COMPETITION LAW IN THE EUROPEAN COMMUNITIES

October, 1999

Volume 22, Issue 10

FAIRFORD PRESS

Publisher and Editor: Bryan Harris

Fairford Review : EU Reports : EU Services : Competition Law in the European Communities

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October, 1999

Volume 22 Issue 10

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ISSN 0141-769X

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The new Commissioner

In the Spring of this year, all the members of the Commission of the European Communities resigned, following a financial scandal. They kept their portfolios on a temporary basis, until the appointment of new Commissioners took effect on 15 September. Only three of the original Commissioners were re-appointed. One of them was Sr Mario Monti, previously the Commissioner for the Internal Market: he is now responsible for Competition Policy, in place of Mr Karel van Miert, who has not been re-appointed. Sr Monti was soon in the news. Described in the London *Times* as "Get-tough Monti", he was reported to have "grounded" the Airtours merger. Mergers are seldom blocked by the Commission, so each of the cases in which this happens tends to make the headlines. A report of the Airtours case is included in this issue.

The ECSC Treaty

Another old friend is due to disappear shortly. The European Coal and Steel Community Treaty, the first of the Treaties setting up the European Communities, is due to lapse in two years' time. It was concluded in 1952 and, unlike the other Treaties, which are "concluded for an unlimited period", was limited to 50 years. According to the Commission, the European Union's policy for the steel industry will soon be aligned with that of other manufacturing sectors (Commission Statement IP/99/726). At present special rules apply to competition in the steel industry: a harsher wind may blow in future.

Competitiveness

Connoisseurs of Brussels jargon appreciate the difference between competition and competitiveness. Competition refers primarily to trading conditions within the European Union, competitiveness to the conditions of global trade. It follows that the Commission's periodic Competitiveness Reports are concerned with the success of European industry in the face of external challenges. As it happens, the recently published Third Report is less concerned with world-wide competition than with external crises and in particular the problems of south-east Asia. But, like the two previous two reports, it reflects the intentions of Article 157 (formerly 130) of the EC Treaty, with its concept of public authorities playing an active role in directing the energies of industrial corporations. As in the steel industry in 1970s and 1980s, the Commission still tends to think in terms of "managing structural change" in industry and to what it calls "the design of enterprise policy". Both terms are used in the Third Report. □

ACQUISITIONS (PACKAGE HOLIDAYS): THE AIRTOURS / FIRST CHOICE CASE

Subject: Acquisitions
Collective dominance
Undertakings by parties

Industry: Package Holidays
(Implications for most industries)

Parties: Airtours plc
First Choice Holidays plc
Thomson
Thomas Cook

Source: Commission Statement IP/99/695, dated 22 September 1999

(Note. Outright opposition to a proposed concentration under the Merger Regulation is still rare enough for a case to be news; there have only been twelve cases since the Regulation came into force ten years ago in which a proposal has been blocked. In the present case the new Commissioner explained that he was afraid that the proposed merger would place control of the British package holiday market in the hands of three tour operators; and, in current parlance, this would create a "collective dominant position" or oligopoly. But an oligopoly presupposes a certain degree of concertation between the operators concerned; and, although the Commission Statement refers to two factors which may imply some concertation, - the "incentive to keep the market tight" and the links in distributing one another's products, - the Commission does not assess the amount of competition between the operators. Perhaps the answer to this lies in the text of the full decision, which is not yet available. If so, we will provide a further report in due course. In the meantime, there is some force in the comment attributed to the Chairman of Airtours, to the effect that the Commission had chosen the case as "a marker on the issue of oligopolies".)

The Commission has prohibited the acquisition by Airtours plc of First Choice Holidays plc. The proposed operation affects the supply of foreign package tour holidays to UK residents and in particular, those package holidays (a large majority of the total) made by air to the popular short haul destinations in the mainland and islands of southern Europe and North Africa. The market structure is already highly concentrated with four vertically integrated companies having some 80% of the short-haul tour operating market between them. The rest of the market is fragmented amongst a large number of much smaller operators, none of them fully integrated and most with market shares of 1% or less. The takeover would create a market structure in which the remaining three vertically integrated companies would collectively have a dom

in ant position, as First Choice would disappear both as a competitor in its own right and as a supplier of charter airline seats and travel agency distribution to the non-integrated operators. Airtours has proposed undertakings which were not however, sufficient to prevent the creation of a position of collective dominance.

Both parties are UK companies active principally in tour operating, and both are fully vertically integrated with substantial interests in charter airline operations and travel agencies. Airtours is active in tour operating, travel agencies, charter airlines, hotels and cruise ships with operations in 17 countries across Europe and North America. First Choice engages in tour operating, travel agencies, charter airlines, seat broking and car rental broking, mainly in the UK and Ireland, with some activities in Canada.

On 29th April 1999 Airtours announced its intention to acquire First Choice by way of a public bid. After the Commission decided on 3rd June 1999 to launch a detailed investigation under the Merger Regulation, Airtours announced on 10th June 1999 that it had allowed its bid to lapse but it could, in the event of a clearance decision by the Commission, launch a new offer for First Choice.

The Commission has found that in the UK market for short haul foreign package holidays, the operation would create a collective dominant position held jointly by Airtours/First Choice and two other remaining large vertically integrated operators, Thomson and Thomas Cook. Package tours are a high volume low margin product, which has a particular characteristic in that capacity (number of holidays) is basically fixed before sales begin and only relatively minor adaptations are possible afterwards. As a result the overall supply/demand balance has a strong effect on profitability. In particular competition for market share risks leading to oversupply with serious negative financial consequences for market operators, whereas constraining capacity will result in markedly improved profitability for all operators. Therefore, tour operators have an incentive to keep the market tight.

