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Exchange rate charges

It is a nice question whether it is better to have standardised charges for certain banking services, which runs the risk that the standard charges will be set at a higher rate than the customers think reasonable, or whether to allow free competition in the setting of charges, which runs the risk that some banks in some countries, especially where they have a local monopoly, will set the rates even higher. By a local monopoly, we mean the exclusive right to operate exchange rate services in a port or airport or motorway service station, where there may be no immediate alternative to the payment of exorbitant charges. Even where there is no local monopoly, national practices (which may or may not technically be "concerted practices") may hit the consumer. In Belgium, for example, it is usual for the banks' profit on currency exchanges to be made solely on the difference between the buying and the selling prices of the different currencies. In Britain, there is almost always a commission on the transaction as well, though the differences between buying and selling prices may be narrower.

In the past, the Commission has tended to accept the need for standardised charges in certain areas of banking, notably in the charges for the use of a Eurocard. But it is taking a more challenging line in the matter of charges for currency exchanges in the so-called "euro-zone" (that is, the eleven Member States - all the Member States except Denmark, Greece, Sweden and the United Kingdom, - which are participants in the single currency system). The Commission has warned 17 banks in Germany and 15 banks in the Netherlands that it has evidence of a breach of European Union anti-trust rules concerning the setting of charges for exchanging euro-zone currencies. The statements of objections issued to Commerzbank, Dresdner Bank and Fortis, among others, follow similar steps against financial institutions in four other euro-zone countries.

Shortly after the introduction of Europe's single currency, the euro, in January 1999, the European Commission received consumer complaints alleging that banks had collectively fixed charges to exchange euro-zone currencies. The Commission's investigation, based on surprise inspections at a number of banks and on replies to questionnaires sent to most euro-zone banks, has showed that banks and national associations may have colluded to keep the commissions at a high level or to control their decrease. In July, the Commission also sent similar statements of objections to 110 banks and banking associations in Belgium, Finland, Portugal and Ireland. The Competition Commissioner, Mario Monti, said that this cartel investigation was one of his top priorities. "Banks are free to set the level of charges for exchanging currencies, but they cannot get together to fix those charges. This would be an infringement of competition rules." ■

REFUSAL TO SUPPLY (SOFTWARE): THE MICROSOFT CASE (2)

Subject: Abuse of dominant position
Discrimination
Licensing restrictions
Refusal to supply

Industry: Computer software

Parties: Microsoft Corporation

Source: Commission Statement IP/00/906, dated 3 August 2000

(Note. Each time there is a reference to Microsoft in these pages a distinction has to be drawn between the case in the United States, the EC case earlier this year and, now, the present case. The distinction is emphasised in the report below. The present case is fundamentally important to Microsoft's operations in Europe: the Commission is squarely accusing Microsoft of abusing a dominant position on the European Union market, refusing to supply essential technology to other parties, except on a discriminatory basis, and relying on intellectual property rights to protect its licensing powers. Judging by previous cases, and in particular the IBM case, the prospects for Microsoft in the present case are bleak. The authorities in the European Union tend to be less sympathetic to the intellectual property argument than their opposite numbers in the United States; and intellectual property owners have been surprised and dismayed to find that they cannot always plead their intellectual property rights in defence of a refusal to supply. This was the classic outcome of the Magill case. Nevertheless, it remains to be seen whether Microsoft can put forward a successful defence of its business practices when the oral hearing takes place.)

The Commission has sent a statement of objections to Microsoft for allegedly abusing its dominant position in the market for personal computer operating systems software by leveraging this power into the market for server software. The Commission's action follows a complaint by American software company Sun Microsystems that Microsoft breached European Union anti-trust rules by engaging in discriminatory licensing and by refusing to supply essential information about its Windows operating systems.

Microsoft has a market share of about 95% in the market for personal computer (PC) operating systems (OS) and thus enjoys a practically undisputed market dominance. Most PCs today are embedded into networks, which are controlled by servers. Interoperability, that is, the ability of the PC to talk to the server, is the basis for network computing: it can function only if the operating systems running on the PC and on the server can talk to each other through links or so-called interfaces. To enable competitors of Microsoft to develop server operating systems which can talk to the dominant Windows software for PCs, interface information - technical information and even limited parts of the software source

code of the Windows PC OS - must be known. Without interoperating software and as a result of the overwhelming Microsoft dominance in the computer software market, computers running on Windows operating systems would be de facto obliged to use Windows server software if they wanted to achieve full interoperability.

Sun Microsystems alleged, in a complaint in December 1998 and in subsequent submissions, that the near monopolistic position of Microsoft in the PC operating system market created an obligation on Microsoft to disclose its interfaces to enable interoperability with non-Microsoft server software. This obligation would cover the OSs distributed by Microsoft at the time when Sun's request for disclosure of interface information was refused in October 1998, that is, Windows 95, 98, NT 4.0 and all subsequent updates. Sun alleges that the launch of Windows 2000 on 17 February 2000, was a final step in Microsoft's strategy to strengthen the effects of its refusal to supply interface information with the intention of driving all serious competitors out of the server software market. Sun claims that Microsoft has applied a policy of discriminatory licensing by distinguishing between its competitors according to a so-called "friend-enemy" scheme. The Commission was given evidence that Microsoft did not carry out its obligation to disclose sufficient interface information about its PC operating system. The Commission believes that Microsoft gave information only on a partial and discriminatory basis to some of its competitors. It refused to supply interface information to competitors like Sun Microsystems.

Resolution of this case is of the utmost importance as operating systems for servers constitute a strategic sector in the development of a global market for information technology and e-commerce. The Commissioner, Mr. Monti, said that the Commission welcomed all genuine innovation and advances in computer technology -wherever they came from - as highly positive developments for consumers and industry alike. "Effective protection of copyrights and patents is most important for technological progress. However, we will not tolerate the extension of existing dominance into adjacent markets through the leveraging of market power by anti-competitive means and under the pretext of copyright protection. All companies that want to do business in the European Union must play by its antitrust " (In February 2000, at the instigation of small and medium-sized firms active in the information technology sector and competitors of Microsoft, the Commission opened an ex officio procedure against Microsoft for alleged abuse of dominance linked to its Windows 2000 software.)

