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Consumers and Distribution

It is hard to make valid generalisations about the relative interests and opinions of consumers in the United States and in the European Union respectively. In the Commission's view, however, European consumers do not yet appear to be as aware of the benefits [of competition policies] as are, for example, consumers in the United States. Consumer advocates in the U.S. have long recognised that competition policy is essential to advance consumer interests. "By contrast, all too often in Europe, the only voices being heard are those of producers (industry and trade unions): important voices, of course, but which cannot represent the whole picture in policy debates where key consumer interests are at stake."

Discussions took place recently between the Commission and representatives of the European Group of Consumers' Associations (known by its French acronym, BEUC), whose director Jim Murray expressed strong support for competition policy, saying it put power in the hands of consumers, where it belonged. On car distribution, a subject raised in the meeting, BEUC praised the Commission's recent proposals introducing more competition in the sector, in particular the introduction of multi-brand dealerships and the loosened link between sales and after-sales services, which bring more choice and competitive prices for consumers. But BEUC expressed concerns about the maintenance of exclusive distribution systems, saying that it would leave car manufacturers with too tight a control over dealers, thereby preventing effective price competition.

Consumers and Mergers

As to the European Union's policy on mergers, the Commission realised that its benefits might be less directly visible to consumers than those produced by the fight against cartels or the control of subsidies. But only an effective merger control policy could ensure that there were sufficient operators in the market, ensuring effective competition and low prices. This was the Commission's underlying goal when, for example, it made its approval of the merger between French oil companies TotalFina and Elf conditional on the sale of 70 petrol stations on French motorways to ensure that petrol prices would not go up as a result of the merger. The Commission claims that, as a result of its intervention, Carrefour entered the French motorways services market, immediately exerting a downward pressure on prices. ■

We inadvertently caused confusion by showing our last issue, Issue 3, as having been published in February. This should have been shown as March. Subscribers have not missed an issue. The error was on the cover, not the Comment page.

EXCLUSIVITY (SOFTWARE): THE CHECK POINT CASE

Subject: Exclusivity
Distribution

Industry: Software; firewalls, virtual private network systems
(Some implications for other industries

Parties: Check Point Software Technologies Ltd (Israel)
Stonesoft (Finland (complainant)

Source: Commission Statement IP/02/521, dated 9 April 2002

(Note. There are some resemblances here to the "ice-cream cases", in which suppliers made it a condition of business with retailers that they should stock only their own products. The main differences are that the relationship here is between supplier and distributors and that there was nothing comparable to the provision of refrigerated cabinets, which tied the ice-cream retailers to their suppliers and gave the suppliers additional leverage. The principle is nevertheless the same: that exclusivity of supply can result in foreclosure of the market.)

The Commission has closed an investigation into a complaint against Check Point Software Technologies Ltd. after the Israeli software company undertook not to engage in exclusionary supply practices with its distributors. Check Point is one of the world's main operators in selling firewall and virtual private network (VPN) software that protects corporate networks from hacking. Firewall/VPN software is used to prevent unauthorised external access to internal computer networks, and to provide data encryption in public computer networks. The Commission had received a complaint from rival Finnish firm Stonesoft that Check Point's distribution practices were unfairly excluding it from the market.

The Commission began an investigation of Check Point's marketing practices following a complaint by Stonesoft, a Finnish software company, ahead of the launch in March 2001 of a competing firewall/VPN product.

Following an extensive market investigation, the Commission was concerned that Check Point had told some of its distributors and resellers that, if they attempted to sell Stonesoft's competing firewall/VPN product, they would no longer be supplied with Check Point's own product. Given Check Point's market presence, the Commission was concerned that this was having a negative foreclosure effect in the market for firewall/VPN software in violation of the rules on competition of the European Community. Negotiations between the Commission and Check Point led to an offer by Check Point of an undertaking which covers the Commission's concerns. The terms of the undertaking are as follows.

Check Point confirms that it will not place undue or unacceptable pressure upon its distributors and resellers regarding their independent decision whether or not

to sell competing products; in this respect, Check Point will confirm to its distributors and resellers their right independently to choose to handle products of other manufacturers which directly or indirectly compete with Check Point's own products. Therefore, Check Point will inform all its distributors and resellers by letter that it will not make the supply of its products, or the terms and conditions of supply of its products, conditional on whether or not its distributors and resellers stock, market and sell competing products. A copy of this letter will be provided to Stonesoft.

Check Point will also ensure that its sales and other relevant personnel are informed about the European Community rules on competition and that they understand the requirement to comply with those laws in their business dealings. The Commission has reviewed and is satisfied with the letter that Check Point is sending to its distributors and resellers. As a result of Check Point's undertaking, Stonesoft's complaint has been withdrawn; and the Commission will therefore close the case file. Nevertheless, the Commission will continue to monitor developments in this market to ensure that the terms of the undertaking are respected. ■

The Opel Case (State Aid)

The Commission has decided to initiate detailed investigation proceedings concerning aid amounting to €41.7 million earmarked for Opel's plant in Azambuja (Lisbon region). At this stage, the Commission has not been able to establish that the planned aid meets the criteria of the Community framework for state aid to the motor vehicle industry and has asked Portugal to forward any comments within one month. The notified project concerns the production of a new small passenger and commercial vehicle based on the Opel Corsa platform, the Corsa Combo. The vehicle, produced from 2001 onwards, replaces ageing models based on the old Corsa platform. The Portuguese authorities have indicated that the General Motors group considered the alternative option of carrying out the investment at its plant in Gliwice (Poland) instead of Azambuja. Comparing the cost in the two options by the means of a cost benefit analysis, they established that the investment in Azambuja would have a cost disadvantage of 37.21% with respect to Gliwice, which is enough to justify a regional aid intensity of 32.5%.

However, the cost benefit analysis does not, at this stage, prove the reported cost disadvantage of Azambuja compared to Gliwice. The Commission's main doubts relate to the alternative of carrying out the project in Gliwice. A first point regards the costs associated with the maintenance of the old paintshop in Azambuja, and a second point the estimated proceedings from the sale of the land where the Azambuja plant is located. At this stage, the Commission has doubts on the compatibility of the aid in question with the common market. The Commission has therefore decided to open a detailed investigation and asked Portugal to provide within one month all the information necessary for the examination of the case.