Moreover, the major operators are linked insofar as they supply one another with airline seats and distribute one another's products, they have similar cost structures, and there are high barriers to entry and growth and no countervailing buyer power.

The industry has gone through a consolidation process as a result of which it has become much more concentrated as well as vertically integrated. The consolidation has mainly taken place through acquisitions rather than organic growth. The four large vertically integrated tour operators, Airtours, First Choice, Thomson and Thomas Cook which have emerged as a result of this process today have about 80% of the market. The remainder is accounted for by a large number of small mainly non-integrated suppliers, who are constrained in their competitive effectiveness by their need for access to

charter airline seats and travel agency services, which are to a large extent controlled by the four large integrated operators. The small operators have experienced difficulties in getting their holidays distributed through the agencies of the large integrated operators, who give preference to their own products (so-called "directional selling").

The direct impact of the merger would be to eliminate First Choice as a competitor in itself, and also to marginalise further the small non-integrated operators, since First Choice would be lost as a supplier of charter airline seats and travel agency distribution channels to such small operators. Crucially, the merger would lead to a collective dominant position on the part of the remaining three large integrated operators in that it would increase their incentive to restrict capacity and facilitate sustained strategies to do so, by strengthening their interdependency as regards capacity decisions which are crucial to the market outcome.

On the last day of the three-month period provided for doing so (other than in exceptional circumstances) by the relevant Commission regulation, Airtours offered certain undertakings to address the Commission's concerns. These were considered by the Commission in consultation with interested third parties in the industry and with the competition authorities of Member States. It was concluded that the undertakings were not sufficient to prevent the merger from creating a dominant position. In particular, they were not considered likely to recreate a fourth force to replace First Choice in short-haul package tours that would be strong enough to offer sufficient competition to an enlarged Airtours and the other two major players.

A few days ago, Airtours submitted a revised package of undertakings. The Commission does not consider that any exceptional circumstances are present such as would justify accepting these undertakings out of time. Moreover, there was not enough time left for the Commission to evaluate arid consult on the new package different from earlier commitments in several respects - before the legal deadline for a final decision, which cannot be extended. Finally, it was not obvious that the revised undertakings would prevent the creation of a dominant position. The Commission, therefore, decided that it could not consider the revised package of undertakings.

It has been difficult to identify satisfactory remedies. Where, as here, the competition problem concerns the companies' core activities rather than small parts of a much larger and more diverse business, the typical structural remedy - divesting all the overlapping activities of one or other party may threaten the commercial rationale for the operation. But if only partial divestment is to be effective, it is vital that the market structure post-merger contains enough players, and with sufficient strength, to ensure sufficient competition. In concentrated markets with barriers to entry or expansion, that may not always be realistic. □

JOINT VENTURES (COMPUTERS): THE SIEMENS / FUJITSU CASE

Subject: Joint ventures
Conditions (for clearance)

Industry: Computers
(Some implications for other industries)

Parties: Siemens AG
Fujitsu Ltd
Siemens Nixdorf Retail and Banking Systems GmbH

Source: Commission Statement IP/99/719, dated 1 October 1999

(Note. It is increasingly common for clearance of operations under the Merger Regulation to depend on certain conditions and for these conditions to include some form of divestiture. As, in the present case, the Commission's main worry was about the effect of the operation on financial workstations, Siemens agreed to the divestiture of its financial workstation subsidiary.)

The Commission has authorised the creation of a full-function joint venture between Fujitsu Ltd and Siemens AG. The aim of the operation is to combine the European businesses of Siemens and Fujitsu for the development, manufacture and sale of computer hardware and related products, including desktop PCS, laptops, workstations, servers and storage systems. The Commission found that the operation would not create or strengthen a dominant position. However, the clearance has been subject to the companies' compliance with certain commitments, designed to remove the risk of coordination in the market for financial workstations.

Fujitsu is active in the provision of information technology and network solutions for the global market. Siemens is active in the provision of electrical engineering and electronics products and services. They have decided to establish a joint venture company combining their European businesses for the development, manufacture, distribution, marketing and sale of desktop computers, servers, storage systems, workstations and other computer hardware and related products (such as high-end server operating systems). The new company will be active in Western and Eastern Europe, the CIS, the Middle East and Africa.

The Commission examined the operation under the Merger Regulation to determine whether it would create or strengthen a dominant position on the relevant product and geographic markets on which the joint venture would be active. Given the market share of the parent companies and the presence of

powerful competitors on all these markets, the Commission concluded that there was no such risk.

According to the Article 2(4) of the Merger Regulation, a joint venture having as its object or effect the co-ordination of the competitive behaviour of its parent companies also has to be appraised in accordance with the criteria of Article 81(1) and (3) of the EC Treaty. In this respect, the Commission found such effects only on the financial workstations market. Financial workstations are used in the banking sector. They consist of automatic teller machines (ATMs) and cash dispensers, which connect to a central computer. These central verification points link with computerised bank accounts.

To address the Commission's serious competitive concerns in the financial workstations market, Siemens has undertaken to divest itself of Siemens Nixdorf Retail and Banking Systems GmbH, a subsidiary active on that market.

