1993 Regulation is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty, the first matter to be considered is whether members of the Bar are undertakings for the purposes of Community competition law.

46 According to settled case-law, 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 (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, *Job Centre II*, paragraph 21).

47 It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, *CNSD*, paragraph 36).

48 Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

49 That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, with regard to medical practitioners, *Joined Cases C-180/98 to C-184/98 Pavlov and Others* [2000] ECR I-6451, paragraph 77).

50 The second point to be considered is the extent to which a professional body such as the Bar of the Netherlands is to be regarded as an association of undertakings, within the meaning of Article 85(1) of the Treaty, where it adopts a regulation such as the 1993 Regulation (see, to that effect, with regard to a professional body of customs agents, *CNSD*, paragraph 39).

51 The respondent in the main proceedings claims that, inasmuch as the Netherlands legislature created the Bar of the Netherlands as a body governed by public law and gave it regulatory powers in order to perform a task in the public interest, the Bar cannot be regarded as an association of undertakings within the meaning of Article 85 of the Treaty, particularly in connection with the exercise of its regulatory powers.

52 The intervener in the main proceedings and the German, Austrian and Portuguese Governments add that a body such as the Bar of the Netherlands exercises public authority and cannot, in consequence, fall within the scope of Article 85(1) of the Treaty.

53 According to the intervener in the main proceedings, a body may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State. The Netherlands have made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State.

54 The German Government, for its part, points out that it is for the competent legislative bodies of a Member State to decide, within the framework of national sovereignty, how they organise the exercise of their rights and powers. Delegation of the power to adopt universally binding rules to a body possessing democratic legitimacy, such as a professional body, falls within the limits of that principle of institutional autonomy.

55 According to the German Government, were bodies entrusted with such regulatory duties to be treated as associations of undertakings within the meaning of Article 85 of the Treaty, this would frustrate the operation of that principle. The idea that national legislation is valid only if it is exempted by the Commission pursuant to Article 85(3) of the Treaty is a contradiction in terms. The consequence would be that the whole corpus of professional regulations would be called in question.

56 The question to be determined is whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings or, on the contrary, as a public authority.

57 According to the case-law of the Court, the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity (see, to that effect, Joined Cases C-159/91, C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 18 and 19, concerning the management of the public social security system), or which is connected with the exercise of the powers of a public authority (see, to that effect, Case C-364/92 *Sat Fluggesellschaft* [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraphs 22 and 23, concerning anti-pollution surveillance of the maritime environment).

58 When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (*Poucet and Pistre*, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (*Sat Fluggesellschaft*, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

59 In that respect, the fact that Article 26 of the *Advocatenwet* also entrusts the General Council with the task of protecting the rights and interests of members of the Bar cannot a priori exclude that professional organisation from the scope of application of Article 85 of the Treaty, even where it performs its role of regulating the practice of the profession of the Bar (see, to that effect, with regard to medical practitioners, *Pavlov*, cited above, paragraph 86).

60 Next, other indications support the conclusion that a professional organisation with regulatory powers, such as the Bar of the Netherlands, cannot escape the application of Article 85 of the Treaty.

61 First, it is clear from the *Advocatenwet* that the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members of the Supervisory Boards, College of Delegates or the General Council (see, as regards a professional organisation of customs agents, *CNSD*, cited above, paragraph 42, and as regards a professional organisation of medical practitioners, *Pavlov*, paragraph 88).

62 Second, when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria. Article 28 of the *Advocatenwet*, which authorises it to adopt regulations, does no more than require that they should be in the interest of the proper practice of the profession (see, as regards a professional organisation of customs

agents, CNSD, paragraph 43).

63 Lastly, having regard to its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, the 1993 Regulation does not fall outside the sphere of economic activity.

64 In light of the foregoing considerations, it appears that a professional organisation such as the Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 85(1) of the Treaty where it adopts a regulation such as the 1993 Regulation. Such a regulation constitutes the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity.

65 It is, moreover, immaterial that the constitution of the Bar of the Netherlands is regulated by public law.

66 According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned (Case 123/83 *BNIC v Clair* [1985] ECR 391, paragraph 17, and *CNSD*, paragraph 40).

67 That interpretation of Article 85(1) of the Treaty does not entail any breach of the principle of institutional autonomy as argued by the German Government (see paragraphs 54 and 55 above). On this point a distinction must be drawn between two approaches.

68 The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

69 The second approach is that the rules adopted by the professional association are attributable to it alone. Certainly, in so far as Article 85(1) of the Treaty applies, the association must notify those rules to the Commission. That obligation is not, however, such as unduly to paralyse the regulatory activity of professional associations, as the German Government submits, since it is always open to the Commission *inter alia* to issue a block exemption regulation pursuant to Article 85(3) of the Treaty.

70 The fact that the two systems described in paragraphs 68 and 69 above produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other.

71 In light of the foregoing considerations, the answer to be given to Question 1(a) must be that a regulation concerning partnerships between members of the Bar and other members of liberal professions, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty.

Question 1(b) and (c)

72 Having regard to the answer given to Question 1(a), there is no need to consider Question 1(b) and (c).

Question 2

73 By its second question the national court seeks, essentially, to ascertain whether a regulation

such as the 1993 Regulation which, in order to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance in conjunction with members of other liberal professions, adopts universally binding rules governing the formation of multi-disciplinary partnerships, has the object or effect of restricting competition within the common market and is likely to affect trade between Member States.

74 By describing the successive versions of the rules on partnerships, the appellants in the main proceedings have set out to establish that the 1993 Regulation had the object of restricting competition.

75 Initially, the Samenwerkingsverordening 1972 (the 1972 Regulation) authorised members of the Bar to enter into multi-disciplinary partnerships subject to three conditions. First, the partners had to be members of other liberal professions with a university education or education of an equivalent standard. Next, they had to belong to an association or group the members of which were subject to disciplinary rules comparable to those applicable to members of the Bar. Finally, the proportion of members of the Bar belonging to that professional partnership and the size of their contributions to it had to be at least equivalent to that of the partners belonging to other professions, so far as both mutual relations between the partners and their relations with third parties were concerned.

76 In 1973 the General Council accredited the members of both the Netherlands association of patent agents and of the Netherlands association of tax consultants for the purposes of creating multi-disciplinary professional partnerships with members of the Bar. Subsequently, notaries were also accredited. According to the appellants in the main proceedings, although, at the material time, members of the Netherlands institute of accountants were not formally accredited by the General Council, there was in principle no objection to this.

77 In 1991, faced for the first time with a request for authorisation of a partnership with an accountant, the Bar of the Netherlands, following an expedited procedure, amended the 1972 Regulation for the sole purpose, according to the appellants, of having a legal basis on which to prohibit professional partnerships between members of the Bar and accountants. Members of the Bar were thenceforth authorised to enter into multi-disciplinary partnerships only where the free and independent exercise of their profession, including the defence of their clients' interests, and the corresponding relationship of trust between lawyer and client cannot be jeopardised.

78 The refusal to authorise partnerships between members of the Bar and accountants is, in the appellants' submission, based on the finding that firms of accountants had evolved and had in the meantime become gigantic organisations, so that a partnership of a law-firm with a firm of accountants would, as the then Algemene Deken (General Dean) of the Bar expressed it, have more resembled the marriage of a mouse and an elephant than a union of partners of equal stature.

79 The Bar of the Netherlands then adopted the 1993 Regulation. That measure recapitulated the amendment made in 1991 and added a further requirement to the effect that members of the Bar were no longer authorised to form part of a professional partnership unless the primary purpose of each partner's respective profession is the practice of the law (Article 3 of the 1993 Regulation), which, in the appellants' submission, demonstrates the anticompetitive object of the national rules at issue in the main proceedings.

80 In the alternative, the appellants in the main proceedings claim that, irrespective of its object, the 1993 Regulation produces effects that are restrictive of competition.

81 They maintain that multi-disciplinary partnerships of members of the Bar and accountants would make it possible to respond better to the needs of clients operating in an ever more complex and international economic environment.

82 Members of the Bar, having a reputation as experts in many fields, would be best placed to offer

their clients a wide range of legal services and would, as partners in a multi-disciplinary partnership, be especially attractive to other persons active on the market in legal services.

83 Conversely, accountants would be attractive partners for members of the Bar in a professional partnership. They are experts in fields such as legislation on company accounts, the tax system, the organisation and restructuring of undertakings, and management consultancy. There would be many clients interested in an integrated service, supplied by a single provider and covering the legal as well as financial, tax and accountancy aspects of a particular matter.

84 The prohibition at issue in the main proceedings prohibits all contractual arrangements between members of the Bar and accountants which provide in any way for shared decision-making, profit-sharing or for the use of a common name, and this makes any form of effective partnership difficult.

