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More about Mergers

In the report in this issue on the *Metsa* case, the Commission makes the following observation: "This is only the fourteenth time the Commission has prohibited a merger since 1990, out of a total of over 1,500 cases notified for regulatory clearance in the past 10 years; prohibition is a decision of last resort when the companies involved do not address or insufficiently address the Commission's legitimate concerns about the creation or strengthening of dominant positions". In other words, prohibitions are rare and may well be avoided. Companies which are contemplating mergers, acquisitions or joint ventures, having a "Community dimension" are well advised to formulate a strategy based on the possibility that they may have to make some concessions to avoid a decision that the operation will create or strengthen a dominant position and be declared incompatible with the common market.

In our last issue, we referred to the main types of "remedies" which have been accepted in merger cases to date, such as divestiture provisions, and noted that the full document prepared by the Commission on merger remedies would shortly be available. The document is indeed a helpful set of guidelines. It rightly gives prominence to the question of divestiture, which is the most frequently employed remedy adopted in cases which would otherwise fail to pass the Commission's test. Company strategy should plainly take into account possible divestitures causing the minimum of disadvantage to themselves and the maximum of satisfaction to the Commission.

However, the guidelines point out that there may be situations in which divestiture is impossible and in which competition problems result from specific features. Of these, the Commission singles out three: the existence of exclusive agreements, the combination of networks or the combination of key patents. "Where the merged entity has a considerable market share, the foreclosure effects resulting from existing exclusive agreements may contribute to the creation of a dominant position"; their termination may be necessary to eliminate competitive concerns. By the same token, the change in market structure resulting from a proposed operation can impede market entry. "Barriers may arise from control over infrastructure, in particular networks, or key technology including patents, know-how or other intellectual property rights. In such circumstances, remedies may aim at facilitating market entry by ensuring that competitors will have access to the necessary infrastructure or key technology." This technology may be divested; but the Commission may accept licensing arrangements – preferably exclusive licences without any field-of-use restrictions on the licensee. (Source: Unofficial text on European Union website. Official text to be published in the Official Journal.)

DISTRIBUTION (CONSTRUCTION EQUIPMENT): THE JCB CASE

Subject: Distribution arrangements
Fines
Sales restrictions
Pricing policy

Industry: Construction, farm and industrial handling equipment
(Implications for other industries)

Parties: J C Bamford Group
JCB Service
Central Parts SA (complainant)

Source: Commission Statement IP/00/1526, dated 21 December 2000

(Note. In earlier days, this type of case would have merited a full and detailed report; but the law on distribution agreements is now well settled. Consequently, the case is mainly interesting both for the fact that circumstances of this kind still recur and for the size of the fine imposed by the Commission. In its Statement, the Commission refers to the fines in the Volkswagen and Opel cases imposed last year, the latter being of a similar size, the former considerably higher. The main reasons for the severity of the fines were the duration of the infringements and other circumstances aggravating the seriousness of the infringement: in the present case, the imposition of sanctions by the infringer on other traders.)

The Commission has adopted a decision finding that J C Bamford Group (JCB) of Britain, a leading manufacturer of construction, farm and industrial handling equipment, has violated the European Communities' rules on competition. Since the late 80s, JCB has put in place distribution agreements and other practices which have had the effect of severely restricting out-of-territory sales of JCB's products both within certain national territories and across national borders, as well as interfering with the freedom to set resale prices. For these very serious violations of article 81 of the EC treaty, JCB has been fined a total €39.6m. The decision is addressed to JCB Service, the parent company of the UK-based JC Bamford Group, the world's fifth largest manufacturer of construction and earth-moving machines.

The antitrust procedure concerns the restrictive agreements and concerted practices implemented by JCB and its network of independent authorised distributors. The proceedings were prompted by a complaint from a French distributor, Central Parts SA, in February 1996. The infringements affect the market for construction and earth-moving machines, which is worth approximately €7.8 billion a year in Europe. JCB's sales account for 13% of Europe's total. This figure does not, however, reflect JCB's important position in relation to its flagship product, the backhoe loader, which was developed in the

late forties by Mr J C Bamford, and for which its European market share has remained stable at around 45% for the last 25 years.

During surprise inspections in November 1996, the Commission found evidence of the illegal agreements implemented by various companies of the JCB Group and, in particular, the JCB Sales organisation in the UK, JCB SA (France) and JCB Spa (Italy), all controlled by JCB Service. These illegal agreements or practices have been implemented in isolation or in combination between 1988 and 1998, according to evidence.

The restrictive agreements or practices between JCB and its distributors consist of:

- restrictions on sales outside allotted territories;
- restrictions on purchases of machines between authorised distributors in different EU states;
- bonuses and fees systems which disadvantaged out of territory sales;
- occasional joint fixing of resale prices and discounts across different territories.

There is evidence that the restrictions have been put in place in at least the United Kingdom, France, Italy and Ireland.

Each of these measures and, *a fortiori*, their combination, are contrary to the ban on restrictive agreements under article 81(1) of the EC Treaty. As a result, import and export purchases and sales of JCB's products have been severely restricted in the Member States more directly concerned and, consequently, within the European Community as a whole. Through such restrictions purchasers of JCB machines are illegally deprived of the opportunity to take advantage of substantial price differences for the same equipment in different Member States. The Commission has ordered JCB to stop these practices and to bring its agreements and arrangements into line with the competition rules applicable to distribution.

JCB's infringements are comparable to those verified in the Volkswagen case, where a fine of €102m was imposed in 1998, subsequently reduced to €90m by the Court of First Instance. The case is also similar to a recent case involving Opel Netherlands, for which a fine of €43 millions was imposed. Pursuant to the Commission guidelines on antitrust fines, JCB's infringements were considered very serious. Given their long duration and the fact that JCB imposed financial penalties on one distributor who did not conform to the restrictive agreements an aggravating circumstance, the fine was set at €39.6m. Commenting on the decision, Competition Commissioner Mario Monti said: "It is shocking that important companies present in all Member States still jeopardise the most fundamental principles of the internal market to the detriment of distributors and, ultimately, consumers". ■

The text of the report on page 44 of this issue (the *Neste* case) is subject to correction: it is taken from the Court's website, which is freely available.

The SAS / Maersk Case

In a statement of objections sent to SAS and Maersk Air, the Commission has taken a preliminary view that the two airlines, by agreeing to share markets, have infringed Article 81 of the EC Treaty, which prohibits concerted behaviour or agreements between companies having an anti-competitive object or effect. As the situation currently stands, Maersk Air has stopped operations between Copenhagen and Stokholm, leaving SAS to dominate overwhelmingly that major Scandinavian route with the risk of higher prices for the one million passengers who fly between the two capitals every year. The Statement of Objections marks the opening of infringement proceedings and the parties are now entitled to present their defence in writing, as well as at an oral hearing.

