COMPETITION LAW IN THE EUROPEAN COMMUNITIES

May, 2002

Volume 25, Issue 5

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD N.H.
JUN 03 2002

FAIRFORD PRESS

Publisher and Editor: Bryan Harris

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

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

www.fairford-press.com *(under reconstruction)*

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

Email: aobh 28@aol.com

May, 2002

Volume 25 Issue 5

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

Copyright © 2002 Bryan Harris
ISSN 0141-769X

CONTENTS

101 COMMENT

State aids: from Germany to Gibraltar
State aids: Research and Development

102 ACQUISITIONS (CROP CONTROL)

The Bayer / Aventis Case

105 ACQUISITIONS (BUILDING MATERIALS)

The Haniel Case

106 PRICE FIXING (AUCTIONS)

The Christie's / Sotheby's Case

108 JOINT VENTURES (TRANSPORT)

The Connex Case

110 ACQUISITIONS (CRUISE LINES)

The Carnival / P&O Princess Case

112 STAE AIDS (BANKS)

The German Banks Cases

115 STATE AIDS (COMPANY TAXATION

The Gibraltar Case

MISCELLANEOUS

The GE/Enron Power Systems Case 109

State Aids: from Germany to Gibraltar

Two reports in this issue concern state aids and illustrate well the different types of state aid which the Commission has to identify and, according to the circumstances, approve or condemn. In Germany, the problem was the familiar one of public guarantees to banks and other credit institutions. Bankers from other Member States have long been unhappy with the guarantees offered by the state, the provinces and the municipalities to German banks, which have derived a competitive advantage over financial institutions without similar cushions to their commercial activities. It now seems that that the main problems have been resolved, though on the face of of it some hard bargaining on the German side has led to substantial concessions by the Commission.

From financial guarantees to tax exemptions may appear to be a long stride; but the Commission is challenging the practices of a number of Member States which allow various kinds of company tax exemptions, every bit as valuable in commercial terms as guarantees and potentially just as harmful to free competition. However, the Gibraltar company tax scheme was partly upheld and partly condemned in a judgment of the Court of First Instance, acting by way of an expedited procedure.

State Aids: Research and Development

There is one area in which state aids are generally approved; and the Commission has recently decided to prolong the existing State Aid framework for Research and Development without any modification until the end of 2005. The current rules distinguish between three different levels of research and development activity: fundamental research designed to broaden scientific and technical knowledge not linked to industrial or commercial activities may receive aid of up to 100% of eligible costs; industrial research is eligible for a basic rate of aid of up to 50% of eligible costs; pre-competitive development activities are eligible for a basic rate of aid of 25% of eligible costs. These basic rates of 50% and 25% may be increased by a series of bonuses of up to a further 25% of eligible costs if the research and development activities are undertaken by SMEs, or in assisted areas, or further the objectives of the Community's own R&D programmes or promote effective cross-border collaboration. Higher rates also apply for feasibility studies.

The Commission considers that the current framework has worked well and is also suitable for supporting the objective adopted by the Barcelona European Council, which is to increase investment in research and development in Europe by 3% of the GDP by 2010. This objective should in the first place be achieved by efforts coming from the private sector directly. State aid for research and development is only one instrument among others to achieve the objective. ■

ACQUISITIONS (CROP CONTROL) THE BAYER / AVENTIS CASE

Subject: Acquisitions
Divestitures

Industry: Crop control and protection; pest control; animal health products
(Some implications for other industries)

Parties: Bayer AG
Aventis Crop Science (ACS)

Source: Commission Statement IP/02/570, dated 17 April 2002

(Note. Although the layman may be put off by the welter of technical names used in this report, there is no gainsaying the fact that the divestitures being made by Bayer, in the interests of securing Commission approval of its acquisition of Aventis, are remarkably far-reaching. They may well reflect the trend towards a more selective business approach to mergers and acquisitions, based on a careful assessment of the commercial areas in which a given corporation is likely to excel.)