85 By contrast, the Luxembourg Government claimed at the hearing that a prohibition of multi-disciplinary partnerships such as that laid down in the 1993 Regulation had a positive effect on competition. It pointed out that, by forbidding members of the Bar to enter into partnership with accountants, the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market.

86 It appears to the Court that the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States.

87 As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the one-stop shop advantage).

88 Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

89 Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

90 A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty.

91 It is true that the accountancy market is highly concentrated, to the extent that the firms dominating it are at present known as the big five and the proposed merger between two of them, Price Waterhouse and Coopers & Lybrand, gave rise to Commission Decision 1999/152/EC of 20 May 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1016 - Price Waterhouse/Coopers & Lybrand) (OJ 1999 L 50, p. 27), adopted pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

92 On the other hand, the prohibition of conflicts of interest with which members of the Bar in all Member States are required to comply may constitute a structural limit to extensive concentration of law-firms and so reduce their opportunities of benefiting from economies of scale or of entering into structural associations with practitioners of highly concentrated professions.

93 In those circumstances, unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.

94 Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.

95 As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29; Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22; and CNSD, paragraph 48).

96 That effect is all the more appreciable in the present case because the 1993 Regulation applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States.

97 However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98 Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

99 As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83 Klopp [1984] ECR 2971, paragraph 17, and Reisebüro, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.

100 The current approach of the Netherlands, where Article 28 of the *Advocatenwet* entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.

101 Those obligations of professional conduct have not inconsiderable implications for the structure

of the market in legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions which are active on that market.

102 Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103 By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

104 As the Advocate General has rightly pointed out in paragraphs 185 and 186 of his Opinion, there may be a degree of incompatibility between the advisory activities carried out by a member of the Bar and the supervisory activities carried out by an accountant. The written observations submitted by the respondent in the main proceedings show that accountants in the Netherlands perform a task of certification of accounts. They undertake an objective examination and audit of their clients' accounts, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those accounts. It follows that in the Member State concerned accountants are not bound by a rule of professional secrecy comparable to that of members of the Bar, unlike the position under German law, for example.

105 The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.

106 Moreover, the concurrent pursuit of the activities of statutory auditor and of adviser, in particular legal adviser, also raises questions within the accountancy profession itself, as may be seen from the Commission Green Paper 96/C/321/01 The role, the position and the liability of the statutory auditor within the European Union (OJ 1996 C 321, p. 1; see, in particular, paragraphs 4.12 to 4.14).

107 A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

108 Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, *Reisebüro*, paragraph 41).

109 In light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession (see, to that effect, Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 35).

110 Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

Question 3

111 By its third question the national court is asking, essentially, whether a body such as the Bar of the Netherlands is to be treated as an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

112 First, since it does not carry on any economic activity, the Bar of the Netherlands is not an undertaking within the meaning of Article 86 of the Treaty.

113 Second, it cannot be categorised as a group of undertakings for the purposes of that provision, inasmuch as registered members of the Bar of the Netherlands are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated (Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraphs 33 and 34).

114 The legal profession is not concentrated to any significant degree. It is highly heterogeneous and is characterised by a high degree of internal competition. In the absence of sufficient structural links between them, members of the Bar cannot be regarded as occupying a collective dominant position for the purposes of Article 86 of the Treaty (see, to that effect, *Joined Cases C-68/94 and C-30/95 France and Others v Commission* [1998] ECR I-1375, paragraph 227, and *Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports and Others v Commission* [2000] ECR I-1365, paragraphs 36 and 42). Furthermore, as is clear from the documents before the Court, members of the Bar account for only 60% of turnover in the legal services sector in the Netherlands, a market share which, having regard to the large number of law firms, cannot of itself constitute conclusive evidence of the existence of a collective dominant position on the part of those undertakings (see, to that effect, *France and Others v Commission*, paragraph 226, and *Compagnie maritime belge*, paragraph 42).

115 In light of the foregoing considerations, the answer to be given to the third question must be that a body such as the Bar of the Netherlands does not constitute either an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

Question 4

116 Having regard to the answer given to the third question, there is no need to consider the fourth question.

Question 5

117 Having regard to the answer given to the second question, there is no need to consider the fifth question.

Question 6

118 Having regard to the answers given to the second and third questions, there is no need to consider the sixth question.

Questions 7, 8 and 9

119 By its seventh question, the national court seeks, essentially, to ascertain whether the compatibility with Community law of a prohibition of multi-disciplinary partnerships of members of the Bar and

accountants, such as that laid down in the 1993 Regulation, must be assessed in light of both the Treaty provisions relating to the right of establishment and those relating to freedom to provide services. By its eighth and ninth questions, that court is asking, essentially, whether such a prohibition constitutes a restriction of the right of establishment and/or freedom to provide services and, if so, whether that restriction is justified.

120 It should be observed at the outset that compliance with Articles 52 and 59 of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (Case 36/74 Walrave and Koch [1974] ECR 1405, paragraphs 17, 23 and 24; Case 13/76 Donà [1976] ECR 1333, paragraphs 17 and 18; Case C-415/93 Bosman [1995] ECR I-4921, paragraphs 83 and 84, and Case C-281/98 Angonese [2000] ECR I-4139, paragraph 32).

121 In those circumstances, the Court may be called upon to determine whether the Treaty provisions concerning the right of establishment and freedom to provide services are applicable to a regulation such as the 1993 Regulation.

122 On the assumption that the provisions concerning the right of establishment and/or freedom to provide services are applicable to a prohibition of any multi-disciplinary partnerships between members of the Bar and accountants such as that laid down in the 1993 Regulation and that that regulation constitutes a restriction on one or both of those freedoms, that restriction would in any event appear to be justified for the reasons set out in paragraphs 97 to 109 above.

123 The answer to be given to the seventh, eighth and ninth questions must therefore be that it is not contrary to Articles 52 and 59 of the Treaty for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnership between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

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**Commission Regulation (EC) No 2790/1999
of 22 December 1999
on the application of Article 81(3) of the Treaty to categories of [vertical agreements](#) and concerted
practices (Text with EEA relevance)**

COMMISSION REGULATION (EC) No 2790/1999

of 22 December 1999

on the application of Article 81(3) of the Treaty to categories of [vertical agreements](#) and concerted practices

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices(1), as last amended by Regulation (EC) No 1215/1999(2), and in particular Article 1 thereof,

Having published a draft of this Regulation(3),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty (formerly Article 85(3)) by regulation to certain categories of [vertical agreements](#) and corresponding concerted practices falling within Article 81(1).
- (2) Experience acquired to date makes it possible to define a category of [vertical agreements](#) which can be regarded as normally satisfying the conditions laid down in Article 81(3).
- (3) This category includes [vertical agreements](#) for the purchase or sale of goods or services where these agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods; it also includes [vertical agreements](#) containing ancillary provisions on the assignment or use of intellectual property rights; for the purposes of this Regulation, the term "[vertical agreements](#)" includes the corresponding concerted practices.
- (4) For the application of Article 81(3) by regulation, it is not necessary to define those [vertical agreements](#) which are capable of falling within Article 81(1); in the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the supply and purchase side.
- (5) The benefit of the block exemption should be limited to [vertical agreements](#) for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).
- (6) [Vertical agreements](#) of the category defined in this Regulation can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings; in particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
- (7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in [vertical agreements](#) depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended

use.

- (8) It can be presumed that, where the share of the relevant market accounted for by the supplier does not exceed 30 %, **vertical agreements** which do not contain certain types of severely anti-competitive restraints generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits; in the case of **vertical agreements** containing exclusive supply obligations, it is the market share of the buyer which is relevant in determining the overall effects of such **vertical agreements** on the market.
- (9) Above the market share threshold of 30 %, there can be no presumption that **vertical agreements** falling within the scope of Article 81(1) will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.
- (10) This Regulation should not exempt **vertical agreements** containing restrictions which are not indispensable to the attainment of the positive effects mentioned above; in particular, **vertical agreements** containing certain types of severely anti-competitive restraints such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.
- (11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions are to be attached to the block exemption; to this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a definite duration; for the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.
- (12) The market-share limitation, the non-exemption of certain **vertical agreements** and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (13) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission may withdraw the benefit of the block exemption; this may occur in particular where the buyer has significant market power in the relevant market in which it resells the goods or provides the services or where parallel networks of **vertical agreements** have similar effects which significantly restrict access to a relevant market or competition therein; such cumulative effects may for example arise in the case of selective distribution or non-compete obligations.
- (14) Regulation No 19/65/EEC empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of **vertical agreements** having effects incompatible with the conditions laid down in Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market; Member States should ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.
- (15) In order to strengthen supervision of parallel networks of **vertical agreements** which have similar restrictive effects and which cover more than 50 % of a given market, the Commission may declare this Regulation inapplicable to **vertical agreements** containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

- (16) This Regulation is without prejudice to the application of Article 82.
- (17) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

For the purposes of this Regulation:

- (a) "competing undertakings" means actual or potential suppliers in the same product market; the, product market includes goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services, by reason of the products' characteristics, their prices and their intended use;
- (b) "non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year;
- (c) "exclusive supply obligation" means any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer inside the Community for the purposes of a specific use or for resale;
- (d) "Selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors;
- (e) "intellectual property rights" includes industrial property rights, copyright and neighbouring rights;
- (f) "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, "secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (g) "buyer" includes an undertaking which, under an agreement falling within Article 81(1) of the Treaty, sells goods or services on behalf of another undertaking.