SAS and Maersk asked the Commission in March 1999 to grant regulatory clearance to a co-operation agreement in place since 28 March 1999. However, it appeared from the fact-finding that followed the notification and from the on-site inspections carried out by the Commission in June 2000 at the headquarters of SAS, Maersk Air and A.P. Møller (Maersk Air's parent) that the scope of co-operation was broader than the parties had notified to the Commission.

In the Commission's view, the evidence obtained shows that SAS and Maersk Air had concluded an overall market-sharing agreement, the basis of which is that Maersk Air will not operate new international routes from Copenhagen without a specific request or approval by SAS and, conversely, that SAS will not operate on Maersk Air's routes out of Jutland, or on the routes from Copenhagen that are operated by Maersk Air. The two companies also agreed to respect a share-out of domestic routes. In addition, the Commission found that SAS and Maersk concluded specific market-sharing agreements regarding individual international routes, as a result of which Maersk Air ceased flying between Copenhagen and Stockholm as from 28 March 1999 and was compensated for this withdrawal. Until that moment, SAS and Maersk Air had been competing on the Copenhagen - Stockholm route. The Copenhagen - Stockholm route is an important route, with approximately one million passengers per year and some 20 daily flights in each direction.

As compensation for Maersk Air's withdrawal from the Copenhagen - Stockholm route, SAS stopped operating between Copenhagen and Venice at the end of March 1999 and Maersk Air started operations on the route at the same moment; SAS stopped flying on the Billund-Frankfurt route in January 1999, leaving Maersk Air as the only airline on the route. Until then, SAS and Maersk had been competing on this route. In the statement of objections, the Commission takes the preliminary view that the behaviour of SAS and Maersk Air violates Article 81 of the Treaty and that, taking into account the seriousness of the infringements, the Commission intends to impose fines. The infringements are particularly significant for consumers, who on some major routes no longer have a choice between the two airlines as a result of these arrangements. The companies have been given two months to respond in writing to the Commission, and they also have the right to request an oral hearing.

(Source: Commission Statement IP/01/156, dated 2 February 2001.)

DOMINANT POSITION (BROADCASTING): THE LADBROKE CASE

Subject: Dominant position

Industry: Broadcasting rights; horse-racing; betting

Parties: Ladbroke Group plc
Paris Mutuel Urbain (PMU)

Source: Commission Statement IP/01/82, dated 22 January 2001

(Note. Over the past four or five years we have carried reports of the seemingly endless Court cases involving Ladbroke and its subsidiaries on the one hand and the PMU on the other; and the main interest of the present report is to show how the litigation has at last ended. It is also interesting, however, to see how persistent and determined efforts to gain a foothold in a market, even where there may be no technical breach of the rules on competition, may ultimately succeed – at least, in part.)

The Commission has cleared an agreement which settles protracted litigation between British bookmaker Ladbroke Group plc and French racing companies' joint service, Pari Mutuel Urbain (PMU), over the broadcasting in Belgium of French horse races.

PMU is an economic interest grouping comprising the main French race societies which has exclusive responsibility to manage the rights of those societies to organise off-course betting, under the pari mutuel (totalizator) system. Ladbroke is the most important English bookmaker. The two have been in dispute since July 1990 over the right to retransmit in Belgium by satellite horse races run in France.

Against the PMU's refusal to grant it a licence as well as against Ladbroke's direct competitor on the Belgian market, the Belgian PMU, Ladbroke has lodged several complaints and applications with the Commission and the European Courts for a finding that the Community competition rules had been infringed. In particular, Ladbroke asserted that the refusal of the French racing societies and the PMU to provide it with the French sound and pictures constituted an abuse of a dominant position for which there was no objective justification.

To settle the litigation, PMU has agreed to supply on a non-exclusive basis live televised pictures of French races as well as commentary and data to Ladbroke to be broadcast in Ladbroke's off-course betting shops in Belgium. PMU will also supply the necessary equipment for decoding the satellite signal needed to receive the broadcasts.

According to the agreement notified to the Commission on 3 March 1999, Ladbroke has agreed to withdraw all proceedings before the Court of First

Instance (CFI) and the Court of Justice as well as its complaints to the Commission in respect of the activities of PMU. In its present version, the agreement recognises that the parties are free to enter any market where the relevant national legislation authorises their respective activities.
The arrangement is an excellent outcome to many years of dispute: it involves no restriction of competition within the meaning of the EC Treaty and in particular does not involve any partitioning of the EC on territorial lines.

Betting on horse races is allowed in all Member States. It can take two forms:

- bookmaking, where bets are placed against the bookmaker who incurs a financial risk dependent upon the bets placed and the outcome of the race, or
- under a tote or totalizator arrangement, where bets are pooled and winnings paid out as a given percentage of the monies received with no financial risk to the operator of the betting system.

The tote is the more common form of betting and is the only system authorised in France. Bookmaking is also allowed in Belgium, the United Kingdom, Germany, Ireland and Italy.

The notified agreement concerns not only a betting market but also a market in sound and pictures. This latter constitutes an ancillary market created as a result of the main betting market, whose operation tends to influence and direct gamblers' choice as regards betting on the races transmitted. In its originally notified version, the agreement specifically provided that the PMU was not to operate on the off-course betting market in Belgium and Ladbroke was not to operate on the off-course betting market in France. In the Commission's view, the prohibition for each of the parties from penetrating into the respective territory of the other amounted to a market-sharing agreement and the conditions for the application of Article 81(3) were not fulfilled. However, this restriction has now been limited to activities which are incompatible with the relevant national legislation and the agreement can be cleared. ■

The Unisource Case

In a number of cases under the rules on competition, the Commission imposes an obligation to report to it from time to time on the way in which the arrangements earning exemption are functioning. In the Unisource case, the Commission has released the telecommunications alliance between KPN of The Netherlands, Telia of Sweden and Swisscom of Switzerland, from its reporting obligations following the Commission's exemption of the operation in 1997. Unisource has divested most of its operations, keeping only the provision of sales to multinational companies and has repealed both the non-competition clauses which prevented the parent companies from competing with Unisource and the exclusive dealing arrangements. In view of these developments and taking into account the competitive situation on the relevant market, the Commission has concluded that the Unisource co-operation no longer appreciably affects competition. It has therefore repealed the 1997 exemption decision and replaced it by a negative clearance decision. (Source: Commission Statement IP/01/1, dated 3 January 2001.)

MERGERS (ROCK CRUSHING MACHINERY): THE METSO CASE

Subject: Mergers
Conditions (of approval)
Product markets

Industry: Rock crushing machinery
(Some implications for other industries)

Parties: Metso Corporation
Svedala AB

Source: Commission Statement IP/01/103, dated 24 January 2001

(In the present case, the Commission felt able to allow the merger, subject to certain conditions on the divestiture of parts of both parties' businesses. This was agreed between the Commission and the parties after the Commission had identified subsidiary product markets which, if the operation had gone ahead in its original form, would have created a dominant position in those separate markets.)

