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

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Tel (44) (0) 1285 656 999
Tel & Fax (1) (207) 439 5932

Email: alanbharris@netzero.net

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Goodbye, ECSC Treaty

Over the years, we have had occasion to report the occasional case falling under the rules on competition contained in the Treaty establishing the European Coal and Steel Community, as distinct from the rules contained in the Treaty establishing the European (Economic) Community, or EC Treaty. But, shortly before the appearance of this issue of the newsletter, the ECSC Treaty will have expired; that is, on 23 July 2002. A report on page 152 of this issue explains the arrangements for dealing with current and future coal and steel competition cases. Meanwhile, the Community Treaties are now reduced to two. The other is the Treaty establishing the European Atomic Energy Treaty (Euratom or EAE Treaty), which contains no separate rules on competition.

Competition in the future Member States

Representatives of the Competition and State aid authorities from the 13 candidate countries and from the Commission of the European Communities met in Vilnius, Lithuania, from 16 to 18 June, for their Eighth Annual Competition Conference. As the negotiations with several countries on accession to the Communities are now reaching their final phase, the conference was held at a key moment in the enlargement process. A credible competition policy and enforcement record are of crucial importance for ensuring that the economies of the future Member States are in good shape and that their companies are well prepared for the European Community's internal market. The main focus of the conference was on the progress achieved by the candidate countries in the field of anti-trust, merger regulation and State aid control in particular, and on how best to organise the future co-operation between the national competition authorities and the Commission.

Among other things discussed at the Conference were the issues raised by energy liberalisation, both in the European Community and in the candidate countries. Recent developments in State aid policy, the ongoing merger review and the state-of-play of antitrust modernisation in the Community also figured on the agenda. In addition, an exchange of views took place on recent developments in the World Trade Organisation and the International Competition Network (ICN). Finally, the Commission presented its proposal on how to deal with State aids that have been granted by the candidate countries before accession, but may have effects beyond their joining the Community. ■

COMPETITION (COAL AND STEEL): COMMISSION STATEMENT

Subject: Rules on competition

Industry: Coal and Steel

Source: Commission Statement IP/02/925, dated 25 June 2002; Commission Communication, published in the Official Journal of the European Communities (C 154 of 28 June 2002)

(Note. After fifty years, the original Treaty setting up a common market among the six Member States of the day in the coal and steel sectors comes to an end; and the present report indicates how the special provisions of the Treaty relating to competition in those sectors are to be subsumed in the rules on competition under the EC Treaty. The transitional provisions are important, particularly in relation to existing exemptions and current procedures. The text of the Communication may be seen on the Internet at the website given at the end of this report.)

After the expiry, on 23 July 2002, of the European Coal and Steel Community (ECSC) Treaty, these two sectors will be subject to the normal rules applicable to the rest of the economy except the nuclear field, which is still governed by the Euratom Treaty. In a Communication, the Commission outlines how the competition rules will apply to pending steel and coal cases during the changeover to the European Community (EC) Treaty rules, thereby providing economic operators and Member States with legal certainty. The Commission has along the years aligned the application of the ECSC and the EC Treaties. This means that the changeover to the EC Treaty is unlikely to cause major problems.

Nevertheless, the Commission thought it useful to provide guidance for companies in the area of antitrust and merger control rules, as well for Member States in respect to State aid rules. The Communication summarises the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime, and it explains how the Commission intends to deal with specific issues raised by this transition in the areas of antitrust, merger control and State aid control. It concentrates on cases which, from a factual or legal point of view started before the expiry of the ECSC Treaty and which in some way or another continue after the expiry.

With regard to procedural law, the basic principle for all three areas (antitrust, merger control and State aid control) is that the rules applicable are those in force at the time of taking the procedural step in question. This means that, as from July 24, the Commission will exclusively apply the EC procedural rules in all pending and new cases. The Commission also informs coal and steel companies of its intention not to initiate antitrust procedures under the EC Treaty against agreements formerly exempted under the ECSC regime, subject however to any

new elements of fact or law appearing afterwards and putting into question whether these agreements should be exempted.

This follows a concern that restrictive agreements, which are exempted under the ECSC Treaty and lose this exemption because of the Treaty's expiry, would all have to be notified again for formal clearance. This would not be appropriate, given the fact that the exemption provisions under the ECSC and the EC Treaties are largely similar, and that the Commission intends to concentrate on prohibition procedures in its antitrust practice. In so doing, the Commission hopes not only to ensure legal certainty for firms that their agreements continue to benefit from antitrust clearance but also to avoid the legal costs and bureaucracy inherent in a notification system.

Coal and steel concentrations will be subject to the normal rules set in the Merger Regulation. This means that, while under the ECSC Treaty the Commission had jurisdiction over all mergers, acquisitions and over most joint ventures in the two sectors regardless of their size, in the future it will examine only those concentrations which meet the turnover thresholds set in the Regulation. With respect to joint ventures, the Commission informs companies that any such deals pending at the time of the expiry of the ECSC Treaty may be converted into notifications of cooperative agreements under the EC antitrust rules particularly if the notifying parties request such conversion. The Merger Regulation applies only to full function joint ventures, that is, joint ventures which create stand-alone and long-lasting business entities with adequate staff and financial ressources.

Where State aids are concerned, the ban on regional investment aid and rescue and restructuring aid to the steel sector will continue after the expiry of the ECSC Treaty. As for the applicable procedures, aid granted to the steel industry under schemes authorised by the Commission will no longer be subject to the prior notification requirement established in the current Steel Aid Code. Coal aid, both in terms of substantive rules and procedures, will be governed by a new Regulation to apply from 24 July 2002 which is in the process of being formally adopted after the agreement reached in the last Energy Council.

The Commission's Communication can be consulted on the internet at the following address: http://europa.eu.int/comm/competition/index_en.html ■

The German Grain Brandy Monopoly

The Commission has adopted a recommendation calling on Germany to take appropriate measures to reform the spirits monopoly law in respect of grain brandy. As they stand, the arrangements constitute aid to German producers, which is not available to producers from other Member States.

Source: Commission Statement IP/02/887, dated 19 June 2002

PRICE-FIXING (ANIMAL FEED): THE DEGUSSA CASE

Subject: Price-fixing
Information agreements
Fines
Immunity

Industry: Animal feed; methionine

Parties: Degussa AG
Nippon Soda Company Ltd
Aventis SA

Source: Commission Statement IP/02/976, dated 2 July 2002

(Note. This is another classic cartel case and another instance of the way in which cases of this sort come to light: that is, as the result of the immunity granted to participating companies willing to provide the Commission with information in accordance with the terms of the Leniency Notice.)

