# COMPETITION LAW IN THE EUROPEAN COMMUNITIES

July, 2000

Volume 23, Issue 7

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD. N. H.
AUG 21 2000

**FAIRFORD PRESS**

*Publisher and Editor: Bryan Harris*

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

58 Ashcroft Road, Cirencester GL7 1QX, UK
P O Box 323, Eliot ME 03903-0323, USA
www.fairfordpress.com

Tel & Fax (44) (0) 1451 861 464
Tel & Fax (1) (207) 439 5932
email anharr@cybertours.com

July, 2000

Volume 23 Issue 7

# COMPETITION LAW IN THE EUROPEAN COMMUNITIES

Copyright © 2000 Bryan Harris
ISSN 0141-769X

## CONTENTS

151 COMMENT
*Japan and the European Union*

152 DISTRIBUTION AGREEMENTS (MOTOR VEHICLES)
*The VW Case*

156 MISCELLANEOUS REPORTS
*The Microsoft / Telewest Case (156)*
*The Bank Cartel (158)*
*The Ford / Land Rover Case (160)*
*The Saeco Case (162)*
*The Boeing / Hughes Case (163)*
*The BASF / American Cyanamid Case (166)*
*German system of fixed prices for books (175)*

157 DISTRIBUTION AGREEMENTS (EDUCATIONAL)
*The Nathan Case*

159 FINES (CHEMICAL PUMPING)
*The Mitsubishi Case*

161 MERGERS (INTERNET)
*The AOL / Time Warner Case*

164 MERGERS (GENERAL)
*Commission Review*

167 PRODUCTION AGREEMENTS
*Commission's Draft Guidelines*

*Japan and the European Union*

Japan and the European Union have just announced agreement on the basic principles of cooperation in the competition field. On 19 July 2000 the authorities concluded negotiations which had been carried out in Tokyo during the previous two months. The planned agreement will make it easier for the competition authorities in the two jurisdictions to exchange information on international competition cases and coordinate their investigations to the fullest extent possible under domestic rules. The existing framework of bilateral agreements between the Community and the US and Canada will be completed by a very similar agreement with Japan; and Japan has recently (October 1999) signed a bilateral agreement with the US in this area. As the Commissioner responsible for competition matters has pointed out, co-operation in competition matters between the world's major economies is beneficial not only from the authorities' point of view but also in the interests of companies and ultimately consumers.

Negotiations to this end between the Commission and the Japan Fair Trade Commission (JFTC) reflect the authorities' recognition of the increasingly global character of the economy. Commercial practices in other countries can have repercussions within the Community, and it may be difficult to deal with them on the basis of Community rules. Competition concerns about firms operating in the global market often exceed the limits of a single; and the agreements which those firms conclude may have to be examined by different competition authorities.

Basic co-operation between competition authorities is mainly promoted by notifying each other on relevant competition cases dealt with by the competition authorities in the EC and Japan and by establishing arrangements for the exchange, use and protection of enforcement related information. Rules on mutual assistance and co-ordination of enforcement activities, co-operation regarding anti-competitive activities in the territory of one party that adversely affect the interests of the other party (positive comity) and provisions regarding the avoidance of conflicts over enforcement activities (traditional comity) are also included.

On present form, it looks as though bilateral action by the principal economic powers in the world may achieve more than multilateral action within the World Trade Organisation or at least may achieve concrete results much sooner. The WTO is committed to studying the prospects for establishing world-wide rules in the competition field; but it suffered a setback to its program and prestige at the abortive meeting in Seattle. It is therefore salutary, while the WTO is recovering, for the advanced economies to set the pace in practical cooperation. (Source: Commission Statement IP/00/739, dated 19 July 2000.) ■

## DISTRIBUTION AGREEMENTS (MOTOR VEHICLES): THE VW CASE

Subject: Distribution agreements
Sales restrictions
Parallel imports
Fines

Industry: Motor vehicles
(Some implications for other industries)

Parties: Volkswagen AG
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-62/98 (*Volkswagen v Commission*), dated 6 July, 2000, as summarised in Court press release 50/00 and in Commission statement IP/00/725

*(Note. Four main points to note about this case are, first, that the Court of First Instance substantially upheld the Commission's decision against Volkswagen; second, that it reduced the fine imposed by the Commission, because of irregularities in the Commission's findings and procedures; third, that the fine is nevertheless the largest to be imposed on a single manufacturer in respect of a breach of the EC rules on competition; and, fourth, that the Commission sees the court decision as a support for the policy of creating a single market, of ending discrimination between the nationals of different Member States and thus of helping consumers.*

*Two different commentaries on the case are reproduced below, one by the court itself and the other by the Commission. The difference in tone will be noted. The Commission's statement usefully provides the background to the case, but makes no mention of the irregularities causing the court to reduce the fine by € 12m.)*

### Court press release

The Court of First Instance has confirmed the existence and gravity of infringements committed by the Volkswagen group which hindered the purchase of vehicles in Italy by final, non-Italian consumers. The fine imposed by the Commission was 102,000,000 ECUs; the Court has confirmed it in most respects, merely reducing it to € 90,000,000.

On 28 January 1998, the Commission adopted a decision in which it found the conduct of Volkswagen, the German motor vehicle manufacturer, and its subsidiaries AUDI AG and AUTOGERMA SpA infringed the EC Treaty rules on freedom of competition in the common market.

The Commission complained that Volkswagen had entered into agreements with its subsidiaries and the Italian dealers in its distribution network in order to prohibit or restrict sales in Italy to final consumers from other Member States and

to authorised dealers in its distribution network in other Member States. Among the means employed by Volkswagen in restricting those parallel imports from Italy were the imposition of supply quotas to Italian dealers and a bonus system discouraging them from selling to non-Italian customers.

The Commission found that the partitioning of a part of the common market was a serious infringement of the EC competition rules and imposed a fine of 102,000,000 ECUs on Volkswagen. In essence the Court has dismissed Volkswagen's application seeking annulment of the Commission's decision.

The Court has found, first, that the allegations against Volkswagen were accurate: the Italian Volkswagen and Audi dealers were in fact induced to sell at least 85% of available vehicles in Italy, to the detriment of purchasers from other Member States who were unable to purchase from them at a time when the low level of the Italian lire offered advantageous prices to German and Austrian customers in particular.

The Court has pointed out that. although motor vehicle manufacturers may protect their networks, that does not authorise them to adopt measures which tend to partition the market.

The Court has upheld the Commission's argument, that Volkswagen committed an infringement which was particularly serious. The seriousness of the infringement was magnified both by the size of the Volkswagen group and by the fact that it was committed in spite of the extensive case-law on the subject. The Court points out that such an infringement runs counter to one of the fundamental objectives of the Community: the achievement of a single market.