Subject to full compliance with this undertaking, the Commission therefore authorised the concentration. □

Motor Vehicle Industry (I): Assessment of Distribution Arrangements

The Commission has sent out a hundred or so questionnaires to parties involved in the motor vehicle distribution trade, including consumer associations, dealers, independent importer/repairers, independent importers, spare-part producers, firms which sell through the Internet and all the motor vehicles manufacturers.

Regulation 1475/95 on motor vehicle distribution requires the Commission to draw up an assessment report by 31 December 2000, taking particular account of the impact of the authorised distribution system on product price differentials between Member States and on the quality of service to final consumers. The Commission needs to know the facts and the actual economic context in which motor vehicle distribution takes place.

The questionnaires are intended to provide three types of information, namely on:
- recent developments in the motor vehicle distribution trade
- whether the objectives set out in the Regulation have been achieved ; and
- whether technical developments in motor vehicles and new marketing and distribution methods (Internet, hypermarkets) do not call into question the very basis of a specific regulation for the motor vehicle distribution trade.

In this context, the Commission wishes to check whether the "natural" link between the distribution of new vehicles and the provision of after-sales service still exists. The questionnaires will soon be available at the Commission's Internet site: http://europa.eu.int/comm/dg04/aid/en/car.htm. (Source: Commission Statement IP/99/691, dated 20 September 1999.)

ACQUISITIONS (OIL): THE BP AMOCO / ARCO CASE

Subject: Acquisitions
Conditions (for clearance)

Industry: Oil, natural gas
(Some implications for other industries)

Parties: BP Amoco Group
Atlantic Richfield Corporation

Source: Commission Statement IP/99/712, dated 29 September 1999

(Note. This is one of two recent decisions in the oil industry. The other is the Exxon / Mobil case. A condition for clearance of the operation is that BP Amoco divests certain pipeline and processing interests.)

The Commission has authorised the acquisition of the US company Atlantic Richfield Corporation, active in the exploration, production and sale of crude oil and natural gas, by the UK company BP Amoco, active in oil exploration, petroleum and petrochemicals. As initially notified, the operation would have created dominant positions on two markets: the transport of unprocessed natural gas by means of off-shore pipelines from fields in the Southern North Sea ("SNS") sector of the UK Continental Shelf to the UK mainland and on the processing of natural gas in processing facilities on the UK mainland serving the SNS area. To eliminate concerns about competition, BP Amoco has undertaken to divest certain pipeline and processing interests.

On 10 June 1999, the Commission decided after an initial one-month investigation to investigate further the impact of the merger on competition in the markets for exploration, development and production of crude oil and natural gas. The Commission also had concerns in gas pipelines and processing facilities in the UK.

This investigation confirmed the Commission's concerns with regard to off-shore gas pipelines and on-shore gas processing facilities in the SNS. The merged entity would have an equity interest in all the pipelines and processing facilities with spare capacity in the SNS. Such spare capacity is made available to owners of new gas fields on the basis of unanimous decisions of the owners of the infrastructure. Therefore, the merged entity would control, to the possible detriment of owners of new gas fields, access to the necessary infrastructure and would thereby control the conditions at which this new gas can be marketed.

To remedy these concerns, BP Amoco has committed itself to divesting its equity interests in certain pipelines and processing facilities. As a result of this divestiture, BP Amoco's position would be similar to its position prior to the concentration. Therefore, the Commission has decided that the concentration can be declared compatible with the common market on condition that BP Amoco fulfils this divestiture commitment.

The Commission concludes that the concentration will not raise any other competition concern. In particular, the in-depth investigation has dispelled initial doubts that recent concentrations among major competitors (the merged entity together with Shell and the Exxon/Mobil merger, investigated in parallel), might result in too small a cluster of oil companies capable of searching for and developing unexplored reserves.

The Commission saw a threat to competition for oil and gas that would be consumed 10 to 15 years from now. However, the "super majors" will still face competitive constraints from smaller oil companies. Also, countries on whose territory oil and gas are found have no incentive to let oil companies restrict production. Finally, smaller explorers indicated that, because of size differences, they would not compete for the same type of exploration rights and would not be dependent on the bigger explorers to sell their oil.

Background

The BP Amoco Group was formed as a result of the merger, last December, between The British Petroleum Company plc and Amoco Corporation. BP Amoco is active in oil and gas exploration, petroleum products and petrochemicals. ARCO is involved in exploration for and production of crude oil and natural gas and in the refining of crude oil and marketing of petroleum products. ARCO is mainly active in the USA.

In accordance with the bilateral agreement of 1991 on antitrust co-operation with the USA, the Commission has co-operated with the Federal Trade Commission in assessing the transaction, in particular with regard to the possible impact of the operation on the exploration and production of crude oil and natural gas. The investigation in the USA has not yet ended. □

Motor Vehicle Industry (II): State Aid for Fiat

The Commission has authorised regional aid totalling €27.9m for Fiat Auto, taking the view that the proposed aid for an investment project at the Termoli engine plant, with an intensity of about 15%, is in line with the rules laid down in the Community framework for state aid to the motor vehicle industry. Some 500 jobs will be safeguarded as a result. (Commission Statement IP/99/710, dated 29 September 1999.)

MERGERS (OIL): THE EXXON / MOBIL CASE

Subject: Mergers
Conditions (for clearance)

Industry: Oil, natural gas
(Some implications for other industries)

Parties: Exxon
Mobil
Thyssengas GmbH
Erdgas Munster

Source: Commission Statement IP/99/708, dated 29 September 1999

(Note. Not surprisingly, the Commission has had some doubts about the merits of the recent series of concentrations in the oil industry, of which this is the biggest. It is, however, satisfied that, given the conditions as to divestiture, which are quite extensive, and the continuing competition among large and small operators in this field, there is for the time being no cause for concern. The case is interesting, in that the two operators are both US companies. Until comparatively recently, there would have been some surprise that two US corporations might have been prevented from merging as the result of a decision taken in Brussels. But, to the extent that the corporations trade in Europe, they are subject to European rules.)