The subject of the US proceedings against Microsoft and the allegations the Commission is investigating are different. The allegations being examined by the Commission are that Microsoft extended its dominance in the PC operating systems market to the server operating systems market. The proceedings launched by the US Department of Justice revolve around Microsoft protecting its dominance in PC operating systems through measures aimed at weakening Netscape's Navigator Internet browser and Sun's Java system. A US Court has found that Microsoft, by virtue of its conduct, has attempted to monopolise the Internet Browser market. At the European Union level, the Commission will continue to examine the two pending cases. ■

PREDATORY PRICING (POSTAL SERVICES): THE DEUTSCHE POST CASE (3)

Subject: Abuse of a dominant position
Discounts
Rebates
Predatory pricing

Industry: Postal services

Parties: Deutsche Post AG

Source: Commission Statement IP/00/919, dated 8 August 2000

(Note. This is another episode in the long-running saga of the Commission's generally admirable attempts to liberalise the postal services market. However, there is a difference in this case. Originally, the Commission had defended the German Post Office from complainants; but the Court of First Instance decided that the complainants had a case and that the Commission should have acted on it. So now the Commission has changed its role and is attacking the German Post Office. The outcome will be determined after the hearing of the Post Office's response to the Commission's statement of objections. Two other cases against Deutsche Post are referred to in the Commission's Statement. Meanwhile, as the next report in this issue points out, the Commission is taking other, more generalised, action to liberalise the market.)

In response to a number of complaints, and a judgment in the Court of First Instance finding that the Commission had wrongly failed to act in the matter, the Commission has initiated formal proceedings against the German postal operator, Deutsche Post, for abuse of its dominant position. These proceedings are concerned in the first place with Deutsche Post's pricing of parcel delivery services for mail-order business. The Commission's preliminary enquiries suggest that Deutsche Post allows large mail-order traders substantial discounts if they undertake to send all their parcels through Deutsche Post. They also suggest that Deutsche Post does not come anywhere near covering the costs of its mail-order parcel services. This means that no private provider of parcel services to mail-order firms has been able to achieve any firm foothold in Germany. The proceedings likewise question the postage charged by Deutsche Post for the letters it delivers under its monopoly rights. At this stage the Commission is asking Deutsche Post to explain why it is that even taking account of quality of service and density of population German customers pay the highest postage in Europe.

The Commission began investigating commercial parcel services in 1994, following complaints lodged by United Parcel Service (UPS) and a number of small and medium-sized carriers grouped in an association known as BIEK. The complainants argued that Deutsche Post was pricing below cost, and that this excluded private competitors from the liberalised commercial parcel services business. UPS subsequently brought an action before the Court of First Instance

seeking a finding that the Commission had wrongly failed to act on its complaint, and on 9 September 1999 the Court held that the Commission ought either to have initiated proceedings against Deutsche Post or to have finally rejected the complaint.

In April of this year the Commission discovered hard evidence that Deutsche Post was giving substantial discounts especially to its large customers. There was also growing evidence that large mail-order customers secured the highest rates of discount only if they sent their entire parcel business or at least a sizeable proportion of it via Deutsche Post. Discounts of this kind have knock-on effects that damage competition.

The Commission's enquiries have confirmed that no private provider of mail-order parcel services is able to secure a foothold in Germany.

A thoroughgoing investigation of the parcel services which Deutsche Post provides to mail-order firms has shown that the extent to which it covers its costs here is a great deal more limited than it is in the case of other commercial customers, or even in the case of the extremely high-cost service for parcels handed in at post office counters.

This suggests that in the mail-order business Deutsche Post is selling its services below cost. If this is confirmed in the formal proceedings, Deutsche Post's conduct would constitute predatory pricing which infringes the prohibition on abuse in Article 82 of the EC Treaty. Deutsche Post's discount agreements would also constitute fidelity rebates incompatible with Article 82.

Parcel services are outside the postal monopoly in Germany. Private service providers such as UPS, Deutsche Paketdienst or German Parcel have been providing commercial parcel services, mainly "business-to-business" or "B-to-B" services, since 1976. But none of the competitors who have been successful in the B-to-B sector have been able to carry their success over into mail-order parcel services.

In February of this year, while the investigation into the mail-order sector continued, the German Association of Postal Service Users ("DVPT") lodged a complaint against what it alleged was an excessive level of postage for the letters service which does form part of Deutsche Post's monopoly. The association argued that postage for standard letters bore no reasonable relation to the service actually provided. The Commission made enquiries, and requested further information from Deutsche Post. From a detailed comparison, which also took account of quality of service and population density, it appeared that German customers were paying by far the highest postage in Europe.

The next steps

Deutsche Post may produce evidence of its own, and may ask for a hearing at which it can present its defence orally. The Commission will then decide whether it should prohibit the conduct at issue. The Commission also has power to

impose fines for infringement of the EU competition rules; the level of the fine depends on the gravity and the duration of the infringement.

Other proceedings against Deutsche Post

In July 1999 the Commission initiated proceedings for unlawful state aid. Those proceedings are concerned with cross-subsidisation of a number of domestic and foreign company acquisitions by Deutsche Post using revenue from the letters monopoly, and the use of revenue from the letters service to offset losses on the parcel service. The decision in the state aid case will have to take account of the outcome of the enquiries in the proceedings now being initiated for abuse of a dominant position.

In May of this year, following a number of complaints, the Commission initiated separate proceedings for abuse of Deutsche Post's dominant position, on the ground that Deutsche Post had disturbed international mail traffic. The Commission accused Deutsche Post of infringing the competition rules of the European Union by frequently and systematically intercepting incoming cross-border mail, imposing surcharges and delaying delivery. The proceedings in that case have no direct implications for the other cases referred to here.

Mail-order parcel services are also known as "business to private" or "B-to-P" services. The carrier may collect sorted and stamped parcels from the customer, or the customer may deliver the sorted and stamped parcels to a freight centre. Under special agreements Deutsche Post may compensate for the cost of the preparatory steps involved. B-to-P services are distinguished from "business-to-business" or "B-to-B" services. B-to-B services consist exclusively of deliveries between business premises, mainly in industrial areas. There is no need here for the relatively costly process of delivery to private customers.

