COMPETITION LAW IN THE EUROPEAN COMMUNITIES

March, 2001

Volume 24, Issue 3

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, N. H.
APR 25 2001

FAIRFORD PRESS

Publisher and Editor: Bryan Harris

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

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

www.fairfordpress.com

Tel & Fax (44) (0) 1451 861 464
Tel & Fax (1) (207) 439 5932

Email: anharr@cybertours.com

March, 2001

Volume 24 Issue 3

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

Copyright © 2001 Bryan Harris
ISSN 0141-769X

CONTENTS

51 COMMENT

Competition and E-Commerce

52 REFUSAL TO SUPPLY (PHARMACEUTICAL DATA)

The IMS Case

55 COOPERATION AGREEMENTS (AIRLINES)

The BM Case

57 PROCEDURE (STEEL TUBES)

The Mannesmannroehren-Werke Case

68 STATE AIDS (ELECTRICITY)

The Preussen Elektra Case

MISCELLANEOUS

The GE / Honeywell Case 54
The MAN / Auwaerter Case 56
The CWP Case 67
The SCI Case 75

Competition and E-commerce

In a speech given on 2nd March, 2001, the Commissioner for Competition Policy, Mr Mario Monti, spoke about the relationship between electronic commerce and the rules on competition. He pointed to five areas calling for attention: the need to avoid a situation in which control of the telecommunications networks might lead to distortions of competition; the "governance" of the Internet; "business-to-business" exchanges; "business-to-consumer" services; and market definition.

On the control of telecommunications networks, he rightly expresses concern about the possible use of that control to facilitate the leverage of the parties' positions into related markets: "this concern is a common one when looking at internet-related markets, given that vertical integration - the presence of the same companies on upstream and downstream markets - is frequent".

In the context of the "governance" (he does not use the word "control") of the Internet, his immediate concern is with the use of domain names. "Avoiding speculative, discriminatory and abusive registration or management of Internet domain names is crucial for securing the removal of geographical barriers to competition. We are therefore currently reflecting on the competition policy considerations related to the Domain Name System."

Both in relation to "business-to-business" exchanges and in relation to "business-to-consumer" services, Mr Monti is quite positive. He says, quite reasonably, that the effects on competition need to be carefully monitored, but concedes that, so far, the Internet appears to be stimulating competition, particularly in the second of these two categories. "Thus, when examining Internet book selling we found that the total costs of establishing on-line bookshops are relatively minor and there are no legal or regulatory barriers to entry. In addition, the availability of so called meta search-engines comparing prices for specific books across multiple online bookshops, make this market segment completely transparent market and therefore fiercely competitive."

As for market definition, this has always presented problems; and they are likely to be increased in the field of electronic commerce. For example, to take a basic point of principle, it is at least questionable whether on-line sales to consumers are part of the same market as offline sales of the same products; whether, in economic terms, the two services are "substitutable".

In concluding his comments on the subject, the Commissioner says that "the Internet is a wonderful enabling technology, which will in principle increase competition in many markets. Nevertheless, that does not mean that it is immune from competition problems." Bravo! ■

REFUSAL TO SUPPLY (PHARMACEUTICAL DATA): THE IMS CASE

Subject: Refusal to supply
Abuse of dominant position
Licensing agreements
Market entry
Interim measures

Industry: Pharmaceutical data
(Some implications for other industries)

Parties: IMS Health
NDC Health
AzyX Geopharma Services

Source: Commission Statement IP/01/365, dated 14 March 2001

(Note. Several features of this case are interesting. One is the Commission's approach to the question of a refusal to supply, with particular reference to the circumstances in which a refusal constitutes an infringement: as a rule in the past, it has been necessary to show reasonable and objective reasons for refusal if it is to be justified. Another point is the question of market entry, which appears to be inhibited by the difficulty competitors have in offering customers a different territorial structure from the one put in place by IMS. Observers may wonder whether this is a genuine difficulty or not. A third point concerns the use by IMS of copyright protection for its territorial scheme. There is a hint here of the way in which US firms may patent business methods. Finally, this is one of the rare cases in which the Commission may resort to "interim measures", in which it will have to show the Court that, in the absence of such measures, "serious and irreparable damage" may ensue. This is a case to watch.)

The Commission has sent US company IMS HEALTH (IMS), the world leader in data collection on pharmaceutical sales and prescriptions, a statement of objections with a view to imposing interim measures. IMS's refusal to grant a licence to its regional sales data method in Germany, known as the 1860 brick structure, would appear to constitute an abuse of a dominant position, according to the Commission's preliminary conclusions. The refusal makes it impossible for new competitors to enter or stay on the market in question and is likely to cause serious and irreparable damage to the two present competitors of IMS: NDC Health of the United States and AzyX Geopharma Services of Belgium.

IMS Health is the world's number one supplier of information on sales and prescriptions of pharmaceutical products with a presence in more than 100 countries and a world-wide turnover of $1.4 billion in 1999. It occupies a dominant position in Germany.

Pharmaceuticals sales data and regional data, in this particular case, are an essential tool for pharmaceutical companies, which use the information to allocate sales territories, develop incentive schemes for their sales representatives and inform their sales force about market changes (market shares, comparison with previous years or months, and so on). IMS was the only provider of regional data in Germany until 1999 at which point two new competitors, NDC Germany (German subsidiary of NDC of the United States) and AzyX Geopharma (German subsidiary of a Belgian company) entered the market. These two companies initially attempted to distribute their regional sales information according to a structure based on a subdivision of the territory of the former German Federal Republic rather than into 1860 segments. However, discussions with potential customers proved that data analysed in this manner would not be marketable because it would not correspond to the territorial division already in place within the industry.