The Commission has decided to clear Bayer's acquisition of Aventis Crop Science (ACS), subject to substantial divestitures. As initially notified, the operation would have led to the creation or strengthening of dominant positions on about 130 markets for crop protection, professional pest control and animal health products. But Bayer has offered a comprehensive set of commitments, including the sale, in one single package, of best-selling insecticide Fipronil and a number of fungicides, which together constitute ACS's entire European seed treatment business. The commitments fully resolve the Commission's competition concerns.

Bayer AG is an international, publicly quoted company with headquarters in Leverkusen, Germany. The company is active in four business segments: health care, agricultural business, polymers and chemical business. The agricultural business segment comprises the crop protection and animal health business groups. The crop protection business group develops, produces and markets crop protection products to control plant diseases, pests (insects and other little animals) and weeds in crops. The animal health business group produces a wide range of veterinary medicines and vaccines to maintain the health of livestock and companion animals as well as a variety of grooming products.

Aventis Crop Science was formed in 1999 as the combination of AgrEvo (the former Hoechst/Schering joint venture) and the Rhône-Poulenc agriculture division. ACS has its headquarters in Lyon, France, and comprises four business segments. The crop protection business is active in the development, production and marketing of agricultural crop protection agents including herbicides, insecticides, fungicides, plant growth regulators and seed treatments. ACS's

environmental science business develops, produces and distributes non-agricultural products, including household insecticides, industrial weed agents, and products for lawn and garden. The seed business is active in the research, production and breeding of field seeds and vegetable seeds. Finally, the bioscience business of ACS is active in the development of technologies to enhance plant value using input traits, agronomic traits and output traits.

After an initial investigation of one month, the Commission decided on 4 December 2001 that it would further investigate the impact of the transaction on competition conditions in several crop protection and animal health markets. The in-depth investigation revealed that the transaction as notified would have led to many competition problems within agricultural insecticides, herbicides, fungicides as well as in seed treatment, molluscicides, professional pest control products and certain animal health products (anti-fleas for cats and dogs).

Clearance conditions

Bayer has offered a complex set of commitments, which allows the Commission to conclude that no dominant position will be created or strengthened on any of these markets. The most important of these is the sale to a single purchaser of a group of ACS's insecticides and fungicides businesses (namely Fipronil, Ethiprole, Iprodione, Prochloraz, Pyrimethanil, Triticonazole and Fluquinconazole). The two insecticides in this group, Fipronil and Ethiprole, are both from the new pyrazole chemistry class. While Ethiprole has not yet been introduced in the European Economic Area, Fipronil is a very successful insecticide in Europe as well as in many other parts of the world. Bayer has undertaken to divest the whole of the Fipronil business world-wide, including the European production facilities, except for non-agricultural uses, where the divestiture is Europe-wide. For Ethiprole Bayer will grant a Europe-wide exclusive licence. The divestment of Fipronil will also alleviate the competition concerns in professional pest control and animal health.

In addition, Bayer will divest the Europe-wide businesses of five fungicides, which together with Fipronil constitute the bulk of ACS's seed treatment business. These five fungicides are Iprodione, Prochloraz, Pyrimethanil, Triticonazole and Fluquinconazole. The purchaser of Fipronil, Ethiprole and the five fungicides will, in effect, take over ACS's entire European seed treatment business. Seed treatment is a highly specialised area within the agrochemical industry, where at present only Bayer, ACS and Syngenta have significant operations. The package of undertakings will ensure that the current level of competition is preserved in this concentrated area.

In insecticides Bayer has undertaken to divest Acetamiprid, which is a promising insecticide in another new chemistry class, the neonicotinoids, where Bayer has by far the strongest portfolio. Acetamiprid is developed jointly by ACS and the Japanese company Nippon Soda. Furthermore, Bayer will divest the following insecticides Europe-wide: Cyfluthrin, Beta-Cyfluthrin, Fenamiphos, Oxydemeton-Methyl, Phosalone and Cypermethrin and grant a Europe-wide exclusive license for Acrinathrin.