The Commission has fined Degussa AG and Nippon Soda Company Ltd respectively €118 million and €9 million for participating in a price-fixing cartel in methionine together with Aventis SA. Aventis (formerly Rhône-Poulenc) was granted full immunity from fines because it revealed the cartel's existence to the Commission and provided decisive evidence on its operation. Methionine is one of the world's most important amino acids used mainly in animal feed for poultry and pigs. The cartel operated for nearly thirteen years until 1999. "The behaviour of Aventis, Degussa and Nippon Soda has shown a complete disregard for their customers and, ultimately, consumers of chicken and pork meat who paid more for the products concerned than if the companies had engaged in healthy price competition," said Commissioner Mario Monti. "The Commission hopes that, like Aventis, other companies will feel encouraged to come clean and denounce any such illicit behaviour, whose sole purpose is to rip off consumers."

After a careful investigation, which started in 1999, the Commission has found that Aventis SA and its subsidiary Aventis Animal Nutrition SA of France, Degussa AG of Germany and Nippon Soda Company Ltd of Japan, participated in a worldwide cartel between 1986 and 1999, through which they agreed on price targets, implemented price increases and exchanged information on sales volumes and market shares for methionine. During the infringement period, the annual market was worth around €260 million in the European Economic Area (the 15 Member States of the European Union, plus Norway, Iceland and Liechtenstein).

The cartel's aim was to fix target and minimum prices, implement concerted price increases, exchange information on sales figures, as well as to agree on prices to individual customers. The companies held regular meetings both at top level, the

so-called "Summit" meetings, and at a technical level the "Managerial" or "Staff" level meetings. During these meetings, the participants exchanged sales volumes, which would then be compiled and used in the discussions to determine the target prices to be fixed.

The companies' conduct was a very serious infringement of the competition rules, as set out in Article 81 of the EC Treaty, for which Degussa and Nippon Soda were fined accordingly. Aventis received full immunity from fines for being the first to alert the Commission and for providing decisive information about the cartel. Otherwise it would have received a fine similar to the one imposed on Degussa. The difference in the fines reflects the disproportion in the market shares of Degussa, the world's biggest producer of methionine, and Nippon Soda, almost five times smaller in terms of 1998 market shares figures. In calculating the fines, the Commission takes into account the effective capacity by market leaders to cause greater damage than smaller players as well as the need to ensure that the penalties have a sufficiently deterrent effect.

Nippon Soda and Degussa co-operated in one way or another with the Commission and were granted appropriate reductions. Nippon Soda provided detailed information, which together with that obtained from Degussa was used in the Decision. Nippon Soda was able to provide the Commission with documents contemporaneous to the infringement, including inter alia hand-written notes taken during cartel meetings and valuable information to confirm the existence of the cartel prior to 1990. On these grounds, Nippon Soda was granted a 50 percent reduction. Most of the information provided by Degussa was not provided voluntarily and Degussa also contested its participation in the cartel prior to mid-1992 and after 1997 despite the fact that the evidence in the Commission's file clearly demonstrates otherwise. On these grounds, the Commission granted Degussa a reduction of only 25 percent of its respective fine.

The documents found by the Commission leave no doubt about the intent to rig the market. A note submitted by Nippon Soda on a meeting with Degussa and Rhône-Poulenc in June 1993, for example, states that "it was basically agreed that the current target price of DM 6.20/kg would remain unchanged during the third calendar quarter except that the target prices applicable for Portugal and Spain, where the currencies had been devalued again by 6%, and in the UK, where the target price was, we had all agreed previously, to be increased in two phases, would be fixed later".

The investigation started in 1999, after Aventis came to see the Commission admitting its participation in a world-wide cartel to fix prices and allocate quotas in methionine and filing for immunity under the 1996 Leniency Notice. The Commission's policy with respect to immunity in cartel cases was modified in February this year to make it easier to grant full immunity and provide legal certainty that immunity will indeed be granted, thus making the policy more effective. The Commission, however, used the 1996 leniency rules as the investigation into the methionine cartel started in 1999. ■

DISTRIBUTION (LOUDSPEAKERS): THE B & W CASE

Subject: Distribution arrangements

Industry: Loudspeakers
(Some implications for other industries)

Parties: B & W Loudspeakers Ltd

Source: Commission Statement IP/02/916, dated 24 June 2002

(Note. When the company's selective distribution system was notified to the Commission, it appears that it was accompanied by restrictions on "bait pricing", cross-supplies between distributors and distance selling through the Internet. As these restrictions have now been removed, the Commission has sent a "comfort letter" to the company concerned.)

The Commission has dropped its objections to the distribution system of B&W Loudspeakers Ltd after the UK-based company, which makes high-quality loudspeakers for hi-fi and home cinema sound reproduction systems, put an end to certain hard-core violations of antitrust law.

In January 2000, B&W Loudspeakers, Europe's second most important supplier of top-quality loudspeakers after Bang & Olufsen, notified a selective distribution system for its products requesting clearance under EU competition rules. After a careful analysis, the Commission came to the preliminary conclusion, in December 2000, that the agreements could not qualify for an exemption under the general rules applying to distribution agreements and started formal proceedings against B&W Loudspeakers. The general rules are set out in Commission Regulation EC/2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices; and in the accompanying Guidelines on Vertical Restraints (Official Journal C 291 of 13.10.2000.).

B&W Loudspeaker's distribution system contained several hard-core restrictions of competition, namely minimum retailer prices disguised as a prohibition on "bait pricing" (this relates to the practice of offering a certain product at a specially attractive price with the aim of attracting customers to the sales outlet), restrictions on cross supplies between authorised dealers and a prohibition on distance sales including through the Internet. Such practices entail serious harm for consumers as explained in the Statement of Objections sent to B&W in 2000.

Following the opening of the formal proceedings, B&W Loudspeakers undertook to delete the restrictions on pricing, cross supplies and distance selling from its agreements. Retailers can now request B&W Loudspeakers to do distance selling. B&W Loudspeakers can refuse such requests only in writing and on the basis of the need to maintain the brand image and reputation of the products.