Deutsche Post still offers the traditional over-the-counter parcel service. This is known as the "private-to-private" or "P-to-P" service. These parcels are accepted at post office counters at standard rates. There is no collection from the customer's own premises. Nor are there any special rates, as Deutsche Post itself sorts and stamps the parcel handed in at the counter and delivers it to the private addressee. ■

The CNSD Case

The Commission has decided to send Italy a reasoned opinion for failure to comply with the competition rules in respect of the remuneration of customs agents despite a Court of Justice judgment. The case goes back to 1993 and the Italian Government recently expressed its intention of adapting its legislation so that customs agents would be free to set their own remuneration. Nevertheless, by sending a reasoned opinion the Commission wishes to ensure that the process will in fact be completed. Source: Commission Statement IP/00/918, dated 8 August 2000.

LIBERALISATION (POSTAL SERVICES): COMMISSION STATEMENT

Subject: Liberalisation

Industry: Postal services

Source: Commission Statement IP/00/541, dated 30 May 2000

(Note. In addition to the individual cases which the Commission has brought against national post offices for infringement of the EC rules on competition, the Commission is proposing more generalised action to liberalise the provision of postal services. The problem is to balance the maximum degree of liberalisation against the maximum protection of the principle of universal service. This principle ensures that competition does not result in a creaming off of the more lucrative parts of the postal services market, leaving the provision of less lucrative services or services to less lucrative areas to decline or abandonment. The principle recognises that, while some postal services may be a largely commercial operation, universal service is a social necessity. In percentage terms, the current liberalisation program is rather modest; the program for the years 2004 to 2007, though still modest, is likely to have more far-reaching effects.)

The Commission has proposed measures to open up a substantial share of the postal services market to competition by 2003; and, on the basis of new proposals to be tabled before the end of 2004, a further share of the market will be opened up by 2007. This step-by-step approach to complete the Internal Market in postal services will maintain existing safeguards to ensure universal postal service throughout the Union. The proposals respond to the request by the Lisbon European Council to speed up liberalisation of postal services as part of efforts to ensure a complete and fully operational Internal Market and so develop "the most competitive, dynamic and knowledge-based economy in the world".

In particular, the Commission is proposing to increase the range of services which Member States must open to competition to include letters weighing more than 50 grams (the current weight limit is 350 grams), letters below 50 grams where the price is at least two and a half times the price of a standard letter (the current value limit is five times the price of a standard letter), all outgoing mail to other Member States and all express mail. The effect of today's proposal would be to open up an additional 20% of the European Union postal market to competition, over and above the 3% opened up by the existing Directive.

Internal Market Commissioner Frits Bolkestein said: "Fast, efficient, competitive postal services are vital to ensure the competitiveness of European Union industry and to make the Internal Market a reality for consumers. They are particularly vital if business and consumers are to reap the full potential of electronic commerce people will not want to order goods over the internet unless they can depend on speedy, affordable, efficient delivery. Efficient postal services are also crucial for advertising, communications and rapid, cost-effective delivery of both

components and finished products. We have to leave the ideological debate behind us, given that there are cast iron safeguards for universal service in both the existing Directive and the new proposal so that the special role of postal services in society will be preserved. We must instead concentrate on implementing this balanced step-by-step approach to opening up the postal market to further competition. The challenges facing the postal sector mean that maintaining the status quo is simply not an option."

The proposal aims to ensure that market opening to be implemented in 2003 is significant enough to engender competition without endangering either the universal service or the financial equilibrium of its provision by the universal service providers. To achieve this, the proposed market opening affects all segments of the mail market (that is, reduction of the weight/price limits for the maximum reservable area), but focuses in particular on market segments that are already de facto open to competition (such as outgoing cross-border mail).

First step

The proposal would require Member States, by 1 January 2003, to:

- reduce the existing weight/price limits from 350 grams/5 times the basic standard tariff for letters to 50 grams/2.5 times the basic standard tariff for letters;
- reduce the existing weight/price limits from 350 grams/5 times the basic standard tariff for letters to 50 grams/2.5 times the basic standard tariff for direct mail (that is, addressed advertising material);
- initiate a full opening to competition of outward cross-border mail; and
- initiate a full opening to competition of all express mail services (without price limit).

The total market opening resulting from the proposal is estimated to represent on average approximately 20% of the universal service providers' revenues from postal services.

The Commission is not proposing specific opening measures for inward cross-border mail because of the risk that this could be used to circumvent the area of domestic mail services Member States could reserve for universal service providers.

On the basis of this proposal, Member States could still maintain a reserved area representing, on average, 50% of the universal service providers' revenue from postal services. Currently universal service providers obtain on average 70% of their revenue from reserved services. However, as some Member States have already opened up their postal markets further than has been proposed by the Commission, the impact of the proposal on market opening varies from one Member State to another.

Finally, the proposal improves legal clarity and certainty of the existing regulatory framework with a clear definition of special services, which cannot be reserved, and the requirement for the transparency and non-discrimination principles to apply to

special tariffs.

Next step

A next step for further opening of the mail market is proposed to take effect from 1 January 2007. Precise proposals are due to be tabled by the Commission before 31 December 2004. These proposals will be based on a review of the sector focusing on maintaining the universal service in a competitive environment.

Universal service safeguards

Safeguards for the universal service already defined in the existing postal Directive (97/67/EC) would be reinforced. In particular, Member States will continue to have the option of using licensing systems to impose universal service obligations on competitors and establishing a compensation fund into which operators would have to pay to cover any shortfall in revenue from services reserved for the universal service provider as a result of which it was unable to meet the cost of the universal service obligation. The new proposal would further enhance these provisions by including the explicit possibility for universal service providers to cross-subsidise universal services which are non-reserved with revenue from reserved services, insofar as it is needed to provide the universal service. ■

The Framatone / Siemens / Cogema Case

The Commission has decided to undertake an in-depth, second phase investigation of a proposed joint venture between French companies Framatome SA and Cogema SA and Germany's Siemens AG. The new joint venture will combine the nuclear activities of Framatome and Siemens.

Framatome is a designer and manufacturer of nuclear power plants and manufactures the main equipment of the primary systems, that is, the core part, of a nuclear power plant. Siemens is active in electrical engineering and electronics, and in the design and supply of different types of nuclear power plants, including related nuclear fuel operations. Cogema is a state-owned company, mainly active in the nuclear field.

The Commission considers that the proposed joint venture raises serious doubts about its compatibility with the common market as regards the strong positions on certain nuclear technology markets.

Source: Commission Statement IP/00/926, dated 11 August 2000.

