COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Fuel Prices and Competition

Faced with outrageous fuel prices and with the fury of an indignant electorate, politicians are apt to react in the manner of King Lear: "I will do such things – what they are yet I know not". The most immediate target is the oil companies: a good scapegoat for governments which impose swingeing taxes and a convenient substitute for the oil producers who run a massive but untouchable cartel. We commented last month on the measures proposed by the Commission to tackle the oil companies, but left the story unfinished, as the Commissioner was just about to convene a meeting of Member States' officials responsible for the enforcement of anti-trust laws. The meeting took place at the end of September; and the layman can be forgiven for thinking that the mountain had brought forth a mouse.

"The aim of the meeting," according to the Commission's subsequent press release, "was to identify and discuss how competition policy could render the motor fuel sector more competitive and to exchange experiences in order to make the enforcement of antitrust rules at national and Community level more effective. The meeting showed that the national competition authorities were following developments in the motor fuel sector closely. National authorities had intervened whenever they detected anti-competitive conduct in the market. Examples of successful interventions were the Italian and Swedish competition authorities' recent findings of cartels. The detected cartels have been focusing on fixing, directly or indirectly, prices at retail or wholesale level. The participating companies have used different methods to attain the same objective, that is, to control the dealers' margins. Under competition law, retailers must be free to set prices. Where they are not free (as for example in the Italian case), price competition among the vertically integrated companies suffers."

This is rather small beer. However, the Commission and the national competition authorities agreed that new entrants and independents (non-integrated companies) were essential to maintain and improve the competitive pressure in the European markets. The experience of the Member States was that markets in which independent non-integrated operators with a countervailing buying power were present showed a more competitive performance than markets where only integrated oil companies were operating. In this respect, supermarkets had proved to be successful entrants in the United Kingdom and France at the retail level. The Commission and Member States concluded that markets must be kept open for independents and new entrants.

It was too much to hope that anything more dynamic would emerge from a meeting of this sort; but there is some possibility that marginal improvements in fuel prices may eventually result from action taken as a result of it. ■

EXPORT RESTRICTIONS (MOTOR VEHICLES): THE OPEL CASE

Subject: Export restrictions
Fines

Industry: Motor vehicles
(Implications for other industries)

Parties: Opel Nederland BV
General Motors Nederland BV

Source: Commission Statement IP/00/1028, dated 20 September 2000

(Note. It seems strange that this type of case continues to arise. Similar cases have been in the news during the last ten years; and, as the Commission points out, the fines have been heavy, particularly in the Volkswagen case. Perhaps it is no coincidence that the date on which the infringement in the Opel case came to an end was about the same as the date on which the Volkswagen fine was imposed. The case illustrates the point that, where prices are for some reason lower in one Member State than in others, dealers and manufacturers are in no hurry to see those lower prices extend to the rest of the market. Market forces operate in different ways in different countries. But where those market forces are artificially nudged by such devices as export restrictions, it is right for competition authorities to intervene.)

The Commission has decided to impose a fine of €43m on Opel Nederland BV, the Dutch importer of cars of the Opel brand for having obstructed exports of new cars to end consumers from other Member States between September 1996 and January 1998. This is the second major Commission decision, following that taken against Volkswagen AG in January 1998, in which complaints from consumers have led the Commission to investigate practices of car manufacturers and their importers, and to impose heavy fines. "The right to buy products cheaper in other Member States is one of the main benefits of the Single Market. The adoption of this decision is therefore a clear signal that competition policy serves consumers' interests," said Competition Commissioner Mario Monti.

In the Netherlands, prices before taxes are generally substantially lower than in other Member States, such as Germany, France and the United Kingdom. The case against Opel Nederland, a 100% subsidiary of General Motors Nederland BV, began with inspections which the Commission carried out in December 1996 on the basis of information received from customers wanting to buy cars in the Netherlands at lower prices. These inspections, which took place at the premises of Opel Nederland and one of its Dutch Opel dealers, prove that due to high export demand from customers from other Member States, Opel Nederland had, from September 1996 onwards, developed and pursued a strategy consisting of three measures destined to restrict or to prevent dealers from selling cars to customers, including end consumers, from abroad.

Direct instructions given by the responsible District Managers of Opel Nederland to a number of exporting dealers, and subsequent commitments received from a number of these dealers to stop all export sales, meant that the importer could be sure of a substantial reduction of exports. Almost all of the exporting dealers are located in areas close to the border, in which export business traditionally plays an important role. Dealers had also been told that the number of cars which they were expected to sell on the basis of their dealership contract, should mainly be sold within the Netherlands. By taking this measure, Opel Nederland intended to limit the scope for export sales. Finally, from October 1996 until January 1998 Opel Nederland operated a large number of sales campaigns, which each contained a provision that bonus payments would be refused if dealers carried out sales to end consumers from abroad. Such bonus payments generally represent an important portion of a dealer's profit from the sale of new cars.

All these measures applied by Opel Nederland violate the provisions of Article 81(1) of the EC Treaty. Commission Regulation EC/1475/95 concerning motor vehicle distribution prohibits car manufacturers and their importers from restricting, either directly or indirectly, the freedom of final consumers, authorised intermediaries or dealers of their own distribution network, to buy new motor vehicles in the Member State of their choice. The Regulation therefore ensures that European consumers have the option of buying a car wherever it is most advantageous to them. In doing this, consumers can also use the services of an authorised intermediary.

In determining the level of the fine, the Commission took into account the fact that the measures applied by Opel Nederland were destined to prevent consumers from taking advantage of the benefits of the Single Market. It also considered that Opel Nederland should have known that its behaviour was incompatible with the European competition rules, and in particular with the provisions of Regulation EC/1475/95. This Regulation, which expires on 30.9.2002, exempts all selective and exclusive distribution systems for motor vehicles and their spare parts from the application of European competition rules, provided that certain conditions are fulfilled. The Commission will present a report on the assessment of the Regulation by the end of this year.