The criteria must be applied indiscriminately and must be comparable to those for sales from a traditional retail outlet. The modifications satisfy the Commission which sent a so-called comfort (administrative) letter which states that B&W from now on benefits from the 1999 Block Exemption Regulation on distribution and other vertical agreements. ■

Deutsche BP / Erdölchemie

The Commission has decided to impose a fine of €35,000 on Deutsche BP AG for negligently providing incorrect and misleading information in relation to the acquisition of German chemicals producer Erdölchemie GmbH. In the notification, the company failed to indicate several relevant elements as regards the market for acrylonitrile (ACN), a chemical used for the production of acrylic fibres, plastics and nitrile rubber. The Commission attaches a paramount importance to receiving all the information needed to be able to assess a concentration's impact on the marketplace within the tight and legally-binding timetable set in the Merger Regulation.

Deutsche BP, a subsidiary of BP plc (UK), filed its acquisition of Erdölchemie with the Commission in February last year for regulatory clearance under the Merger Regulation. During the course of its investigation, the Commission discovered that the BP group had co-operation agreements with competitors, which limited their ability to sell ACN on the European market. It was also revealed that BP had strong positions on the vertically related markets for the licensing of ACN production technology and for the supply of ACN catalyst, an essential input material for the production of ACN. The information provided in the initial notification of the transaction did not identify these factors, which were of significant relevance for the assessment of BP's competitive position on the ACN market. After BP supplied the missing information, the Commission was able to complete its investigation and finally cleared the transaction on 26 April 2001 without the need for commitments.

Under the Merger Regulation the Commission can impose fines between €1,000 and €50,000 when a company intentionally or negligently provides incorrect or misleading information in a notification of a transaction. In calculating the fine, the Commission takes into account the gravity of the infringement and the relevance of the omitted information for the assessment. In the present case, the Commission recognises that there was no intention to mislead on the part of Deutsche BP. Given that BP did not contest the facts, but agreed that the relevant information should have been included in the so-called Form CO notification, the fine was calculated at €35,000.

Source: Commission Statement IP/02/897, dated19 June 2002

COOPERATION AGREEMENTs (AIRLINES): THE AIR FRANCE CASE

Subject: Cooperation agreements

Industry: Airlines

Parties: Air France
Alitalia

Source: Commission Statement IP/02/966, dated 1 July 2002

(Note. Although the Commission tends to look kindly on cooperation agreements, it rightly judges that there are factors which may offset the usual advantages - "connectivity", "cost savings and synergies", as they put it, - and jeopardize free access to the market. The outcome of the present case therefore hangs in the balance and may well depend on the reactions by third parties to the Commission's announcement in the Official Journal, inviting comments.)

The Commission has informed Air France and Alitalia that it has serious doubts that their co-operation agreement can be approved in its current form. Overall, the alliance, which was notified for clearance at the end of last year, contributes to technical and economic progress, given the improvements in connectivity and the cost savings and synergies achieved by the parties. However, the agreement will significantly reduce competition on key routes between France and Italy, including between Paris, on the one hand, and Rome and Milan, on the other hand, which would be against the interests of passengers on these routes. The Commission invites Alitalia and Airfrance to reflect on how best these problems can be addressed with a view to reaching a solution allowing the alliance to go through while protecting consumers and respecting the rules on competition.

Bilateral co-operation agreements in the airline sector and especially between national flag carriers often eliminate competition on the routes concerned as the companies agree on virtually everything from capacity and flight schedules to pricing. The Commission's practice in this field has shown that such restrictive agreements can be allowed only if conditions are created to preserve consumer choice and competitive prices.

In November 2001, Air France and Alitalia notified to the Commission a number of co-operation agreements and requested an exemption under competition rules, more precisely under Regulation 3975/87, the regulation which spelt out the application of the European Community's antitrust rules to the air transport sector. The agreements pursue the double aim of integrating Alitalia into the world-wide SkyTeam alliance created by Air France and Delta Air Lines, the United States's third largest airline, and of building a far-reaching, long-term strategic bilateral alliance based on close co-operation between the parties. The agreements would also interconnect the two airlines' respective hubs at Paris-Charles de Gaulle, Rome Fiumicino and Milan Malpensa.

The current co-operation agreement runs the risk of significantly restricting competition between Air France and Alitalia, as they will agree on passenger capacity, flight frequencies and prices to be charged on flights between France and Italy. As for other bilateral aviation pacts in the past, the agreements also involve code-sharing, sharing of earnings and the pooling of frequent flyer programmes.

Air France and Alitalia put together will control practically the whole of the traffic on a number of routes between the two countries, including Paris-Rome, Paris-Milan and Paris-Venice, where the two airlines have very high market shares. The pooling of the forces between the two flag carriers will also make it difficult for third parties to enter the routes concerned in the future.

On May 8 this year, the Commission published a summary of the co-operation agreements in the Official Journal of the European Communities, giving third parties the opportunity to submit their views. Under Regulation 3975/87, publication of the summary triggers a 90-day period within which the Commission must decide whether to raise serious doubts or not. If it does not raise serious doubts, the agreement is automatically exempted for a period of six years from the date of publication. Meanwhile, the Commission has informed the parties that it does indeed have competition concerns and cannot, at this stage of the procedure, grant an antitrust exemption. This does not prejudge the outcome of the procedure nor does it prejudge the companies' right to defend their position.

Commissioner Mario Monti has said: "The final outcome of the case will depend on Air France's and Alitalia's response and particularly on their ability to create conditions favouring the emergence of new competitors on the affected routes, failing which passengers would have little or no choice and potentially higher prices. I invite the two airlines to start discussions with the Commission on possible remedies as soon as possible".

The Commission has already examined many bilateral alliances between European flag carriers; and a solution has always been found to ensure that consumers would have enough choice of services and competitive prices. The most recent example was given by the partnership agreement between Lufthansa and Austrian Airlines where the two airlines agreed, among other things, to liberate landing and take off rights at their respective hubs in a sufficient number and at times attractive enough to encourage other carriers to operate flights between Austria and Germany where a monopoly would been created. (See the report on the following page.) ■

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.

COOPERATION AGREEMENTS (AIRLINES): THE LUFTHANSA CASE

Subject: Cooperation agreements
Market entry

Industry: Airlines

Parties: Lufthansa (Deutsche Lufthansa AG)
Austrian Airlines (Österreichische Luftverkehrs AG)

Source: Commission Statement IP/02/1008, dated 5 July 2002

(Note. The circumstances of this case show how the Air France / Alitalia case may turn out, if the Commission has its way. The terms of the arrangements made by Austrian Airlines and Lufthansa appear to be favourable to the consumer and to facilitate market entry and do credit to the Commission's attempts to remove restrictions on competition in this sector.)