The Court has nevertheless reduced the fine imposed on Volkswagen in particular because it found that the infringement had lasted for only three years (from 1993 to 1996); the Commission did not adequately prove that the infringement continued after that period.

The Court has also held that the Commission did not fully comply with the principle that an investigation is confidential: the fine which the Commission intended to impose on Volkswagen was in fact announced to the press before the decision was adopted. The Court points out that, until a final decision terminating the proceedings has been taken, the principle of business secrecy must govern the conduct of all proceedings relating to undertakings and their business relationships.

## Commission statement

In its judgement, the Court of First Instance has upheld the Commission Decision of 28/1/1998 against Volkswagen establishing a serious infringement of EC Competition rules. Together with its subsidiaries Audi AG and Autogerma SpA, their common Italian importer, Volkswagen AG had prevented its dealers in Italy from selling new cars to non-residents, in particular German and Austrians consumers. The fine imposed by the Commission on Volkswagen was slightly revised [decreased by 12%] by the Court. Volkswagen AG had appealed to with

the Court of First Instance against this decision in April 1998, rejecting the Commission's findings and considering the amount of the fine as totally [inappropriate. (The Commission statement says "inadequate", which is patently wrong.)]

"This ruling is good news for European consumers," Competition Commissioner Mario Monti said. "The opportunity to buy goods at better prices in other Member States is indeed one of the key advantages of the Single Market. Car makers have some latitude in the way they choose to organise their distribution networks, but the rules also give consumers the unalterable right to buy, either directly or through an authorised intermediary, a car in the Member State of their choice. By upholding such rights, competition policy directly serves citizens. The decision adopted by the Commission against Volkswagen indicates that it does not hesitate to take the necessary measures against motor manufacturers who do not comply with the rules on motor vehicle distribution," Mr. Monti said. "Today's judgement of the Court encourages us to pursue vigorously this endeavour. The conduct of manufacturers also plays a role in the evaluation of the current Regulation on car distribution."

It is worth pointing out that, on the basis of the decision and this judgement, consumers who feel that they have been the victim of similar practices can take their case directly to the national competition authorities or national courts (or both). Those authorities and courts will usually have jurisdiction to establish whether there has been an infringement of European competition law and to order the manufacturer or the importer to bring the infringement to an end.

The decision of January 1998 is the most important Commission decision to date concerning obstacles to re-imports of new motor vehicles. The size of the fine is an indication that the Commission will not tolerate practices of this kind and will act with similar determination against other manufacturers who set out to partition the market for new cars. In its decision, the Commission had found that the conduct of Volkswagen and Audi, which are part of the largest car manufacturing group in Europe, was a threat to the proper operation of the Single Market, and a very serious infringement of Community competition law.

In setting the fine, the Commission took account not only of the nature of the infringement but also of its duration and of the fact that the companies concerned of the Volkswagen group had set up the system of restrictive practices by exploiting the economic strength they enjoyed in their relationship with their network of authorised dealers in Italy. An aggravating factor was that Volkswagen had not taken appropriate action, when told by the Commission, already before the inspections carried out in 1995, that its behaviour was not in line with the European competition rules and with Regulation No 1475/95 applicable to motor vehicle distribution.

In its decision, the Commission had fined Volkswagen for systematically forcing its authorised dealers in Italy to refuse to sell Volkswagen and Audi cars to non-Italian buyers. In 1995, the Commission had received a large number of complaints from consumers who had had difficulty buying new cars in Italy. In its decision, the Commission found that Volkswagen, Audi and Volkswagen's

Italian subsidiary Autogerma had devised, in concert with their Italian dealers, a strategy aimed at preventing, or at least substantially restricting, sales from Italy to other Member States, especially Germany and Austria. This strategy was aimed at sales to final consumers but also at sales to intermediaries acting on behalf of the buyer and to Volkswagen or Audi dealers in other Member States.

In October 1995, the Commission had carried out inspections at Volkswagen's offices in Wolfsburg, at Audi's offices in Ingolstadt, at Autogerma's offices in Verona (Autogerma is a wholly owned subsidiary of Volkswagen, and the official importer for both makes in Italy) and at the offices of a number of VAG dealers in the north of Italy. Documents found in the course of those inspections provided clear evidence of a market-partitioning policy pursued by Volkswagen, Audi and Autogerma.

Some of the illegal practices identified were the following. About fifty authorised dealers were threatened that their dealership contracts would be terminated if they sold to foreign customers, and some twelve dealerships were actually terminated. The profit margins and bonuses of authorised dealers who sold outside their allotted territories were systematically reduced. Deliveries to Italian dealers were rationed; in 1995 alone, Audi refused to supply some 8,000 cars which Autogerma had promised them. Autogerma kept the Italian dealers under supervision and gave clear warnings to those who sold to non-Italian customers; it also monitored lists of foreign customers. Volkswagen and Audi recommended to their Italian dealers that they should not tell their foreign customers the real reasons for the refusal to sell but should instead try to discourage them by speaking of different specifications and difficulties with the guarantee; they were not to let them know that they had instructions to this effect from the Volkswagen group.

The documents found clearly indicate that Volkswagen and Audi were well aware that these practices were unlawful. The fine, even though reduced to € 90 million, is the highest fine ever imposed on a single European enterprise for infringement of competition law.

Regulation 1475/95 contains a so-called "black list" of clauses and practices which are not allowed under this Regulation. This list is of particular importance for European consumers. It reinforces their right to purchase a new car, either directly or via an authorised intermediary, wherever they wish to do so in the European Union.

Therefore, the Regulation forbids any direct or indirect hindrance of parallel trade, namely, the refusal of dealers to supply a consumer simply because this consumer is a resident of another Member State; charging foreign consumers higher prices or imposing longer delivery periods than for native consumers; refusing to grant guarantee services or other free-of-charge services for cars imported from another Member State; hindering the activities of intermediaries authorised by consumers by applying excessive criteria concerning their mandate; restriction of supplies by manufacturers to dealers who sell cars to consumers resident in another Member State; threats by manufacturers to terminate contracts with dealers who sell cars to consumers resident in another Member State; any

interference by manufacturers with the freedom of consumers to resell new cars, provided that the sale is not effected for commercial purposes

Additional measures to ensure the consumer's freedom of choice for the maintenance and repair of his car are designed to safeguard the freedom of dealers to sell to consumers spare parts offered by independent suppliers which match the quality of those spare parts offered by the manufacturer; the manufacturer has to make accessible to independent repairers the technical knowledge required for the repair or maintenance of his brand of cars.