The Commission has authorised the proposed merger between Metso Corporation and Svedala AB, two Nordic companies with world-wide activities in the production and distribution of machinery for the rock and mineral processing industry. The merger creates one of the largest rock crushing equipment manufacturers world-wide. Regulatory clearance was possible after it was agreed that Svedala's jaw crusher and cone crusher businesses as well as Metso's primary gyratory crusher business would be divested to an independent competitor. This commitment was necessary to ensure effective competition on the markets for rock crushing equipment in the European Economic Area (EEA) and in individual Member States.

Metso is a Finnish company, established in 1999 through the merger of Valmet Corporation and Rauma Corporation. It is active in three main business areas: machinery including rock and mineral processing, automation and control technology, and fibre and paper technology. Svedala is a Swedish construction and mineral processing equipment company active in equipment for mineral recovery, processing and handling, including drilling equipment, rock crushing equipment, transport systems, and compaction equipment.

The competitive impact of the operation will be in the field of rock crushing equipment, which is sold both by Svedala and by Metso (under its Nordberg brand). Rock crushing equipment principally aims at reducing the size of rock in order to make it suitable for its expected application. It is therefore primarily used for the production of aggregates and cement, and in the mining industry. There are essentially four main types of crushing equipment. Each type corresponds to a specific technology. The four types are jaw crushers, impactors, cone crushers and

primary gyratory crushers. Rock crushers used for mining applications are significantly larger and more expensive than crushers used in aggregate and construction applications ("A&C crushers"), and therefore belong to different product markets.

On 22 November 2000, the Commission decided, after an initial investigation of six weeks, that it would further investigate the impact of the proposed transaction, due to serious competition concerns in the following markets: cone crushers for aggregate production and construction applications in most Member States (Austria, Denmark, Finland, France, Germany, Italy, Ireland, Norway, Portugal, Spain, Sweden and the United Kingdom); jaw crushers for aggregate production in the Nordic countries (Denmark, Finland, Norway and Sweden); high capacity cone crushers for mining applications (EEA wide); jaw crushers for mining applications (EEA wide) and primary gyratory crushers used in mining applications (EEA wide).

In particular, the operation would have led to substantial market shares at national and EEA-wide level in the cone crusher markets (above 60% at EEA-wide level and above 50% in most Member States), in the primary gyratory market (above 60% EEA-wide), and, to a lesser extent, in the jaw crusher markets (above 50% in most Nordic countries for A&C jaw crushers and above 35% at EEA-wide level for mining jaw crushers). In addition, the Commission's investigation showed that Metso and Svedala benefit from specific advantages over their competitors, due to their high reputation, their broad product portfolio and their wide geographic coverage. Furthermore, there are significant barriers to entry into the rock crushing equipment markets because customers tend to be very risk averse and because local presence and quality of after-sales services are essential factors in these markets. Potential competition would therefore not have been a credible deterrent to prevent the parties from exerting their significant market power. The operation would thus have resulted in dominant positions in all the above-mentioned markets.

However, the parties have offered undertakings that will result in a complete divestment of Svedala's cone and jaw crushers businesses, as well as in the divestment of Metso's primary gyratory business. As a result, the overlaps between the parties' activities in the markets where the Commission had identified competition concerns will be entirely removed. Therefore, the undertakings offered by the parties correctly resolve the competition concerns created by the operation and ensure that customers will continue to benefit from sufficient choice and competitive prices. The Commission's decision to clear this operation is conditional upon full compliance with the undertakings offered by the parties.

Of the basis of the bilateral agreement on antitrust co-operation between the European Commission and the United States of America, the European Commission has co-operated with the Federal Trade Commission in the analysis of this transaction. The investigation in the US continues. In addition, the Commission has held discussions with the competition authorities of Australia, Canada and South Africa. ■

ACQUISITIONS (PAPER TISSUE): THE METSA CASE

Subject: Acquisitions
Prohibitions

Industry: Paper (especially tissue, paper towels and similar products)

Parties: Metsa Tissue
SCA Molnlycke

Source: Commission Statement IP/01/147, dated 31 January 2001

(Note. This is one of the relatively rare cases in which the Commission has announced an outright prohibition of a proposed concentration. The proposal would have created or strengthened dominant positions in the supply of a variety of paper tissue products in Scandinavia; and the undertakings offered by the parties concerned were insufficient, in the Commission's opinion, to offset the competitive disadvantages of the operation. The Commission compared the undertakings unfavourably with those offered in the Metso case, which is the subject of the preceding report in this issue.)

The Commission has blocked the proposed takeover of Finnish tissue paper manufacturer Metsä Tissue by its Swedish competitor SCA Mölnlycke on competition grounds. The operation would have created or strengthened dominant market positions in a total of 26 hygienic tissue products in Sweden, Norway, Denmark and Finland. As such, it would have severely limited consumer choice for tissue products, such as kitchen towels and toilet paper, and would have enabled manufacturers to raise customer prices.

The deal would have given SCA sole control of Metsä Tissue Corp, which is currently majority-owned by Metsä-Serla Corp, also of Finland. The present merger case forms part of an extensive exchange of assets between Metsä-Serla and Svenska Cellulosa AB, the parent company of SCA. Two other deals, the acquisition of Metsä Corrugated by SCA and Modo Paper by Metsä-Serla, were cleared by the European Commission with conditions, last year.

The Commission's careful analysis of the SCA/Metsä Tissue merger showed very high market shares (up to 90% in some markets) throughout the entire Nordic region (Sweden, Norway, Denmark and Finland) for toilet paper and kitchen towels.

The operation would combine SCA's Edet toilet paper and kitchen towels with Metsa Tissue's own well known brands Lambi, Leni and Serla, leaving little room for alternative suppliers. The Commission found that Nordic supermarkets' countervailing buyer power would be insufficient to restrain the merged company's market power. The investigation also showed that with such a

powerful player no competitors would be ready to penetrate the market due to very high investment costs, including the costs of introducing a new brand. Hygienic tissue products can be divided into different categories, such as toilet paper, kitchen towels, handkerchiefs and napkins. These products are either sold through retailers ("consumer products") or to corporate customers, such as hotels, schools, hospitals etc. ("Away-from-home products" - AFH). The parties and most other tissue manufacturers have developed their own branded products but also supply supermarkets and other large consumers with private-label products. Tissue products can be transported over distances of approximately 800-1000 kilometres, beyond which supply of the relatively bulky products becomes increasingly uneconomical.