The Commission of the European Communities has authorised the merger between Exxon and Mobil, who are active in the whole oil and gas chain from exploration to motor fuel retailing. As initially notified, the operation would have created or strengthened dominant positions on eight markets for natural gas, motor fuel and aviation oil in several countries. Exxon and Mobil have made a series of undertakings to eliminate these concerns. The merger would have created or strengthened dominant position on the following markets:

(a) wholesale transmission of natural gas in the Netherlands;
(b) long-distance wholesale transmission of natural gas in Germany;
(c) underground storage facilities for natural gas servicing the South of Germany;
(d) Group I base oils in the EEA;
(e) motor fuel retailing in Austria, Germany, Luxembourg, Netherlands and the UK;
(f) motor fuel retailing on toll motorways in France;
(g) aviation lubricants world-wide; and
(h) aviation fuels at Gatwick Airport (UK).

To eliminate these concerns, Exxon and Mobil have undertaken (following the

same lettering as in the paragraph above):

(a) to divest Mobil's gas trading entity in the Netherlands;

(b) to divest Exxon's 25% interest in Thyssengas GmbH (Germany), a long-distance gas wholesale transmission company and to reduce certain voting rights in Erdgas Münster, a short-distance gas wholesale transmission company (Germany);

(c) to offer for sale certain Mobil rights in depleted reservoirs around Munich (Germany);

(d) to divest certain base oil businesses;

(e)+(f) to divest Mobil's share in Aral (a motor fuel retailing company active in Germany, Austria and Luxembourg) and in the fuels part of the BP/Mobil JV (active in motor fuel and lubricants production and retailing within Europe);

(g) to divest Exxon's aviation lubricants' business and

(h) to divest certain pipeline capacity servicing Gatwick Airport.

On 9 June 1999, the Commission decided after an initial investigation of one month that it would further investigate the impact of the transaction on competition conditions in the above markets and in those for the exploration, development and production of crude oil and natural gas. The Commission indicated that it would also look to "Gas-to-Liquids" technology.

Exploration, development and production of crude oil and natural gas

The further investigation has dispelled the initial doubts expressed by the Commission that the recent concentrations among major competitors (the merged entity together with Shell arid the BP Amoco take-over of Atlantic Richfield Corporation, investigated at the same time), might result in too small a cluster of oil companies capable of searching for and developing unexplored reserves that will be consumed 10 to 15 years from now, thereby producing effects incompatible with the common market.

The "super majors" would still be facing competitive constraints from smaller oil companies and the countries on whose territory oil and gas is found have no incentives to let oil companies restrict production. In addition, smaller explorers indicated that, because of size differences, they would not compete for the same type of exploration rights and they would not be dependent on the bigger explorers to sell their oil.

Gas-to-Liquids technology

This technology enables natural gas to be converted into finished fuels at the production site. Exxon and Mobil have strong patent positions in alternative GTL technologies. However, even if the parties held an essential portfolio of patents, this would still not give rise to a dominant position, given the small impact on petroleum product markets of products produced with the technology in question.

Wholesale transmission of natural gas in the Netherlands

Gasunie is the dominant Dutch wholesale transmission company; Exxon has a 25% share in it. Mobil is one of two competitors of Gasunie and, as a consequence of an agreement between the Gasunie shareholders, Mobil would stop competing with Gasunie after the merger. As the Merger Regulation also applies to the strengthening of the dominant position of a third party (Gasunie), the parties have committed themselves to divesting Mobil's Dutch trading entity together with its supply and transport contracts.

Long-distance wholesale transmission of natural gas in Germany

The existing oligopoly within Germany or the single dominant positions within their region of the main (that is, long-distance) wholesale transmission companies such as Ruhrgas (in which Exxon and Mobil are shareholders), BEB and Thyssengas (both of which are jointly controlled by Exxon and other companies) would be strengthened as Mobil, one of the smallest long-distance companies, also operates on this market and is a shareholder of Ruhrgas. The parties will divest Exxon's share in Thyssengas and will give up majority voting rights in Erdgas Münster, the only potential competitor.

Storage of natural gas in the South of Germany

Ruhrgas has a dominant position in this market which would be strengthened as Mobil has concession rights in almost all depleted fields capable of being converted in storage facilities; and this would constitute a barrier to entry for any potential competitor). The parties will offer for sale Mobil's interest up to a certain volume at a market price.

Group I Base oils in the EEA

The merged entity would, with a 40-45% share, become dominant on the EEA market for base oils (an ingredient to produce lubricants). The parties will either divest certain base oil businesses or pass over control of these businesses by way of long-term leases.

Distribution of fuels

In view of the equity links between Exxon, BP/Mobil and Aral (in which Mobil is an important equity holder) and the other structural factors of the industry in these countries, the transaction would have created or strengthened dominant positions in the distribution of fuels in Germany, Austria, the Netherlands, the UK and on French toll motorways. The parties have offered to dissolve the fuels part of the BP/Mobil joint venture and to sever the connection with Aral.

World-wide aviation lubricants

Exxon and Mobil each have a market share of more than 40%, so that the

merged entity would have a single dominant position. The parties have offered to divest Exxon's aviation lubricants business which has more of a stand-alone character than Mobil's business. This allows the eventual purchaser to compete independently.