The infringement committed by Opel Nederland is of similar nature to the offence committed by Volkswagen AG, which resulted in the Commission fining Volkswagen in January 1998. According to the Court of First Instance in the subsequent Volkswagen judgment, such measures adopted by car manufacturers constitute a serious infringement of European competition rules, since they obstruct the proper functioning of the Single Market, which is one of the most fundamental objectives of the Community. In spite of the grave nature of the offence, the fine imposed on Opel Nederland is lower than that inflicted on Volkswagen. This does not imply a more lenient attitude on the part of the Commission with respect to this type of infringement but simply reflects the fact that the Commission must take into account the special circumstances of each case including the rigour with which the illicit measures were applied and their duration. ■

EXPORT RESTRICTIONS (MOTOR-CYCLES): THE TRIUMPH CASE

Subject: Export restrictions

Industry: Motor-cycles
(Implications for other industries)

Parties: Triumph Motor-Cycles
Greenib

Source: Commission Statement IP/00/1014 dated 15 September 2000

(Note. Ostensibly, the infringement in this case bears a strong resemblance to the infringement in the Opel case described above. However, the scale and duration of the infringement in the Triumph case, as well as the cooperation received from the infringing corporation after the discovery of the infringement, were such that the Commission did not consider it necessary to proceed to a formal decision imposing a fine. It is interesting to note that currency fluctuations were given as one of the main reasons for the price differences among the Member States concerned.)

The Commission has decided to end its antitrust action against the motorcycle manufacturer Triumph after the company stopped prohibiting its Benelux dealers from selling to UK customers. Following a number of letters from British customers claiming that they were unable to purchase Triumph's motorcycles in the Netherlands and Belgium, the Commission carried out a "dawn raid" at the premises of Triumph in the UK, its Benelux importer and a number of dealers in the above-mentioned countries in April 1999. Evidence of an export prohibition was indeed found. Later Triumph acknowledged the facts for the period from April 1997 until March 1998 and offered to co-operate with the Commission. By its action the Commission sends a clear message to the motorcycle manufacturers that it will act against similar infringements should they occur and sanction them where appropriate.

Triumph is a manufacturer of motorcycles of large engine capacity (750cc and over). Its motorcycles are sold in all Member States of the European Union (EU). Triumph's market share for this kind of motorcycle in the entire Union is below 5%. Market shares in individual Member States are also below 5% except in the United Kingdom where it varies around 10%. Motorcycle distribution is not covered by the block exemption granted by Regulation 1475/95 which concerns only the selective and exclusive distribution system for cars, trucks and buses.

Following the reception of the British customers' letters the Commission started an inquiry on its own initiative to investigate the existence of the alleged export prohibition from Belgium and the Netherlands to the United Kingdom. For that purpose, surprise inspections were carried out at Triumph's, at Greenib's

premises, the Benelux importer, and at a number of dealers in Belgium and the Netherlands.

The Commission found evidence proving that Greenib urged its Benelux dealers to stop export sales of Triumph motorcycles. Documents found at the premises of the Belgian and Dutch dealers confirmed this instruction. Three months after the inspections, Triumph admitted having imposed an export prohibition via Greenib on its Benelux dealers from April/May 1997 to March 1998 to prevent its dealers from selling to UK customers. According to Triumph, the action to reduce parallel trade was a result of the currency fluctuations between the sterling and other currencies. Price differences between the UK and Belgium and the Netherlands reached 30% for certain models at the time.

At the Commission's request and with a view to ensuring that the action does not recur, Triumph advised Greenib, its UK dealers and the dealers in Belgium and the Netherlands, that all dealers were free to sell motorcycles to any customer irrespective of that customer's country of origin or where the motorcycle is to be used.

An export prohibition constitutes one of the most serious restrictions of competition and is contrary to Article 81 of the Treaty. However, given the limited period of time during which the ban was applied, the limited impact that it was able to produce on the market, and given that Triumph has acknowledged the facts, has taken appropriate measures to cease the export ban, and has implemented all the requested measures asked for by the Commission to inform dealers of their obligations, the Commission considers that it is not necessary in the present circumstances to pursue the case further. ■

The Boeing / Hughes Case

In our July, 2000, issue, we referred to the in-depth investigation by the Commission into the proposed acquisition by the Boeing Company of the satellite business of Hughes Electronics Corporation. The investigation has dismissed earlier doubts that the operation could significantly strengthen Hughes' position in commercial geostationary communication satellites, as well as the concern that the parties might induce Hughes' satellite customers to procure launch services from Boeing. The Commission has therefore decided that the acquisition will not lead to the creation or strengthening of a dominant position on these markets. Hughes is currently the market leader for commercial GEO satellites, with market shares around 35-40%. It was originally thought that the operation could further enlarge the gap between Hughes Space and Communications (HSC) and its competitors. However, following the results of the Commission's detailed investigation, it appears that HSC is and will remain subject to the competition from other large satellite prime contractors, such as Lockheed Martin, S/S Loral, Alcatel Space Industries and Astrium.

Source: Commission Statement IP/00/1067, dated 27 September 2000

REBATES (PARCEL SERVICES): THE DEUTSCHE POST CASE

Subject: Rebates

Industry: Parcel services

Parties: Deutsche Post AG

Source: Commission Statement IP/00/1108 dated 4 October 2000

(Note. Our last issue contained particulars of the Statement of Objections by the Commission, addressed to the German Post Office. The Commission has now taken the unusual course of adding to its Statement of Objections because of further evidence received in the last few weeks. The case against the German Post Office is therefore on the face of it more substantial than before. The Post Office now has an opportunity to respond.)

In the light of new evidence concerning Deutsche Post AG' s contracts with its major mail order customers, the Commission has widened the scope of its formal proceedings launched on 8 August 2000 against the German postal operator. The Commission's examination of these contracts has revealed that they contain a combination of fidelity and target rebates. According to these rebate schemes large mail-order customers are granted discounts on the double condition of them sending all their parcels and an annual minimum volume through Deutsche Post AG. Deutsche Post's rebate scheme means that no private provider of parcel services to mail-order firms has been able to achieve any firm foothold in Germany. A supplementary statement of the Commission's objections has been sent to Deutsche Post.

An examination of Deutsche Post's contracts revealed that the operator, since 1974, had concluded contracts making discounts conditional on the customer shipping all his parcels through Deutsche Post.

The investigation has also revealed that, as of November 1997, Deutsche Post concluded a new series of parcel delivery contracts which contained a scheme of combined fidelity and annual target rebates. This confirms the Commission's initial finding that large mail-order customers secure the highest rates of discount only if they sent their entire parcel business and at least the agreed upon target volume through Deutsche Post.

