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CONTENTS

26 COMMENT

Unscrambling Mergers
Merger Remedies

27 ACQUISITIONS (COMPUTERS)

The HP / Compaq Case

29 ABUSE OF DOMINANT POSITION (POST OFFICES)

The Belgian Post Office Case

32 LICENSING (TECHNOLOGY TRANSFER)

Commission Report

35 DE MINIMIS RULES (ALL INDUSTRIES)

Commission Notice

42 DISTRIBUTION (MOTOR VEHICLES)

Draft Regulation

MISCELLANEOUS

The Credit Mutuel Case *28*
The Tetra Laval / Sidel Case *31*
The Cisal / INAIL Case *41*

Unscrambling mergers

In eleven years, out of a total of some 1,900 cases notified under the Mergers Regulation, the Commission has prohibited only eighteen operations. The number of prohibited *but already implemented* concentrations is even more limited: four cases pursuant to Article 8(4) of the Regulation in total. These are *Kesko/Tuko, Blokker/Toys 'R Us, Schneider/Legrand* and *Tetra Laval/Sidel.* Of these, the first two can be distinguished from the others by the fact that they had been implemented in accordance with national law, having no Community dimension. The *Tetra/Laval* case is reported briefly in this issue, on page 31. It illustrates a problem facing the Commission in all cases involving the "unscrambling" of an operation already carried out: namely, conformity with the legal principle of proportionality, under which the measure in question must be no more drastic than the circumstances of the case require.

As to how a corporation may legitimately complete an operation, only to find it prohibited at a later stage, the Regulation contains an exception to the normal principle, according to which corporations are prohibited from implementing a merger or acquisition without prior approval from the Commission. The exception, contained in Article 7(3) of the Regulation, covers cases in which corporations may implement public bids and acquire the shares of the target company before the Commission's final decision, provided the acquirer does not exercise the voting rights attached to those shares before obtaining the Commission's approval.

Merger Remedies

In the *Schneider/Legrand* case, mentioned above, there was a clear illustration of the risks run by parties who do not discuss remedies early enough. ("Remedies" in this context mean proposals for making an anti-competitive merger or acquisition acceptable to the Commission, mainly by way of some form of divestiture.) In this case, the first remedy package was offered on the very last day for the submission of remedies. Since the market test carried out by the Commission gave a negative result, and the second remedy package offered by the merging companies, after the deadline, was of great complexity, the Commission was not in a position to accept it.

Merging companies, particularly in complex cases, are well advised to start discussing remedies at the earliest possible stage. As explained in the Commission Notice on Merger Remedies, the Commission is prepared to discuss remedies on an informal basis even in the pre-notification phase. The *Total/Fina/Elf* case is a good example of a concentration, leading to the creation of a national champion and raising serious competition problems, being approved due to early discussions on remedies between the parties and the Commission. ■

ACQUISITIONS (COMPUTERS): THE HP / COMPAQ CASE

Subject: Acquisitions

Industry: Computers and related technology

Parties: Hewlett-Packard Co
Compaq Computer Corporation

Source: Commission Statement IP/02/181, dated 31 January 2002

(Note. On the principle that all the current decisions of the Commission involving United States corporations have a special interest, this case is reported here, even though it resulted in a favourable outcome for the parties. Looked at from each of a number of different standpoints, the Commission was unable to find any respect in which the acquisition by HP of Compaq could jeopardize competition in the highly competitive market in which they operate.)

The Commission has formally approved the acquisition of Compaq Computer Corporation (Compaq) by Hewlett-Packard Co (HP), two US-based global providers of computing and enterprise technology solutions. A careful analysis of the merger, the largest ever in the Information Technology sector, and of the competitive forces in the markets concerned, has shown that HP would not be in a position to increase prices and that consumers would continue to benefit from sufficient choice and innovation.

HP's announced acquisition of Compaq was notified to the Commission for regulatory approval on December 20. The Commission's analysis focused on the combination of HP's and Compaq's activities in the markets for personal computers (PCs), servers, handheld products, storage solutions and services. In addition, the Commission also assessed the impact of the merger on HP's joint development of the Itanium processor with Intel as well as the importance of HP's increased opportunity for joint sales of PCs and printers following the integration of Compaq's PC products.

With regard to PCs, the Commission concluded that the merged entity would continue to face strong competition in Europe from a number of credible rivals including IBM, Dell and Fujitsu-Siemens, which, together with the absence of significant barriers to entry and the practice of non-exclusive contractual relationships between retailers and manufacturers, would prevent the new HP from any attempt to raise prices significantly.

On the market for servers, which are central computers linking PCs, workstations, printers and related devices into a network, the Commission similarly concluded that the proposed transaction was not likely to raise competitive issues. Indeed, while the servers market can be broken down according to price bands into entry-level servers, mid-range and large servers, HP and Compaq are largely

complementary, except in the entry-level market segment where the combined entity will have relatively high market shares. However, the Commission's analysis of that segment confirmed that the new HP would not be able to act independently from either customers or competitors. This was a result of the combination of a number of factors, among them the dynamic and growing nature of the market, the absence of entry barriers, the presence of several strong competitors including fringe suppliers and the white brands built around Intel processors.

As to the potential impact of HP and Intel's jointly developed Itanium processor, the Commission's analysis concluded that the merged entity would not be able to foreclose competitors' access to this component and that it was in HP and Intel's interest to guarantee unrestricted access.

Finally, the results of the Commission's analysis further indicated that, due among other things to the merged entity's moderate share of the relevant PC market and the limited impact that joint PC/printer sales could have on the new HP's printer market share, the proposed transaction was not likely to give HP the ability to foreclose competition from the printer markets.