The 1860 brick structure is in effect a segmentation of the German territorial division already in place within the industry. The 1860 brick structure is in effect a segmentation of the German territory into 1860 zones or bricks. This segmentation is used to report the estimated sales of pharmaceutical products in each zone. The purpose of the segmentation is to allow reporting of sales data broken down into a small, useful geographic area, while avoiding the identification of sales to individual pharmacies. The latter is necessary for data protection purposes. In Germany data protection rules require that at least three pharmacies be aggregated. To keep the structure stable at least four or five pharmacies are necessary in each segment. The 1860 brick structure was created by IMS in co-operation with the pharmaceutical companies in the early 1970s. It is regarded by the pharmaceutical industry as an essential tool to have the data delivered.

In 2000, IMS filed a lawsuit in the Frankfurt District Court against the two new competitors, alleging that they had infringed IMS's copyright in the 1860 brick structure. The court at the end of 2000 prohibited NDC and AzyX from employing the 1860 brick structure or any other brick structure derived from it. While continuing to contest that the structure is in fact protected by copyright, both NDC and Azyx then asked IMS for a licence to use the 1860 brick structure, which was refused. According to NDC, which complained to the Commission in December 2000, in the absence of a licence it would be barred from operating and Germany. In all likelihood IMS's conduct would foreclose the market to potential new entrants and eliminate all prospect of competition in Germany.

Following the preliminary judgment of the German Court and NDC's complaint, the Commission investigated whether there was a real and practical possibility for companies willing to offer pharmaceutical sales data in Germany to employ another structure which would not infringe any copyright IMS might have. This does not seem to be the case. The preliminary investigation of the Commission shows that the refusal of access to the structure is likely to eliminate all competition in the relevant market. Such refusal cannot be objectively justified and the structure itself is indispensable for NDC to carry on its business, inasmuch as there is no actual or potential substitute. This situation is likely to

cause serious and irreparable damage to the two competitors of IMS. The Commission takes the view that this type of practice by a company in a dominant position like IMS distorts competition between rival operators and forms a solid barrier to potential entrants.

The statement of objections concludes that the refusal in question is a prima facie abuse of a dominant position within the meaning of Article 82 of the EC Treaty. This is a preliminary document starting the procedure for granting interim measures and is not the Commission's final verdict on granting the interim measures or on the substance of the case. However, according to European Competition Commissioner, Mario Monti, if the Commission's initial opinion is confirmed, IMS will have to license the use of the 1860 brick structure on non-discriminatory, commercially reasonable terms.

Procedure

The power of injunctive relief was recognised by the Court of Justice in 1980, but interim measures procedures remain exceptional (there have been fewer than 15 cases so far). The Commission resorts to such exceptional measures when there is a risk of serious and irreparable harm either to a specific firm or to competition in general. The procedure is similar to the normal procedure except that it is accelerated. In accordance with the rights of defence in interim measures cases, IMS has two weeks from receiving the statement of objections to comment in writing. It is also entitled to ask for a hearing, which may also be attended by the complainant and by EU member states' competition experts who form the Advisory Committee on Restrictive Practices and Dominant Positions. The adoption of interim measures would not end the procedure as the Commission would continue its investigation on the substance of the case. IMS could also appeal against the measures before the Court of Justice in Luxembourg. ■

The GE / Honeywell Case

The Commission has decided to open a full investigation into the proposed merger between US companies General Electric (GE) and Honeywell International Inc. (Honeywell). The Commission will make a detailed assessment of the impact of the transaction on competition, in particular as regards the supply of components to aircraft, such as jet engines, avionics and non-avionics products. The focus of the investigation will be on whether or not the combination of GE's strong market position on engines with Honeywell's also strong market positions on avionics and certain non-avionics products will create or strengthen a dominant position on any of these markets.

Source: Commission Statement IP/01/298, dated 1 March 2001

COOPERATION AGREEMENTS (AIRLINES): THE BM CASE

Subject: Cooperation agreements
Joint ventures

Industry: Airlines

Parties: British Midland (BM)
Lufthansa
Scandinavian Airlines System (SAS)

Source: Commission Statement IP/01/366, 14 March 2001

(Note. On the face of it, an agreement of a kind likely to increase overall competition is to be welcomed: the scheme planned by the three airlines concerned is bound to offer something of a challenge to British Airways. It remains to be seen whether the Commission receives any objections from third parties and whether the Commission itself sees any drawbacks in the proposal.)

In its Statement, the Commission has published a summary of a co-operation agreement between British Midland, Lufthansa and SAS, giving interested parties the opportunity to comment before it takes a position the alliance. The Commission has not at this stage reached any conclusions on the agreement despite the fact that the three airlines have submitted undertakings to address potential competition concerns.

On 1 March 2000 British Midland, Lufthansa and SAS notified to the Commission a co-operation agreement, applying for an exemption under Article 81(3) of the EC Treaty. The airlines have entered into a Tripartite Joint Venture Agreement which, according to the parties, allows British Midland to re-organise and extend its network services out of London and Manchester to new routes within the European Union, in particular from London to Madrid, Barcelona and Rome. BM has already started flying these routes.

Germany's Lufthansa and the Scandinavian Airlines System (SAS) are members of the STAR alliance. The agreement will improve their competitive position in the United Kingdom market insofar as it enables them to sell online services between London and a number of British regional destinations, as well as between London and Dublin. It also offers them improved access to London Heathrow, Europe's largest and most congested airport. As a result, the STAR alliance expects to compete more vigorously with the OneWorld alliance of British Airways.