The Commission has approved the partnership between Lufthansa and Austrian Airlines after the two airlines successfully resolved the Commission's concerns that consumers would be left with no choice of carriers between Austria and Germany and with the likelihood of higher prices. To prevent a quasi-monopoly in air services between the two neighbouring countries, the airlines offered to make available to new market entrants up to 40% of the airport slots used to operate flights on all bilateral routes such as for example Vienna-Berlin, Vienna-Frankfurt and Vienna-Stuttgart. Lufthansa and Austrian Airlines also agreed to reduce fares on the routes on which they do not face any competition to an extent similar to the fare reduction on city pairs where rivals start operations. The co-operation agreement was granted antitrust immunity retroactively from 10 December 1999, when it was activated, to 31 December 2005.

In December 1999, Austrian Airlines and Lufthansa notified a co-operation agreement with the Commission requesting an exemption under the European Community's competition rules. The agreement will, amongst other things, allow them to co-ordinate fares and schedules for all flights world-wide. After a careful examination, the Commission issued a Statement of Objections in May 2001, warning that the co-operation agreement, as originally conceived, could not be exempted as it would eliminate competition on virtually all 33 routes between Austria and Germany leaving travellers with no choice of airline and the likelihood of higher prices.

Subsequently, the parties offered a substantial package of remedies with a view to promote competition on the routes concerned and to ensure that consumers would not suffer from the parties' dominant position. Although the European Union's air transport market has been liberalised, high entry barriers, like the shortage of slots at main airports, the parties' high number of frequencies and the pooling of frequent-flyer programmes, prevent other carriers from entering the

market. In the case of non-European Union airlines entry is made even more difficult by additional regulatory barriers.

On the basis of the undertakings made by the Parties, the Commission could establish that several competitors are seriously interested in entering major routes between Austria and Gemany. In fact, Adria Airways of Slovenia last year started flying twice a day on the Vienna-Frankfurt route and Air Alps operates a daily flight between Vienna and Stuttgart following the offer by Lufthansa and Austrian Airlines, even before the Commission took its final decision, to apply the remedies. In addition, two other airlines from central and eastern Europe have expressed a serious interest in entering two further major routes between Austria and Germany and a new Austrian airline, Styrian Airways, has been created which plans to start operations on a number of additional routes this autumn.

To create conditions for competition between Germany and Austria, Austrian Airlines and Lufthansa have to make available up to a maximum of 40% of the slots they operate on any given city pair to any newcomer wishing to operate the routes and which would not be able to find those slots through the normal slot allocation procedure. Each time they reduce a published fare on a route where they face the presence of a new entrant, Austrian Airlines and Lufthansa will be obliged to apply the same fare reduction, in percentage terms, on three other Austrian-German city pairs on which they do not have competition. The purpose of this obligation is to ensure that passengers enjoy the benefits of competition including routes on which Austrian Airlines and Lufthansa maintain a monopoly position.

Austrian Airlines and Lufthansa are further obliged to allow new entrants to participate in their frequent flyer programmes if they do not have their own and if they so wish. Other commitments relate, for example, to interlining, that is, the ability for passengers to travel on more than one airline on a given journey based on a single ticket and to enter into special pro rata agreements comparable to those entered into with other alliance carriers. To ensure that new entrants are not squeezed out of the market shortly after entry, parties are obliged to maintain a frequency freeze during a start-up period of two years. Finally, Austrian Airlines and Lufthansa will have to enter into inter-modal agreements in particular with railway companies, to ensure greater choice and better transport services for consumers.

In December 1999, Austrian Airlines and Lufthansa had notified the cooperation agreement to the Commission, requesting an exemption. While examining the notification, the Commission received numerous complaints from individuals as well as corporate customers concerned about high fares between Austria and Germany. The Austrian tourist sector also complained about the potentially negative effects for Vienna as a tourist destination. However, on 14 December 2001, the Commission published a full description of the undertakings made by the parties. It received comments from IATA, the Austrian federation of hotels and a new start-up airline, Styrian Airways, which were taken into account when the Commission reached its final decision. ■

ACQUISITIONS (ACCOUNTANCY): THE ANDERSEN CASE

Subject: Acquisitions

Industry: Accountancy

Parties: Deloitte & Touche
(Deloitte Touche Tohumatsu)
Arthur Andersen (UK)

Source: Commission Statement IP/02/968, dated 1 July 2002

(Note. Most of the interest of this case lies in the fact that it concerns the demise of a once prestigious accountancy firm, as the result of the Enron scandal in the United States. But it also lies in the same kind of concern expressed by the Commission at the time when Price Waterhouse joined Coopers & Lybrand in 1998. Then the Big Six accountancy firms became the Big Five; and now the Big Five have been replaced by the Big Four. Even so, the Commission considered that the peculiar circumstances of the present case did not even justify the in-depth analysis of the implications for competition.)

The Commission has granted regulatory clearance for the proposed acquisition of most of Arthur Andersen UK's business by UK-based Deloitte & Touche, which is part of the global audit and accounting firm Deloitte Touche Tohumatsu. The Commission examined the merger's impact, particularly for large companies quoted in the London Stock Exchange, which tend to choose one of the Big Five players to audit their accounts. It concluded that the disappearance of Andersen UK was inevitable in view of the serious problems facing Andersen US, which has been convicted of obstruction of justice in a US probe into the collapse of energy trader Enron Corporation. A number of UK customers claimed that the acquisition was preferable to the disorderly disappearance of the UK Andersen partnership.

On May 29, Deloitte & Touche UK (D&T) requested regulatory clearance from the Commission for the acquisition of the various assets of Andersen UK, comprising equipment, furniture and leasehold properties and the rights under service contracts. D&T is also offering partnership or employment to most partners and employees of Andersen UK.

This acquisition must be seen in the context of the disintegration of Andersen Worldwide following the Enron bankruptcy and the ensuing damage for Andersen US, which audited the company's accounts. As a result, Andersen's national practices worldwide have sought separately to join one of the other four big players: PriceWaterhouseCoopers (PwC), KPMG, Ernst & Young and D&T. Andersen France and Andersen Germany, for example, have in the meantime separately teamed up with Ernst & Young. As far as the European Union is concerned, some of these deals will be examined by the Commission whereas

others, depending on their size, will be looked at by national competition authorities.

