COMPETITION LAW IN THE EUROPEAN COMMUNITIES

September, 1999

Volume 22, Issue 9

FAIRFORD PRESS

Publisher and Editor: Bryan Harris

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

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September, 1999

Volume 22 Issue 9

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ISSN 0141-769X

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The "euro" and competition

According to the Commission of the European Communities, the introduction of the euro will have a profound impact on competition in Europe. The Commission gives three reasons for asserting that, "in general, economic and monetary union will intensify competition". The first is that it will reinforce the positive effects of the single market programme: it will eliminate exchange rate risk and transactions costs arising from currency conversion and thereby increase trade flows. It will help to broaden geographic markets, create new opportunities for economies of scale and lead to an increase in mergers and acquisitions. There may, however, be an element of wishful thinking here, as there was in the years leading up to the planned completion of the internal market by the end of 1992. In practice the savings in costs, resulting from the use of a single currency, may not be a decisive factor in commercial decision-making. Moreover, inasmuch as the opportunities for savings will apply equally to traders, they may turn out to be a neutral factor in competition. They may encourage traders generally, but not necessarily one competition against another.

There is some force in the second reason given by the Commission for thinking that the euro will stimulate competition: this is the likelihood of an increase in price transparency. It is perhaps under-estimating the acuity of consumers to suppose that the euro will make a decisive difference to the accuracy of their price comparisons; but it should help. At the same time, price transparency is only one factor in the assessment of trading advantages. Quite fairly, the Commission itself adds some cautionary words. Price transparency, it says, may enable traders to monitor more readily their competitors' prices.

A more persuasive, though inevitably more speculative reason for thinking that the euro will encourage competition is the Commission's view that economic and monetary union will reduce the cost of capital and that new financing techniques and markets can be put to work for a new generation of entrepreneurs in the European Union, thereby facilitating market entry. If the premiss is correct, and the cost of capital is reduced, the Commission's conclusions seem reasonable enough. In particular, the prediction that cheaper capital will lead to more acquisitions and mergers is probably correct. Whether acquisitions and mergers in turn benefit competition is another matter. The Commission does its best to ensure that they do not jeopardise competition, but recognises that they do not necessarily increase competition. □

LICENSING (WATCHES): THE BENETTON CASE

Subject: Licensing
Arbitration
National law
Procedure

Industry: Watches and clocks
(Implications for most industries)

Parties: Eco Swiss China Time Ltd
Benetton International NV
Bulova Watch Company Inc

Source: Judgment of the Court of Justice of the European Communities in Case C-126197 *(Eco Swiss China Time Ltd v Benetton International NV)*, dated 1 June 1999

(Note. Essentially, this case is concerned with two points of law. The first is whether an arbitration award can be annulled on the grounds that it is contrary to public policy, where the public policy concerned is the enforcement of Article 81 of the EC Treaty, bearing in mind that under Dutch law an award is contrary to public policy only if it conflicts with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. The Dutch Supreme Court referred the matter to the Court of Justice under Article 234 (formerly 177) of the EC Treaty for a preliminary ruling, asking whether the position was governed by the ruling given in Case C-430/93, Van Schijndel, from which it appeared that Article 81 was not a mandatory rule of such a fundamental nature. The Court of Justice distinguished the Van Schijndel case and held that Article 81 of the EC Treaty, read in conjunction with Article 3(1)(g), constituted a fundamental provision essential for the accomplishment of the tasks entrusted to the Community.

As to the second point of law, the question arose, whether the arbitration award could be challenged, even though the time limit for challenging it had passed, or whether it was in the nature of res judicata. Under national law in the Netherlands, application for annulment had to be made within a period of three months following the lodging of that award at the appropriate court registry. The Court of Justice took the view that this period was not unduly short and that the principle of legal certainty should prevail. Community law did not therefore require a national court from applying those procedural rules. If no application had been made for annulment within the prescribed time period, the award acquired the force of res judicata. Nor could it be called into question by a subsequent arbitration award, even if this was necessary to examine, in

proceedings for annulment of a subsequent arbitration award, whether an agreement which the earlier arbitration award had held to be valid in law was nevertheless void under Article 81 of the EC Treaty.

Two points are worth adding. One is that the Court offered a reminder that an arbitration tribunal constituted on the basis of agreement between the parties was not a "court or tribunal of a Member State" within the meaning of Article 234 of the EC Treaty. The other is that four Member States - the Netherlands, France, Italy and the United Kingdom, - thought the issues raised by what was in fact litigation between private parties sufficiently important to provide written observations to the Court; their costs were not recoverable.)

Judgment

1 By order of 21 March 1997, received at the Court on 27 March 1997, the Supreme Court of the Netherlands referred to the Court for a preliminary ruling under Article 234 EC (formerly Article 177) five questions on the interpretation of Article 81 EC (formerly Article 85).

2 Those questions have been raised in proceedings brought by Benetton International NV (Benetton) for stay of enforcement of an arbitration award ordering it to pay damages to Eco Swiss China Time Ltd (Eco Swiss) for breach of a licensing agreement concluded with the latter, on the ground that the award in question was contrary to public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure by virtue of the nullity of the licensing agreement under Article 81 EC (formerly Article 85).

[Paragraphs 3 to 8 refer to the provisions of Netherlands law on arbitration.]