Aviation fuels at Gatwick

The merger would lead to the creation of a single dominant position of the parties on this market in view of their supply position (43%) and control over an important part of the infrastructure (pipelines linking refineries with the airport) and, especially, the only pipeline with spare capacity. The parties will divest their interests in certain of the pipelines concerned.

Co-operation with other anti-trust authorities

The UK competition authorities had requested, pursuant to Article 9 of the Merger Regulation, a referral of a part of the case, namely, motor fuel retailing in the North West of Scotland, back to the UK. However, the Commission dealt with these concerns as part of the Commission's assessment of the UK motor fuel retailing market. The dissolution of the fuels element of the BP/Mobil joint venture will also solve any particular concerns related to the North West of Scotland.

In accordance with the bilateral agreement of 1991 on antitrust co-operation with the US, the Commission has co-operated with the Federal Trade Commission in assessing the transaction, in particular with regard to (a) the possible impact of the operation on the exploration and production of crude oil and natural gas and (b) the world-wide aviation lubricants market. The procedure in the US is still pending. □

Motor Vehicle Industry (III): State Aid for Daimler-Chrysler

The Commission has decided to authorise regional aid of€28.8m to be granted by Spain for investment aimed at producing a new commercial vehicle at the Daimler-Chrysler plant in Vitoria (Basque Country). The project involves the production of a 2.6t van called the NVC2, which will replace the Vito.

Productive investments totalling €595m for the period 1999-2002 will enable a production line with a capacity of 90,000 units to be built. A total of 2,800 jobs will be created or safeguarded in the long term. The Commission concludes that the planned regional aid, which has an intensity of 6.7%, satisfies the rules of the Community framework for state aid to the motor vehicle industry. (Source: Commission Statement IP/99/709, dated 29 September 1999.)

ACQUISITIONS (INDUSTRIAL GASES): THE BOC / L'AIR LIQUIDE CASE

Subject: Acquisitions
Investigation

Industry: Industrial gases
(Some implications for other industries)

Parties: BOC Group plc
L'Air Liquide SA
Air Products and Chemicals Inc

Source: Commission Statement IP/99/688, dated 17 September 1999

(Note. This is a second-phase investigation, which indicates that the Commission is unhappy about the proposed operations. These are complicated by the fact that, in addition to the immediate subject of investigation into the plans for L'Air Liquide to take over parts of BOC, there are further plans for L'Air Liquide and the US corporation Air Products and Chemicals to take over the rest of BOC. The outcome of the Commission's "in-depth" investigation is expected in January.)

The Commission of the European Communities has opened a full investigation into the proposed acquisition of parts of the BOC Group plc, UK, by the French company L 'Air Liquide SA in the industrial gases industry. Air Liquide and the US company Air Products and Chemicals Inc have announced a joint bid for BOC. After completion of the takeover bid, Air Liquide and Air Products plan to split up BOC's businesses and assets. The operation is considered in the context of an on-going global consolidation in the industrial gases industry. The companies involved are leading global suppliers of industrial gases and related equipment and services. Areas of concern are, among others, the strong position Air Liquide will obtain in particular in the markets for the supply of oxygen and nitrogen in large quantities to industrial users (so-called tonnage markets), in the markets for helium and for speciality gases used in the electronics industry.

Air Liquide and BOC both produce and/or distribute air gases (oxygen, nitrogen, argon), carbon dioxide, hydrogen and some speciality gases, in particular, helium, medical gases and electronics speciality gases (ESG). Industrial gases are supplied to different industries including, for example, iron, steel, refining, chemicals, glass, electronics, paper and pulp industries. Gases are either supplied in small quantities in cylinders (cylinder market), or in larger quantities in liquid from using tanker trucks (bulk market), or are produced in very large quantities directly on the customers' premises using on-site production units or pipelines (tonnage market). Air Liquide is the world's number one in the production and distribution of industrial gases and BOC the number two.

Air Liquide and Air Products have announced a joint pre-conditional recommended cash offer under the UK Takeover Code for all the shares in BOC. Upon regulatory approval and after completion of the bid, Air Liquide and Air Products have agreed to divide the world-wide businesses and assets of BOC. The Commission is assessing only those businesses and assets of BOC which Air Liquide proposes to acquire, notably the European Economic Area (EEA) businesses located in the UK and Ireland.

This assessment will cover each affected gases market separately on either a national, an EEA or a global basis, if necessary. The preliminary view of the Commission is that each gas constitutes a separate product market, although some limited possibilities of substitution between certain gases and processes seem to exist. This view is generally shared by the industry. Another decisive factor in assessing these markets is the quantity of gases required and thus the method of distribution.

The possible geographic markets particularly affected by the operation are the UK and Ireland. There may also be wider geographic markets. The Commission will also focus its investigation on the effects of the acquisition in the production/distribution of helium, electronics speciality gases and medical gases markets. The Commission will investigate whether the acquisition of BOC by Air Liquide may have adverse effects on the functioning of these markets, where Air Liquide, BOC and Air Products are leading operators.

The Commission must now take a final decision within four months. The Commission and the US antitrust authorities (the Federal Trade Commission) have been collaborating closely and will continue to do so, especially if the two authorities identify common competition concerns.