The notifying carriers also contend that the agreement will lead to important consumer benefits in terms of greater choice of services and better connections on a number of routes within Europe in particular from London-Heathrow and Manchester. Consumers will benefit from the parties' entry into routes which

hitherto were operated by only one alliance (for example, London-Barcelona or London-Madrid). This will increase competition on these routes generating lower fares. According to the parties, consumers will also benefit from a better connection between the services, more convenient scheduling and seamless travel. Existing arrangements relating to lounge access, through check-in etc. will be improved and will be extended to services which hitherto were not covered in the bilateral arrangements between the Parties.

Following preliminary discussions with the Commission, the companies have proposed a set of remedies to address competition concerns raised by the co-operation agreement. These remedies are detailed in the summary of the case published in the EU's Official Journal. Under the procedure laid down for air transport operations under Regulation 3975/87, the Commission has 90 days following the publication of a notice to decide whether to raise serious doubts. Third parties have 30 days to submit their views also from the publication date. If the Commission raises no objections, the joint venture will be automatically exempted for a period of six years. ■

The MAN / Auwärter Case

The Commission has decided to start a detailed second-stage investigation into the planned merger between German truck and bus manufacturer MAN Nutzfahrzeuge AG and Gottlob Auwärter GmbH & Co. KG, another bus maker also of Germany. The Commission's initial one-month review suggests there are serious concerns, particularly in relation to the companies' strong positions on the German city bus market.

MAN is an integrated manufacturer of complete lorries and buses owned entirely by MAN Aktiengesellschaft, Munich, Germany. Auwärter is a bus manufacturer, but not fully integrated. It designs and manufactures buses and coaches under the Neoplan make, but obtains some components, from suppliers such as MAN and DaimlerChrysler.

The Commission's initial review showed that the merger would have an impact on the markets for city buses, inter-city buses and coaches. The Commission is particularly concerned about the impact on the German market for city buses, iwhere the merged MAN/Auwärter will attain a market share of well over 40%, thereby matching EvoBus (DaimlerChrysler), traditionally their strongest competitor. As a result of the acquisition, the number of bus manufacturers in Germany will be reduced from three to two.

Source: Commission Statement IP/01/217, 14 February 2001.

PROCEDURE (STEEL): THE MANNESMANNROEHREN-WERKE CASE

Subject: Procedure
Annulment (of Commission Decision)
Investigation
Self-incrimination
Human rights

Industry: Steel tubes
(Implications for all industries)

Parties: Mannesmannröhren-Werke AG
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-112/98 (*Mannesmannröhren-Werke AG v Commission of the European Communities*) dated 20 February 2001

(This important decision clarifies the extent to which the Commission may legitimately pursue its investigation of a possible breach of the rules on competition, in circumstances in which the answers given to the Commission's questions may incriminate the party concerned. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which does not bind the Court, but is accepted by the Treaty on European Union, parties are entitled to a fair legal process. But "the applicant cannot directly invoke the Convention before the Community courts": paragraph 75. On the other hand, "Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process ... and the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission": paragraph 77. Consequently, the Commission's Decision to request information in the present case was largely annulled. The Court's judgment provides a thorough review of the relevant earlier case law.)

Judgment

Relevant legislation

1. Paragraphs 1, 4 and 5 of Article 11, headed 'Requests for information, of Council Regulation 17 of 1962: First regulation implementing Articles 85 and 86 of the Treaty provide as follows:

> 1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the governments and competent authorities of

the Member States and from undertakings and associations of undertakings.

...

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time-limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time-limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

2. Article 16 of Regulation 17, entitled 'Periodic penalty payments, provides:

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

...

(c)to supply complete and correct information which it has requested by decision taken pursuant to Article 11(5);

....

3. Furthermore, Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 provides:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Background

4. The Commission initiated an investigation procedure with respect to the applicant and other producers of steel tubes in the course of which, on a number of occasions, it carried out inspections at the premises of the applicant, amongst others.

5. On 13 August 1997, following those inspections, the Commission sent the applicant a request for information in which it asked questions regarding presumed infringements of the competition rules in which the applicant was thought to have taken part.

6. That request for information contained, inter alia, the following four questions:

1.6 Meetings between European and Japanese producers

According to the Commission's information, your firm participated in meetings between European and Japanese producers of seamless tubes. The meetings took place within the framework of what the trade calls the Europe-Japan Club. Meetings were held at president level (Presidents Meetings or P-Meetings), at manager level (Managers Committee or Managers Meetings or M-Meetings), at expert level (Experts Meetings or E-Meetings) and at working group level (Working Group).

Please provide, for the period from 1984 to the present day:

-the dates, places and names of the firms participating in each of the meetings between European and Japanese seamless tube producers at president, manager, expert and working group level;

-the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons;

-copies of all the invitations, agendas, minutes, internal memoranda, records and any other document in the possession of your firm and/or its employees concerning the abovementioned meetings;

-in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting.

1.7 Special Circle meetings

According to the Commission's information, your firm participated in meetings between European seamless tube producers within what is called the Special Circle.

Please provide, for the period from 1984 to the present day:

-the dates, places and names of the firms participating in each of the meetings between European and Japanese seamless tube producers at president, manager, expert and working group level;

-the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons;

-copies of all the invitations, agendas, minutes, internal memoranda, records and any other document in the possession of your firm and/or its employees concerning the abovementioned meetings;

-in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting.

1.8 1962 agreement

Between 1 January 1962 and July 1996, your firm was party to four agreements concerning OCTG and linepipe (Quota agreement for OCTG [stainless steel extraction and transport tubes], Price agreement for OCTG, Price agreement for Linepipe, Supplementary agreement). What is the relationship between these agreements and the Europe-Japan Club mentioned above and the Special Circle?

