COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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The "failing firm" defence

In his capacity as Commissioner for Competition, Mario Monti provides us all with open, interesting and thoughtful views on developments in the European Communities' competition policy. He surpassed himself in a speech to the American Bar Association in Washington DC on 14 November 2001; the subject was Antitrust in the US and Europe. Among the many subjects he covered was the "failing firm" defence (well-established in the United States), which may allow a merger to proceed - in spite of competition concerns - where the acquired firm would otherwise go out of business. The Commission's policy here is still evolving; but in the recent *BASF/Eurodiol/Pantochim* case the Commission widened the scope of application of the failing firm defence to one which is now much closer to the US approach than it was before. Indeed, the Commission, for the first time, acknowledged that, as in the US, one of the criteria necessary for the defence to apply is that, but for the merger, the assets of the failing firm would have left the market. In addition to that, however, the Merger Regulation requires the Commission to establish on a case by case basis that the deterioration of the competitive structure as a consequence of the merger is at least no worse than it would have been in the absence of the merger.

"Efficiency gains"

Mr Monti was at pains to refute the assertion that the Commission, when dealing with conglomerate mergers, was in fact applying what has been dubbed an "efficiency offence". The Commission distinguished clearly between, on the one hand, mergers leading to price reductions resulting from strategic behaviour on the part of a dominant firm, the purpose of which is to eliminate or marginalize competitors with a view to exploiting consumers in the medium term, and, on the other hand, mergers leading to significant and durable efficiency gains likely to be passed on to the consumer. "Efficiency gains" do not refer to any cost reductions resulting from the merger, but to the types of efficiencies which are relevant for anti-trust authorities that is, a long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive means and which reasonably will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality. When the merging parties do not provide a clearly articulated and quantified defence in terms of efficiencies as they did not, for instance, in the *GE/Honeywell* case, it is much harder for an anti-trust authority to clear a transaction that is likely to lead to foreclosure effects, because if foreclosure takes place and competitors are marginalised, there is no guarantee that prices are going to be maintained, at least over the medium and longer term, at the low level at which the merged entity may strategically set them to foreclose competition. *[To be continued in our next issue.]* ■

PRICE FIXING (VITAMINS): THE VITAMIN CARTEL CASE

Subject: Price fixing
Market sharing
Information exchanges
Supply restrictions
Fines

Industry: Vitamins; pharmaceuticals
(Implications for most industries)

Parties: Hoffman La Roche and others (listed below)

Source: Commission Statement IP/01/1625, dated 21 November 2001

(Note. The most remarkable feature of this case is the staggering level of fines imposed, not far short of €1 billion. Parallel cases in the United States resulted in similar fines. In other respects, the case follows the usual pattern of classic cartels, with the emphasis on price fixing and the operation of a quota system. After one of the members of the cartel, Aventis, had cooperated with the Commission, others followed; and the Commission makes the fair point that members of a cartel can largely escape the consequences of infringement if they cooperate in this way.)

The Commission has fined eight companies a total of €855.22 million for participating in eight distinct secret market-sharing and price-fixing cartels affecting vitamin products. Each cartel had a specific number of participants and duration, although all operated between September 1989 and February 1999. Because Swiss-based company Hoffman-La Roche was an instigator and participated in all the cartels it was given the highest cumulative fine of €462 million. "This is the most damaging series of cartels the Commission has ever investigated due to the sheer range of vitamins covered which are found in a multitude of products from cereals, biscuits and drinks to animal feed, pharmaceuticals and cosmetics," said Competition Commissioner Mario Monti. "The companies' collusive behaviour enabled them to charge higher prices than if the full forces of competition had been at play, damaging consumers and allowing the companies to pocket illicit profits. It is particularly unacceptable that this illegal behaviour concerned substances which are vital elements for nutrition and essential for normal growth and maintenance of life".

Following the opening of an investigation in May 1999, the European Commission has found that 13 European and non-European companies participated in cartels aimed at eliminating competition in the vitamins A, E, B1, B2, B5, B6, C, D3, Biotin (H), Folic Acid (M), Beta Carotene and carotinoids markets. A striking feature of this complex of infringements was the central role played by Hoffmann-La Roche and BASF, the two main vitamin producers, in

virtually each and every cartel, while other producers were involved in only a limited number of vitamin products.

Fines were imposed on the following eight companies as follows:

F. Hoffmann-La Roche AG (Switzerland):	€ 462 million
BASF AG (Germany):	€ 296.16 million
Aventis SA (France):	€ 5.04 million
Solvay Pharmaceuticals BV (Netherlands):	€ 9.10 million
Merck KgaA (Germany):	€ 9.24 million
Daiichi Pharmaceutical Co Ltd (Japan):	€ 23.4 million
Eisai Co Ltd (Japan):	€ 13.23 million
Takeda Chemical Industries Ltd (Japan):	€ 37.05 million

The five remaining companies, Lonza AG (Germany), Kongo Chemical Co Ltd (Japan), Sumitomo Chemical Co Ltd (Japan), Sumika Fine Chemicals Ltd (Japan) and Tanabe Saiyaku Co Ltd (Japan) were not fined because the cartels in which they were involved – the Vitamin H or Folic Acid cartels - ended five years or more before the Commission opened its investigation. Under European Community law, limitation applies in these circumstances. It also applied to the Vitamin B1 and B6 cartels.

Nature of the infringements

The participants in each of the cartels fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. They also set up a machinery to monitor and enforce their agreements and participated in regular meetings to implement their plans. The *modus operandi* of the different cartels was essentially the same ("target" and "minimum" prices; maintenance of the status quo in market shares and compensation), in particular it included:

- the establishment of formal structure and hierarchy of different levels of management, often with overlapping membership at the most senior levels to ensure the functioning of the cartels;
- the exchange of sales values, volumes of sales and pricing information on a quarterly or monthly basis at regular meetings;
- in the case of the largest cartels, the preparation, agreement and implementation and monitoring of an annual "budget" followed by the adjustment of actual sales achieved so as to comply with the quotas allocated.

The cartel arrangements generally followed this scheme, pioneered in vitamins A and E, with certain variants in other products. Hoffmann-La Roche acted as the agent and representative of the European producers in the meetings and negotiations held in Japan and the Far East. The simultaneous existence of the collusive arrangements in the various vitamins was not a spontaneous or haphazard development, but was conceived and directed by the same persons at the most senior levels of the undertakings concerned.

The Parties

The prime mover and main beneficiary of these schemes was Hoffmann-La Roche, the largest vitamin producer in the world, with some 50% of the overall

market. The cartel arrangements covered its full range of vitamin products. The involvement of some of its most senior executives tends to confirm that the arrangements were part of a strategic plan conceived at the highest levels to control the world market in vitamins by illegal means.