In view of the presence of strong existing and potential competition in all markets considered, the Commission concluded that the operation would not result in the creation or strengthening of any dominant position, and has decided not to oppose the concentration. According to the 1991 agreement on anti-trust issues between the European Union and the United States, the Commission has co-operated closely with the Federal Trade Commission, which is still investigating the transaction. The Commission's decision does not prejudice in any way the outcome of the assessment in the US. ■

Overpayment of Compensation: The Credit Mutuel Case

One of the more entertaining aspects of the otherwise sombre subject of state aids is the remarkable variety of forms which state aids may assume. In the early days, they were mainly associated with straightforward government subsidies. Later, it was recognised that tax concessions could be a state aid. Later still, it was almost as though Member States' governments were pitting their wits against the Commission to find ingenious ways of indirectly and discreetly handing out funds. In the Credit Mutuel case, an unusual form of state aid was detected by the Commission. The bank was entrusted by the French government with the operation of a special savings scheme, known as the Livret Bleu, which had public policy objectives, and received compensation for the costs of doing so. However, in the present case, the government over-compensated the bank to the tune of €164m; and the Commission has decided that this is a form of state aid and must be repaid by the bank. Source: Commission Statement IP/02/67, dated15 January 2002.

ABUSE OF DOMINANT POSITION (POSTAL SERVICE): THE BPO CASE

Subject: Abuse of dominant position
Predatory pricing
Complaints
Fines

Industry: Postal service
(Some implications for other industries)

Parties: De Post – La Poste

Source: Commission Statement IP/01/1738, dated 5 December 2001

(Note. Predatory pricing is usually difficult to engineer, unless there is some form of cross-subsidisation from other sectors of a company's business. Where the business is a monopoly – however legitimate – it may be in a position to offer preferential prices on the basis of its monopoly revenue. By doing so, it is in a good position to oust competitors from a related market. The Belgian Post Office was in this position; and its main competitor in the market for "business-to-business" mail came perilously close to losing its market in Belgium. However, a timely complaint to the Commission resulted in the Decision described below.)

The Commission has decided that the Belgian Post Office (De Post - La Poste) has abused its dominant position by making a preferential tariff in the general letter mail service subject to the acceptance of a supplementary contract covering a new business-to-business ("B2B") mail service. This new service competes with the "document exchange" B2B service provided in Belgium by Hays, a private undertaking established in the United Kingdom. As La Poste exploited the financial resources of the monopoly it enjoys in general letter mail, to leverage its dominant position there into the separate and distinct market for B2B services, the Commission has imposed a fine of €2.5m.

The Commission pointed out that it would not accept that postal incumbents could exploit the resources of their statutory monopoly to eliminate competitors providing services in areas which were open to competition. In the period ahead, which would be marked by the co-existence of services covered by the postal monopoly and services which were liberalised, the Commission would remain extremely vigilant that the beneficiaries of the monopoly did not extend their dominance into markets open to private operators. Following the Commission's intervention, and without waiting for its final decision, La Poste terminated this abuse of its dominant position.

In April 2000, Hays plc, a private operator of postal services based in the United Kingdom, lodged a complaint with the Commission alleging that La Poste was trying to eliminate the Hays document exchange network, which it had been operating in Belgium since 1982. Hays could not compete with the tariff

reduction offered by La Poste in the monopoly area and was accordingly losing most of its traditional clients in Belgium, the insurance companies.

B2B mail services are offered only to a closed group of subscribers for the mutual exchange of business-related documents. B2B mail services offer overnight delivery and time-certain pick-up and delivery. B2B mail therefore differs significantly from the general letter mail services covered by the monopoly. La Poste and Hays compete in providing B2B services to insurance companies in Belgium.

In the course of the Commission's investigation, the following facts emerged. After Hays' customers in the insurance sector indicated that they were not interested in the new B2B mail service offered by La Poste, within days the latter unilaterally terminated the preferential tariffs that the insurance companies enjoyed previously when sending their general letter mail. Second, La Poste let stand the termination, notified on 30 October 1998, of the preferential tariff until the Federation of insurance companies, on 27 January 2000, subscribed to the new B2B service. Following the installation of a new management team which has cooperated with the Commission investigators, La Poste abolished the tying practice by discontinuing the B2B mail service on 27 June 2001.

By tying the tariff reduction in the monopoly area to the subscription of its B2B service, La Poste made it impossible for Hays to compete on a level playing field because it could not offer a similar advantage. The effects of this tying practice, although it has been terminated in the meantime, still risk the elimination of Hays, a company that has established a cross-border network for the exchange of documents, from the Belgian market. The overnight cross-border exchange of documents between Belgium and the United Kingdom and France, which is at present offered by Hays, would cease if Hays disappeared from the Belgian market. The infringement therefore had a negative impact on trade between Member States and sent a strong negative signal to foreign competitors, who might wish to do business in Belgium.

Article 82(d) of the EC Treaty provides that an abuse of a dominant position may consist in "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

Context of the decision

Protecting postal services open to competition is the best means of safeguarding the interests of consumers and European industry that require high performance and competitive postal services. The competition rules are being applied in the postal sector against the background of the gradual opening of postal monopolies. The immediate period ahead will thus be marked by the co-existence of services covered by the postal monopoly and services open to competition. The present decision is the fifth in a series of Commission decisions with respect to postal services taken since December 2000. In the Commission's view, this demonstrates its intention to remain extremely vigilant that beneficiaries of the

monopoly do not exploit the monopoly resources to leverage their dominance into markets open to competition.

In December 2000, the Commission adopted a Decision against Italy which confirmed that innovative new services, like time-certain hybrid electronic mail services, could not be included in the postal monopoly. With respect to such new services, there should be open competition on the merits. In March 2001, the Commission imposed a fine on Deutsche Post AG for abusing its dominant position by granting fidelity rebates to almost the entire German mail order industry. The Commission also established the rule that revenues from the monopoly should not be used to finance a predatory pricing policy in markets open to competition. The Commission's proceedings resulted in a structural separation of competitive parcel services from the Deutsche Post AG monopoly services. In July 2001, a further decision was adopted which stated that Deutsche Post AG must not levy the full domestic tariff on all forms of incoming cross-border mail. In October 2001, a decision against France demonstrated the Commission's ongoing concern that there must be adequate and independent regulatory supervision by the Government vis-à-vis the beneficiary of the postal monopoly.. All of these decisions serve as useful precedents and thereby give guidance to public postal operators as to the Commission's clear policy goal to protect competition in those postal markets which are close to, but distinct from, the postal monopoly. ■