Article 2

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it

is hereby declared that Article 81(1) shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements").

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1) ("vertical restraints").

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million; vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 81 to horizontal agreements concluded between the members of the association or decisions adopted by the association.

3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings; however, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

- (a) the buyer has a total annual turnover not exceeding EUR 100 million, or
- (b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or
- (c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation.

Article 3

1. Subject to paragraph 2 of this Article, the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services.

2. In the case of vertical agreements containing exclusive supply obligations, the exemption provided for in Article 2 shall apply on condition that the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

Article 4

The exemption provided for in Article 2 shall not apply to **vertical agreements** which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except:
 - the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
 - the restriction of sales to end users by a buyer operating at the wholesale level of trade,
 - the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
 - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- (e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5

The exemption provided for in Article 2 shall not apply to any of the following obligations contained in **vertical agreements**:

- (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. However, the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer;
- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, unless such obligation:
 - relates to goods or services which compete with the contract goods or services, and
 - is limited to the premises and land from which the buyer has operated during the contract period, and

- is indispensable to protect know-how transferred by the supplier to the buyer,

and provided that the duration of such non-compete obligation is limited to a period of one year after termination of the agreement; this obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain;

(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

Article 6

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7(1) of Regulation No 19/65/EEC, where it finds in any particular case that [vertical agreements](#) to which this Regulation applies nevertheless have effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers.

Article 7

Where in any particular case [vertical agreements](#) to which the exemption provided for in Article 2 applies have effects incompatible with the conditions laid down in Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competent authority of that Member State may withdraw the benefit of application of this Regulation in respect of that territory, under the same conditions as provided in Article 6.

Article 8

1. Pursuant to Article 1 a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to [vertical agreements](#) containing specific restraints relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

Article 9

1. The market share of 30 % provided for in Article 3(1) shall be calculated on the basis of the market sales value of the contract goods or services and other goods or services sold by the supplier, which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, their prices and their intended use; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used

to establish the market share of the undertaking concerned. For the purposes of Article 3(2), it is either the market purchase value or estimates thereof which shall be used to calculate the market share.

2. For the purposes of applying the market share, threshold provided for in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (b) the market share shall include any goods or services supplied to integrated distributors for the purposes of sale;
- (c) if the market share is initially not more than 30 % but subsequently rises above that level without exceeding 35 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % market share threshold was first exceeded;
- (d) if the market share is initially not more than 30 % but subsequently rises above 35 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35 % was first exceeded;
- (e) the benefit of points (c) and (d) may not be combined so as to exceed a period of two calendar years.

Article 10

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2) and (4), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10 %.

Article 11

1. For the purposes of this Regulation, the terms "undertaking", "supplier" and "buyer" shall include their respective connected undertakings.

2. "Connected undertakings" are:

- (a) undertakings in which a party to the agreement, directly or indirectly:
 - has the power to exercise more than half the voting rights, or
 - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - has the right to manage the undertaking's affairs;

- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
- (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
- (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
 - one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

3. For the purposes of Article 3, the market share held by the undertakings referred to in paragraph 2(e) of this Article shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).

Article 12

1. The exemptions provided for in Commission Regulations (EEC) No 1983/83(4), (EEC) No 1984/83(5) and (EEC) No 4087/88(6) shall continue to apply until 31 May 2000.

2. The prohibition laid down in Article 81(1) of the EC Treaty shall not apply during the period from 1 June 2000 to 31 December 2001 in respect of agreements already in force on 31 May 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulations (EEC) No 1983/83, (EEC) No 1984/83 or (EEC) No 4087/88.

Article 13

This Regulation shall enter into force on 1 January 2000.

It shall apply from 1 June 2000, except for Article 12(1) which shall apply from 1 January 2000.

This Regulation shall expire on 31 May 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 December 1999.

For the Commission

Mario MONTI

Member of the Commission

- (1) OJ 36, 6.3.1965, p. 533/65.
- (2) OJ L 148, 15.6.1999, p. 1.
- (3) OJ C 270, 24.9.1999, p. 7.

- (4) OJ L 173, 30.6.1983, p. 1.
 (5) OJ L 173, 30.6.1983, p. 5.
 (6) OJ L 359, 28.12.1988, p. 46.

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**Judgment of the Court
of 28 February 1991**

Stergios Delimitis v Henninger Bräu AG.

**Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany.
Competition - Beer supply agreements - Effect on intra-Community trade - Block exemption -
Jurisdiction of national courts.
Case C-234/89.**

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1. Competition - Agreements - Effect on competition - Brewery agreements - Assessment criteria - Market accessibility - Contribution by the contract at issue to the sealing off of market positions stemming from the existence of a large number of similar agreements

(EEC Treaty, Art. 85(1))

2. Competition - Agreements - Effect on trade between Member States - Brewery agreements - Agreement authorizing purchase of beer from other Member States - Assessment criteria

(EEC Treaty, Art. 85(1))

3. Competition - Agreements - Prohibition - Block exemption -

Brewery agreements - Conditions for listing in the agreement itself the drinks subject to exclusive purchasing terms - Determination by reference to a price list drawn up unilaterally by the brewery - Not permissible

(Commission Regulation No 1984/83, Art. 6(1))

4. Competition - Agreements - Prohibition - Block exemption -

Brewery agreements - Conditions not satisfied - Consequence - Automatically void - Conditions and scope
(EEC Treaty, Art. 85(1) and (2); Commission Regulation No 1984/83, Art. 8(2)(b))

5. Competition - Community rules - Direct effect - Application by the national courts - Limits

(EEC Treaty, Arts. 85 and 86; Commission Regulation No 1984/83).

1. A beer supply agreement is prohibited by Article 85(1) of the EEC Treaty if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

2. A beer supply agreement which contains an access clause, that is to say one which permits the reseller to buy beer from other Member States, is not such as to affect trade between States provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States. That possibility is to be assessed in the light of the wording of the clause, regard also being had to the specific effect of all the contractual clauses in their economic and legal context.

3. A beer supply agreement does not satisfy the conditions laid down in Article 6(1) of Regulation No 1984/83 for block exemption for this type of agreement if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the price list of the brewery or its subsidiaries, as amended from time to time.

4. Where a beer supply agreement relating to premises used for the sale and consumption of drinks leased or made available to the reseller by the supplier and entailing a purchasing obligation for drinks other than beer cannot enjoy the block exemption provided for in Regulation No 1984/83 because that agreement does not meet the requirement laid down in Article 8(2)(b) of that regulation that the reseller should have the right in certain cases to obtain drinks from other suppliers, that does not necessarily mean that the whole of the contract is void under Article 85(2) of the Treaty, if only because such an agreement may qualify for exemption under another head. If anything is void, it is only those aspects of the agreement prohibited by Article 85(1). The agreement as a whole is void only if those parts do not appear to be severable from the agreement itself.

5. Whilst both Articles 85(1) and 86 of the Treaty and the provisions of the exemption regulations produce direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard, that does not mean that national courts may extend the sphere of application of the block exemption for agreements provided for in Regulation No 1984/83 to a beer supply agreement not explicitly complying with the conditions for exemption contained in that regulation; nor may they declare Article 85(1) of the Treaty inapplicable to such an agreement under Article 85(3). A national court may, however, declare the agreement void under Article 85(2) if it is certain that the agreement could not be the subject of an exemption under Article 85(3). Otherwise, it may in any event, on the one hand, request a preliminary ruling under Article 177 of the Treaty and, on the other, contact the Commission, which, by virtue of its duty of sincere cooperation with the judicial authorities of the Member States responsible for ensuring that Community law is applied and respected in the national legal system, will supply the national court with such economic and legal information as is necessary in order to resolve the litigation before the national court and which it is in a position to provide.