BASF, the next largest vitamin producer worldwide, assumed a paramount role in following Hoffmann-La Roche's lead. Both major European producers effectively formed a common front in conceiving and implementing the arrangements with the Japanese producers concerned. Together, for example, they recruited Eisai to their "Club" in vitamin E.

Takeda, as one of the main world producers of bulk vitamins, was fully involved in the cartel arrangements for vitamins B1, B2, B6, C and Folic Acid. Takeda's involvement in the arrangements in each of these vitamin products was instrumental to Hoffmann-La Roche's designs to secure the illegal coordination of the vitamin markets it was active in, including those in the range of vitamin products it shared with Takeda. The other vitamin producers were all active members of the cartel arrangements in the respective vitamin product markets in which they operated.

The Products

The cartels concerned bulk synthetic substances which belong to the following groups of vitamins and closely related products: A, E, B1, B2, B5, B6, C, D3, Biotin (H), Folic Acid (M), Beta Carotene and carotinoids. Vitamins are vital elements for human and animal nutrition. They are essential for normal growth, development and maintenance of life. There are some 15 major vitamins, each has specific metabolic functions and is therefore not interchangeable with the others. In addition, the various group of vitamins when combined have a complementary synergistic effect. Vitamins are added to both compound animal feeds and human food products. Vitamins for pharmaceutical purposes are marketed to the public as diet supplements in tablet or capsule form. In the cosmetics industry, vitamins are added to skin- and health-care products.

The Commission estimates that the European Economic Area (EEA) market for the products covered in the decision was worth around € 800 million 1998. This includes vitamin E, which in 1998 was worth approximately €250 million in the EEA and vitamin A, which represented some €150 million. Strikingly, European revenues in vitamin C slumped from €250 million in the last year the cartel arrangements were in place (1995) to less than half, €120 million, three years later (1998).

The calculation and destination of the fines

Fines imposed by the Commission as a result of infringements of the European Community's rules on competition are accounted into the general budget of the European Community once they have become definitive. The overall budget is pre-defined and therefore any unscheduled revenue is be deducted from the

contributions made by Member States to the budget, ultimately to the benefit of the European tax payer.

Given the continuity and similarity of method, the Commission has considered it appropriate to treat in one and the same procedure the complex of agreements covering the different vitamins. The Commission therefore covers several infringements in a single decision. When setting fines, the Commission takes into account the gravity of the infringement, its duration, any aggravating or mitigating circumstances as well as the cooperation of a company. It also takes account of a company's market share in the product market concerned and its overall size. The upper limit of any fine is established at 10% of a company's total annual turnover. Companies have three months in which to pay any fine imposed.

The Commission considers that each cartel in this case represents a very serious infringement of competition law. Furthermore, most of the cartel participants committed infringements of long duration, that is, more than five years. The Commission considers that Hoffmann-La Roche and BASF were joint leaders and instigators of the collusive arrangements affecting the common range of vitamin products they produced and therefore their role in the different cartels is an aggravating factor. The combination of the market power that the leading participants held in each of the individual vitamin markets increased their overall ability to implement and maintain the anti-competitive agreements.

Aventis (formerly Rhône-Poulenc) was granted full immunity in regard to its participation in the cartels in vitamins A and E because it was the first company to co-operate with the Commission and provided decisive evidence in the case of these two products. This is the first time that the Commission has granted a 100% reduction of a fine under the terms of the Leniency Notice. A fine was, however, imposed on Aventis for its passive participation in the vitamin D3 infringement, on which it provided no information to the Commission. According to the Commission, the fact that it had granted, for the first time, a total exemption of fines to a company illustrated its willingness to grant companies actively co-operating at the earliest stage a unique opportunity to escape the full consequences of infringement. Both Hoffmann La Roche and BASF also co-operated with the Commission at an early stage of the investigation providing crucial information on all of the vitamins cartels they have been involved in. The Commission granted a 50 percent reduction of the fines to each company. All other companies on which fines have been imposed have co-operated with the Commission during the course of its investigation and their corresponding fines have been reduced in accordance with the level of their co-operation.

In 1999 the main parties in the cartels covered in the Commission's decision pleaded guilty to similar anti-competitive conduct in the US and paid heavy fines, including $500 million for Hoffmann La Roche, $225 million for BASF and $72 million for Takeda. ■

MARKET ACCESS (GAS PIPELINES) THE MARATHON CASE

Subject: Market access

Industry: Gas pipelines
(possible implications for other industries)

Parties: Marathon (Norway)
Thyssengas GmbH

Source: Commission Statement IP/01/1641, dated 23 November 2001

(Note. This case can be read in two ways, which may be important for other industries. On the one hand, it can be regarded as a further step by the Commission to enable third parties to benefit from a system or infrastructure developed by the original manufacturer; almost as a kind of compulsory licence to third parties. There are many precedents for this type of action, not least the agreement reached between the Commission and IBM more than ten years ago. On the other hand, it is arguable, on the basis of the present case, that the justification for the Commission's insistence on access depends entirely on specific legislation introducing a legally binding third party access regime. In this case, the legislation takes the form of a Directive, specifically designed to liberalise the gas distribution market. It may even be said that this was not a competition case at all but a case involving the enforcement of the terms of an existing law: see the last paragraph of the Commission's statement)

The Commission has decided to close the Marathon case as regards Thyssengas GmbH following the German gas company's commitment to grant improved access to its pipeline network. The Commission's investigation, which relates to the alleged joint refusal to grant Norwegian gas producer Marathon access to continental European gas pipelines in the nineties, will continue as far as other European companies are concerned. "Refusal to grant third-party access to gas pipelines makes a farce of the European internal market and constitutes a violation of competition rules", Commissioner Mario Monti said, adding: "I hope that the commitments offered by Thyssengas will quickly become industry practice in Germany and also help improve the situation in certain other Member States, to the benefit of German and European industrial users as well as traders and ultimately all final consumers".

Refusal to grant access to pipeline

The Marathon case concerns the alleged joint refusal to grant access to continental European gas pipelines by a group of European gas companies, amongst them Thyssengas, a joint venture between German power company RWE and British-Dutch energy company Shell. The case was triggered by a complaint from the Norwegian subsidiary of US oil and gas producer Marathon. The complaint was withdrawn after Marathon and the European companies

reached a commercial settlement, but the Commission took the view that it was in the Community interest to continue the investigation.

Proposed undertakings

Of the companies involved in this case, Thyssengas - the smallest of the European operators - has put forward substantial proposals aimed at rendering access to its network more effective. The undertakings by Thyssengas relate to five areas:
(1) balancing,
(2) trade in capacity rights,
(3) congestion management,
(4) transparency and
(5) handling of access requests.