Source: Commission Statement IP/02/490, 3 April 2002

ABUSE OF DOMINANT POSITION (MOBILE PHONES): THE KPN CASE

Subject: Abuse of dominant position
Price differentials

Industry: Telecommunications; mobile phone networks

Parties: Koninklijke KPN NV
KPN Mobile
KPN Telecom
MCI WorldCom (complainant)

Source: Commission Statement IP/02/483, dated 27 March 2002

(Note. Quite apart from commercial considerations, consumers are likely to welcome the Commission's initiative in the field of mobile phone costs. There are clearly price differentials: if they stem from the operators' dominant position on the market, as the Commission believes, they may well be the result of an abuse. The problem has to some extent been resolved in other countries following a settlement. There is still a possibility that the present case may end in the same way.)

Commission's Statement of Objections

The Commission has sent to Dutch incumbent telecommunications operator Koninklijke KPN NV a statement of objections alleging that KPN, through its subsidiaries KPN Mobile (mobile traffic) and KPN Telecom (fixed traffic), has violated the competition rules of the EC Treaty. Specifically, the Commission suspects KPN of abusing its dominant position regarding the termination of telephone calls on the KPN mobile network through discriminatory or otherwise unfair behaviour. The case stems from a complaint by MCI WorldCom, a United States based fixed telecommunications network operator who is a new entrant in the European Union market. Studies show that fixed to mobile termination rates in Europe can be ten times higher than the average charge for fixed to fixed interconnection. This results in undue barriers for newcomers to the market and high prices for consumers. Originally, WorldCom's complaint also concerned mobile operators in other European Union countries, namely Sweden and Germany; but the complaint against Germany was withdrawn after the German operators reduced their termination rates by 50%, while in Sweden the national competition authority is dealing with the issue.

Call termination in mobile networks

There is a general concern in the European Union regarding the competitiveness of mobile call termination markets. Already in May 2000, an OECD report on pricing structures in the mobile sector queried: "Why....is it more expensive to call from a fixed to a mobile network in off-peak times than to make a call in the

opposite direction?" and also noted that users making calls from fixed to mobile networks during business hours appear to be "meeting a very steep additional cost".

More recently, in its annual report on the state of the telecommunications sector, the Commission identified the mobile call termination market as a source of concern.

Despite a decrease of around 10% over 2001, average peak time rates charged by mobile operators in the European Union for terminating telephone calls on their respective networks remain approximately ten times higher than the average charge for fixed to fixed interconnection.

The mobile market in The Netherlands

In The Netherlands, unlike in all otherMember States of the European Union, all telecommunication traffic to all mobile network operators, not just to KPN Mobile, must at present pass through the fixed network of KPN Telecom. This is because so far only KPN Telecom appears to have direct interconnection with the mobile networks in The Netherlands. Despite requests from WorldCom and other telecoms operators over the last few years, KPN Mobile has not, until now, entered into any kind of direct interconnection agreement with other network operators than KPN Telecom. An offer for direct interconnection that was made at the end of 2000 contained terms which were unacceptable for the other market parties, and was subsequently withdrawn by KPN. This absence of direct interconnection significantly reduces the scope of services that WorldCom and other operators can offer to their customers. WorldCom complained to the Commission at the end of 1999.

After a thorough analysis, the Commission has come to the preliminary conclusion that the provision of terminating access services on KPN Mobile's public mobile telecommunications network constitutes a separate product/services market. At retail level (demand side), users who wish to call a subscriber A of mobile network operator A, cannot at present choose an alternative mobile operator for terminating their calls to subscriber A. At wholesale level (demand side), all public network operators are under a regulatory obligation to offer calls to other networks. To do so, they must purchase wholesale terminating access services on each network, for which there are no substitutes: for a call to reach a subscriber of network A, the originating or transit operator must purchase terminating access services from network operator A.

On the supply side, only the individual mobile network operator can offer terminating access on its own network, so that there is no substitution between network operators. Furthermore, mobile network operators are found not to compete for termination services. In general, price elasticity is found to be very low and there appears to be no competitive responses to significant price changes. For these reasons the Commission has concluded in its preliminary assessment that there is a separate market for the termination of calls on each mobile network; and that) given the absence of countervailing market power, KPN

Mobile holds a dominant position on the market for the termination of calls on its network.

In its statement of objections, the Commission states that it believes KPN abused its dominant position through:
- discrimination by KPN Mobile on the terms for direct termination in favour of KPN Telecom;
- unfair pricing practices amounting to a margin squeeze between KPN Mobile's wholesale terminating services offered to other network operators and the retail prices of KPN Mobile/Telecom for certain mobile/fixed services offered to business customers in The Netherlands;
- (constructive) refusal by KPN Mobile to provide direct interconnection for call termination on its network.

The Commission can use Article 82 of the EC Treaty to prohibit abuses of a dominant position. KPN now has two months to present arguments contesting this preliminary analysis and may also expand on those arguments at an oral hearing. It is only after this has happened that the Commission will form a final position.

Technical background information

Terminating access is the wholesale network service that consists of the termination by a network operator of traffic that originates on another network, that is, completing a call for another network operator, which allows users of the respective networks to communicate with each other. Both mobile and fixed operators provide these services each on their individual network.

Based on comparative data collected by the Commission, the average rates charged by mobile operators in the European Union is ten times as high as the rates charged on all fixed networks. There is no technical explanation for such a large difference.