To what extent did the existence and implementation of these agreements influence the decisions adopted within the Europe-Japan Club and/or within the Special Circle?

To what extent did the decisions adopted within the Europe-Japan Club and/or within the Special Circle influence the implementation of the abovementioned agreements?

...

2.3 Meetings between European and Japanese producers

According to the Commission's information, your firm participated in meetings between European and Japanese producers of large-diameter welded tubes.

Please provide, for the period from 1984 to the present day:

-the dates, places and names of the firms participating in each of the meetings between European and Japanese large-diameter welded tube producers at president, manager, expert and working group level;

-the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons;

-copies of all the invitations, agendas, minutes, internal memoranda, records and any other document in the possession of your firm and/or its employees concerning the abovementioned meetings;

-in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting.

7. By letter of 14 October 1997, the applicant's lawyers replied to certain of the questions in the request for information and declined to reply to the four questions set out above. By letter of 23 October 1997, the applicant confirmed the content of the reply given by its lawyers.

8. In its reply of 10 November 1997, the Commission rejected the applicant's argument that it was not obliged to answer the said four questions and, on the basis of Article 11(4) of Regulation 17, set a time-limit of 10 days from the date of receipt of its letter for answers to be given to the four questions. It added that, should the applicant fail to answer the questions within the given time, a periodic penalty payment could be imposed on it.

9. In a letter dated 27 November 1997 from its lawyers, the applicant reiterated its refusal to provide the information requested.

10. On 15 May 1998 the Commission adopted a decision pursuant to Article 11(5) of Regulation 17 (the contested decision), Article 1 of which provided that the applicant must, within 30 days of notification of the contested decision, reply to the four questions at issue, which were set out in an annex to the decision. Article 2 provided that should [the applicant] fail to provide the information requested in the manner specified in Article 1, a fine of €1,000 per day of delay [would] be imposed on it as from the end of the period laid down in Article 1.

Procedure

11. By application lodged at the Registry of the Court of First Instance on 23 July 1998 the applicant brought the present action.

12. Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance, and on the proposal of the First Chamber, the Court decided, after hearing the parties in accordance with Article 51 of those Rules, to refer the case to a Chamber sitting in extended composition.

13. Upon hearing the report of the Reporting Judge, the Court (First Chamber, Extended Composition) decided to open the oral procedure.

14. The parties presented oral argument and their replies to the Court's questions at the hearing on 23 May 2000.

15. By facsimile letter received at the Registry of the Court of First Instance on 18 December 2000 the applicant asked the Court to have regard to the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) proclaimed in Nice on 7 December 2000 (hereinafter 'the Charter) in determining the present case, on the ground that the Charter constituted a new point of law concerning the applicability of Article 6(1) of the Convention to the facts of the case. In the alternative, the applicant asked for the oral procedure to be re-opened.

16. On being invited to submit its observations on that request, the Commission rejected the applicant's arguments by letter of 15 January 2001, contending that the Charter is of no consequence for the purpose of the determination of the present case.

Forms of order sought by the parties

17. The applicant claims that the Court should:
-annul the contested decision;
-in the alternative, annul Article 2 of the contested decision;
-order the Commission to pay the costs.

18. The Commission contends that the Court should:
-dismiss the action as manifestly inadmissible in so far as it seeks the annulment of Article 2 of the contested decision;
-dismiss the action as unfounded in so far as it seeks the annulment of Article 1 of the contested decision;
-order the applicant to pay the costs.

19. At the hearing, the Commission confirmed that it had neither the intention nor the power to enforce Article 2 of the contested decision, whereupon the applicant withdrew its claim for annulment of that article and, consequently, its pleas in relation thereto, of which formal note was taken.

Substance

20. In support of its claim for annulment of Article 1 of the contested decision, the applicant puts forward four pleas in law. It is appropriate to begin by

considering together the first three of those pleas, all of which concern an alleged infringement of the rights of defence.

[Paragraphs 21-58 set out the arguments of the parties.]

Findings of the Court

59. It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, because the Convention is not itself part of Community law (Case T-374/94, *Mayr-Melnhof v Commission*, paragraph 311).

60. However, it is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, the Opinion of the Court of Justice of 28 March 1996 in Case 2/94, paragraph 33, and the judgment in Case C-299/95, *Kremzow*, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect (Case 222/84, *Johnston*, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, paragraph 2 of Article F of the Treaty on European Union (now Article 6(2)) provides that 'the Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

61. Next, it must be borne in mind that the purpose of the powers conferred on the Commission by Regulation No 17 is to enable that institution to fulfil its duty under the Treaty to ensure that the rules on competition within the common market are observed.

62. During the preliminary-investigation procedure, Regulation 17 does not give an undertaking that is subjected to an investigative measure any right to avoid the application of that measure on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, it places the undertaking under a duty of active cooperation, which means that it must be prepared to make available to the Commission any information relating to the subject-matter of the investigation (*Orkem*, paragraph 27, and *Société Générale*, paragraph 72).

63. In the absence of any right to silence expressly provided for in Regulation 17, it is necessary to consider whether certain limitations on the Commission's powers of investigation during a preliminary investigation are, however, implied by the need to safeguard the rights of defence (*Orkem*, paragraph 32).

64. In this respect, it is necessary to prevent the rights of defence from being irremediably impaired during preliminary-investigation procedures which may

bedecisive in providing evidence of the unlawful nature of conduct engaged in by undertakings (*Orkem*, paragraph 33, and *Société Générale*, paragraph 73).