Schemes under which a customer has to purchase all or a large proportion of his requirements from a dominant supplier are an abuse within the meaning of Article 82 of the Treaty as their aim is, by granting financial advantages, to prevent customers from obtaining their supplies from competing suppliers. Furthermore, a system based on annual targets puts strong pressure on the customer to obtain his supplies from the same supplier because of the risk of

losing the discount if the target is not attained at the end of the year. Annual target rebates are also contrary to Article 82 of the Treaty because they prevent customers from being able to select their supplier freely at any time or to change supplier without suffering appreciable economic damage.

The next steps

Formal proceedings against Deutsche Post AG for the infringement of the EC Treaty competition rules began with an initial statement of objections sent on 8 August 2000. The statement of objections gives a detailed account of the allegations made and explains why the Commission believes that Deutsche Post has infringed Article 82.

Deutsche Post's rebate schemes. which have came to light in the meantime, necessitate a widening of the initial proceedings. In order to grant Deutsche Post the right to defend itself, the Commission has issued the supplementary statement of objections. After having received Deutsche Post's defence on the initial and supplementary statements of objections, the Commission will decide whether it should prohibit the conduct at issue and, if so, whether to impose fines for infringement of the EC competition rules.

As a reminder of the terms used in the parcel business, 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 WPP / Y&R Case

The Commission has cleared the proposed acquisition of Young& Rubicam by WPP. The companies' merger will not create a dominant position in the markets for marketing communication services and media buying. Some of WPP's leading agencies include J. Walter Thompson, Ogilvy & Mather, Conquest, MindShare and Research International. Young & Rubicam's primary agencies include Y&R Advertising, The Media Edge, KnowledgeBase Marketing and Burson-Marsteller. Source: Commission Statement IP/00/943, dated 25 August 2000.

MARKET SHARING (BREWING): THE BREWERS CARTEL CASE

Subject: Market sharing
Price fixing
Information agreements

Industry: Brewing
(Implications for other industries)

Parties: Interbrew
Alken-Maes
Haacht
Martens
Danone
Bofferding
Diekirch
Mousel et Clausen
Battin
De Wiltz

Source: Commission Statement IP/00/1092, dated 2 October 2000

(Note. The interest of this case lies mainly in the fact that, while past action against brewers has been almost entirely directed to problems of vertical restraints, as between the brewers and their retail outlets, the present case is concerned with horizontal arrangements, as between the different firms of brewers themselves. If the Commission's prima facie case is proved, the penalties could be severe since, as the Commissioner points out, market sharing and price fixing are particularly heinous offences. However, the brewers have yet to respond to the Commission's Statement of Objections.)

The Commission has issued Statements of Objections to brewers in Belgium and Luxembourg relating to alleged infringements of Article 81 of the EC Treaty which prohibits concerted behaviour or agreements between companies that have an anti-competitive object or effect. The Statements of Objections mark the opening of infringement proceedings and contain the Commission's preliminary assessment. The parties are now entitled to present their defence in writing, as well as at an oral hearing. The Commission is also investigating similar alleged practices by major brewers in other Member States, in particular France, the Netherlands, Italy and Denmark. However, these investigations are at an early stage and no conclusions should be drawn as to the existence of any infringement.

The Statement of Objections for Belgium is addressed to Interbrew, Alken-Maes (and its parent company at the time of the alleged infringement, Danone), Haacht and Martens. Interbrew and Alken Maes are the No. 1 and No. 2 brewers on the Belgian market. The alleged infringements include market sharing, price fixing and information exchange on the Belgian market during the period 1993 to at

least 1998. The involvement of the two smaller brewers, Haacht and Martens, is limited to alleged infringements relating to private label beer (i.e. sold under supermarkets' own labels).

The Statement of Objections for Luxembourg is addressed to the following Luxembourg brewers: Bofferding, Diekirch, Mousel et Clausen, Battin and De Wiltz. The alleged infringement is an agreement to maintain the parties' market shares in the Luxembourg on-trade (that is, restaurants, hotels and cafés) and to restrict entry by foreign brewers from 1985 until at least 1998.

The Commission became aware of the alleged practices following surprise inspections at Interbrew, Alken-Maes and the Belgian brewers' federation in July and October 1999. Competition Commissioner Mario Monti commented: "While the Commission has for many years focused on the exclusive dealing agreements between brewers and their outlets, this is the first time that it has acted against possible horizontal collusion between brewers. Market sharing and price fixing are among the most serious forms of anti-competitive practice. In this respect, the beer sector will be treated no differently from any other." ■

The Danone Case

In the Brewers Cartel Case, reported above, Danone is shown as one of the brewers to whom the Statement of Objections was addressed. However, Danone has been divesting its brewing interests. Three months ago, the Commission cleared the acquisition of Danone's beer businesses in France and Belgium by British brewer Scottish & Newcastle. Through the operation Scottish & Newcastle acquires sole control over Danone's beer business known as Kronenbourg Brasseries, which will be aggregated with the Scottish & Newcastle's beer business in the UK and Ireland. The proposed transaction will be carried out in two stages. In a first phase, which will last a maximum of three years, all of the relevant businesses will come under the management of Scottish & Newcastle but Danone will have an option to require Scottish & Newcastle to buy all of Danone's interest in the various beer businesses. In a second phase and if the option has not been exercised, Danone will keep a minority shareholding in the company controlled by Scottish & Newcastle. Britain's Scottish & Newcastle and Danone of France brew, produce and sell a wide range of branded beers in the UK, Ireland, France and Belgium. Scottish & Newcastle beer brands include Courage, John Smiths, McEwan's and Newcastle Brown. It also produces under licence other beer brands including Fosters, Kronenbourg 1664 (for Danone in the UK) and Miller and Moleson. Danone beer brands include Kronenbourg 1664, Kanterbrau, Maes and Cristal. It also produces a number of beers under licence including Grimbergen, Brugs and Judas.

Source: Commission Statement IP/00/754, dated 12 July 2000.