In Case C-234/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht (Higher Regional Court) Frankfurt am Main (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Stergios [Delimitis](#)

and

[Henninger](#) Braeu AG,

on the interpretation of Article 85 of the EEC Treaty and of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (Official Journal 1983 L 173, p. 5, corrected by the Corrigendum in Official Journal 1983 L 281, p. 24),

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida and M. Díez de Velasco, Presidents of Chambers, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: W. Van Gerven,

Registrar: H. A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of

Stergios [Delimitis](#), by Hans Thieme, of the Frankfurt am Main Bar,

[Henninger](#) Braeu AG, by Gerd Becht, of the Frankfurt am Main Bar,

the French Government, by Edwige Belliard, Deputy Director in the Directorate of Legal Affairs in the Ministry of Foreign Affairs, and by Mark Giacomini, Secretary for Foreign Affairs in the same Ministry, acting as Agents,

the Commission, by Norbert Koch, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Stergios [Delimitis](#), of [Henninger](#) Braeu AG, represented by Frank Montag, of the Cologne Bar, and of the Commission at the hearing on 20 June 1990,

after hearing the opinion of the Advocate General at the sitting on 11 October 1990,

gives the following

Judgment

Costs

56 The costs incurred by the French Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on cost is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Oberlandesgericht Frankfurt am Main, by order of 13 July 1989, hereby rules:

- (1) A beer supply agreement is prohibited by Article 85(1) of the EEC Treaty if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.
- (2) A beer supply agreement which permits the reseller to buy beer from other Member States is not such as to affect trade between States, provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States.
- (3) The conditions for the application of Article 6(1) of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements are not satisfied if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the

price list of the brewery or its subsidiaries, as amended from time to time.

- (4) The block exemption under Regulation (EEC) No 1984/83 does not apply to a beer supply agreement relating to premises used for the sale and consumption of drinks leased or made available to the reseller by the supplier which entails a purchasing obligation for drinks other than beer where that agreement does not meet the requirement laid down in Article 8(2)(b) of that regulation.
- (5) A national court may not extend the scope of Regulation (EEC) No 1984/83 to beer supply agreements which do not explicitly meet the conditions for exemption laid down in that regulation. Nor may the national court declare Article 85(1) of the Treaty inapplicable to such an agreement under Article 85(3). It may, however, declare the agreement void under Article 85(2) if it is certain that the agreement could not be the subject of an exemption decision under Article 85(3).

1 By an order of 13 July 1989, which was received at the Court on 27 July 1989, the Oberlandesgericht Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Article 85 of the EEC Treaty and of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (Official Journal 1983 L 173, p. 5, corrected by the Corrigendum in Official Journal 1983 L 281, p. 24).

2 Those questions were raised in proceedings between Mr Stergios [Delimitis](#), formerly the licensee of premises for the sale and consumption of drinks in Frankfurt am Main (hereinafter referred to as "the publican") and the brewery [Henninger](#) Braeu AG, established in Frankfurt (hereinafter referred to as "the brewery"). The dispute relates to an amount claimed from the publican by the brewery following the termination at the publican's request of the contract entered into between them on 14 May 1985.

3 Under Clause 1 of that contract the brewery let to the publican a public house. Clause 6 of the contract required the publican to obtain supplies of draft, bottled and canned beer from the brewery, and soft drinks from the brewery's subsidiaries. The range of products in question was determined on the basis of the current price lists of the brewery and its subsidiaries. However, the publican was permitted to purchase beers and soft drinks offered by undertakings established in other Member States.

4 Under Clause 6 the publican had to purchase a minimum quantity of 132 hectolitres of beer a year. If he bought less, he was required to pay a penalty for non-performance.

5 The contract was terminated by the publican on 31 December 1986. The brewery considered that he still owed it the sum of DM 6 032,15, comprising rent, a lump sum penalty for failure to observe the minimum purchasing requirement and miscellaneous costs. The brewery deducted that amount from the tenant's deposit which had been paid by the publican.

6 The publican challenged the deduction made by the brewery and brought proceedings against it before the Landgericht (Regional Court) Frankfurt am Main in order to recover the sum deducted. In support of his claim, he contended, inter alia, that the contract was automatically void by virtue of Article 85(2) of the EEC Treaty. By a judgment of 10 February 1988, the Landgericht dismissed the action. It considered that the contract did not affect trade between the Member States within the meaning of Article 85(1) on the ground, in particular, that it left the publican free to obtain supplies in other Member States; in the Landgericht's view, it was therefore immaterial that the contract in question did not observe the conditions for block exemption provided for in the abovementioned Regulation No 1984/83.

7 The publican lodged an appeal against the Landgericht's judgment with the Oberlandesgericht Frankfurt am Main which considered that it was necessary to ask the Court of Justice for a preliminary

ruling on the compatibility of the beer supply agreements with Community competition rules and accordingly referred the following questions to it:

"A - 1) Can an individual beer supply agreement containing an exclusive purchasing clause, such as the agreement between the parties, be such as to affect, to an appreciable degree, trade between Member States within the meaning of Article 85(1) of the EEC Treaty because it forms part of a 'bundle' of similar beer supply agreements in that Member State - no matter which brewery is involved - and the capacity to produce adverse effects on trade between States is to be assessed according to the effects on the market of that 'bundle of agreements' ?

2) If Question 1 is answered in the affirmative:

How high must the proportion of tied outlets in a Member State be for there to exist an appreciable effect on international trade; would the figure of some 60% accepted by the Commission of the European Communities for the proportion of tied outlets in the Federal Republic of Germany be sufficient for that purpose?

3. If Question 1 is answered in the negative:

Are the cumulative effects on the market of the totality of the beer supply agreements in the Federal Republic of Germany involving exclusive ties and/or the contributory role of the extant network of agreements to be ascertained by a comprehensive examination of the respective circumstances; if so, what are the criteria for such an examination and does special importance attach to any of the following factors:

- the size of the brewery making the tied-outlet agreement,
- the volume of trade affected by a single agreement,
- the volume of trade covered by the whole 'bundle' of agreements,
- the number of existing agreements, their duration, the volume of goods affected and their importance in comparison with the trade of sellers not subject to such ties,
- the contractual commitment imposed on the publican by the brewery, the drinks supplier or the landlord in the tenancy agreement,
- the volume of supplies to premises used for the sale and consumption of drinks, by independent wholesalers not subject to ties,
- the extent of ties to foreign producers,
- the density of tied outlets in particular geographical areas,
- a comparison with sales outside premises for the sale and consumption of drinks, and sales trends in this field,
- the possibility of setting up or purchasing new outlets?

4) If Question 1 or Question 3 is answered in the affirmative:

Is a beer-purchasing agreement which explicitly leaves the publican at liberty to purchase beer from other Member States (an 'access clause') in principle incapable of affecting trade between Member States or does the answer depend partly on whether - and to what extent - a minimum supply is agreed and on the rights (as to damages, notice of termination, etc.) accruing to the brewery in the event of insufficient purchases?

B - 1) Are the conditions laid down in Articles 1 and 6(1) of Regulation (EEC) No 1984/83 on block exemptions satisfied if the drinks covered by the purchase commitment are not listed in the

text of the contract, but it is agreed that the range will be as set out in the brewery's price list as amended from time to time?

2) Does a beer-supply agreement as a whole cease to be exempted by Regulation No 1984/83 from the prohibition in Article 85(1) of the EEC Treaty if it contains a commitment to buy soft drinks without including a 'more-favourable-conditions' clause as envisaged by Article 8(2)(b) of Regulation No 1984/83, as might be inferred from Article 2(1) thereof, read in conjunction with paragraph 17 of the Commission Notice concerning Commission Regulations (EEC) No 1983/83 and No 1984/83 of 22 June 1983, or does this mean that only this particular commitment under the purchasing agreement is void by virtue of Article 85(2) of the EEC Treaty because it is in itself permissible under Article 2(1) of Regulation No 1984/83?

C - Does a beer-purchasing agreement which falls under Article 85 of the EEC Treaty and does not meet the conditions under Regulation No 1984/83 on block exemptions always require a specific exemption or does the national court have power to treat the agreement as valid where there is a minor divergence from the aforesaid regulation?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In Questions A(1), (2) and (3), the national court seeks to ascertain the criteria to be applied in examining whether a beer supply agreement is compatible with Article 85(1) of the EEC Treaty. In Question A(4), the national court is essentially asking whether those criteria differ where the beer supply agreement contains an access clause which expressly allows the publican to obtain supplies in other Member States. Questions B(1) and (2) relate to the interpretation of Regulation No 1984/83, and in particular Articles 6 and 8 thereof. Question C concerns the jurisdiction of a national court to apply Article 85 of the EEC Treaty to a beer supply agreement which does not fulfil the conditions for exemption laid down in Regulation No 1984/83.

The compatibility of beer supply agreements with Article 85(1) of the Treaty

10 Under the terms of beer supply agreements, the supplier generally affords the reseller certain economic and financial benefits, such as the grant of loans on favourable terms, the letting of premises for the operation of a public house and the provision of technical installations, furniture and other equipment necessary for its operation. In consideration for those benefits, the reseller normally undertakes, for a predetermined period, to obtain supplies of the products covered by the contract only from the supplier. That exclusive purchasing obligation is generally backed by a prohibition on selling competing products in the public house let by the supplier.

11 Such contracts entail for the supplier the advantage of guaranteed outlets, since, as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods. The supply agreements, moreover, lead to cooperation with the reseller, allowing the supplier to plan his sales over the duration of the agreement and to organize production and distribution effectively.