In the present operation, the Commission examined the acquisition's impact in the United Kingdom and particularly on the market for audit and accounting services to large quoted companies, which usually use the services of the Big Five. The Commission reckoned that there was no danger of creating a single dominant position given that Andersen and D&T were the smallest of the Five in the UK. PwC is by far the biggest firm in audit fees, followed by KPMG, E&Y, AA and D&T whether the market concerned is the FTSE 100 or FTSE 350 firms. However, the Commission also examined the extent to which there could be concerns about the reduction to four of the big auditing firms as it had done in 1998, in the examination of the merger between Price Waterhouse and Coopers & Lybrand, before which there were six big firms.

A careful analysis has shown that, although Andersen UK may be able to continue as an independent audit and accounting services firm for smaller clients, it can no longer service its large clients. These large clients demand a global network, a high degree of international expertise and a reputation which only the remaining Big Four firms can offer. Andersen Worldwide was able to offer this, but Andersen UK on its own cannot. Therefore, and as far as large, quoted clients are concerned, a reduction to four was inevitable and would have occurred whether Andersen UK was taken over or simply disintegrated.

The acquisition of Andersen UK by second-tier UK auditing firms, such as BDO or Grant Thornton would not be able to create either a global network or the reputation required to enter the market for quoted and large companies. Moreover, a number of Andersen UK's customers expressed the view that the merger between Deloitte & Touche and Andersen UK would be preferable to a situation in which Andersen UK's partners, teams and expertise were spread around in a fragmented manner. Taking all these elements into consideration, the Commission concluded that there were no grounds to begin an in-depth investigation and cleared the operation.

Deloitte & Touche is a member of the global Deloitte & Touche Tohumatsu network of firms, which employs over 95,000 people in 140 countries. Andersen UK was active as member firm of the Andersen Worldwide international network. Until recently, the Andersen Worldwide member firms collectively employed approximately 85,000 people around the world in 84 countries. In October 2001, after Enron had announced further losses, the US Securities and Exchange Commission started to seek information about Enron and in relation to Andersen's auditing of Enron's accounts. On 14 March 2002, the Department of Justice in the US accused Andersen US of criminal obstruction for shredding Enron documents. This series of events has damaged the reputation of Andersen and resulted in the disintegration of Andersen Worldwide. Around the world, the firms originally forming part of the Andersen network have either already joined or announced their intention of joining one of the remaining Big Four firms, on a national basis. ■

Deutsche Post: More Trouble

The Commission has concluded that Deutsche Post has used €572 million, funds it received from the State to finance its public service mission, for the purposes of financing an aggressive pricing policy intended to undercut private rivals in the parcel sector between 1994 and 1998. This behaviour breaches the key principle according to which companies receiving State funding for services of general interest cannot use these resources to subsidise activities open to competition. The German government has two months to inform the Commission of how it intends to recover the money unlawfully used by Deutsche Post in the commercial sector.

In 1997 the Commission had taken the view that no state aid was involved in the relationship between the French Post Office, La Poste, and its express courier subsidiary Chronopost. But the Court of First Instance overturned this decision in December 2000 on the grounds that the Commission had failed to verify whether La Poste, in providing logistical assistance to Chronopost, received remuneration that an undertaking operating under normal market conditions would have charged for this logistical assistance.

Source: Commission Statement IP/02/890, dated 19 June 2002

The Landesbank Berlin case

The Commission has initiated formal investigation proceedings in a further case involving a capital injection into a German provincial bank taking the form of a transfer to the bank of an institution governed by public law. Several years ago the Province of Berlin transferred the housing loans institution W-K to the Provincial Bank of Berlin (Landesbank Berlin). This capital injection enabled Landesbank Berlin to expand its business substantially in the face of competition; and, as the Commission understands the matter, the Province never received any appropriate consideration. It appears that that there was state aid to the bank; and it is doubtful whether the aid was compatible with the common market.

The case is similar to that of the transfer of the WFA to WestLB, in which the Commission in 1999 decided to require the recovery of €800 million. The Commission said at the time that it would be looking into other cases of transfers to provincial banks but would await the outcome of court action in the WestLB case. However, given the urgency of the Berlin Bank case and the fact that the court proceedings are now well advanced, the Commission intends to initiate formal investigations in the other Landesbank cases very shortly.

Source: Commission Statement IP/02/983, dated 2 July 2002

STATE AIDS (BANKING): THE STARDUST MARINE CASE

Subject: State aids
Annulment (of Commission Decision)

Industry: Banking

Parties: French Republic
Commission of the European Communities
(Credit Lyonnais)
(Altus Finance)
(SBT-Batif)
(Stardust Marine)

Source: Judgment of the Court of Justice of the European Communities, dated 16 May 2002, in Case C-482/99 (*French Republic v Commission of the European Communities*)

(Note. As in the Airtours case, reported in our last issue, the present case represented a serious setback for the Commission. It is no coincidence that the Paris newspaper, Le Monde, carried an article recently questioning the Commission's ability to take its competition cases to a satisfactory conclusion in the light of the two cases. In the present case, the Commission certainly succeeded in showing that there was a presumption of State aid where state funds were used, whether directly or indirectly; and the Commission gained a valuable dictum from the Court to the effect that "Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid": Paragraph 23. But the Commission lost on the issue inelegantly described as imputability. The Court, no less inelegantly, described the issue in the following terms. "There is no dispute that, in the contested decision, the Commission inferred the imputability of the financial assistance granted to Stardust by Altus and SBT to the State simply from the fact that those two companies, as subsidiaries of Crédit Lyonnais, were indirectly controlled by the State. Such an interpretation of the condition that, for a measure to be capable of being classified as State aid within the meaning of Article 87(1) of the EC Treaty, it must be imputable to the State, which infers such imputability from the mere fact that that measure was taken by a public undertaking, cannot be accepted": Paragraphs 51-2. The case is an invaluable source of material and case-law on the whole question of State aids.)

Judgment

1. By application lodged at the Court Registry on 20 December 1999, the French Republic brought an action under Article 230 of the of the EC Treaty for the annulment of Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to Stardust Marine (the contested decision).

2. Stardust Marine (Stardust), a company whose main business developed in the pleasure-boat market, was set up in 1989. The bank SBT-Batif (SBT), a subsidiary of Altus Finance (Altus), which was itself part of the Crédit Lyonnais group, initially undertook to finance Stardust by loans and guarantees.