Background

Any investigation under the Merger Regulation is conducted under a legally binding timetable. From the date that the Commission is fully informed of the details of the transaction (so-called notification), the Commission has a period of one month to make an initial assessment of the notified transaction. If the Commission comes to the conclusion that there are serious concerns whether an operation is compatible with the competition rules in the common market a full investigation is initiated. For this investigation a further four months is allowed before the Commission adopts a final decision whether or not to allow the proposed transaction to proceed. The opening of a full investigation is a procedural step without prejudice to the final outcome of the case.

Now that the Commission has opened a full investigation in this case it will continue a detailed fact-finding exercise. The legal test is the likelihood that the acquisition will create or reinforce a dominant position, held either by a single entity (single dominance) or by a cluster of competitors presenting the structural characteristics of an oligopoly (collective dominance). □

DISTRIBUTION AGREEMENTS: PROPOSED COMMISSION REGULATION

Subject: Distribution agreements
Selective distribution
Exclusive supply
Franchising agreements
Vertical restraints
Intellectual property
Know-how
Non-competition] obligations
Block exemption

Industry: All industries concerned with industrial supply and distribution

Sources: (a) Commission Statement IP/99/699 of 24.09.1999
(b) Official Journal No C.270 of 24.09.1999

(Note. All the discussions which followed the publication of the Commission's Green Paper on Vertical Restraints have now assumed concrete form as a draft Regulation on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices. Like the Green Paper, the draft Regulation concentrates on distribution agreements, including franchising. The draft is based on an over-riding economic assumption that, where the share of the relevant market accounted for by the supplier does not exceed 30%, vertical agreements generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits. For some years, the Commission has been emphasising the importance of market share in the context of vertical agreements, though it did not fully succeed in gaining acceptance of the market share criterion for the block exemption regulation on technology transfer agreements, in which the percentage proposed was a more generous 40%. Unless there is any last-minute opposition to the Commission's present draft, the Regulation is likely to be adopted well before the end of the year and to come into force in general on 1 June, 2000, except for the provision extending the existing regulations until that date.

The draft Guidelines accompanying the draft Regulation will be covered in a forthcoming issue, if space permits.)

The Commission has published draft rules and accompanying guidelines on vertical agreements between producers and distributors. These two legislative proposals aim at achieving an important reform in a key area of competition policy. They follow an in-depth policy review launched in 1997 with the publication of a Green Paper; this review is now entering its final phase of public consultation. The proposals concern virtually all arrangements between

companies operating at different levels of the supply chain, spanning from industrial supply to distribution agreements. The new competition rules applicable to vertical restraints are designed to come into force in the year 2000.

The proposed Commission Regulation on the application of Article 81(3) of the EC Treaty to vertical agreements is designed to replace the existing block exemption regulations applicable to exclusive distribution, exclusive purchasing and franchising agreements, which will expire on 31 December 1999.

The aim of the proposed new rules is to allow a shift from the formalistic approach underlying the current legislation towards a more economic approach in the assessment of vertical restraints under the EU competition rules. The new policy is based on a single Commission Regulation, with a wide scope of application, which gives block exemption to all vertical restraints (agreements between producers and distributors) concerning final or intermediary products as well as services, with the exception of a limited number of hard-core restrictions. These restrictions include the imposition of resale prices and certain types of territorial protection leading to a partitioning of geographical markets.

The principal objective of the draft block exemption Regulation is to allow companies which do not have market power to benefit from a safe haven within which they are no longer obliged to assess the validity of their agreements with Community competition rules. Hence, the draft Regulation limits the benefit of the block exemption to companies whose market share is below 30%. Above this threshold, agreements would not be presumed to be illegal but may require an individual examination under Article 81. The draft Guidelines are designed to assist undertakings in carrying out such an examination.

With the publication of its draft Regulation and Guidelines, the Commission has invited all interested parties to comment upon the new rules before their final adoption. Interested parties are granted one month to present their comments in respect of the block exemption Regulation, which is due to be adopted by the end of 1999 when the existing block exemptions will expire. As regards the Guidelines, interested parties will have two months to react as the Commission envisages adopting this text during the first six months of the year 2000.

On the occasion of publication of the new draft legislation, Commissioner Mario Monti stated that this important reform project was well advanced and confirmed the Commission's commitment to review and modernise Community rules on competition. "The aim is to simplify our rules and reduce the regulatory burden for companies, while ensuring a more effective control of vertical restraints implemented by companies holding sign ificant marker power. This will allow the Commission to concentrate in the future on important cases, in co-operation with the Member States, who will play an

increased role in the application of Community competition rules."

Background

In January 1997 the Commission adopted a Green Paper on vertical restraints in EU competition policy (COM(96) 721 final, IP/97/35), the purpose of which was to initiate a wide ranging consultation to help the Commission in the formulation of future policy in this area. The Commission subsequently set out the main lines for a policy reform in its *Communication on the application of EC competition rules to vertical restraints* of 30 September 1998 (COM(98) 544 final IP/98/853).

To obtain the necessary powers to carry out its envisaged reform, on 30 September 1998, the Commission submitted to the Council two proposals for Regulations, designed to amend Council Regulation No 19/65/EEC, with a view to extending the Commission's delegated legislative powers, and Council Regulation No 17, with a view to dispensing all vertical agreements from the requirement of prior notification provided for by Article 4(2). The Council then adopted the two new Council Regulations on 10 June 1999 (Regulations 1215/99/EC and 1216/99/EC). On 14 July 1999 the Commission approved the draft Commission Regulation on the application of Article 81(3) to vertical agreements, as well as the draft of the accompanying Guidelines, and authorised the Commissioner in charge of Competition to take the necessary procedural steps towards their final adoption. Member States were consulted on these two drafts on 2 and 3 September.

