COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Merger "Remedies"

Just before Christmas, rather in line with the Commission's old tradition of offering "Christmas Gifts", the Commission published a Notice on Merger Remedies: that is, on remedies acceptable to solve competition problems raised by mergers and acquisitions. The Notice is designed to provide the business and legal communities with guidance and predictability on merger control policy in the European Union. It builds on the experience of ten years of application of the merger regulation. The Notice focuses on the following areas: the general principles on which remedies can be proposed and implemented in merger proceedings; an overview of the main types of remedies that have been accepted in merger cases to date (such as divestiture provisions, termination of exclusive agreements, and licensing arrangements to provide access to infrastructure and key technology); the specific requirements for submission of remedies in Phase I and Phase II proceedings, respectively; and the major elements for implementing divestiture commitments, including the provisions for the appointment of a trustee for oversight, preservation of the assets and/or activities to be divested, and Commission approval of the potential purchaser. This is a timely Notice by the Commission.

Block exemptions for state aids

On 6th December, the Commission adopted three block exemption regulations on State aid. The first concerns state aids to small and medium-sized enterprises (SME); the second concerns training aid and the third lays down *de minimis* rules. The regulations will exempt these categories of aid from the requirement of prior notification. In future, Member States can grant aid fulfilling all the conditions of the regulations without prior approval by the Commission. The Commission's regulations are based on an enabling regulation: namely Council Regulation EC/994/98, adopted on 7 May 1998. The *de minimis* regulation codifies the present rules, laid down in a Communication dating from 6 March 1996. According to these rules, aid measures to an enterprise below the ceiling of €100,000 within a period of three years are not considered to be State aid within the meaning of the Treaty, since they do not threaten to distort competition and do not affect trade between Member States. In one respect, this is also a timely move by the Commission. In another, it is a belated move, coming so long after the powers were provided in the Treaty to make regulations along these lines.

Note. The source of the information about mergers is Commission Statement IP/00/1525, dated 21 December 2000. The source of the information about state aids is Commission Statement IP/00/1415, dated 6 December 2000. The texts will shortly be available on the European Union's website. ■

STATE AIDS (POSTAL SERVICES): THE UFEX CASE

Subject: State aids
Monopolies
Annulment (of Commission Decision)
Complaints

Industry: Postal services

Parties: Union Francaise de l'Express (UFEX)
DHL International
Federal Express
CRIE
(SFMI-Chronopost)
Commission

Source: Court of Justice Press Release 91/00 of 14 December 2000, referring to the Judgment of the Court of First Instance in Case T-613/97 (*UFEX and Others v Commission*)

(Note. This case is more important than it seems; and it is unfortunate that the Court has not yet made available an English language version of its judgment. Unless we produce our own version of the judgment, we shall have to be content for the time being with the Court's press release. Meanwhile, it is necessary to draw a distinction between two connected but distinct lines of litigation: the first being concerned with the accusation that La Poste abused its dominant position and the second with the question of state aids. The first of these issues was the subject of the case referred to in the Masterfoods judgment, paragraph 46, elsewhere in this issue. The Court of Justice overruled the Court of First Instance on that issue and upheld part of the complainants' plea. The present case is concerned primarily with the state aids issue but covers much the same ground, particularly as regards the Commission's assessment of "logistical and commercial assistance" afforded by La Poste to its subsidiary.)

According to the Court of First Instance the Commission should have checked that La Poste had not used its monopoly position on the ordinary postal service market to favour its subsidiary SFMI-Chronopost, enabling it to obtain services for less than their market value

By decision of 1 October 1997, the Commission found that logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost did not constitute State aid. According to the Commission's method of calculation, the subsidiary did not derive any financial benefit from that assistance.

The Union Française de l'Express (UFEX), DHL International, Federal Express International and CRIE contested that decision before the Court of First Instance.

Those undertakings, all of which are in competition with SFMI Chronopost, submitted primarily that the assistance fell within the definition of State aid, maintaining that La Poste's commercial relations with its subsidiary amounted to a form of aid contrary to Community competition law. They argued that without any good reason the Commission omitted to take normal market conditions into account when examining La Poste's return on the assistance provided. They also criticised the Commission for refusing to regard as State aid certain other benefits enjoyed by SFMI-Chronopost (such as exemption from stamp duty, privileged access to Radio-France, and preferential customs clearance procedures).
The Court of First Instance pointed out, first, that in order to assess whether the measures at issue may constitute State aid, the situation must be examined from the point of view of the recipient undertaking. This presupposes an economic analysis which takes into account all the factors which an undertaking supplying services, operating in normal market conditions, ought to have taken into consideration when setting a price on services rendered.

The economic analysis undertaken by the Commission failed to demonstrate that the transaction in question was comparable to a transaction between undertakings operating in normal market conditions.