Any infringement of the provisions of the "black list" renders essential parts of manufacturers' distribution agreements void. This legal effect improves the opportunity for any injured party to bring infringements to the attention of the competent national courts. The courts can - unlike the Commission - grant injunctions and award damages.

A Commission decision is expected later this year in similar infringement procedures against Daimler Chrysler and Opel Nederland. Moreover, the Commission is currently investigating allegations that PSA and Renault have also obstructed the sale of vehicles to customers from other Member States. ■

### The Microsoft / Telewest Case

Microsoft Corp has informed the European Commission that it has agreed to limit its investment in Telewest Communications plc to a minority interest, and will not therefore exercise a decisive influence over the British broadband cable company. This means that Microsoft no longer has joint control over Telewest, leading it to withdraw its notification of the original deal, under which it was acquiring control with Liberty Media Corp. Consequently, the Commission will not take any further action with regard to this operation.

US software giant Microsoft had notified an operation in February whereby it would have acquired joint control over Telewest with Liberty Media, a subsidiary of AT&T Corp. The Commission, on March 22, started an in-depth probe into the deal over fears that it would reduce competition in the digital cable industry, in particular regarding the supply of software for digital television set-top boxes in the United Kingdom.

Following the Commission's objections, expressed in a formal statement in May, Microsoft has now informed the Commission that, while keeping its 23,7% in Telewest, it is breaking all structural links with Liberty Media and giving up any rights which would have given it decisive influence over decisions at Telewest.

Commission Statement IP/00/733, dated 7 July 2000.

## DISTRIBUTION (EDUCATIONAL MATERIAL): THE NATHAN CASE

Subject: Distribution agreements
Price restrictions
Territoriality
Fines

Industry: Educational material
(Some implications for other industries)

Parties: Editions Nathan
Bricolux SA

Source: Commission Statement IP/00/713, dated 5 July 2000

*(Note. Although this case is relatively small beer, it does have some of the features of larger and more egregious cases. The distribution agreements in question "prevented the distributors from marketing Nathan products outside their own exclusive territories and restricted their freedom to set prices and commercial conditions of sale".)*

The Commission has found against the French company Editions Nathan for entering into restrictive distribution agreements concerning educational material in several Member States. The agreements prevented exclusive distributors from competing with one another and freely setting prices, to the detriment of schools in France and Belgium. However, given the limited geographical scope of the agreements and the cooperation of the companies throughout the procedure, the Commission has imposed only very small fines.

Editions Nathan produces educational material and school textbooks, mainly in France. The agreements in question with its three exclusive distributors in Italy, Sweden and the French-speaking parts of Belgium concern only educational material aimed at pre-school children, which is sold by a network of independent distributors in almost all the Member States. These products are purchased as teaching aids namely by crèches and nursery schools, a market estimated at some € 600m per year in the European Union.

The Commission investigation, launched at the prompting of the French authorities, showed that the agreements prevented the distributors from marketing Nathan products outside their own exclusive territories and restricted their freedom to set prices and commercial conditions of sale. This "private preserves" practice also affected customers in France as foreign distributors were automatically excluded from the market.

Agreements that aim to partition markets between Member States are in breach of Article 81 of the Treaty on unlawful agreements and are detrimental to the interests of schools, which could have benefited from competition among distributors from different countries, including France, where Nathan is one of

the market leaders. The Commission has recently revised its policy on distribution agreements, but it has repeated that such practices restrictive of trade will not be tolerated within the internal market. (See Commission Regulation (EC) No 2790/99 of 22 December 1999 and Guidelines on vertical restraints.)

In calculating the fines, the Commission, acting under the relevant guidelines (OJ C 9, 14.1.1998, p. 3) took account of the fact that the unlawful agreements had actually been implemented in France and Belgium only. Editions Nathan and its Belgian distributor Bricolux SA also cooperated actively during the procedure. Editions Nathan has been fined € 60,000, after a considerable reduction based on mitigating circumstances, and Bricolux SA, a family firm, € 1,000. ■

### Member States' banks in cartel investigation

The Commission has warned banks and banking associations in Belgium, Finland, Portugal and Ireland that it has evidence of breach of European Union competition rules concerning charges for exchanging euro-zone currencies. The banks have until early October to reply. The Commission has stated that it will severely punish any price-fixing arrangements which, if confirmed, may have undermined the launch of Europe's single currency and harmed consumers.

The Commission has sent or is on the point of sending statements of objections to nearly 120 banks and banking associations in the four countries following an investigation into consumer complaints that banks had collectively fixed charges for the exchange of currencies in the euro zone. The formal warnings follow an investigation which started shortly after the introduction of the euro in January 1, 1999, in 11 European Union countries. The United Kingdom, Denmark, Sweden and Greece are not part of the euro zone.

Banks are free to set the level of charges individually for exchanging currencies. But consumers must be able to shop around for the best price, according to the Commission, whose investigation so far has showed that banks may have engaged in price-fixing arrangements either to increase the exchange fees or to control their decrease. The Commission is likely to send statements of objections to other banks in the near future. Meanwhile, the list of banks in the four Member States has been released.

Statements of objection are a step in antitrust proceedings and do not prejudge the final outcome of the investigation. These statements present documentary evidence that banks and banking associations have fixed the prices for the exchange of euro-zone notes which, if confirmed, would constitute a breach of Article 81 of the EC Treaty prohibiting cartels and other concerted practices.

Source: Commission Statement IP/00/784, dated 14 July 2000

## FINES (CHEMICAL PULPING): THE MITSUBISHI CASE

Subject: Fines
Investigations

Industry: Chemical pulping
Implications for all industries

Parties: Mitsubishi Heavy Industries

Source: Commission Statement IP/00/764, dated 12 July 2000

(Note. This case is a sharp reminder that even third parties must provide evidence to the Commission in the course of a Commission investigation, if required to do so; and that periodic penalty payments may be imposed instead of or – as in this case – in addition to fines.)

The Commission has decided to impose fines on Mitsubishi Heavy Industries for failing to supply information with regard to a joint venture last year between Kvaerner and Ahlström. This is the first time the Commission has fined a company other than a notifying party in merger proceedings. This is also the first time that a periodic penalty payment has been imposed on an undertaking in such proceedings. During the investigation into the Ahlström/Kvaerner chemical pulping joint venture, Mitsubishi was requested to supply information according to Article 11(5) of the Merger Regulation, which obliges third parties to assist the Commission in merger reviews to determine whether a given deal may create a dominant position. But despite repeated requests from the Commission, Mitsubishi supplied only incomplete information concerning its activities in the world-wide market for recovery boilers, one of the markets where the Commission had expressed concerns.