ACQUISITIONS (FOOD): THE UNILEVER/BESTFOODS CASE

Subject: Acquisitions
Divestments

Industry: Food products
(Implications for all industries)

Source: Commission Statement IP/00/1076, dated 28 September 2000

(Note. This case is interesting from the point of view of the substantial divestments which are having to be made as the price of approval of the acquisition. Even after divestment a further hurdle has to be crossed by the acquirers, since the parties to whom the divested businesses are transferred will have to be approved by the Commission: that is to say, the Commission will need to be assured that the transfers themselves are not anti-competitive. It seems to be the Commission's policy to approve acquisitions and mergers, wherever possible, rather than to block them; but it is becoming increasingly tough in insisting both on divestments being made and on their being satisfactory as well.)

The Commission has granted regulatory clearance to the acquisition of US company Bestfoods by Anglo/Dutch company Unilever after the parties made substantial concessions to resolve competition concerns. The two companies overlap in the production and distribution in a large number of national markets for food products both for retailing and for food services across the EEA. The undertakings include the divestment of a significant number of brands such as Lesieur, Royco and Oxo. The total value of the divestment package in terms of annual retail sales is estimated at €500m euros.

The acquisition notified to the Commission will give Unilever sole control of Bestfoods and, as originally notified, would have led to overlaps in nearly 150 separate national food-related markets. Key Unilever brands within the food business include Lipton (tea), Magnum (ice cream), Bertolli (olive oil) and Becel (fat spreads). Bestfoods' most famous brand in Europe is its Knorr brand.

In the food retail sector, where the customers are mainly supermarkets and food retail operators, Unilever and Bestfoods have overlapping activities which would have created competition concerns in the markets for instant and regular dry soups, dry side dishes, cold sauces, hot sauces (wet and dry), jams and other culinary products such as bouillon. Virtually all the countries in the EEA were affected.

In the food service sector, the concentration would have produced competition problems in the Nordic countries (in the markets for dry soups and hot sauces in Finland, Sweden and Denmark and in the markets for bouillon in Sweden and Denmark) as well as in Ireland (in the markets for dry hot sauces) and in the UK

(for dry sauces and bouillon). The food service sector comprises food sales to a variety of catering customers such as hotels, leisure clubs, cafés and restaurants.

To remove the Commission's concerns in the above-mentioned markets, Unilever has undertaken to divest a number of significant brands, which are Lesieur, Batchelors, McDonnells, Bla Band Royco and Oxo, together with the product brands endorsed by them. An important factor is that the divestments will include the whole range of products currently sold under those brands both in the food retail and in the food service sector. The divestiture package will also include appropriate supply arrangements, manufacturing facilities, sales forces and intellectual property rights associated with the individual businesses. This should ensure that the respective purchasers will not only acquire the present market share attached with the above-mentioned portfolios but also their full brand value together with the access to the customer base attached to them.

Thus, the commitments given by Unilever will enable the purchasers, who will have to be approved by the Commission, to be viable competitors and to exercise strong competition against the merging companies in those markets where effective competition would otherwise have been threatened as a result of the acquisition. Competition Commissioner Mario Monti stated: "This merger will bring about a major restructuring of the European food industry and should release significant efficiencies [sic]. At the same time, I believe that Unilever's commitments will fully address the Commission's concerns and will ensure that consumers will continue to benefit from unfettered competition in the markets affected." ■

The Metsa / SCA Case

The European Commission has decided to undertake a full, second phase investigation of the proposed purchase of Metsä Tissue by SCA Mölnlycke (SCA). The Commission considers that the proposed operation raises serious doubts about its compatibility with the common market due to the strong positions that would arise on certain markets for hygienic tissue products. SCA is a wholly owned subsidiary of Swedish company Svenska Cellulosa AB, a forest industry and paper company that specialises in the manufacture of absorbent hygiene products, corrugated packaging and graphic papers. SCA manufactures and distributes a variety of tissue-based hygiene products throughout the European Economic Area. SCA produces tissue-based products in most Member States of the European Union and in Poland and Russia. Metsä-Tissue is active in the production of tissue products and of baking and cooking papers. It is majority-owned (66%) by the Metsä-Serla Corp., a Finnish forest industry company. Metsä Tissue has production capacity in Germany, Finland, Sweden and Poland.

Source: Commission Statement IP/00/1063, dated 27 September 2000

MERGERS (RECORDING): THE EMI / TIME WARNER CASE

Subject: Mergers

Industry: Recording; music recording and publishing
(Some implications for other industries)

Parties: EMI plc (UK)
Time Warner Inc (USA)

Source: Commission Statement IP/00/1122, dated 5 October 2000

(Note. From the consumers' point of view, it was hard to feel entirely comfortable about the proposal referred to in this report: the recording companies already enjoy considerable power, which would have been further concentrated as the result of the proposed merger. To make the deal palatable, substantial concessions would have been needed; and these could not apparently be provided within the statutory time-limits. It remains to be seen whether a further notification will be received at a later date. In the meantime, the Commission is continuing its separate investigation of the proposed merger between Time Warner and America on Line.)

EMI Plc and Time Warner Inc have informed the Commission that they have decided to terminate their agreement and to withdraw the notification they had submitted to the Commission for regulatory clearance. In view of this, the Commission will not take any decision with regard to the notified operation.

On 5 May 2000 EMI and Time Warner had notified to the Commission an agreement by which they would have combined their music recording and publishing businesses. On 14 June the Commission opened an in-depth investigation over concerns that the operation could create a collective dominant position in national European markets for recording music, a single dominant position in national markets for music publishing, and a single dominant position in the markets for on-line music and software based music. The Commission made known its preliminary position to the companies in a statement of objections on August 22.

EMI and Time Warner submitted undertakings on 19 September - the deadline, in this deal, for offering remedies - which proved insufficient to meet the Commission's concerns. Despite the fact that the deadline had expired, the Commission continued discussions with the parties to find a solution. During that process, EMI and Time Warner provided informal proposals that improved substantially the initial remedies. But the Commission still had doubts and in view of the late stage of the procedure could not properly evaluate the undertakings.

When a merger review is in the second (in-depth) phase, undertakings must be submitted at the latest one month before the deadline for a ruling: in this case, 18 October. Because of the need for transparency and of the Advisory Committee's role, the practice of the Commission is not to accept remedies submitted after the deadline unless they resolve all concerns in a clear and obvious way and do not require a further market evaluation.

The parties informed the Commission on 5 October that they had decided to terminate their deal and to withdraw the notification they had submitted. They have publicly announced that they will continue the discussions between themselves and with the Commission and other regulators to try to reach a new agreement. The Commission will obviously review any new modified agreement that the parties may reach.