In molluscicides Bayer will grant a Europe-wide exclusive license of ACS's snail bait formulation "Skipper", based on the active ingredient Thiodicarb.

In herbicides Bayer will divest the Europe-wide business of Metamitron, sold as a beet herbicide under the "Goltix" brand name. Bayer will also divest the Europe-wide business of Linuron, which is used as a potato and vegetable herbicide. Finally, Bayer will give a co-exclusive Europe-wide licence to develop mixture products with Propoxycarbazone, which is used as a cereal herbicide against grasses.

Over and above the Europe-wide undertakings mentioned above, Bayer will give a number of exclusive licences for various products in one or more Member States and will discontinue several third party distribution agreements.

The Commission has come to the conclusion that these undertakings are sufficient to guarantee that no dominant position will be created or strengthened on any market. Therefore, subject to the fulfilment of the undertakings, the Commission has decided to clear the transaction.

Co-operation with the United States

On the basis of the bilateral agreement on antitrust co-operation between the European Community and the United States of America, the Commission and the Federal Trade Commission have co-operated closely in their analysis of the acquisition of ACS by Bayer. The investigation in still going on in the United States. ■

Cooperation with the United States

Both in the foregoing report and in the report on the Carnival / P & O Princess case, on page 110, the Commission Statements quoted as the source of the information refer to the "agreement between the European Commission [sic: see page 109] and the United States Government" on cooperation in competition and anti-trust matters. It is true that there was such an agreement; but it was held by the Court of Justice to be invalid. The situation was rectified by an act of the Council, which alone was responsible for concluding agreements with the governments of non-member states. Since the Council act, the practical arrangements have been entrusted to the Commission of the European Communities on the one hand and to the Department of Justice and Federal Trade Commission for the United States on the other. Except in the GE / Honeywell case, cooperation between the two authorities appears to have worked well and may provide a model for bilateral or multilateral agreements among other states.

ACQUISITIONS (BUILDING MATERIALS): THE HANIEL CASE

Subject: Acquisitions

Industry: Building materials

Oarties: Haniel Group
Ytong Holding AG

Source: Commission Statement IP/02/530, dated 9 April 2002

(Note. Here is another case in which the responsibility for dealing with anti-trust concerns falls both to the Commission and to the authorities of a Member State. The Commission's case is cleared – on certain conditions. The German Cartel Office's case continues.)

The Commission has cleared the proposed acquisition by the Haniel Group of Ytong Holding AG, two German companies active in the building materials sector. The Commission, in examining the deal's impact in the Dutch market for wall building materials, found that, subject to the sale of Ytong's business in the Netherlands to another company, as proposed by Haniel, no competition concerns would arise. The acquisition is still being reviewed by the German competition authority so far as the German market is concerned. Haniel is a German-based conglomerate group active in the building materials sector. The company makes wall-building materials such as sand-lime products and cellular concrete products. Indirectly, it also owns a 50% stake in CVK, the co-operative of Dutch sand-lime producers. Ytong mainly produces cellular concrete, another wall building material. Haniel is buying control of Ytong from the UK-based Readymix Group.

In the Netherlands, Haniel's activities in the building materials sector consist in its indirect 50% stake in CVK, a co-operative comprising all existing production facilities of sand-lime products in that country. The other 50% of CVK are indirectly owned by Cementbouw, a Dutch building materials group. The Commission's investigation of the Dutch market revealed that Haniel, through CVK, already held a dominant position in the market for wall building materials for load-bearing walls, with a market share greater than 50%. The Commission found that the acquisition of Ytong would strengthen CVK's dominance in that market. Haniel, being already, through CVK, the only supplier of sand-lime products, the wall building materials most demanded by construction companies in the Netherlands, would, by acquiring Ytong, also become the leading supplier of cellular concrete. Therefore, building materials traders and construction companies likewise would to an even greater degree depend on the products offered by Haniel, thereby giving Haniel additional power to raise prices above competitive level to the detriment of its customers. To meet the Commission's competition concerns, Haniel undertook to sell Ytong's Dutch subsidiary to an independent company. Two other cases involving Haniel are outstanding. ■