The main proceedings

9 On 1 July 1986 Benetton, a company established in Amsterdam, concluded a licensing agreement for a period of eight years with Eco Swiss, established in Kowloon (Hong Kong), and Bulova Watch Company Inc (Bulova), established in Wood Side (New York). Under that agreement, Benetton granted Eco Swiss the right to manufacture watches and clocks bearing the words "Benetton by Bulova", which could then be sold by Eco Swiss and Bulova.

10 Article 26A of the licensing agreement provides that all disputes or differences arising between the parties are to be settled by arbitration in conformity with the rules of the Netherlands Institute of Arbitrators and that the arbitrators appointed are to apply Netherlands law.

11 By letter of 24 June 1991, Benetton gave notice of termination of the agreement with effect from 24 September 1991, three years before the end of

the period originally provided for. Arbitration proceedings were instituted between Benetton, Eco Swiss and Bulova in relation to the termination of the agreement.

12 In their award of 4 February 1993, entitled Partial Final Award (the PFA), lodged at the registry of the District Court of 's-Gravenhage on the same date, the arbitrators directed *inter alia* that Benetton should compensate Eco Swiss and Bulova for the damage which they had suffered as a result of Benetton's termination of the licensing agreement.

13 When the parties failed to come to agreement on the quantum of damages to be paid by Benetton to Eco Swiss and Bulova, the arbitrators on 23 June 1995 made an award entitled Final Arbitral Award (the FAA), which was lodged at the registry of the District Court on 26 June 1995, ordering Benetton to pay US $23,750,000 to Eco Swiss and US $2,800,000 to Bulova by way of compensation for the damage suffered by them. By order of the President of the District Court of 17 July 1995, leave was given to enforce the FAA.

14 On 14 July 1995, Benetton applied to the District Court for annulment of the PFA and the FAA on the ground, inter alia, that those arbitration awards were contrary to public policy by virtue of the nullity of the licensing agreement under Article 81 EC (formerly Article 85), although during the arbitration proceedings neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to that provision.

15 The District Court dismissed that application by decision of 2 October 1996, whereupon Benetton appealed to the Regional Court of Appeal of 's-Gravenhage, before which the case is pending.

16 By application lodged at the registry of the District Court on 24 July 1995 Benetton also requested that court to stay enforcement of the FAA and, in the alternative, to order Eco Swiss to provide security.

17 By order of 19 September 1995 the District Court allowed only the alternative claim.

18 Benetton lodged an appeal against that decision. By order of 28 March 1996 the Regional Court of Appeal essentially allowed the primary claim.

19 The Court of Appeal took the view that Article 81 EC (formerly Article 85) was a provision of public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure, infringement of which might result in annulment of an arbitration award.

20 However, the Court of Appeal considered that, in the proceedings before it for stay of enforcement, it was unable to examine whether a partial final

award such as the PFA was in conformity with Article 1065(1)(e) of the Code of Civil Procedure, since Benetton had not lodged an application for annulment within three months after the lodging of that award at the registry of the District Court, as required by Article 1064(3) of the Code of Civil Procedure.

21 Nevertheless, the Court of Appeal took the view that it was able to examine the FAA in relation to Article 1065(1)(e), particularly as regards the effect of Article 81(1) and (2) EC (formerly Article 85(1) and (2)) on the assessment of damage, since to award compensation for damage flowing from the wrongful termination of the licensing agreement would amount to enforcing that agreement, whereas it was, at least in part, void under Article 81(1) and (2) EC (formerly Article 85(1) and (2)). The agreement in question enabled the parties to operate a market-sharing arrangement, since Eco Swiss could no longer sell watches and clocks in Italy and Bulova could no longer do so in the other countries which were then Member States of the Community. As Benetton and Eco Swiss acknowledge, the licensing agreement was not notified to the Commission and is not covered by a block exemption.

22 The Court of Appeal considered that, in the procedure for annulment, the FAA could be held to be contrary to public policy, and therefore decided to grant the application for a stay in so far as it related to the FAA.

23 Eco Swiss appealed to the Supreme Court against the decision of the Court of Appeal and Benetton lodged a cross-appeal.

24 The Supreme Court observes that an arbitration award is contrary to public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure only if its terms or enforcement conflict with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. It states that, in Netherlands law, the mere fact that, because of the terms or enforcement of an arbitration award, a prohibition laid down in competition law is not applied is not generally regarded as being contrary to public policy.

25 However, referring to the judgment in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF*, the Supreme Court wonders whether the position is the same where, as in the case now before it, the provision in question is a rule of Community law. The Supreme Court infers from that judgment that Article 81 EC (formerly Article 85) is not to be regarded as a mandatory rule which is so fundamental that no restrictions of a procedural nature should prevent it from being observed.

26 Moreover, since it is not disputed that the question whether the licensing agreement might be void under Article 81 EC (formerly Article 85) was not raised in the course of the arbitration proceedings, the Supreme Court considers that the arbitrators would have gone beyond the ambit of the dispute

if they had inquired into and ruled on that question. In such a case, their award would have been open to annulment pursuant to Article 1065(1)(c) of the Code of Civil Procedure, because they would have failed to comply with their terms of reference. Furthermore, according to the Supreme Court, the parties themselves could not have raised the question of the possible nullity of the licensing agreement for the first time in the context of the proceedings for annulment.