The Tetra Laval / Sidel Case

The Commission has adopted a decision requiring the separation of the Swiss-based company Tetra Laval from the French company Sidel through the divestiture of Tetra's shareholding in Sidel. This follows the prohibition on 30 October 2001 of Tetra's acquisition of Sidel. Applying the principle of proportionality, the decision allows Tetra flexibility in choosing an appropriate buyer and a suitable method of divestiture within the time limit fixed by the Commission. Tetra's acquisition of Sidel, which was notified to the Commission on 18 May 2001, was prohibited by the Commission on 30 October 2001 because it would significantly impede competition in the European Economic Area in distinct markets for liquid food packaging equipment to the detriment of innovation, choice and competitive prices for consumers. Tetra's bid for Sidel was unconditional in accordance with French stock exchange rules. Tetra has already acquired around 95% of Sidel's shares. The Merger Regulation, exceptionally in the case of public bids, allows such acquisitions even before the Commission's final decision. As a result, Tetra had already implemented a concentration which was later prohibited by the Commission. The Commission has therefore considered it necessary to adopt a decision pursuant to Article 8(4) of the Merger Regulation which provides that the Commission may "require the undertakings or assets brought together to be separated (...) or any other action that may be appropriate in order to restore conditions of effective competition". In adopting the decision the Commission has sought to adopt the measures necessary to restore conditions of effective competition.

Source: Commission Statement IP/02/174, dated 30 January 2002

LICENSING (TECHNOLOGY TRANSFER): COMMISSION REPORT

Subject: Licensing
Patent licensing
Know-how licensing
Intellectual property

Industry: All industries

Source: Commission Statement IP/02/14, dated 7 January 2002

(Note. This is a timely report on the effectiveness of the Block Exemption Regulation governing technology licensing agreements. The Regulation represented an advance on its predecessor, in that it extended the scope of the exemption to mixed intellectual property licenses. But it did not go far enough. In addition, it reflected an approach to licensing bases on somewhat formal views on competition policy and not sufficiently on economic considerations. It is a complex Regulation; and some of its provisions are manifestly extraneous to the process of licensing as such. The Commission's report recognizes these limitations and invites comments on the possible ways of improving the scope and content of the Regulation.)

Evaluation of the Regulation

The Commission has adopted a report evaluating the functioning of Regulation EC/240/96, which sets out the competition rules for the application of Article 81(3) to technology transfer agreements. This is an important policy area, as the economic development of the Community and its ability to draw abreast of its competitors in the rest of the world depend on the capacity of industry to devise new technologies and to disseminate them on a large scale. Competition is one of the main driving forces of innovation; and it is therefore important to find the right balance between protecting competition and protecting intellectual property rights. The evaluation report adopted by the Commission raises issues such as the treatment of software licensing agreements and licensing pools which have become increasingly important for the development and dissemination of new technologies. In its report the Commission is asking for comments on its competition policy approach to licensing agreements. After discussion on the report with industry, consumer associations and other interested parties the Commission may propose new competition rules for the application of Article 81 to licensing agreements in the second half of the year 2002.

Article 81(1) of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Under Article 81(3) an anti-competitive agreement may be exempted from the prohibition of Article 81(1) if the positive effects brought about by the agreement outweigh its negative effects. The Commission can block exempt categories of agreements of

the same nature and has done so in 1996 for certain licensing agreements by adopting the technology transfer block exemption Regulation 240/96 (hereafter the TTBE) which covers the licensing of patent and know-how rights.

The report provides a critical analysis of the application and the policy approach underpinning the TTBE. It discusses the problems arising in the context of licences of intellectual property rights (hereafter IPRs) and acknowledges the complementary role of competition and innovation policies. It also contains a comparison between the competition policy approach to licensing of IPRs in the Community and in the US. It stresses the need to adapt the TTBE to ensure consistency with the new Commission block exemptions concerning distribution agreements, as well as R&D and specialisation agreements. Both of which are based on a more economic approach.

Basic findings of the Report

Before adopting its report, the Commission carried out a preliminary fact-finding that has shown that industry would be favourable to a review of the TTBE and insists on the need to proceed with a simplification and clarification of the current rules. The report finds that the TTBE uses criteria relating more to the form of the agreement than the actual effects on the market. The TTBE has in fact four main shortcomings. Firstly, the TTBE is too prescriptive and seems to work as a straitjacket, which may discourage efficient transactions and hamper dissemination of new technologies. Secondly, the TTBE only covers certain patent and know-how licensing agreements. This narrow scope of application of the TTBE seems increasingly inadequate to deal with the complexity of modern licensing arrangements, such as pooling arrangements, software licenses involving copyright and so on. Thirdly, a number of restraints are currently presumed illegal or excluded from the block exemption without a good economic justification. This concerns in particular certain restrictions extending beyond the scope of the licensed IPR (for example, non-compete obligations and tying). In terms of economic analysis, such restraints may be efficiency enhancing or anti-competitive depending on the competitive relationship between the parties, the market structure and the parties' market power. Fourthly, by concentrating on the form of the agreement the TTBE extends the benefit of the block exemption to situations which cannot always be presumed to fulfil the conditions of Article 81(3), either because the contracting parties are competitors or because they hold a strong position on the market. For instance, the grant of an exclusive license can have serious foreclosure effects when an exclusive license granted to a dominant producer prevents other companies gaining access to technology that might foster their market entry.

Some issues for discussion

The report invites comments on a number of issues. One is the question whether the scope of the TTBE, which applies only to patents and know-how should be widened to cover also copyright, design rights and trademarks. This issue is of particular importance for a number of sectors, including the software industry,

which depends upon a chain of copyright licences for manufacture and distribution.

A second question is whether the TTBE should also cover licensing agreements between more than two companies such as licensing pools. Such arrangements have become increasingly important for industry, given the growing complexity of new technologies. In this respect, it can be observed that multi-party licences may be efficiency enhancing and pro-competitive, in particular where without all the patents contributed to the pool the exploitation of the new technology would not be possible. However, multi-party licenses may also have serious anti-competitive effects, especially when the agreement covers competitive technologies or where it requires the members to grant licences to each other for current and future technology at minimal cost or on an exclusive basis. In such circumstances, multiparty agreements may disguise a cartel, lead to foreclosure or reduce the parties' incentives to engage in R&D thereby delaying innovation.