PRICE FIXING (AUCTIONS): THE CHRISTIE'S/SOTHEBY'S CASE

Subject: Price fixing
Concerted practices

Industry: Auction houses; fine art

Parties: Christie's International plc
Sotheby's Holdings, Inc

Source: Commission Statement IP/02/595, dated 19 April 2002

(Note. As yet this case is still unresolved: the Commission has stated its reasons for considering that the collusion between Christie's and Sotheby's infringed the EC rules on competition, particularly in respect of the fees and charges to sellers and buyers, and it is now for the parties to respond. In the circumstances described by the Commission, it appears that the parties have largely conceded the case and that they will rely as far as possible on the "leniency rules" to escape the more serious consequences of the alleged infringements. We will watch future developments and report on them in due course.)

The Commission has sent a Statement of Objections to Christie's and Sotheby's, setting out its preliminary conclusion that the world's two leading fine art auction houses breached the competition rules of the European Community by colluding to fix commission fees and other trading terms. The Statement is based on evidence made available to the Commission. The sending of a Statement of Objections is a procedural step in the Community's antitrust proceedings. It does not prejudge the outcome of the investigation, as the parties will have the right to reply to the Commission's objections, to have access to the file and to request a formal hearing.

In a 50-page document addressed to Christie's International plc and Sotheby's Holdings, Inc, the Commission has informed the companies that, based on the evidence in its possession, it believes that they entered into an anti-competitive cartel agreement in the course of 1993. According to the Commission's preliminary findings, the agreement affected auction sales between 1993 and early 2000, when the parties appear to have recovered their freedom to set prices independently.

The purpose of the cartel agreement was to reduce the fierce competition between the two leading auction houses which had developed during the 1980's and early 1990's. The most important aspect of the agreement consisted in an increase in the commission paid by sellers at auction (the so-called vendor's commission). But the collusive agreement concerned many other trading conditions, such as advances paid to sellers, guarantees given for auction results and payment conditions.

In the art auction market, apart from the vendor's commission, buyers also pay fees (buyers' premium). Auction houses may also compete through a number of other mechanisms such as the paying of advances on payments and providing guarantees to the sellers as to the minimum price to be achieved at auction.

According to the Statement of Objections, the information made available to the Commission indicates that the collusive behaviour originated at the top level: the two chairmen at the time, Alfred Taubman for Sotheby's and Christie's Anthony Tennant, first entered into secret discussions in 1993, meeting at their respective private residences in London or New York. These first high-level meetings were followed by regular gatherings and contacts between the companies' Chief Executive Officers.

The Commission's investigation started in January 2000, when Christie's approached both the United States Department of Justice and the Commission with proof of a cartel between itself and Sotheby's and applied for leniency in both jurisdictions. The evidence consisted mainly of documents that Christopher Davidge, former CEO of Christie's, had gathered about contacts between the two auction houses. Sotheby's subsequently also applied for leniency in Europe. The two auction houses are cooperating with the Commission's investigation.

Duopoly market

Christie's and Sotheby's are the world's leading operators in a market which can be characterised as a duopoly: their joint market share is around 90%. Christie's, which was established in 1766, has its headquarters in London, but has been a subsidiary of French company Artémis SA since 1998. Sotheby's was also founded in the 18th century but has since become a a publicly-listed company both on the New York and London stock exchanges and has its headquarters in New York. Its majority shareholder is American entrepreneur, A. Alfred Taubman, who was also its chairman during the entire period of the suspected cartel activity.

Procedure

A Statement of Objections is a procedural step in proceedings under Article 81 of the EC Treaty, which bans cartels and other damaging concerted business practices. It does not prejudge the outcome of the investigation, as the companies will have the right to answer the Commission's objections, to have access to the file and to request a formal hearing. The companies have six weeks to reply in writing to the Commission's allegations. There is no fixed deadline to conclude antitrust investigations. Their duration is determined largely by the complexity of each case, by the parties' exercise of their rights of defence and by the need to comply with the Commission's internal consultation and other procedures.