65. However, it is settled case-law that, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct (*Orkem*, paragraph 34, and Case 27/88, *Solvay v Commission*, summary publication, and *Société Générale*, paragraph 74).

66. To acknowledge the existence of an absolute right to silence, as claimed by the applicant, would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty under Article 89 of the EC Treaty (now, after amendment, Article 85 EC) to ensure that the rules on competition within the common market are observed.

67. It follows that an undertaking in receipt of a request for information pursuant to Article 11(5) of Regulation 17 can be recognised as having a right to silence only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*Orkem*, paragraph 35).

68. Those are the limits within which the arguments raised by the applicant must be assessed.

69. It is appropriate in this case to review first of all the legality of questions 1.6, 1.7 and 2.3, which are almost identical, and then that of question 1.8.

70. In their first three indents, questions 1.6, 1.7 and 2.3 contain requests for purely factual information and the production of documents already in existence. Comparable questions were not held to be unlawful by the Court of Justice in its judgment in *Orkem*. The applicant was therefore under an obligation to provide answers in response to those requests.

71. By contrast, the last indent of each of those three questions does not concern exclusively factual information. In the last indent, the Commission calls upon the applicant, in identical terms, to describe in particular the purpose of the meetings it attended and the decisions adopted during them, even though it is clear that the Commission suspected that their purpose was to arrive at agreements, in respect of selling prices, of a nature such as to prevent or restrict competition. It follows that requests of this kind are such that they may compel the applicant to admit its participation in an unlawful agreement contrary to the Community rules on competition.

72. On this point, it must be observed that the Commission expressly indicated in the last indent of the three questions at issue that the applicant was to

provide it with the information in question only in the event that it was unable to find the relevant documents requested in the preceding indent. The applicant was therefore required to reply to the last indent of the questions only in so far as it was unable to produce the documents requested. Nevertheless, because of the order and content of the first three indents of the questions, it cannot be excluded that the applicant would have been obliged to reply to the last indent.

73. Consequently, it must be held that the last indent of each of questions 1.6, 1.7 and 2.3 infringes the applicant's rights of defence.

74. As far as question 1.8 is concerned, it should be observed that the Commission is requiring the applicant to comment, first, on the relationship between, on the one hand, the four OCTG and linepipe agreements concluded in 1962 and notified to the German Federal Cartel Office and, on the other hand, the Europe-Japan Club and Special Circle, and, second, on the decisions adopted within the Europe-Japan Club and the Special Circle, that is to say, decisions which the Commission regards as possibly constituting infringements of the rules laid down by the Treaty. Answering this question would require the applicant to give its assessment of the nature of those decisions. It must be held that, in accordance with the judgment in *Orkem*, question 1.8 also constitutes an infringement of the applicant's rights of defence.

75. As regards the arguments to the effect that Article 6(1) and (2) of the Convention enables a person in receipt of a request for information to refrain from answering the questions asked, even if they are purely factual in nature, and to refuse to produce documents to the Commission, suffice it to repeat that the applicant cannot directly invoke the Convention before the Community courts.

76. As regards the potential impact of the Charter, to which the applicant refers, upon the assessment of this case, it must be borne in mind that that Charter was proclaimed by the European Parliament, the Council and the Commission on 7 December 2000. It can therefore be of no consequence for the purposes of review of the contested measure, which was adopted prior to that date. That being so, there is no reason to accede to the applicant's request for the oral procedure to be re-opened.

77. However, it must be emphasised that Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process (see *Baustahlgewebe v Commission*, cited above, paragraph 21, and Case C-7/98, *Krombach*, paragraph 26). It is in application of those principles, which offer, in the specific field of competition law, at issue in the present case, protection equivalent to that guaranteed by Article 6 of the Convention, that the Court of Justice and the Court of First Instance have consistently held that the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission.

78. The mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process. There is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission.

79. It follows that the contested decision must be annulled in so far as it obliges the applicant to answer the last indent of each of questions 1.6, 1.7 and 2.3 and all of question 1.8, which may involve the applicant in admitting that it was party to an agreement liable to prevent or restrict competition.

The fourth plea, alleging disregard for national procedural safeguards

[Paragraphs 80 to 83 set out the arguments of the parties]

Findings of the Court

84. In the field of competition law, the national laws of the Member States do not, in general, recognise a right not to incriminate oneself. It is, therefore, immaterial to the result of the present case whether or not, as the applicant claims, there is such a principle in German law.

85. As regards the applicant's argument that there is a risk that information obtained by the Commission and communicated to the national authorities may be used by those authorities against it, it is sufficient to refer to the judgment in *AEB and Others*, where, at paragraph 42, the Court of Justice, after pointing out that information obtained by the Commission must be communicated to the national authorities, gave the following clear statement of the law in this respect: "Such information cannot be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. Such information must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure."

86. It follows that the German authorities cannot rely on information obtained by the Commission by means of its request for information pursuant to Article 11 of Regulation 17 in order to justify a decision taken against the applicant on the basis of the provisions of competition law.

87. Consequently, should the German authorities take the view that the information thus obtained by the Commission is relevant for the purpose of initiating a procedure in respect of the same facts, they must make their own request for information regarding those facts.

88. The fact that information obtained by the Commission may alert the German authorities to the possibility of an infringement of German law and that the German authorities might use that information for the purpose of determining whether or not it is appropriate to initiate national procedures, does not alter the conclusion that, as is clear from paragraph 42 of the judgment in *AEB and Others*, the plea now under consideration cannot be upheld.