Draft COMMISSION REGULATION on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65 of 2 March 1965 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices as last amended by Council Regulation No 1215/99 of 10 June 1999, and in particular Article 1 thereof,

Having published a draft of this Regulation,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) Whereas Council Regulation no 19/65 as amended empowers the Commission to apply Article 81(3) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 81(1) (hereinafter referred to as "vertical agreements");

(2) Whereas 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) Whereas it is appropriate to include in this category all vertical agreements for the purchase and sales of goods and services, certain vertical agreements between competitors and vertical agreements concluded by associations of retailers; whereas vertical agreements concluded by an association of retailers are covered without prejudice to the application of Article 81(1) to horizontal agreements entered into between its members, or decisions adopted by such an association;

(4) Whereas it is also appropriate to include certain ancillary agreements on the assignment or use of intellectual property rights related to vertical agreements;

(5) Whereas it is not necessary, for the purposes of the application of Article 81(3) of the Treaty by regulation, to define expressly those vertical agreements which are capable of falling within Article 81(1);

(6) Whereas the benefit of the block exemption must be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3) of the Treaty;

(7) Whereas vertical agreements of the category defined in Article 1 of this Regulation can improve economic efficiency within a chain of production or distribution through a better co-ordination between the participating undertakings; whereas they can lead to a reduction in the transaction and distribution costs of the parties and to an optimal level of their investments and sales;

(8) Whereas the likelihood that such efficiency enhancing effects outweigh possible anti-competitive effects resulting from restrictions contained in vertical agreements (hereinafter referred to as "vertical restraints") depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which these undertakings face competition from other suppliers of goods or services regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use;

(9) Whereas it can be assumed that, where the share of the relevant market accounted for by the supplier does not exceed 30%, vertical agreements generally lead to an improvement in production or distribution and allow

consumers a fair share of the resulting benefits; whereas in the case of vertical agreements including exclusive supply obligations, it is the market power of the buyer which is relevant for determining the overall effects of such agreements on the market;

(10) Whereas it is not possible to presume that, above the aforesaid market share threshold, vertical agreements give rise in general to objective advantages of such character and size as to compensate for the disadvantages which they may cause for competition;

(11) Whereas this Regulation must not exempt restrictions which are not indispensable to attain the positive effects mentioned hereabove; whereas, certain severe anti-competitive vertical restraints like minimum and fixed resale prices and certain types of territorial protection are to be excluded from the benefit of the present block exemption irrespective of the market share of the undertakings concerned;

(12) Whereas certain conditions are to be attached to the block exemption with a view to ensuring access to the market by competing undertakings or to preventing collusion between competing suppliers; whereas, to this end, a time limit must be set for the exemption of non-compete obligations in view of possible foreclosure effects connected with such obligations; whereas any direct or indirect obligation imposed on the members of a selective distribution system to sell or not to sell specified brands of competing suppliers may facilitate collusion among the suppliers concerned or restrict access to the market by other competing suppliers;

(13) Whereas the market share limitation, the non-exemption of certain vertical agreements and the imposition of conditions provided for in this Regulation are such as to in general ensure effective competition on the relevant markets; whereas, therefore, the agreements to which the block exemption applies do not normally enable the participating undertakings to eliminate competition for a substantial part of the products in question;

(14) Whereas in particular cases in which the agreements satisfying the conditions of this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption from the undertakings party thereto;

(15) Whereas Council Regulation 1215/99 has granted the competent authorities of Member States the power to withdraw the benefit of the block exemption in respect of vertical agreements having certain effects incompatible with the conditions laid down in Article 81(3) of the Treaty, where such effects are felt in their respective territory, or in a part thereof and where such a territory has the characteristics of a distinct geographic market; whereas Member States must ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules and the full effect of the measures adopted in

implementation of those rules;

(16) Whereas, 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 certain restraints operated on the market concerned, with a view to restoring the full application of Article 81(1) and (3) in their respect;

(17) Whereas this Regulation does not exclude the application of Article 82 of the Treaty;

(18) Whereas, in accordance with the principle of primacy of Community law, this Regulation prevails over any decision taken in application of national laws on competition; whereas this Regulation does not however preclude Member States from applying national laws on competition to vertical agreements to which Article 81(1) is not applicable;

HAS ADOPTED THIS REGULATION:

Article 1

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) of the Treaty shall not apply to agreements or concerted practices entered into between two or more undertakings each operating, for the purposes of the agreement, at a different level of the production or distribution chain and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services (hereafter referred to as "vertical agreements"), to the extent that these conditions constitute restrictions of competition falling within the scope of Article 81(1) of the Treaty (hereafter referred to as "vertical restraints").

2 This Regulation applies to vertical agreements entered into between an association of distributors selling to final consumers and its members, or between such an association and its suppliers, provided that no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding €50 million.

3 This Regulation applies to provisions contained in vertical agreements concerning the assignment or use of intellectual property rights for the purpose of using or reselling the goods or services supplied, on condition that these provisions do not constitute the primary object of, but are directly related to and necessary for, the implementation of such agreements and do not contain restrictions of competition having the same object or effect as vertical restraints not exempted under the present Regulation.

4 This Regulation does not apply to vertical agreements entered into between competing undertakings; however it does apply where competing undertakings enter into a non-reciprocal vertical agreement and:

(a) the buyer has a total annual turnover not exceeding €100 million or

(b) the buyer is a distributor and not also a manufacturer of goods or services competing with the contract goods or services.