Accordingly, the Court criticised the Commission for merely verifying that internal prices for the services exchanged between parent company and subsidiary were calculated on the basis of full costs. It should have examined whether those full costs genuinely reflected the elements which go to make up the price paid by a subsidiary to its parent company in normal market conditions.

The Court observed that La Poste might, by virtue of its position as a public undertaking engaged in provision of a monopoly (reserved sector) service, have been able to provide some of the logistical and commercial assistance to its subsidiary at a cost lower than would have been charged by a company operating in normal market conditions.

By ruling out the existence of State aid without first checking those points, the Commission had based its decision on an incorrect interpretation of the concept of State aid. The Court therefore annulled the Commission decision in that respect. ■

SmithKline Beecham / Block Drug

The Commission has granted regulatory clearance to the proposed acquisition by UK-based SmithKline Beecham of Block Drug, which operates as Stafford-Miller in many countries outside the US. The companies' activities overlap in a number of product areas within the health and oral care sectors including, within oral care, toothpaste, toothbrushes, and cosmetic mouthwashes, and, within health care, products for treating mouth infection, acidity/heartburn, allergies, and inflammatory bowel disease. But the Commission's review showed that sufficient competition would remain in all the markets concerned. (Source: Commission Statement IP/01/34 dated 11 January, 2001.)

NATIONAL COURTS (ICE CREAM): THE MASTERFOODS CASE

Subject: National Courts
Legal certainty
"Sincere cooperation"

Industry: Ice cream
(Implications for all industries)

Parties: Masterfoods Ltd
HB Ice Cream Ltd

Source: Judgment of the Court, dated 14 December 2000, in Case C-344/98 (*Masterfoods Ltd v HB Ice Cream Ltd*)

(Note. This case clarifies a number of concepts arising in connection with the respective roles of the Commission and the national courts in the application of the rules on competition. The Irish Supreme Court sought a preliminary ruling on three questions about the course to be adopted by the national court when a matter is the subject of an appeal from a Commission decision. The second and third questions depended on the answer to the first and, in the event, did not need to be answered. The judgment of the Court of Justice is important in setting the boundaries of "sincere cooperation" between the national courts and the Commission and in reconciling the process of cooperation with the principle of legal certainty. The arguments of the parties and of the British, French and Italian governments, and the Court's coverage of the case law, are interesting;.)

1 By order of 16 June 1998, received at the Court on 21 September 1998, the Supreme Court referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234) three questions on the interpretation of Articles 85, 86 and 222 of the EC Treaty (now Articles 81, 82 and 295).

2 Those questions were raised in two sets of proceedings between Masterfoods Ltd (Masterfoods) and HB Ice Cream Ltd, now Van Den Bergh Foods Ltd (HB), in connection with an exclusivity clause contained in agreements for the supply of freezer cabinets concluded between HB and retailers of impulse ice cream.

3 HB, a wholly owned subsidiary of the Unilever group, is the leading manufacturer of ice cream in Ireland. For a number of years HB has supplied ice cream retailers with freezer cabinets free of charge or at a nominal rent, while retaining ownership of the cabinets, provided that they are used exclusively for HB products ('the exclusivity clause).

4 Masterfoods, a subsidiary of the U.S. corporation Mars Inc., entered the Irish ice cream market in 1989.

5 From the summer of 1989 numerous retailers began to stock and display Masterfoods products in cabinets supplied to them by HB. HB demanded that the exclusivity clause be complied with.

6 In March 1990 Masterfoods brought an action before the High Court of Ireland seeking, *inter alia*, a declaration that the exclusivity clause was null and void in domestic law and under Articles 85 and 86 of the EC Treaty. HB brought a separate action for an injunction to restrain Masterfoods from inducing retailers to breach the exclusivity clause. Damages were claimed by Masterfoods and HB.

7 In April 1990 the High Court granted HB an interlocutory injunction.

8 On 28 May 1992 the High Court gave judgment in the actions brought by Masterfoods and HB respectively, dismissing Masterfoods' claim and granting HB a permanent injunction restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB. However, HB's claim for damages was dismissed.

9 On 4 September 1992 Masterfoods appealed against those judgments to the Supreme Court.

10 In parallel with those contentious proceedings, on 18 September 1991 Masterfoods lodged with the Commission of the European Communities a complaint against HB under Article 3 of Council Regulation 17 of 1962, First Regulation implementing Articles 85 and 86 of the Treaty. That complaint concerned the supply by HB, to a large number of retailers, of freezer cabinets to be used exclusively for HB products.

11 On 29 July 1993 the Commission, in a statement of objections addressed to HB, concluded that the distribution system operated by it infringed Articles 85 and 86 of the Treaty.