27 The Supreme Court states that such rules of procedure are justified by the general interest in having an effectively functioning arbitration procedure and that they are no less favourable to application of rules of Community law than to application of rules of national law.

28 However, the Supreme Court is uncertain whether the principles laid down by the Court in *Van Schijndel and Van Veen*, cited above, also apply to arbitrators, particularly since, according to the judgment in Case 102/81 *Nordsee v Reederei Mond*, an arbitration tribunal constituted pursuant to an agreement under private law, without State intervention, is not to be regarded as a court or tribunal for the purposes of Article 234 EC (formerly Article 177) and cannot therefore make references for a preliminary ruling under that article.

29 The Supreme Court explains that, under Netherlands procedural law, where arbitrators have settled part of a dispute by an interim award which is in the nature of a final award, that award has the force of *res judicata* and, if annulment of that interim award has not been sought in proper time, the possibility of applying for annulment of a subsequent arbitration award proceeding upon the interim award is restricted by the principle of *res judicata*. However, the Supreme Court is uncertain whether Community law precludes the Court of Appeal from applying such a procedural rule where, as in the present case, the subsequent arbitration award, the annulment of which has been applied for in proper time, proceeds upon an earlier arbitration award.

30 In those circumstances, the Supreme Court of the Netherlands decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"(1) To what extent is the ruling of the Court of Justice in Joined Cases C-430/93 and C-431/93, *Van Schijn del and Van Veen v SPF*, applicable by analogy it in a dispute concerning a private law agreement brought before arbitrators and not before the national courts, the parties make no reference to Article 85 of the EC Treaty and, according to the rules of national procedural law applicable to them, the arbitrators are not at liberty to apply those provisions of their own motion ?

(2) If the court considers that an arbitration award is in fact contrary to Article 85 of the EC Treaty, must it, on that ground and notwithstanding the rules

of Netherlands procedural law [according to which a party may claim annulment of an arbitration award only on a limited number of grounds, one ground being that an award is contrary to public policy, which generally does not cover the mere fact that through the terms or enforcement of an arbitration award no effect is given to a prohibition laid down by competition law], allow a claim for annulment of that award if the claim otherwise complies with statutory requirements ?

(3) Notwithstanding the rules of Netherlands procedural law [according to which arbitrators must not go outside the ambit of disputes and must keep to their terms of reference], is the court also required to allow such a claim if the question of the applicability of Article 85 of the EC Treaty remained outside the ambit of the dispute in the arbitration proceedings and the arbitrators therefore made no determination in that regard ?

(4) Does Community law require the rules of Netherlands procedural law set out in paragraph 5.3 above [according to which an interim arbitration award that is in the nature of a final award acquires the force of *res judicata* and is open to appeal only within a period of three months following lodgement of the award at the registry of the District Court] to be disapplied if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which an interim arbitration award having the force of *res judicata* has held to be valid may nevertheless be void because it conflicts with Article 85 of the EC Treaty ?

(5) Or, in a case such as that described in Question 4, is it necessary to refrain from applying the rule that, in so far as an interim arbitration award is in the nature of a final award, annulment of that award may not be sought simultaneously with that of the subsequent arbitration award ?"

The second question

31 By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 81 BC (formerly Article 85) although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.

32 It is to be noted, first of all, that, where questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award,

which may be more or less extensive depending on the circumstances and which they are obliged to carry out in the event of an appeal, for setting aside, for leave to enforce an award or upon any other form of action or review available under the relevant national legislation *(Nordsee,* cited above, paragraph 14).

33 In paragraph 15 of the judgment in *Nordsee,* the Court went on to explain that it is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 234 EC (formerly Article 177) in order to obtain an interpretation or assessment of the validity of provisions of Community law which they may need to apply when reviewing an arbitration award.

34 In this regard, the Court had held, in paragraphs 10 to 12 of that judgment, that an arbitration tribunal constituted pursuant to an agreement between the parties is not a "court or tribunal of a Member State" within the meaning of Article 234 EC (formerly Article 177), since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.

35 Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.

36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(l)(g) EC), Article 81 EC (formerly Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) EC (formerly Article 85(2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37 It follows that, where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (formerly Article 85(1))

38 That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on

certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention).

39 For the reasons stated in paragraph 36 above, the provisions of Article 81 EC (formerly Article 85) may be regarded as a matter of public policy within the meaning of the New York Convention.

40 Lastly, it should be recalled that, as explained in paragraph 34 above, arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 *Federconsorzi*, paragraph 7). It follows that, in the circumstances of the present case, unlike *Van Schijndel and Van Veen*, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 81(1) EC (formerly Article 85(1)) should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

41 The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (formerly Article 85), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

The first and third questions

42 In view of the reply given to the second question, there is no need to answer the first and third questions.

The fourth and fifth questions

43 By its fourth and fifth questions, which can be examined together, the referring court is asking essentially whether Community law requires a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be

called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of the subsequent award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (formerly Article 85).

44 According to the relevant domestic rules of procedure, application for annulment of an interim arbitration award which is in the nature of a final award may be made within a period of three months following the lodging of that award at the registry of the court having jurisdiction in the matter.

45 Such a period, which does not seem excessively short compared with those prescribed in the legal systems of the other Member States, does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.

46 Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become *res judicata,* are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata,* which is an expression of that principle.

47 In those circumstances, Community law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (ex Article 85).

48 The answer to be given to the fourth and fifth questions must therefore be that Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (formerly Article 85).