MARKETING AGREEMENTS: COMMISSION'S DRAFT GUIDELINES

Subject: Marketing agreements
Cooperation agreements
Information agreements

Industry: All industries

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

(Note. In the last issue, there was an item, from the same Commission document, on Production Agreements; this time, the subject is Marketing Agreements, or what the paper refers to as Commercialisation Agreements. The value of these sections of the Commission's paper lies in the useful summary which they provide of the law on, and of the Commission's policy towards, the treatment of those agreements under the EC rules on competition. For example, the section below clarifies the distinction between vertical and horizontal restraints in the matter of distribution and provides a reminder of the scope of the block exemption regulation covering distribution agreements. It also explains the rationale for the objections to agreements on the exchange of information: "the more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information" (paragraph 142, in which the relevant case-law is cited). If this comes a surprise to some companies, so too must the reminder that horizontal agreements may well be acceptable if, for example, they enable parties to enter a market they could not enter individually. Thus, consortia formed to allow companies to make a bid or tender may be justified, where the individual firms cannot compete with one another for the contract concerned. If they are not competitors, agreements between them are not anti-competitive. As in the last issue, the section reported here provides useful examples of the types of agreement concerned.)

5. COMMERCIALISATION AGREEMENTS

5.1. Definition

131. The agreements covered in this section involve co-operation between competitors in the selling, distribution or promotion of their products. These agreements can have a largely varying scope, depending on the marketing functions which are being covered by the cooperation. At the one end of the spectrum, there is joint selling that leads to a joint determination of all commercial aspects related to the sale of the product including price. At the other end, there are more limited agreements that only address one specific marketing function, such as distribution, service, or advertising.

132. The most important of these more limited agreements would seem to be distribution agreements. These agreements are generally covered by Block Exemption Regulation No. 2970/1999 and the Guidelines on Vertical Restraints unless the parties are actual or potential competitors. In this case, the Block Exemption Regulation No 2970/1999 only covers non-reciprocal vertical agreements between competitors, if (a) the buyer, together with its connected undertakings, has an annual turnover not exceeding 100 million Euro, or (b) the supplier is a manufacturer and a distributor of goods and the buyer is a distributor who is not also a manufacturer of goods competing with the contract goods, or (c) the stipplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases 'the contract services.[34] If competitors agree to distribute their products on a reciprocal basis there is a possibility in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to collusion. The same is true for non-reciprocal agreements between competitors exceeding a certain size. These agreements have thus first to be assessed according to the principles set out below. If this assessment leads to the conclusion that a cooperation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. This assessment should be based on the principles set out in the Guidelines on Vertical Restraints[35], for instance as regards the list of hardcore restrictions which are unlikely to be exempted in vertical agreements.

133. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another co-operation. This can be for instance the case as regards joint production or joint purchasing. These agreements will be dealt with as in the assessment of those types of cooperation.

5.2. Relevant markets

134. To assess the competitive relationship between the co-operating parties, first the relevant product and geographic market(s) directly concerned by the co-operation (i.e. the market(s) to which products subject to the agreement belong) have to he defined. Secondly, a commercialisation agreement in one market may also affect the competitive behaviour of the parties in a neighbouring market closely related to the market directly concerned by the cooperation.

5.3. Assessment under Article 81(1)

5.3.1. Nature of the agreement

5.3.1.1. Agreements that do not come under Article 8 1(1)

135. The commercialisation agreements covered by this section only fall under the competition iules if the parties to the agreements are competitors. If the parties clearly do not compete with regard to the products or services covered by the agreement, the agreement cannot be restrictive of competition. This also

applies if a co-operation in commercialisation is objectively necessary to allow one party to enter a market it could not have entered individually, for example because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to mount a credible tender for projects that they would not be able to fulfil, or would not have bid for, individually. As they are therefore not potential competitors for the tender, there is no restriction of competition.

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

136. The principal competition concern about a commercialisation agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of co-ordinating the pricing policy of competing manufacturers. In this case they not only eliminate price competition between the parties but also restrict the volume of goods to be delivered by the participants within the framework of the system for allocating orders. They therefore restrict competition between the parties on the supply side and limit the choice of purchasers and fall under Article 81(l).

137. Tbis appreciation does not change if the agreement is non-exclusive. Article 81(1) continues to apply even where the parties are free to sell outside the agreement, as long as it can be presumed that the agreement will lead to an overall co-ordination of the prices charged by the parties.

5.3.1.3. Agreements that may come under Article 81(1)

138. For commercialisation arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost structure of the commercialisation, a significant input to the parties' final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties' final cost.

139. A specific concern related to distribution arrangements between competitors which are active in different geographic markets is that they can lead to or be an instrument of market partitioning. In the case of reciprocal agreements to distribute each other's products, the parties to the agreement allocate markets or customers and eliminate competition between themselves. The key question in assessing an agreement of this type is if the agreement in question is objectively necessary for the parties to enter each other's market. If it is, the agreement does not fall under 81(1). If it is not, the agreement falls under 81(1). If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It needs however to be assessed if the non-reciprocal agreement constitutes the basis for a mutual understanding to not enter each other's market or is a means to control access to or competition on the 'importing' market.

5.3.2. Market power and market structure

140. As indicated above, agreements that involve price fixing will always fall under Article 81(1) irrespective of the market power of the parties. They may, however, be exemptable under Article 81(3) under the conditions described below.

141. Commercialisation agreements between competitors which do not involve price fixing are only subject to Article 81(1) if the parties to the agreement have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15%. In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

142 If the parties' combined market share is larger than 15%, the likely impact of the joint commercialisation agreement on the market must be assessed. In this respect market concentration, as well as market shares will be a significant factor. The more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information. (The exchange of sensitive and detailed information which takes place in an oligopolistic market might as such he caught by Article 81(1). The judgments of 28 May 1998 in the "Tractor" cases (C-8/95 P, *New Holland Ford* and C-7/95 P, *John Deere*) and of 11 March 1999 in the "Steel Beams" cases (T-34/94 et seq) provide useful clarification in this respect.)

5.4. Assessment under Article 81(3)

5.4.1. Economic Benefits

143. The efficiencies to be taken into account when assessing whether a joint conimercialisation agreement can be exempted wilt depend upon the nature of the activity. Price fixing can generally not be justified, unless it is objectively necessary for the integration of other marketing functions, and this integration will generate substantial efficiencies. The size of the efficiencies generated depends *inter alia* on the importance of the joint marketing activities for the overall cost structure of the product in question. Joint distribution is thus more likely to generate significant efficiencies for producers of widely distributed consumer goods than for producers of industrial products which are only bought by a limited number of users.