The Commission's investigation showed that the operation would lead to the creation of single dominant market positions in 21 tissue paper markets in Sweden, Norway and Denmark, to the creation of duopolistic dominant positions in two tissue product markets in Finland between the merged entity and Fort James of the United States -- and to the strengthening of dominant positions in three product markets in Finland.

SCA is a wholly owned subsidiary of the Swedish company Svenska Cellulosa AB, a forest industry and paper group 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 and in Poland and Russia. Metsä-Tissue is active in the production of tissue products as well as 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.

During the Phase II (in-depth) investigation, the parties re-submitted undertakings already offered in first phase. These undertakings, which included the divestiture of certain assets, had already been rejected in Phase I as they did not address any of the competition issues identified for consumer and AFH tissue products in Finland or for private-label consumer tissue products in Denmark. Furthermore, the proposed divestment package contained insufficient capacity in a number of product markets for the buyer to compete effectively with the merged entity and to effectively restrain SCA's market power in Sweden, Norway, Denmark and Finland.

This is only the fourteenth time the Commission has prohibited a merger since 1990, of a total of over 1,500 cases notified for regulatory clearance in the past 10 years, and this a decision of the last resort when the companies did not address or insufficiently addressed the Commission's legitimate concerns about creation or strengthening of dominant positions. The Commission has been able to clear the overwhelming majority of mergers and acquisitions involving Nordic companies either with or without conditions such as, for example, the SCA/Metsä Corrugated and Metsä-Serla/Modo cases mentioned above, the decision involving Metso and Svedala. or the April 2000 clearance of the banking merger between Merita Nordbanken and Unidanmark. ■

ACQUISITIONS (CEMENT): THE CIMPOR CEMENTOS CASE

Subject: Acaquisitions

Industry: Cement
(Implications for other industries)

Parties: Cimpor Cementos de Portugal SGPS
Secil Companhia Geral de Cal e Cimentos SA
Holderbank
The Portuguese Government

Source: Commission Statement IP/00/1338, dated 22 November 2000

(Note. This case, which escaped attention when first made public, is interesting in the way in which it illustrates the determination of the Commission to assert its jurisdiction in merger cases. Member States' powers to take action are limited to "the protection of legitimate interests", which are defined as public security, plurality of the media and prudential rules: see the second paragraph of the report below.)

The Commission has decided that the measures taken by the Portuguese authorities against the proposed takeover bid by Secil Companhia Geral de Cal e Cimentos SA and Holderbank for Portuguese company Cimpor Cimentos de Portugal SGPS were incompatible with the European Community's competition law. The decisions taken by the Minister of Finance in July and August 2000 opposing the bid were found not to protect any legitimate interest recognised under Article 21 of the European Merger Regulation. The Commission intends to protect its exclusive right to review mergers with a Community dimension and will challenge any other similar infringements.

The decision is based on Article 21 of the Merger Regulation, which grants the Commission exclusive legal power to assess concentrations above certain turn-over thresholds. The same article allows Member States to take appropriate measures to protect legitimate interests, which are defined as public security, plurality of the media and prudential rules. Any other public interests must be communicated to the Commission by the Member State and be recognised by the Commission after an assessment before the measure is taken by the Member State, according to Article 21.

The Commission's decision finds that in blocking the proposed acquisition, the Portuguese Government has breached its obligations under Article 21 of the Merger Regulation. The prohibition could not be intended to protect the interests foreseen in Article 21, nor did Portugal communicate to the Commission any other public interests they wished to safeguard.

The Portuguese Government's decisions, which were based on the application of national legislation, refer, *inter alia*, to "the need to protect the development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the national economic policy guidelines". The Commission does not consider this as a public interest that can be reconciled in this particular case with the general principles of merger control law.

In the light of the decision, the Portuguese Government is under an obligation to take the necessary measures to comply with Community law and withdraw the decisions it took in relation to the proposed concentration.

The Portuguese company Cimpor Cimentos de Portugal SGPS was established as a 100% state-owned company in 1976. In 1991, it became a public company and was subsequently partly privatised in 1994. The company is listed on the Lisbon Stock Exchange. The Portuguese state has progressively sold its shareholding in Cimpor and currently holds approximately 12% of the shares including 10% golden shares. Article 22 of Cimpor's by-laws grants the Government the right to veto strategic decisions and any amendment to the by-laws of Cimpor.

On 15 June 2000, Holderbel, a fully-owned Belgian subsidiary of the Holderbank group of Switzerland and Secil Companhia Geral de Cal e Cimentos SA of Portugal announced a public bid for the shares of Cimpor through Secilpar, a special purpose vehicle jointly controlled by the parties. The operation, which has a Community dimension within the meaning of the Merger Regulation[1] was notified to the Commission on 4 July 2000.

On 16 June 2000, the notifying parties applied for prior authorisation from the Portuguese Minister of Finance to acquire through a public offer a minimum of 67%, of the share capital of Cimpor. Pursuant to Decree Law No 380/93 of 15 November the acquisition of more than 10% of the share capital with voting rights in companies, which have not yet entirely been privatised, requires an authorisation of the Minister of Finance. On 6 July 2000, the Portuguese Minister of Finance adopted a decision opposing the notified operation. Following a modification to the bid, the parties applied on 7 July 2000 again for authorisation at the Minister of Finance. On 11 August 2000, the Minister of Finance issued a decision to the effect that the renewed application for an authorisation by the notifying parties was declined. The decision reformed the motivation of the decision of 6 July 2000 but confirmed its conclusion. Since then, the Portuguese government has announced its intention to privatise Cimpor and to renounce its golden share in the company.

In 1997 the Commission challenged in the European Court of Justice the Portuguese legislation on which the two vetoes were based as breaching the right of establishment and the free movement of capital, two of the key principles of the European Single Market. Similar legislation has been challenged by the Commission also in Spain, the United Kingdom, France and Belgium among other countries. The Court's judgment in these cases is still awaited. ■

STATE AIDS (BANKING): THE GERMAN BANKING CASE

Subject: State aids
Guarantees

Industry: Banking; credit institutions

Parties: Provincial Banks in Germany (special purpose and savings banks)
European Banking Federation (complainant)

Source: Commission Statement IP/01/119, dated 26 January 2001

(Note. For many years the Commission has rightly done its best to stop state aids to banks and other financial and credit institutions; but it has encountered some difficulty over the entrenched system of state guarantees to public credit institutions in Germany. The Commission Statement, reported below, does not mention Declaration 37 annexed to the Treaty amending the Treaty on European Union – declarations annexed to Treaties do not, in any case, have the force of law – but the declaration represented an attempt to preserve the status quo in Germany. Now that the European Banking Federation has formally complained about the practice of allowing guarantees to public credit institutions in Germany, the Commission has been given the opportunity to renew its attack, though as the report explains this is only the first move in the procedure. The terminology used in the report is not ideal; but the translations of the German words for the two types of guarantee which are the subject of the complaint are offered by the Commission and are accepted for the purposes of this commentary.)