Transit is the wholesale service that consists of the conveyance (transport) by a transit operator over its network of traffic that neither originates nor terminates on its network. ■

The Austrian Banks Case

The Commission has written to the Austrian Government stating its view that the current guarantees given by the Federal, provincial and local authorities for certain publicly owned credit institutions (notably the provincial mortgage banks and some savings banks) in as far as they affect their competitiveness and trade between the Member States constitute state aid that is incompatible with the common market. It has asked the Austrian Government to respond to the Commission's provisional finding within one month. *(See also the Berlin Bank Case on page 100 of this issue.)*

Source: Commission Statement IP/02/505, dated 5 April 2002

PRICE FIXING (BOOKS): THE BDB CASE

Subject: Price fixing
Trade between Member States

Industry: Book publishing and selling

Parties: Börsenverein des Deutschen Buchhandels eV
(German publishers' and booksellers' association)
Verlagsgruppe Random House GmbH
Koch, Neff & Oetinger GmbH

Source: Commission Statement IP/02/461, dated 22 March 2002

(Note. This is not the happiest of arrangements made by the Commission, which seems to have gone out of its way to say that, while it is – rightly – concerned about trade between Member States, it regards price fixing systems in the book industry as being in the national interest and "aimed at preserving cultural and linguistic diversity in Europe". It is a perfectly fair point that, if a national price fixing system does not affect trade between Member States, the system falls outside the scope of the Community's rules on competition. But it is unfortunate that the Commissioner should lend his authority to the old fallacy that price fixing systems have some special justification in the book trade.)

The Commission will no longer pursue competition proceedings regarding the German book price fixing system. Following the sending of a Statement of Objections, the Börsenverein des Deutschen Buchhandels e.V. (German publishers' and booksellers' association), as well as the publisher Verlagsgruppe Random House GmbH and the bookseller Koch, Neff & Oetinger GmbH, submitted an Undertaking (set out in the Annex below). This meets fully and definitively the objections raised by the Commission. It guarantees the freedom of direct cross-border selling of German books to final consumers in Germany, in particular, via the Internet. In parallel, it establishes an exclusive list of conditions under which the Commission exceptionally accepts that a circumvention of the national price fixing occurs. These conditions ensure that German publishers and booksellers cannot consider direct cross-border Internet selling of cheaper books by foreign retailers to be a circumvention of the system. Nor can they hinder these sales by means of a collective embargo. As a result, if correctly implemented, the current German price fixing system has no appreciable effect on trade between Member States and thus does not infringe the European Community's competition rules.

"On the basis of EU competition law the Commission has no problem with national book price fixing systems which do not appreciably affect trade between Member States. By clearing the German price fixing system the Commission, in view of subsidiarity, also takes account of the national interest in maintaining

these systems which are aimed at preserving cultural and linguistic diversity in Europe," Competition Commissioner Mario Monti said.

The Commission in July 2001 initiated proceedings with a Statement of Objections triggered by indications that the German publishers and booksellers with the participation of the Börsenverein des Deutschen Buchhandels e.V. (German publishers' and booksellers' association), the publisher Verlagsgruppe Random House GmbH as well as the bookseller Koch, Neff & Oetinger GmbH applied the price fixing system in a way that, according to the preliminary findings of the Commission, appreciably affected trade between Member States and, therefore, amounted to an infringement of Article 81 of the EC Treaty.

The Commission had also received complaints from Austrian bookseller Libro AG and its affiliated Internet branch Lion.cc, who sold German best-sellers to German final consumers via the Internet at prices far below the fixed prices, as well as from Belgian Internet bookseller Proxis who planned similar rebate sales on the German market. The complaints were essentially based on the suspicion of a concerted embargo at the expense of foreign Internet booksellers that, according to the Commission's preliminary judgment, served to block cross-border Internet trade in cut-price books with German final consumers.

In parallel to ongoing formal proceedings, including a Hearing on 30 November 2001, the Commission, together with the Börsenverein, Verlagsgruppe Random House GmbH and Koch, Neff & Oetinger GmbH, reached agreement on the submission of an Undertaking which, in the Commission's view, definitively and fully meets the objections raised.

The Undertaking, the full wording of which is annexed hereto, guarantees the freedom of direct cross-border selling of German books to final consumers in Germany, in particular via the Internet, including ancillary services, such as cross-border advertising. At the same time, it establishes an exclusive list of conditions under which German booksellers and publishers can exceptionally stop cross-border selling to German final consumers if found to be a circumvention of the price fixing agreement. In that case, the Undertaking makes it clear that for circumvention to take place it would require a German bookseller bound by the fixed price to take the initiative of circumventing the price fixing possibly by means of or with the help of a foreign bookseller. The listed categories of circumvention behaviour are to be interpreted restrictively. Moreover, the burden of proof for the relevant "objective circumstances" rests with the publishers and booksellers invoking circumvention.

The Undertaking and its defined list of circumvention behaviour merely concerns the issue of inapplicability of Article 81 paragraph 1 of the EC Treaty. In the Commission's view, the price fixing system, as long as it is interpreted and applied in conformity with this Undertaking and the Commission Notice pursuant to Article 19 paragraph 3 of Regulation No. 17 of 10 June 2000, does not appreciably affect trade between Member States in the sense of Article 81(1) of the EC Treaty. The Undertaking's content, however, has no bearing on the assessment of issues related to the national book price fixing in the light of EC

law as a whole, in particular, the free movement of goods and services as well as the freedom of establishment. Moreover, the Undertaking's validity in time is limited until the entry into force of a German law on fixed book prices or comparable State measures that replace the contractual price fixing system.

The detailed definition of the notion of circumvention in the Undertaking promotes legal certainty not only for the publishers participating in the price fixing system and the booksellers bound by it, but also for foreign booksellers who aim at starting sales activity vis-à-vis final consumers on the German market for books. The Undertaking ensures that the Commission will intervene in case of concerted blocking of direct cross-border Internet book selling to German customers. For this reason, the complainant Libro agreed with both the Undertaking and the closure of the proceedings while Proxis had already withdrawn its complaint shortly before. Therefore, the Commission intends not only to terminate the pending competition proceedings, but also to grant a so-called negative clearance that confirms the compatibility of the price fixing system with the competition rules of the EC Treaty. However, the Commission reserves the right to intervene again should the application of the system lead to an adverse effect on trade between Member States.

