COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Competition in the New Economy

There is much talk these days of the "new economy" and of the part played by rules on competition in changing conditions. As Chairman of the Federal Trade Commission, Robert Pitofsky addressed these problems from an American point of view. Now, Mario Monti, the Commissioner for Competition Policy, has also tackled the question. In a recent speech in Barcelona, he identified three main issues: the boundary between applying competition law to the new economy and leaving it alone; the boundary between competition law and regulation in the telecommunications sector; and some key issues on mobile telecommunications and the progress of competition in the local loop. On the face of it, he says, three characteristics of the new economy already offer benefits to consumers and competitors alike, without interference from competition regulations. These three are an increase in transparency, a growth in the size of the markets and a reduction of transaction costs.

It is arguable that the pace of change renders the role of regulators, including competition authorities, both unnecessary, because the market will correct itself, and impossible to fulfil, because the change is too rapid for a competition authority to make timely decisions. Mr Monti recognizes that a firm may not have a position of entrenched market power because its product is likely to be displaced, or rendered obsolete by technological innovation. He also recognizes that, even where a firm has entrenched market power in a particular industry, condemning it could damage incentives to innovate and would constitute a denial of the realities of market preferences. "Nevertheless, the finding that entrenched market power can exist in the new economy by definition means that the way that market power may be used should be subject to the normal rules of competition analysis."

Regulation will therefore continue to be a tool in the promotion of competition. The link between regulation and competition is reflected in the Commission's current review of the regulations on electronic communications. One of the main shifts in the new framework will be the replacement of the current threshold for significant market power (based on a market share of 25%) with the dominance criterion, as it is defined by Commission practice and the case law of the Court of Justice. Technological change and new emerging activities (like those linked to the Internet) require constant review of the criteria for assessing cases. The correct definition of the relevant product and service markets and of their geographical scope is a key element is this respect; hence the Commission's current consultations on draft "Guidelines" which are intended to provide further guidance to all parties concerned about how these principles apply to electronic communication services. ■

PRICE FIXING (SODIUM GLUCONATE): THE CARTEL CASE

Subject:	Price fixing Market sharing Sales restrictions Fines	
Industry:	Sodium gluconate (Implications for other industries)	
Parties:	Archer Daniels Midland Company Inc	(US)
	Akzo Nobel NV	(NL)
	Avebe BA	(NL)
	Fujisawa Pharmaceutical Company Ltd	(Japan)
	Jungbunzlauer AG	(Switzerland)
	Roquette Freres SA	(F)
Source:	Commission Statement IP/01/1355, dated 2 October 2001	

(Note. This is a classic cartel case, with most of the usual features of a case of this sort. An interesting feature is the way in which the Commission granted reductions in fines in accordance with the so-called "Leniency Notice".)

The Commission has fined the six companies named above a total of €57.53 million for fixing the price and sharing the market for sodium gluconate, a chemical mainly used to clean metal and glass, with applications such as bottle washing, utensil cleaning and paint removal. The decision comes after a thorough investigation, which established that the six companies, which together accounted for the quasi-totality of the production world-wide, operated a secret cartel from 1987 until 1995.

The investigation started in 1997. During the infringement period, the market was worth €18 million annually in the European Economic Area; that is, in the fifteen Member States of the European Union together with Norway, Iceland and Liechtenstein. The cartel started in 1987 and continued until June 1995. The companies held regular meetings, where they agreed on individual sales quotas, fixed "minimum" and "target" prices and shared out specific customers. The Commission gathered evidence on over 25 cartel meetings, held in places like Amsterdam, London, Paris, but also in Hakone (Japan), Chicago, Vancouver or Zürich. Compliance with agreed sales quotas was carefully monitored, and the rule was that if a company had over-sold at the end of a given year, its sales quota for the next year would be reduced accordingly.

Part of the evidence on the cartel was provided to the Commission by the companies involved, under European Community rules providing for full or partial immunity from fines for companies cooperating with the Commission in cartel cases. (See the "Leniency Notice".) Fujisawa was given a reduction of

80% of its fine for being the first to supply decisive evidence of the cartel, before the Commission had carried out surprise investigations. It is the first time that the Commission has granted such a large reduction. While the Commission could have granted total immunity to Fujisawa in this respect, it did not do so as Fujisawa started to cooperate only after it had received a request for information from the Commission. Fujisawa's cooperation was therefore not entirely spontaneous.

The Commission characterised the companies' conduct as a serious infringement of the competition rules and adopted a Decision under Article 81 of the EC-Treaty and Article 53 of the EEA-Agreement, imposing the following fines:

Archer Daniels Midland Company Inc:	€ 10.13 million
Akzo Nobel:	€ 9 million
Avebe:	€ 3.6 million
Fujisawa Pharmaceutical Company Ltd:	€ 3.6 million
Jungbunzlauer:	€ 20.4 million
Roquette Frères:	€ 10.8 million

The Commission takes into account the gravity of antitrust violations, their duration and the existence or absence of aggravating or mitigating circumstances, to calculate fines. It also bears in mind the companies' share of the market concerned and their overall size. The calculation of the fines is therefore not made solely by reference to the companies' turnover even though the final figure cannot be higher that 10% of a company's total annual sales. In the sodium gluconate cartel, the infringement was serious; and most of the cartel participants infringed the law for more than five years. In defining the starting amounts for the fines, the Commission took into account the limited size of the sodium gluconate market. Over the entire period of its participation, Jungbunzlauer was the driving force behind the cartel. This is an aggravating circumstance which justified an increase of Jungbunzlauer's basic fine by 50%.

The Commission started to investigate the case in 1997, when it learnt that some of the addressees of the present decision had been charged by the US authorities with international conspiracy in the US and elsewhere. Most of the parties to the cartel pleaded guilty and paid fines in the US and in Canada.