144. In addition, the claimed efficiencies should not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency that would make an agreement exemptable.

145. Claimed efficiency benefits must be demonstrated. An important element in this respect would be the contribution by both parties of significant capital,

technology, or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. If, on the other hand, the joint commerciatisation represents no more than a sales agency with no investment, it is likely to be a disguised cartel and as such can not fulfil the conditions of Article 81(3).

5.4.2. Indispensability

146. A commercialisation agreement can not be exempted if it imposes restrictions that are not indispensable to the attainment of the above-mentioned benefits. As discussed above, the question of indispensability is especially important for those agreements involving price fixing or the allocation of markets.

5.4.3. No ehmination of competition

147. Joint commercialisation agreements can never been exempted if they enable the parties to eliminate competition in respect of a substantial part of the products in questions. In making this assessment, the combined market shares of the parties can be regarded as a starting point. One then needs to evaluate whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as the potential for market entry. Arrangements between competitors who have a combined market share equivalent to dominance will not normally fulfil the conditions of Article 8 1(3).

5.5. Examples

148. Example 1

Situation: 5 small food producers, each with 2% market share of the overall food market, agree to: combine their distribution facilities; market under a common brand name; and sell their products at a common price. This involves significant investment in warehousing, transport, advertising, marketing and a sales force. It significantly reduces their cost base, representing typically *50%* of the price at which they sell, and allows them to offer a quicker more efficient distribution system. The customers of the food producers are large retail chains.

Three large multinational food groups dominate the market, each with 20% market share. The rest of the market is made up of small independent producers. The product ranges of the parties to this agreement overlap in some significant areas. But in no product market does their combined market share exceed 15%.

Analysis: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement can not be considered as having market power. However, the integration of the marketing and distribution appears to provide significant efficiencies which are of benefit to customers both in terms of improved service, and lower costs. The question is therefore whether the agreement is exemptable under Article 81(3). To answer this question it must be established whether the price fixing is objectively necessary for the integration of the other marketing functions. In this case, the price fixing can be regarded as

necessary, as the clients - large retail chains - do not want to deal with a multitude of prices. It is also necessary, as the aim - a common brand - can only be achieved credibly if all aspects of marketing, including price, are standardised. As the parties do not have market power and the agreement creates significant efficiencies it is compatible with Article 81.

149. Example 2

Situation: 2 producers of ball bearings, each having a market share of 5%, create a sales joint venture which will market the products, determine the prices and allocate orders to the parent companies. They retain the right to sell outside this structure. Customers continue to be delivered directly from the parents' factories. They claim that this will create efficiencies as the joint sales force can demonstrate the parties' products at the same time to the same client thus eliminating a wasteful duplication of sales efforts. In addition, the joint venture would, wherever possible, allocate orders to the closest factory possible, thus reducing transport costs.

Analysis: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement cannot be considered as having market power. It is not
exemptable under Article 81(3), as the claimed efficiencies are only cost reductions derived from the elimination of competition between the parties.

150. Example 3

Situation: 2 producers of soft drinks are active in 2 different, neighbouring Member States. Both have a market share of 20% in their home market. They agree to reciprocally distribute each other's product in their respective geographic market. Both markets are dominated by a large multi-national soft drink producer, having a market share of 50% in each market.

Analysis: The agreement falls under Article 81(1) if the parties can be presumed to be potential competitors. Answering this question would thus require an analysis of the barriers to entry into the respective geographic markets. If the parties could have entered each other's market independently, than their agreement eliminates competition between them. However, even though the market shares of the parties indicate that they could have some market power, an analysis of the market structure indicates that this is not the case. In addition, the reciprocal distribution agreement benefits customers as it increases the available choice in each geographic market. The agreement would thus be exemptable even if it were considered to be restrictive of competition. ■

The full text of the foregoing document, and of related documents on the subject of horizontal agreements, may be found on the Commission's web-site. The full text of the EPAC case, reported on pages 191 to 200, is freely available on the Court's web-site; the text is not, however, definitive.

STATE AIDS (CEREALS): THE EPAC CASE

Subject: State aids
Repayment

Industry: Cereals
(Implications for all industries)

Parties: Commission of the European Communities
Portuguese Republic
Empresa para a Agroalimentação e Cereais SA (EPAC)

Source: Judgment of the Court of Justice of the European Communities, dated 27 June 2000 in Case C-404/97, (*Commission of the European Communities v Portuguese Republic*)

(Note. This case provides a clear illustration of what happens when a state aid is given illegally to a trader, to the detriment of the trader's competitors, and has to be recovered. The Court reviews the relevant case-law and addresses some of the typical problems arising from the Commission's demand that the Member State's government must recover from the trader the aid granted. A common argument by Member States is that recovery is impossible. The argument is stated in the present case in paragraphs 25 and 29 to 33 below. But the Court tackles this argument at length in paragraphs 34 to 55, which deal comprehensively with the legal and technical problems of recovery and provide an excellent guide to future cases of the kind.)

Judgment

1. By application lodged at the Court Registry on 2 December 1997, the Commission of the European Communities brought an action under the second sub-paragraph of Article 93(2) of the EC Treaty (now the second sub-paragraph of Article 88(2) (EC) for a declaration that, by failing to cancel and recover, within the prescribed period, the aid from which EPAC - Empresa para a Agroalimentação e Cereais, SA (hereinafter EPAC) unduly benefited, the Portuguese Republic has failed to fulfil its obligations under Commission Decision 97/762/EC of 9 July 1997 on measures taken by Portugal to assist EPAC (hereinafter the decision at issue).

2. According to the preamble to the decision at issue, before the accession of Portugal to the European Community, the marketing of cereals in Portugal was covered by EPAC as a public monopoly. After accession, this public monopoly was gradually dismantled. From 1991 the cereals market was liberalised and EPAC made into a limited company with public capital. However, EPAC remained responsible for ensuring cereal supplies to the country.

3. EPAC's assets situation was unbalanced, with an excess of fixed assets and insufficient capital of its own for financing current activity. Moreover, it was overstaffed and its financial situation was made worse by the failure of Silopor, a company with exclusively public capital, formed by Decree-Law No 293-A/86 of 12 September 1986 through the transfer of EPAC assets, debt and capital, to pay for the transfer of the port silos.