Undertaking

By the Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH given in the proceedings COMP/C-2/34.657 Sammelrevers and COMP/C-2/37.906 Internetbuchhandel

The Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH give the subsequent Undertaking with respect to the Commission Notice, in particular its paragraphs 7, 8 and 10, pursuant to Article 19(3) of Regulation No 17 on the granting of a negative clearance by reason of the inapplicability of Article 81(1) of the EC Treaty to the German book price fixing system (O.J. C No. 162 of 10 June 2000, p. 25). The Undertaking exclusively refers to the lack of applicability of Article 81(1) EC Treaty to the system and, in particular, has no effect on the assessment and interpretation of either its provisions or future State measures for the regulation of the price fixing of books and other printed products in the light of EC law as a whole, in particular, on the free movement of goods and services as well as the freedom of establishment:

I.

1. *The German book price fixing system does not apply to cross border activities*, in particular, cross border sales of books and other printed products to end consumers in Germany including ancillary services, such as cross border advertising. This includes cross border activities in the above sense via the Internet.

2. As an exception to paragraph 1, the German book price fixing system is only applicable to cross border sales of books and other printed products to German

end consumers if it is shown on the basis of objective circumstances that a bookseller bound by the system circumvents the retail price maintenance. Circumvention in this sense takes place only if

- a bookseller bound by the system colludes at the retail level with a book seller not bound by the system in order to sell, on the basis of a common plan, books and other printed products to end consumers in Germany at prices below the fixed price. Collusion in this sense takes place, in particular, where the bookseller bound by the system, on the basis of the common plan, makes available Internet access or other communication devices to the bookseller not bound by the system.
- a bookseller bound by the system exports books and other printed products in another Member State for the sole purpose of reselling them to end consumers in Germany, either unilaterally or by means of an affiliated undertaking or a third party not bound by the system.
- a bookseller bound by the system or an undertaking either controlled by or affiliated and intentionally co-operating with the former creates or gains control over an establishment in another Member State for the purpose of circumventing the retail price maintenance under the system."

II.

3. The German book price fixing system applies to cross border sales of books and other printed products to booksellers only if it is shown on the basis of objective circumstances that they were exported for the sole purpose of re-importing them in order to circumvent the retail price maintenance under the system.

III.

4. The clauses under paragraphs 2 and 3 constitute exceptions to be interpreted narrowly.

5. The burden of proof for the presence of objective circumstances establishing circumvention of the retail price maintenance in the sense of paragraphs 2 and 3 lies with the party invoking the exception. The further interpretation of the notion of circumvention is left to the national courts, however, subject to the competence of the European Court of Justice to give preliminary rulings and the Notice on the co-operation between the Commission and the national courts of 13 February 1993 (J.O. C No. 39 of 1993, p. 6).

6. The German book price fixing system is to be applied by the publishers in accordance with proportionality.

IV.

7. This Undertaking is only valid during the maintenance in force of the German book price fixing system 2000 governing the retail price maintenance of books and other printed products in Germany. As soon as the system is repealed by State measures governing the retail price maintenance this Undertaking ceases its validity.

Date and signatures ■

The Huntsdown Case

In the Commission's view, from which it is hard to dissent, the refusal of planning permission by the local planning authority does not amount to an abuse of a dominant position by the national government. The Commission has decided to reject a complaint from Huntstown Air Park and Omega Aviation Services, two companies owned by Irish businessmen (the McEvaddy brothers), against the Irish government's refusal to grant permission to build a second passenger terminal at Dublin airport. In particular, the Commission rejected allegations that the refusal amounted to an abuse of dominant position by airport authority Aer Rianta and a breach of the rules on public undertakings.

In their complaint, Huntstown Air Park Ltd and Omega Aviation Services Ltd, two companies which own land in the immediate vicinity of Dublin airport, contested a decision taken in 1997 by the Irish Minister of Transport denying the complainants access to runways at Dublin Airport. The Irish decision had been taken in the context of the procedure followed by the local planning authority – Fingal County Council -- set up to examine Huntstown Air Park's application for outline planning permission to build a second passenger terminal at Dublin Airport. The Minister for Transport at the time found that, both from an airport planning and from an economic point of view, the existing terminal should be developed to its maximum capacity before it would be appropriate to develop a second terminal.

The complaint also involves Aer Rianta, a public undertaking which is fully owned by the Irish State and which operates Dublin Airport. It is at present the sole supplier of passenger terminal services at the airport. The complainants had attacked the denial by the Irish Minister of Transport of access to runways at Dublin Airport. They alleged in particular that the runways were an essential facility to which they should have a right of access and that the attitude of the Irish State was in breach of article 82 of the EC treaty (abuse of dominant position) and article 86(1) (applying the competition rules to public undertakings). The latter article requires that Member States must not enact nor maintain in force any measure, which may have the effect of violating competition rules, in relation to undertakings which are granted special or exclusive rights.

After examination, the Commission concluded that there was no breach of the EC rules on competition. The decision by Fingal County Council to refuse to grant Huntstown Air Park Ltd outline permission to build a second terminal at Dublin Airport was based on considerations of aeronautical safety, general planning and environmental impact. Without planning permission, any authorisation of access to runways at Dublin Airport given to Huntstown Air Park Limited and Omega Aviation Services Ltd would have been purely notional. Ireland has recently announced that it is now considering the construction of a second terminal at Dublin Airport to face the future increase of passenger traffic. The construction of this facility will be the subject of an open tender.

Source: Commission Statement IP/02/440, dated 20 March 2002

ADMISSIBILITY (BROADCASTING): THE SATELLIMAGES CASE

Subject: Admissibility
Complaints

Industry: Broadcasting
(Implications for all industries)

Parties: Satellimages TV 5 SA
French Republic (intervener)
Commission of the European Communities
Deutsche Telekom AG (intervener)

Source: Judgment Of The Court Of First Instance, dated 7 March 2002 in Case T-95/99 (*Satellimages TV 5 SA, v Commission of the European Communities*)

(Note. If a formal complaint to the Commission is formally rejected, the complainant has as a rule the right to challenge the Commission's rejection in proceedings before the Court of First Instance. However, a great deal depends on what constitutes a formal rejection; and the interest of the present case lies in the fact that what may have appeared to be a rejection of the complaint was no more than a statement to the effect that, while the Commission was willing to look at any further evidence, it did not have enough to proceed with the case at this stage. In other words, the file had not been formally closed; and the Commission's letter, which is reproduced in the report below, was not justiciable. Since the action was therefore inadmissible, the Court did not consider the substantive elements of the case, based largely on an allegation that Deutsche Telekom had abused its dominant position.)