12 On 8 March 1995, following discussions with the Commission, HB notified the Commission of proposals for alterations to its distribution arrangements with a view to exemption under Article 85(3) of the Treaty. On 15 August 1995, pursuant to Article 19(3) of Regulation 17, the Commission stated its intention to take a favourable view of HB's distribution arrangements.

13 On 22 January 1997, however, finding that the changes had not achieved the expected results in terms of opened outlets, the Commission sent a new statement of objections to HB.

14 By Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the Treaty (*Van den Bergh Foods Limited*), the Commission ruled that:

- the exclusivity provision in the freezer-cabinet agreements concluded between HB and retailers in Ireland, for the placement of cabinets in retail outlets which have only one or more freezer cabinets supplied by HB for the stocking of single-wrapped items of impulse ice cream, and not having a freezer cabinet either

procured by themselves or provided by another ice-cream manufacturer constitutes an infringement of Article 85(1) of the Treaty (Article 1 of Decision 98/531) and that

- HB's inducement to retailers in Ireland to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply them with one or more freezer cabinets for the stocking of single-wrapped items of impulse ice cream and to maintain the cabinets, free of any direct charge, constitutes an infringement of Article 86 of the Treaty (Article 3 of Decision 98/531).

15 The Commission also rejected the request for exemption pursuant to Article 85(3) of the Treaty (Article 2 of Decision 98/531) and gave HB notice to cease the infringements found immediately and to refrain from taking any measure having the same object or effect (Article 4 of Decision 98/531). HB was also given notice to inform retailers with whom it had freezer-cabinet agreements constituting infringements as described in Article 1 of Decision 98/531 of the full wording of Articles 1 and 3 of that Decision and to notify them that the exclusivity provisions in question were void (Article 5 of Decision 98/531).

16 By application lodged at the Registry of the Court of First Instance of the European Communities on 21 April 1998, which was registered as Case No T-65/98, HB, acting under its present name of Van den Bergh Foods Ltd, brought an action under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230) for the annulment of Decision 98/531.

17 By separate document lodged at the Registry of the Court of First Instance on the same day, HB also applied, pursuant to Article 185 of the EC Treaty (now Article 242 EC), for application of Decision 98/531 to be suspended until the Court of First Instance had given judgment on the substance.

18 In those circumstances the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. In the light of the judgment and orders of the High Court of Ireland dated 28 May 1992, the decision of the Commission of the European Communities dated 11 March 1998 and the applications by Van den Bergh Foods Ltd pursuant to Articles 173, 185 and 186 of the Treaty establishing the European Economic Community (EC Treaty) to annul and suspend the latter decision:

(a) Does the obligation of sincere cooperation with the Commission as expounded by the Court of Justice require the Supreme Court to stay the instant proceedings pending the disposal of the appeal to the Court of First Instance against the aforesaid decision of the Commission and any subsequent appeal to the Court of Justice?

(b) Does a decision of the Commission which is addressed to an individual party (and which is the subject of an application for annulment and suspension by that party) declaring such party's freezer cabinet agreement to be contrary to Article 85(1) and/or Article 86 of the EC Treaty thereby prevent such party from seeking to uphold a contrary judgment of the national court in that party's favour on the same or similar issues falling under Articles 85 and 86 of the Treaty where that decision of the national court is appealed to the national court of final appeal?

Questions 2 and 3 only arise in the event of a negative answer to Question 1(a).

2. Having regard to the legal and economic context of the cabinet agreements at issue in the market for single-wrapped items of impulse ice cream, does the practice whereby a manufacturer and/or supplier of ice cream provides a freezer to a retailer at no direct charge - or otherwise induces the retailer to accept the freezer - subject to the condition that the retailer stock no ice cream in such freezer other than that supplied by the said manufacturer and/or supplier constitute an infringement of the provisions of Article 85(1) and/or Article 86 of the EC Treaty?
3. Are freezer exclusivity agreements protected from challenge under Articles 85 and 86 of the EC Treaty by reason of the provisions of Article 222 of the EC Treaty?

19 By order of 7 July 1998 in Case T-65/98 R, *Van den Bergh Foods* v *Commission*, the President of the Court of First Instance suspended the operation of Decision 98/531 until the Court of First Instance had given judgment terminating the proceedings in Case T-65/98.

20 By order of 28 April 1999, the President of the Fifth Chamber of the Court of First Instance, pursuant to the third paragraph of Article 47 of the EC Statute of the Court of Justice, stayed proceedings in Case T-65/98 until the Court of Justice has delivered judgment in the present case.

Question 1: Observations of the parties

21 Masterfoods begins by observing that a negative reply to Question 1 would mean that it would be open to a national court of final appeal to refer to the Court of Justice questions in relation to the interpretation of Articles 85 and 86 of the Treaty at a time when essentially the same questions were already under consideration in the Court of First Instance in an action brought against a Commission decision adopted pursuant to those articles. The preliminary ruling of the Court of Justice would then be applied by the national court to the dispute before it at the same time as the action against the Commission decision was being heard before the Court of First Instance and, if there was an appeal, before the Court of Justice, and quite possibly before those proceedings against the Commission decision were completed.