The Commission has sent a letter to the German authorities stating that it considers the guarantees in favour of the country's public law credit institutions, to the extent that they affect the competitive position of the institutions and trade between Member States, to be State aid which is incompatible with Community law. The German Government is invited to submit its observations on the Commission's position within one month. The letter is the first step in the normal procedure for bringing existing aid schemes into line with EU rules. The Commission not only spelled out its general position on State aid in the form of guarantees in November 1999 but has also received, more than a year ago, a formal complaint directed specifically against maintenance obligations and guarantee obligations (*Anstaltslast* and *Gewährträgerhaftung*), the two guarantee instruments traditionally used in the German public banking sector. The letter was sent by the Directorate General for Competition.

The Commissioner responsible for competition policy emphasized that the Commission did not question the ownership structure of Germany's public banks. "What must be remedied, however, is the distortion of competition arising from State guarantees which are unlimited both in duration and amount and are provided free. Ultimately, such aid is not in the interest of the beneficiaries.

Shielding them from market pressures which other players have to cope with may, in the long run, weaken their structures and competitive positions."

The Commission had looked carefully at all aspects of this matter and had come to the preliminary conclusion that both forms of guarantee had to be considered as existing aid regimes within the meaning of the European Community's state aid rules. No action could therefore be taken for their application in the past. However, a solution had to be found for the future in all cases where such guarantees affected trade between Member States. The Commissioner called on Germany to cooperate in dismantling the distortion of competition. "It is always preferable for the Member State concerned to come up with an acceptable solution. In this case no such solution has yet been offered by the German authorities. The ball is now formally in their court. I am aware that discussions are going on in Germany on how to address this matter and I would hope that they will shortly lead to constructive proposals in Brussels. The Community's state aid rules leave the door wide open to solutions shaped by the interested parties themselves."

The maintenance obligation means that the public owners (such as the Federal State, the provinces and the municipalities) of the institution are responsible for securing the economic basis of the institution and its function for the entire duration of its existence. The guarantee obligation stipulates that the guarantor will meet all liabilities of the bank which cannot be satisfied from its assets. Both guarantees are unlimited in time or amount; and the credit institutions do not have to pay for them. The publicly owned German credit institutions which benefit from these guarantees comprise the provincial banks, a number of special purpose banks and around 580 savings banks of widely varying size.

The guarantees have an effect on the competitive situation of the financial institutions concerned. In particular they improve their creditworthiness and so normally the financing conditions, because creditors ask a lower risk premium. On the basis of a preliminary evaluation it can be assumed that the advantages arise in particular for activities on the (international) capital markets, such as issuing bonds or raising subordinated equity), in the derivative and over-the-counter (OTC) business and in the interbank business. Where there is distortion of competition, it can in general be considered to affect trade between Member States: in the financial services sector the single market has to a large extent been achieved and there is strong competition between institutions of different Member States.

The Commission has therefore arrived at the preliminary conclusion that the guarantees fulfil the conditions of Article 87(1) of the Treaty in that they involve a transfer of state resources, favour certain undertakings, distort competition and affect trade between Member States. The analysis looked at whether any of the exemptions possible under the State aid rules might apply. However, this was not the case.

Finally, it is doubtful whether the guarantees represent compensation for the provision of services of general economic interest. At present, there seem to be no

precise definitions of the services with which the public law credit institution in Germany may be entrusted. In addition, no costs of any such services are calculated, and the proportionality of any compensation facility can therefore not be verified.

According to the Procedural Regulation concerning State aid, Member States must provide the Commission with all necessary information for the review of existing aid schemes. The Commission can demand such information. If the Commission considers a scheme is not, or is no longer, compatible with the common market, it must inform the Member State of this preliminary view. This is usually done by way of a letter signed by the responsible Director. The Member State has the opportunity to comment on the letter within one month. If the Commission maintains its position that the scheme is not, or is no longer, compatible it must propose appropriate measures, suggesting amendments or an abolition of the scheme. These appropriate measures take the form of a formal Commission decision and constitute only a recommendation. If the Member State accepts the proposed measures no further Commission action is needed. The Commission will only monitor the implementation of the appropriate measures.

If, however, the Member State does not accept the proposed measures, the Commission can initiate a formal state aid investigation procedure under Article 88(2) of the Treaty. This procedure can then end with the adoption of a decision declaring the aid incompatible and requesting its amendment or abolition. From that moment on (or a later time stated in the Commission decision, as in the case of a transitional period granted by the Commission) the existing aid becomes illegal.

The procedure is different in the case of "new aid". Normally, when the Commission receives a complaint and does not immediately consider it unfounded, it asks the Member State concerned for information. Then it decides whether or not to open a formal state aid procedure under Article 88(2) of the Treaty. If this procedure ends with a negative decision and the aid has already been paid out, it has to be recovered from its beneficiary.

"Existing aid" is, according to the Procedural Regulation,

- aid which existed before the entry into force of the Treaty;
- aid authorised in the meantime;
- aid with regard to which the limitation period of ten years to recover unlawful aid has expired;
- aid which was no aid when put into effect and which became aid in the meantime because of the evolution of the market (unless the changes in the market are due to liberalisation acts by Community legislation; then it becomes "new aid").

On 24 November 1999, the Commission adopted a Notice summing up its approach to state aid in the form of state guarantees. The document explains conditions in which the Commission considers that a state guarantee includes elements of state aid and when it does not. The Notice also confirms that, if aid

is involved, this aid is already granted when a guarantee is given and not only when it is actually honoured. The Notice was intended to make the Commission's policy in this area as clear as possible. It covers all forms of guarantees in the commercial field except export credit guarantees, irrespective of their legal basis and the transaction covered.

The European Banking Federation had filed a complaint on 21 December 1999 about maintenance and guarantee obligations. The complaint referred, as examples, to the West German Provincial Bank (*Westdeutsche Landesbank*), the Cologne City Savings Bank (*Stadtsparkasse Köln*) and the West German Real Property Bank (*Westdeutsche Immobilienbank*), but is targeted at the whole system of guarantees.