Background

1. The applicant is a broadcasting undertaking charged with providing a service in the public interest whose shareholders are public undertakings providing French-language broadcasting services and based in France, Belgium, Switzerland and Canada.

2. By letter of 18 March 1998, the applicant filed a complaint with the Commission, requesting that it declare that by requiring broadcasters to pay a tariff for the transmission of their programmes on the cable that it owns, Deutsche Telekom AG (hereinafter 'Deutsche Telekom) abused its dominant position on the cable distribution market, thereby infringing Article 86 of the EC Treaty (now Article 82 EC). The applicant submitted, essentially, that the principle of levying tariffs in itself constituted a breach of Article 86 of the EC Treaty, whatever the precise level of the tariff...

10. The applicant submitted fresh written observations to the Commission, concerning its complaint of 18 March 1998, on 9 July 1998.

11. The applicant states that, following its complaint and written observations, it had informal contacts with representatives of the competent unit of the Commission. During those contacts, the representatives indicated that their position as regards the applicant's complaint was not going to differ from the one already expressed by the Commission in the VPRT report. Those representatives could find no reason for which cable operators could not levy tariffs on the satellite broadcasters whose signals they were retransmitting by cable to connected households.

12. Accordingly, and following repeated requests from the applicant to have a written statement of the Commission's position, the Director in charge of the matter sent the applicant the letter of 15 February 1999, which is the subject of the present action (the contested measure).

The Commission's letter

13. The contested measure is worded as follows:

> ... I refer to your client's complaint of 18 March 1998 alleging that Deutsche Telekom's pricing policy vis-à-vis satellite broadcasting companies such as your client for access to its cable distribution services is abusive and contrary to Article 86 of the EC Treaty.
>
> In broad lines, the complaint attacks two separate aspects of Deutsche Telekom's pricing policy, namely (1) the fact that with regard to its cable television network, Deutsche Telekom applies a system of dual levies, requiring payment from broadcasters such as Satellimages/TV5 as well as from the final consumers, i.e. the cable-connected households; (2) the level of the carriage fee charged by Deutsche Telekom to broadcasters, notably the increases thereof. You allege that Deutsche Telekom's behaviour is abusive in both respects.
>
> My collaborators, Ms. Schiff and Mr. Haag, have indicated to you during the course of various telephone conversations that in our preliminary view, the system of dual levies applied by Deutsche Telekom does not in itself constitute an abuse of a dominant position. Both viewers of cable television and satellite broadcasters such as your client whose programmes are transmitted via satellite into the cable network for final distribution to viewers, benefit from a service for which payment may be required: cable-connected households pay inter alia for the service of having television signals carried over the cable network into their homes where they can be viewed, while broadcasters pay for having their signals fed into Deutsche Telekom's cable network and carried across the cable network into the homes of cable-connected viewers. You have in our preliminary view not presented any arguments which would lead us to consider that Article 86 could be applied against this aspect of Deutsche Telekom's pricing policy.

With respect to the level of the carriage fee charged by Deutsche Telekom to your client, we understand that you are currently seeking a determination by the German national telecommunications regulatory authority. In our view this aspect of the complaint is indeed most appropriately dealt with by the competent national authority.

I should stress that the above comments are provisional and based on the information available to my department at present. They do not constitute a final position of the European Commission and are subject to any further comments you or your client may wish to make. ...

John Temple Lang, Director

Procedure and forms of order sought

20. The applicant and the French Republic claim that the Court of First Instance should:
- declare the application admissible and well founded;
- consequently, annul the contested measure;
- declare that, under Article 176 of the EC Treaty (now Article 233 EC), the Commission is required to take all measures necessary to comply with the judgment to be delivered;
- order the Commission to pay the costs, including those incurred in relation to the objection of inadmissibility.

21. The Commission and Deutsche Telekom contend that the Court of First Instance should:
- declare the application inadmissible or unfounded;
- order the applicant to pay the costs...

Admissibility: Findings of the Court

32. For the purpose of determining whether the present action is admissible, it should be noted at the outset that according to settled case-law only measures which produce binding legal effects and are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position constitute measures challengeable by an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the same case-law that, in principle, an act is reviewable only if it is a measure definitively establishing the position of the Commission at the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (Case 60/81, *IBM v Commission*, paragraphs 9 and 10).

33. It is therefore appropriate to examine whether the contested measure shows that the Commission definitively established its position in relation to the complaint submitted to it by the applicant.

34. In that respect, it should be noted that, in the contested measure, the Commission makes it clear that the assessments contained in it are of a provisional nature. The concluding passage of the contested measure could not, in that regard, be expressed in plainer terms, inasmuch as it states that 'the above comments are provisional and based on the information available to [the Commission] at present. They do not constitute a final position of the European Commission and are subject to any further comments you or your client may wish to make. Contrary to what the applicant states, there is nothing to suggest that those concluding statements do not concern all the assessments made by the Commission in that measure.

35. That passage in the contested measure cannot be regarded as a purely formal clause unrelated to the content of the measure, as claimed by the applicant and the French Republic, citing in that respect the judgment in Case T-37/92, *BEUC and NCC v Commission*. With regard to the main subject of the complaint, the provisional nature of the assessments by the Commission officers is emphasised several times, especially in the passage of the contested measure worded as follows: 'in our preliminary view, the system of dual levies applied by Deutsche Telekom does not in itself constitute an abuse of a dominant position ... [the applicant has] in our preliminary view not presented any arguments which would lead us to consider that Article 86 could be applied against this aspect of Deutsche Telekom's pricing policy.

36. Moreover, as the Commission has rightly argued, the contested measure does not in any way show that the complaint has been rejected or that it has been decided to close the file on it.

37. Finally, the Commission made it clear that its comments were subject to any further observations the applicant might wish to make.