4. From April 1996 EPAC stopped making payments in respect of most of its financial commitments, since the level of indebtedness and the financial charges to be paid became so high that it could no longer shoulder the burden from its own resources.

5. By inter-ministerial decision of 26 July 1996, a plan for making EPAC viable and financially sound was adopted, as part of which EPAC was authorised to negotiate the terms of a loan up to a total of PTE 50 billion, PTE 30 billion of which would be covered by a State guarantee.

6. By Decision No 430/96-XIII of 30 September 1996, the Finance Ministry granted that guarantee in connection with a loan obtained by EPAC from a group of private banks with the purpose of restructuring EPAC's short-term bank debt into medium-term bank debt. The loan was granted for a period of seven years at an interest rate equal to six-month Lisbor for the guaranteed amount and six-month Lisbor +1.2% for the remainder.

7. Having become aware of that operation as a result of a complaint, the Commission decided, by a letter of 27 February 1997 addressed to the Portuguese authorities, to initiate the procedure under Article 93(2) of the Treaty. It considered that the State guarantee did not comply with the Commission letter to the Member States (SG(89) D/4328) of 5 April 1989 stating that guarantees were subject to specific obligations. Furthermore, it took the view that the interest rates on the loans, which were considerably lower than the reference rates, included an aid element since an undertaking in financial difficulties such as EPAC could not under normal market conditions obtain loans on more favourable conditions than those available to operators in a balanced financial situation. It pointed out, moreover, that the mechanism for consolidating the EPAC liabilities seemed to constitute an aid with substantial knock-on advantages for Silopor. Finally, the Commission stated that the State guarantee grantedto EPAC did not meet the conditions necessary to be compatible with the common market in the light of Community criteria for restructuring aid for undertakings in difficulty. In view of the effect on trade between Member States and the resulting distortion of competition, the Commission found that the aid fell within the scope of Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC) without being able to benefit from any of the derogations provided for in Article 92(2) and (3).

8. The Commission, in the same letter, gave the Portuguese Government formal notice to submit its comments and asked it to take all measures necessary to suspend with immediate effect the guarantee granted to EPAC for any new business activity by that undertaking on the cereals market.

9. By letter of 21 March 1997, the Portuguese Republic argued that there had been no intervention by the State administration in the negotiation of the loans granted to EPAC by the banks. By letter of 8 April 1997 the Portuguese Government submitted its comments, summarised in points 6 to 8 of the decision at issue, on the contested measures.

10. On 30 April 1997 the Commission adopted Decision 97/433/EC requiring the Portuguese Government to suspend with immediate effect the grant of the State guarantee to the undertaking EPAC. On 7 July 1997, two actions for annulment were brought against that decision, one by the Portuguese Government (C-246/97) and another by EPAC (T-204/97).

11. By letter of 21 May 1997, the Portuguese authorities, without mentioning any measure taken to implement such suspension, challenged the characterisation as aid of the guarantee granted which did not, in their opinion, constitute financial operating aid to the undertaking and did not therefore distort the conditions of competition. Moreover, it had not been demonstrated how and to what extent granting the State guarantee to EPAC would affect trade between Member States. They again indicated that the State had not taken part in the negotiation of the bank loans contracted by EPAC from financial institutions as part of its routine business.

12. Following the replies from the Portuguese authorities, the Commission decided to close the procedure provided for by Article 93(2) of the Treaty and adopted the decision at issue in which it found that the State guarantee granted to EPAC constituted aid to that undertaking, since it had enabled it to obtain loan conditions which were more favourable than it would have been able to obtain without that guarantee, in view of its difficult financial situation (point 13(d) of the decision at issue). It also considered that the State guarantee granted to EPAC constituted indirect aid to Silopor, since it enabled EPAC not to demand payment of the debt owed to it (point 13(c) of the contested decision).

13. The Commission, observing, first, that the monetary value of the trade in cereals, so far as Portugal was concerned, in 1996 was around 5.8m ECUs for exports and 310m ECUs for imports and, secondly, that EPAC was an operator active in both intra- and extra-Community trade in cereals, concluded that the guarantee granted affected trade between the Member States and distorted or threatened to distort competition (point 11 of the decision at issue).

14. Next, it found that the derogations provided for in Article 92(2) of the Treaty were manifestly not applicable in the present case nor was there any justification for a claim that the aid concerned met the conditions required for the application of any of the derogations provided for in Article 92(3) of the Treaty (point 12 of the decision at issue).

15. In particular, the Commission found that the guarantee did not fulfil the criteria laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty on the ground that the interest rates on the loans

obtained by EPAC are low thanks to the guarantee, that the planned duration of the credit operation is seven years (greatly exceeding the established general rule of six months), that furthermore, it is difficult to argue that a State guarantee on such a large scale is the amount strictly necessary for keeping the firm in business and that, finally, no serious social situation requiring the undertaking to be kept in business such as to justify granting the aid has been cited by the Portuguese Government or found by the Commission (point 13(b)).

16. It is in those circumstances that Articles 1, 2 and 3 of the decision at issue provide:

Article 1

The aid granted by the Portuguese Government to EPAC is illegal since it was granted in contravention of the procedural rules referred to in Article 93(3) of the Treaty. Furthermore, it is incompatible with the common market pursuant to Article 92(1) of the Treaty and does not meet the conditions for derogations provided for in Article 92(2) and (3) of the Treaty.

Article 2

1. Portugal must cancel the aid referred to in Article 1 within 15 days of the date of notification of this Decision.

2. Within two months of the date of notification of this Decision, Portugal shall take the measures necessary to recover the aid referred to in Article 1.

3. Recovery of the aid shall be carried out in accordance with the procedures laid down in Portuguese legislation, with interest due from the date on which the aid was paid. The interest rate to be applied must be the reference rate used to calculate subsidy equivalents in the context of regional aid.

Article 3

1. Portugal shall keep the Commission regularly informed of the measures it adopts to meet the requirements of this Decision. Its first communication shall be made not later than one month from the notification of this Decision.

2. Not later than two months after the expiry of the period provided for in Article 2(2), Portugal shall send the Commission information to enable it to verify without any additional investigation that the obligation to recover the aid has been met.