The question of maintenance and guarantee obligations has to be distinguished from the cases of equity transfers to Provincial Banks (the *Westdeutscher Landesbank* and similar casess). On 8 July 1999 the Commission adopted a final negative decision regarding the transfer of equity to *Westdeutscher Landesbank* and ordered the recovery of a state aid element of DM 1,580m plus interest for the period from 1992 to 1998. This decision has been challenged before the European Court of Justice. The appeals do not suspend the implementation of the decision. Two proposals by the German authorities on how to recover the aid could not be accepted by the Commission. Therefore, the latter on 25 May 2000 also referred the matter to the Court, for failure of Germany to implement the Commission's decision. ■

The FIA / FAO Case

Recently, the Fédération Internationale de l 'Automobile (FIA) and Formula One Administration (FAO) reached agreement in a case involving important issues relating to the management and governance of motor sport in general, as well as specific issues relating to the broadcasting and related rights for Formula One motor sport. As a result, the Commission is satisfied that the FIA's role in future will be limited to that of impartial motor sports regulator. FOA has sold its interest in Rallying and all other forms of motor sport other than Formula One, and has agreed to make a number of changes to the current arrangements relating to the marketing and broadcasting of Formula One races. The changes already adopted, together with those agreed in principle, will benefit all citizens interested in motor sport, as well as the sport's participants. However, before giving its final approval, the Commission wishes to give third parties the opportunity to comment. To this end a full description of the new arrangements, an Article 19(3) Notice, will be published in the Official Journal of the European Communities in the coming weeks; and third parties will be invited to submit their comments on the new arrangements to the Commission.

(Source: Commission Statement IP/01/120, dated 26 January 2001.)

STATE AIDS: COMMISSION GUIDELINES

Subject: State aids
Environmental protection

Industry: All industries

Source: Commission Statement IP/00/1519, dated 21 December 2000

(Note. In our report in December on the Commission's new guidelines on environmental agreements, we pointed out that it was not too difficult to imagine circumstances in which environmental considerations were offered as a justification for competitive trading. Similarly, in the field of state aids, it is not too difficult to imagine circumstances in which Member States may seek to justify the granting of subsidies or other forms of aid on environmental grounds where these forms of aid would otherwise be illegal under the Treaty. The Commission itself gives possible examples of such circumstances in its new Guidelines on state aids for environmental purposes. It cites in particular the energy sector, in which it is easy enough to justify support on environmental grounds, but hard to justify in terms of a competitive market. The new guidelines are therefore a welcome advance on the old and may be expected to encourage genuine expenditure of state resources on protection of the environment and at the same time to discourage the use of state resources to five certain traders special advantages and thereby distort competition.)

The Commission has adopted new guidelines setting out the conditions on which Member States may grant firms aid to promote environmental protection. The guidelines, which have been adopted following close cooperation with the Member States and all those concerned, are intended to promote measures to protect the environment while preventing any state aid that is not justified. "Competition policy and environmental policy are not at variance with one another," said Mr Monti, the Competition Commissioner. "However, taking environmental requirements into account does not mean that all forms of aid must be authorised. Consideration has to be given to the effects of aid in terms of sustainable development and full application of the 'polluter pays' principle." Mr Monti also explained why the Commission had brought in the new guidelines. "The current rules, which date from 1994, have proved effective, but Member States now intervene more frequently, for example in the energy sector, providing aid in forms that were rather uncommon until recently, notably tax reductions or exemptions. Similarly, new forms of operating aid are proliferating."

The Commission policy on environmental protection is based on the 'polluter pays' principle; that is to say, the costs of protecting the environment must be borne by the firms causing the pollution. However, state aid may be counter-productive here in that firms will be able to avoid the costs of pollution which they themselves have caused. The Commission is aware that aid may be justified in some cases where it serves as an incentive or provides a temporary solution.

One example concerns firms which decide to do more in terms of environmental protection than is required by Community rules. A further example is the development of renewable energy sources, where production costs are higher than the market price of the energy. An approach which looks favourably on aid for renewable energy sources has therefore been adopted. Member States can now choose between several options for granting investment and operating aid. In the case of investment aid, the basic rate of aid has been increased from 30% (1994 guidelines) to 40% for investments in support of renewable energy, energy saving and the combined production of energy and heat. A bonus of 10 percentage points is available for small and medium-sized firms, for firms located in assisted regions, and for investments in renewable energy serving the needs of an entire community such as an island. This means that, depending on the case in question, the rate of investment aid may easily reach 50%.

In the case of renewable energy, Member States will also be able to choose between four options for granting operating aid. In the first place, they may grant aid to compensate for the difference between the production costs of renewable energy and the market price of electricity until the plant has been fully depreciated. The length of the depreciation period is left to the discretion of the Member States. Where necessary, the aid may also cover a fair return on capital in order to attract investment to this type of activity. In the second place, Member States may also have recourse to market mechanisms such as green certificates. In the Commission's view, these are mechanisms that can make an effective contribution to promoting renewable energy and should, therefore, be authorised. Member States will though have to ensure that such mechanisms do not result in overcompensation. In the third place, Member States may similarly grant aid on the basis of the external costs avoided. This is because the production of renewable energy makes it possible to avoid high external costs for society that can now be quantified. Until such time as these external costs are borne by the firms responsible, aid may be granted to renewable-energy producers in proportion to the costs avoided, in order to compensate for the handicap they face. However, conditions will be laid down in order to avoid any risk of overcompensation. Finally, Member States will also still be able to grant aid in accordance with the general rules governing operating aid; that is to say, aid may be granted for not more than five years and must, in principle, be wound down over time (degressive aid). This is only one of the four options but it will allow Member States to grant ad hoc aid to a project that does not require long-term aid.

The new guidelines contain specific provisions for small and medium-sized enterprises, which may be eligible for investment aid when adapting to new Community standards. The Commission here allows an exception from the principle that compliance with the standardscannot normally provide justification for granting aid. Taken together, the guidelines, which will come into force once they have been published in the Official Journal, constitute a coherent set of measures reconciling the requirements of environmental protection with the provisions of the EC Treaty governing the control of state aid. The new guidelines will be valid until the end of 2007. ■

EXCLUSIVE PURCHASING (SERVICE STATIONS) THE NESTE CASE

Subject: Exclusive purchasing agreements
Market access

Industry: Service stations
(Limited application to other industries)

Parties: Neste Markkinointi Oy
Yötuuli Ky and Others

Source: Judgment of the Court of Justice of the European Communities, dated 7 December 2000, in case C-214/99 (*Neste Markkinointi Oy v Yötuuli Ky and Others*)

(Note. There are two main points of interest in this case. The first is the reappearance of a type of action in which a party to a contract seeks to have the contract voided on the grounds that it is contrary to the rules on competition. The classic case in which this happened was 161/84, Pronuptia v Schillgallis, in which a franchisee sought to avoid the payment of royalties to the franchisor on the grounds that the franchise agreement infringed Article 85(1). Not all cases in which voidance of a contract is sought on competition grounds are necessarily reprehensible. In the present case, the party claiming voidance considered that, while the contract period was for ten years, it was automatically renewable; that this meant in practice that it was for an unlimited duration; and that, inasmuch as it would largely foreclose the market, this would be contrary to the interests of a competitive system. However, it was the second and wider point which engaged the attention of the court: this was the question whether an individual agreement should be considered on its own or as part of a larger network of agreements in any assessment of the foreclosure of the market. Not all the agreements were of a similar duration: it therefore had to be determined whether, in assessing the significance of the effect of the agreements on competitive conditions, there should be a differentiation in the types of agreement according to their duration. The Court's ruling is a little convoluted; but it comes down in favour of differentiation. If a large number of agreements are of limited and relatively short – five years' – duration, they cannot have a significant effect on the foreclosure of market access: they must therefore be distinguished from agreements giving rise to the present proceedings.)