38. In those circumstances, it must be concluded that the contested measure is to be regarded as a preparatory statement of position (see, to that effect, Case C-39/93 P, *SFEI and Others v Commission*, paragraph 30).

39. That conclusion cannot be called into question by the existence of the VPRT report. Without its being necessary to decide whether the VPRT report contains a final decision of the Commission in the context of the VPRT/DPB Telekom case, it should be noted that the existence of that report cannot confer on the contested measure the nature of a final position adopted by the Commission in relation to the complaint lodged by the applicant. Contrary to what the applicant maintains, in the context of any final decision applying Article 86 of the Treaty to the facts which form the subject of the applicant's complaint, the Commission is required to make a fresh analysis of the conditions of competition, which will not necessarily be based on the same considerations as those underlying the VPRT report (see, by analogy, Joined Cases T-125/97 and T-127/97, *Coca-Cola v Commission*, paragraph 82).

40. It follows for the reasons set out above that, in the contested measure, the Commission did not definitively state its position in relation to the applicant's

complaint. The contested measure is designed, inter alia, to give the applicant the opportunity of elaborating on its arguments in the light of the initial reaction of the Commission's officers expressed in that measure. The fact that, as it stated at the hearing, the applicant considers that it set out all its arguments in its letters to the Commission, before the Commission sent the letter containing the contested measure, cannot alter that finding. That fact cannot render the contested measure less provisional than the Commission expressly intended it to be.

41. Since the contested measure is not one which definitively establishes the Commission's position, it does not produce binding legal effects capable of affecting the applicant's interests, and is not therefore a reviewable act for the purposes of Article 173 of the EC Treaty. The present action must therefore be dismissed as inadmissible without there being any need to examine the other arguments on admissibility. In those circumstances, it follows that the substantive issues, as presented in the parties' arguments, cannot be examined.

Court's Ruling

The Court hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to bear its own costs and to pay the costs incurred by the Commission;

3. Orders the interveners to bear their own costs. ■

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

The BMW Case (State Aid)

The Commission has decided to open a formal State aid investigation procedure in order to examine aid that the German authorities propose to grant to BMW for a new car plant in Leipzig. The case concerns an investment of around €1.2 billion, €418.6 million of which would be covered by aid. The investigation aims at establishing whether the planned aid meets the requirements of the State aid rules for the automobile sector. The main doubts of the Commission concern the level of the aid and the question whether the amount proposed does not exceed the "regional handicap" of the Leipzig site compared to BMW's alternative location in the Czech Republic.

Source: Commission Statement IP/02/492, dated 3 April 2002

(See also the Opel Case on page 78 of this Issue)

FINES (POWER): THE ASEA BROWN BOVERI CASE

Subject: Fines
Rights of defence
Statement of reasons

Industry: Power generation, transmission and distribution; construction; transport
(Implications for all industries)

Parties: ABB Asea Brown Boveri Ltd, (Switzerland)
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 20 March 2002. in Case T-31/99 (*ABB Asea Brown Boveri Ltd (Switzerland), v Commission of the European Communities*)

(Note. This case is important for its thorough and extensive coverage of the many considerations determining the levels of fines imposed by the Commission in cases of infringement of the rules on competition. With the overall increase in the levels of fines in recent years, big money is involved; and, in the present case, the applicant succeeded in having the fine, which had been imposed by the Commission, reduced by €5m, a substantial sum by any standard, though only a fraction of the total fine ultimately thought appropriate by the Court, namely €65m.

As the judgment ran to well over two hundred paragraphs, the report below has been drastically curtailed. In any event, the applicant lost on almost all pleas, except the one reported in full in paragraphs 234 to 245: this concerns the principle of "equal treatment". According to the Court, the Commission should have differentiated the reduction for cooperation to be granted to the applicant from the reductions granted to other parties: the Commission incorrectly set at 30% the reduction to be granted to the applicant for its cooperation during the administrative procedure. This justified the lowering of the total fine.

Among many other matters covered by the judgment, in which the case law is cited at length, are the rights of the defence, the right to be heard and the need for the Commission's investigation to be "careful and impartial". But the Court goes out of its way to emphasise the Commission's discretion in setting the level of the fine; supports the Commission's general assessment in the present case; and takes the view that the applicant's subsequent introduction of a compliance programme is not necessarily a mitigating factor: the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in a specific case. As to the applicant's plea that the Commission did not give an adequate statement of the reasons for its decision, the Court reiterates the principle that the Commission cannot cover everything

and adds that there is no exhaustive list of the criteria to be applied in cases involving comparative fines imposed on different parties.)

Facts of the case

1. The applicant is a multinational group active in the power generation sector, the power transmission and distribution sector, the industrial and building systems sector and the transportation sector. In the ABB Asea Brown Boveri Ltd group ('the ABB group), the district heating business involves the Danish undertaking ABB IC Møller A/S ('ABB IC Møller), located in Fredericia (Denmark), and other production and/or distribution undertakings in Germany, Finland, Poland and Sweden.

2. In district heating systems, water heated in a central site is taken by underground pipes to the premises to be heated. Since the temperature of the water (or steam) carried in the pipes is very high, the pipes must be insulated in order to ensure an economic, risk-free distribution. The pipes used are pre-insulated and, for that purpose, generally consist of a steel tube surrounded by a plastic tube with a layer of insulating foam between them.

3. There is a substantial trade in district heating pipes between Member States. The largest national markets in the European Union are Germany, with 40% of Community consumption, and Denmark, with 20%. Denmark has 50% of the manufacturing capacity in the European Union and is the main production centre in the Union, supplying all Member States in which district heating is used.

4. By a complaint dated 18 January 1995, the Swedish undertaking Powerpipe AB informed the Commission that the other manufacturers and suppliers of district heating pipes had shared the European market in a cartel and that they had adopted concerted measures to harm its activities or to confine those activities to the Swedish market, or simply to force it out of the sector.