In 1996 the Commission first adopted rules providing partial or full immunity from fines for companies which unveiled or provided significant information on price-fixing, market-sharing or other anti-competitive agreements. These rules were updated in February 2002. ■

JOINT VENTURES (TRANSPORT): THE CONNEX CASE

Subject: Joint ventures
National laws

Industry: Public transport

Parties: Connex Verkehr GmbH
Deutsche Nahverkehrsgesellschaft mbH (DNVG)

Source: Commission Statement IP/02/627, dated 25 April 2002

(Note. The interest of this case lies in the distribution of authority between the Commission and the national authoritiy in cases in which there may be a Community interest but where in practice the issue is exclusively national. This is a joint venture case, governed by the Mergers Regulation.)

The Commission has referred to the German competition authorities (the Federal Cartel Office) a joint venture by which Connex Verkehr GmbH, a subsidiary of the Frerich Vivendi group, and Deutsche Nahverkehrsgesellschaft mbH (DNVG) plan to offer local public transport services in the Riesa area (Saxony, Germany). The referral had been requested by the Federal Cartel Office because the competitive impact of the transaction was limited to local markets within Germany.

DNVG is controlled indirectly by three municipalities, Bonn, Leipzig and Hanover. Connex is active in Germany as a provider of local public transport services in several German cities, including Schaumburg near Hanover. At present the holding company Deutsche Nahverkehrs- Beteiligungs- und Verwaltungsgesellschaft mbH (DNVBVG), which is controlled by Stadtwerke Bonn Verkehr-GmbH, Leipziger Verkehrsbetriebe GmbH and Lüstra Hannoversche Verkehrsbetriebe, holds all shares in DNVG. After the transaction, Connex will hold 51% while DNVBVG will keep 49%. Provisions in the shareholder agreement will lead to joint control.

The Federal Cartel Office has recently requested the referral because the joint venture would create structural links between the operator of public transport in Hanover and Connex which, from its established base in the adjacent Schaumburg market, would be best placed to act as a competitor in Hanover.

Today's Commission decision allows the German competition authorities to examine these potential implications. The Merger Regulation (Article 9(2)(b)) stipulates that concentrations which affect competition on a local or regional market within a Member State must under certain conditions be referred to the Member State. ■

The GE Power Systems / Enron Case

Whatever the context, Enron is news these days, even when it is involved in a fairly straightforward takeover of one of its remaining business interests. The Commission has cleared an operation by which GE Power Systems (GEPS), a wholly owned subsidiary of the General Electric Company (GE), acquires Enron's Wind Turbine Business. The Commission has concluded that the acquisition, which concerns wind turbines used for power generation, does not raise any competition concerns in Europe. GE Power Systems agreed in February to buy the wind turbine business of bankrupt US energy trading firm Enron Corp. The deal was notified on April 02 to the European Commission under the European Union's Merger Regulation for regulatory approval in Europe. Enron's Wind Turbine Business develops, manufactures and markets wind turbines. GEPS is not in the wind turbine business although it also develops, produces and markets turbines of various other types and sizes. The Commission's market investigation showed that, at present, wind turbines can be distinguished from other forms of power generation by reason of their technical characteristics, availability and reliability. Consequently, there are no horizontal overlaps between the activities of GEPS and Enron's Wind Turbine Business. As GE has no activities upstream or downstream of wind turbines, the operation does not raise vertical integration concerns. Enron's Wind Turbine Business holds an important, but not leading position in the market for wind turbines. Although GE is one of the leading players for power generation equipment other than wind turbines, the Commission concluded that it would not be able to leverage this position as customers for both products are largely different.

Source: Commission Statement IP/02/644, dated 30 April 2002

The Commission

References in this newsletter to the "Commission" are, unless the text specifies otherwise, references to the Commission of the European Communities. In Article 7 of the Treaty establishing the European Community, the name is simply the Commission. It is not "the European Commission", though this name appears on the Commission's letterheads and in its official Statements.