12 Beer supply agreements also have advantages for the reseller, inasmuch as they enable him to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market. The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance in guaranteeing product quality and customer service.

13 If such agreements do not have the object of restricting competition within the meaning of Article

85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition.

14 In its judgment in Case 23/67 *Brasserie De Haecht v Wilkin* [1967] ECR 407, the Court held that the effects of such an agreement had to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. It also follows from that judgment that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected.

15 Consequently, in the present case it is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers.

16 In making that analysis, the relevant market must first be determined. The relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic considerations. The specific nature of the public house trade is borne out by the fact that the breweries organize specific distribution systems for this sector which require special installations, and that the prices charged in that sector are generally higher than retail prices.

17 It follows that in the present case the reference market is that for the distribution of beer in premises for the sale and consumption of drinks. That finding is not affected by the fact that there is a certain overlap between the two distribution networks, namely inasmuch as retail sales allow new competitors to make their brands known and to use their reputation in order to gain access to the market constituted by premises for the sale and consumption of drinks.

18 Secondly, the relevant market is delimited from a geographical point of view. It should be noted that most beer supply agreements are still entered into at a national level. It follows that, in applying the Community competition rules, account is to be taken of the national market for beer distribution in premises for the sale and consumption of drinks.

19 In order to assess whether the existence of several beer supply agreements impedes access to the market as so defined, it is further necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers (judgment in Case 43/69 *Bilger v Jehle* [1970] ECR 127). The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.

20 The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised (Case 23/67 *Brasserie De Haecht*, cited above). The other factors to be taken into account are, in the first instance, those also relating to opportunities for access.

21 In that connection it is necessary to examine whether there are real concrete possibilities

for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system. The presence of beer wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own beer.

22 Secondly, account must be taken of the conditions under which competitive forces operate on the relevant market. In that connection it is necessary to know not only the number and the size of producers present on the market, but also the degree of saturation of that market and customer fidelity to existing brands, for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a market in full expansion in which a large number of small producers are operating without any strong brand names. The trend in beer sales in the retail trade provides useful information on the development of demand and thus an indication of the degree of saturation of the beer market as a whole. The analysis of that trend is, moreover, of interest in evaluating brand loyalty. A steady increase in sales of beer under new brand names may confer on the owners of those brand names a reputation which they may turn to account in gaining access to the public-house market.

23 If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 85(1) of the Treaty. They do not, therefore, fall under the prohibition laid down in that provision.

24 If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Under the Community rules on competition, responsibility for such an effect of closing off the market must be attributed to the breweries which make an appreciable contribution thereto. Beer supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition under Article 85(1).

25 In order to assess the extent of the contribution of the beer supply agreements entered into by a brewery to the cumulative sealing-off effect mentioned above, the market position of the contracting parties must be taken into consideration. That position is not determined solely by the market share held by the brewery and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of drinks found in the relevant market.

26 The contribution of the individual contracts entered into by a brewery to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals.

27 The reply to be given to the first three questions is therefore that a beer supply agreement is prohibited by Article 85(1) of the EEC Treaty, if two cumulative conditions are met. The first

is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

The compatibility with Article 85(1) of a beer supply agreement containing an access clause

28 A beer supply agreement containing an access clause differs from the other beer supply agreements normally entered into inasmuch as it authorizes the reseller to purchase beer from other Member States. Such access mitigates, in favour of the beers of other Member States, the scope of the prohibition on competition which in a classic beer supply agreement is coupled with the exclusive purchasing obligation. The scope of the access clause must be assessed in the light of its wording and its economic and legal context.

29 As far as its wording is concerned, it should be noted that the clause affords only very limited access if it is regarded as solely authorizing the reseller himself to purchase competing beers in other Member States. However, the degree of access is greater if it also permits the reseller to sell beers imported from other Member States by other undertakings.

30 As far as its economic and legal context is concerned, it should be pointed out that where, as in this case, one of the other clauses stipulates that a minimum quantity of the beers envisaged in the agreement must be purchased, it is necessary to examine what that quantity represents in relation to the sales of beer normally achieved in the public house in question. If it appears that the stipulated quantity is relatively large, the access clause ceases to have any economic significance and the prohibition on selling competing beers regains its full force, particularly when under the agreement the obligation to purchase minimum quantities is backed by penalties.

31 If the interpretation of the wording of the access clause or an examination of the specific effect of the contractual clauses as a whole in their economic and legal context shows that the limitation on the scope of the prohibition on competition is merely hypothetical or without economic significance, the agreement in question must be treated in the same way as a classic beer supply agreement. Accordingly, it must be assessed under Article 85(1) of the Treaty in the same way as beer supply agreements in general.

32 The position is different where the access clause gives a national or foreign supplier of beers from other Member States a real possibility of supplying the sales outlet in question. An agreement containing such a clause is not in principle capable of affecting trade between Member States within the meaning of Article 85(1), with the result that it escapes the prohibition laid down in that provision.

33 The reply to the Oberlandesgericht's fourth question should therefore be that a beer supply agreement which permits the reseller to buy beer from other Member States is not such as to affect trade between States provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States.

Interpretation of Article 6(1) of Regulation No 1984/83

34 In Question B(1), the national court essentially seeks to ascertain whether a beer supply agreement

falls within the block exemption under Regulation No 1984/83, in particular Article 6(1) thereof, when the range of products subject to the exclusive purchasing obligation imposed on the reseller is not specified in the text of the agreement itself, but is contained in the stock and price lists drawn up at regular intervals by the supplier.

35 Regulation No 1984/83 contains special rules on block exemption for beer supply agreements. Those rules, which differ from the general provisions applicable to exclusive purchase agreements, are contained in Articles 6, 7 and 8 of that regulation.

36 It is clear from Article 6(1) of that regulation that the exclusive purchasing obligation on the part of the reseller relates solely to certain beers or to certain beers and drinks specified in the agreement. The purpose of requiring that they be so specified is to prevent the supplier from unilaterally extending the scope of the exclusive purchasing obligation. A beer supply agreement which refers, as regards the products covered by the exclusive purchasing agreement, to a list of products which may be unilaterally altered by the supplier does not satisfy that requirement and thus does not enjoy the protection of Article 6(1).

37 Consequently, the reply to Question B(1) must be that the conditions for the application of Article 6(1) of Regulation No 1984/83 are not satisfied if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the price list of the brewery or its subsidiaries, as amended from time to time.

Interpretation of Article 8(2)(b) of Regulation No 1984/83

38 Article 8(2)(b) of Regulation No 1984/83 provides, *inter alia*, that, where the beer supply agreement relates to premises which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, the agreement must provide for the reseller to have the right to obtain drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet. In Question B(2) the national court seeks to ascertain whether an agreement not satisfying that requirement as a whole ceases to enjoy the block exemption under the regulation or whether the consequences of that incompatibility with the abovementioned provision are confined to the clause in the agreement prohibiting the reseller from purchasing drinks other than beer from other undertakings.

39 The reply to that question is given by the terms of Article 8 of Regulation No 1984/83. Article 8(1) expressly provides that the block exemption for beer supply agreements is not applicable when certain clauses restrict the reseller's freedom of action and the duration of the agreement is excessive. Article 8(2) adds special provisions for agreements concerning the letting or provision of premises for the sale and consumption of drinks. The block exemption for beer supply agreements provided for in Article 6(1) of the regulation therefore ceases to be applicable in its entirety if those conditions are not met.

40 However, the fact that a beer supply agreement does not satisfy the conditions for block exemption does not necessarily mean that the whole of the contract is void under Article 85(2) of the Treaty. It is only those aspects of the agreement which are prohibited by Article 85(1) that are void. The agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself (judgment in Case 5665 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235).

41 Moreover, it should be pointed out that the parties to an agreement which does not enjoy the protection of a block exemption regulation may always request the Commission to grant an individual exemption, or may claim that the conditions of another exemption regulation for other categories of agreements are fulfilled (judgment in Case 10/86 *VAG France v Magne* [1986] ECR 4071).

42 The reply to Question B(2) should therefore be that the block exemption provided for in Regulation No 1984/83 does not apply to a beer supply agreement relating to premises used for the sale and consumption of drinks leased or made available to the reseller by the supplier which entails a purchasing obligation for drinks other than beer where that agreement does not meet the requirement laid down in Article 8(2)(b) of that regulation.

The jurisdiction of the national court to apply Article 85 to an agreement not enjoying the protection of an exemption regulation

43 In its final question the national court asks what assessment it is to make under Community competition rules in regard to an agreement which does not satisfy the conditions for the application of Regulation No 1984/83. That question raises a general problem of a procedural nature concerning the respective powers of the Commission and national courts in the application of those rules.