A third question concerns the possibility of a more lenient approach to licensing agreements between non-competitors. It is generally acknowledged that if the parties to an agreement are in a vertical relationship, and are therefore not competitors, exclusive licences are generally efficiency enhancing and pro-competitive. For instance, if the IPR holder does not have the assets for the production or distribution of the licensed products, it is more efficient to license to someone who does have these assets. The exclusivity may be necessary to protect the licensee against free riding on his investments or to create the necessary incentives for both parties to invest in further improvements.

A fourth question concerns the possibility of a more prudent approach to licensing agreements between competitors. Agreements between competitors may give rise to a number of competition concerns if the licence prevents competition that could have taken place between the licensor and the licensee absent the licence. On the one hand, exclusive licences will often lead to market sharing through the allocation of territories or customers, especially when the licence is reciprocal or the exclusivity extends also into non-licensed competing products. Production quotas agreed in licensing agreements between competitors may easily lead to a straightforward output restriction. On the other hand, under certain conditions, in particular in the case of licensing to a joint venture and in case of non-reciprocal licensing, the exclusivity may not only lead to a loss of inter-brand competition but also to efficiencies. To assess whether the negative effects on competition may be outweighed by the efficiencies, the market power of the parties and the structure of the markets affected by the agreement need to be taken into account.

Publication of the Report

The report will be published and is already available on the internet, as follows.
http://europa.eu.int/comm/competition/antitrust/technology_transfer/
Comments on the report have to be sent to the Commission by 26 April 2002. ■

DE MINIMIS RULES (ALL INDUSTRIES): COMMISSION NOTICE

Subject: De minimis rules

Industry: All industries

Source: Commission Statement IP/02/13, dated 7 January 2001; text of Notice in C.369 of 2001

(Note. In the January 2002 issue we carried a brief note on the introduction of the new guidelines on the application of de minimis rules to cases otherwise covered by Article 81(1) of the EC Treaty on restrictive agreements. In the following report, there will be found a summary of the aims and content of the new guidelines, together with the full text of the Notice. The new Notice replaces the 1997 Notice.)

Summary

Article 81(1) of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified this provision by saying that it does not apply where the impact of the agreement on intra-community trade or on competition is not "appreciable". In the new Notice, the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition: that is to say, what is *de minimis* and thus outside the prohibition under Article 81(1). The new Notice reflects an economic approach and has the following key features.

The *de minimis* thresholds are raised to 10% market share for agreements between competitors and to 15% for agreements between non-competitors. The previous Notice had fixed the *de minimis* thresholds at respectively 5% and 10% market share. The new Notice raises these thresholds to respectively 10% and 15%. Competition concerns can in general not be expected when companies do not have a minimum degree of market power. The new thresholds take account of this while at the same time staying low enough to be applicable whatever the overall market structure looks like. The difference between the two thresholds takes into account, as before, the fact that agreements between competitors in general lead more easily to anti-competitive effects than agreements between non-competitors. It specifies for the first time a market share threshold for networks of agreements producing a cumulative anti-competitive effect.

The previous *de minimis* Notice excluded from its benefit agreements operated on a market where "competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers." This meant in practice that firms operating in sectors like the beer and petrol sector could usually not benefit from the *de minimis* Notice. The new Notice

introduces a special *de minimis* market share threshold of 5% for markets where there exist such parallel networks of similar agreements.

It contains the same list of hardcore restrictions as in the horizontal and vertical Block Exemption Regulations. The new Notice defines in a clearer and more consistent way the hardcore restrictions, i.e. those restrictions, such as price fixing and market sharing, which are normally always prohibited irrespective of the market shares of the companies concerned. Hardcore restrictions can not benefit from the de minimis Notice. For agreements between non-competitors the new Notice has taken over the hardcore restrictions set out in Block Exemption Regulation 2790/1999 for vertical agreements. For agreements between competitors the new Notice has taken over the hardcore restrictions set out in Block Exemption Regulation 2658/2000 for specialisation agreements.

Agreements between small and medium-sized enterprises are in general *de minimis* . The new Notice states that agreements between small and medium-sized enterprises (SMEs) are rarely capable of appreciably affecting trade between Member States. Agreements between SMEs therefore generally fall outside the scope of Article 81(1).

In cases covered by the new Notice, the Commission will not institute proceedings either upon application or on its own initiative. Where companies assume in good faith that an agreement is covered by the Notice, the Commission will not impose fines. Although not binding on them, the Notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

Full Text of Notice (Endnotes in Square Brackets)

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [1]

I

1. Article 81(1) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.

2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1). [2]

3. Agreements may in addition not fall under Article 81(1) because they are not capable of appreciably affecting trade between Member States. This notice does not deal with this issue. It does not quantify what does not constitute an appreciable effect on trade. It is however acknowledged that agreements between small and medium-sized under-takings, as defined in the Annex to Commission Recommendation 96/280/EC [3], are rarely capable of appreciably affecting trade between Member States. Small and medium-sized undertakings are currently defined in that recommendation as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.

4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

5. This notice also applies to decisions by associations of undertakings and to concerted practices.

6. This notice is without prejudice to any interpretation of Article 81 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):

(a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors) [4]; or

(b) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors). In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10% threshold is applicable.

8. *Where in a relevant market competition is restricted by the cumulative effect of* agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds under point 7

are reduced to 5%, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect. [5] A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects.

9. The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10%, 15% and 5% set out in point 7 and 8 during two successive calendar years by more than 2 percentage points.

10. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the notice on the definition of the relevant market for the purposes of Community competition law. [6] The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

11. Points 7, 8 and 9 do not apply to agreements containing any of the following hardcore restrictions:

(1) as regards agreements between competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object [7]:

(a) the fixing of prices when selling the products to third parties;

(b) the limitation of output or sales;

(c) the allocation of markets or customers;

(2) as regards agreements between non-competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:

- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to

another buyer, where such a restriction does not limit sales by the customers of the buyer,

- the restriction of sales to end users by a buyer operating at the wholesale level of trade,
- the restriction of sales to unauthorized distributors by the members of a selective distribution system, and
- the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

(e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;

(3) as regards agreements between competitors as defined in point 7, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the hardcore restrictions listed in paragraph (1) and (2) above.