3. After five years of rapid growth, Crédit Lyonnais made losses in 1992 (FRF 1.8 billion) and 1993 (FRF 6.9 billion). In 1994, at the request of the supervisory authority of the French banking system, the French authorities took decisions to support it financially. The decisions included, first, an increase in capital of FRF 4.9 billion and, second, the assuming of the risks and costs connected with the commitments, which were then transferred to a separate structure, the Consortium de Réalisations (CDR), a 100% subsidiary of Crédit Lyonnais, which was created in 1995 as part of a hiving-off operation. CDR purchased nearly FRF 190 billion of assets from Crédit Lyonnais. Under the restructuring plan, all the assets concerned were to be transferred or sold.

4. Stardust, controlled since 1994 by Crédit Lyonnais through the intermediary of Altus, following an increase in capital of FRF 44.3 million, which had been subscribed by Altus in October 1994 through conversion of debts, was part of the Crédit Lyonnais assets transferred to CDR under the 1995 hiving-off plan in view of their poor results and expected losses. As a subsidiary of CDR, Stardust was part of the Crédit Lyonnais group after 1995 and until the latter's privatisation, since until the end of 1998 CDR remained a 100%, unconsolidated, subsidiary of Crédit Lyonnais. The Crédit Lyonnais management, however, ceased to play any direct part in the management of Stardust after its transfer to CDR because of the total separation of management between CDR and Crédit Lyonnais, in accordance with Commission Decision 95/547/EC of 26 July 1995 giving conditional approval to the aid granted by France to the bank Crédit Lyonnais.

5. CDR increased Stardust's capital in three stages. A first increase of capital, totalling FRF 112 million, took place in April 1995. A second increase, of FRF 250.5 million, was decided upon following an extraordinary general meeting held on 26 June 1996 and was effected in two payments made, respectively, in June 1996 (as to two-thirds of that sum) and March 1997 (as to the remaining third). Finally, a third increase in capital was effected following the extraordinary general meeting of 5 June 1997, in the amount of FRF 89 million.

6. Following the last recapitalisation operation in June 1997, CDR sold its holding in Stardust (which was 99.90% of its capital) to FG Marine for FRF 2 million.

The procedure before the Commission and the contested decision

7. On 20 June 1997, the Commission received a complaint against the French Republic, concerning several recapitalisations of Stardust by the State and the conditions in which the latter had been transferred by CDR to FG Marine.

8. On 2 July 1997, the Commission sent a letter to the French authorities, asking them to supply full information on the financial position of Stardust, the capital

operations which had taken place and, where appropriate, the transfer or planned transfers of those assets of CDR and the precise arrangements for the sale procedure which had been entered into.

9. On 5 November 1997, the Commission decided to initiate the procedure under Article 93(2) of the EC Treaty (now Article 88(2)) in relation to the support measures in favour of Stardust and informed the French Government of that fact by letter of 8 December 1997, requesting it to supply all the information necessary for the investigation of the matter.

10. The initiation of that procedure formed the subject-matter of Commission communication 98/C 111/07 of 9 April 1998, sent pursuant to Article 93(2) of the of the EC Treaty Treaty to the other Member States and other interested parties on the recapitalisation of Stardust Marine.

11. After the initiation of the above-mentioned procedure, further exchanges of information took place between the Commission and the French Government.

12. The Commission adopted the contested decision on 8 September 1999, and notified it to the French authorities on 13 October 1999.

13. The operative part of the contested decision is worded as follows:

Article 1

The capital increases of FRF 44.3 million injected into Stardust Marine in October 1994 by Altus Finance and FRF 112 million injected by CDR in April 1995, the advance on current account of FRF 127.5 million granted by CDR from July 1995 to June 1996, the recapitalisations of FRF 250.5 million in June 1996 and of FRF 89 million in June 1997 by CDR constitute State aid within the meaning of Article 87(1) of the Treaty. The aid, amounting to a discounted value at 31 October 1994 of FRF 450.4 million, cannot be declared compatible with the common market under Article 87(2) and (3) of the Treaty and with Article 61(2) and of the EEA Agreement.

Article 2

France shall require Stardust to repay to the State or to CDR the sum of FRF 450.4 million corresponding to the State aid content of the measures in question, discounted to 31 October 1994. The amount to be repaid shall bear interest from that date, at the reference rate established by the Commission for the calculation of the net grant equivalent of aid in France.

Article 3

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the French Republic.

Substance

14. In support of its action for annulment of the contested decision the French Government puts forward five pleas in law.

15. First, the French Government disputes the State origin of the funds supporting Stardust, its plea in this respect being composed of two parts. Second, it maintains that the Commission made an obvious error of assessment in holding the conduct of SBT and Altus with respect to Stardust to have been imprudent. Third, the contested decision reveals internal contradictions, particularly in relation to the identification of the person dispensing the aid. Fourth, the decision infringes the principle of legal certainty by going back upon previous decisions of the Commission. Finally, the Commission infringed the French Government's rights of defence in the procedure which led to the adoption of the contested decision.

General preliminary observations

16. The contested decision shows that Commission's analysis of the measures in question as State aid relates, first, to financial support granted to Stardust before it was hived off to CDR.

[Paragraphs 17 to 19 summarise the Commission's position.]

20. Since the Commission thus regarded the financial aid granted to Stardust by Altus and SBT in 1992, 1993 and 1994 as being at the root of the State aid impugned by the contested decision, the Court's examination of the issue of classification as State aid, which is called for by both the first and the second of the applicant's pleas in law, must relate first and foremost to those measures.

The first plea in law

21. In this plea, the French Government denies, first, that the funds used by Altus and SBT, subsidiaries of Crédit Lyonnais, to finance Stardust may be classified as State resources (first part of the plea) and, second, that the support measures taken in favour of Stardust may be regarded as imputable to the French State (second part of the plea).

Preliminary observations on the first plea

22. It should be recalled, at the outset, that Article 87(1) of the EC Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

23. It is settled case-law that no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid (see, in particular, Case 78/76, *Steinike and Weinlig* v *Germany*, paragraph 21; Case 290/83, *Commission* v *France*, paragraph 14; Joined Cases 67/85, 68/85 and 70/85, *Van der Kooy* v *Commission*, paragraph 35; and Case C-305/89, *Italy* v *Commission*, paragraph 13). Community law

cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.