As regards balancing, Thyssengas will help shippers to avoid high imbalancing charges by introducing a free-of-charge online balancing system avoiding imbalances of nominated and actual deliveries. Thyssengas will also offer a so-called "extended balancing regime" increasing shippers' flexibilitiy from 15 to 25%. Additionally shippers may compensate imbalances within the following month either in natura (for example, extra deliveries of gas) or by swapping imbalances with other customers or by paying for the imbalance.

Thyssengas's commitments as regards the trade in capacity rights will mark a first step towards the development of a secondary market, in which capacity holders can trade capacity rights acquired from the pipeline owners. In this respect it is also important to note that Thyssengas is willing to offer transport contracts with a short duration - down to one day - and will allow several shippers to bundle transport contracts, thereby reducing costs.

With respect to congestion management, Thyssengas undertakes to introduce a "use it or lose it" principle for capacity reservations of its own gas trading branch. This commitment means that third parties are entitled to use, upon request, unused transport capacity originally booked by Thyssengas' trading branch in a valid manner. Thyssengas also undertakes to offer interruptible contracts, which generally lead to a continuous transport, unless an interrupting event occurs, for example a drop of temperature.

To improve the transparency of its access regime Thyssengas will publish a detailed map on its internet site showing the available capacity at the main entry points of Thyssengas's pipeline system. Similarly Thyssengas will create a computer system allowing shippers to obtain information on Thyssengas's transmission tariffs in a simplified manner.

Finally, Thyssengas has undertaken to improve its handling of access requests. Thus the company will develop standard forms and contracts and will limit the reasons justifying refusals to grant access to its pipelines. This will increase planning security and reduce transaction costs and prevent cases of refusal to grant access to the network.

Thyssengas's undertakings will come into force on 1 December 2001 with the exception of the standard contracts, the computer system showing available capacity and the tariff system, which will follow shortly afterwards. They will remain in force until July 2005. During this period the undertakings will be monitored by a trustee, who will report regularly to the Commission. For further details, interested parties will be able to consult a non-confidential version of the commitments on Thyssengas's internet site (www.thyssengas.de, click on "Unternehmen", "Fakten", "Zusage") as from 28 November 2001.

The Commission welcomes the undertakings made by Thyssengas as they will contribute to a better functioning of the gas transmission market in Germany, even though the undertakings are based on the model of negotiated Third Party Access. In this respect it should be noted that the Commission is of the view that the mandatory introduction of a "regulated" access regime is warranted at this stage of the liberalisation process as is apparent from the Commission's proposal for the completion of the energy markets presented in March 2001.

Commenting on the case, Commissioner Monti also said: "The Marathon case clearly shows that the Commission is determined to render gas liberalisation effective and a success in Europe. The Commission will deal with all major restrictions of competition irrespective of whether the companies are located inside or outside the European Union".

Legal requirements on access

Third-party access is required by law. The European Gas Directive of 1998 provides for a so-called Third Party Access regime, that is, a regime allowing third parties to use the existing gas pipelines. Access to the existing pipelines is essential for competition to succeed on the European gas market, as gas consumers can normally be reached only by means of these pipelines. While the Gas Directive had to be implemented into national law by August 2000, in practice there are still significant imperfections rendering the Third Party Access regimes and gas-to-gas competition less effective than expected. ■

A case in the Court of Justice of the European Communities (Case C-221/99, *Conte v Rossi*), in which judgment was given on 29 November 2001, failed to provide the excitement it could easily have provoked. It concerned architects' fees; and the national court referring it to Luxembourg for a preliminary ruling asked various questions about the possible status of architects as "undertakings" and whether the architects' fee scales were contrary to the rules on competition. But the Court did not need to answer these questions, as the fee scales permitted architects to set their own rates. The Court therefore simply ruled that Articles 10 and 81 of the Treaty did not preclude national legislation which provided that the members of a profession might set at their discretion the fees for certain services they performed.

Cooperation Agreements and the Environment

In a series of reports last year, we discussed in some detail the Commission's guidelines on horizontal agreements. Among these was a report on the treatment of horizontal agreements which, while restricting competition, might nevertheless be justified on the grounds of environmental considerations. The recent decision in the CECED case illustrates the application of the guidelines to a case in which these considerations were paramount.

The Commission had examined two agreements notified by the European Committee of Domestic Equipment Manufacturers (CECED). Nearly all European manufacturers of dishwashers and domestic electric water heaters are party to the agreements, which are designed to improve the energy efficiency of appliances marketed in the European Union. To achieve this goal, manufacturers have undertaken, among other things, to stop producing high-energy consumption appliances. After examining the agreements, the Commission has concluded that the energy savings and environmental benefits outweigh the restrictions on competition. The Directorate-General for Competition has therefore closed its examination of these cases.

The two agreements notified on 20 June 2000 by the CECED aimed at introducing special additional measures to improve the energy efficiency of dishwashers and domestic electric water heaters sold in the European Union. These separate legal agreements were concluded under the auspices of the CECED, with the participation of most European manufacturers of dishwashers and electric water heaters. Under the agreements, the parties undertake to stop producing and importing into the Union high-electricity consumption appliances.

The implementation of the agreements will be monitored, with regular reports being presented to the Commission and made accessible to the public. The agreements were analysed in the light of the principles laid down in the guidelines on horizontal cooperation and in the Commission's favourable decision on similar CECED agreements for washing machines. In both cases the agreements have an appreciable effect on competition, so that the Commission had to assess whether they had substantial technical benefits and advantages for consumers. Objectively, the new electric water heaters and dishwashers will be more efficient and enable consumers to reduce their energy bills. Moreover, lower electricity consumption will indirectly help the Union achieve its environmental objectives.

In general, the Commission tends to favour cooperation agreements. Where they have positive environmental merits, they are still more likely to gain approval.

Source: Commission Statement IP/01/1659, dated 26 November 2001

STATE AIDS (BROADCASTING): COMMISSION GUIDELINES

Subject: State aids

Industry: Broadcasting; public service broadcasting

Source: Commission Statement IP/01/1429, dated 17 October 2001; also the *Communication on the application of State Aid rules to Public Service Broadcasting*, which will be published on the Internet pages of the Commission's Directorate General for Competition as soon as the legal and linguistic revisions of the text have been completed (http://europa.eu.int/comm/competition).

(Note. One of the odd features of the State Aid regime of the European Communities is that, while it is quite properly designed to protect competition from unfair subsidy, it is full of exceptions. One of the most recent exceptions was included in the Treaty amending the Treaty on European Union, often known as the Amsterdam Treaty, which came into force in May, 1999. This Treaty has a Protocol designed to keep public service broadcasting largely outside the rules on State Aids, though it is worded in such a way as to create some uncertainty about how it should be applied. The Commission's initiative in producing guidelines is to be applauded. As the last paragraph of the Commission's statement shows, there are several pending cases in this field; and some of them have arisen precisely because competing broadcasters, who do not receive state aids themselves, have complained about the resulting distortions of competition.)