Costs

49 The costs incurred by the Netherlands, French, Italian 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 action pending before the

national court, the decision on costs is a matter for that court.

Court's Ruling

The Court hereby rules:

1 A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (formerly Article 85), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

2 Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (formerly Article 85). □

The "relevant market" may be world-wide

In a pertinent passage in its XXVIIIth Report on Competition Policy, the Commission gives us a salutary reminder that, as the globalisation of markets progresses, competition analysis is increasingly carried out on markets which are not confined to Europe. It takes account of the geographical market and, in doing so, may examine the competitive situation in geographical areas outside the relevant market when analysing potential competition. It is largely as a result of merger controls that the Commission has tended to identify world markets, as it did in twenty cases in 1998. In the *Boeing / MacDonnell Douglas* case, the Commission considered that the market for large commercial jet aircraft was a world market. In the *Gencor / Lonrho* and *AngloAmerican Corporation / Lonrho* cases, the Commission recognised the existence of world markets in platinum and rhodium. In the *Saint Gobin / Wacker-Chemie / NOM* case, relating to silicon carbide, the Commission looked at potential competition from companies based in China and in eastern Europe. Some sectors by their very nature involve European and non-European activities. This is particularly true of transatlantic shipping lines (the *TACA* case being an example) and international telecommunications (as in the *Atlas / Global One* case). These considerations underline the need to intensify plans for international cooperation on competition policies.

COOPERATION AGREEMENTS (TELECOMMUNICATIONS): THE CEGETEL CASE

Subject: Cooperation agreements
Joint ventures
Product market
Geographic market
Market shares
Ancillary restrictions
Exclusive distribution
Exclusive supply
Non-competition clauses

Industry: Telecommunications
(Some implications for other industries)

Parties: Cégétal SA
Société Nationale des Chemins de Fer Français
Télécom Développement

Source: Commission Decision, dated 27 July 1999, published in the Official Journal, L.218, dated 18 August 1999

(Note. In one respect this is rather a peculiar case, in that the party providing a substantial telecommunications infrastructure is not itself in the telecommunications business. It runs a railway, but happens to have the infrastructure as part of its internal requirements. The opportunity for a new operator in the telecommunications sector to make use of this infrastructure must have been irresistible. It was also attractive to the Commission, which saw the agreement concluded between the new entrant and the railway company as a wonderful opportunity to challenge the dominance of the market by France Telecom, without distorting competition. The Commission recognised the ways in which the cooperation agreements between Cegetel and SNCF may technically have restricted competition but concluded that there was nothing in them to justify action under Article 81(1). There is plenty of potential competition: a number of telecommunications operators are building or have announced plans to build national fibre optic networks in France.

Most of the restrictions in the notified agreements were ancillary to the operation of the joint venture and necessary to ensure its entry into the market. Technical needs justify the exclusive use by the joint venture of SNCF's optical fibre network. It is not unreasonable for the joint venture to have priority use of SNCF land, given that other operators are not excluded from using it as well. Exclusive distribution by Cegetel of the joint venture's voice telephony services ensures that the joint venture will have a sufficient demand for its services to

sustain its entry into the market. Exclusive supply of the joint venture's services to Cegetel ensures that the joint venture has an effective and profitable minimum volume of activities. The non-competition clauses guarantee that Cegetel and SNCF, "two non-competitors who have entered a product market which is new to both of them", will concentrate their efforts on the joint venture. These points in the Commission's decision are strained to their limits, but are probably justified in the overall assessment of the competitive position. Four critical comments were received from interested parties but did not change the Commission's views.)

1 The Facts

A Introduction

(1) On 11 April 1997 Cegetel SA (Cegetel), a new telecommunications operator in France, and Societe nationale des chemins de fer francais (SNCF), the French national railway company, concluded a number of agreements, under which they will cooperate through a jointly-owned subsidiary, Telecom Developpement (TD), to develop and run a national long-distance telecommunications network along the French national railway network.

(2) The notified transaction is linked to the creation of Cegetel. By its decision of 20 May 1999, the Commission declared that the agreements setting up Cegetel as a telecommunications operator in France did not give grounds for objection under Article 81(1) of the EC Treaty.

B The Parties

(3) SNCF is the state-owned railways operator in France, with both industrial and commercial activities, providing transport services on the nationwide rail network. Its core activities are passenger and freight transport, and related and complementary activities. SNCF has its own telecommunications network to satisfy its own needs. The aggregate turnover of SNCF for 1997 was € 6,573m.

(4) Cegetel is a telecommunications operator, created in 1996, owned by the French water utility company Vivendi SA (previously known as Compagnie Generale des Eaux (CGE)), British Telecommunications plc (BT), Mannesmann AG and indirectly by SBC International Inc. Since 1 February 1998, Cegetel has offered a full range of telecommunications services to all the different segments of the French market. Cegetel also operates a nationwide GSM network through its subsidiary Societe francaise de radiotelephonie (SER). The aggregate turnover of the Cegetel group in 1997 was approximately € 1,610m.

(5) TD is a private company with limited liability incorporated under French law, created in 1996 by SNCF in which, by virtue of the notified agreements, Cegetel becomes a shareholder.

C Transaction

(6) The notification relates to the Framework Agreement dated 11 April 1997, the purpose of which is to define the principles governing the relations between SNCF and Cegetel both with respect to the shareholding of Cegetel in TD and as regards the modalities of deployment of the network and operation of telecommunications services.