12. (1) For the purposes of this notice, the terms "undertaking", "party to the agreement", "distributor", "supplier" and "buyer" shall include their respective connected undertakings.

(2) "Connected undertakings" are:

(a) undertakings in which a party to the agreement, directly or indirectly:

- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
- has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
- one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

(3) For the purposes of paragraph 2(e), the market share held by these jointly held undertakings shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).

Endnotes

[1] This notice replaces the notice on agreements of minor importance published in OJ C 372, 9.12.1997.

[2] See, for instance, the judgment of the Court of Justice in Joined Cases C-215/96 and C-216/96, *Bagnasco v Banca Popolare di Novara and Casa di Risparmio di Genova e Imperia*, points 34-35. This notice is also without prejudice to the principles for assessment under Article 81(1) as expressed in the Commission notice "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", OJ C 3, 6.1.2001, in particular points 17-31 inclusive, and in the Commission notice "Guidelines on vertical restraints, OJ C 291, 13.10.2000, in particular points 5-20 inclusive.

[3] OJ L 107, 30.4.1996, p. 4. This recommendation will be revised. It is envisaged to increase the annual turnover threshold from EUR 40 million to EUR 50 million and the annual balance-sheet total threshold from EUR 27 million to EUR 43 million.

[4] On what are actual or potential competitors, see the Commission notice "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", OJ C 3, 6.1.2001, paragraph 9. A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices.

[5] See also the Commission notice "Guidelines on vertical restraints", OJ C 291, 13.10.2000, in particular paragraphs 73, 142, 143 and 189. While in the guidelines

on vertical restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this notice all market share thresholds refer to total market shares.

[6] OJ C 372, 9.12.1997, p. 5.

[7] Without prejudice to situations of joint production with or without joint distribution as defined in Article 5, paragraph 2, of Commission Regulation EC/2658/2000 and Article 5, paragraph 2, of Commission Regulation EC/2659/2000, OJ L 304, 5.12.2000, pp. 3 and 7 respectively. ■

Cisal v INAIL (Meaning of "Undertaking")

There is a large body of case law on the meaning of "undertakings" – that is, the persons, firms or other entities, – covered by the rules on competition. In its recent judgment, delivered on 22 January 2002, in Case C-218/00, the Court of Justice had to consider whether Italy's National Institute for Insurance against Accidents at Work (INAIL) was an undertaking within the meaning of Articles 81 and 82 of the EC Treaty. It referred briefly, in paragraphs 22 and 23 of the judgment, to the principal cases. "According to settled case-law, the concept of an undertaking in competition law covers any entity engaged in economic activity, regardless of the legal status of the entity or way in which it is financed (see, in particular, Joined Cases C-180/98 to C-184/98, *Pavlov and Others*, paragraph 74)... In that regard, it has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85, *Commission* v *Italy*, paragraph 7; Case C-35/96, *Commission* v *Italy*, paragraph 36; and *Pavlov*, cited above, paragraph 75)."

Applying these principles to INAIL, the Court summarized the position in paragraphs 44 and 45 of the judgment. "In summary, it is clear from the foregoing that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them... In conclusion, it may be stated that in participating in this way in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, the INAIL fulfils an exclusively social function. It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 [sc 81 and 82] of the Treaty."

DISTRIBUTION (MOTOR VEHICLES): DRAFT REGULATION

Subject: Distribution arrangements
Selective distribution
Exclusive distribution
Pricing policy

Industry: Motor vehicles

Source: Commission Statements IP/02/196, and MEMO/02/18, dated 5 February 2002

(Note. At this stage, the Commission's draft is still subject to further consultation: the final version of the Regulation is expected to be adopted in time for it to come into force on 1 October 2002, when the current Regulation expires. The full text will then be published in this newsletter. In the meantime, the Commission has issued an explanatory Statement, together with a list of Questions and Answers about its draft. These are set out below.)

The Commission has proposed new competition rules for the motor vehicle sector, which aim at a better deal for car buyers throughout the European Union. The new draft regulation aims to remedy the competition problems identified in the Commission's 2000 evaluation report on the current competition regime. It is designed to increase competition and bring tangible benefits to European consumers for both vehicle sales and servicing. The regulation will open the way to greater use of new distribution techniques such as Internet sales. It will lead to more competition between dealers, make cross-border purchases of new vehicles significantly easier, and lead to greater price competition. Consumers will be better informed and it will be easier to compare cars and associated services offered by dealers. Car owners will have easier access to after-sales servicing, potentially at lower prices. The quality of vehicle servicing and repairs will be fully maintained. With regard to all these aspects, the driving theme that has inspired the draft regulation is that the consumer's interests must be put first.

"This bold initiative encourages diversity and choice in motor vehicle retailing and puts the European consumer firmly in the driver's seat", Competition Commissioner Mario Monti explained. "It should help to remedy the competition problems that we have observed in the sector over the past few years and allow the car buyer to purchase a vehicle wherever it is cheapest. The new regulation will improve competition in both vehicle sales and servicing. This is important because, over the lifetime of a car, a consumer spends as much on maintenance and repairs as he does to purchase the car in the first place."

The draft is intended to replace the regime established in 1995, which is due to expire on 30 September 2002 (Regulation 1475/95). If the Commission simply let this Regulation lapse, the car sector would automatically fall under the general competition rules for distribution agreements (Commission Block Exemption

Regulation 2790/99). While this general regime is suitable for most economic sectors, the Commission has concluded that it does not contain sufficient safeguards to remedy the problems identified in the evaluation report, and that a stricter regime for the car sector is therefore necessary.