22 Masterfoods and the French Government, referring to the judgment in Case C-234/89, *Delimitis* v *Henninger Bräu*, paragraphs 44 and 45, and to point 4 of Commission Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (the Cooperation Notice), observe that the Commission is responsible for the implementation and thrust of European competition policy and must for this purpose act in the public interest, whereas the national courts safeguard the subjective rights of private individuals in their relations with one another.

23 Masterfoods contends that the Commission exercises its powers and takes decisions where that is necessary in the Community interest (Case T-24/90 *Automec* v *Commission*, paragraphs 77 and 85 to 87, and point 13 of the Cooperation Notice). It gives priority to cases involving questions of particular political, economic or legal significance for the Community. Commission decisions are binding in their entirety upon those to whom they are addressed.

24 It follows that the Commission is the appropriate body for taking decisions on issues of Community interest.

25 With regard to the procedure under Article 177 of the Treaty, Masterfoods argues that, in contrast to the procedure under Article 173 of the Treaty, the Court of Justice has no power to find facts and may rule only on issues of law, leaving the national court to decide the case by applying the ruling of the Court of Justice to the facts as found in the national proceedings.

26 Masterfoods claims that there is a significant risk that, in applying a ruling obtained from the Court of Justice, a national court of final appeal could arrive at a decision which was inconsistent with a Commission decision if the latter is upheld by the Court of First Instance and possibly on appeal to the Court of Justice, or inconsistent with the final ruling of the Court of First Instance or Court of Justice in a situation where the Commission decision is not upheld in full. The need to avoid inconsistent decisions of this kind is one element of the duty of cooperation between the national courts and the Community institutions. Such cooperation is designed, in particular, to ensure application of the principle of legal certainty (*Delimitis*, cited above, paragraph 47).

27 Both Masterfoods and the French Government consider that the need to avoid conflicting decisions applies also to cooperation between the national courts and the Court of First Instance dealing with an action against a decision of the Commission at first instance. According to the French Government, national courts must stay proceedings if there is a risk of conflict between their forthcoming decision and that of the Court of First Instance or Court of Justice, in other words, if there is a genuine problem of legal certainty or of sincere cooperation. The need for proceedings to bestayed seems even more clearly justified in the case of a national court giving judgment on final appeal.

28 Masterfoods adds that the national court may, by making an appropriate interlocutory order, avoid any injustice caused by the delay consequent on a stay.

29 HB and the Italian and United Kingdom Governments begin by observing that the national courts and the Commission have concurrent competence to apply Articles 85(1) and 86 of the Treaty (*Delimitis*, paragraphs 44 and 45) and that those articles produce direct effects in relations between individuals (Case 127/73, *BRT* v *SABAM*).

30 According to HB, in the cases in the main proceedings the conflict between Decision 98/531 and the High Court judgment is contrary to the principle of legal certainty as interpreted by the Court of Justice in paragraph 47 of the *Delimitis* judgment. However, that judgment gives no direct guidance on how to avoid or minimise the danger of conflicting decisions in circumstances where the Commission bears the responsibility for having created the legal uncertainty by intervening in relation to a case which is already the subject of proceedings before the national court.

31 HB states that it is clear from the case-law that the duty of sincere cooperation may, in appropriate circumstances, lead a national court, in the exercise of its discretion, to stay its proceedings (*Delimitis* and *Automec* v *Commission*, cited above). Furthermore, there is no doubt that the national court is entitled to make a reference for a preliminary ruling under Article 177 of the Treaty (point 32 of the Cooperation Notice).

32 In view of the fact that Decision 98/531 was adopted in breach of the duty of sincere cooperation, and the fact that the decision has now been suspended pending determination of the action for annulment by the Court of First Instance, and given the principle that the decision does not bind the national court, but at best gives it substantial guidance in reaching a decision (point 20 of the Cooperation Notice), HB considers that a stay of the proceedings before the Supreme Court would not be the most appropriate course of action. On the other hand, a stay of the proceedings before the Court of First Instance until such time as the Court of Justice had given a preliminary ruling and the Supreme Court had applied that ruling would enable the Court of First Instance to take a decision on HB's action for annulment with the benefit of the interpretation by the Court of Justice of the points of law arising in both cases.

33 HB adds that a Commission decision does not bind a national court in the same way as a judgment of either of the Community Courts, nor can it deprive a party of the right of argument. The right of access to justice is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and is recognised by the constitutions of the Member States, with the result that it can be regarded as a fundamental principle of Community law (see Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary*, paragraph 18).