(7) The aim of TD is to develop and run a national, long distance telecommunications network based on:

(a) the surplus transmission capacity on the existing SNCF telecommunications network;

(b) the optical fibre cables made available to it by Cegetel or its subsidiaries; and

(c) additional investment for using its own cables as part of an installation plan laid down in the agreements for the initial period 1997-2000.

(8) TD holds a licence to operate long-distance, public access networks. The notified agreements provide also for TD to develop and deploy a long-distance telecommunications service in France capable of constituting an alternative to the offer of the incumbent operator.

(9) On the basis of this network, owned by TD, Cegetel intends to become the second full service telecommunications operator in France by offering a complete range of telecommunication services including voice telephony between fixed points and transmission capacity for other operators.

(10) TD will not provide a connection service for end-users, namely businesses or individuals, except for the connections required by SNCF. Under Article 1 of the frame-work agreement, TD will provide:

(a) a long-distance interconnection service for telecommunications operators:

(b) long-distance transmission capacities for Cegetel and Cegetel subsidiaries but also for other network operators and telecommunications services providers;

(c) an end-to-end, long-distance voice telephony service, which is to be distributed exclusively by Cegetel's subsidiaries, Cegetel Le 7 (previously known as Telecom Developpement Services (TDS)) (residential market) and Cegetel Entreprise (businesses), jointly owned with TD.

(11) As a result of the clauses on the acquisition of an interest in the share

capital of TD by Cegetel the capital share of TD will be divided up as follows:

SNCF:	between slightly more than 50% and 60%,
Cegetel:	between 40% and slightly less than 50%,
third party (if any):	10%.

(12) TD is governed by a management board (the *Directoire*), a supervisory board and a shareholders' committee. The management board, which is entrusted with the day-to-day business of TD, is composed of five members, two appointed on a proposal from SNCF, two on a proposal from Cegetel, and a qualified person unconnected with either of the Parties (the president) appointed by the supervisory board, by joint agreement between the Parties. The supervisory board exercises supervision over the management board's conduct of business and is made up of an odd number of members. The number of members appointed by the shareholders meeting on proposal by SNCF will always be greater by one member than the number of members appointed by Cegetel. The president of the supervisory board will be one of the members chosen by the members of the supervisory board appointed on a proposal from SNCF. The shareholders committee, made up of 10 members, half appointed by Cegetel and half by SNCF, is set up to determine the joint position of the Parties on a number of issues, including the strategic decisions and orientation of TD, the adoption and modification of the business plan and annual budget and acquisitions of assets or realisation of important investments.

D Relevant Market

(a) Product market

(13) TD acts as an operator of a telecommunications network alternative to the network of the incumbent operator, France Telecom. It will provide; mainly for Cegetel but also for other operators, transmission capacity for national, long-distance telecommunications traffic and, on an exclusive basis for Cegetel, long-distance, voice-telephony services. The notified agreements will therefore address:

(i) the market for carrier's carrier services and

(ii) the market for the provision of fixed, long-distance telecommunications services. These two markets have been defined in a number of previous Commission decisions (such as *Phoenix/Global*, 1996, and *Unisource*, 1997). As in past decisions, moreover, the precise product market delimitation in this case can be left open since, even on the narrowest possible definitions, the proposed transaction does not give rise to competition problems.

(b) Geographic market

(14) The scope of the geographic market in telecommunications is

determined:

(I) by the extent and the coverage of the network and the customers that can economically be reached and whose demand may be met and
(ii) by the legal and regulatory system in force in the territory where the operator is active.

(15) Having regard to the licensing and regulatory framework for the provision of fixed, long-distance telecommunications services, the geographic market for these services must be regarded as being national in scope. Furthermore, the TD network will be limited to the territory of France. Accordingly, the relevant geographic market for the provision of carrier's carrier services is France.

(c) Situation of the parties on the telecommunications market

(16) SNCF is not commercially active in the telecommunications sector. TD and Cegetel entered the long-distance, voice-telephony market (deregulated in France on 1 January 1998) only on 1 February 1998. In 1997, TD had had a negligible share of the transmission capacity supply market.

(d) Main competitors

(17) Until 31 December 1997, France Telecom had a monopoly on the long-distance voice-telephony market in Prance, and it still has a significant market power on that market. Similarly, France Telecom has a very strong position on the markets for long-distance, transmission capacity supply and for the provision of interconnection services, with a market share exceeding 95% in both of them.

(18) Many companies have entered or intend to enter the French telecommunications market, either as full service telecommunication operators (9 Telecom) or on specific market segments: resale of voice-telephony services (Axis, Kertel, and others), telecommunications networks (Hermes, Colt, Esprit Telecom), services for corporate clients (WorldCom, Siris, Colt, Omnicom, and others), or local access (Lyonnaise Cable), and so on. As of 8 April 1999, 59 licences had already been delivered for telecommunications network and/or services provision by the national telecommunications regulator. Seven operators had been granted a short prefix for carrier pre-selection.