At the time of writing, the Commission has just approved Time Warner's proposed merger with AOL, subject to stringent conditions. This will be covered in a report in our next issue. ■

The Volvo / Renault Case

The Commission has decided not to oppose the acquisition by Volvo of Renault Vehicules Industriels (RVI). Volvo is a Swedish manufacturer of trucks, buses and engines. RVI has until now been a wholly owned subsidiary of Renault SA. The decision follows a careful investigation of the affected markets, in the course of which the parties have made significant undertakings that will remove the competition concerns resulting from the acquisition of RVI.

On 14 March 2000, the Commission declared the proposed merger between Volvo and Scania incompatible with the Common market. Following this decision Volvo has remained a significant shareholder in Scania. Similarly, RVI has, through the Irisbus joint venture, been linked to Iveco (of the Fiat group) in the production and sales of buses. However, in the context of the RVI acquisition, the parties have given the Commission an undertaking that they will remove these links to Scania and Iveco within a specific timeframe. In addition, the parties have also undertaken to eliminate the overlap in bus activities in France created by the operation.

These undertakings will ensure that the present concentration will not lead to negative effects on competition on the markets considered in the Volvo/Scania case or, through the additional link with the Fiat group, on the bus markets. They have also enabled the Commission to focus its investigation on the relatively limited number of markets where both Volvo and RVI have significant activities.

Source: Commission Statement IP/00/962, dated 1 September 2000.

DOMINANT POSITION (INSURANCE): THE WOUDE CASE

Subject: Dominant position

Industry: Insurance
(Implications for other industries)

Parties: Hendrik van der Woude
Stichting Beatrixoord
Commission of the European Communities (intervener)
The Netherlands (intervener)
Sweden (intervener)
United Kingdom (intervener)

Source: Judgment of the Court of Justice, dated 21 September 2000, in Case C-222/98 (Hendrik van der Woude v Stichting Beatrixoord)

(Note. This seems at first to differ little from the Pavlov case reported in our last issue; but there are some refinements which give it both interest and importance. Once again an insurance scheme is under attack; but this time it is a sickness insurance scheme and not a pension scheme. Once again, the plaintiff is complaining about a situation in which he cannot make a choice or, if he makes a choice, cannot be compensated; but this time, he claims that health insurance is not a form of remuneration, like a pension, and that this differentiates the circumstances of the case. Once again, the plaintiff failed; this time, at least in part, because he did not fully establish the facts in his allegation of abuse of a dominant position.

Cases of this sort reflect a wish in some quarters that agreements between employees' unions and agreements between employees and employers could be subject to the same rules as agreements between undertakings. But, whether this is socially desirable or not, the rules need to be tailor-made for the purpose and not simply a stretching of the rules which exist at present.)

[Paragraphs 1 to 18 set out the facts. For the purposes of the following paragraphs, it is useful to know that the initials IZZ refer to the medical insurance scheme and the intitials VGZ to the commercial insurer running it.]

Question by the national court

18. The national court is asking essentially whether the provisions of a collective labour agreement which relate to sickness insurance for employees covered by the agreement and under which employers' contributions are paid only in respect of insurance taken out with the insurer or insurers selected for the purposes of implementing that agreement are compatible with Articles 85 and 86 of the Treaty.

19. Despite being notified of the judgments in Case C-67/96 *Albany International* v *Stichting Bedrijfspensioenfonds Textielindustrie*, Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* and Case C-219/97 *Maatschappij Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, the national court considers it necessary to maintain its reference on the grounds that, in the present case, operation of the IZZ Medical Expenses Scheme had been subcontracted to IZZ, which called upon the commercial insurer VGZ to carry on the insurance business in question.

20. Mr Van der Woude submitted at the hearing that in *Albany*, *Brentjens'* and *Drijvende Bokken* the Court had given an answer, in the main, to the question which has been referred. He nevertheless submitted that the exception to the application of Article 85 of the Treaty recognised in those cases did not apply to health care insurance. He argued that insurance premiums relating to health care, unlike pension contributions which form part of the direct remuneration for work, do not fall within the core subjects negotiated in the framework of collective labour agreements. In addition, he submits that the collective labour agreement has a direct influence on third parties, namely other providers of health care insurance, since it entails an obligation to become a member of VGZ.

21. The Netherlands Government, supported by the Swedish and United Kingdom Governments and the Commission, also referred to *Albany*, *Brentjens'* and *Drijvende Bokken* at the hearing, submitting that the agreement entered into in the present case between six associations of employers and 28 organisations representing employees evolved from dialogue between management and labour, was concluded in the form of a collective agreement and concerned employees' terms of employment. A collective labour agreement of that kind would therefore satisfy the criteria set out in the case-law mentioned above. It added that the fact that the insurance business was not carried on by management and labour and that IZZ subcontracted the business to VGZ did not affect the nature or purpose of the collective labour agreement at issue in the main proceedings.

22. It should be noted that, in *Albany*, *Brentjens'* and *Drijvende Bokken*, the Court held that agreements entered into in the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 85(1) of the Treaty.

Nature and purpose of the agreement

23. It is therefore necessary to consider whether the nature and purpose of the agreement at issue in the main proceedings warrant its exclusion from the scope of Article 85(1) of the Treaty.

24. First, the agreement in point in the main proceedings was concluded in the form of a collective agreement and constitutes the result of collective bargaining between organisations representing employers and those representing employees.

25. Second, regarding its purpose, the agreement establishes in a given sector a health care insurance scheme which contributes to improving the working conditions of the employees, not only by ensuring that they have the necessary means to meet medical expenses but also by reducing the costs which, in the absence of a collective agreement, would have to be borne by the employees.

26. The fact that the insurance business in question was subcontracted cannot prevent the exception from the prohibition in Article 85 of the Treaty, which was established by *Albany*, *Brentjens'* and *Drijvende Bokken*, from applying in the case of a collective labour agreement such as that in point in the main proceedings. To accept such a limitation would constitute an unwarranted restriction on the freedom of both sides of industry who, when they enter into an agreement concerning a particular aspect of working conditions, must also be able to agree to the creation of a separate body for the purpose of implementing the agreement and this body must be able to have recourse to another insurer.