44 In that respect it should be stressed, first of all, that the Commission is responsible for the implementation and orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. The performance of that task necessarily entails complex economic assessments, in particular in order to assess whether an agreement falls under Article 85(3). Pursuant to Article 9(1) of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-62, p. 87), the Commission has exclusive competence to adopt decisions in implementation of Article 85(3).

45 On the other hand, the Commission does not have exclusive competence to apply Articles 85(1) and 86. It shares that competence with the national courts. As the Court stated in its judgment in Case 127/73 (BRT v SABAM [1974] ECR 51), Articles 85(1) and 86 produce direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard.

46 The same is true of the provisions of the exemption regulation (judgment in Case 63/75, *Fonderies Roubaix* [1976] ECR 111). The direct applicability of those provisions may not, however, lead the national courts to modify the scope of the exemption regulations by extending their sphere of application to agreements not covered by them. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence.

47 It now falls to examine the consequences of that division of competence as regards the specific application of the Community competition rules by national courts. Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85(1) and 86, and also of Article 85(3). Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission.

48 As the Court has consistently held, national courts may not, where the Commission has given no decision under Regulation No 17, declare automatically void under Article 85(2) agreements which were in existence prior to 13 March 1962, when that regulation came into force, and have been duly notified (judgment in Case 48/72 *Brasserie De Haecht v Wilkin Jansen* [1973] ECR 77; and judgment in Case 59/77 *De Bloos v Bouyer* [1977] ECR 2359). Those agreements in fact enjoy provisional validity until the Commission has given a decision (judgment in Case 99/79 *Lancôme v Etos* [1980] ECR 2511).

49 The contract at issue in the main proceedings was entered into on 14 May 1985 and there is nothing in the file to indicate that that contract represents an exact reproduction of a standard contract

concluded before 13 March 1962 and duly notified (judgment in Case 1/70 Rochas [1970] ECR 515). The contract would not therefore appear to enjoy provisional validity. Nevertheless, in order to reconcile the need to avoid conflicting decisions with the national court's duty to rule on the claims of a party to the proceedings that the agreement is automatically void, the national court may have regard to the following considerations in applying Article 85.

50 If the conditions for the application of Article 85(1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85(3).

51 In that connection it should be borne in mind that such a decision may only be taken in respect of an agreement which has been notified or is exempt from having to be notified. Under Article 4(2) of Regulation No 17, an agreement is exempt from the notification obligation when only undertakings from a single Member State are parties to it and it does not relate to imports or exports between Member States. A beer supply agreement may satisfy those conditions, even if it forms an integral part of a series of similar contracts (judgment in *Bilger v Jehle*, cited above).

52 If the national court finds that the contract in issue satisfies those formal requirements and if it considers in the light of the Commission's rules and decision-making practices, that that agreement may be the subject of an exemption decision, the national court may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure. A stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of Articles 85(1) and 86.

53 It should be noted in this context that it is always open to a national court, within the limits of the applicable national procedural rules and subject to Article 214 of the Treaty, to seek information from the Commission on the state of any procedure which the Commission may have set in motion and as to the likelihood of its giving an official ruling on the agreement in issue pursuant to Regulation No 17. Under the same conditions, the national court may contact the Commission where the concrete application of Article 85(1) or of Article 86 raises particular difficulties, in order to obtain the economic and legal information which that institution can supply to it. Under Article 5 of the Treaty, the Commission is bound by a duty of sincere cooperation with the judicial authorities of the Member State, who are responsible for ensuring that Community law is applied and respected in the national legal system (Order of 13 July 1990 in Case C-2/88, *Zwartveld* [1990] ECR I-3365, paragraph 18).

54 Finally, the national court may in any event, stay the proceedings and make a reference to the Court for a preliminary ruling under Article 177 of the Treaty.

55 The reply to the *Oberlandesgericht's* last question should therefore be that a national court may not extend the scope of Regulation No 1984/83 to beer supply agreements which do not explicitly meet the conditions for exemption laid down in that regulation. Nor may a national court declare Article 85(1) of the Treaty inapplicable to such an agreement under Article 85(3). It may, however, declare the agreement void under Article 85(2) if it is certain that the agreement could not be the subject of an exemption decision under Article 85(3).

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Practical Case¹ - Competition Law

Facts

Utopia is a member state of the European Union. Utopians are prodigious beer drinkers. Beer touches something very deep in the Utopian psyche. The national saint is the patron saint of brewers, the national flower is the hop, and the national anthem makes frequent reference to the pleasures of beer. As a result, the production, marketing and consumption of beer has been heavily regulated for some centuries.

All aspects of beer are regulated in Utopia by the Beer Act 1745. In order to protect the quality of Utopian beer, the Act long provided that hops may be used in brewing only if the hop producer is licensed by the Hop Authority, a public body, which imposes strict quality control and enjoys a statutory monopoly in the sale of brewing hops. For many years Utopian beer was required to be produced from hops sold by the Hop Authority, malt, yeast and water, and no other ingredient. Bottled and draught beer may be sold for consumption by restaurants, public houses and cafés (hereinafter "licensed premises") only if the premises hold a licence from the Beer Authority, the public administrative authority regulating beer production and consumption, to do so. Since 1987, off licence sales of beer are available only through the state owned outlet, the Beerhaus, which is controlled by the Beer Authority. About 70 percent of beer consumed in Utopia is bought at licensed premises, of which 80 percent is draught beer; 30 percent is bought from the Beerhaus, which sells only bottled beer.

In the last century beer was produced in Utopia by hundreds of small, local brewers. By tradition, Utopians prefer beer sold on draught. The last 100 years have seen a high degree of concentration of the draught beer market, so that now about 95 percent of Utopian production

¹ The case was originally used as the 1998-1999 moot court case of the European Law Moot Court Society

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is in the hands of four brewers: Ambrosius SA (with 30 percent of the market), Bacchus SA (30 percent), Chemin d'Ambre SA (20 percent) and Espérance d'Or SA (15 percent). All four brewers are publicly owned companies, incorporated under Utopian law and quoted on the Utopian stock exchange. Their combined annual turnover amounts to some ECU 50 thousand million. The remaining independent local brewers account for the other 5 percent of Utopian draught beer production. The four brewers also produce bottled beer, but there are several dozen Utopian brewers of bottled beer with which they compete.

In 1987, following the judgment of the Court of Justice in Case 178/84 Commission v Germany [1987] ECR 1227, the Beer Act was amended in order to permit the importation of hops from other member states, the use of imported hops in Utopian brewing, and the sale both by the Beerhaus and by licensed premises of imported beer which did not comply with the requirements of the Beer Act. However, all Utopian brewers continue to buy their hops exclusively from the Hop Authority the few which tried otherwise went out of business very quickly and Utopians have remained fiercely loyal to Utopian beer. Imported beer accounts for less than 2 percent of the Utopian market. The four major Utopian brewers however are enjoying ever increasing export sales. The Beer Act was further amended in 1987 in the light of concentration within the Utopian draught beer market: in order that consumers should always have a choice of draught beers, Article 10 provides that all licensed premises must sell draught produced by at least two different brewers.

Beer is supplied to the Beerhaus by all brewers by means of standard term contracts. The price at which beer is supplied has been more or less uniform since the Beerhaus was established. There is no suggestion they have colluded on prices. Last year however Ambrosius struck a deal with the Beerhaus that it would supply its beer at significantly lower prices, set just above average variable cost of production but lower than average total cost. Ambrosius is able to sustain this low price through the profits it makes from its draught beer sales. The Beerhaus passed on these savings to its customers, and immediately sales of Ambrosius bottled beers increased significantly. Espérance d'Or therefore raised proceedings (sub. nom. Espérance d'Or SA v Ambrosius SA (No 1)) in a Utopian civil court seeking both a declaration that Ambrosius was engaged in predatory pricing and so committing an infringement of Article 86 of the EC Treaty and an order that Ambrosius raise the prices at which it sold beer to the Beerhaus.

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In 1992 Ambrosius developed a new hand drawn system for draught beer. The new system delivers beer in a draught glass which retains much longer the creamy 'head' beloved of all Utopians. Ambrosius secured from the Utopian Patent Office a patent on the system. Immediately it notified the Commission of the existence of the patent and its intention to license its use for the sale of Ambrosius draught beer in Utopian public houses, and requested negative clearance under Regulation 17 (Regulation 17/62 30 1962, p. 24) as regards both Articles 85 (1) and 86 of the EC Treaty in accordance with Article 2 of the Regulation. Two years later, the Commission responded with a decision (Decision 94/100) addressed to Ambrosius, which reasoned that Ambrosius' acquisition of the patent and its intention to license it exclusively for the sale of Ambrosius draught beer fell within the specific subject matter of the patent, and so provided in Article 1 (the operative part): "Upon the basis of information provided and available to it, the Commission has no grounds for action under Articles 85(1) or 86 of the EC Treaty in respect of the notified patent and licensing arrangements proposed by Ambrosius SA."