34 According to the Italian Government, the obligation of cooperation imposed by Article 5 of the EC Treaty (now Article 10 EC) on the Commission and the national courts cannot go so far as to deprive the latter of their specific autonomous jurisdiction.

35 It points out in this connection that if the Commission initiates proceedings regarding a particular instance of infringement of Articles 85 and 86 of the Treaty, the national court dealing with the same matter may, but is not required to, stay the proceedings before it while awaiting the outcome of the Commission's action (see *BRT I*, cited above, paragraph 21). Although in the present case the procedure initiated by the Commission concluded with a decision properly so-called within the meaning of Article 3(1) of Regulation No 17, that decision is not final. It has been challenged before the Court of First Instance on the basis of Article 173 of the Treaty and, what is more important, it has been suspended on the basis of Article 185 of the EC Treaty.

36 The Italian Government submits that the national court must, in its own judgment, take account of the Commission decision, unless it intends to contest the validity thereof by seeking a preliminary ruling under Article 177 of the Treaty. However, that option will not be available where the party contesting the

decision had standing to challenge it under the fourth paragraph of Article 173 and failed to do so (Case C-188/92, *TWD Textilwerke Deggendorf*). On the other hand, where the Commission decision is challenged before the Court of First Instance, the national court, as an alternative to seeking a preliminary ruling on validity, has the right, but not the obligation, to stay the proceedings before it pending the judgment of the Community Courts.

37 The United Kingdom Government points out that under Article 189 of the EC Treaty (now Article 249 EC) a Commission decision is binding upon the addressee and takes effect upon notification. It is presumed valid until declared void by the Court of First Instance or the Court of Justice as a result of proceedings under Article 173 or Article 177 of the Treaty.

38 It further submits that it follows from the general principle of legal certainty and the duty of cooperation laid down by Article 5 of the Treaty that national courts must exercise their powers so as to avoid any significant risk of conflict, not only in relation to decisions that the Commission has yet to take, but also in respect of decisions formally adopted.

39 That risk could be avoided in several ways. First, if national courts consider the Commission decision to be factually incorrect, they can stay the proceedings and invite the Commission to reconsider the decision. Second, they can refer the validity of the Commission decision to the Court of Justice pursuant to Article 177 of the Treaty. Third, where the Commission decision is being challenged before the Court of First Instance, the national court can stay its own proceedings pending the judgment. It is incumbent on a national court to stay the proceedings in any case where there is a risk that the decision contemplated by it might conflict with an existing or future decisionof a Community institution (Case 23/67, *Brasserie de Haecht*, *BRT I*, *Delimitis*, and Case C-250/92 *Gøttrup-Klim* v *Dansk Landbrugs Grovvareselskab*). Fourth, since not every risk of conflict will justify national courts delaying their proceedings, a national court must assess the materiality of the risk to the proceedings in issue when it decides upon the course of action to be taken. In addition, if it decides to stay the proceedings, the national court must consider whether to prescribe interim measures.

40 The Commission observes that the main proceedings concern a situation where a Commission decision based on Article 3(1) of Regulation 17 is still open to annulment by the Court of First Instance. That decision remains a binding Community act and only the Community Courts have jurisdiction to annul it.

41 In such a situation, in order to avoid the risk of conflicting decisions, the national court should normally stay its proceedings until final judgment is given on the application for annulment of the Commission's decision (*Delimitis*, paragraph 52).

42 If the national court considered that it could not wait, it could refer a question to the Court of Justice (*Delimitis*, paragraph 54). In such a case, a national court from whose decision there is no appeal, such as the Supreme Court, is obliged to seek a preliminary ruling under Article 177 of the Treaty. It is

not, however, required to do so immediately, but may await the outcome of the proceedings before the Court of First Instance and any subsequent appeal, and then consider whether there is still scope for reasonable doubt.

43 Given that the purpose of attaching the Court of First Instance to the Court of Justice was, first, to improve the judicial protection of individual interests and, second, to maintain the quality and effectiveness of judicial review in the Community legal order (Case C-185/95 P, *Baustahlgewebe* v *Commission*, paragraph 41), the Commission wonders whether the most appropriate course would not be to wait until final judgment is given on the action for annulment of the Commission's decision.

44 Regarding the suspension of the Commission's decision, the Commission states that if the Court of First Instance, and the Court of Justice on appeal, upheld the legality of the decision, the risk of conflict with the decision of a national court would not be entirely removed but merely postponed.

Findings of the Court

45 First of all, the principles governing the division of powers between the Commission and the national courts in the application of the Community competition rules should be borne in mind.

46 The Commission, entrusted by Article 89(1) of the EC Treaty (now, after amendment, Article 85(1) EC) with the task of ensuring application of the principles laid down in Articles 85 and 86 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. In order effectively to perform that task, which necessarily entails complex economic assessments, it is entitled to give differing degrees of priority to the complaints brought before it (*Delimitis*, paragraph 44, and Case C-119/97 P, *Ufex et al* v *Commission*, paragraph 88).