Commission Statements are sometimes inaccurate: in the Statement on which the Christie's/Sotheby's report is based, there is a reference to Article 81 of the EU Treaty. There is no such Article. What is meant is Article 81 of the EC Treaty.

Whatever happens to the ECSC Treaty, which contains some provisions on competition but expires this year, the newsletter will keep its present title for the time being.

ACQUISITIONS (CRUISE LINES): THE CARNIVAL CASE

Subject: Acquisitions

Industry: Cruise Lines

Parties: Carnival Corporation
P & O Princess plc

Source: Commission Statement IP/02/552, dated 11 April 2002

(Note. This case has some interesting ramifications, in that it is not only closely related to a more or less simultaneous proposal by Royal Caribbean Cruises to acquire P & O Princess, but also on account of the participation of three different competition authorities, from the United Kingdom, the United States and the European Communities respectively, responsible for dealing with the case.)

The Commission has decided to open an in-depth investigation into the proposed acquisition of the British cruise operator P&O Princess plc by the US-based cruise operator Carnival Corporation. Current information suggests that there are serious concerns, particularly in relation to the parties' strong position in the cruise sector in the United Kingdom, Germany and possibly other European countries.

Carnival is a company active world-wide in maritime cruise operation, offering a broad range of cruise brands through Carnival Cruise Lines, Holland America Line, Costa Cruises, Cunard Line, Seabourn Cruise Line and Windstar Cruises. Carnival operates around 40 ships in various destinations around the world.

P&O Princess is also a company active world-wide, mainly in maritime cruise operation, with around 20 ships, marketed under the following brands: Princess Cruises, P&O Cruises, Swan Hellenic, Aida Cruises, Seetours, and A'Rosa. P&O Princess has also activities in riverine cruises.

On 16 December 2001, Carnival announced a unilateral pre-conditional offer to acquire all the shares of P&O Princess.

The Commission's preliminary investigations indicate that the operation raises serious concerns regarding the market for oceanic cruises in the United Kingdom and Germany where the operation is likely to lead to the creation or strengthening of a dominant position. The Commission will also investigate the cruise sector in Spain, Italy and France, where the combined entity would have a strong position but with minimal overlaps.

In the course of the Commission's market investigation, some concerns have also been raised as to the detrimental effect that Carnival's bid could eventually have on certain vertically related markets linked to the ocean cruise industry, primarily

the ship-building business, the ports sector and travel agencies. These concerns will be further assessed in the in-depth investigation.

In view of the serious doubts on the compatibility of the operation with the common market and the functioning of the EEA Agreement, the Commission decided to initiate proceedings in accordance with the Merger Regulation. The Commission has now four months to reach a final decision on the notified transaction. The initiation of the formal investigation procedure is a procedural step and is without prejudice to the final outcome.

UK referral request

The competition authorities of the United Kingdom have requested referral of the case pursuant to Article 9 of the EC Merger Regulation in so far as the merger affects competition in the market for the supply of cruise holidays in the United Kingdom. The Commission considers that the formal conditions for such a referral are met as the proposed operation threatens to create a dominant position on a distinct market within the United Kingdom. It has in such circumstances discretion whether to refer the examination of such a distinct market to the Member State or whether to open proceedings itself. The Commission has carefully weighed the arguments for and against such a referral, and in particular the fact that the rival bid for P&O Princess, launched by Royal Caribbean is currently under investigation in the United Kingdom. However, as the Commission's own preliminary investigation revealed that the operation proposed by Carnival also raised competition concerns in other Member States, the Commission considers that in these circumstances it is more appropriate not to fragment the case and not to conduct parallel investigations in Europe.

Under the referral provisions of the EC Merger Regulation (Article 9), the Commission had the option in this case to either refer the part of the case to the United Kingdom Competition Authorities or to open a detailed investigation itself, including the markets which are the subject of the request. Under the bilateral agreement of 1991 on antitrust co-operation between the European Community and the United States of America, the Commission and the Federal Trade Commission have been cooperating and will continue to do so. (This cooperation was facilitated by Carnival's consent to direct exchange of confidential information submitted by it in the course of both procedures.) The Commission has also been in fruitful contact with the United Kingdom's Competition Commission to which the Secretary for Trade and Industry has referred the United Kingdom's investigation of Royal Caribbean's bid. ■

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.