89. That plea must therefore be rejected.

90. Having regard to all the foregoing considerations, the contested decision must be annulled in so far as it relates to the last indent of each of questions 1.6, 1.7 and 2.3 and to question 1.8 of the request for information sent to the applicant on 13 August 1997, and the remainder of the application must be dismissed.

Costs

91. Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

92. In the present case, account should be taken, firstly, of the fact that both the applicant and the defendant have been partly unsuccessful. Secondly, it should be borne in mind that, by requiring it to reply to the requests made in the last indent of each of questions 1.6, 1.7 and 2.3 and in question 1.8, the Commission infringed the applicant's rights of defence, contrary to the judgment in Orkem, and constrained the applicant to bring the present action. That being so, the Court takes the view that the Commission must pay two thirds of the applicant's costs.

Court's Ruling

The Court hereby:

1 Annuls Commission Decision C(98)1204 of 15 May 1998 relating to a procedure under Article 11(5) of Council Regulation No 17, in so far as it relates to the last indent of each of questions 1.6, 1.7 and 2.3 and to question 1.8 of the request for information sent to the applicant on 13 August 1997;

2 Dismisses the remainder of the application;

3 Orders the defendant to bear its own costs and to pay two thirds of the costs of the applicant, which shall bear the remaining third. ■

[The above report is taken from the Court's web-site and is freely available. It may be corrected on linguistic and other grounds and is not therefore definitive.]

State Aids: The CWP Case

In this case a Belgian company, Prayon-Rupel, sought the annulment of a Decision by the Commission not to raise objections to the grant of aid from the German Government to the German firm, Chemische Werke Piesteritz GmbH (CWP). The Court had to establish whether in the case in question the procedure followed by the Commission had significantly exceeded what would normally constitute a preliminary investigation within the meaning of Article 93(3) [old numbering] of the EC Treaty.

The Court recalled that, in its so far unpublished judgment in Case T-46/97, *SIC v Commission*, the length of the time taken by the Commission might lead to the conclusion that the Commission had found serious difficulties in assessing the case. The Court therefore looked at the Commission's internal rules of procedure to see whether these threw light on what a reasonable length of time would be.

It was evident both from the rules of procedure and from the course of events after the Commission had asked the German Government for further information about its proposed aid to the company, that the German Government had not fully complied with the duty imposed on it by Article 5 [old numbering] of the EC Treaty to cooperate fully in the implementation of the Treaty's provisions. The failure to supply the requested information had led to an unnecessary prolongation of the proceedings; and this was in itself evidence of the existence of "serious difficulties".

Although two companies, one of them the applicant in this case, had expressed their fears about the consequences of the grant of state aid to CWP, the Commission proceeded to a Decision. In the Court's opinion, the Commission did so on the basis of an insufficient knowledge of the facts. Even though the assessment of compatibility with the common market raised serious difficulties, the Commission had failed to open the procedure envisaged in Article 93(2) and to gather fuller information by way of a hearing of the interested parties. The Decision therefore had to be annulled.

Source: Judgment of the Court of First Instance in Case T-73/98 (*Société chimique Prayon-Rupel SA v Commission of the European Communities*, supported by the Federal Republic of Germany), dated 15 March 2001. The judgment is available only in French; and the extracts from the judgment included in the text above are our own translation. As to the *SIC* case referred to by the Court, this is available on the Court's website, under the heading "Recent Judgments of the Court" (judgment was in fact given in April, 2000). We did not carry a report at the time in view of the length and complexity of the case and a shortage of space.

STATE AIDS (ELECTRICITY): THE PREUSSEN ELEKTRA CASE

Subject: State aids
Complaints

Industry: Electricity

Parties: Preussen Elektra AG
Schleswag AG
Windpark Reußenköge III GmbH
Land Schleswig-Holstein
German Government
Finnish Government
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities in Case C-379/98 (Preussen Elektra AG v Schleswag AG), dated 13 March 2001

(What constitutes a State Aid under EC Treaty rules is the subject of a large volume of case law, in which a variety of expedients designed to circumvent the rules has been tested. But, in the present case, the circumstances fell short of the requirement that the aid in question must come from the state or comprise state resources. In essence, the aid in the case came from other undertakings in compliance with a state law. This was held not to be state aid. German law requires electricity undertakings to buy electricity at minimum process and to apportion the resulting costs between those undertakings and upstream network operators. Thus, there is a kind of subsidy in existence; but it is, strictly speaking, cross-subsidisation by one sector of industry to another and does not involve state resources. It is arguable that this distorts competition and that national legislation should not be used to thwart the rules on competition in the EC Treaty. The Court's brief rejection of this argument is unconvincing: paragraphs 63 and 64. There are many instances in which national legislation results in cross-subsidisation: if the Court considers these are not covered by the Treaty as it stands, there is a case for amendment of the Treaty.)

Judgment

1. By order of 13 October 1998, received at the Court on 23 October 1998, the Regional Court, Kiel, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93(3) of the EC Treaty (now Article 88(3) EC).

2. The questions were raised in proceedings between PreussenElektra AG and Schleswag AG concerning the repayment of sums paid by the former to the latter pursuant to [German legislation].

[Paragraphs 3 to 10 describe the German legislation and, in particular, the arrangements under the SEG for compensating electricity suppliers for complying with legal obligations to buy at uneconomic rates.]