47 The Commission has exclusive competence to adopt decisions in implementation of Article 85(3) of the Treaty, pursuant to Article 9(1) of Regulation 17 (*Delimitis*, paragraph 44). However, it shares competence to apply Articles 85(1) and 86 of the Treaty with the national courts ((*Delimitis*, paragraph 45). The latter provisions produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which national courts must safeguard (*BRT I*, paragraph 16). The national courts thus continue to have jurisdiction to apply the provisions of Articles 85(1) and 86 of the Treaty even after the Commission has initiated a procedure in application of Articles 2, 3 or 6 of Regulation 17 (*BRT I*, paragraphs 17 to 20).

48 Despite that division of powers, and in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 85(1) and 86 of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Articles 85 and

86 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.

49 It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, to that effect, Case C-2/97 *IP* v *Borsana*, paragraph 26).

50 Under the fourth paragraph of Article 189 of the Treaty, a decision adopted by the Commission implementing Articles 85(1), 85(3) or 86 of the Treaty is to be binding in its entirety upon those to whom it is addressed.

51 The Court has held, in paragraph 47 of *Delimitis*, that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Articles 85(1) and 86 and Article 85(3) of the Treaty.

52 It is even more important that when national courts rule on agreements or practices which are already the subject of a Commision decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.

53 In that connection, the fact that the President of the Court of First Instance suspended the application of Decision 98/531 until the Court of First Instance has given judgment terminating the proceedings before it is irrelevant. Acts of the Community institutions are in principle presumed to be lawful until such time as they are annulled or withdrawn (Case C-137/92 P, *Commission* v *BASF and Others*, paragraph 48). The decision of the judge hearing an application to order the suspension of the operation of the contested act, pursuant to Article 185 of the Treaty, has only provisional effect. It must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order in Case C-149/95 P(R), *Commission* v *Atlantic Container Line and Others*, paragraph 22).

54 Moreover, if a national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 177 of the Treaty, refer a question to the Court of Justice for a preliminary ruling.

55 If, as here in the main proceedings, the addressee of a Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision pursuant to that article, it is for the national court to decide whether to stay proceedings until a

definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling.

56 It should be borne in mind in that connection that application of the Community competition rules is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Community Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty.

57 When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

58 If a national court stays proceedings, it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment.

59 In this case it appears from the order for reference that the maintenance in force of the permanent injunction granted by the High Court restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB depends on the validity of Decision 98/531. It therefore follows from the obligation of sincere cooperation that the national court should stay proceedings pending final judgment in the action for annulment by the Community Courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

60 The answer to Question 1 must therefore be that, where a national court is ruling on an agreement or practice the compatibility of which with Articles 85(1) and 86 of the Treaty is already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling.

[Paragraph 61 points out that Questions 2 and 3 do not call for an answer; and paragraph 62 deals with costs. The Court's ruling is in the same terms as paragraph 60 of the Judgment.] ■

Note. The foregoing text is from the web-site of the Court of Justice. The web-site is freely available for general use. Texts are subject to correction.

IMPLEMENTING RULES: COMMISSION PROPOSAL (PART II)

[This completes the Explanatory Memorandum begun in our last issue, relating to the Commission Proposal for a new Council Regulation replacing Regulation 17.]

Consistent application of Community competition law

The application of the same law and policy will in itself promote consistency throughout the single market. The application of Articles 81 and 82 by national competition authorities and courts will be subject to Community block exemption regulations, creating safe harbours for defined categories of agreements. Further guidance will be provided by guidelines adopted by the Commission. Application by national competition authorities and courts will also be subject to the case-law of the Court of Justice of the European Communities and the Court of First Instance as well as the administrative practice of the Commission. In the latter respect, it is proposed in Article 16 of the proposed Regulation to impose on national competition authorities and courts an obligation to use every effort not to contradict a Commission decision. More decision-makers also mean more case-law and administrative decisions, which will further clarify the scope of the Community competition rules. Moreover, there will be a number of additional instruments aiming at ensuring that Articles 81 and 82 are applied in a consistent manner.

The application of the Community competition rules by national courts will be subject to the preliminary reference procedure of Article 234 of the EC Treaty. The Court of Justice of the European Communities will play the same important role in ensuring consistency as it has done and continues to do in other areas of Community law. As the proposal aims at increasing the level of private enforcement before national courts, an initial increase in Article 234 references can be expected. A significant increase, however, is unlikely, as it is expected that most litigation before national courts will concern areas where the law has been clearly established.