The Commission considers Mitsubishi's behaviour a very serious infringement of EU law since the information requested was necessary for the proper assessment of the Ahlström/Kvaerner operation. Following Mitsubishi's failure to supply the information requested, the Commission was forced to base its assessment of the markets for recovery boilers partly on estimates. Under Article 14(1)(c) of the Merger Regulation, the Commission may impose fines between € 1,000 and 50,000 on undertakings which, intentionally or negligently, supply incorrect information in response to the Commission's request for information or which fail to supply information within the period fixed by a decision pursuant to Article 11. In addition, under Article 15(1) of the Merger Regulation, the Commission may also impose periodic penalty payments of up to € 25,000 per day of delay calculated from the date when a formal request for information was taken in this case since July 10, 1999, until September 8, 1999, when the Commission closed its merger probe. Ahlström and Kvaerner withdrew the notification of their merger in the face of Commission objections.

The Commission has, therefore, decided to impose two types of fines on Mitsubishi. The first fine, € 50,000, for failing to comply with the Commission decision, pursuant to Article 14(1)(c) of the Merger Regulation. The Commission has also decided to impose a periodic penalty payment totalling € 900,000. In adopting this decision, the Commission stressed its determination to enforce the merger control rules in the European Union, which presupposes the supply of correct information by both merging parties and competitors requested to assist it in its task. Incorrect, misleading or incomplete information or the refusal to provide it can lead the Commission to take incorrect decisions, with potentially serious effects on European businesses and consumers.

### The Ford / Land Rover Case

The Commission has cleared Ford Motor Company's acquisition of the British car company Land Rover from Germany's BMW. The deal poses no competition problems given Ford's small share in the British market for special utility four-wheel-drive passengers cars, or jeeps.

The only country in the European Economic Area where the combined share in this segment will exceed 20% is the United Kingdom; but the increment in market share is marginal in view of Ford's limited presence in the segment. The Commission's review indicates that the four-wheel-drive market segment is highly competitive: these competitors include Honda, Daimler Chrysler, Suzuki and Toyota. In view of the above the Commission has decided not to oppose the operation. Moreover, the Commission has approved certain ancillary restraints relating to supply agreements and licences.

Land Rover and BMW will continue to supply certain goods and services to each other for a transitional period of time. The objective of these supply agreements is to ensure, for a transitional period, the continuity of the Land Rover and BMW businesses, and as such they are directly related to and indispensable to the implementation of the concentration.

BMW will grant to Land Rover a non-exclusive royalty-free licence to use, in connection with Land Rover's business, intellectual property rights relating to technology used on both Land Rover and Rover (BMW) vehicles. Land Rover will grant to BMW a non-exclusive royalty-free licence to use, in connection with BMW's business, intellectual property rights relating to technology used on both Land Rover and a new special utility vehicle. These licences are directly related to and indispensable to the implementation of the concentration.

Source: Commission Statement IP/00/693, dated 30 June 2000.

## MERGERS (INTERNET): THE AOL/TIME WARNER CASE

Subject: Mergers
Vertical integration

Industry: Internet; music; publishing

Parties: Time Warner Inc
America on Line Inc

Source: Commission Statement IP/00/634, dated 19 June 2000

*(Note. In global terms, this is one of the biggest and most significant mergers ever to be contemplated; and its effects in Europe are bound to be substantial. Whether these effects are likely to be beneficial, from the point of view of competition policy, trade policy and the interests of consumers will be examined by the Commission under the strict time-table laid down by the Mergers Regulation. The Commission's main concern is the degree of vertical integration resulting from the merger.)*

The Commission has decided to open a full investigation into the proposed merger between AOL Inc. and Time Warner Inc., both of the United States. In the course of its investigation the Commission will examine the effects of the transaction on the emerging business of music distribution over the Internet and on the markets for Internet dial-up access and paid-for content. This deal is about the combination of Time Warner, one of the world's largest recording and music publishing companies, with AOL, the largest Internet access and service provider in the world. The main competition issue raised by the merger is the vertical integration of Time Warner content with AOL on-line services.

This matter is complicated by the fact that AOL has recently entered into a joint promotion, distribution and sales agreement with Bertelsmann, the German music recording, publishing and broadcasting group. This agreement brings about a considerable integration of the two companies' commercial activities.

Therefore, as a result of the merger with Time Warner, AOL will have preferential access to the leading source of music publishing rights and music repertoire in most Member States. It cannot be excluded that, because of the strength of the music catalogue to which AOL will have access, it will be able to dictate the technical standards for delivering music over the Internet and monopolise the music player software. This strategy could enable AOL to play the role of the "gate-keeper" in the emerging on-line music distribution channel.

As regards the Internet, the Commission found that AOL, which with a market share of almost 40% is the leading Internet company in the USA, is the only Internet company with a presence in most European Member States. During its second phase investigation the Commission will thus examine whether AOL could leverage its strong position in America and its proprietary content and

services to achieve dominance in Europe, in particular, in a number of neighbouring Internet paid-for content markets, such as films, TV programmes and financial news.

To ease the competition problems identified by the Commission AOL has offered some commitments aimed at severing a structural link with Bertelsmann stemming from their European joint venture AOL/Europe. After examination of the proposed commitments, the Commission has found that they are insufficient to ease the competition concerns raised by the transaction and decided to open a full investigation. The Commission is also carrying out a full investigation into the merger between Time Warner and EMI Group plc of Britain in the music sector which has been the subject of a separate notification. ■

### The Saeco Case

The Commission has closed a competition case against Saeco SpA, a leading Italian manufacturer of coffee machines, after Saeco's implementation of a new guarantee scheme for its products without territorial restrictions. The case had been opened following a complaint brought by EK Großeinkauf, a purchasing co-operative based in Germany, against Saeco's warranty conditions, under which consumers were entitled to a guarantee only in the Member State in which they had purchased their machine and into which the machine had been imported directly by the official importer. This restriction represented a problem when EK exported Saeco products to Austria. Following the complaint, however, Saeco decided to lift the territorial restrictions and has in the meantime taken all necessary steps to ensure the full implementation of a Community-wide guarantee system, including the substitution of the old guarantee certificates by new certificates.

The Commission has insisted on many occasions that, where a manufacturer offers a guarantee for the products bearing his trade mark, he has to make sure that the guarantee can be invoked within a manufacturer's distribution network in the whole of the European Union. Territorial restrictions as to warranty claims act as a disincentive for parallel trade between Member States and discourage consumers from buying products in a Member State other than the one in which they are resident. They thus constitute an obstacle to the inter-penetration of markets. Although Saeco claimed that its guarantee was generally honoured despite the restrictive wording of its guarantee certificates, the complaint showed that there were problems, at least in some cases. Furthermore, it is essential that customers have certainty about their rights. The Commission has closed the case without taking any formal measures.