STATE AIDS (BANKS): THE GERMAN BANKS CASES

Subject: State aids

Industry: Banking (particularly German banking, though there are substantial implications for banking interests throughout the European Community)

Parties: German banks and special credit institutions

Source: Commission Statement IP/02/634, dated 26 April 2002

(Note. The Commission justly deserves credit for the progress it has made in dealing with the problem of state support for German banks, particularly in the light of Treaty provisions designed to offer some protection for the status quo. For true believers in free competition, the help given by some of the Member States to banks with more national prestige than economic foresight has always gone against the grain; and it seemed to be a step back in time when the original EEC Treaty was amended with the apparent aim of condoning some of the traditional support systems for banks in Germany. It looks as though the Commission is close to an agreement on ways in which competitive conditions will prevail. While not wishing to play down the Commission's success, it has to be pointed out that the transitional provisions are remarkably generous and the exceptions to the termination of the guarantees surprisingly wide.)

"The road is now clear to making the German system of State guarantees for public banks compatible with the State aid rules of the EC Treaty, thereby removing a longstanding distortion of competition at the heart of Germany's and Europe's financial system". In these words the Competition Commissioner Mario Monti commented on the German Government's official and definitive undertaking to implement the agreements reached with the Commission on the two forms of guarantees, the maintenance obligation and the guarantee obligation (see the end of this report for the definitions). To that effect, the German authorities undertook to put in place by the end of 2002 all necessary legislation both at the Federal and at the Provincial level.. The changes concern the Provincial banks, savings banks and special credit institutions.

"After two years of intensive negotiations, we are, at last, on course for a definitive solution to the issue of State aid in the form of guarantees to all of Germany's public banks", Mr Monti commented. "This subject had poisoned for a long time the domestic debate in Germany as well as the climate between the German authorities and the Commission. Germany's acceptance represents a milestone in our efforts to ensure a level playing field in the financial services sector. This development will also be beneficial to the competitiveness of the German and European economy, which requires the allocation of financial resources to be efficient, while certain types of government interventions tend to distort it, as experience has shown repeatedly. The change will not be abrupt,

since we have agreed on transitional arrangements. But it will be a significant change, and a salutary one for the German taxpayer, the other German and non-German banks competing in the market, and in the end also for the German public banks themselves. Shielding them from market pressures would not, in the long run, have been in their own interest."

"This case is of great significance particularly in four respects", Mr Monti pointed out: "It shows that the Commission acts against all those forms of State aid, which are incompatible with the EU rules, whether they are in the open or are hidden ones such as guarantees; that we remain vigilant about State support to the banking sector, as we have been already in a number of other cases; that the Commission fulfils its role of guardian of the treaties with equal determination towards all Member States, large and small; finally, that it is perfectly possible to achieve compliance with State rules without putting in question the public nature of undertakings". Mr Monti also paid tribute to the efforts of the negotiating teams on both sides - the German team being headed by State secretary Caio Koch-Weser - who were involved in the highly complex discussions. "This has not been an easy task, not least because it involved both the federal Government and the Provinces, and I salute the efforts made by Germany to conform to State aid rules in such a crucial sector... Without the acceptance by the German authorities of a full and timely implementation of the necessary changes, the Commission would have had to pursue its legal procedure until the end".

The Commissioner recalled the strong initial resistance to the Commission's action, making a reference to further cases involving State guarantees. "It is interesting to note that, once the scope and motivation of our initiative had been fully understood, as well as our determination to ensure compliance with Community law, the public banks themselves came up with the outline of a solution which then became the basis for our discussions with Germany. I hope that this will be reflected upon by our interlocutors in future discussions about similar support schemes in certain other Member States." It is recalled that the Commission recently took the first step to bring the Austrian system of State guarantees in favour of certain public banks into line with the Treaty rules and that guarantee schemes in other Member States are currently being examined to determine whether they must also be altered or discontinued. It is also recalled that enforcement of State aid rules in the banking sector already took place in several cases, in particular concerning French and Italian banks.