The draft was prepared following an extensive process of fact-finding and consultation, and takes into account the views of interested parties and the findings of a series of studies commissioned from independent consultants. The Commission's own evaluation report showed that several of the aims underlying Regulation 1475/95 had clearly not been achieved. European consumers do not derive their fair share of benefits from the system, competition between dealers is not strong enough and dealers remain too dependent on car manufacturers. Consumers have also in practice found it difficult to exercise their Single Market right to take advantage of price differentials between Member States and buy their vehicle wherever the price is lowest.

The new Regulation will be applicable to the sale and after-sales services of all motor vehicles (passenger cars, light commercial vehicles, trucks and buses). It is based on the same philosophy as Regulation 2790/99 in that, unlike the current sector-specific block exemption (Regulation 1475/95), it does not prescribe a single rigid model for car distribution but rather leaves a set of choices open to carmakers, distributors and dealers. Car manufacturers may choose between exclusive distribution, where each dealer approved by the manufacturer is allocated a sales territory, and selective distribution, where dealers are selected according to a set of criteria. The Commission does not seek to define what criteria are permitted or how a carmaker should organise his network; instead, providing an agreement corresponds to the basic conditions for the application of the regulation, everything is permitted with the exception of a defined blacklist of "hard core" (that is, severely anti-competitive) restrictions. Although the Regulation is much stricter than the current block exemption when it comes to ensuring effective competition, it is also more flexible.

Studies have shown that many consumers would value the in-store choice and comparability available in multi-brand outlets. This "multi-branding" reinforces dealers' commercial independence vis-à-vis their suppliers and also enables dealers in sparsely populated areas to keep their businesses profitable. The new draft regulation therefore gives retailers a genuine choice as to whether they sell more than one brand.

Regulation 1475/95 contains a clause commonly referred to as the availability clause, intended to allow dealers to supply cars to consumers from other Member States that are identical to those supplied to dealers in the consumer's home country. This clause is retained in the new draft regulation, as it allows consumers to make cross-border purchases, and has enabled UK and Irish consumers to obtain right-hand-drive vehicles from Continental dealers at lower prices. The Commission's twice-yearly car price report has consistently revealed major differences in new car prices between EU Member States. A study published for the Commission a year ago concluded that these differences were not entirely due to differences in tax levels[2]. The draft for a new regulation contains other

measures intended to make it easier for the consumer to take advantage of lower prices in other EU countries. In particular, existing restrictions on operators who act on behalf of a consumer with regard to the purchase of a vehicle will be lifted. In future, these representatives, commonly referred to as intermediaries, will only have to produce a mandate showing that they are acting on behalf of a consumer. Under Regulation 1475/95, when a consumer wants to buy a car cheaply in another Member State, it is mainly up to the individual concerned or his intermediary to try to locate dealers willing to sell to this person. The new draft Regulation not only makes shopping abroad easier, but also contains measures to allow those dealers who wish to sell to consumers in other areas of the European Union to be more pro-active. It provides that dealers in a selective distribution system may engage in active sales in other words, they may place advertisements in other areas, and address mail shots and personalised e-mails to consumers located anywhere in the European Union. Dealers may not be penalised financially for selling in this manner, and may not have a quota imposed on them.

In addition, dealers in a selective distribution system may set up a secondary sales outlet or a delivery point in another part of their own country or in another Member State of the European Union. One might imagine, for example, that a Ford dealer in Belgium who commonly sells many vehicles to UK consumers might find that it made business sense to open a sales outlet or a delivery point in London. The new draft regulation would make it possible for him to do so. These measures should help to ensure that the Single market operates to put pressure on the often extraordinarily high price differentials that exist between Member States of the European Union.

Whereas, under the current system, every car dealer is forced to invest in facilities to carry out repairs and maintenance on the vehicles they sell, under the new draft, dealers may choose whether they wish to carry out repairs themselves, or sub-contract them to another authorised member of the manufacturer's network, be it another dealer/repairer or a repairer only. The new draft regulation also provides that, providing they meet the quality standards set by a manufacturer, both independent repairers and today's car dealers may become authorised repairers within that manufacturer's network, without being obliged to sell new cars. The carmaker may not place a limit on the number of authorised repairers, and may not seek to limit an authorised repairer's right to repair vehicles of other makes. Studies have shown that consumers favour a dense network of repairers, and this proposed change should help to maintain network density while reinforcing the current level of technical expertise within the network.

The draft regulation also provides that carmakers must allow those repairers who choose to remain independent from specific brands, access to all necessary technical information, tools, equipment, including diagnostic equipment, and training. Furthermore, the draft forbids clauses which seek to prevent authorised repairers from supplying original spare parts or parts of matching quality to independent repairers. These provisions aim to ensure that independent repairers can continue to compete effectively with the manufacturer's network of

authorised repairers. The consumer will therefore have a choice as to where his vehicle is repaired.

The draft also aims to give consumers a choice as to which spare parts are used to repair their vehicle; clauses by which a carmaker seeks to prevent repairers from obtaining spare parts from other sources or which restrict the right of authorised repairers to use spare parts which match the quality of original spare parts would not be allowed by the new block exemption. These measures should lead to more spare parts being sold directly to repairers by the spare part producers, thereby lowering prices for the European consumer. However, in view of the vehicle manufacturers' direct contractual involvement in free servicing, recall operations, and repairs under warranty, authorised repairers may be obliged to use original spare parts supplied by the carmakers for these types of repair.

Taken as a whole, the changes as regards both independent and authorised repairers set the scene for improvements in competition and for safe and high-quality repair and maintenance services, to the benefit of the European consumer. Strengthening dealers' commercial independence to allow them to better serve the car buyer. Although the current rules contain provisions to reinforce dealers' commercial independence through contractual protection, notably by providing for minimum notice periods for contract termination, the Commission's evaluation report makes it plain that these have not been sufficient to achieve all of the desired effects.

In the absence of more effective measures, there is the risk that certain carmakers might use termination or the threat of termination as a way of preventing dealers from engaging in the types of pro-competitive behaviour which the new draft regulation seeks to encourage, such as selling more than one brand within the same showroom, or selling to consumers from other Member States or their representatives. To prevent manufacturers or their importers from undermining the new regime in this way, to the detriment of both consumer interests and dealers' commercial independence, the draft regulation now provides that any carmaker wishing to terminate a dealer agreement must give clear written reasons for doing so. This measure should enable a judge or an arbitrator to check the validity of the contract termination.