Source: Commission Statement IP/00/684, dated 29 June 2000.

## The Boeing / Hughes Case

The Commission has opened an in-depth investigation into the proposed acquisition by the Boeing Company of the satellite business of Hughes Electronics Corporation. The initial investigation has shown that the operation could strengthen Hughes' already leading position in commercial communication geostationary satellites (GEO satellites); there are also indications that, after the transaction, Hughes could induce its satellite customers to procure launch services from Boeing. In view of Hughes' current market position in GEO satellites, and of the recent development of Boeing's activities in launch services, the Commission has therefore identified risks that the acquisition may lead to the creation or strengthening of a dominant position on these markets. Concerns have also been raised with regard to access for third parties to certain satellite equipment manufactured by Hughes.

Boeing is active in commercial aircraft, defence and space industries. The US-based company supplies navigation satellites and has substantial activities in the field of satellite launch services, where it operates its family of Delta launchers and has an interest in Sea Launch, another launch service operator. Hughes, a subsidiary of General Motors, is the world's leading manufacturer of commercial GEO satellites. It produces certain satellite equipment and provides satellite-based communication services and pay-TV. The proposed transaction would combine the parties' satellite manufacturing activities and result in vertical integration between Hughes' satellite operations and Boeing's launch activities.

At this stage of the investigation, the Commission has identified serious concerns that the operation could lead to the creation or a strengthening of a dominant position on the world-wide market for commercial GEO satellites and to the creation of a dominant position on the market for launches of commercial satellites. Hughes is currently clearly the market leader for commercial GEO satellites, with market shares around 35-40%. There are indications that the operation could strengthen this position.

With the decision to open a full investigation in the case, the Commission will continue a detailed-fact finding exercise, using as a legal test the likelihood that the proposed acquisition might create or reinforce a dominant position. Pursuant to the bilateral agreement of 1991 on antitrust co-operation between the European Union and the United States, the Commission has co-operated with the Federal Trade Commission (FTC) in the analysis of the transaction. The Commission's decision to open an in-depth investigation in this case does not prejudice the outcome of the assessment in the United States. The investigation of the case in the United States has not yet terminated.

Source: Commission Statement IP/00/539, dated 26 May 2000.

## MERGERS (GENERAL): COMMISSION REVIEW

Subject: Mergers

Industry: All industries

Source: Commission Statement IP/00/671, dated 28 June 2000

*(Note. Commission plans to review the working of the recently amended Mergers Regulation will be salutary. The amended regulation introduced complicated rules on the criteria based on thresholds; and the vast majority of cases are still relatively straightforward and do not need to be subjected to detailed investigation. The Commission's statement outlines the way in which, subject to the views of industry, it proposes to improve the procedures.)*

According to the Commission, in a report to the Council, too many mergers with cross-border effects still fail to meet the turnover thresholds set in the merger regulation as revised in 1997. This report will act as the basis for a more in-depth investigation into whether to propose new modifications to Merger Regulation 4064/89 at a later stage. The Commission has also approved a simplified merger review procedure for mergers, acquisitions and joint ventures which pose no competition problems, with a view to concentrate its scarce staff resources on more complex and problematic deals.

### The review of the merger regulation

The merger regulation as last amended requires the Commission to report back to the Council primarily on the working of the new turnover thresholds and the referral procedures. The report covers the period between March 1998, when the revised regulation came into force, and the end of 1999. It provides prima facie indications that more merger cases should be dealt with under Community rules.

Of the total of 4,303 mergers, acquisitions and joint ventures or "concentrations" requiring clearance in the European Union during that period, no fewer than 294 cases were notified to two national competition authorities, rather than to the Commission, because they did not meet the turnover thresholds. Another 31 cases were notified in three Member States and 39 in more than three Member States. By comparison, the Commission received a total of 494 notifications between March 1998 and the end of 1999.

For deals to qualify for the "one-stop shop" review by the Commission, they need to involve companies with a combined worldwide turnover of over € 5b and a Community-wide turnover of over € 250m for each of the companies. The 1997 revision of the regulation introduced complex, secondary thresholds to avoid multiple filings to national competition authorities. However, it appears, on the basis of the survey carried out so far, that a significant number of operations with cross-border effects continue to fall outside the scope of the Regulation. This is of

concern to the business community, for which multiple notifications are tantamount to legal uncertainty, increased efforts and costs.

The Commission recognises that merger control forms an important part of competition policy in many Member States. It therefore believes that any changes to the current jurisdictional rules can be proposed only on the basis of a thorough examination, involving active participation by all interested parties.

Commenting on the way forward, Competition Commissioner Mario Monti said: "If our preliminary data are confirmed in the review process, my ambition will be to introduce amendments by which the Commission's jurisdiction will cover better those operations which have a Community dimension and to offer a greater number of companies the advantages of the one-stop shop principle. After ten years of application of the Merger Regulation, it is appropriate to conduct a forward-looking inventory also of other legal and practical aspects of the Merger Regulation to ascertain the continued effectiveness of this important policy instrument."

## Other aspects of the regulation

The 1997 revision also introduced modifications to the mechanisms for referral of cases between the Member States and the Commission (Articles 9 and 22). The report indicates the divergent views of industry and the Member States on the effectiveness and desirability of these provisions. In the review, the Commission intends to assess the functioning of these rules, as well as to collect objective information concerning the impact, if any, on the costs that involved firms will have to bear in referral cases.

Finally, the Commission intends to carry out a more thorough inventory of the Community merger control system, in order to assess whether or not the existing system is well equipped to face the challenges of the foreseeable future. These challenges will include external factors, such as the extension of the Community through the accession of the applicant countries and the continuing "merger boom", as well as internal factors, such as the modernisation of Community anti-trust rules.

In the context of the further review, the Commission will have to rely on information provided by companies with experience from merger control proceedings at the Community level as well as in the Member States. It would therefore encourage the active participation of all interested parties, and in particular those who have not yet made their views known to the Commission.

## A simplified procedure for certain cases

In parallel to launching the merger review, the Commission has adopted a Notice, which makes merger procedures more efficient within the present legislative framework. The Notice is based on the experience gained in the application of Merger Regulation, which has shown that certain categories of concentrations do not normally raise competition concerns and are therefore cleared.

The Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 identifies three categories of cases, which would qualify for a short-form decision adopted by the Commission at the end of the usual one month review. The Notice applies to concentrations where: two or more undertakings acquire joint control over a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the EEA territory (turnover of less than € 100m and assets less that € 100m in the European Economic Area – that is, the 15 European Union states plus Norway, Iceland and Liechtenstein); none of the parties is engaged in business activities in the same product and geographical market (horizontal relationships), or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships); and two or more of the parties are engaged in business activities in the same product and geographical market or upstream or downstream market, provided that their combined market share is not 15% or more for horizontal and 25% or more for vertical relationships.

The short-form decision will contain information about the parties, nature of the concentration and economic sectors concerned as well as a statement that the concentration is declared compatible with the common market because it falls within one or more of the categories contained in the Notice, with the applicable category or categories being explicitly identified. As in all full clearance decisions, the Commission will publish a public version of the decision in the Official Journal of the European Communities and on the Internet. There will be no press release, but clearance will be announced in the Commission's Midday Express.

The simplified procedure can reduce the administrative burden on notifying parties. It will still give the Member States and third parties the same opportunities to comment or intervene as under the ordinary procedure. The Commission may also, if necessary, at any time revert to the ordinary investigative procedures. ■

**The BASF / American Cyanamid Case**

The Commission has decided to authorise the acquisition of American Cyanamid, the crop protection subsidiary of American Home Products, by BASF subject to undertakings submitted by BASF. The takeover will create the third largest crop protection company worldwide. The deal raised serious competition concerns in certain herbicide and fungicide markets, but BASF proposed undertakings, consisting largely of the divestiture or licensing of certain products to a viable independent third party, which will guarantee healthy competition and protect consumers' interests.

Source: Commission Statement IP/00/697, dated 3 July 2000.

## PRODUCTION AGREEMENTS: COMMISSION'S DRAFT GUIDELINES

Subject: Production agreements
Specialisation agreements

Industry: All industries

Source: Commission paper entitled *Draft Guidelines on the Applicability of Article 81 to horizontal co-operation*

*(Note. This recently published paper provides the basis for a discussion between industrial interests and the Commission on the review of horizontal agreements: that is, agreements between traders at the same functional level, such as manufacturing and distribution. Apart from its value as a policy discussion paper, the draft guidelines provide a useful indicator of the Commission's categorisation and treatment of the various different types of horizontal agreements. Essentially, the Commission identifies the following six categories:*

*Research and Development Agreements*
*Production (including Specialisation) Agreements*
*Purchasing Agreements*
*Marketing Agreements*
*Standardisation Agreements*
*Environmental Agreements*

*At present there are block exemption regulations covering research and development agreements, specialisation (but not other types of production) agreements and certain types of purchasing agreements.*

*The purpose of the report which follows is to select production agreements in the first instance for examination. Reports in later issues will cover marketing, standardisation and environmental agreements, to the extent that space allows. A valuable part of the Commission document is in the examples of the types of agreement under discussion.)*

[Chapter 3 of the Commission's draft Guidelines deals with production agreements (including specialisation agreements).]

### 3.1. Definition

74. Production agreements may vary in form and scope. They may take the form of joint production through a joint venture, i.e. a jointly controlled company that runs one or several production facilities, or can be carried out by means of specialisation or sub-contracting agreements whereby one party agrees to carry out the production of a certain product. (Joint ventures which fall under the Merger Regulation are not the subject of these guidelines. Full-function joint ventures below Community dimension will only be assessed as co-operation by the Commission if spill-over effects are likely to be caused. The assessment under Article 81 will then be limited to the spill-over effects.)

75. Generally, one can distinguish three categories of production agreements: joint production agreements, whereby the parties agree to produce certain products jointly; specialisation agreements, whereby the parties agree unilaterally or reciprocally to cease production of a product and to purchase it from the other party; and subcontracting agreements whereby one party (the contractor) entrusts to another party (the subcontractor) the production of a product.

76. Subcontracting agreements are vertical agreements. They are therefore, to the extent that they contain restrictions of competition, covered by the Block Exemption Regulation and the Guidelines on Vertical Restraints. There are however two exceptions to this rule: subcontracting agreements between competitors (Article 2, paragraph 4, of the Block Exemption Regulation on Vertical Restraints), and subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor. (Article 2 paragraph 3 of the Block Exemption Regulation on Vertical Restraints. See also Guidelines on Vertical Restraints, paragraph 28, which notes that subcontracting arrangements between non-competitors under which the buyer provides specifications to the supplier which merely describe the goods or services to be supplied are covered by the Block Exemption Regulation on Vertical Restraints.)

77. Subcontracting agreements between competitors are covered by these guidelines. (If a subcontracting agreement between competitors stipulates that the contractor will cease production of the product to which the agreement relates, the agreement constitutes a unilateral specialisation agreement which is covered, subject to certain conditions, by the Specialisation block exemption Regulation (see below).) Guidance for the assessment of subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor is given in a separate Notice. (Notice concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, OJ C 1. 3.1.1979, p.2.)

## 3.2. Relevant markets

78. To assess the competitive relationship between the co-operating parties, the relevant product and geographic market(s) directly concerned by the co-operation (that is, the market(s) to which products subject to the agreement belong) must first be defined. Secondly, a production agreement in one market may also affect the competitive behaviour of the parties in a market which is downstream or upstream or a neighbouring market closely related to the market directly concerned by the co-operation (so-called "spill-over markets", as also referred to in Article 2(4) of the Merger regulation). However, spill-over effects occur only if the co-operation in one market necessarily results in the co-ordination of competitive behaviour in another market, that is, if the markets are linked by interdependencies, and if the parties are in a strong position on the spill-over market.

## 3.3. Assessment under Article 81(1)

### 3.3.1. Nature of the agreement

79. The main source of competition problems that can possibly arise from production agreements is the co-ordination of the parties' competitive behaviour as suppliers. This type of competition problems arises where the co-operating parties are actual or potential competitors on at least one of these relevant market(s), that is, on the markets directly concerned by the co-operation and/or on possible spill-over markets. Foreclosure problems and other negative effects towards third parties may also arise, but are less frequent in the context of production agreements. (They are not caused by a competitive relationship between the parties, but by a very strong market position of at least one of the parties (e.g. on an upstream market for a key component, which enables the parties to raise the costs of their rivals in a downstream market) in the context of a more vertical or complementary relationship between the co-operating parties.)

80. The fact that the parties are competitors does not automatically cause the co-ordination of their behaviour. In addition, the parties normally need to co-operate with regard to a significant part of their activities in order to achieve a substantial degree of commonality of costs. The higher the degree of commonality of costs, the greater the potential for a limitation of price competition, especially in the case of homogenous products.