During Spring 1998, shortly after the Commission sent out requests for information, Fujisawa filed an application under the Leniency Notice and provided the Commission with decisive evidence of the cartel. In September 1998, « surprise » investigations were carried out. All involved companies subsequently filed an application under the Leniency Notice. The Commission granted a reduction of 40% to both ADM and Roquette, in view of their cooperation. As for Akzo, Avebe and Jungbunzlauer, they did not provide the Commission with any information beyond what was already in its possession, but they corroborated some of that information before the Commission issued its Statement of Objections. The Commission therefore considered that a reduction of only 20% was appropriate. ■

EXEMPTION (PACKAGING): THE DSD(II) CASE

Subject: Exemption
Conditions of exemption

Industry: Packaging
(Some implications for other industries)

Parties: Duales System Deutschland AG (DSD)

Source: Commission Statement IP/01/1279, dated 17 September 2001

(Note. In our May, 2001, issue, on page 104, we reported the Commission's decision on the abuse of a dominant position by DSD. The present report describes the action taken to enable DSD to continue its operations on terms which the Commission can accept. Essentially, this involves shorter contractual periods and greater transparency of tendering. Meanwhile, DSD has lodged an application with the Court of First Instance for annulment of the Commission's earlier Decision, so this is probably not the end of the affair.)

The Commission has adopted a favourable decision, subject to conditions, on a set of contracts concluded by DSD concerning its system of selective collection and recovery of sales packaging waste. Following the decision in this same case on April 20, 2001, the present decision defines clear principles for the competitive assessment of exclusive, long-term service agreements in the waste management sector. As applied to DSD's service agreements, these have led to significantly reduced contractual periods. In addition, the principle of free and unimpeded access to the collection infrastructure for competitors of DSD has been established. This decision takes into account the objectives of the relevant environmental legislation; and it is expected that the consumer will benefit from overall lower disposal costs.

Under this decision, which certifies that there are no grounds for action in respect of DSD's statutes and guarantee agreements and which exempts the service agreements, the Commission has defined two principles of its competition policy for the waste disposal sector. First, the Commission makes clear that it can accept long-term, exclusivity provisions in favour of the collectors in the service agreements concluded between DSD and its collectors, only when the indispensability of such provisions is justified on the basis of convincing economic evidence. In the present case this assessment has led to significantly reduced contractual periods, leading to a 4 years early tendering procedure. Secondly, by this decision, the Commission emphasizes the importance it attaches to free and unimpeded access to the collection infrastructure for competitors of DSD. Together with the decision adopted in this case earlier this year, concerning the payment provision of the trade mark agreement concluded between DSD and the companies covered by the German Packaging Ordinance,

this decision lays down the necessary conditions for competition in the collection and recovery of sales packaging waste in Germany.

DSD is at present the only company running a countrywide system for the collection and recycling of sales packaging in Germany. Last year it had a turnover of DM 4 billion. DSD itself does not collect the waste but uses local collecting companies and has concluded Service Agreements with these undertakings. There are 546 collection districts in Germany. As originally notified, the service agreement had raised serious competition concerns about the exclusivity provisions in favour of the collectors. According to the Service Agreement the collector has the exclusive task of collecting and sorting sales packaging in a designated district. The assessment of this exclusivity provision showed - taking into account the market position of DSD and the duration of the service agreement - that access to the relevant market by domestic and foreign collectors was greatly obstructed and went a long way towards partitioning a substantial part of the common market. Article 81 of the EC Treaty is therefore applicable to the exclusivity clause in the Service Agreement.

Most of the Service Agreements initially notified were to run until the end of 2007 thereby having overall contractual duration times of up to 15 years. Consequently the Commission scrutinised whether such long-term exclusive agreements were indeed necessary. The results of the analysis undertaken by the Commission suggested rather that if the Service Agreements were to run until the end of 2003 collectors would have sufficient time to achieve an economically satisfactory recovery of their investment. The Commission informed the applicants of this finding, and the applicants then set a termination date of 31 December 2003 for the Agreements. This allows the Commission to exempt service agreements containing an exclusivity clause running no further than the end of 2003. The exemption decision is issued for the period 1 January 1996 to 31 December 2003. Afterwards these service agreements have to be put out for tender according to the German Packaging Ordinance. The Commission's assessment was further influenced by the need for competitors of DSD to share the collection facilities of the collectors. Although DSD had already given commitments regarding the joint use of collection facilities by competitors, the Commission considers it necessary, in view of the vital importance of unimpeded access to the collection infrastructure for competition on a market characterised by special supply conditions, to attach conditions to this Decision to ensure that competition on the relevant markets is not restricted.

When the main contents of the DSD notification were published in March, 1997, comments were received from third parties indicating that the notified agreements could lead to a restriction of competition. In addition, in November, 1999, hair care product manufacturers and others addressed a formal complaint to the Commission. The complainants wished to organise a self-management system for the collection and recycling of packaging of products used by hairdressers and accused DSD of abusive behaviour. The complaints and investigations led to the Commission's Decision of 20 April, 2001. On July 5, 2001 DSD appealed against this decision at the Court of First Instance in Luxembourg. ■

Pirelli-Edizione / Olivetti-Telecom Italia

(Note. This case illustrates once again the complex commercial interrelations among the major Italian industrial corporations.)

The Commission has approved a concentration consisting of the acquisition by Pirelli SpA and Edizione Holding SpA of joint control of Olivetti SpA and indirectly of the undertakings controlled by the latter, namely Telecom Italia SpA and its group. To remove competition concerns, Edizione undertakes to sell its direct and indirect shareholdings in the capital of Blu, one of Italy's four second generation mobile phone operators, the biggest of which is Telecom Italia's TIM. In the market for transmission capacity, Edizione has also undertaken to transfer the exclusive control of Autostrade Telecomunicazioni to one or more independent third parties, with the possibility of maintaining, subject to Commission approval, only a minority share in the Italian backbone operator.