Faced with growing success of the Ambrosius system, earlier this year Espérance d'Or requested that Ambrosius license Espérance d'Or to use it for the sale of its draught beer in exchange for royalty payments. Ambrosius refused. Espérance d'Or therefore raised further proceedings (sub. nom. Espérance d'Or SA v Ambrosius SA (No 2)) before a Utopian civil court seeking a declaration that the refusal constituted an infringement of Article 86 of the EC Treaty. The court was clearly minded to find a breach of Article 86, but Ambrosius argued that Decision 94/100 barred it from so holding. Espérance d'Or argued that the court was not bound by Decision 94/100, and raised an ancillary plea that the decision was illegal because the Commission failed to publish a summary of the notification in the Official Journal prior to adopting the decision as required by Article 19(3) of Regulation 17. To this plea, Ambrosius responded with the following argument: a decision granting negative clearance is not an act which affects the legal position of the applicant(s) and so is not susceptible to judicial review.

In the meanwhile, last year Espérance d'Or itself developed a new marketing strategy intended to increase its share of the Utopian market for both bottled and draught beer sold in licensed premises. It entered into a series of contracts, each valid for a 10 year period, with a large number of Utopian public houses whereby Espérance d'Or agreed with each a fidelity rebate

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of 12 percent on all beer purchases in exchange for an undertaking to buy a series of Espérance d'Or brands of beer, listed in each contract, and to buy supplies from no other brewer. Immediately Ambrosius raised an action (sub. nom. Ambrosius SA v Espérance d'Or SA) in a civil court seeking a declaration that the contracts were a nullity for breach of Article 10 of the Beer Act. Espérance d'Or responded with the argument that the contracts fall within Articles 6 to 9 of Commission Regulation 1984/83 OJ 1983 L173/5 (as last amended by Regulation 1582/97 OJ 1997 L214/27) and, as a result, the requirements of Article 10 of the Beer Act are set aside.

The civil courts found for Ambrosius in all three cases. Espérance d'Or appealed all three judgments to the Utopian Court of Appeal, which enjoys appellate jurisdiction in civil matters. The three cases were joined by the Court of Appeal, which then stayed the proceedings and referred the following questions to the Court of Justice under Article 177 of the EC Treaty:

Questions

1 a) In the circumstances of Espérance d'Or SA v Ambrosius SA (No 1), is Ambrosius SA in a dominant position within the meaning of Article 86 of the EC Treaty ?

b) If the answer to question 1(a) is yes, does Ambrosius' pricing policy in its supplies of beer to the Beerhaus constitute an abuse of that dominance?

2 a) Is Commission Decision 94/100 an act susceptible to judicial review?

b) If the answer to question 2(a) is yes, is Decision 94/100 illegal owing to a failure of the Commission to publish a summary of the notification in the Official Journal?

c) If the answer to question 2(b) is no, may a national court, which takes a view different from the Commission, ignore the Commission view as stated in a decision granting negative clearance?

3) If a series of contracts between a brewer and a number of publicans for the exclusive

purchase of beer supplies fails within Regulation 1984/83, does that have the effect of setting aside national statutory rules which encourage greater competition and would otherwise render the contracts a nullity?

The order of referral has now been received by the Registrar of the Court of Justice, who has allocated to it Case number M 300/98. In accordance with Article 20 of the Statute of the Court of Justice of the EC, the Registrar has notified Espérance d'Or SA (as applicant) and Ambrosius SA (as respondent) and has invited them to submit written observations to the Court.

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**Judgment of the Court
of 27 September 1988**

**A. Ahlström Osakeyhtiö and others v Commission of the European Communities.
Concerted practices between undertakings established in non-member countries affecting selling
prices to purchasers established in the Community.
Joined cases 89, 104, 114, 116, 117 and 125 to 129/85.**

++++

1 . Competition - Community rules - Territorial scope - Pricing agreement between producers established outside the Community - Purchasers established within the Community - Implementation of the agreement within the Community - Application of Community law - Conformity with public international law - Recourse to subsidiaries, agents or branches within the common market - Immaterial

(EEC Treaty, Art. 85)

2 . Public international law - Principle of non-intervention - Where applicable

3 . International agreements - Agreement between EEC and Finland - Competition rules - No barrier to application of Articles 85 and 86 of the Treaty

(EEC Treaty, Arts 85 and 86; Agreement between EEC and Finland, Arts 23 and 27)

1 . Where producers established outside the Community sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.

It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.

The Community' s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law. Under the rules against agreements, decisions or concerted practices, the decisive factor is where the agreement, decision or concerted practice is implemented rather than where it is formed. It is immaterial whether or not the producers had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

2 . Where there is no contradiction between the conduct required of an undertaking from a non-member country operating in the common market by the Community competition rules and that required by the legislation of that non-member country, which authorizes export cartels but does not require them to be concluded, there is, in public international law, no conflict regarding the exercise of competing national jurisdictions which has to be resolved by applying a principle of non-intervention.

3 . Articles 23 and 27 of the Free Trade Agreement between the Community and Finland do not preclude the application of Articles 85 and 86 of the EEC Treaty.

In Joined Cases "wood pulp"

89/85,

(1) A . [Ahlstroem](#) Osakeyhtioe, Helsinki,

(2) Joutseno-Pulp Osakeyhtioe, Joutseno,

(3) Kymmene Oy, Helsinki, successor in title to Oy Kaukas AB, Lappeenranta,

(4) Kemi Oy, Kemi,

- (5) Oy Metsae-Botnia AB, Kaskinen,
(6) Metsaeliiton Teollisuus Oy, Espoo,
(7) Veitsuluoto Oy, successor in title to Oulu Oy, Oulu,
(8) Oy Wilh. Schaumann AB, Helsinki,
(9) Sunilà Osakeyhtiö, Sunila,
(10) Veitsiluoto Oy, Kemi,
(11) Finncell, Helsinki,
(12) Enso-Gutzeit Oy, Helsinki,

all Finnish undertakings, represented by A. von Winterfeld, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt, 4 avenue Marie-Thérèse,

applicants,

v

Commission of the European Communities, represented by its Legal Advisers, A . McClellan and G. zur Hausen, and by P. J. Kuyper, a member of its Legal Department, acting as Agents, assisted by S. Boese of the Belmont European Community Law Office in Brussels, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant;

104/85,

Bowater Incorporated, Darien (Connecticut, USA), represented by D. Vaughan QC and by D. F. Hall, Solicitor, of Linklaters and Paines, London, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant;

114/85,

The Pulp, Paper and Paperboard Export Association, Bethlehem (Pennsylvania, USA), comprising the United States undertakings :

The Chesapeake Corporation,

Crown Zellerbach Corporation,

Federal Paper Board Company Inc.,

Georgia-Pacific Corporation,

The Mead Corporation,

Scott Paper Company, and

Weyerhaeuser Company,

represented by M. Waelbroeck and A. Vandencastele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 4 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

116/85,

St Anne-Nackawic Pulp and Paper Company Ltd, Nackawic (New Brunswick, Canada), represented by D. Voillemot, avocat at the cour d' appel, Paris, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant;

117/85,

International Pulp Sales Company, New York, represented by I. Van Bael and J . F. Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by B. Clarke-Smith and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant;

125/85,

Westar Timber Ltd, Canada, represented by C. Stanbrook (Barrister-at-law, London) of Stanbrook and Hooper, Brussels, and by M . Siragusa (of the Rome Bar) of Cleary, Gottlieb, Steen and

Hamilton, 23 rue de la Loi, Brussels, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by K. Banks and P. J. Kuyper, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

126/85,

Weldwood of Canada Ltd, Canada, represented by Christopher Prout of the Middle Temple, Barrister-at-law, and Miss Alice Robinson of Gray' s Inn, Barrister-at-law, instructed by J. M. Cochran III of Wilkie Farr and Gallagher, Paris, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

127/85,

MacMillan Bloedel Ltd, Canada, represented by C. Stanbrook (Barrister-at-law, London) of Stanbrook and Hooper, Brussels, by P. Sambuc of Boden, Oppenhoff and Schneider and by Cleary, Gottlieb, Steen and Hamilton, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N.

Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

128/85,

Canadian Forest Products Ltd, Canada, represented by C. Stanbrook (Barrister-at-law, London) of Stanbrook and Hooper, Brussels, and by M . Siragusa (of the Rome Bar) of Cleary, Gottlieb, Steen and Hamilton, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-Law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

129/85,

British Columbia Forest Products Ltd, Canada, represented by C. Stanbrook (Barrister-at-Law, London) of Stanbrook and Hooper, Brussels, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d' Eich,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, A . McClellan, by P. J. Kuyper and K. Banks, members of its Legal Department, acting as Agents, assisted by N. Forwood, Barrister-at-law, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The United Kingdom, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, MP (the Solicitor-General) and Professor R. Higgins, QC,

intervener;

APPLICATION for a declaration that the Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.725 - Wood pulp) (Official Journal 1985, L 85, p. 1) is void,

THE COURT

composed of : Lord Mackenzie Stuart, President, G. Bosco, O. Due, J . C . Moitinho de Almeida, and G. C. Rodríguez Iglesias, (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y . Galmot, C . N. Kakouris, R. Joliet, T. F. O' Higgins and F. A. Schockweiler, Judges,

Advocate General : M. Darmon

Registrar : H. A. Ruehl, Principal Administrator

having regard to the Report for the Hearing, as amended, and further to the hearing on 12 January 1988, after hearing the Opinion of the Advocate General delivered at the sitting on 25 May 1988,

gives the following :

Judgment

1 By applications lodged at the Court Registry between 4 and 30 April 1985, wood pulp producers and two associations of wood pulp producers, all having their registered offices outside the Community, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Decision IV/29.725 of 19 December 1984 (Official Journal 1985, L 85, p. 1), in which the Commission had established that they had committed infringements of Article 85 of the Treaty and imposed fines on them.

2 The alleged infringements consisted of : concertation between those producers on prices announced each quarter to customers in the Community and on actual transaction prices charged to such customers (Article 1 (1) and (2) of the decision); price recommendations addressed to its members by the Pulp, Paper and Paperboard Export Association of the United States (formerly named Kraft Export Association and hereinafter referred to as "KEA "), an association of a number of United States producers (Article 1 (3)); and, as regards Fincell, the common sales organization of some 10 Finnish producers, the exchange of individualized data concerning prices with certain other wood pulp producers within the framework of the Research and Information Centre for the European Pulp and Paper Industry which is run by the trust company Fides of Switzerland (Article 1 (4)).

3 In paragraph 79 of the contested decision the Commission set out the grounds which in its view justify the Community' s jurisdiction to apply Article 85 of the Treaty to the concertation in question. It stated first that all the addressees of the decision were either exporting directly to purchasers within the Community or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community. It further pointed out that the concertation applied to the vast majority of the sales of those undertakings to and in the Community. Finally it stated that two-thirds of total shipments and 60% of consumption of the product in question in the Community had been affected by such concertation. The Commission concluded that : "The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices ."

4 As regards specifically the Finnish undertakings and their association, Fincell, the Commission stated in paragraph 80 of the decision that the Free Trade Agreement between the Community and

Finland (Official Journal 1973, L 328, p. 1) contains "no provision which prevents the Commission from immediately applying Article 85 (1) of the EEC Treaty where trade between Member States is affected ".

5 A number of applicants have raised submissions regarding the Community' s jurisdiction to apply its competition rules to them. On 8 July 1987 the Court decided in the first instance to hear the parties' submissions on this point. By order of 16 December 1987 the Court joined the cases for the purposes of the oral procedure and the judgment .

6 All the applicants which have made submissions regarding jurisdiction maintain first of all that by applying the competition rules of the Treaty to them the Commission has misconstrued the territorial scope of Article 85. They note that in its judgment of 14 July 1972 in Case 48/69 ICI v Commission ((1972)) ECR 619 the Court did not adopt the "effects doctrine" but emphasized that the case involved conduct restricting competition within the common market because of the activities of subsidiaries which could be imputed to the parent companies. The applicants add that even if there is a basis in Community law for applying Article 85 to them, the action of applying the rule interpreted in that way would be contrary to public international law which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community.

7 The applicants which are members of the KEA further submit that the application of Community competition rules to them is contrary to public international law in so far as it is in breach of the principle of non-interference. They maintain that in this case the application of Article 85 harmed the interest of the United States in promoting exports by United States undertakings as recognized in the Webb Pomerene Act of 1918 under which export associations, like the KEA, are exempt from United States anti-trust laws.

8 Certain Canadian applicants also maintain that by imposing fines on them and making reduction of those fines conditional on the producers giving undertakings as to their future conduct the Commission has infringed Canada' s sovereignty and thus breached the principle of international comity.

9 The Finnish applicants consider that in any event it is only the rules on competition contained in the Free Trade Agreement between the Community and Finland that may be applied to their conduct, to the exclusion of Article 85 of the EEC Treaty, and that the Community should therefore have consulted Finland on the measures which it envisaged adopting regarding the agreement in question in accordance with the procedure provided for in Article 27 of that agreement.

10 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Incorrect assessment of the territorial scope of Article 85 of the Treaty and incompatibility of the decision with public international law

(a) The individual undertakings

11 In so far as the submission concerning the infringement of Article 85 of the Treaty itself is concerned, it should be recalled that that provision prohibits all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market.

12 It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that

constitutes competition within the common market.

13 It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.

14 Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.

15 The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the Community.

16 It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

17 The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

18 Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.

19 As regards the argument based on the infringement of the principle of non-interference, it should be pointed out that the applicants who are members of KEA have referred to a rule according to which where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. The applicants have concluded that by disregarding that rule in applying its competition rules the Community has infringed the principle of non-interference.

20 There is no need to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded.

21 It should further be pointed out that the United States authorities raised no objections regarding any conflict of jurisdiction when consulted by the Commission pursuant to the OECD Council Recommendation of 25 October 1979 concerning Cooperation between Member Countries on Restrictive Business Practices affecting International Trade (Acts of the Organization, Vol. 19, p. 376).

22 As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.

23 Accordingly it must be concluded that the Commission's decision is not contrary to Article 85 of the Treaty or to the rules of public international law relied on by the applicants.

(b) KEA

24 According to its Articles of Association, KEA is a non-profit-making association whose purpose is the promotion of the commercial interests of its members in the exportation of their products and it serves primarily as a clearing-house for its members for information regarding their export markets. KEA does not itself engage in manufacture, selling or distribution.

25 It should further be pointed out that within KEA a number of groups have been formed, including the Pulp Group, to cover the different sectors of the pulp and paper industry. Under Article I of the by-laws of KEA, undertakings may only join KEA by becoming a member of one of those groups. Article 2 of the by-laws provides that the groups enjoy full independence in the management of their affairs

26 It should lastly be noted that according to a policy statement adopted by the Pulp Group, referred to in paragraph 32 of the contested decision, the members of the group may conclude price agreements at meetings which they hold from time to time provided that each member is informed in advance that prices will be discussed and that the meeting is quorate. The unanimous agreement of the members present is also binding on members who are absent when the decision is adopted .

27 It is apparent from the foregoing that KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements .

28 In those circumstances the decision should be declared void in so far as it concerns KEA.

The question whether or not the competition rules in the Free Trade Agreement between the Community and Finland are exclusively applicable

29 It is necessary to determine whether, as the applicants maintain, Articles 23 and 27 of the Free Trade Agreement have the effect of precluding the application of Article 85 of the EEC Treaty in so far as trade between the Community and Finland is concerned.

30 It should be noted first of all that, under Article 23 (1) of the Free Trade Agreement, in particular, agreements and concerted practices which have as their object or effect the restriction of competition are incompatible with the proper functioning of the agreement in so far as they may affect trade between the Community and Finland . Under Article 23 (2), if a Contracting Party considers that a given practice is incompatible with Article 23 (1), it may take appropriate measures in accordance with the procedures laid down in Article 27 . In the context of those procedures it is to consult the other Contracting Party within the Joint Committee in order to reach agreement on the measures which it proposes to adopt in order to put a stop to the offending practices. If no agreement can be reached, the Contracting Party concerned may adopt safeguard measures.

31 It should also be observed that Articles 23 and 27 of the Free Trade Agreement presuppose that the Contracting Parties have rules which enable them to take action against agreements which they regard as being incompatible with that agreement. As far as the Community is concerned, those rules can only be the provisions of Articles 85 and 86 of the Treaty. The application of those articles is therefore not precluded by the Free Trade Agreement.

32 It should be pointed out finally that in this case the Community applied its competition rules to the Finnish applicants not because they had concerted with each other but because they took part in a very much larger concertation with United States, Canadian and Swedish undertakings which restricted competition within the Community. It was thus not just trade with Finland that was affected. In that situation reference of the matter to the Joint Committee could not have

led to the adoption of appropriate measures.

33 Consequently the submission relating to the exclusive application of the competition rules in the Free Trade Agreement between the Community and Finland must be rejected.

On those grounds,

THE COURT,

before giving judgment on all the applicants' submissions, hereby :

- (1) Rejects the submission relating to the incorrect assessment of the territorial scope of Article 85 of the Treaty and the incompatibility of Commission Decision IV/29.725 of 19 December 1984 with public international law;
- (2) Declares Commission Decision IV/29.725 of 19 December 1984 void in so far as it concerns the Pulp, Paper and Paperboard Export Association of the United States;
- (3) Rejects the submission relating to the exclusive application of the competition rules in the Free Trade Agreement between the Community and Finland;
- (4) Assigns the case to the Fifth Chamber for consideration of the other submissions;
- (5) Reserves the costs.

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