E The Notified Agreements

Agreements

(19) The principles and detailed rules for the collaboration between the Parties have been defined in the Agreement between SNCF and Cegetel for their partnership within the company Telecom Developpement. This agreement (the framework agreement), signed on 11 April 1997, includes:

- a deployment plan for the TD network (Annex 2 to the framework agreement),
- an initial business plan relating to the development of TD (Annex 9 to the framework agreement),
- a marketing agreement aimed at organising the conditions of the distribution by Cegetel of the long-distance telephone services of TD), the supply of an interconnection service and the supply of long-distance transmission capacity (Annex 3 to the framework agreement),
- a contract relating to the deployment by SNCF of the TD network (Annex 5 to the framework agreement),
- a contract relating to the maintenance by SNCF of the TD network (Annex 6 to the framework agreement).

Contractual provisions

(a) *Contribution to TD of existing optical fibre network capacity*

(20) In an agreement concluded on 22 November 1996, SNCF contributed to TD exclusive rights for the use of the surplus capacity on its existing optical fibre network. Furthermore, Cegetel transferred its own long-distance optical fibre network and those of its subsidiaries to TD. Cegetel Longue Distance was taken over by TD.

(b) Priority use of railway land

(21) In an agreement concluded on 22 November 1996, SNCF granted TD a non-exclusive right to occupy public railway land for a period of 30 years, to allow it to deploy a telecommunications network. In order to enable TD to complete the installation of its network in the shortest possible time, SNCF has also granted it a priority right of access to SNCF's land, guaranteed by a penalty clause applicable for a period of three and a half years, from 1997 to 2000.

(22) The precise details regarding the scope of this priority access and the arrangements for its application were amended following intervention by the Commission, as is described in recitals 28, 29 and 30.

(c) Exclusive distribution of voice-telephony services

(23) A joint company between Cegetel and TD, Cegetel Le 7, in which Cegetel has an 80% stake and TD a 20% stake, will be solely responsible for marketing TD's long-distance telephony services for the general public. Similarly, end-to-end, voice-telephony services for corporate clients will be exclusively distributed by Cegetel Entreprise, also owned 80% / 20 % by Cegetel and TD.

(d) Exclusive supply of transmission capacity

(24) Cegetel has signed an exclusive supply agreement with TD, on behalf of both itself and its subsidiaries, under the terms of which they undertake that TD is their sole supplier for the provision of transmission capacity for long-distance telecommunications traffic in France. However, Cegetel is permitted to use other suppliers if TD's prices should at any time prove to be above the market price. In addition, TD may buy capacity from other operators to meet Cegetel's requirements. In addition, Cegetel is bound by its previous supply agreements.

(e) Non-competition

(25) SNCF has undertaken not to engage, either directly or indirectly via a subsidiary, in any activity in the telecommunications field that would be in competition with TD or the Cegetel group.

(26) Cegetel has promised to abstain from any investments in long-distance telecommunications networks, apart from its investment in TD.

(27) TD has undertaken not to compete with Cegetel Le 7 and Cegetel Entreprises as regards the marketing of telecommunications services.

F Contractual Changes

(28) On 18 March 1998, the Commission informed the parties that it considered the clause governing the priority use of railway premises by TD as falling within the scope of Article 81(1) of the EC Treaty and that, as it stood, it was not eligible for an exemption under Article 81(3). On 20 April 1998, the parties proposed amending the clause in question in order to clarify the scope and practical application of the priority access granted to TD, and thus to spell out clearly the conditions under which the penalties provided for in the agreements would be applicable. Taking into account the Commission's observations, the parties introduced on 31 July 1998 an amendment to the original agreements under which they make provision for:

(i) equal treatment for third parties in those exceptional cases where the railway infrastructures in question are the only means of putting in its cables (narrow valley structures); and

(ii) that SNCF (or, where appropriate, Reseau Ferre de France) remain free to give access to the railway infrastructures to other telecommunications operators, provided that this can be done without interfering with the development of TD's network.

(29) These amendments allow SNCF to give access to its infrastructures to other operators, provided that this can be done without interfering with the development of TD's own network.

(30) Furthermore, the priority right is limited to the minimum period required to implement the network (1997-2000), and there is an explicit undertaking that the priority rights shall not apply in the event of other companies' seeking access to specific portions of railway-owned land if the installation of cables on these sites is the only way of creating a telecommunications network.

C Third Party Observations

(31) Following the publication pursuant to Article 19(3) of Regulation 17, comments were received from four interested parties. The comments focused, in particular, on the changes submitted by the Parties regarding the priority use of railway land by TD, the conditional access to the railway premises under the agreement during the period of deployment of TD's network and to the alternatives to the rail network infrastructures in France for the purposes of installation of telecommunication networks. These comments were fully assessed by the Commission but proved not to be such as to cause the Commission to change its favourable position in the light of the contractual changes agreed by the Parties.

II Legal Assessment

A Application of Article 81(1) to the entry of Cegetel into capital share of TD

(32) SNCF and Cegetel are neither actual nor potential competitors. They operate on completely different markets. Cegetel is present, or emerging, on most segments of the telecommunications market in France, while SNCF, which is contributing the infrastructures on the basis of which the services will be developed and exploited, is not commercially active in the telecommunications sector. Moreover, neither SNCF nor Cegetel are present on the market for carriers' carrier services on which TD wilt mainly operate.