Pirelli is active in the manufacturing and sale of tyres as well as cables for the telecommunications sector and for the transmission of electricity. It has also a presence in the management and sale of real states. Edizione is an holding company, controlled by the Benetton family, which is active in a number of sectors, including textiles and clothing industry, road infrastructure and telecommunications, catering, real estate, agriculture and merchant banking. Edizione controls Autostrade Telecomunicazioni, which operates in the transmission capacity market using Autostrade's optical fibre network, and Blu, one of Italy's four mobile phone operators. Olivetti, which is the target company, operates in the sector of information systems and related services. Olivetti is the parent company of Telecom Italia, the incumbent telecoms operator in Italy, owning the country's largest mobile phone operator Telecom Italia Mobile (TIM).

The Commission's investigation revealed serious concerns in the markets for transmission capacity and for mobile telephony, both in Italy. In the transmission capacity market, the operation will eliminate Autostrade as an important competitor, therefore reinforcing Telecom Italia's dominant position. As for the Italian market for mobile voice telephony, the investigation showed that the concentration might strengthen a possible dominant position enjoyed by TIM. Besides TIM and Blu there are only two second generation mobile operators in Italy, Omnitel and Wind, and barriers to entry are high. To address these competition concerns, the parties undertook to remove the overlap in the transmission capacity market by transferring the exclusive control of Autostrade Telecomunicazioni to one or more independent third parties. In the market for mobile voice telephony, Edizione undertakes to sell its direct and indirect shareholdings in Blu. The implementation of the latter commitment will ensure that Edizione will be prevented from having a controlling position in two of the four Italian second generation mobile operators.

Source: Commission Statement IP/01/1299, dated 20 September 2001

TYING AGREEMENTS (BREWERIES): THE COURAGE CASE

Subject: Tying agreements
National law

Industry: Brewing; public houses
(Implications for other industries)

Parties: Bernard Crehan
Courage Ltd
Inntrepeneur Estates Ltd (IEL)

Source: Judgment of the Court of Justice of the European Communities, dated 20 September 2001, in Case C-453/99 (*Courage Ltd v Bernard Crehan; Bernard Crehan v Courage Ltd et al*)

(Note. The Court's judgment in this important case is clear, convincing and concise: it determines the extent to which a party to a contract infringing the rules on competition may sue the other party. The principles set out in paragraph 36 of the judgment apply, notwithstanding any national rule of law to the contrary.)

Judgment

1. By order of 16 July 1999, received at the Court on 30 November 1999, the Court of Appeal (England and Wales) (Civil Division) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 85 of the EC Treaty (now Article 81) and other provisions of Community law.

2. The four questions have been raised in proceedings between Courage Ltd (hereinafter Courage) and Bernard Crehan, a publican, concerning unpaid supplies of beer.

Facts of the case and questions referred for a preliminary ruling

3. In 1990, Courage, a brewery holding a 19% share of the United Kingdom market in sales of beer, and Grand Metropolitan plc (hereinafter Grand Met), a company with a range of catering and hotel interests, agreed to merge their leased public houses. To this end, their respective pubs were transferred to Inntrepreneur Estates Ltd (hereinafter IEL), a company owned in equal shares by Courage and Grand Met. An agreement concluded between IEL and Courage provided that all IEL tenants had to buy their beer exclusively from Courage. Courage was to supply the quantities of beer ordered at the prices specified in the price lists applicable to the pubs leased by IEL.

4. IEL issued a standard form lease agreement to its tenants. While the level of rent could be the subject of negotiation with a prospective tenant, the exclusive

purchase obligation (beer tie) and the other clauses of the contract were not negotiable.

5. In 1991, Mr Crehan concluded two 20-year leases with IEL imposing an obligation to purchase from Courage. The rent, subject to a five-year upward-only rent review, was to be the higher of the rent for the immediately preceding period or the best open market rent obtainable for the residue of the term on the other terms of the lease. The tenant had to purchase a fixed minimum quantity of specified beers and IEL agreed to procure the supply of specified beer to the tenant by Courage at the prices shown in the latter's price list.

6. In 1993, Courage, the plaintiff in the main proceedings, brought an action for the recovery from Mr Crehan of the sum of £15,266 for unpaid deliveries of beer. Mr Crehan contested the action on its merits, contending that the beer tie was contrary to Article 85 of the Treaty. He also counter-claimed for damages.

7. Mr Crehan contended that Courage sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie. He contended that this price difference reduced the profitability of tied tenants, driving them out of business.

8. The standard form lease agreement used by Courage, Grand Met and their subsidiaries was notified to the Commission in 1992. In 1993, the Commission published a notice under Article 19(3) of Council Regulation 17, stating its intention to grant an exemption under Article 85(3) of the Treaty.

9. That notification was withdrawn in October 1997 following the introduction by IEL of a new standard form lease agreement, which was also notified to the Commission. The new lease is, however, not at issue in the main proceedings, as the actions brought concern the operation of the beer tie under the old lease.

10. The considerations which led the Court of Appeal to refer questions to the Court of Justice for a preliminary ruling were as follows.

11. According to the referring court, English law does not allow a party to an illegal agreement to claim damages from the other party. So, even if Mr Crehan's defence, that the lease into which he entered infringes Article 85 of the Treaty, were upheld, English law would bar his claim for damages.

12. Moreover, in a judgment which predated the present order for reference, the Court of Appeal had held, without considering it necessary to seek a ruling from the Court of Justice on the point, that Article 85(1) of the EC Treaty was intended to protect third parties, whether competitors or consumers, and not parties to the prohibited agreement. It was held that they were the cause, not the victims, of the restriction of competition.