27. It must therefore be concluded that the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

Dominant position

28. As far as Article 86 of the Treaty is concerned, Mr Van der Woude has submitted that the relevant geographic market was the Netherlands and that the market for the product concerned was that of supplying and concluding private health care insurance for employees who were subject to the Collective Labour Agreement. He argues that Article 32 of the Collective Labour Agreement resulted in the creation of a sub-market since, as regards those employees subject to the agreement, ordinary health insurance could not be substituted for insurance provided by IZZ/VGZ. Those insurers therefore enjoyed a dominant position for the purposes of Article 86 of the Treaty and, since the employers paid 50% of the premium, IZZ/VGZ were able to act independently of their competitors.

29. Mr Van der Woude asserts, in addition, that IZZ/VGZ abused their dominant position by imposing unfair prices or other unfair trading conditions. He claims that, in spite of deriving advantages as regards costs from the contested body of provisions of the Collective Labour Agreement, IZZ/VGZ none the less offered less advantageous conditions than any of their potential competitors, as is apparent from the observations set out in paragraph 14 above. He also draws attention to Article 2(1A) of the IZZ's rules on health care, the consequence of which is that an employee who for personal reasons does not become a member, or ceases to be a member, of IZZ/VGZ may not join or rejoin the IZZ scheme, a provision which further strengthens the link between the assured and IZZ/VGZ.

30. In that regard, it is sufficient to note that it does not appear from either the papers provided by the national court or from the written and oral observations that the system laid down in the Collective Labour Agreement has induced the undertaking responsible for managing the insurance scheme at issue in the main

proceedings to abuse any dominant position it might have or that the services provided by the undertaking do not meet the needs of the employees concerned.

31. Questions concerning whether the term under which former members may not rejoin the IZZ scheme, or the fact that unfair pricing or trading conditions are imposed in the present case, constitute an abuse of a dominant position do not fall within the scope of the main proceedings, which concern only the compatibility with the competition rules of rules laid down in the Collective Labour Agreement as to which sickness insurance scheme employers may contribute to.

32. The answer to be given to the question referred for a ruling must therefore be that the provisions of a collective labour agreement which relate to the sickness insurance of employees covered by the agreement and under which employer contributions may be paid only in respect of insurance taken out with insurer(s) selected in the context of implementing the agreement are compatible with Articles 85 and 86 of the EC Treaty.

Costs

33. The costs incurred by the Netherlands, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Court's Ruling

The Court, in answer to the question referred to it by the Kantongerecht te Groningen by order of 20 May 1998, hereby rules:

The provisions of a collective labour agreement which relate to the sickness insurance of employees covered by the agreement and under which employer contributions may be paid only in respect of insurance taken out with insurer(s) selected in the context of implementing the agreement are compatible with Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC). ■

The full text of the foregoing case is freely available on the web-site of the Court of Justice of the European Communities. It is not, however, definitive and may be subject to changes of wording and expression.

The full text of the document, on which there is a report on pages 245 to 250 of this issue, and of related documents on the subject of horizontal agreements, may be found on the web-site of the Commission of the European Communities.

PROCEDURE: DRAFT COUNCIL REGULATION

Subject: Procedure

Industry: All industries, except agriculture, transport and coal and steel

Source: Commission Statement IP/00/1064, dated 27 September 2000

(Note. It looks as though we shall soon be bidding farewell to Regulation 17 of 1962 and to the system of notification of infringements of the rules on competition. A new Council Regulation is being proposed by the Commission to replace it. The text has just been published and will be the subject of comment in forthcoming issues of the newsletter. In the meantime, the following statement by the Commission gives a broad idea of the proposal, once of whose principal objectives is a sharing of responsibility for enforcing the rules competition between the Commission and the Member States' authorities and courts. Sharing responsibility for enforcement does not mean that the Commission will give up its central authority in competition matters: the Commission has no intention of "re-nationalising" competition jurisdiction.)

The Commission has adopted a proposal for a Regulation implementing Articles 81 and 82 of the Treaty, which set out the Community competition rules applicable to restrictive practices between businesses and abuses of dominant positions committed by them. The proposal is intended to replace the current system - in force since 1962 - of administrative authorisation centralised at Commission level by one in which both the Commission and the national authorities and courts will be able to apply Article 81 in full. "This is the most important legislative initiative in the competition field since the 1990 Merger Regulation," said Mr Monti, the Commissioner responsible for Competition Policy.

Substance of the proposal

The proposal amends extensively the arrangements for implementing Articles 81 and 82 of the Treaty. It does not concern state aid or merger control. The new text will replace Regulation 17 of 1962, which is one of the cornerstones of Community competition law but which, after close on forty years of existence, needs to be adapted to a different economic and institutional environment. The proposal will need to be adopted by the Council, after the European Parliament has been consulted.

In April 1999 the Commission adopted a White Paper mapping out the broad lines of the proposed reform. The proposal adopted today takes account of the contributions from the European Parliament and the Economic and Social Committee and of the numerous observations received from the national authorities and industry. The Commission is proposing a system in which, as they are already able to do in the case of Article 82, the national competition

authorities and courts will be able to apply Article 81 in its entirety. The competition authorities and the Commission will form a network and work together to punish infringements of the Community competition rules. For their part, national courts will protect the rights that individuals enjoy under Community law by awarding damages or ruling on the enforcement of contracts.

Better protection of competition in consumers' interests

The proposal is intended to strengthen competition in the Community. To that end, it will extend to national competition authorities and courts the power to apply Community law in full. In the run-up to enlargement a decision is needed since a single institution - the Commission - cannot on its own ensure that Community rules are complied with. The current system involves the notification of agreements to the Commission, which alone is empowered to authorise those that restrict competition. Experience has shown that this notification system does not serve to safeguard competition. Its abolition will enable the Commission to target the most serious restrictions and abuses. Lastly, the intention is to strengthen the means that the Commission has at its disposal to detect and punish cartels and other infringements of the rules. The proposal will therefore improve the protection afforded to competition and ensure that consumers are able to benefit fully from the single market.

Decentralisation without renationalisation

Increased involvement of the national competition authorities and courts is at the heart of the proposal. It is important that the decision-making bodies should be brought closer to the individual so as to disseminate more widely a common competition culture and to foster the acceptance of Community rules. However, as the European Parliament has stated on many occasions, greater decentralisation must in no circumstances lead to any renationalisation of competition policy, which is an important pillar of the Community edifice. All economic agents must be treated on a non-discriminatory basis throughout the Community. It is for this reason that the proposal retains an autonomous decision-making power for the Commission and sets up information and cooperation mechanisms that will guarantee consistent application of the rules within the Community.