The Commission has adopted in principle a Communication which explains how State aid rules are applied to the funding of public service broadcasters. The Communication, which is still to be formally adopted in the Community languages, makes it clear that Member States are in principle free to define the extent of the public service and the way it is financed and organised, according to their preferences, history and needs. The Commission, however, calls for transparency on these aspects in order to assess the proportionality of State funding and to control possible abusive practices. Member States are asked whenever this is lacking to establish a precise definition of the public service remit, to entrust it formally to one or more operators through an official act and to have in place an appropriate authority monitoring its implementation. The Commission will intervene in cases where a distortion of competition arising from the aid cannot be justified by reference to the need both to perform the public service as defined by the Member State and to provide for its funding.

The "Amsterdam Protocol"

The Commission is currently investigating several complaints from private operators concerning State financing of public broadcasters. To take into account recent developments (such as the so-called Amsterdam Protocol on public service

broadcasting, the new Commission Communication on services of general interest and the amended Transparency Directive), treat consistently the various cases and provide guidance to public authorities and operators, the Commission has decided to draft a Communication on the application of State aid rules to public service broadcasting.

The Communication adopts the following approach. The Commission recognises the particular role of public service broadcasting as acknowledged by the Protocol to the Amsterdam Treaty in the promotion of democratic, social and cultural needs of each society. The Commission is responsible for the control of State aids. Public broadcasting can be defined as a service of general interest, but its funding by state resources in general remains a form of State aid. This means that, while Member States are responsible for the definition and choice of methods of funding the public service, the Commission continues to have a duty to check abusive practices and possible cases of over-compensation.

Member States are free to define a broad programme spectrum as a public service remit. In other words, the public remit can be defined as providing the public with a balanced and varied programming which also includes, for instance, entertainment and sport. This means that no objections will be raised to the nature of the programmes included in the public remit. The definition of the public service remit, however, could not extend to activities that could not be reasonably considered to meet in the wording of the Protocol the "democratic, social and cultural needs of each society".

Proposed conditions for compliance

The Commission will seek compliance with the following three conditions:
- the establishment of a clear and precise definition of public service in broadcasting (whatever its content);
- the formal authorization, by means of an official act, of one or more undertakings to carry out the public service mission. (It is also necessary that the public service should be actually supplied in accordance with the formal authorization.. To this end, it is desirable for a body or authority appointed by the Member State and independent of the authorized undertaking(s) to monitor its performance; and
- the limitation of public funding to what is necessary for the performance of the public service mission (the principle of proportionality).

These conditions are based on Article 86 of the EC Treaty, which states that the application of the competition rules of the Treaty - in this case, the ban on State aid, - may be limited if it obstructed the performance of the public service. This approach is fully consistent with the provisions of the Amsterdam Protocol , which refers to the "public service remit as conferred, defined and organised by each Member State" and provides an exception to Treaty rules for funding public service broadcasting "in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit...and ...does not affect trading conditions and competition in the Community to an extent which would

be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account").

In carrying out the proportionality test, the Commission will consider whether any distortion of competition arising from state aid can or cannot be justified by reference to the need both to perform the public service as defined by the Member State and to provide for its funding. When necessary, the Commission will also take action in the light of other Treaty provisions.

The question of transparency

Finally, the Communication recalls that public service broadcasters, in so far as they are beneficiaries of State aid and are also active in non-public service activities, are subject to the transparency requirements indicated in the so-called "Transparency Directive". The Directive imposes the separation of accounts between public service and non-public service activities: the present Communication specifies the criteria to be followed by broadcasting operators.

The Commission has opened formal State aid procedures regarding public service broadcasting in Italy and France and will soon decide on cases concerning Spain and Portugal. (The circumstances of the Portuguese case are set out in the next report.) The Commission also received notifications of aid from the United Kingdom and from Belgium and is examining complaints concerning the funding of public broadcasting in Greece, Ireland, Austria, Denmark and Sweden. ■

Formula One: the FIA Case

The Commission has informed the four-wheel motor sports regulator, the Fédération Internationale d'Automobile (FIA), and the Formula One companies that it has closed the various anti-trust investigations into certain regulations and commercial arrangements involving that sport. The investigation of the FIA regulations and commercial agreements relating to the FIA Formula One Championship came about following voluntary notifications in 1994 and 1997 requesting clearance from European competition rules. The Commission objected to certain of the rules in 1999 on the grounds that FIA had abused its power by putting unnecessary restrictions on promoters, circuit owners, vehicle manufacturers and drivers as well as to certain provisions in the commercial agreements with television broadcasters. However, the FIA agreed to modify its rules to ensure that its role would be limited to that of a sports regulator, with no commercial conflicts of interest; its rules would not be used to prevent or impede new competitions unless justified on grounds related to the safe, fair or orderly conduct of motor sport; and it has sold all its rights in the FIA Formula One World Championship.

Source: Commission Statement IP/01/1523, dated 30 October 2001

STATE AIDS (BROADCASTING): THE RTP CASE

Subject: State aids

Industry: Broadcasting; public service broadcasting

Source: Commission Statement IP/01/1573, dated 13 November 2001

(Note. This report illustrates some of the points made in the preceding report, on the Commission's guidelines for State Aids to public service broadcasting. It is a case in which the independent broadcasters have complained about the special treatment given to the public service broadcaster RTP and is likely to turn on the question of proportionality: that is, whether the amount of state aid granted to RTP is in a reasonable proportion to the special needs of public service broadcasting. The Commission's action in this case follows a critical judgment by the Court of First Instance.)

The Commission has decided to open the formal State aid investigation procedure of Article 88(2) of the EC Treaty on a number of ad hoc measures granted in favour of the Portuguese public broadcaster RTP. The investigation does not address the aid granted to RTP in the form of annual compensation indemnities, as the Commission is not yet in a position to conclude whether the indemnities can be considered as "existing aid" within the meaning of Article 88(1) of the Treaty. As to the ad hoc measures specified below, the Commission has opened the investigation as it has doubts whether or not the Portuguese State over-compensated the reimbursable public service costs of RTP in 1992-1998 by an amount of € 83.6 million.

Complaints by private broadcaster

The Commission received three complaints (in 1993, 1996 and 1997) from the private Portuguese broadcaster Sociedade Independente de Comunicação SA (SIC), alleging that state aid incompatible with the common market had been granted to the public broadcaster Radio Televisão Portuguesa SA (RTP) in the form of annual compensation payments and ad hoc measures. On 7 November 1996 the Commission took a decision on the first and part of the second complaint and concluded that no state aid was present. Following an appeal by SIC, on 10 May 2000 the Court or First Instance annulled the Commission's decision (Case T- 46/97). According to the Court, the Commission was not in a position, at the time when the initial examination was concluded, to establish whether or not the measures constituted state aid and that it was therefore under a duty to initiate the formal investigation procedure.