Article 15 of the proposed Regulation codifies the existing obligation of the Commission, based on Article 10 of the Treaty, to cooperate with national courts. This cooperation includes a right for national courts to ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules. It is expected that the importance of this mechanism will increase once national courts are empowered to apply Article 81(3) as well. Article 15 also proposes to vest in the Commission the power to submit written or oral submissions to national courts at its own initiative and in the Community public interest. This will allow the Commission to contribute to the consistent application of Community competition law by national courts. It is also proposed that the national competition authorities be empowered to make oral and written submissions to their national courts.

With regard to the national competition authorities, the creation of a network in

which all members apply the same law and policy will greatly promote consistency and a level playing field throughout the single market. The formal basis for establishing the network is found in Article 11 of the proposed Regulation, according to which the national competition authorities and the Commission are to apply the Community competition rules in close cooperation. The details of this cooperation will be developed in a notice. The network will foster the development of a common competition culture throughout the Community. In addition, certain formal mechanisms are established to ensure consistent application, including a consultation procedure for certain types of decisions adopted by national competition authorities (see Article 11(4) of the proposed Regulation). This provision requires national competition authorities to consult the Commission prior to the adoption of prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption regulation. All such decisions have direct repercussions for the addressees. It is therefore important to ensure that these decisions are consistent with the general practice of the network. In case of substantial disagreement within the network, the Commission retains the power to withdraw a case from a national competition authority by itself initiating proceedings in the case.
It is not necessary for consistency purposes to provide for prior consultation in respect of other types of decisions adopted by national competition authorities, such as rejections of complaints and decisions to take no action. These decisions bind only the deciding authority, and do not preclude subsequent action by any other competition authority or before national courts. As regards decisions adopted by the Commission, it is proposed to maintain the present obligation for the Commission to consult the Advisory Committee on Restrictive Practices and Dominant Positions.

An adequate level of legal certainty for companies and a reduction of bureaucracy

Under the existing Regulation 17 an agreement or decision caught by Article 81(1) can become valid, i.e. enforceable before a civil court, only if it is notified to the Commission and is exempted by the Commission. In practice, most notified cases are closed by a non-binding administrative letter from the Commission services (a "comfort letter"). The proposed Regulation removes the bureaucratic obstacles connected with the notification and authorisation procedure while maintaining an adequate degree of legal certainty. In particular, the proposed Regulation provides that agreements and decisions which satisfy the conditions of Article 81(3) are valid and enforceable ab initio with no administrative decision being required to that effect. Undertakings can therefore rely on civil enforceability as an element of improved legal certainty independently of any action by an administration.

The proposed Regulation does not remove the necessity for undertakings to assess their business transactions to verify whether they are in compliance with the competition rules. Under the present Regulation 17, this analysis is carried out by undertakings when preparing a notification. The proposal assimilates the application of the Community competition rules to other areas of law where undertakings are required to ascertain themselves that their behaviour is legal.

In the field of Community competition law, companies' task of assessing their behaviour is facilitated by block exemptions and Commission notices and guidelines clarifying the application of the rules. As a complementary element of the current reform, the Commission commits itself to an even greater effort in this area. Article 28 of the proposed Regulation confers on the Commission a general power to adopt block exemption regulations. This power will ensure that it is in a position to react with sufficient speed to new developments and changing market conditions. In addition, under the new system, with the larger number of decision-makers applying Article 81(3), case-law and practice on its interpretation will rapidly develop where they do not yet exist, thereby inherently reinforcing the framework for assessment.

The Commission will further contribute to this development by continuing to set policy through its own decisions in individual cases. In addition to prohibition decisions, the proposed Regulation provides that in cases where it is in the Community public interest to do so the Commission, acting on its own initiative, can adopt decisions finding that no infringement has been committed. This will permit the Commission to set out its position in a landmark case so as to clarify the law for all companies that find themselves in similar situations.
Finally, the Commission will remain open to discuss specific cases with the undertakings where appropriate. In particular, it will provide guidance regarding agreements, decisions or concerted practices that raise an unresolved, genuinely new question of interpretation. To that effect, the Commission will publish a notice in which it will set out the conditions under which it may issue reasoned opinions. Any such system of opinions must not, however, lead to companies being entitled to obtain an opinion, as this would reintroduce a kind of notification system.

Subsidiarity and proportionality

In the interest of the single market, the proposed Regulation ensures that Community competition law should be applied to agreements and practices capable of affecting trade between Member States, thereby creating a level playing field throughout the Community. At the same time, the proposal ensures that the application of that law takes place at the most efficient level. Under the proposal, the Commission shares the power to apply Article 81(3) with national competition authorities and national courts, thereby enabling these bodies to apply Articles 81 and 82 effectively. The scope for effective intervention at national level is substantially increased by the cooperation mechanisms contained in Articles 12 and 21 of the proposed Regulation, which empower national competition authorities to exchange confidential information and to assist each other in respect of fact-finding. As a result of market integration evidence and information will increasingly be located in several Member States. Enhanced horizontal cooperation will make it easier for national competition authorities to obtain all the relevant facts.