13. The Court of Appeal points out that the Supreme Court of the United States of America held, in its decision in *Perma Life Mufflers Inc.* v *International Parts Corp.* 392 U.S. 134 (1968), that where a party to an anticompetitive agreement is

in an economically weaker position he may sue the other contracting party for damages.

14. The Court of Appeal therefore raises the question of the compatibility with Community law of the bar in English law to Mr Crehan's claims set out at paragraph 6 above.

15. If Community law confers on a party to a contract liable to restrict or distort competition legal protection comparable to that offered by the law of the United States of America, the Court of Appeal points out that there might be tension between the principle of procedural autonomy and that of the uniform application of Community law.

16. In those circumstances, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

> 1. Is Article 81 (formerly Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?
> 2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?
> 3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law?
> 4. If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?

17. By its first, second and third questions, which should be considered together, the referring court is asking essentially whether a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that provision before a national court to obtain relief from the other contracting party. In particular, it asks whether that party can obtain compensation for loss which he alleges to result from his being subject to a contractual clause contrary to Article 85 and whether, therefore, Community law precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages.

18. If Community law precludes a national rule of that sort, the national court wishes to know, by its fourth question, what factors must be taken into consideration in assessing the merits of such a claim for damages.

19. It should be borne in mind, first of all, that the Treaty has created its own legal order, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal order are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly

granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62, *Van Gend en Loos;* Case 6/64, *Costa* and Joined Cases C-6/90 and C-9/90, *Francovich and Others*, paragraph 31).

20. Secondly, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g)), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market (judgment in Case C-126/97, *Eco Swiss*, paragraph 36).

21. Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void (judgment in *Eco Swiss*, cited above, paragraph 36).

22. That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) of the Treaty (on the latter point, see *inter alia* Case 10/69, *Portelange*, paragraph 10). Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (see the judgment in Case 22/71, *Béguelin*, paragraph 29). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (see the judgment in Case 48/72, *Brasserie de Haecht II*, paragraph 26).

23. Thirdly, it should be borne in mind that the Court has held that Article 85(1) of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (judgments in Case 127/73, *BRT and SABAM*, paragraph 16, and Case C-282/95 P, *Guérin Automobiles* v *Commission*, paragraph 39).

24. It follows from the foregoing considerations that any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see *inter alia* the judgments in Case 106/77, *Simmenthal*, paragraph 16, and in Case C-213/89, *Factortame*, paragraph 19).

26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

28. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

29. However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-261/95, *Palmisani*, paragraph 27).

30. In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78, *Ireks-Arkady* v *Council and Commission*, paragraph 14; Case 68/79, *Just*, paragraph 26; and Joined Cases C-441/98 and C-442/98, *Michailidis*, paragraph 31).

31. Similarly, provided that the principles of equivalence and effectiveness are respected (see *Palmisani*, cited above, paragraph 27), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72, *Commission* v *Italy*, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.

32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.

33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict

or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.

34. Referring to the judgments in Case 23/67, *Brasserie de Haecht* and Case C-234/89, *Delimitis*, paragraphs 14 to 26, the Commission and the United Kingdom Government also rightly point out that a contract might prove to be contrary to Article 85(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article 85, particularly where in practice the terms of the contract were imposed on him by the party controlling the network.

35. Contrary to the submission of Courage, making a distinction as to the extent of the parties' liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article 85 of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function (see *inter alia* Joined Cases 56/64 and 58/64, *Consten and Grundig* v *Commission*). That case-law concerns the conditions for application of Article 85 of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.

36. Having regard to all the foregoing considerations, the questions referred are to be answered as follows:
- a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party;
- Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within themeaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract;
- Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

Costs

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

[The Court's formal ruling is in the same terms as paragraph 36 above.] ■

JOINT VENTURES (TELEVISION): THE M6 CASE

Subject: Joint ventures
Ancillary restrictions
Rule of reason
Exemption
Legal certainty

Industry: Television; broadcasting
(Implications for all industries)

Parties: Métropole Télévision (M6)
Suez-Lyonnaise des Eaux
France Télécom
Télévision Française 1 SA (TF1)
Commission of the European Communities
CanalSatellite (intervener)

Source: Judgment of the Court of First Instance, dated 18 September 2001, in Case T-112/99 (*Métropole television et al v Commission of the European Communities*)

(Note. In this important case, raising several substantial points of law and including a discussion of the "rule of reason" in the competition law of the European Communities, the applicants challenged a Commission Decision granting them negative clearance and exemption for their plans to establish a joint venture. Their reason for challenging a Decision ostensibly favourable to themselves was mainly that the period of clearance and exemption fell a long way short of the period applied for – three years against ten. They submitted a number of pleas; and the Court's judgment is long. It has therefore been radically edited, concentrating on the most interesting features and keeping the factual background to the minimum necessary for an understanding of the issues.

Much of the case turned on the effects of certain clauses in the joint venture agreements, particularly a non-competition clause, an exclusivity clause and a clause dealing with "special interest channels". The applicants:
- contested the Commission's finding that these clauses restricted competition;
- argued that they were in the nature of ancillary restrictions;
- suggested that, in considering them, the rule of reason should apply; and
- submitted pleas on the duration of exemption and the need for legal certainty.

The report which follows includes a short discussion of the admissibility of the action, but excludes the sections of the judgment dealing with the application of the law to the particular facts of this case in, for example, the applicants' pleas that the Commission had misinterpreted the criteria for exemption. Having won the argument on the admissibility of their action, the applicants lost on all their other pleas. Their action was therefore dismissed with costs.]

Judgment

General background to the case

1. This case relates to Commission Decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (the contested decision) concerning the creation of Télévision par Satellite (hereinafter TPS), whose object is to devise, develop and broadcast, in digital mode by satellite, a range of television programmes and services, against payment, to French-speaking television viewers in Europe.