The Commission's Decision

15. ... the operative part of the [Commission's] decision is as follows:

Article 1

ABB Asea Brown Boveri Ltd, Brugg Rohrsysteme GmbH, Dansk Rørindustri A/S, Henss/Isoplus Group, Ke Kelit Kunststoffwerk GmbH, Oy KWH Tech AB, Løgstør Rør A/S, Pan-Isovit GmbH, Sigma Tecnologie Di Rivestimento S.r.L. and Tarco Energie A/S have infringed Article 85(1) of the Treaty by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the pre-insulated pipes sector which originated in about November/December 1990 among the four Danish producers, was subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market.

The duration of the infringements was as follows:

- in the case of ABB, ... from about November/December 1990 to at least March or April 1996,.

...
The principal characteristics of the infringement consisted in:
- dividing national markets and eventually the whole European market amongst themselves on the basis of quotas,
- allocating national markets to particular producers and arranging the withdrawal of other producers,
- agreeing prices for the product and for individual projects,
- allocating individual projects to designated producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question,
- in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to hinder its commercial activity, damage its business or drive it out of the market altogether.
...

Article 3

The following fines are hereby imposed on the undertakings named in Article 1 in respect of the infringements found therein:
(a) ABB Asea Brown Boveri Ltd, a fine of ECU 70 000 000;
...

The Applicant's five pleas in law

23. The applicant relies in essence on five pleas in law. The first plea alleges factual errors in applying Article 85(1) [now 81(1)] of the EC Treaty. The second alleges infringement of the rights of defence. The third alleges infringement of the principle of sound administration. The fourth alleges infringement of general principles and factual errors in determining the fine. The fifth alleges that the obligation to state reasons was infringed in connection with the determination of the fine.

Rights of the Defence

53. Observance of the rights of the defence, which constitutes a fundamental principle of Community law and which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure, requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76, *Hoffman-La Roche v Commission*, paragraph 11, and Case T-11/89, *Shell v Commission*, paragraph 39).

54. According to the case law, the statement of objections must set out the objections in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to take cognisance of the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision

(Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v Commission*, paragraph 42, and Case T-352/94, *Mo och Domsjö v Commission*, paragraph 63).

Right to be heard

78. It is settled case-law that, where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (Joined Cases 100/80 to 103/80, *Musique Diffusion Française and Others v Commission*, paragraph 21).

79. It follows that, so far as concerns the determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make their submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. Moreover, the undertakings have an additional guarantee, as regards the setting of that amount, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (Case T-83/91, Tetra Pak v Commission, paragraph 235).

Careful and impartial examination

99. The guarantees conferred by the Community legal order in administrative proceedings include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case T-44/90, *La Cinq v Commission*, paragraph 86; Case T-7/92, *Asia Motor France and Others v Commission*, paragraph 34; and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision v Commission*, paragraph 93).

Commission's discretion in setting fines

122. As regards the setting of fines for infringements of the competition rules, the Commission enjoys a discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89, *Martinelli v Commission*, paragraph 59; Case T-49/95, *Van Megen Sports v Commission*, paragraph 53; and Case T-229/94, *Deutsche Bahn v Commission*, paragraph 127). It is settled case law that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained (see Case 245/81, *Edeka*, paragraph 27, and Case C-350/88, *Delacre and Others v Commission*, paragraph 33).

123. On the contrary, the Commission is entitled to raise the general level of fines, within the limits laid down in Regulation No 17, if that is necessary to ensure the implementation of the Community competition policy. According to the case-law, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy (*Musique Diffusion Française and Others v Commission*, cited above, paragraph 109; Case T-12/89, *Solvay v Commission*, paragraph 309, and Case T-304/94, *Europa Carton v Commission*, paragraph 89).

124. It follows that undertakings involved in an administrative procedure which may lead to a fine cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously applied.

125. Furthermore, the dissuasive effect of fines is one of the factors which the Commission may take into account in assessing the gravity of the infringement and, consequently, in determining the level of the fine, since the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P, *SPO and Others v Commission*, paragraph 54, and judgments in Case C-219/95 P, *Ferriere Nord v Commission*, paragraph 33, and Case T-295/94, *Buchmann v Commission*, paragraph 163).

Correct assessment of the fine

205. The Commission did not commit an error of assessment vis-à-vis the applicant by increasing the basic amount of €70m taken to correspond with the gravity of the infringement by 50% on account of a number of circumstances, including, first, [the applicant's] role as the ringleader and instigator of the cartel and its bringing pressure on other undertakings to persuade them to enter the cartel, second, its systematic orchestration of retaliatory measures against Powerpipe, aimed at its elimination from the market and, third, its continuation of such a clear-cut and indisputable infringement after the investigations despite having been warned at high level by the Directorate-General for Competition of the consequences of such conduct (point 171 of the decision).

Importance of Applicant's compliance policy

220. First of all, the Commission cannot be criticised for not having regarded the applicant's strengthening of its Community law compliance policy as a mitigating circumstance.

221. Although it is indeed important that the applicant took measures to prevent future infringements of Community competition law by its personnel, that fact does not alter the reality of the infringement found in the present case (Case T-7/89, *Hercules Chemicals v Commission*, paragraph 357). Furthermore, it

follows from the case law that, although the implementation of a compliance programme demonstrates the intention of the undertaking in question to prevent future infringements and therefore constitutes a factor which better enables the Commission to accomplish its task of, inter alia, applying the principles laid down by the Treaty in competition matters and influencing undertakings in that direction, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in a specific case (Case T-319/94, *Fiskeby Board v Commission*, paragraph 83, and *Mo och Domsjö v Commission*, cited above, paragraph 417). That is all the more so when, as here, the infringement in question constitutes a manifest violation of Article 85(1)(a) and (c) of the Treaty.

Cooperation with the Commission during investigation

234. It should be observed at the outset that in the leniency notice the Commission defined the conditions in which undertakings which cooperate with it during the investigation into a cartel may be exempt from a fine or receive a reduction in the fine which they would otherwise have had to pay (see Section A 3 of the leniency notice).

235. It is not disputed that the applicant's case does not fall within the scope of Section B of that notice, which refers to cases where an undertaking has informed the Commission about a secret cartel before the Commission has undertaken an investigation (in which case the fine may be reduced by at least 75%), or within that of Section C of that notice, which concerns an undertaking which has disclosed the secret cartel after the Commission has undertaken an investigation which has failed to provide sufficient grounds for initiating the procedure leading to a decision (in which case the fine may be reduced by between 50% and 75%).