In view of the judgment, the Commission has now decided to initiate the formal investigation procedure on tax exemptions, payment facilities for use of the television broadcasting network and the rescheduling of debt arising from failure to pay social security contributions, together with waiver of interest for late

payment. The Commission has also decided to initiate a formal State aid probe on the ad hoc measures indicated by SIC in their complaint of 1996 concerning an increase in social capital in 1994, a bond issue accompanied by a State guarantee, a protocol to support cinema and a restructuring plan for 1996-2000. In addition, the Commission will look into capital increases in 1994-1997, as well as loans granted in 1997 and 1998, after a preliminary examination of the information supplied by the Portuguese authorities on the third complaint brought forward by SIC in 1997.

At the present stage the compensation measures granted by the Portuguese authorities seem to be disproportionate to the public service costs as calculated by RTP in their public service reports. The Commission will publish a summary of the decision in the Official Journal of the European Communities. Portugal and any interested parties will have one month to submit their comments.

Public Broadcasting in Portugal

RTP was incorporated in 1955. It launched its first television channel in March 1957 and its second in December 1968. Under the 1976 Constitution television fell under a state monopoly and the Constitution imposed upon the State the responsibility to ensure the existence and operation of a public television service. In 1989 private operators were given access to the television sector. While private Portuguese television channels are financed exclusively by advertising revenues, RTP receives in addition to such revenues public financing, granted annually in connection with its public service obligations. The public service obligations of RTP are laid down in subsequent laws and contracts. Law 58/90 of 7 September 1990 confirms the basic regime for both public and private television broadcasting and grants the public service concession to RTP for a period of 15 years. Law 21/92 imposes a concession contract to be concluded between the State and RTP. On 17 March 1993 a Public Service Contract was signed between the Portuguese government and RTP. On 31 December 1996 a new Public Service Contract was concluded. ■

French Tax Relief and the ECSC Treaty

A reminder that the ECSC Treaty is still alive and has its own competition rules, five years older that the rules of competition under the EC Treaty, is to be found in a recent decision by the Commission that a French scheme for granting tax aid in the form of tax exemptions for setting up branches abroad was incompatible with the ECSC Treaty. None of the exemptions provided for in the Steel Aid Code (that is, aid for research and development, for environmental protection or for closures) was applicable.

Source: Commission Statement IP/01/1627, dated 21 November 2001

ABUSE OF DOMINANT POSITION (TOBACCO): THE AAMS CASE

Subject: Abuse of dominant position
Distribution arrangements
Monopoly
Relevant market
Fines

Industry: Tobacco; cigarettes
(Some implications for other industries)

Parties: Amministrazione Autonoma dei Monopoli di Stato (AAMS)
Commission of the European Communities
Rothmans International Europe BV (intervener)
JT International BV (intervener)

Source: Judgment of the Court of First Instance, dated 22 November 2001 in Case T-139/98 (Amministrazione Autonoma dei Monopoli di Stato v Commission of the European Communities)

(Note. This case illustrates the difference, in the competition law of the European Communities, between "monopoly" and "abuse of a dominant position". The state tobacco monopoly in Italy is underpinned by Italian law; it contravenes the Community's rules on competition only when it enjoys a dominant position in a given geographical and product market and abuses that position. The present case is interesting for its careful discussion of the nature of the abuses. As to the level of the fine imposed by the Commission, the applicant, AAMS, failed to secure a reduction and the intervener, JV International, an increase.)

Background

1. The present action seeks annulment of Commission Decision 98/538/EC of 17 June 1998 ... (hereinafter the contested decision). Amministrazione Autonoma dei Monopoli di Stato (AAMS) is a body forming part of the financial administration of the Italian State which, in particular, engages in the production, import, export and wholesale distribution of manufactured tobaccos. AAMS's activities and the way it is organised are set out in, and regulated by, Italian Royal Decree-Law No 2258 of 8 December 1927.

[Paras 2 and 3 note that the Commission's Decision arose from complaints by certain companies, including the interveners in the present case.]

4. The Commission found that Article 45 of Law No 907 of 17 July 1942 (GURI No 199 of 28 May 1942) gave AAMS the exclusive right to produce manufactured tobacco on national territory. It found that, at the time when the contested decision was adopted, AAMS was producing not only the cigarette brands which it owned but also brands owned by Philip Morris. It also noted that

over several decades, AAMS had concluded licensing agreements with Philip Morris and that in 1995 AAMS manufactured some 54 million kilograms of cigarettes, of which 40 million kilograms were its own brand and 14 million the branded of Philip Morris (recital 2 of the preamble to the contested decision).

5. The Commission found that the importation into Italy of cigarettes from other Member States and their wholesale distribution were liberalised by [the Italian Law of 1975] and that, consequently, imports were allowed through distribution warehouses other than those of AAMS. It observed that, despite that liberalisation, all Community cigarettes continued to be imported into Italy by AAMS, which also handled their wholesale distribution on the basis of agreements concluded by it with foreign manufacturers (hereinafter foreign firms) wishing to sell their cigarettes in Italy.

[Para 6 describes the way in which Italian law regulates the distribution of articles subject to monopoly, including cigarettes]

7. The Commission made clear that the inspectorates, the warehouses and the warehouse outlets were part of AAMS, that private individuals were responsible for the management of the magazzini and that AAMS was not present in the market for retail sales of cigarettes. It added that retail sales of all cigarettes in Italy were subject to a monopoly, that the management of tobacco outlets was regulated by decree and, in particular, by instructions given by AAMS and that, since 1 January 1993, foreign firms had been able to entrust the wholesale distribution of their cigarettes to commercial traders with 'bonded warehouses used to market other products liable to excise duty.

8. In order to determine whether AAMS held a dominant position within the meaning of Article 86 of the Treaty, the Commission identified three markets for products and services, characterised by a high degree of interdependence, so that any action taken in one of them could have an appreciable effect on the others. First, there was the market for cigarettes produced in Italy or in other Member States for distribution and sale on Italian territory (hereinafter the cigarette market). Second, there was the market for services relating to the distribution and wholesale of the abovementioned cigarettes (hereinafter the wholesale distribution market). Third, there was the market for services relating to the retailing of the cigarettes (hereinafter 'the retail distribution market).

9. The Commission went on to hold that, from a geographic point of view, those markets were coterminous with Italian territory for the following reasons:
(a) the preferences of Italian smokers were different from those of smokers in other Member States;
(b) retail prices for cigarettes differed considerably from those in other Member States;
(c) in order to meet the requirements of the prevailing Italian regulations, all foreign manufacturers wishing to sell their products in Italy were required to label their cigarette packages with appropriate warnings (such as "Tobacco seriously damages your health") in Italian;
(d) there were no parallel imports of cigarettes into Italy.