The Commission's proposal is thus fully in line with the principle enshrined in Article 5 of the Treaty, according to which action should be taken at the most efficient level. While promoting the Community interest in a level playing field

throughout the single market, the proposal ensures that national competition authorities and courts can apply Articles 81 and 82 fully and effectively to all cases in respect of which intervention at national level is more efficient.

The Commission, being the only authority that can act throughout the European Union, will necessarily continue to play a central role in the development of Community competition law and policy and in ensuring that it is applied consistently throughout the single market, thereby preventing any renationalisation of Community competition law. The development and application of the law and policy will, however, be a concern of all the competition authorities involved in the enforcement of Articles 81 and 82. Policy issues will be the subject of discussion within the network. The proposal does not go beyond what is necessary to achieve the objectives of the Treaty. The Treaty aims, inter alia, to create an internal market and a system of undistorted competition. The very objective of the present proposal is to enhance the protection of competition and to create a level playing field throughout the Community.

The proposal to exclude the application of national competition law to agreements and practices that affect trade between Member States is necessary in order to ensure that such agreements and practices are subject to a single set of rules. This is essential in order to ensure that competition in the internal market is not distorted as a result of differences in the legal framework and to ensure that cases can be allocated efficiently within the network. Effective case allocation also makes it necessary that the members of the network should inform each other of all new cases and exchange relevant case-related information. Moreover, provision must be made for prior consultation by the national competition authorities in respect of prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption regulation.

Inconsistencies in respect of these types of decisions would be detrimental to the single market and the objective of creating a level playing field throughout the Community. Such decisions also have important implications for the common competition policy of the network. The Commission will associate the other members of the network in the consultation process. The functioning of the network will be further elaborated upon in a notice on cooperation between competition authorities. The present proposal is based on the premise that national competition authorities will apply Articles 81 and 82 in accordance with their respective national procedural rules. It is not necessary for the implementation of the reform to embark on a full-scale harmonisation of national procedural laws. On the other hand, it is necessary to regulate at Community level a limited number of issues that have a direct impact on the proper functioning of the proposed system.

First and foremost, it is necessary to oblige the Member States to empower their national competition authorities to apply Articles 81 and 82.
It is also necessary to stipulate the content of the decisions that national competition authorities may adopt in the application of Articles 81 and 82 (see Article 5 of the proposed Regulation), in order to ensure a full and effective

implementation of the directly applicable exception system. No competition authority forming part of the network can be empowered to adopt constitutive exemption decisions when applying the Community competition rules.
Article 13 of the proposed Regulation empowers national competition authorities and the Commission to suspend or terminate proceedings on the ground that another member of the network is or has been dealing with the case; this is necessary to ensure an efficient allocation of cases and use of resources within the network. It is, however, neither necessary nor appropriate to oblige other competition authorities to suspend or terminate their proceedings. It is the task of the network to ensure in practice that resources are used efficiently.

The proposed Regulation provides a legal basis for the exchange of information and assistance between national competition authorities. Such horizontal cooperation is necessary in order to enable them to apply Articles 81 and 82 effectively. The power of the Commission to make written and oral submissions in the Community public interest before national courts hearing a case on the application of Articles 81 and 82 (see Article 15) is necessary in order to allow the Commission to contribute to their consistent application. Divergent application of Community competition law by national courts would pose a threat to the proper functioning of the single market and the coherence of the system. In accordance with the principle of subsidiarity it is proposed that the power to make submissions before the courts be shared between the Commission and the national competition authorities. Furthermore, submissions will be made in accordance with the procedural rules in force in the Member State in question. Thus, the proposal does not purport to harmonise national procedural law, except that it grants the Commission and the national competition authorities the power to make submissions on their own initiative. In order to enable the Commission and the national competition authorities to exercise this proposed new power effectively, it is necessary to oblige national courts to furnish, upon request, relevant information pertaining to cases before them in which the Commission or a national competition authority is considering making a written or oral submission or has decided to do so. ■

United Airlines / US Air

The Commission has authorised UAL Corporation, whose principal operating subsidiary is United Airlines Inc, to acquire US Airways Group Inc. The Commission's review showed that the operation could raise competition concerns on four transatlantic routes (Frankfurt-Philadelphia, Charlotte and Pittsburgh and Munich-Philadelphia). But United submitted undertakings in the form of slot divestitures at Frankfurt and Munich which will facilitate the entry of new competitors on those routes. United Airlines Inc and US Airways Group Inc (US Air) are both based in the United States. Their main area of operation is the United States; however, both airlines also operate flights between Europe and the United States, hence the regulatory review by the Commission of the European Union. (Source: Commission Statement IP/01/48, dated 15 January 2001.)

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