236. The applicant's case comes under section D of the leniency notice, which states that '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would had been imposed if it had not cooperated. The notice specifies that:

> Such cases may include the following:
> - before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;
> - after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

237. In that context, it should be observed, first, that the Commission cannot be criticised for having refused to grant the applicant the full 50% reduction available under section D of the leniency notice by relying, in particular, on the fact that it was necessary to wait until the requests for information had been sent out before the applicant cooperated (third and fourth paragraphs of point 174 of the decision).

238. It is settled case law that a reduction in the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (Case C-297/98 P, *SCA Holding v Commission*, paragraph 36; Case T-13/89, *ICI v Commission*, paragraph 393; Case T-310/94, *Gruber + Weber v Commission*, paragraph 271; and Case T-311/94, *BPB de Eendracht v Commission*, paragraph 325). Since, even outside the situations coming under section C of the notice, cooperation on the part of an undertaking before the Commission has issued a request for information may make the Commission's investigation easier, it was perfectly permissible for the Commission not to grant the maximum reduction envisaged by section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information on 13 March 1996, although the investigations at ABB IC Møller's premises had commenced on 29 June 1995.

239. As regards a comparison between the present case and the Commission's previous practice, the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (Case T-347/94, *Mayr-Melnhof v Commission*, paragraph 368).

240. However, it is appropriate to consider whether the Commission, in granting the applicant the same 30% reduction as the reduction granted to Løgstør and Tarco, observed the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified (Case 106/83, *Sermide*, paragraph 28; Case C-174/89, *Hoche*, paragraph 25; and *BPB de Eendracht v Commission*, cited above, paragraph 309).

241. In that regard, the Commission cannot be criticised for having failed to differentiate the extent to which the applicant cooperated from that to which Løgstør and Tarco cooperated in submitting evidence to the Commission. Although it is true that the information provided by ABB did assist materially in the establishment of the relevant facts, in particular as regards the origins of the cartel in Denmark in late 1990, Tarco was the first to provide evidence (Tarco's reply of 26 April 1996 to the request for information of 13 March 1996). Otherwise, it is apparent from the case-file that the information provided by the applicant in its replies to the request for information was considerable but, as regards its contribution to establishing the infringement, no greater than that given by other undertakings, having regard to the evidence available to the Commission after the investigations. Thus, as regards the continuation of the cartel after the investigations, evidence was provided by Løgstør (Løgstør's reply of 25 April 1996 to the request for information of 13 March 1996), while the applicant, after acknowledging in its reply of 4 June 1996 that the infringement was continuing, did not provide more detailed information until its reply of 13 August 1996. As regards the measures against Powerpipe, the Commission was unable to rely on information provided by ABB, but had to rely on the

information provided by Powerpipe and on other documents evidencing the approval and implementation of such an arrangement. It follows that the Commission was correct not to differentiate between the reductions for cooperation granted to the applicant, to Løgstør and to Tarco in so far as their communication of evidence to the Commission was concerned.

242. However, the Commission should have differentiated the reduction for cooperation to be granted to the applicant from the reductions granted to Løgstør and to Tarco on the ground that the applicant, after receiving the statement of objections, no longer disputed the findings of fact or their interpretation by the Commission. Having regard to the finding that, on the one hand, the applicant's cooperation in communicating evidence was not significantly different from that given by Løgstør or by Tarco and, on the other hand, the Commission made no further reference, when assessing the applicant's cooperation in point 174 of the decision, to the fact that the applicant did not contest the truth of the facts, the latter circumstance was not taken into account in calculating the reduction to be granted to the applicant for cooperation.

243. In that regard, the Commission expressly acknowledged, in point 26 of the decision, that, on the basis of its observations on the statement of objections, the applicant distinguished itself from the other undertakings in so far as the majority of the undertakings minimised the duration of the infringement and the role they had played and denied having participated in any scheme to damage Powerpipe, with the exception of the applicant, which did not dispute the main facts described by the Commission or the conclusions which it drew. The Commission also stated that, in their observations on the statement of objections, Løgstør and Tarco claimed that there had been no cartel outside the Danish market before 1994 and that, in addition, there had been no continuous cartel, and they denied having participated in or implemented any action designed to eliminate Powerpipe (second paragraph of point 26 and fifth paragraph of point 27 of the decision).

244. Since the Commission did not observe the principle of equal treatment in so far as it should have taken into consideration, when assessing the applicant's cooperation, the fact that the applicant did not dispute the main facts, it must be held that the Commission incorrectly set at 30% the reduction to be granted to the applicant for its cooperation during the administrative procedure.

245. The plea must therefore be upheld in so far as it criticises the Commission for not having granted a reduction greater than 30% of the fine.

Statement of reasons for Decision

251. It is settled case law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253) must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of

reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P, *Commission v Sytraval and Brink's France*, paragraph 63).

252. Where a decision imposes fines on a number of undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be determined, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others v Commission*, cited above, paragraph 54).

Court's Ruling

The Court hereby:

1. Orders that the fine imposed on the applicant by Article 3(a) of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel) be reduced to €65,000,000;

2. Dismisses the remainder of the application;

3. Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;

4. Orders the Commission to pay 10% of its own costs. ■

The Berlin Banking Company (Bankgesellschaft Berlin) Case

The Commission has decided to carry out a detailed investigation of restructuring aid granted to Bankgesellschaft Berlin AG by the Province of Berlin. The volume of aid is large; and there is at present some doubt whether it is compatible with the common market. The Bank, whose majority shareholder is the Province of Berlin, is one of the ten biggest banks in Germany, and easily the leading credit institution in the Berlin and Brandenburg area. As a result of high-risk real estate transactions, in particular generous rent and repurchase guarantees given to investors in real estate funds, it has found itself in serious trouble as market prices have fallen. The Province has already provided aid, but plans further measures, which appear to the Commission to be incompatible with the common market.

Commission Statement IP/02/518, dated 9 April 2002