Reference by national court

1. By decision of 1 June 1999, received at the Court on 7 June 1999, the Tampere District Court referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 85(1) of the EC Treaty (now Article 81(1) EC).

2. That question was raised in proceedings between (i) Neste Markkinointi Oy ('Neste) and (ii) Yötuuli Ky ('Yötuuli) and its responsible partners concerning a service-station agreement.

The main proceedings

3. In 1986 the Finnish-law companies Yötuuli and Kesoil Oy entered into a cooperation and marketing agreement ('the contract), with effect from 7 October 1986, under which Yötuuli became a member of Kesoil Oy's distribution chain, buying and selling in its service stations exclusively petrol and other special products marketed by Kesoil Oy.

4. The contract was concluded for a 10 year period. It provided that after that period the member company could terminate the contract by giving one year's notice.

5. On 31 December 1995 Kesoil Oy was taken over by a company which, in turn, merged with two other companies to form the company Neste, which thus became the other party to the contract.

6. By registered letter of 23 June 1998, Yötuuli gave notice to Neste of its decision to cease purchasing motor fuels from it with effect from 1 July 1998.

7. Neste recovered possession of property belonging to it and then brought a claim against Yötuuli and its partners before the Tampere District Court for compensation for the damage which it claimed to have suffered as a result of the contract being terminated without the required one year's notice.

8. Before the national court, the defendants contended that the application should be dismissed on the ground that, since the contract contains an exclusive purchasing clause, it is contrary to Article 85(1) of the Treaty, so that it is automatically void by virtue of paragraph 2 of that article.

9. By contrast, Neste claims that the contract is not contrary to Article 85(1) of the Treaty.

10. The national court observes that the dispute raises a question as to the interpretation and application of Article 85(1) and (2) of the Treaty. It submits that the dispute also gives rise to a question as to the interpretation and application of Articles 10 and 12 of Commission Regulation EEC/83/1984 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements. The applicant claims before the national court that Article 85(1) of the Treaty does not apply to the contract by virtue of Article 10 of that regulation, on the ground that the contract was not concluded for an indefinite duration within the meaning of Article 12(1)(c) of the regulation, while the defendants contend that the contrary is the case, asserting that the contract, which was automatically renewed after 10 years, must be classified as a contract concluded for an indefinite duration.

11. The national court makes clear, however, that the reference for a preliminary ruling is concerned only with the interpretation of Article 85(1) of the Treaty.

12. It refers to the judgments of the Court of Justice in Case 23/67, *Brasserie de Haecht v Wilkin*, and Case C-234/89, *Delimitis v Henniger Bräu*, which were given in respect of exclusive purchasing agreements for beer.

13. It infers, inter alia, from paragraphs 19 to 27 of the judgment in *Delimitis* that, in order for the prohibition laid down in Article 85(1) of the Treaty to apply, the contract, taking into account its economic and legal context, must make it more difficult to gain access to the market or to increase market share. For those purposes, account must be taken of the fact that the contract is part of a network of similar agreements having a cumulative effect on competition. However, the application of the prohibition also presupposes that the contract has a significant effect on the closing-off of the market brought about by the network. In that regard, the extent of the effect of an individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

14. The national court has found that a contract of the kind at issue before it, taken in conjunction with other contracts which are comparable by reason of their duration, does not appear to have any appreciable effect on the partitioning of the market in motor fuels. According to the national court, contracts of a fixed period concluded for several years restrict access to the market far more than those which may be terminated upon short notice at any time. It is not therefore arbitrary to distinguish between them by making only the first category of contracts, and not the second, subject to the prohibition, the basis for which is the cumulative effect of the network, where the second type represent only a very small proportion of the contracts of a single supplier which make a significant contribution to the cumulative effect.

15. Consequently, the national court considers that the defendants ought to have complied with the termination clause.

16. However, it considers that Community law is not without ambiguity in the area concerned and raises a question as to whether the solution to which an analysis of the judgment in Delimitis leads it is not contrary to the principle of legal certainty.

17. It points out that in its judgment in Case T-7/93, *Langnese-Iglo v Commission*, the Court of First Instance held in relation to exclusive purchasing agreements for ice-creams, that, in assessing the contribution of any disputed agreements to any cumulative effect found, the network of contracts of one and the same producer cannot be divided in order to limit the application of the prohibition to those contracts which have a significant effect, since the assessment must apply, for each producer, to all the individual contracts constituting the network.

18. It adds that, in its judgment in Case T-9/93, *Schöller Lebensmittel v Commission,* relating also to exclusive purchasing agreements for ice-creams, the Court of First Instance did not specifically address the applicant company's assertion that the Commission had not taken sufficient account of the fact that the agreements, whichcould be terminated at the end of each calender year following the expiry of the second year following their entry into force, were of relatively short duration.

Question for preliminary ruling

19. In those circumstances, the Tampere District Court decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:
"Is the prohibition referred to in Article 85(1) of the EC Treaty applicable to an exclusive purchasing agreement concluded by a supplier of goods, which could be terminated by the retailer at any time on one year's notice, if all the exclusive purchasing agreements concluded by that supplier have had a significant influence on the partitioning of the market, either on their own or together with the network of exclusive purchasing agreements concluded by all suppliers, but the agreements of similar duration to the exclusive purchasing agreement in question represent only a very small proportion of all the exclusive purchasing agreements of the same supplier, the majority of which are fixed-term agreements which have been concluded for a period of several years?"

20. Neste claims that, from the point of view of Article 85(1) of the Treaty, the agreement, which could be terminated at any time upon one year's notice, must be distinguished from its other agreements which were entered into for a period of several years. The duration of an agreement is of cardinal importance in any assessment of the freedom of action granted to the contracting party bound by an exclusive purchasing obligation, as paragraph 26 of the judgment in Delimitis confirms. In that regard, a one-year notice period gives each of the parties, on reasonable conditions, an opportunity to prepare for a change of brand and, in particular, enables the retailer to make the necessary alterations having decided to change its fuel supplier. Thus the contract does not constitute a commercial restriction for a party contracting with the supplier.

21. Therefore, for the purposes of Article 85(1) of the Treaty, contracts which are made by one supplier in respect of one product but which contain different terms must be evaluated in different ways.

22. Neste also claims that, even if considered on a cumulative basis, the contracts which it entered into, such as the contract at issue in the main proceedings, had only a quite minimal effect on conditions of competition in the relevant market in motor fuels, since, all in all, those contracts totalled 27 in July 1998. They did not therefore fall within the prohibition in Article 85(1) of the Treaty.