### 3.3.1.1. Agreements which do not fall under Article 81(1)

81. Production agreements between non-competitors are not normally caught by Article 81(1). (They may only fall under Article 81(1) if foreclosure problems arise). This is also true for agreements whereby inputs or components which have so far been manufactured for own consumption (captive production) are purchased from a third party, unless there are indications that the company which so far has only produced for own consumption could have entered the merchant market for sales to third parties without incurring significant additional costs or risks in response to small, permanent changes in relative market prices.

82. Even production agreements between competitors do not necessarily come under Article 81(1). First, co-operation between firms which compete on markets closely related to the market directly concerned by the co-operation, cannot be defined as restricting competition, if co-operation is the only commercially justifiable way of entering a new market, launching a new product or service or carrying out a specific project.

83. Secondly, an effect on the parties' competitive behaviour as market suppliers is highly unlikely if the parties have a small proportion of their total costs in common. For instance, a low degree of commonality in total costs can be assumed, where two or more companies agree to specialise or to jointly produce an intermediate product which only accounts for a small proportion of the production costs of the final product and, consequently, the total costs. A low degree of commonality of total costs can also be assumed where the parties jointly manufacture a final product, but only a small proportion as compared to the total output of the final product. Even if a significant proportion is jointly manufactured, the degree of commonality of total costs may nevertheless be low or moderate, if the co-operation concerns heterogeneous products which require costly marketing.

### 3.3.1.2. Agreements which almost always fall under Article 81(1)

84. Agreements which fix the prices for market supplies of the parties, limit output or share markets or customer groups have the object of restricting competition and almost always fall under Article 81(1). This does, however, not apply to cases where the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), or where a production joint venture sets the sales prices for the manufactured products when the joint venture also carries out the distribution of these products so that the price fixing by the joint venture is the effect of integrating the various functions. (A production joint venture which also carries out joint distribution is, however, in most of the cases a full-function joint venture.) In both scenarios the agreement on output or prices will be assessed together with the other effects of the joint venture on the market in order to determine the applicability of Article 81(1).

### 3.3.1.3. Agreements which may fall under Article 81(1)

85. Production agreements which cannot be characterised as clearly restrictive or non-restrictive on the basis of the above factors may fall under Article 81(1) and have to be analysed in their economic context. (Pursuant to Article 4, paragraph 2(3) of Council Regulation N°17/62, agreements which have as their sole object specialisation in the manufacture of products need not, under certain conditions, be notified to the Commission. They may, however, be notified.) This applies to co-operation agreements between competitors which create a significant degree of commonality of costs, but do not involve hard core restrictions as described above.

### 3.3.2. Market power and market structures

86. The starting point for the analysis is the position of the parties in the market(s) concerned. This is due to the fact that without market power the parties to a production agreement do not have an incentive to co-ordinate their competitive behaviour as suppliers. Secondly, there is no effect on competition in the market without market power of the parties, even if the parties co-ordinate their behaviour.

*Block Exemption*

87. Most common types of production agreements can be assumed to cause some economic benefits in the form of economies of scale or scope or better production technologies unless they are an instrument for price fixing, output restriction or market and customer allocation. These benefits outweigh a limited degree of market power. It is therefore reasonable to block exempt production agreements which result in a restriction of competition up to a certain market share threshold. Therefore, agreements concerning unilateral or reciprocal specialisation as well as joint production are block exempted (revised Regulation on specialisation) provided that they do not contain hard core restrictions (see Article 4) and that

they are concluded between parties with a combined market share not exceeding 20% in the relevant market(s). The block exemption also applies to related purchasing and distribution agreements (see Article 2).

*Production agreements falling outside the Block Exemption*

88. Agreements falling outside the block exemption require a more detailed analysis. The starting point again is the market position of the parties. This will normally be followed by the concentration ratio and the number of players as well as by other factors as described in Chapter 1.

89. Usually the analysis will involve only the relevant market(s) directly concerned by the co-operation. In certain circumstances, for example, if the parties have a very strong combined position on up- or down-stream markets or on markets otherwise closely related to the markets directly concerned by the co-operation, these spill-over markets may however have to be analysed as well. This applies in particular to co-operation in upstream markets by firms which also enjoy a strong combined market position further downstream. Market position of the parties, concentration ratio, number of players and other structural effects.

90. If the parties' combined market share is larger than 20%, the likely impact of the production agreement on the market must be assessed. In this respect market concentration as well as market shares will be a significant factor. The higher the combined market share of the parties, the higher the concentration in the market concerned. However, a moderately higher market share than allowed for in the block exemption does not necessarily imply a high concentration ratio. For instance, a combined market share of the parties of slightly more than 20% may occur in a market with a moderate concentration (HHI below 1800). In such a scenario a restrictive effect is unlikely. In a more concentrated market, however, a market share of more than 20% is likely to cause a competition restriction (see also example 1 below). The picture may nevertheless change, if the market is very dynamic with new participants entering the market and market positions changing permanently.

91. For joint production, network effects, that is, links between a significant number of competitors, can also play an important role. In a concentrated market the creation of an additional link may tip the balance and make collusion in this market likely, even if the parties have a significant, but still moderate combined market share (see example 2 below).

92. In specific circumstances co-operation between potential competitors may also raise competition concerns. This is, however, limited to cases where a strong player in one market co-operates with a realistic potential entrant, for instance, with a strong supplier of the same product or service in a neighbouring geographic market. The reduction of potential competition creates particular problems if actual competition is already weak and threat of entry is a major source of competition.

*Co-operation in upstream markets*

93. Joint production of an important component or other input to the parties' final product can cause negative market effects in certain circumstances:
- Foreclosure problems (see example 3 below), provided that the parties have a strong position on the relevant input market (non-captive use) and that switching between captive and non-captive use would not occur in the presence of a small but permanent relative price increase for the product in question;
- Spill-over effects (see example 4 below), provided that the input is an important component of costs and that the parties have a strong position in the downstream market for the final product.

*Specialisation agreements*

94. Reciprocal specialisation agreements with market shares beyond the threshold of the block exemption will almost always fall under Article 81 (1) and have to be examined carefully because of the risk of market partitioning (see example 5 below).

### 3.4. Assessment under Article 81(3)

#### 3.4.1. Economic Benefits

95. For agreements falling under the block exemption, the existence of economic benefits can be assumed. For those agreements not covered by the block exemption the parties have to demonstrate improvements of production or other efficiencies. Efficiencies that only benefit the parties or cost savings that are caused by output reduction or market allocation cannot be taken into account.

#### 3.4.2. Indispensability

96. Restrictions that go beyond what is necessary to achieve the economic benefits described above will not be accepted. For instance, parties should not be restricted in their competitive behaviour on output outside the co-operation.