2. TPS, which was set up in the form of a partnership under French law by six major companies active in the television sectors (Metropole television (M6), Télévision Française 1 SA (TF1), France 2 and France 3) or in the telecommunication and cable distribution sectors (France Telecom and Suez-Lyonnaise des Eaux) is a new entrant on markets which are very much dominated by a long-standing operator, namely Canal+ and its subsidiary CanalSatellite.

[Paragraphs 3 to 13 deal with the relevant markets; 14 to 19 with the notification; paragraphs 20 to 22 with the contested Decision; and paragraphs 23 to 30 with the subsequent procedure. Paragraphs 17 to 19 describe, respectively, the three clauses of the notified agreement giving rise to the present case and are set out in full below.]

The non-competition clause

17. This clause is included in Article 11 of the Agreement and Article 5.3 of the Associates' Pact and, at the Commission's request, its scope was defined by a supplementary agreement of 17 September 1998. It specifies as follows:

> Except for ongoing cases as at the date of conclusion of the agreements, and except for the sale of new programmes and services that are not under contract to TPS, the parties undertake not to become in any way involved, even indirectly, and for as long as they remain TPS shareholders, in companies engaged in or whose object is the distribution and marketing of a range of television programmes and services for payment which are broadcast in digital mode by satellite to French-speaking homes in Europe (point 77 of the contested decision).

The clause relating to special-interest channels

18. Article 6 of the Agreement (under the heading Digital programmes and services) and Article 5.4 of the Associates' Pact cited above, provide that TPS has a right of priority and a right of final refusal with regard to the production of special-interest channels and television services by its shareholders. The clause is worded as follows:

> In order to supply TPS with the programmes it requires, the parties have agreed to give TPS first refusal in respect of the programmes or services

which they themselves operate or over which they have effective control within the producing company, and in respect of the programmes and services which they produce. TPS is also entitled to final refusal or acceptance on the best terms proposed by competitors with regard to any programmes or services which its shareholders offer to third parties. If it accepts them, whether on exclusive terms or not, TPS will apply financial and contractual terms which are at least equivalent to those which the programmes and services could receive elsewhere.

As regards the acquisition of these channels and services, TPS will freely decide, on the basis of its own assessment, whether or not to agree to integrate them into its digital bouquet, either exclusively or non-exclusively; however, the parties underline their objective of having programmes and services in TPS's digital bouquet on an exclusive basis.

The exclusivity clause

19. Lastly, Article 6 of the Agreement provides that the general-interest channels (M6, TF1, France 2 and France 3, are to be broadcast exclusively by TPS (point 81 of the contested decision). TPS is to meet the technical costs of transporting and broadcasting the programmes but will not pay any remuneration for them.

Law

Admissibility of the action

[Paras 31 to 34 set out the parties' arguments. The Court's findings follow.]

35. It is settled law that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 of the EC Treaty (now, after amendment, Article 230) for a declaration that it is void (Case 60/81, *IBM* v *Commission*, paragraph 9; Joined Cases C-68/94 and C-30/95, *France and Others* v *Commission*, paragraph 62;Case T-87/96, *Assicurazioni Generali and Unicredito* v *Commission*, paragraph 37; and Joined Cases T-125/97 and T-127/97, *Coca-Cola* v *Commission*, cited in paragraph 27 above, paragraph 77).

36. Thus, any natural or legal person may bring an action for annulment of a decision of a Community institution which does not allow, in whole or in part, a clear and precise request from that person which falls within the competence of that institution (see, to that effect, as regards a request based on Article 3(2)(b) of Regulation 17, Case 26/76, *Metro* v *Commission*, paragraph 13). In such a situation the total or partial rejection of the request produces binding legal effects capable of affecting the interests of its maker.

37. It is necessary to establish, in the light of those principles, whether the present action for annulment is admissible.

38. In the present case, the applicants notified to the Commission the agreements relating to the creation of TPS and the restrictions which they considered to be ancillary to that operation, with a view to obtaining, under Article 2 of Regulation 17, negative clearance for the entire duration of those agreements, that is to say for a period of 10 years, or, failing that, to obtaining an individual exemption for the same period under Article 4(1) of that regulation.

39. It is apparent from the operative part of the contested decision that both the negative clearance relating to the non-competition clause (Article 2) and the individual exemption relating to the exclusivity clause and to the clause on special-interest channels (Article 3) are granted only for a period of three years.

40. It follows from that limitation on the duration of the negative clearance and of the exemption provided for in Articles 2 and 3 that the applicants benefit only for a much shorter period than that with which they initially reckoned in terms of legal certainty resulting from such decisions. Moreover, the applicants have claimed, without contradiction by the Commission in that regard, that this factual situation also affected the calculation of the profitability of the investments underlying the conclusion of the notified agreements.

41. That part of the operative part of the decision therefore produces binding legal effects capable of affecting the applicants' interests.

42. It is of little importance in that regard that the applicants might possibly, following a new notification of the restrictions at issue, obtain a new negative clearance or exemption for a period that is less, equal, or even greater than that initially granted. Since they do not already enjoy the legal certainty which they would have enjoyed if the negative clearance and exemption provided for in Articles 2 and 3 of the contested decision had been granted for a period of 10 years, their interests are definitely affected by that part of the operative part of the contested decision.

43. Lastly, unlike in the applications in the cases which gave rise to the judgments in Case T-138/89, *NBV and NVB* v *Commission* and *Coca-Cola* v *Commission*, cited in paragraph 35 above, the action for annulment brought by the applicants is aimed at the operative part and not the grounds of the contested decision. In the form of order sought by the applicants, they seek annulment of Articles 2 and 3 of the operative part of the contested decision. Furthermore, although it is true that in the judgment in *NBV and NVB* v *Commission*, cited above (paragraph 32), the Court held that a decision to grant negative clearance "satisfie[d] the applicant and, by its very nature, [could] neither change his legal position nor adversely affect his interests", it must be observed that in the case giving rise to that judgment the negative clearance had been issued for a period which corresponded to that sought by the interested parties. On the other hand, as has been observed above, in the present case the negative clearance was granted for only a period of three years, whereas the applicants had requested that it be granted for a period of 10 years.