A more level playing field and less red tape for businesses

One of the key aspects of the proposal is the application by all decision-making authorities of a single rule of law whenever trade between Member States is affected. In future, businesses will no longer have to contend with sixteen distinct legal systems; they will be faced with a single Community instrument whenever their activities affect trade between Member States. This will guarantee them a level playing field throughout the Community and will reduce compliance costs significantly. In addition, abolition of the notification system will ease the administrative constraints imposed on them by the current system. ■

PURCHASING AGREEMENTS: COMMISSION DRAFT GUIDELINES

Subject: Purchasing agreements

Industry: All industries

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

(Note. In the July and August issues, there were extracts from the Commission's draft Guidelines on horizontal agreements dealing respectively with Production Agreements and Marketing Agreements. The extract which follows deals with Purchasing Agreements. As a broad generalization, the Commission seems to be willing to exempt purchasing agreements provided, first, that they result in economies of scale, second, that they benefit the consumer and, third, that they do not result in a dominant position. On this last point, the Guidelines are ambiguous. In the text, they say roundly that "a dominant position on either the buying or the selling market excludes exemption"; but, in the example illustrating the point, the more qualified view is taken that "even if efficiencies are caused by the [parties'] cooperation, it is not likely to be exempted due to the high degree of market power". The real test is whether competition is eliminated. The Guidelines point out, by the way, that horizontal agreements aimed at increasing purchasing power may be accompanied by vertical agreements between the purchasing body and the suppliers; and that, in these cases, the arrangements have to be looked at additionally in the light of the Commission's policy and regulation on vertical restraints.)

4. PURCHASING AGREEMENTS

4.1. Definition

106. This chapter focuses on agreements concerning the joint buying of products. Joint buying can be carried out by a jointly controlled company or by a company in which many firms hold a small stake or by a contractual arrangement or even looser form of co-operation.

107. Purchasing agreements are often concluded by small and medium sized enterprises to achieve similar volumes and discounts as their bigger competitors. These agreements between small and medium sized enterprises are therefore normally pro-competitive. Even if a moderate degree of market power is created, this may be outweighed by economies of scale provided the parties really bundle volume. Joint buying occurs in many sectors; most frequently it seems to occur in the retail sector.

108. Joint purchasing may involve both horizontal and vertical agreements. These agreements have first to be assessed according to the principles described in

the present guidelines. If this assessment leads to the conclusion that a co-operation between competitors in the area of purchasing would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included agreements concluded with suppliers or retailing members. This assessment should be based on the principles set out in the Guidelines on Vertical Restraints, for instance as regards the list of hardcore restrictions which are unlikely to be exempted in vertical agreements.

109. An example would be an association formed by a group of retailers for the joint purchasing of products. The agreement to set up the association and the conditions under which it engages in joint purchasing would be examined under the present guidelines. The resulting vertical agreements, between the association and an individual member, or between the association and an outside supplier, are covered - up to a certain limit - by the block exemption for vertical restraints: Article 2(2), Regulation EC/2790/1999. Those agreements falling outside the vertical block exemption will not be presumed to be illegal but may need individual examination.

4.2. Relevant markets

110. There are two markets which may be affected by joint buying: first, the market(s) directly concerned by the co-operation, that is, the relevant purchasing market(s); and, secondly, the selling market(s), that is, the market(s) downstream where the participants of the joint purchasing arrangement are active as sellers.

111. The definition of relevant purchasing markets follows the principles described in the Commission notice on market definition and is based on the concept of substitutability to identify competitive constraints. The only difference to the definition of "selling markets" is that substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words: the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. These could be analysed for instance by examining the suppliers' reaction to a small but lasting price *decrease*. If the market is defined, the market share can he calculated as the percentage which the purchases for the parties concerned account for out of the total sales of the purchased product or service in the relevant market.

112. Example 1. A group of car manufacturers agree to buy product X jointly. Their combined purchases of X account for 270 units. All the sales of X to car manufacturers account for 900 units. However, X is also sold to manufacturers of other products than cars. All sales of X account for 1800 units. Then the (purchasing) market share of the group is 15%.

113. If the parties are in addition competitors on one or more selling markets, these markets are also relevant for the assessment. Restrictions of competition on these markets are more likely if the parties will achieve market power by co-ordinating their behaviour and if the parties have a significant proportion of their total costs in common. This is, for instance, the case if retailers which are active in the same relevant retail market(s) jointly purchase a significant amount of the

products they offer for resale. It may also be the case if competing manufacturers and sellers of a final product jointly purchase a high proportion of their input together. The selling markets have to be defined by applying the methodology laid down in the Commission Notice on market definition.

4.3. Assessment under Article 81(1)

4.3.1. Nature of the agreement

4.3.1.1. Agreements that do not come under Article 81(1)

114. By their very nature joint buying agreements will be concluded between companies that are at least competitors on the purchasing markets. If, however, competing purchasers cooperate who are not active on the same relevant market further downstream (for example, retailers which are active in different geographic markets and can not be regarded as realistic potential competitors), Article 81(1) will rarely apply unless the parties have a very strong position in the buying markets, which could be used to harm the competitive position of other players in their respective selling markets.

115. In most cases, joint buying will be agreed between companies that are competitors on both the purchase and the selling market (see below 4.3.1.3).

4.3.1.2. Agreements that almost always fall under Article 81(1)

116. Purchasing agreements only come under Article 8 1(1) by their nature if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation.

4.3.1.3. Agreements that may fall under Article 81(1)

117. Most purchasing agreements must be analysed in their legal and economic context. The analysis has to cover both the purchasing and the selling markets.

4.3.2. Market power and market structures

118. The starting point for the analysis is the examination of the parties' buying power. Buying power can be assumed if a purchasing agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that prices can be driven down below the competitive level or access to the market can be foreclosed to competing buyers. A high degree of buying power over the suppliers of a market may bring about inefficiencies such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply. However, the primary concerns in the context of buying power are that lower prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers' competitors on the selling markets because either suppliers will try to recover price reductions for one group of customers by increasing prices for other customers or competitors have less access to efficient suppliers.