#### 3.4.3. No elimination of competition

97. The effects on competition have to be analysed on the market to which the products subject to the co-operation belong and on possible spill-over markets. Production agreements which bring about efficiencies, but involve parties with significant market power require a detailed analysis as to the assessment of whether or not effective competition is likely to be eliminated in the market. The analysis has to include the factors described under the point "market power and market structures". Efficiencies and other relevant benefits can justify even a significant restriction of competition in the market provided that effective competition is not eliminated and the creation or strengthening of a dominant position is excluded.

### 3.5. Examples

*Joint production*

98. The following two examples concern hypothetical cases causing competition problems on the relevant market to which the jointly manufactured products belong.

99. Example 1

*Situation:* Two suppliers, A and B, of the basic chemical product X decide to build a new production plant controlled by a joint venture. This plant will produce roughly 50% of their total output. X is a homogeneous product and is not substitutable for other products: it forms a relevant market on its own. The market is rather stagnant. The parties will not significantly increase total output, but close down two old factories and shift capacity to the new plant. A and B each have a market share of 20%. There are three other significant suppliers each with a 10-15% market share and several smaller players.

*Analysis:* It is likely that this joint venture would have an effect on the competitive behaviour of the parties because co-ordination would give them considerable market power, if not even a dominant position. Severe restrictive effects in the market are probable. High efficiency gains which may outweigh these effects are unlikely in such a scenario where a significant increase in output cannot be expected.

100. Example 2

*Situation:* Two suppliers, A and B, form a production joint venture on the same relevant market as in example 1. The joint venture also produces 50% of the parties' total output. A and B each have 15% market share. There are 3 other players: C with a market share of 30%, D with 25% and E with 15%. B has already a joint production plant with E.

*Analysis:* Here the market is characterised by very few players and rather symmetric structures. The joint venture creates an additional link between the players. Co-ordination between A and B de facto would further increase concentration and also link E to A and B. This co-operation is likely to cause a severe restrictive effect, and – as in example 1 – high efficiency gains cannot be expected.

101. Example 3 also concerns the relevant market to which the jointly manufactured products belong, but demonstrates the importance of criteria other than market share (here: switching between captive and non-captive production).

102. Example 3

*Situation:* A and B set up a production joint venture for an intermediate product X through restructuring current plants. The joint venture sells X exclusively to A and B. It produces 40% of A's total output of X and 50% of B's total output. A and B are captive users of X and are also suppliers of the non-captive market. A's share of total industry output of X is 10%, B's share amounts to 20% and the share of the joint venture to 14%. On the non-captive market, however, A and B have respectively 25% and 35% market share.

*Analysis:* Despite the parties' strong position on the non-captive market, the co-operation may not eliminate effective competition in the market for X, if switching costs between captive and non-captive use are small. However, only very rapid switching would counteract the high market share of 60 %. Otherwise this production venture raises serious competition concerns which cannot even be outweighed by significant economic benefits.

103. Example 4 concerns co-operation regarding an important intermediate product with spill-over effects on a downstream market.

104. Example 4

*Situation:* A and B set up a production joint venture for an intermediate product X. They will close their own factories, which have been manufacturing X and will cover their needs of X exclusively from the joint venture. The intermediate product accounts for 50% of the total costs of the final product Y. A and B have each a share of 20% in the market for Y. There are two other significant suppliers of Y each with a 15% market share and several smaller competitors.

*Analysis:* Here the commonality of costs is high; furthermore the parties would gain market power through co-ordination of their behaviour on the market Y. The case raises competition problems, and the assessment is almost identical with example 1, though here the co-operation is taking place in an upstream market.

*Specialisation*

105. Example 5

*Situation:* A and B each manufacture and supply the homogeneous products X and Y which belong to different markets. A's market share of X is 28%, of Y it is 10%. B's share of X is 10%, of Y it is 30%. Because of economies of scale they agree to specialise, that is, A will in future produce only X and B will produce only Y. Both agree on cross-supplies so that they will both stay as suppliers in the markets. Due to the homogeneous nature of the products, distribution costs are minor. There are two other manufacturing suppliers of X and Y with market shares of roughly 15%, the remaining suppliers have 5-10% shares.

*Analysis:* The degree of commonality of costs is extremely high, only the relatively minor distribution costs remain separate. Consequently, there is very little room for competition left. The parties would gain market power through co-ordination of their behaviour on the markets for X and Y. Furthermore, it is rather likely that the market supplies of Y from A and X from B will diminish over time. The case raises competition problems which the economies of scale can hardly outweigh. The scenario may change if X and Y were heterogeneous products with a very high proportion of marketing and distributing costs (for example, 65-70% of total costs). If furthermore the offer of a complete range of the differentiated products were a condition for competing
successfully, the withdrawal of one or more parties as suppliers of X and/or Y would be rather unlikely. In such a scenario the criteria for exemption may be

fulfilled (provided that the economies are significant), despite the high market shares. ■

### German system of fixed prices for books

After a first examination, the Commission has reached the preliminary conclusion that the new agreements between publishers and booksellers in Germany on fixed book prices at national level do not fall within the scope of application of the EC competition rules. The condition for this, however, is that the rules on re-imports of German books and direct cross-border sales to end consumers at free prices are respected. With the publication of a notice pursuant to Article 19 (3) of Council Regulation No. 17(1) the Commission has announced its intention to give clearance to the agreements notified. At the same time it has invited comments from interested third parties.

The pending case concerning the German-Austrian system of fixed book prices has recently seen some new developments. In spring of this year, the publishers submitted a new version of their agreements for retail price maintenance for books in Germany and Austria (as well as Switzerland). By virtue of the new agreements, on 1 July 2000 all cross-border agreements for price fixing between Austrian publishers and German booksellers and between German publishers and Austrian booksellers will be abolished. The new German system of fixed book prices is limited in the European Union to agreements between German publishers and German booksellers.

German books and printing products re-imported into Germany from another Member State are in principle not subject to retail price maintenance. The system applies to them only if it is clear that the books and similar products were exported from Germany solely for the purpose of being re-imported in order to circumvent the retail price maintenance arrangements. Cross-border sales of books to final consumers in Member States other than the Member State in which the seller is established are not subject to the price maintenance arrangements. This also applies to direct cross-border sales to final consumers via the Internet.

The Commission has come to the preliminary conclusion that the new German system of fixed book prices does not have an appreciable effect on trade between Member States and, therefore, does not fall under Art. 81 (1) of the EC Treaty. Interested third parties may now submit their observations to the Commission. Even if the Commission's preliminary conclusion stands, it monitor closely the application of the system in practice.

Source: Commission Statement IP/00/651, dated 22 June 2000.