44. It follows from the foregoing that the action is admissible.

Merits

[In paragraphs 47 to 67, the Court examined the pleas for annulment of Article 3 of the contested decision, that is to say, those relating to the exclusivity clause and the clause on special-interest channels; and then the plea directed at Article 2 of the contested decision, concerning the non-competition clause. The pleas were rejected largely on factual grounds.]

Failure to apply a rule of reason

[Paras 68 to 71 set out the parties' arguments. The Court's findings follow.]

72. According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article 85(1) of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that article. It should, however, be observed, first of all, that contrary to the applicants' assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful (see Case C-235/92, *P. Montecatini* v *Commission*, paragraph 133 ("... even if the rule of reason did have a place in the context of Article 85(1) of the Treaty"), and Case T-14/89, *Montedipe* v *Commission*, paragraph 265, and in Case T-148/89, *Tréfilunion* v *Commission*, paragraph 109).

73. Next, it must be observed that an interpretation of Article 85(1) of the Treaty, in the form suggested by the applicants, is difficult to reconcile with the rules prescribed by that provision.

74. Article 85 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro- and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84, *Pronuptia*, paragraph 24, and Case T-17/93, *Matra Hachette* v *Commission*, paragraph 48, and T-388/94, *European Night Services and Others* v *Commission*, paragraph 136). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.

75. It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty (see, in particular, Case 56/65, *Société technique minière* and Case 399/93, *Oude Luttikhuis and Others*, Case 258/78, *Nungesser and Eisele* v *Commission* and Case 262/81, *Coditel* v *Ciné-Vog Films*, *Pronuptia*, and *European Night Services and Others* v *Commission*, cited in

paragraph 74 above, as well as the judgment in Case C-250/92, *DLG*, paragraphs 31 to 35).

76. Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty. In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (see, in particular, *European Night Services and Others* v *Commission*, paragraph 136, *Oude Luttikhuis*, paragraph 10, and *VGB and Others* v *Commission*, paragraph 140, as well as the judgment in Case C-234/89, *Delimitis*, paragraph 31).

77. That interpretation, while observing the substantive scheme of Article 85 of the Treaty and, in particular, preserving the effectiveness of Article 85(3), makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties. It must, however, be emphasised that such an approach does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) of the Treaty applies.

78. In the light of the foregoing, it must be held that, contrary to the applicants' submission, in the contested decision the Commission correctly applied Article 85(1) of the Treaty to the exclusivity clause and the clause relating to the special-interest channels inasmuch as it was not obliged to weigh the pro and anti-competitive aspects of those agreements outside the specific framework of Article 85(3) of the Treaty.

79. It did, however, assess the restrictive nature of those clauses in their economic and legal context in accordance with the case-law. Thus, it rightly found that the general-interest channels presented programmes that were attractive for subscribers to a pay-TV company and that the effect of the exclusivity clause was to deny TPS' competitors access to such programmes (points 102 to 107 of the contested decision). As regards the clause relating to the special-interest channels, the Commission found that it resulted in a limitation of the supply of such channels on that market for a period of 10 years (point 101 of the contested decision).

80. This objection must therefore be rejected.

Ancillary restrictions

[Paras 81 to 102 set out the parties' arguments. The Court's findings follow.]

103. It is necessary, first of all, to define what constitutes an ancillary restriction in Community competition law and point out the consequences which follow from classification of a restriction as ancillary. It is then necessary to apply the principles thereby established to the exclusivity clause and to the clause relating to the special-interest channels in order to determine whether, as the applicants' assert, the Commission committed an error of appraisal in not classifying those commitments as ancillary restrictions.

104. In Community competition law the concept of an 'ancillary restriction covers any restriction which is directly related and necessary to the implementation of a main operation (see, to that effect, the Commission Notice of 14 August 1990 regarding restrictions ancillary to concentrations, point I.1), the notice on cooperative joint ventures (point 65), and Articles 6(1)(b) and 8(2), second paragraph, of Regulation 4064/89).

105. In its notice on ancillary restrictions the Commission rightly stated that a restriction 'directly related to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (point II.4).

106. The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it (see, to that effect, Case 42/84, *Remia* v *Commission*, paragraph 20; see also points II.5 and II.6 of the notice regarding ancillary restrictions).

107. As regards the objective necessity of a restriction, it must be observed that inasmuch as, as has been shown in paragraph 72 *et seq.* above, the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty.

108. That approach is justified not merely so as to preserve the effectiveness of Article 85(3) of the Treaty, but also on grounds of consistency. As Article 85(1) of the Treaty does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions.

109. Consequently, as the Commission has correctly asserted, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even

impossible to implement, the restriction may be regarded as objectively necessary for its implementation.

110. Thus, in the judgment in *Remia* v *Commission*, (paragraph 19), the Court of Justice held that a non-competition clause was objectively necessary for a successful transfer of undertakings, inasmuch as, without such a clause, 'and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business.

111. Similarly, in its decisions, the Commission has found that a number of restrictions were objectively necessary to implementing certain operations. Failing such restrictions, the operation in question 'could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success (point II.5 of the notice regarding ancillary restrictions; see also, for example, Decision 90/410, point 22 *et seq.*)

112. Contrary to the applicants' claim, none of the various decisions to which they refer show that the Commission carried out an analysis of competition in classifying the relevant clauses as ancillary restrictions. On the contrary, those decisions show that the Commission's analysis was relatively abstract. Thus, point 77 of Decision 1999/329 states as follows:

> Actually, a claim-sharing arrangement cannot function properly without at least one level of cover to be offered being agreed by all its members. The reason is that no member would be willing to share claims brought to the pool by other clubs of a higher amount than the ones it can bring to the pool.