17. The Portuguese Republic and EPAC, by applications lodged at the Registry of the Court of Justice on 23 September 1997 (C-330/97) and at the Registry of the Court of First Instance on 14 October 1997 (T-270/97) respectively, brought two actions for annulment against the contested decision.

18. By two orders of 15 December 1998, the Court of Justice decided to stay proceedings in Cases C-246/97 and C-330/97 pending judgments of the Court of First Instance in Cases T-204/97 and T-270/97.

19. Taking the view that, despite the expiry of the prescribed time-limit, the Portuguese Republic had not complied with the decision at issue and that it had not claimed that it was absolutely impossible for it to comply or put forward any other difficulties relating to its implementation, the Commission brought the present action.

20. The Commission states, first of all, that, even if the Portuguese Republic considered the decision at issue to be unlawful and brought an action seeking its annulment, it was obliged to comply with it within the prescribed period. Under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC), a decision is to be binding in its entirety upon those Member States to which it is addressed until the Court decides otherwise.

21. Next, it submits that the only argument on which a Member State may rely as a ground for not implementing a decision of the Commission ordering it to cancel and recover State aid declared incompatible with the Treaty is that it is absolutely impossible to implement that decision. However, the Portuguese Republic has not, in this case, claimed any such impossibility.

22. In response to the argument raised by the Portuguese Government, alleging the need for a decision of the Tribunal Administrativo Supremo annulling the above-mentioned Decision No 430/96-XIII, the Commission again points out that, according to settled case-law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law (Case C-74/89, *Commission v Belgium*).

23. It points out moreover that, in cases of unforeseen difficulties, the Commission itself and the Member State must, in accordance with the duty of cooperation under Article 5 of the EC Treaty (now Article 10 EC), cooperate in good faith in order to overcome any difficulties. However, in the present case, the Portuguese Republic has, according to the Commission, neither attempted to implement the decision at issue, attempted to prove the existence of unforeseen or unforeseeable difficulties relating to its implementation, nor discussed the methods for its implementation; it has merely brought two actions for annulment against Decision 97/433 and the decision at issue.

24. The Portuguese Government states first of all that the guarantee could not constitute State aid within the meaning of Article 92 of the Treaty in view of the conditions under which it was granted to EPAC's creditors.

25. Although it acknowledges that, where an action is pending against a contested decision, failure to comply with such a decision can amount to an infringement of Community law, it argues that that is not the case here, because it found it absolutely impossible to implement the decision at issue.

26. In that connection, it states, first, that the decision at issue contains a number of contradictions making it materially impossible to implement.

27. The Portuguese Government submits, first of all, that, while, in the statement of the reasons on which the decision at issue is based, the Commission refers to a single measure as constituting State aid, namely the guarantee given by the Portuguese Republic to EPAC's creditors, Articles 1 and 2 [in the Portuguese version of the decision] refer to aid in the plural.

28. Next it claims that the meaning of the orders in Article 2 of the decision at issue to cancel and recover the aid is incomprehensible, having regard to the statement of the reasons for that decision and to the fact that the Commission admits that the guarantee granted in favour of EPAC does not involve any payment or direct or indirect transfer to EPAC of State resources. Accordingly, the Portuguese Republic states that it does not understand what form recovery of the guarantee could take.

29. The Portuguese Government maintains, secondly, that implementation of the contested decision is also legally impossible.

30. In that connection, it states first of all that it cannot unilaterally withdraw the guarantee accorded by contract. Unilateral withdrawal of that guarantee would lead the creditor banks not only to require immediate payment by EPAC of its entire debt, which would bankrupt EPAC, but also to put in issue the State's liability.

31. The Portuguese Government further contends that unilateral withdrawal as sought by the Commission would amount to a breach of the principle of proportionality, on the ground that withdrawal of the guarantee would seriously undermine competition by eliminating from the market the main Portuguese operator which holds a 30% share of the market.

32. It also states that withdrawal of the guarantee can be brought about only by agreement with EPAC's creditor banks, which is clearly out of the question since those banks would not agree, in the absence of a sufficient guarantee, to waiving a guarantee which had had a decisive influence on their willingness to enter the contract, or by a judicial decision annulling the State measure granting the guarantee. The Portuguese Republic states in this respect that it has brought an action before the Tribunal Supremo Administrativo seeking the annulment of the abovementioned Decision No 430/96-XIII. It explains that the reason for which judgment has not yet been given in that case is because the action for annulment is still pending before the Court of Justice in Case C-330/97.

33. Finally, the Portuguese Government claims to have attempted to seek together with the Commission a solution which was acceptable to each of the parties, in accordance with the duty to cooperate in good faith incumbent upon them under Article 5 of the Treaty. It points out, in particular, that it informed

the Commission, by letter of 10 December 1997, of the fact that EPAC had withdrawn from the tendering procedures for the importation of cereals.

Court's Opinion

34. First of all, it must be borne in mind that the system of remedies set up by the Treaty distinguishes between the actions under Articles 169 and 170 of the EC Treaty (now Articles 226 and 227 EC), which are directed to obtaining a declaration that a Member State has failed to fulfil its obligations, and those under Articles 173 of the EC Treaty (now, after amendment, Article 230 EC) and Article 175 of the EC Treaty (now Article 232 EC), which are directed to obtaining judicial review of measures adopted by the Community institutions, or of failure to act on their part. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision (Case 226/87, *Commission v Greece*, paragraph 14, and Case C-74/91, *Commission v Germany*, paragraph 10).

35. The position could be different only if the measure in question contained particularly serious and manifest defects such that it could be deemed non-existent (Case 226/87, *Commission v Greece*, cited above, paragraph 16, and Case C-74/91, *Commission v Germany*, cited above, paragraph 11).

36. That also applies to an action for failure to fulfil obligations based on the second subparagraph of Article 93(2) of the Treaty.

37. In this connection, it must be stated that, although the Portuguese Government has, on the basis of various points of fact, challenged the characterisation as aid of the guarantee granted to EPAC it has not pleaded any defect of a nature such as to call in question the actual existence of the act.

38. It must next be borne in mind that it is settled case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful and that that consequence cannot depend on the form in which the aid was granted (see in particular Case C-183/91, *Commission v Greece*, paragraph 16).

39. The Court has also held that the only defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly (Case C-348/93, *Commission v Italy*, paragraph 16).