(33) SNCF is the state-owned railway operator and does not intend to become a telecommunications operator. TD was not created by SNCF in order to act as a telecommunications operator, but merely to deploy a telecommunications network previously used for its own internal needs. The French authorities have confirmed that the purpose of TD, as a subsidiary company of SNCF, is to be limited to the activity of exploiting that network (as confirmed by a letter of the French Secretary of State for Transport to the president of SNCF dated 17 July 1996). Through the notified agreement, Cegetel will be able to have access to the French nationwide railway infrastructures for the purpose of building up a telecommunications network of its own. In exchange, SNCF will receive an atypical financial return from its assets and will obtain telecommunications capacity for its own internal purposes.

(34) Furthermore, the deployment of a telecommunications network with national coverage takes a number of years and requires substantial investment. TD could not reasonably be expected to undertake such investments without the support of a full service telecommunications operator aiming to establish itself on the basis of infrastructure and services alternative to those provided by the incumbent operator in France.

(35) Cegetel is a new entrant in the French telecommunications markets facing strong competition from France Telecom. It does not have its own backbone network and has been, until now, dependent on the incumbent operator for the infrastructure by means of which it offers its services. By means of TD, Cegetel will be able to have access to the French nationwide railway infra- structures for the purpose of building up a telecommunications network of its own. This network will be the first nationwide alternative network (to the one controlled by the incumbent operator) to be put into service in France. Although for the purposes of creating telecommunications networks there are a number of alternative infrastructures to that of the railways, which Cegetel could in fact have studied before deciding to acquire an interest in TD, it is unlikely that without TD's existing network and the priority usage of the railway premises of SNCF, Cegetel could have been present on the long-distance, voice-telephony market (including switched transit or dedicated transit services) as early as 1 February 1998.

(36) The notified agreements provide for an allocation of tasks between, on the one hand, TD, which will be in charge of the technical aspects of the establishment, maintenance and operation of the telecommunications network, and, on the other hand, Cegetel, which through Cegetel Le 7 and Cegetel Entreprises will provide commercial telecommunication services to end-users.

(37) The French telecommunications market has only relatively recently been fully liberalised (1 January 1998) and new entrants are exposed to strong pressure from the incumbent operator which has traditionally represented the sole source of domestic transmission lines in that country. Liberalisation of alternative infrastructures occurred in France on 1 July 1996. A number of tele-communications operators are building or have announced plans to build national fibre optic networks in France, including Hermes (of which SNCF is an indirect shareholder through a 9% shareholding in HitTail BV), COLT, Worldcom / MCI and Cable & Wireless. Against that background, it does not appear that the notified agreement has the effect of preventing, restricting or distorting competition within the relevant market referred to above. By enabling Cegetel to build up its own network and offer long-distance services over the transmission capacity developed by TD, the agreements will allow that company to compete more effectively on the market by ending its dependency on the incumbent operator for its backbone network.

(38) The agreements are not likely to affect the competitive position of third parties, in so far as SNCF is not unduly precluded from granting access to its infrastructures to other operators. Furthermore, third-party operators would benefit from the existence of the additional transmission capacity for telecommunications services that TD will create.

(39) The Commission has itself recognised that new licensed operators such as TD required access to pathways across public and private property to enable them to roll out their networks, as well as acknowledging the merits of facility sharing in terms of town planning, and for environmental and economic reasons, albeit in an interconnection context (see Commission Directive 90/388/EEC of 28 June 1990, on competition in the markets for telecommunications services, as amended).

(40) In conclusion, on the basis of the arguments set out above, the acquisition of a shareholding by Cegetel in the share capital of TD falls outside the scope of Article 81(1) of the EC Treaty.

B Application of Article 81(1) to the Contractual Provisions

(41) On the basis of arguments developed below, the contractual provisions identified in recitals 28, 29 and 30 are ancillary to the activity of TD in as much as they are directly linked to, and necessary for, such activity. Given the financial investment required to deploy an alternative nationwide telecommunications network which constitutes the basis of the operation of Cegetel, itself a new entrant into the French telecommunications market, those provisions ensure TD the conditions of operation required to secure its entry into the market within a short period of time.

(a) Exclusive use by TD of the SNCF optical fibres

(42) By means of this provision, SNCF ensures that its venture TD will have the necessary resources for carrying on its main business. This is an exclusive right which concerns the very nature of the contribution agreement. This provision also arises from the SNCF's decision not to act as a telecommunications operator and to transfer to its subsidiary TD all the activities relating to the operation of the network built up on the railway facilities. Furthermore, the task of TD involves the configuration and maintenance of a nationwide telecommunications network starting from the optical fibres already deployed by SNCF. Those fibres require an upgrading in order to increase their capacity and ensure their integration into the network. The management, integration and upgrading of such network would be extremely difficult unless the exclusive use of all the fibres which constitute the network has been secured.

(b) Priority use of railway land

(43) The purpose of this provision is to secure for TD its means of operation by ensuring that the deployment of the telecommunications network will take place within the schedule contained in its business plan. Cegetel is relying solely on the long-distance network of TD for the transport of the long-distance telecommunications traffic. The priority use of railway land is justified in view of the conditions of deployment of the network imposed by the law and of the requirements of continuity of railroad transport operation and security of circulation of trains. The wording of the agreements, as amended by the Parties (see recitals 28, 29 and 30), does not imply that any exclusivity is given to TD and does not prevent third parties from having access to the railway land for the purposes of laying cables, and thus does not hinder the construction of networks by competing operators.