11. The order for reference and the written observations submitted to the Court show that, by letter of 14 August 1990, the German Government notified to the Commission as a State aid the draft law which, after adoption, became the SEG, in accordance with Article 93(3) of the Treaty. By letter of 19 December 1990, the Commission authorised the notified draft on the basis, first, that it was in accordance with the energy policy aims of the European Communities, and secondly that renewable sources of energy constituted only a small part of the energy sector and that the additional revenues and the repercussions on electricity prices were minor. The Commission nevertheless requested the German Government to send it information on the application of the SEG, the latter having to be re-examined two years after its entry into force, and emphasised that any amendment or extension of that law should be subject to prior notification.

12. The order for reference and the written observations submitted to the Court also show that, following numerous complaints from electricity supply undertakings, the Commission informed the Federal Minister for the Economy in a letter of 25 October 1996 of its doubts as to whether, in view of the increase in the production of electricity derived from wind energy, the SEG was still compatible with the aid provisions of the Treaty. In that letter, the Commission made several proposals for amendment in relation to the provisions on wind energy and stated that, if the [German Parliament] were not prepared to amend the SEG in that respect, the Commission might find itself obliged to propose appropriate measures to the Federal Republic of Germany within the meaning of Article 93(1) of the Treaty, to make the Law compatible with Community rules on aid.

13. It is also apparent from the written observations of Windpark Reußenköge III GmbH and of the Province of Schleswig-Holstein, who intervened in the main proceedings, and from those of the Commission, that, at the request of the latter, the German Government informed the Commission of the progress of the work on the draft new law for the energy industry. In a letter of 29 July 1998, after the entry into force of the 1998 Law, the Commission informed the Federal Minister of the Economy that, having regard to current developments at Community level, concerning in particular possible proposals for harmonising the rules on the feeding in of electricity from renewable energy sources, it did not expect to take a formal decision concerning the SEG, as amended by the 1998 Law, before the ministerial report on the effects of the hardship clause, provided for in Paragraph 4(4) thereof, was drawn up, even though the German legislature, at the time of the adoption of the 1998 Law, had not taken account of the proposals formulated in its letter of 25 October 1996.

14. Finally, a footnote published with the 1998 Law states that the latter, Paragraph 1 of which is headed Law on the supply of electricity and gas, transposed into national law Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

15. The third recital in the preamble to that directive confirms that it in no way affects the application of the Treaty, in particular the provisions concerning the internal market and competition, and Article 8(3) and (4) in Chapter IV, 'Transmission system operation, provides as follows:

> 3.A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.
>
> 4.A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

16. In addition, Article 11(3) in Chapter V, 'Distribution system operation, provides:

> A Member state may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

The main proceedings and the questions referred

17. PreussenElektra operates more than 20 conventional and nuclear power stations in Germany as well as a maximum-voltage and high-voltage electricity distribution network, through which it feeds electricity to regional electricity suppliers, medium-scale local undertakings and industry.

18. Schleswag is a regional electricity supplier which buys electricity to supply to its customers in Schleswig-Holstein almost exclusively from PreussenElektra.

19. PreussenElektra owns 65.3% of Schleswag's shares. The remaining 34.7% are held by various municipal authorities in Schleswig-Holstein.

20. By virtue of Paragraph 2 of the SEG, Schleswag is obliged to purchase electricity from renewable sources produced within its area of supply, including wind-generated electricity. The order for reference shows that the proportion of wind-generated electricity in Schleswag's total turnover in electricity sales, which was 0.77% in 1991, has increased continuously to an estimated 15% in 1998. In consequence, the additional costs accruing to Schleswag on account of the obligation to purchase at the minimum price laid down by the SEG rose from DM 5.8m in 1991 to an estimated DM 111.5m in 1998, of which only DM 38m remained the responsibility of Schleswag, taking into account the application of

the compensation mechanism introduced into Paragraph 4(1) of the SEG by the 1998 Law.

21. At the end of April 1998 Schleswag's purchases of electricity produced from renewable energy sources reached 5% of the total volume of electricity it had sold over the previous year. Schleswag therefore invoiced PreussenElektra, pursuant to Paragraph 4(1) of the amended SEG, for the additional costs entailed by the purchase of electricity from renewable energy sources, initially claiming from it monthly instalments of DM 10m.

22. PreussenElektra transferred the instalment for May 1998, reserving the right to claim the money back at any time. That is what it did by making an application to the Kiel Provincial Court for the repayment of DM 500,000, representing the part of the sum paid to Schleswag in compensation for the additional costs entailed by the latter's purchase of wind-generated electricity...

25. The Provincial Court found, first, that the Commission had not been informed, in accordance with Article 93(3) of the Treaty, of the amendments made to the SEG by the 1998 Law ...

26. The Provincial Court found, secondly, that the obligation to purchase electricity produced in Germany from renewable energy sources on conditions which could not be obtained on the open market might depress demand for electricity produced in other Member States, which might constitute an obstacle to trade between Member States prohibited by Article 30 of the Treaty.

27. In those circumstances, considering that interpretation of Articles 30, 92 and 93(3) of the Treaty was necessary to enable it to resolve the dispute before it, the Kiel Provincial Court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

> 1.Do the rules on payment and compensation for supplies of electricity, laid down in [the German legislation] constitute State aid for the purposes of Article 92 of the EC Treaty?
>
> Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules for the benefit of the recipient of the payment, under which the costs entailed are not met, either directly or indirectly, from the public budget but are borne by individual undertakings in a sector, which have a statutory obligation to purchase at fixed minimum prices, and which are precluded by law and circumstance from passing those costs on to the final consumer?
>
> Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules which merely govern the apportionment of the costs between undertakings at the various production levels which have arisen through purchasing obligations and minimum prices, where the legislature's approach creates in practice a permanent burden for which the undertakings affected obtain no consideration?
>
> 2.In the event that the [first] question is answered in the negative in respect of Paragraph 4 of the amended SEG:

Is Article 93(3) of the EC Treaty to be interpreted as meaning that its restrictive effects apply not only to the benefit itself but also to implementing rules such as Paragraph 4 of the amended SEG?