Consequently, purchasing markets and selling markets are characterised by interdependencies as set out below.

Interdependencies between purchasing and selling market(s)

119. The co-operation of competing purchasers can appreciably restrict competition by means of creating buying power. Whilst the creation of buying power can lead to lower prices for consumers, buying power is not always pro-competitive and may, under certain circumstances, even cause severe negative effects on competition.

120. First, lower purchasing costs resulting from the exercise of buying power cannot be seen as pro-competitive, if the purchasers together have power on the selling markets. In this case, the cost savings are probably not passed on to consumers. The more combined power the parties have on their selling markets, the higher is the incentive for the parties to coordinate their behaviour as sellers. This may be facilitated if the parties achieve a high degree of commonality of costs through joint purchasing. For instance, if a group of large retailers buys a high proportion of their products together, they will have a high proportion of their total cost in common. The negative effects of joint buying can therefore be rather similar to joint production.

121. Secondly, power on the selling markets may be created or increased through buying power which is used to foreclose competitors or to raise rivals' costs. Significant buying power by one group of customers may lead to foreclosure of competing buyers by limiting their access to efficient suppliers. It can also cause cost increases for its competitors because suppliers will try to recover price reductions for one group of customers by increasing prices for other customers (e.g. rebate discrimination by suppliers of retailers). This is only possible if the suppliers of the purchasing markets also have a certain degree of market power. In both cases, competition in the selling markets can be further restricted by buying power.

122. There is no absolute threshold which indicates that a buying co-operation creates some degree of market power and thus falls under Article 81(1). However, in most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15% on both the purchasing market(s) and also the selling market(s). 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.

123. A market share above this threshold does not automatically indicate that a negative market effect is caused by the co-operation but requires a more detailed assessment of the impact of a joint buying agreement on the market involving factors such as the market concentration and possible countervailing power of strong suppliers. Joint buying that involves parties with a combined market share significantly above 15% in a concentrated market is 1ik~y to come under Article 81(1), and efficiencies that may outweigh the restrictive effect have to be shown by the parties.

4.4. Assessment under Article 81(3)

4.4.1. Economic benefits

124. Purchasing agreements can bring about economic benefits such as economies of scale in ordering or transporting which may outweigh restrictive effects. If the parties together have significant buying or selling power, the issue of efficiencies has to be examined carefully. Cost savings which are caused by the mere exercise of power and do not benefit the consumers cannot be taken into account.

4.4.2. Indispensability

125. Purchasing agreements cannot be exempted if they impose restrictions that are not indispensable to the attainment of the above-mentioned benefits. An obligation to exclusively buy through the co-operation can in certain cases be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

4.4.3. No elimination of competition

126. Joint buying agreements can never be exempted if they afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. This assessment has to cover buying and selling markets. The combined market shares of the parties can be regarded as a starting point. It then needs to be evaluated whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as countervailing power of suppliers on the purchasing markets or potential for market entry in the selling markets. A dominant position on either the buying or selling market excludes exemption under Article 81(3).

4.5. Examples

127. Example 2. Situation: Two manufacturers, A and B, decide to jointly buy component X. They are competitors on their selling market. Together their purchases represent 35% of the total sales of X in the EEA, which is assumed to be the relevant geographic market. There are 6 other manufacturers (competitors of A and B on their selling market) accounting for the remaining 65% of the purchasing market; one having 25%, the others account for significantly less. The supply side is rather concentrated with 6 suppliers of component X, two with 30% market share each, and the rest between 10 and 15% (HHI of 2300-2500). On their selling market, A and B achieve a combined market share of 35%. Analysis: Due to the parties' market power in their selling market, the benefits of possible cost savings may not be passed on to final consumers. Furthermore, the joint buying is likely to increase the costs of the parties' smaller competitors because the two powerful suppliers probably recover price reductions for the group by increasing smaller customers' prices. Increasing concentration in the downstream market may be the result. In addition, the cooperation may lead to further

concentration among suppliers because smaller ones, which may already work near or below minimum optimal scale, may be driven out of the business if they cannot reduce prices further. Such a case probably causes a significant restriction of competition which may not be outweighed by possible efficiency gains from bundling volume.

128 Example 3. Situation: 15 small retailers conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation which accounts for roughly 50% of each retailer's total costs. The retailers can buy more than the minimum volume through the organisation, but they may also buy outside the co-operation. They have a combined market share of 20% on each the purchasing and the selling market. A and B are their two large competitors, A has a 25% share on each of the markets concerned, B 35%. The remaining smaller competitors have also formed a buying group. The 15 retailers achieve economies by combining a significant amount of volume and buying tasks. Analysis: The retailers may achieve a high degree of commonality of costs if they finally buy more than the agreed minimum volume together. However, together they have only a moderate market position on the buying and the selling market. Furthermore, their co-operation brings about some economies of scale. This co-operation is likely to be exempted.

129 Example 4. Situation: Two supermarket chains conclude an agreement to jointly buy products which account for roughly 50% of their total costs. On the relevant buying markets for the different categories of products the parties have shares between *25%* and 40%, on the relevant selling market (assuming there is only one geographic market concerned) they achieve 40%. There are five other significant retailers with each 10-15% market share. Market entry is not likely. Analysis: It is likely that this joint buying arrangement would have an effect on the competitive behaviour of the parties because co-ordination would give them significant market power. This is particularly the case if entry is weak. The incentive to co-ordinate the behaviour is higher if the costs are similar. Similar margins of the parties would add an incentive to have the same prices. Even if efficiencies are caused by the co-operation, it is not likely to be exempted due to the high degree of market power.

105 Example 5. Situation: 5 small co-operatives conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation. The parties can buy more than the minimum volume through the organisation, but they may also buy outside the co-operation. Each of the parties has a total market share of 5% on each of the purchasing and selling markets, giving a combined market share of 25%. There are two other significant retailers each with 20-25% market share and a number of smaller retailers with market shares below 5%. Analysis: The setting up of the joint buying organisation is likely to give the parties a market position on both the purchasing and selling markets of a degree which enables them to compete with the two largest retailers. Moreover, the presence of these two other players with similar levels of market position are likely to result in the efficiencies of the agreement being passed on to consumers. In such a scenario the agreement is likely to be exempted. ■