(c) Exclusive distribution of TD's voice-telephony services by Cegetel

(44) The commercialisation agreement provides that TD will not, by itself, market voice-telephony services to end-users, and will instead provide those services to Cegetel. The strategy agreed between the two parent companies results in TD being in charge of the technical aspects of the setting up and operation of the network; and Cegetel, through Cegetel Le 7 and Cegetel Entreprises, assumes the commercial operation of client services. This provision reflects SNCF's intention to limit the activity of TD to the operation and exploitation of the telecommunications network. As a result of that limitation, the commercialisation agreement ensures that TD will find a demand for its long-distance voice-telephony services which will be marketed by Cegetel. The agreement ensures therefore that TD will have sufficient demand for its services to sustain its entry into the market and contributes to its long-term viability as operator.

(d) Exclusive supply clause

(45) Similarly, the obligation contained in Articles 4(4) and (5) of the framework agreement, by requiring Cegetel to establish its operation on TD's network, ensures that the venture company has an effective and profitable minimum volume of activities, as well as regular profits. It should be recalled, however, that this undertaking is considerably reduced on the one hand by Cegetel's option of being supplied by a third party if the TD prices are less favourable than those on the market, and on the other hand by Cegetel's adherence to previous supply undertakings.

(46) On the basis of the particular circumstances of this case, it can be concluded that the exclusive *use* of the SNCF optical fibre cable network capacity, the priority use of railway land resulting from the amendments introduced by the parties on 31 July 1998, the exclusive distribution of voice-

telephony services and the exclusive supply clause are directly related and necessary to the successful implementation of the network and operation of TD. Hence, they have to be regarded as ancillary restraints to the project intended by the Parties under the competition rules of the EC Treaty.

(47) Ancillary restraints are to be assessed together with the creation of the company. In this respect, as the agreements between SNCF and Cegetel concerning TD have been found not to fall within the scope of Article 81(1) of the EC Treaty, it follows that the provisions detailed above do not do so either.

(e) Non-competition

(48) The non-compete terms applicable to SNCF (Articles 3 and 36 of the framework agreement) and to Cegetel (Article 4(8) of the framework agreement) guarantee that Cegetel and SNCF, two non-competitors who have entered a product market which is new to both of them, will concentrate their efforts on TD. Furthermore, given that the telecommunications network operated by TD, which is built upon the premises of French railway infrastructures, is essential for Cegetel's operation as a full telecommunications operator, those terms are necessary in order to ensure that TD becomes stable on the market. The non-compete obligation binding on TD ensures that TD will concentrate its efforts on the exploitation of the telecommunications network.

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement in respect of the notified agreements relating to the cooperation between Societe nationale des chemins de fer francais and Cegetel SA through their joint subsidiary Telecom Developpement.

Article 2

[...] □

Increase in the number of complaints to the Commission

In the last four full years the number of complaints to the competition in competition cases has continued to rise. In 1995, there were 114 complaints; in 1996, there were 159 complaints; in 1997, there were 177 complaints; and, in 1998, there were 192 complaints. The 1998 figure compares with 101 cases opened on the Commission's own initiative and 216 cases based on notifications.

The Commission's XXVIIIth Report on Competition Policy

Both the interest and the value of the Commission's annual reports on competition policy have shifted in the last two or three years. At one time, the primary interest lay in the comprehensive reviews of the year's case-law - decisions by the Commission and judgments by the Court - filling in many of the gaps in the month-by-month reports available in the Bulletin and elsewhere and often adding considered comments on the significance of the cases from the Commission's point of view. Now the emphasis is on discussion and statistics. This is no bad thing: the latest report offers some useful discussions of various aspects of competition, several of which have been picked up in this issue, and a lot of statistics, mostly in the form of bar-charts, pie-charts and the like. One of the most useful discussions in the report concerns the international dimension of competition policy, with particular reference to the World Trade Organisation's working party under the chairmanship of Professor Jenny. In his introduction to the report, the outgoing Commissioner, Mr Van Miert, offers some interesting views on the prospects for this working party's activities; and, in a final section of the report, there is some additional material on the subject, largely in factual form on the progress made so far.

The Irish Steel cases

Two recent judgments of the Court of First Instance, in Case T-89/96 *(British Steel plc v Commission)* and Case T-106/96 (*Wirtschaftsvereinigung Stahl v Commission*) upheld a Commission decision on aid from the Irish government to Irish Steel. The financial position of Irish Steel, a 100% State-owned steel company, deteriorated between 1990 and 1995. In 1996 the Commission authorised State aid from the Irish Government to Irish Steel for restructuring and privatisation. In its decision, the Commission did not insist on reduction of production capacity as in practice this would have forced Irish Steel's closure, since it had only one rolling mill. It did, however, impose certain conditions in return for the aid received, particularly in relation to the range of products manufactured and the volume of additional sales. British Steel, a United Kingdom company, and Wirtschaftsvereinigung Stahl, a German association, both brought proceedings for annulment of that decision. The Court of First Instance observed that, since the early 1980's, there has been a Community State aid code authorising certain categories of aid to the steel industry, which made no provision for aid for restructuring. The Court held, however, that that did not prevent the Commission from exercising its discretion under Article 95 of the ECSC Treaty to determine whether a particular form of aid not listed by the Code was nevertheless consistent with the objectives of the Treaty. The Court held that the Commission did not commit a manifest error of assessment in treating the difficult economic situation of the region concerned as a material consideration in reaching its decision; and it held that the Commission was