The draft regulation will now be submitted to the Advisory Committee on Restrictive Practices and Dominant Positions, consisting of representatives from the Member States. The Committee is due to be convened at the beginning of March 2002. In the meantime, it will also be sent for consultation to the European Parliament and the Economic and Social Committee. After its discussion in the Advisory Committee, the draft will then be published in the Official Journal to give interested parties the opportunity to comment. After further consideration by the Commission of all the views expressed during the consultation period, the draft will be submitted to the Advisory Committee once more and should formally be adopted by the Commission before the summer break. The new regulation is due to come into force on 1 October 2002. There will be a transition period (probably one year) during which all distribution agreements existing as of that date will have to be brought in line with the new

rules. The block exemption provided for in the draft regulation will expire on 31 May 2010. This date was chosen to coincide with the expiry of Regulation 2790/99, the general block exemption regulation applicable to vertical restraints.

Commission Memorandum: Questions and Answers

What is a Block Exemption?

The EC Treaty lays down a basic rule (Article 81(1)) banning agreements which could have anti-competitive effects. Of course, many common agreements which are pro-competitive and benefit the consumer contain clauses which limit one or other of the parties' ability to compete, and the Treaty (in Article 81(3)) therefore gives the Commission the power to exempt such agreements from the ban. Rather than read through every individual agreement notified to it, the Commission often exempts a whole class of agreements, on condition that they respect certain requirements and so long as they do not contain "hard-core" restrictions. The new draft regulation is an example of such a "block exemption". The new draft regulation applies Article 81(3) of the EC Treaty to certain types of motor vehicle distribution and servicing agreements, and is intended to replace block exemption Regulation 1475/95, which came into force in 1995 and is due to expire on 30 September 2002.

How did the Commission elaborate its proposal?

The proposal was drawn up following an extensive process of fact-finding and consultation. This began with the publication, in November 2000, of an "evaluation report" which identified a series of problems with the current regulatory regime. European consumers do not derive a fair share of benefits from the system, competition between dealers is not strong enough and dealers remain too dependent on car manufacturers. Consumers have also in practice found it difficult to make use of their Single Market right to take advantage of price differentials between Member States and buy their vehicle wherever the price is lowest. Studies were commissioned from independent consultants on key elements of the review, such as the obligation to link sales and service, the nature of price differentials, the views of consumers on different features of current and possible future regimes, and the potential impact of various regulatory changes on all of those concerned.

A hearing was held in February 2000 to debate the findings of the evaluation report and the first two of the studies. It was attended by consumers' associations, car dealers' associations, and representatives of the major carmakers among others. In addition, the Commission considered individual submissions from interested parties, and took into account large numbers of individual letters received from European consumers.

Why not just let the current Block Exemption Regulation 1475/95 expire?

During the review, the Commission considered a number of alternatives for legislative change. It was clear from an early stage that simply letting Regulation

1475/95 expire was not a realistic option. If the Commission allowed Regulation 1475/95 to lapse, the car sector would automatically fall under the general competition rules for distribution agreements (Commission Block Exemption Regulation for vertical restraints, Regulation 2790/99). While this general regulation is suitable for most economic sectors, the Commission concluded that it does not contain sufficient safeguards to remedy the problems which the evaluation report identified in the automobile sector. Additional safeguards were especially necessary because the Commission also identified what is referred to in the legal jargon as a "cumulative effect" in the motor vehicle sector. This may occur when a high percentage of goods are distributed using distribution networks which have near-identical features which are restrictive of competition.

What is the nature of the proposed regime?

While the new draft regulation is stricter than its predecessor, it is less prescriptive. Carmakers may choose an exclusive distribution system, where dealers are allocated a territory, or a selective distribution system. If a selective distribution system is chosen, the carmaker may apply a combination of qualitative and quantitative criteria, or he may alternatively select his dealers according to purely qualitative criteria. If he chooses the latter option, he will not be able to place a ceiling on the number of dealers and any dealer who meets the criteria may join the network.

Will the Regulation lead to multi-brand sales outlets?

Although, under the current Regulation, dealers are in theory allowed to sell vehicles of more than one brand, in practice they rarely do so. The Regulation allows manufacturers to require dealers to sell other brands in separate premises, through a separate company, with separate management and a separate sales force, and in practice this makes multi-brand sales uneconomic. Studies have shown, however, that there is consumer demand for dealers to sell more than one brand, and the new draft regulation accordingly lifts most of the restrictions that are allowed under the current regulation, giving retailers (and ultimately consumers) a genuine choice. Car manufacturers may, however, protect their brand image by requiring their vehicles to be displayed in a "brand-specific" area of the showroom.

What are the changes for the so-called "intermediaries"?

Experience has shown that it is difficult for the individual consumer to buy a vehicle abroad. He or she may experience language problems, or may be unfamiliar or uneasy with the commercial environment in another Member State. Past regulations in this sector therefore made room for the consumer to use a representative, known in the jargon as an intermediary. Many of the operators who advertise on the Internet, such as Virgin Cars or OneSwoop, operate as intermediaries. So far, measures adopted by the Commission allow manufacturers to impose restrictions on the activities of these intermediaries, such as a rule that no intermediary is allowed to buy more than ten per cent of his vehicles from the same dealer. These rules obviously hamper what is a perfectly legitimate trade,

and they will in future be prohibited. The only rule that car manufacturers will be able to impose will be a requirement that the intermediary must produce a mandate from the consumer.

What about sales through supermarkets?

There has been speculation whether the Commission ought somehow to force car manufacturers to sell to supermarkets. In a free market economy, it is the general rule that manufacturers of goods may choose to whom they sell, and it is only in extreme circumstances that a competition authority could intervene to force a supplier of goods or services to sell to a certain individual or class of operator. One might imagine, for example, an island with only one port facility and no airport. If the port operator only allowed vessels from one shipping company to dock, the island's competition authority might consider forcing the port to let in other shipping companies. The Commission acknowledges that such an extreme situation does not currently exist in the motor vehicle sector in Europe. It has accordingly opted for a set of flexible rules allowing manufacturers to choose whether they sell cars also to supermarkets. During the consultation process undertaken by the Commission, no supermarket or association speaking on their behalf ever directly expressed a desire to sell cars on a regular basis. This is all the more striking when one considers that all other operators on this market have commented extensively on many topics.