24. However, for advantages to be capable of being categorised as aid within the meaning of Article 87(1) of the EC Treaty, they must, first, be granted directly or indirectly through State resources (See Joined Cases C-72/91 and C-73/91, *Sloman Neptun* v *Bodo Ziesemer*, paragraph 19; Case C-189/91, *Kirsammer Hack* v *Sidal*, paragraph 16; Joined Cases C-52/97 to C-54/97, *Viscido and Others* v *Ente Poste Italiane*, paragraph 13; Case C-200/97, of the EC Treaty*otrade Srl* v *Altiformi e Ferriere di Servola SpA*, paragraph 35; Case C-295/97, *Piaggio SpA* v *International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH, Ministero della Difesa*, paragraph 35; and Case C-379/98, *PreussenElektra AG* v *Schleswag AG*, paragraph 58) and, second, be imputable to the State (*Van der Kooy*, paragraph 35; Case C-303/88, *Italy* v *Commission*, paragraph 11; Case C-305/89 *Italy* v *Commission*, cited above, paragraph 13).

[Paragraphs 25 to 31 set out the arguments of the parties]

Findings of the Court

32. As a preliminary point, it should be observed that the French Government does not deny that the resources used by CDR to finance Stardust are State resources within the meaning of Article 87(1) of the EC Treaty. It therefore only needs to be examined whether the loans, guarantees and recapitalisation granted by Altus and SBT in favour of Stardust, before it was hived off to CDR, must be regarded as coming from State resources.

33. On that point, the documents before the Court show that, on 31 December 1994, the State held about 80% of the shares in Crédit Lyonnais and nearly 100% of its voting rights. Crédit Lyonnais held 100% of the shares in Altus and the latter owned 97% of those of SBT, the remaining 3% being held by Crédit Lyonnais. In addition, the chairman of Crédit Lyonnais and two-thirds of the members of its administrative board were appointed by the State. The chairman of Crédit Lyonnais also chaired the administrative board of Altus, the members of which were appointed by the administrative board of Crédit Lyonnais.

34. In those circumstances, it has to be concluded that Crédit Lyonnais, Altus and SBT were under the control of the State and had to be regarded as public undertakings within the meaning of the second indent of the first subparagraph of Article 2 of Commission Directive EEC/723/80 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, as amended by Commission Directive EEC/84/93 of 30 September 1993). The French authorities were indeed able, directly or indirectly, to exercise a dominant influence over those undertakings within the meaning of that provision of Directive EEC/723/80.

35. It therefore needs to be examined whether such a situation of State control allows the financial resources of the undertakings subject to that control to be regarded as State resources, within the meaning of Article 87(1) of the EC Treaty,

in a case such as the present, in which it is undisputed between the parties that the undertakings in question did not receive financial support from the French authorities before 30 June 1994, such as a guarantee or a specific transfer of funds.

36. In that respect, it should first be noted that, according to settled case-law, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 87(1) of the EC Treaty (see, in particular, Case C-387/92, *Banco Exterior de España* v *Ayuntamiento de Valencia*, paragraph 14; Case C-6/97 *Italy* v *Commission*, paragraph 16).

37. Second, it should be recalled that it has already been established in the case-law of the Court that Article 87(1) of the EC Treaty covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see the judgment in Case C-83/98 P, *France* v *Ladbroke Racing and Commission*, paragraph 50).

38. It follows that, by holding in the contested decision that the resources of public undertakings, such as those of Crédit Lyonnais and its subsidiaries, fell within the control of the State and were therefore at its disposal, the Commission did not misinterpret the term State resources in Article 87(1) of the EC Treaty. The State is perfectly capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings.

39. Moreover, such an interpretation cannot be regarded, as the French Government argues, as a possible source of discrimination against public undertakings as compared with private undertakings. In a context such as that in point here, the position of a public undertaking cannot be compared with that of a private undertaking. Through its public undertakings, the State may pursue objectives other than commercial ones, as is pointed out in the eleventh recital in the preamble to Directive 80/723.

40. Nor can the French Government validly argue that the contested decision infringes Article 253 of the EC Treaty, in that the Commission did not indicate the reasons for which the measures in favour of Stardust were granted by means of State resources.

41. According to settled case-law, the statement of reasons required by Article 253 of the EC Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure in order to defend their rights and to enable the Community judicature to exercise its

power of review (Joined Cases 43/82 and 63/82, *VBVB and VBBB* v *Commission*, paragraph 22; Case C-156/98, *Germany* v *Commission*, paragraph 96).

42. In that regard, it is sufficient to note that the contested decision mentions several times, in particular in paragraphs 27, 37 and 83, that the Commission considers that the resources of public undertakings, such as those of Crédit Lyonnais and its subsidiaries, are State resources within the meaning of Article 87(1) of the EC Treaty. That enabled the French Government and the Community judicature to know the reasons for which the Commission considered that, in this case, State resources were involved.

43. It follows from all the foregoing that the first part of the first plea in law must be rejected.

[Paragraphs 44 to 49 set out the arguments on the second part of the first plea]

Findings of the Court

50. There is no dispute that, in the contested decision, the Commission inferred the imputability of the financial assistance granted to Stardust by Altus and SBT to the State simply from the fact that those two companies, as subsidiaries of Crédit Lyonnais, were indirectly controlled by the State.

51. Such an interpretation of the condition that, for a measure to be capable of being classified as State aid within the meaning of Article 87(1) of the EC Treaty, it must be imputable to the State, which infers such imputability from the mere fact that that measure was taken by a public undertaking, cannot be accepted.

52. Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. That might be the situation in the case of public undertakings such as Altus and SBT. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.

53. On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty.

54. Moreover, it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public

undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities.

55. For those reasons, it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court has already taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities (see, in particular, *Van der Kooy*, paragraph 37) or the fact that, apart from factors of an organic nature which linked the public undertakings to the State, those undertakings, through the intermediary of which aid had been granted, had to take account of directives issued by a Comitato Interministeriale per la Programmazione Economica (CIPE) (Case C-303/88 *Italy* v *Commission*, cited above, paragraphs 11 and 12; Case C-305/89 *Italy* v *Commission*, cited above, paragraphs 13 and 14).

56. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

57. However, the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot, having regard to the autonomy which that legal form is capable of conferring upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State (Case C-305/89, *Italy* v *Commission*, cited above, paragraph 13). The existence of a situation of control and the real possibilities of exercising a dominant influence which that situation involves in practice makes it impossible to exclude from the outset any imputability to the State of a measure taken by such a company, and hence the risk of an infringement of the Treaty rules on State aid, notwithstanding the relevance, as such, of the legal form of the public undertaking as one indicator, amongst others, enabling it to be determined in a given case whether or not the State is involved.