10. On the basis of those various factors, the Commission concluded that the relevant markets for the purposes of the instant case were: the Italian market for cigarettes, the Italian wholesale distribution market and the Italian retail distribution market.

11. The Commission went on to assess AAMS's position on those markets. First, as regards the Italian cigarette market, it found that it consisted of a duopoly made up of Philip Morris and AAMS (which together held some 94% of the market), with other firms having only a marginal share of the market.

12. Second, the Commission found that AAMS held a dominant position on the Italian wholesale distribution market. Despite the fact that the import and wholesale distribution of cigarettes had been liberalised, manufacturers preferred to continue to use the AAMS network to distribute their own products in Italy. According to the Commission, foreign firms had considerable financial difficulty in setting up a sufficiently extensive independent wholesale distribution network. The Commission found, in that connection, that foreign firms had systematically chosen to use AAMS for the distribution of their cigarettes in Italy. The Commission also described it as an unavoidable trading partner for foreign firms, since it had a de facto monopoly. Furthermore, it was not possible for those undertakings to entrust wholesale distribution of their cigarettes to traders with bonded warehouses, since the latter would have encountered insurmountable financial obstacles. First, Italian regulations required manufactured tobaccos to be kept on separate premises from other goods subject to excise duty and that involved the parties concerned in substantial investment. Second, cigarette retailers were very different from the customers for other excise goods, so that it would have been necessary to set up a new transport and distribution structure, which would not have brought about any operational synergies with the existing distribution structure. Third, the market share held by foreign manufacturers (excluding Philip Morris, which was tied to AAMS by licensing agreements) was extremely small (about 7%) and hence did not provide a sufficient financial incentive for firms wishing to compete against AAMS in the wholesale distribution of tobacco. Further, it would not have been in the interests of retailers to obtain supplies from a different wholesaler if the latter could supply them only with a small proportion of the cigarettes they required.

13. In the third place, the Commission found that AAMS was not present on the market for retail sales of cigarettes.

14. The Commission found that AAMS had abused its dominant position on the market for the wholesale distribution of cigarettes. It identified two kinds of conduct on the part of AAMS:
- the conclusion of standard distribution agreements with certain cigarette manufacturers, under which the latter made AAMS responsible for the introduction and wholesale distribution on Italian territory of cigarettes which they manufactured in another Member State;
- certain unilateral actions on the part of AAMS concerning cigarettes manufactured in another Member State and subsequently brought into Italy.

[In paras 15 to 21, the Court describes the Commission's objections to various features of the distribution agreement and, in particular, to he clause relating to the time-limit for the introduction of new cigarette brands onto the market; the clause relating to the maximum quantities of new cigarette brands allowed onto the market; the clause relating to the maximum monthly quantities of cigarettes allowed on the market; the clause relating to increases in the monthly maximum quantities of cigarettes allowed on the market; and clauses relating to the packaging of cigarettes and to inspections.]

Abusive practices

22. The Commission found that AAMS had on several occasions refused to accede to requests from foreign firms under Article 2.5 of the distribution agreement, asking it to increase the maximum quantities of imported cigarettes allowed on the market, and that the effect of that conduct had been to prevent the firms from placing on the Italian market the volume of cigarettes that they judged opportune and hence to weaken their competitiveness.

23. The Commission also found that AAMS inspectors who supervised the activities of the magazzini took action which was required neither by the legislation in force nor by any term of the agreement and which was aimed at promoting domestic cigarettes and limiting sales of imported cigarettes. The restrictive effect of such conduct was particularly severe in the cases where AAMS had required magazzini to comply with sales quotas applicable both to AAMS cigarettes and to foreign cigarettes. Further, AAMS inspectors took action with regard to retailers which was required neither by the legislation in force nor by any contractual provision and which was aimed at promoting AAMS cigarettes and limiting sales of imported cigarettes (recitals 48 to 53 in the preamble to the contested decision).

24. On the basis of those findings, the Commission adopted the contested decision, the operative part of which reads as follows:

Article 1
Taking advantage of its dominant position on the Italian market for the wholesale distribution of cigarettes, [AAMS] has engaged in improper behaviour in order to protect its position on the Italian market for cigarettes, in breach of Article 86 of the EC Treaty, through the use of clauses compulsorily inserted in distribution contracts as set out in Article 2, and through unilateral practices as set out in Article 3.

Article 2
The compulsory clauses improperly inserted by AAMS in the distribution contracts are as follows:
(a) the clause relating to the time limit for the introduction of new cigarette brands onto the market (third paragraph of Article 1);
(b) the clause relating to the maximum quantities of cigarettes allowed on the market (Appendix B, fifth and sixth paragraph);
(c) the clause relating to the maximum monthly quantities of cigarettes allowed on the market (Appendix B, second paragraph);
(d) the clause relating to increases in the monthly quantities of cigarettes allowed on the market (fifth and sixth paragraph of Article 2);

(e) the clause relating to the printing of Monital on the cigarettes (Article 4);
(f) the clause relating to inspection and analysis of the cigarettes (Article 5).
Article 3
The improper unilateral practices pursued by AAMS are as follows:
(a) refusal to authorise increases in the monthly quantities of foreign cigarette imports requested by foreign undertakings in conformity with the distribution contracts;
(b) behaviour with regard to magazzini and retailers, designed to promote national cigarettes and to limit sales of foreign cigarettes.

Article 4
AAMS shall forthwith put an end to the infringements referred to in Articles 2 and 3, in so far as it has not already done so. In particular, AAMS shall amend the clauses of the distribution contracts referred to in Article 2 which are still in force, in such a way as to eliminate the abuses found by this Decision to have occurred. The new distribution contracts shall be submitted to the Commission.

Article 5
AAMS shall refrain from continuing or repeating the behaviour referred to in Articles 2 and 3 and from all activities having an equivalent effect.
To that end, AAMS shall, for a period of three years from the date of notification of this Decision, forward to the Commission within two months of the end of each calendar year, a report on the preceding year describing the quantities of foreign cigarettes distributed by AAMS as well as any refusal (total or partial) to distribute such cigarettes.

Article 6
A fine of ECU 6 000 000 is hereby imposed on AAMS in respect of the abuses referred to in Articles 2 and 3...

[Paras 25 to 37 set out the procedure followed after the Commission had issued its Decision; the forms of order sought by the parties; and the parties' arguments on the geographical market, on which the Court found as follows.]

38. First of all, the contested decision defines the relevant product and services markets as the markets for cigarettes manufactured in Italy or in other Member States and for services relating to wholesale distribution and retail sale of those cigarettes. The applicant does not dispute the validity of those definitions.