The available evidence shows moreover that, if manufacturers were now forced to accept supermarkets into their distribution systems, this could have a certain negative impact on manufacturers and distributors. Studies (the Andersen study) show that this could lead to a concentration of players, cause product ranges to shrink, decrease product innovation and could, after a short period of lower car prices, lead to less effective intra-brand competition and ultimately to higher prices. Moreover, other studies (the Lademann study) show that consumers are not much attracted by the idea of buying a car from a supermarket.

On the other hand, it would not be true to say that the draft Block Exemption Regulation gives no business opportunities to supermarkets. A supermarket could become a dealer (mono- or multi-brand) if it satisfied the same criteria laid down by the manufacturer as any other potential dealer and if the car manufacturer accepted it as such. Similarly, it may act as an intermediary for consumers, given the relaxation of the rules on intermediaries, and may also establish privileged relationships with dealers all over the Common Market. For instance, 'El Corte Inglés' has introduced this model in Spain and may develop it further.

Why is the Commission stopping short of requiring car makers to sell to pure Internet operators?

The Commission's analysis tends to show that in the longer term alleged benefits for consumers would be outweighed by drawbacks: Internet distributors who sell vehicles exclusively over the Internet could be seen as free-riding on other distributors who have an obligation to invest in a showroom, demonstration vehicles and trained sales staff who give advice to consumers. Consumers, it

might be argued, would take advantage of all of these facilities but would then turn to an Internet dealer for the actual purchase of their new vehicle. In view of these risks and the fact that a study (the Lademann study) shows that consumers are not much attracted by the idea of buying a car from a pure Internet distributor, it seems for the time being inappropriate to force manufacturers to give them full and unconditional access to distribution networks. However, under the new draft rules, no dealer who meets the manufacturer's criteria may be restricted as to his ability to sell via the Internet, or in his use of an Internet referral site. The Internet is a low-cost medium and should in the medium term reduce both distribution costs and consumer prices.

Although manufacturers are not forced to accept pure Internet operators into their networks, the draft BER nevertheless does allow such operators some business opportunities. For instance, a pure Internet operator could complement his virtual sales operation with one bricks and mortar multi-brand dealership, wherever he wants, if he satisfies the same criteria laid down by a manufacturer as any other potential dealer, and is accepted as such by the car manufacturer. He could then sell cars over the Internet to all consumers in the Common Market. Such an operator could also act as an intermediary for consumers and could establish privileged relationships with dealers all over the Common Market.

Will the reorganisation of the link between sales and after-sales servicing really be in the consumer's interest?

Under the current regime, any dealer member of the network has an obligation to provide for sales and servicing of cars if the carmaker so requires. He cannot currently choose one or other of the two activities, which restricts his business freedom considerably. Under the new regime, a distributor who wants to specialise in selling cars will have the choice between carrying out after-sales servicing himself or subcontracting it to one or more official repairers which are easily accessible for his consumers. This approach will ensure that the customers of each distributor will be able to turn to at least one official repairer and will be informed by the dealer of the location of this repairer before acquiring the car. Furthermore, under the new regime, the necessary infrastructure consisting of official repairers, which meet the quality standards of a manufacturer needed for the honouring of warranties and carrying out of recall operations and free servicing, will exist throughout Europe, just as it does today.

The only difference between the new regime and today's system is that some of the official repairers would in the future not sell new vehicles. This is however already the case today: for example Audi, VW and Ford have a network of official repairers (for example, the Audi service centres in Germany and Belgium or the Ford service outlets) which also carry out this type of repairs. No problems regarding this arrangement have been brought to the attention of the Commission's services. Moreover, under the new regime, independent repairers may qualify to be official repairers if they fulfil carmakers' criteria, which will improve service to consumers and territorial coverage. Also, dealers who have their dealership terminated will be able to stay as official repairers of the make.

This will avoid that loss of technical expertise from the market and will help to maintain a dense coverage of service points.

What is the expected impact of the new rules on employment in the sector?

The draft regulation is not expected to have any direct discernible net effect on employment in this sector, which is ultimately driven by the profitability of the retail and after-sales markets. Most manufacturers are already implementing programmes to cut costs and rationalise distribution networks in the EC. The trend which began under the current Regulation 1475/95 is expected to continue into the future, with industry analysts predicting that the number of official network dealers will diminish by between 20-25% by 2010, regardless of the competition rules applicable to the sector.

The draft regulation offers former dealers the opportunity to become official repairers within the manufacturers' network. No quantitative ceiling can be imposed on repairers which fulfil the qualitative criteria for joining the network, which allows former dealers to continue to operate within the network as authorised repairers. In this way, the draft regulation should at least partly compensate the expected decrease in dealer numbers. Those who currently operate as independent repairers may also find this opportunity attractive, even though qualifying as a member of a manufacturer's network may necessitate a certain level of investment in tooling, personnel and training. Moreover, by enabling independent repairers to keep pace with these developments, the draft regulation may indirectly preserve or even increase employment, by encouraging such repairers to consolidate their position on the market.

Does the Commission expect retail prices to decrease as a consequence of the new rules?

The only task of the Commission in terms of prices is to ensure that conditions exist on the market to allow satisfactory and undistorted competition. This implies also that consumers must have the right to buy wherever within the Single Market they find it most advantageous. Proper competition on the market, however, is generally an important factor to prevent price levels and price differentials that cannot be justified. In this respect, bi-annual car price reports issued by the Commission identify price differentials which may indicate a lack of competition or market-partitioning. The new regulation aims to create the market conditions which will lead to a reduction of the existing high price differentials in the European Union and to more competitive prices on the sales and after-sales markets. Competition takes place on other grounds as well. For instance, product quality and diversity are major elements of competition in the car industry today; and these elements also have a high priority for consumers. ■

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