113. Where a restriction is objectively necessary to implement a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under Article 85(3) of the Treaty (see, to that effect, Case T-61/89, *Dansk Pelsdyravlerforening* v *Commission*, paragraph 78).

114. Lastly, it must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers (see, to that effect, with regard to assessing the permissible duration of a non-competition clause, *Remia* v *Commission*, paragraph 34).

Consequences of classification as an ancillary restriction

115. If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation.

116. Thus, if the main operation does not fall within the scope of the prohibition laid down in Article 85(1) of the Treaty, the same holds for the restrictions directly related and necessary for that operation (see, to that effect, *Remia* v *Commission*, paragraph 20). If, on the other hand, the main operation is a restriction within the meaning of Article 85(1) but benefits from an exemption under Article 85(3) of the Treaty, that exemption also covers those ancillary restrictions.

117. Moreover, where the restrictions are directly related and necessary to a concentration within the meaning of Regulation 4064/89, it follows from both Article 6(1)(b) and Article 8(2), second subparagraph, of that regulation that those restrictions are covered by the Commission's decision declaring the operation compatible with the common market.

Classification of the exclusivity clause as an ancillary restriction

118. It is necessary to examine, in the light of the principles set out in paragraphs 103 to 114 above, whether in the present case the Commission committed a manifest error of assessment in not classifying the exclusivity clause as a restriction that was ancillary to the creation of TPS.

119. The applicants submit that the exclusivity clause is ancillary to the creation of TPS as the clause is indispensable to allow TPS to penetrate the pay-TV market in France because TPS does not enjoy any exclusive rights to films and sporting events of the first rank.

120. It must, however, be observed, first of all, that the fact that the exclusivity clause would be necessary to allow TPS to establish itself on a long-term basis on that market it is not relevant to the classification of that clause as an ancillary restriction.

121. As has been set out in paragraph 106 above, such considerations, relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market, are not part of an analysis of the ancillary nature of the restrictions. They can be taken into account only in the framework of Article 85(3) of the Treaty (see, in that regard, *Pronuptia*, paragraph 24, and *Dansk Pelsdyravlerforening* v *Commission*, cited in paragraph 113 above, paragraph 78).

122. Next, it must be observed that although, in the present case, the applicants have been able to establish to the requisite legal standard that the exclusivity clause was directly related to the establishment of TPS, they have not, on the other hand, shown that the exclusive broadcasting of the general-interest channels was objectively necessary for that operation. As the Commission has rightly

stated, a company in the pay-TV sector can be launched in France without having exclusive rights to the general-interest channels. That is the situation for CanalSatellite and AB Sat, the two other operators on that market.

123. Even if the exclusivity clause was objectively necessary for the creation of TPS, the Commission did not commit a manifest error of assessment in taking the view that this restriction was not proportionate to that objective.

124. The exclusivity clause is for an initial period of 10 years. As the Commission finds in point 134 of the contested decision, such a period is deemed excessive as 'TPS [has] *to establish itself on the market before the end of that period. It is quite* probable that the competitive disadvantage of TPS (principally with regard to access to exclusive rights to films and sporting events) will diminish over time (see, to that effect, point 133 of the contested decision). It cannot, therefore, be ruled out that the exclusive broadcasting of the general-interest channels, although initially intended to strengthen the competitive position of TPS on the pay-TV market might ultimately allow it, after some years, to eliminate competition on that market.

125. Moreover, the exclusivity clause is also disproportionate in so far as its effect is to deprive TPS' actual and potential competitors of any access to the programmes thatare considered attractive by a large number of French television viewers (see, to that effect, the judgment in *Oude Luttikhuis and Others*, paragraph 16). This excessiveness of the commitment is also reinforced by the existence of 'shadow zones. The television viewers living in those zones who wish to subscribe to a pay-TV company which also broadcasts the general-interest channels can turn only to TPS.

126. It must therefore be held that the Commission did not commit a manifest error of assessment in not classifying the exclusivity clause as a restriction that was ancillary to the creation of TPS.

127. That limb of the applicants' argument must, therefore, be rejected.

Classification of special-interest clause as an ancillary restriction

128. It is also necessary to examine, in the light of the principles set out in paragraphs 104 to 114 above whether, in the present case, the Commission committed a manifest error of assessment in not classifying the clause relating to the special-interest channels as an ancillary restriction.

129. In that regard, it must be pointed out that in the contested decision (point 101) the Commission stated:

> The obligation on the members to give TPS first refusal over their special-interest channels might possibly be regarded as ancillary to the launch of the platform; this obligation, which is imposed for a period of ten years, nevertheless results in a limitation of the supply of special-interest channels and television services. In this respect, the clause in question falls within *the scope of Article 85(1).*

130. It is clear from point 101 of the contested decision that the main reason why the Commission refused to classify the clause as an ancillary restriction was that it had a negative impact on the situation of third parties over quite a long period.

131. The applicants, despite having the burden of proof in that regard, have not adduced any evidence to invalidate that assessment.

132. They merely assert that on account of the exclusivity policy operated by CanalSatellite, the special-interest channels operated or created by them are the only channels to which TPS has access, so that the clause at issue is indispensable for its survival. Even accepting that such an assertion is correct, a consideration of that kind relating to the competitive situation of TPS cannot be taken into account for the purpose of classifying that clause as an ancillary restriction. As explained in paragraphs 107 to 112 above, the objectively necessary nature of the clause is established without reference to the competitive situation.