23. The French Government submits that there is little, if any, justification for subdividing one operator's network by reference to the duration of a category of

contracts, for the purpose of treating those contracts differently. Such a distinction is complex and, in certain cases, difficult to apply.

24. The Commission submits that when a supplier sets up a network of similar contracts, the effect of that network on competition must be assessed as a whole. If, taken as a whole, those contracts restrict competition significantly, they are all, according to the Commission, contrary to Article 85(1) of the Treaty. Segregating exclusive purchasing contracts or groups of such contracts according to whether or not they are 'insignificant is inevitably arbitrary. The Court of First Instance made a specific ruling to that effect, in paragraphs 129 and 95 of, respectively, *Langnese-Iglo* and *Schöller*.

Court's views

25. It should be recalled that, even if exclusive purchasing agreements do not have as their object the restriction of competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition. The effects of an exclusive purchasing agreement have to be assessed in the economic and legal context in which the agreement occurs and where it may combine with other agreements to have a cumulative effect on competition. It is therefore necessary to analyse the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the relevant market or to increase their market share (*Delimitis*, paragraphs 13 to 15).

26. In that connection, it is necessary to examine the nature and extent of all similar contracts which tie a large number of points of sale to various suppliers and to take into account, among the other factors pertaining to the economic and legal context of the agreement, factors relating to opportunities for access to the relevant market. In that regard, it is necessary to examine whether there are real concrete possibilities for a new competitor to enter the network of contracts. It is also necessary to take account of the conditions under which competitive forces operate on the relevant market (*Delimitis*, paragraphs 21 and 22).

27. If an examination of all similar contracts reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the contracts entered into by the supplier concerned contribute to the cumulative effect produced by the totality of the agreements. Under the Community rules on competition, responsibility for such an effect of closing off the market must be attributed to the suppliers who make an appreciable contribution thereto. Contracts entered into by suppliers whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition laid down in Article 85(1). In order to assess the extent of the contribution of the contracts concluded by a supplier to the cumulative sealing-off effect, the market position of the contracting parties must be taken into consideration. That contribution also depends on the duration of the agreements. If the duration is manifestly excessive in relation to the average duration of contracts generally concluded on the relevant market, the

individual contract falls under the prohibition laid down in Article 85(1) (*Delimitis*, paragraphs 24 to 26).

28. In its judgment making the reference, the national court found that the contract was part of a network of exclusive purchasing agreements which closed off the larger part of the market in motor fuels.

29. Furthermore, it appears from the information which was provided to the national court and which has not been contested:
- as at 1 July 1998, the number of service stations tied to Neste by a contract of the kind at issue was 27 out of a total of the 573 service stations comprising Neste's network, that is to say, less than 5% of that total or 1.5% of the 1 799 service stations in Finland;
- the 27 service stations mentioned above account for 8% of the Neste network's petrol sales and 10.48% of its diesel sales, namely 2.48% of petrol sales and 1.07% of diesel sales made in the whole of Finland;
- a large number of the agreements entered into by Neste with other retailers were amended in order to come within the scope of Regulation No 1984/83 or were already exempt by virtue of Article 12(2) of the regulation.

30. By the question it has submitted, the national court is essentially seeking to ascertain whether, in the actual conditions characterising the Finnish market for motor-fuels distribution, supply contracts for those fuels terminable upon one year's notice at any time may be regarded as making only an insignificant contribution to the cumulative effect of closing off that market and therefore as not being caught by the prohibition laid down in Article 85(1), even though they form part of an entire set of agreements entered into by the same supplier which, overall, make a significant contribution to that closing-off.

31. Neste and the French Government rightly point out that an exclusive purchasing agreement for motor fuels differs in one significant respect from an exclusive purchasing agreement for other products such as beer or ice-cream, in so far as only one brand of motor fuels is, as a matter of fact, sold in a particular service station.

32. It follows from this finding that, as regards the type of contract in point in the main proceedings, the fundamental factor for the supplier is less the exclusivity clause itself than the duration of the supply obligation assumed by the retailer and that duration is the decisive factor in the market-sealing effect.

33. In that connection, it must be recognised that, as the national court has suggested, fixed term contracts concluded for a number of years are more likely to restrict access to the market than those which may be terminated upon short notice at any time.

34. As far as service-station agreements are concerned, the obligations entered into by the supplier are, in general, onerous in terms of investment, entailing adapting the sales point to the image of the brand sold. Therefore, a change of supplier most often entails, from a technical standpoint, a certain period of time.

35. In view of those particular factors, a notice period of one year is one which can give reasonable protection to the economic and legal interests of each of the parties to the contract and limit the restrictive effect of the contract on competition on the market in motor-fuels distribution.

36. In those circumstances, when, as in the case before the national court, the contracts which may be terminated upon one year's notice at any time represent only a very small proportion of all the exclusive purchasing agreements entered into by a particular supplier, they must be regarded as making no significant contribution to the cumulative effect, for the purposes of the judgment in *Delimitis*, and therefore as not being caught by the prohibition laid down by Article 85(1) of the Treaty.

37. The fact of subdividing, exceptionally, a supplier's network is not arbitrary nor does it undermine the principle of legal certainty. Subdividing the network in that way results from a factual assessment of the position held by the operator concerned on the relevant market, the aim of the assessment being, on the basis of an objective criterion of particular relevance in that it takes into account the market's distinctive features, to limit the number of cases in which a supplier's contracts are declared void to those which, together, contribute significantly to the cumulative effect of sealing off the market.

38. Contrary to the submissions made by the Commission in its observations, that approach does not conflict with the judgment in *Delimitis*. Although that judgment, in the context of the case then under consideration, set out in paragraphs 25 and 26 the criteria for assessing the extent to which a supplier's 'contracts, without being more specific, contribute to the cumulative sealing-off effect, it did not exclude a selective assessment according to the various categories of contracts that a particular supplier might have entered into.

39. The answer to the question raised must therefore be that the prohibition laid down by Article 85(1) of the Treaty does not apply to an exclusive purchasing agreement entered into by a motor-fuels supplier which the retailer may terminate upon one year's notice at any time where all that supplier's exclusive purchasing agreements, whether considered separately or as a whole, taken together with the network of similar agreements made by the totality of suppliers, have an appreciable effect on the closing-off of the market but where the agreements of the same kind as the agreement at issue in the main proceedings by reason of their duration represent only a very small proportion of the totality of one supplier's exclusive purchasing agreements, of which the majority are fixed term contracts entered into for more than one year.

[Paragraph 40 of the judgment concerns costs. Those incurred by the French Government and by the Commission 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. The Court's formal ruling is expressed in the same terms as paragraph 39.]