58. In this case, the Commission adopted in the contested decision, as the sole criterion, the organic criterion according to which Crédit Lyonnais, Altus and SBT, as public undertakings, were under the control of the State. In those circumstances, it must be held that that interpretation of the criterion of imputability to the State is erroneous.

59. The second part of the French Government's first plea in law is therefore well founded.

[Paragraphs 60 to 67 set out the arguments on the second plea in law]

Findings of the Court

68. It should be noted as a preliminary observation that investment by the public authorities in the capital of an undertaking, in whatever form, may constitute State aid only where all the conditions set out in Article 87(1) of the EC Treaty are fulfilled (see, in particular, Case C-142/87 *Belgium* v *Commission, Tubemeuse*, paragraph 25; Joined Cases C-278/92 to C-280/92, *Spain* v *Commission*, paragraph 20).

69. It should also be noted that, pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (Case C-303/88, *Italy* v *Commission*, cited above, paragraph 20).

70. Therefore, in accordance with equally settled case-law, it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size (Case C-261/89, *Italy* v *Commission*, paragraph 8; Joined Cases C-278/92 to C-280/92, *Spain* v *Commission*, cited above, paragraph 21; Case C-42/93, *Spain* v *Commission*, paragraph 13), having regard in particular to the information available and foreseeable developments at the date of those contributions.

71. In this case, it is undisputed between the parties that, in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market of the economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the of the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.

72. In those circumstances, and having regard to paragraphs 16 to 20 of the present judgment, it has to be examined whether, as the contested decision states several times (see, in particular, paragraph 25), the Commission did indeed view matters from the standpoint of 1992, 1993 and 1994 when holding that the loans and guarantees granted to Stardust by Altus and SBT did not reflect prudent conduct in a market of the economy, taking account of the available information and foreseeable developments at the time when they were actually granted. Should that not be the case, the Commission has misapplied the criterion of the private investor operating in a market of the economy, which also concerns the recapitalisations of Stardust by Altus in October 1994 and by CDR in April 1995, June 1996 and June 1997.

73. On that point, the contested decision states, in paragraph 25, that the bank [SBT] became the [company's] sole banker and that its financial support took a number of forms, including direct and indirect loans, in particular financing granted by SBT to investors wishing to acquire shares in boats managed by Altus, or in the form of guarantees for those investments. That practice entailed a considerable amount of risk, as SBT bore all the banking exposures and a large part of the firm's off balance-sheet exposures.

[Paragraphs 74 and 75 illustrate the Commission's argument.]

76. It must be noted, however, first, that the Commission did not identify the amount of the loans and guarantees granted to Stardust in 1992, 1993 and 1994 respectively. Such detail is indispensable in order to assess whether or not the financing measures in question were prudent and to enable the Court to exercise its power of review. Nor, moreover, has the Commission in any way indicated the reasons for which those various financing measures appeared imprudent in the context of the period. The contested decision contains no indications in that regard on the basis of the information available in each of those years, taking account, in particular, the financial position of Stardust, its position on the market as a start-up company, and the prospects of that market.

77. Moreover, the contested decision shows that the Commission took as its point of reference the end of 1994 in applying the criterion of the prudent investor operating in a market of the economy, that is to say in a context later than that of the period during which the aid was actually granted ...

[Paragraphs 78 to 80 substantiate the foregoing by quoting from the Decision.]

81. It is thus apparent from the wording of the contested decision itself that the Commission misapplied the criterion of the private investor operating in a market economy in that it did not examine the loans and guarantees granted to Stardust in the context of the period in which they were granted. That misapplication concerns not only those loans and guarantees but also the recapitalisations by Altus in 1994 and by CDR in April 1995, June 1996 and June 1997 which the Commission regarded as the implementation of the aid granted to Stardust before October 1994, as has been mentioned in paragraphs 16 to 19 of this judgment.

82. Therefore, the second plea in law of the French Government is also well founded.

83. Since the two pleas alleging misinterpretation of the criterion of imputability to the State of the financial support measures taken in favour of Stardust by Altus and SBT and misapplication of the criterion of the private investor in a market of the economy are well founded, the contested decision must be annulled without there being any need to examine the other pleas in law raised by the French Government.

[Paragraph 84 deals with costs: see the ruling below.]

Court's Ruling

The Court hereby:
1. Annuls Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to Stardust Marine;
2. Orders the Commission to pay the costs. ■

The Dutch Service Stations Case

In Case C-382/99 (*Kingdom of the Netherlands v Commission of the European Communities*), dated 13 June 2002, the Court of Justice dismissed the application brought by the Netherlands for partial annulment of the Commission's decision on State aid to 633 Dutch service stations located near the border between Germany and the Netherlands. The Netherlands scheme for granting aid in respect of individual service stations carries a risk of accumulation of aid and indirectly benefits oil companies by making the application of price management system clauses unnecessary. Following an increase in excise duties on petrol, diesel and liquid gas at the beginning of July 1997, the Netherlands legislature, concerned about the adverse effects for operators of service stations located near the German border as a result of the more competitive rates charged in Germany, provided for the adoption of temporary measures intended to reduce the disparity in the rates between the two countries.

Aid granted to undertakings by Member States is incompatible with the EC Treaty; however, exceptions are permitted under certain circumstances, and it is the Commission which determines the conditions for compatibility of that aid. The Commission considers that small amounts of aid do not affect trade between Member States. Such aid, known as *de minimis* aid, must comply with three conditions: the maximum amount must not exceed €100 000; the amount covers a period of 3 years from the date when the first aid is granted; and the aid must not be cumulative. Although such *de minimis* aid is exempted from the requirement of notification to the Commission, the Netherlands Government notified the Commission of the proposed amendment to verify its legality. The declared that part of the aid was incompatible with the common market and consequently ordered the recovery of aid which had already been granted.

The Kingdom of the Netherlands then brought an action for partial annulment of that decision before the Court of Justice of the European Communities. In its judgment, the Court dismissed that application, in particular, with regard to the following four points: the risk of accumulation of aid, the existence of indirect aid to oil companies, the absence, or at the very least, the inadequacy, of information provided by the Netherlands, and the recovery of aid which had already been granted.