133. Furthermore, as the market for the operation of special-interest channels is enjoying rapid growth (point 65 of the contested decision), the Commission did not commit a manifest error of assessment in taking the view that the obligation on the shareholders of TPS, for a period of 10 years, to offer their special-interest channels first to TPS exceeded what was necessary for the creation of TPS.

134. Finally, as the Commission has correctly submitted, the applicants are wrong in referring to the decisions in *Cégétel* and *Télécom Développement* inasmuch as those decisions relate to different factual situations. Thus, the situation of TPS cannot be compared to that of a new entrant on a market dominated by a company with a long-standing monopoly and which requires access to essential infrastructure. Canal+ does not enjoy a long-standing monopoly on the market for the operation of the special-interest channels and entry onto that market does not require access to essential infrastructure. Furthermore, in the *Cégétel* and *Télécom Développement* decisions, the effect of the clauses considered was not to deprivethird-parties of any possibility of access to the services of the shareholders. It was merely a question of preferential treatment.

135. It must therefore be held that the Commission did not commit a manifest error of assessment in not classifying the clause relating to the special-interest channels as a restriction that was ancillary to the creation of TPS.

136. That part of the applicants' alternative argument must therefore be rejected.

[Paragraphs 138 to 150 concern the criteria for exemption]

Duration of the individual exemption

[Paras 151 to 155 set out the parties' arguments. The Court's findings follow.]

156. It must be observed, first, that it is settled law that the exercise of the Commission's powers under Article 85(3) of the Treaty necessarily involves

complex evaluations on economic matters, which means that judicial review of those evaluations must confine itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces from them (see, in particular, the judgment in Case 56/64 and 58/64 *Consten and Grundig* v *Commission* and *Matra Hachette* v *Commission*, paragraph 104).

157. That principle applies especially with regard to the Commission's determination of the period during which a restriction is considered indispensable (*Remia* v *Commission*, paragraph 34).

158. Second, it must be observed that in *Matra Hachette* v *Commission*, (paragraph 104), the Court held that "it is incumbent upon notifying undertakings to provide the Commission with evidence that the conditions laid down by Article 85(3) are met" (judgment in Joined Cases 43/82 and 63/82, *VBVB* and *VBBB* v *Commission*), an obligation which, in the proceedings before the Court, must be assessed in the light of the onus which falls on the applicant to provide information to challenge the Commission's appraisal.

159. However, the applicants merely assert that the Commission committed an error of assessment inasmuch as, according to them, the indispensability of the exclusivity will increase rather than diminish, having regard to the unassailable positions held by the Canal+ group on the market. As to the clause relating to special-interest channels, they submit that it is necessary in order to secure the supply to TPS of channels of that type. They do not, however, adduce any cogent evidence to show that this assertion is correct, an assertion which, moreover, does not take account of changes in the market. Lastly, the applicants do not dispute any of the facts on the basis of which the Commission took the view that the indispensability of those clauses would necessarily diminish over time and held that three years was the minimum period during which they were indispensable for TPS (point 134 of the contested decision).

160. Third, it must be observed that the applicants are wrong in referring to the *Cégétel* decision. As the Commission correctly states, only the exclusive distribution of certain products was the subject of an exemption in that decision and the distribution of those products was merely a small part of *Cégétel's* activities, whereas the exclusive right to transmit the general-interest channels is an essential element of the services offered by TPS.

161. It must therefore be found that the Commission did not commit a manifest error of assessment in limiting the period of exemption to three years.

162. That part of the applicants' argument must therefore be rejected.

Legal certainty

[Paras 164 to 167 set out the parties' arguments. The Court's findings follow.]

168. In the first place, it must be observed that it is apparent from the extract from the XXIVth Report on competition policy cited by the applicants, namely that

'the ancillary restrictions are usually allowed for the whole duration of the joint venture and from the specific context in which it is found (the analysis of the establishment of five joint ventures in the research and development sector) that the part of the report in which that extract is found does not lay down strict rules which the Commission is alleged to have imposed on itself with regard to classification of an agreement as an ancillary restriction. It is more in the nature of a simple description of a number of principles which the Commission normally follows when assessing certain clauses which it considers to be ancillary to a main operation.

169. Contrary to the applicants' assertion, the present case cannot therefore be compared to the case which gave rise to the judgment in Case T-7/89, *Hercules Chemicals* v *Commission*. In that case the Commission had in fact made known, through its annual report on competition policy, a number of rules which it had imposed on itself relating to access to the file in competition proceedings.

170. It is also apparent from the extract from the XXIVth Report on competition policy cited by the applicants that the extract merely reproduces, almost literally, the principles set out by the Commission in paragraph 67 of the notice on cooperative joint ventures. However, as that notice makes clear, it has only indicative value as regards the way in which the Commission will apply the theory of ancillary restrictions in practice.

171. It follows that the applicants cannot rely on the above extract in order to prove that the Commission infringed the principle of legal certainty in regard to them.

172. In the light of the foregoing, the present plea must be rejected as unfounded.

173. As all the pleas on which the applicants rely are unfounded, the application must be dismissed. ■

Coca-Cola / Nestle

The Commission has cleared the proposed restructuring of Coca-Cola Nestlé Refreshment Company (CCNR), an existing beverages joint venture in the field of iced tea and coffee between The Coca-Cola Company (TCCC) and Nestlé SA. The operation does not give rise to any competition concerns in view of:
- the existence of strong competing brands in Europe such as Unilever's Lipton or San Benedetto,
- the presence of a number of other local brands, and
- the absence of barriers to entry in the market concerned.

CCNR is a 50/50 joint venture between TCCC and Nestle which was originally created in 1991 for the manufacture and distribution of Nestea (a Nestlé's iced tea brand) as well as iced coffee and iced chocolate beverages. In 1995 the parent companies agreed to restructure CCNR and terminate its responsibility for iced chocolate beverages.

Source: Commission Statement IP/01/1333, dated 27 September 2001