3.In the event that the first and second questions are answered in the negative:

Is Article 30 of the EC Treaty to be interpreted as meaning that a quantitative restriction on imports - and/or a measure having equivalent effect as between Member States for the purposes of the aforementioned provision - arises where a provision of national law places undertakings under an obligation to purchase electricity produced from renewable energy sources at minimum prices and requires grid operators to meet the costs entailed for no consideration?

Admissibility

[In paragraphs 28 to 37, interveners raised the question of the admissibility of the proceedings. The Court expressed the following view.]

38. It should remembered that it is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93, *Bosman*, paragraph 59).

39. Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, to assess whether it has jurisdiction (see, to that effect, Case 244/80, *Foglia*, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Bosman*, paragraph 61; Case C-36/99, *Idéal Tourisme*, paragraph 20; Case C-322/98, *Kachelmann*, paragraph 17).

40. In this case, as regards, first, the alleged omissions and factual errors in the order for reference, it is sufficient to note that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, in particular, Case C-435/97, *World Wildlife Fund*, paragraph 32).

41. Second, it should be noted that the action brought by PreussenElektra seeks repayment of the sum which it had to pay to Schleswag to compensate for the additional cost arising for the latter from the purchase of wind-generated electricity, made pursuant to the purchase obligation laid down by the amended Stromeinspeisungsgesetz, from producers of that type of electricity established in its area of supply.

42. The dispute in the main proceedings cannot, therefore, be regarded as hypothetical in character.

[For these reasons and for the reasons set out in paragraphs 43 to 52, the Court concluded as follows.]

53. It follows from the above considerations that answers must be given to the questions referred.

The interpretation of Article 92 of the Treaty

54. It should be noted as a preliminary observation, first, that there is no dispute that an obligation to purchase electricity produced from renewable energy sources at minimum prices, such as that laid down by Paragraphs 2 and 3 of the amended SEG, confers a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence.

55. ...

56. In the light of the above, the first question referred should be understood as asking, essentially, whether legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, constitutes State aid within the meaning of Article 92(1) of the Treaty.

57. It should be recalled in that respect that Article 92(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

58. In that connection, the case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision between 'aid granted by a Member State and aid granted 'through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the

State and those granted by a public or private body designated or established by the State (see Case 82/77, *Van Tiggele*, paragraphs 24 and 25; *Sloman Neptun*, paragraph 19; Case C-189/91, *Kirsammer-Hack*, paragraph 16; Joined Cases C-52/97, C-53/97 and C-54/97, *Viscido*, paragraph 13; Case C-200/97, *Ecotrade*, paragraph 35; Case C-295/97, *Piaggio*, paragraph 35).

59. In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.

60. Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.

61. In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.

62. That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State.That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, *Sloman Neptun*, paragraph 21, and *Ecotrade*, paragraph 36).

63. In the alternative, the Commission maintains that, in order to preserve the effectiveness of Articles 92 and 93 of the Treaty, read in conjunction with Article 5 of the EC Treaty (now Article 10 EC), it is necessary for the concept of State aid to be interpreted in such a way as to include support measures which, like those laid down by the amended SEG, are decided upon by the State but financed by private undertakings. It draws that argument by analogy from the case-law of the Court of Justice to the effect that Article 85 of the EC Treaty (now Article 81 EC), read in conjunction with Article 5 of the Treaty, prohibits Member States from introducing measures, even of a legislative or regulatory nature, which may render the competition rules applicable to undertakings ineffective (see, in particular, Case C-2/91, *Meng*, paragraph 14).

64. In that respect, it is sufficient to point out that, unlike Article 85 of the Treaty, which concerns only the conduct of undertakings, Article 92 of the Treaty refers directly to measures emanating from the Member States.

65. In those circumstances, Article 92 of the Treaty is in itself sufficient to prohibit the conduct by States referred to therein and Article 5 of the Treaty, the

second paragraph of which provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, cannot be used to extend the scope of Article 92 to conduct by States that does not fall within it.

66. The answer to the first question referred must therefore be that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 92(1) of the Treaty.

67. In the light of that answer, there is no need to reply to the second question referred, which was raised only in so far as the obligation to purchase at minimum prices did constitute State aid, whereas the allocation of the resulting financial burden did not.

[Paragraphs 68 to 81 are concerned with the interpretation of Article 30 (now 28) of the EC Treaty and are therefore outside the scope of the rules on competition. The Court's ruling on the main question is in the same terms as paragraph 66 above. Its ruling on the interpretation of Article 30 is that, in the current state of Community law concerning the electricity market, such provisions are not incompatible with Article 30 of the EC Treaty.] ■

State Aids: The SCI Case

The Commission has decided that €1.5m aid granted to the computer assembly factory of SCI in Heerenveen, the Netherlands, is not compatible with the common market and has to be recovered by the Dutch authorities. Aid for the creation of jobs for several categories of disadvantaged workers is approved, as the Dutch authorities will ensure that this aid, combined with investment aid, will remain below the ceiling of 20% of eligible cost. The current estimate of the combined aid which can be allowed is about €6.6m. The illegal aid resulted from a land sale below the market price and a low rent for temporary production facilities. Furthermore, the regional authorities paid the renovation of these facilities and the security services around them. Under normal market conditions, SCI would have had to pay for these expenses itself.

Source: Commission Statement IP/01/199, dated 13 Febraury 2001