39. Turning next to the relevant geographical market, it is settled case-law that that market must be defined so as to determine whether the undertaking concerned is in a dominant position in the Community or a substantial part of it. The definition of the geographical market, as that of the product market, accordingly calls for an economic assessment. The geographical market can thus be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns specifically the relevant products. It is not at all necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are the same or sufficiently homogeneous (Case 27/76, *United Brands v Commission*, paragraphs 44 and 53; Case T-83/91, *Tetra Pak v Commission*, paragraph 91). Furthermore, the market may be confined to a single Member State (Case 322/81, *Michelin v Commission*, paragraph 28).

40. According to recital 28 in the preamble to the contested decision, from a geographic point of view, the three markets for the products and services concerned are coterminous with Italian territory. It is apparent both from the contested decision and from the documents before the Court that AAMS supplied the services provided for by the distribution agreement solely in Italy and that it was present neither as a manufacturer nor as a distributor of cigarettes on the markets of the other Member States. Furthermore, AAMS does not dispute that, at the time when the contested decision was adopted, it was the only trader present on the Italian market for the wholesale distribution of cigarettes and that it had for many years enjoyed a de facto monopoly on that market. Those facts are sufficient on their own to support the Commission's analysis in the contested decision concerning the definition of the geographical market and to rebut AAMS's arguments in that regard.

41. But in addition, the definition of the geographical market employed in the contested decision is supported by various other undisputed facts which are apparent from the decision and which illustrate the special nature of the market. Those facts include in particular:
- the existence, in Italy, of legislation governing all operations concerning cigarettes and, in particular, the production, import, storage, labelling, wholesale distribution and retail sale of cigarettes;
- considerable differences in retail sale prices between Italy and other Member States;
- the lack of parallel imports of cigarettes into Italy;
- the fact that Italian consumers have particular preferences;
- the fact that AAMS brands of cigarettes had a very large market share in Italy, while they were virtually non-existent in the other Member States;
- the fact that Philip Morris cigarette brands had a higher market share in Italy than in the other Member States.

42. The Court finds, in the light of the foregoing, that the Commission could rightly conclude that the relevant markets defined in the contested decision are coterminous with Italian territory. As to the remainder, it should be pointed out that, as the Commission argues, the fact that Italian legislation regarding tobacco labelling has been imposed by a Community directive in no way precludes that legislation from being taken into consideration as a determining factor in the definition of the relevant geographical market.

43. It follows that the first part of the plea must be rejected.

The second part of the plea: AAMS's dominant position on the Italian market for the wholesale distribution of cigarettes

[Paras 44 to 50 set out the arguments of the parties; the Court found as follows]

51. It is settled case-law that very large market shares are in themselves and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands

for - without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share - is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (*Hoffman-La Roche*, paragraph 41). Moreover, a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (*United Brands*, paragraph 65).

52. In the present case, AAMS does not dispute either that its share of the Italian market for the wholesale distribution of cigarettes was 100% or that it preserved that share in its entirety, despite the fact that at law foreign firms were able either to set up their own distribution network or to entrust the wholesale distribution of their cigarettes to traders operating bonded warehouses. Further, AAMS's argument alleging that the creation by foreign firms of their own distribution networks could be justified from an economic point of view cannot be accepted. The financial difficulties that foreign firms (other than Philip Morris), whose total share of the Italian cigarette market is less than 10%, would have encountered when setting up an independent distribution network and AAMS's ability to decline the requests of those firms for amendments to be made to the distribution agreement are factors which may properly be taken into account in a finding of a dominant position. Furthermore, AAMS did not deny at the hearing that retailers are in any event obliged de facto to obtain their supplies from AAMS's warehouse outlets.

53. It follows that the Commission did not make a manifest error of assessment when it found that AAMS held a dominant position on the Italian market for the wholesale distribution of cigarettes.

54. Consequently, the second part of the plea must be rejected.

[Para 55 briefly dismisses the third part of the plea, alleging errors in assessing the restrictive effects of certain clauses of the distribution agreement. Paras 56 to 72, on the clauses relating to the maximum quantities of new cigarette brands, to the maximum monthly quantities of cigarettes allowed on the market and to increases in the monthly quantities of cigarettes allowed on the market set out the arguments of the parties; the Court found as follows.]

73. At the outset, it must be pointed out that AAMS has objected only in general terms to the Commission's analysis of the three clauses mentioned above, save for its arguments relating to the payment of an additional fee prescribed by Article 2.5 of the distribution agreement.

74. In those circumstances, it is necessary to consider whether the applicant has established that the Commission has made manifest errors of assessment in

finding that the inclusion in the agreement of the three clauses in question constituted an abuse of a dominant position.

75. First, AAMS's argument concerning its refusal to negotiate specific clauses with the various foreign firms is not relevant. In the contested decision the Commission did not object to the use of a standard distribution agreement. It merely complained that AAMS had insisted on the inclusion in the agreement of the six specific clauses outlined in Article 2 of the contested decision.

76. Second, as regards AAMS's arguments concerning the application to the present case of the Court's reasoning in *Bronner*, the Court would point out that that judgment is not relevant here. The Commission does not accuse AAMS of refusing to grant certain foreign firms access to its distribution network but of making access to the network conditional upon the firms accepting unfair terms in the distribution agreement.

77. Nor can AAMS's arguments relating to its storage and distribution capacity be accepted. First, AAMS does not make any mention in its pleadings of having encountered real difficulties in that regard. Second, AAMS does not dispute that it distributed 102 million kilograms of cigarettes in 1983, that 90 million kilograms of cigarettes were lawfully sold in Italy in 1995 and that it did not reduce its storage capacity in the meantime. Finally AAMS did not produce, before the present action was commenced, any figures concerning its actual storage capacity or any concrete examples of difficulties with storage. It is quite apparent from the documents before the Court that, during the administrative procedure, AAMS did not avail itself of the opportunity to adduce any firm evidence in that regard...

78. AAMS argues that the obligation laid down in Article 2.5 of the standard distribution agreement to pay an additional fee where the number of cigarettes placed on the market is increased is prompted by the need to avoid certain financial risks. Suffice it to say, at this stage, that AAMS merely reproduces the arguments that it put forward during the administrative procedure without adducing any proof at all that the Commission made a manifest error of assessment at the time when the contested decision was adopted.

79. In any event, while it is the case that the fact that an undertaking has a dominant position on a market does not deprive it of its entitlement to protect its own commercial interests when they are attacked and while such an undertaking must be granted the right to take such reasonable steps as it deems appropriate to protect its interests, AAMS has not proved to the requisite legal standard that the clauses mentioned above were necessary to protect its commercial interests and to avoid both the risk of its distribution network becoming overloaded and the financial risk of cigarettes not ordered by retailers remaining in storage for lengthy periods.