40. However, where a Member State, when implementing a Commission decision relating to State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences not contemplated by the Commission, it must submit those problems for consideration by the Commission, together with proposals for suitable amendments to the decision in question. In such a case the

Commission and the Member State concerned must respect the principle underlying Article 5 [now Article 10] of the Treaty, which imposes a duty of genuine cooperation on the Member States and the Community institutions, and must work together in good faith with a view to overcoming difficulties while fully observing the Treaty provisions, and in particular the provisions on aid (see, in particular, Case 94/87, *Commission v Germany*, paragraph 9).

41. So far as concerns the alleged material impossibility of implementing the decision because, in the submission of the Portuguese Government, its operative part is impossible to understand, it must be pointed out that the operative part of an act is indissociably linked to the statement of the reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-355/95 P, *TWD v Commission*, paragraph 21).

42. Accordingly, it must first be ascertained whether, as the Portuguese Government claims, the use of the plural instead of the singular in the [Portuguese version of the] operative part of the decision at issue was, in view of the statement of reasons, incomprehensible and therefore such as to render implementation of the decision impossible.

43. In that respect, it should be observed that the decision at issue in fact concerns the guarantee granted by the Portuguese Republic by way of the above-mentioned Decision No 430/96-XIII. The operative part of the decision at issue does indeed refer to the aid granted to EPAC in the plural [in the Portuguese version]; however, that looseness of language is not such as to render the contested decision incomprehensible and prevent its implementation, since the national measure under challenge is clearly identified in the decision. Moreover, it was open to the Portuguese Government, if necessary, to take up the matter with the Commission upon receipt of the decision at issue.

44. So far as concerns the allegedly incomprehensible nature of the orders in Article 2 of the decision at issue on the ground that there had been no transfer of resources, it should be recalled that the Court has consistently held that the concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, to that effect, Case C-387/92, *Banco Exterior de España*, paragraph 13, and Case C-6/97, *Italy v Commission*, paragraph 16).

45. It follows that, without prejudging the question as to the legality of the aid, which is to be examined in the context of the action for annulment, it is sufficient to point out that, in order for a measure to constitute aid within the meaning of Article 92(1) of the Treaty, it is not necessary for there to have been a transfer of resources from the State to the beneficiary.

46. Moreover, as the Court has pointed out in paragraph 38 above, the obligation to cancel unlawful aid by way of its recovery cannot depend on the form in which the aid was granted.

47. Next, it must be observed that the statement of the reasons for the decision at issue makes it possible to identify with precision the aid which is considered to be unlawful and which requires to be cancelled, namely the State guarantee granted by way of the above-mentioned Decision No 430/96-XIII.

48. The financial advantage which is to be recovered is defined in the fifth paragraph of point 15 of the decision as represented by the difference between the market financial cost of bank loans (represented by the reference rate) and the financial cost actually paid by EPAC in the financial operation (taking account of the cost of the guarantee), calculated on a six-monthly basis.

49. The decision at issue further states, in the sixth paragraph of point 15, that interest is due from the date on which the unlawful aid in issue was granted and that the interest rate to be applied must be the reference rate used to calculate subsidy equivalents in the context of regional aid.

50. It follows from that examination that the terms of the decision at issue are clear and easily understandable and that the Portuguese Republic could not have misunderstood either their meaning or their scope.

51. As regards the assertion that it was legally impossible to implement the decision at issue, the Portuguese Government stated, with regard to the cancellation of the guarantee, that an agreement with EPAC's bank creditors was clearly out of the question since they would never agree to it, in the absence of a guarantee, but it made no mention of any attempt at negotiating with them.

52. It is settled case-law that apprehension of even insuperable internal difficulties cannot justify a failure by a Member State from complying with its obligations under Community law (see, to that effect, Case C-52/95, *Commission v France*, paragraph 38, Case C-265/95, *Commission v France*, paragraph 55, and Case C-280/95, *Commission v Italy*, paragraph 16).

53. So far as concern the reasons which are said to make it impossible to withdraw the guarantee unilaterally, it must be pointed out that the financial difficulties with which undertakings in receipt of aid could be confronted as a result of its withdrawal do not make it absolutely impossible to implement the Commission's decision finding that the aid is incompatible with the common market and ordering that it be repaid (Case 63/87, *Commission v Greece*, paragraph 14). That finding also applies, for the reasons set out in paragraph 52 above, with regard to the risk allegedly run by the Portuguese Republic of incurring liability.

54. In so far as it calls in question the actual principle, laid down in the decision at issue, of cancellation of the guarantee, the argument based on breach of the principle of proportionality must also be rejected in the context of the present action for failure to fulfil obligations.

55. As regards the need to await a decision of the Tribunal Administrativo Supremo annulling the above-mentioned Decision No 430/96-XIII, while that court is itself awaiting the outcome of the action for annulment pending before the Court of Justice against the decision at issue, it must be observed that although, in the absence of Community provisions relating to the procedure applicable to the recovery of illegal aid, such recovery must take place, in principle, in accordance with the relevant provisions of national law, such provisions must however be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration (see, in particular, Case 94/87, *Commission v Germany*, cited above, paragraph 12).

56. In any event, in reply to the written questions which had been sent to it, the Portuguese Government admitted that a judgment of the Tribunal Administrativo Supremo annulling the above-mentioned Decision No 430/96-XIII was not necessary in order to recover the financial advantage referred to in the decision at issue.

57. It must moreover be borne in mind in that respect that the decision at issue is presumed to be lawful and that, despite the existence of the action for annulment, it remains binding in all respects on the Portuguese Republic.

58. Finally, so far as concerns EPAC's withdrawal from tendering procedures for cereals, it need merely be observed that the Commission was not informed until December 1997, that is to say after the time-limit prescribed in Article 2 of the decision at issue had expired and the present action for failure to fulfil obligations had been brought.

59. In view of the foregoing, it must be held that, by failing to comply with the decision at issue, the Portuguese Republic has failed to fulfil its obligations under the Treaty.

Costs

60. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

Court's Ruling

The Court hereby:

1. Declares that, by failing to comply with Commission Decision 97/762/EC of 9 July 1997 on measures taken by Portugal to assist EPAC - Empresa Para a Agroalimentação e Cereais, SA, the Portuguese Republic has failed to fulfil its obligations under the Treaty;

2. Orders the Portuguese Republic to pay the costs. ■