5. This Regulation does not apply to vertical agreements the subject matter of which is regulated by other block exemption regulations.

Article 2

1 Subject to paragraph 2, the exemption of Article 1 shall apply on condition that the market share held on the relevant market by the supplier and by undertakings connected with the supplier does not exceed 30%.

2 In the case of exclusive supply obligations, the threshold of 30 % shall apply to the market share held by the buyer and by undertakings connected with the buyer on the market on which it purchases the contract goods or services.

Article 3

The exemption of Article 1 does not apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under control of the parties, have the following object:

(a) the restriction on the buyer in determining its resale price, without prejudice to the possibility for the supplier to impose a maximum resale price or to recommend a resale price provided that these do not amount to a fixed or minimum resale price as a result of pressure or incentives created by any of the parties;

(b) the restriction of resales except:
- restrictions on active resales into the exclusive territory or exclusive customer group allocated by the supplier to another buyer, where such restrictions are imposed by the supplier on its direct buyers
- restrictions on resales to unauthorised distributors by the members of a selective distribution system, and
- restrictions on resales of goods or services which are supplied for the purposes of incorporation;

(c) the restriction of active or passive resales to users by members of a selective distribution system;

(d) the restriction of cross-supplies between distributors within a selective distribution system;

(e) the restriction of sales of spare parts to independent repairers and service providers agreed between the supplier of these spare parts and a buyer

which incorporates and resells these parts.

Article 4

The exemption of Article 1 does not apply to any of the following specific obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation if its duration is indefinite or exceeds 5 years ; however, this time limitation does not apply where the goods or services to which a vertical agreement relates are resold by the buyer from premises owned or leased by the supplier, provided that the duration of such non-compete obligations does not exceed the period of occupancy of the premises by the buyer;

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase or distribute goods or services, unless such an obligation

- relates to goods or services which compete with the contract goods or services,
- is indispensable to protect know-how transferred by the supplier to the buyer

and its duration is limited to a period of one year after termination of the agreement; this condition 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 fallen in the public domain.

(c) any direct or indirect obligation imposed on the members of a selective distribution system to sell or not to sell specified brands of competing suppliers.

Article 5

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7(1) of Council Regulation No 19/65, where it finds in a particular case that vertical agreements to which this Regulation applies have nevertheless certain 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 practised by competing suppliers or buyers.

Article 6

Where in any particular case vertical agreements to which Article 1 applies have certain effects incompatible with Article 81(3) 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 in that Member State may withdraw the benefit of application of this Regulation in respect of its territory under the same conditions as provided for in Article 5.

Article 7

1 Pursuant to Article 1a of Council Regulation No 19/65, 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 and relating to that market.

2 A regulation pursuant to paragraph 1 shall not enter into force earlier than six months following its adoption.

Article 8

1 For the purposes of Article 2(1), the market share shall be calculated on the basis of market sales value of the contract goods or services and other goods or services sold by the supplier or by an undertaking connected with the supplier and which are regarded as interchangeable or substitutable by the consumer, 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, can be used to establish the market share of the undertaking concerned. This rule applies *mutatis mutandis* for the purposes of Article 2(2).

2 For the purposes of applying the market share threshold provided for in Article 2 the following rules shall apply:

(a) the relevant market share shall be calculated on the basis of data relating to the preceding calendar year;

(b) if the relevant market share exceeds 30% but does not exceed 35%, the exemption of Article 1 shall continue to apply during a period of two consecutive calendar years.

(c) if the relevant market share exceeds 35% the exemption of Article 1 shall continue to apply for one calendar year;

(d) the benefit of letters (b) and (c) may not be combined so as to exceed a period of two calendar years.

Article 9

1 For the purpose of applying the turnover thresholds used in the present Regulation, the exemption of Article 1 shall remain applicable where during any period of two consecutive financial years the total annual turnover is exceeded by no more than 10%.

2 For the purpose of calculating total annual turnover within the meaning of Article 1, the turnovers achieved during the last financial year by the relevant

party to the agreement and 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.

Article 10

1 Connected undertakings within the meaning of Articles 1(2), 2, 8(1), 9(2) and 11 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 one of the parties to the agreement or one of the undertakings as referred to in (a) to (c) jointly have the rights or the powers listed in (a).

2 For the purposes of Article 2, the market share held by the undertakings referred to in paragraph 1(d) shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 1(a).

Article 11

For the purposes of this Regulation the following terms have the following meaning:

- "Competing undertakings" are actual or potential suppliers of contract goods or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use ; the same applies where the goods or services referred to are supplied by an undertaking connected with a party to the agreement.

- "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 a third party designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes, calculated on the basis of its purchases in the previous year.

- "Exclusive supply obligation" means any direct or indirect obligation causing the supplier to sell certain goods or services only to one buyer for the purposes of a specific use or for resale.

- "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 certain predefined criteria and where these distributors undertake not to sell such goods or services to unauthorised dealers.

- "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 necessary for the sale of the contract goods or services to end users, and in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services or methods of dealing with customers; "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.

Article 12

The exemption provided for in Regulations (EEC) 1983/83, 1984/83 and 4087/88 shall continue to apply until the entry into force of the present Regulation.

The prohibition laid down in article 81(1) of the 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 satisfy the conditions for exemption provided for in Commission Regulations (EEC) 1983/83,1984/83 or 4087/88.

Article 13

This Regulation shall enter into force on 1 June 2000 except for Article 12 which shall enter into force on 1 January 2000.

It shall expire on 1 June 2010.

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