80. In the light of all the foregoing factors, the Court holds that the Commission was fully entitled to find that AAMS's insistence on including the clauses in

question in the distribution agreement amounted to an abuse of a dominant position within the meaning of Article 86 of the Treaty.

[Paras 81 and 82 set out the arguments of the parties on the clause relating to the inspection of cigarettes; in para 83, the Court noted that AAMS and the Commission disagreed as to which provisions of Italian legislation were relevant in this case and found that the inspections were disproportionate and needless.]

84. It follows from the foregoing that AAMS has not adduced any persuasive evidence capable of establishing that the Commission's analysis of the clause referred to in Article 2(f) of the contested decision is vitiated by a manifest error of assessment.

85. It follows that the third part of the plea must be rejected in its entirety.

The fourth part of the plea: alleged error of assessment as regards improper unilateral practices

[Paras 86 to 91 set out the arguments of the parties; the Court found as follows.]

92. In the contested decision the Commission states that AAMS, taking advantage of its dominant position on the Italian market for the wholesale distribution of cigarettes, adopted various improper courses of conduct, which were intended to protect and strengthen its position on the Italian cigarette market.

93. First, AAMS's arguments relating to its refusal to approve increases in the maximum monthly quantities of cigarettes allowed on the market cannot be accepted. AAMS does not deny that it refused on several occasions, particularly in 1995 and 1996, to allow foreign firms to increase the maximum amount of cigarettes allowed on the market, as they had asked to do under Article 2.5 of the distribution agreement. It merely tries to play down the significance of those unjustified refusals by pointing out that the Commission found only a few cases over a limited period of time.

94. Nor can AAMS's arguments concerning the conduct of its inspectors towards the magazzini and retailers be accepted. The Court holds that the Commission has shown to the requisite legal standard that the effect of AAMS's conduct was to prevent foreign firms from placing on the Italian market the quantities of cigarettes that they judged to be appropriate and that it weakened their competitiveness.

95. In recital 18 in the preamble to the contested decision, the Commission listed eight examples of actions taken by AAMS inspectors with regard to the magazzini, which it alleges demonstrate that AAMS intended to favour national cigarettes and restrict sales of imported cigarettes. It is appropriate to point out that AAMS raises objections to the relevance of the facts set out in the first three examples described in recital 18 but does not dispute the facts recounted in the five other examples featuring in that recital. It is quite apparent from the last five examples that the AAMS inspectors sent the magazzini letters on several

occasions requiring them, in particular, to observe sales quotas applying to national and imported cigarettes. The following paragraph can be found in one of those letters: "It goes without saying that an increase in sales of foreign products must go hand in hand with a proportional increase in the sales of domestic products. Exceptional sales of non-domestic products will in any case have to be offset within the next two months ...". The Court finds that AAMS has not shown, to the requisite legal standard, that the conduct of its inspectors was vindicated by a concern to ensure that the service was efficient and regular or that it was required by the legislation in force or by contractual terms. As a result, the Commission has adequately proved that the conduct of AAMS's inspectors amounted to abuse within the meaning of Article 86 of the Treaty. Furthermore, the contested decision contains an adequate statement of reasons in that regard in recitals 48 to 50.

96. The Commission also held in the contested decision that AAMS's inspectors had adopted a course of conduct towards retailers intended to promote sales of AAMS's cigarettes and to limit those of imported cigarettes. The conduct in question is described in recital 29 in the preamble to the contested decision and consisted, in particular, in stressing to the retailers the need to sell a minimum quantity of domestic cigarettes, something which AAMS does not dispute.

97. However, AAMS argues that in its relations with retailers it was acting in its capacity as a public authority and that those relations cannot be examined in the context of a procedure under Regulation 17. The Court asked AAMS to provide further details about the regulatory powers exercised by its inspectors in the course of the four operations referred to in recital 19 to the contested decision and to explain in what respect the inspectors' conduct was consonant with the objectives of the legislation applying in the cigarette sector.

98. In its reply, AAMS restated that its inspectors were carrying out public duties and had statutory supervisory powers over distributors and retailers in the cigarette sector under [Italian Law]. It added that its inspectors were obliged to monitor the activities of the distributors and retailers of monopoly goods under [Italian Law] to prevent fraud. According to AAMS, "if retailers receive abnormally large supplies, that may result from, or be symptomatic of, factors such as prohibited advertising of the products or the illegal provision or supply of goods to third parties". It argues that, in any event, even if the actions in question were not consonant with the objectives of the provisions concerned, they are merely liable to be declared an abuse of powers.

99. It is appropriate to point out that the actions referred to in recital 19 to the contested decision were taken in order to favour the sale of domestic cigarettes and that AAMS's arguments concerning the need to prevent fraud and unlawful advertising are merely speculative and unpersuasive. Consequently, the Court holds that AAMS has not established that the Commission made a manifest error in its appraisal of the actions in question.

100. In those circumstances, the fourth part of the plea must be rejected.

The alternative claims seeking a reduction in the fine imposed

[Paras 101 to 103 set out the parties' arguments; the Court found as follows.]

104. First of all, as regards the applicant's arguments concerning the circumstances in which it would be appropriate to set aside the fine or to reduce the amount thereof, the Court has not upheld AAMS's claim for annulment of the contested decision and so there are no grounds to set aside that part of the decision relating to the fine or to reduce the amount of the fine on that basis.

105. Furthermore, AAMS cannot validly rely on the fact that the contested decision refers only to certain events which took place in 1995 and 1996 and that the infringement must, therefore, be regarded as of medium duration, rather than of long duration. Even if the Commission has found only a few examples of AAMS refusing to approve increases in the maximum monthly quantities of cigarettes imported between 1995 and 1996, that conduct must not be considered in isolation, but globally as part of a series of actions taking place between 1990 and 1996. The assessment made by the Commission of the duration of the infringement is not vitiated by any error, since it is apparent from recitals 16 to 19 in the preamble to the contested decision that the actions which AAMS is alleged to have taken as regards cigarettes in Italy occurred over a seven-year period, namely from 1990 to 1996. In those circumstances, the conclusion must be drawn that the Commission has adequately demonstrated that the infringement of which AAMS stands accused was of long duration.

106. The fourth paragraph of Article 37 of the EC Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. JT International BV intervened in the present action in support of the form of order sought by the Commission. Its claim for an increase in the fine must be rejected as inadmissible, given that the Commission did not seek such an increase.

107. It follows from the foregoing that the claims of AAMS and JT International BV concerning the legality and the amount of the fine must be rejected in their entirety.

[Paragraphs 108 and 109 concern costs.]

Court's ruling

The Court of First Instance hereby:
1. Dismisses the action;
2. Orders AAMS to pay the costs of the Commission and of the interveners and to bear its own costs. ■

Note. The Court cases reported in the Newsletter are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.