Background

After starting negotiations in February 2000, the Commission adopted a decision on 8 May 2001, proposing to the German Government so-called "appropriate measures" to make the guarantee systems compatible with the State aid rules of the EC Treaty. In July 2001, the German authorities fully accepted the proposed appropriate measures, on the basis of an understanding between Commissioner Monti and State-Secretary Koch-Weser on the key principles of a solution as well as on the process and the timing, including transitional arrangements. Further discussions were, however, necessary to clarify important aspects, in particular regarding the application of State aid rules to the special credit institutions and

the "grandfathering" of the guarantee obligation. After these had been successfully concluded, the Commission on 27 March 2002 amended its above-mentioned decision to reflect fully the measures to be taken by Germany, as agreed by the Commission. Germany in turn formally accepted on 11 April 2002 this new Commission decision. Provided the measures are correctly implemented, this acceptance puts an end to the State aid case.

Reminder of the main changes to the guarantee system

For provincial banks and savings banks, the guarantee obligation will be abolished; and the maintenance obligation will be replaced by a normal owner relationship between the owner and the public financial institution concerned. Liabilities existing on 18 July 2001, the date of acceptance by the German authorities of the Commission's recommendation of 8 May 2001, will continue to be covered by the guarantee obligation until their maturity runs out. There will a transitional period which will last until 18 July 2005, during which the maintenance and guarantee obligations can be kept in their present form. On the final date of this transitional period any liability still existing then and created after 18 July 2001 will continue to be covered by guarantee obligations on condition that its maturity does not go beyond 31 December 2015.

As regards special credit institutions, [here the Commission's Statement is unintelligible, but appears to mean that:] the use of advantages peculiar to the maintenance guarantee and other State guarantees relevant to the State aid rules is allowed for the performance of promotional tasks at the request of the State in certain areas such as the financing of small and medium-sized enterprises, infrastructure, environment-friendly investment, housing as well as co-operation with developing countries. Promotional tasks are to be specified in the legal texts. The activities of the special credit institutions, which are not in line with the State aid rules, must be either discontinued or hived off to legally independent subsidiaries without State support. The time limit for prescribing the legally binding legislative framework for special credit institutions (such as the promotional exceptions) is 31 March 2004. The hiving off must be achieved by 31 December 2007; and, in the interest of capital markets, the understanding makes clear that the application of the general State aid rules to an individual promotional activity will not have an effect on the continuance of the State guarantees as such.

Definitions

The "maintenance obligation" (*Anstaltslast*) means that the public owners (such as the Federal State, the Provinces and the municipalities) of the institution are responsible for securing the economic basis of the institution and its function for the entire duration of its existence. The obligation does not confer any rights on creditors. The "guarantee obligation" (*Gewährträgerhaftung*) on the other hand, confers a right on creditors. It stipulates that the guarantor will meet all liabilities of the bank, which cannot be satisfied from its assets. Neither guarantee is limited in time or in amount. Also, the credit institutions do not have to pay for them. ■

STATE AIDS (COMPANY TAXATION): THE GIBRALTAR CASE

Subject: State aids

Industry: All industries

Parties: Government of Gibraltar
Commission of the European Communities
Kingdom of Spain (Intervener)

Sources: (1) Court of Justice Statement CJE/02/40, dated 30 April 2002
(2) Judgment of the Court of Justice in Joined Cases T-195 and 207/01, dated 30 April 2002 (*Government of Gibraltar v Commission of the European Communities*)

(Note. Special concessions wrapped up in complex systems of company taxation are a classic method of introducing a subtle form of state aid; and it is interesting to note that the Commission has initiated investigation procedures in respect of eleven company taxation schemes in eight Member States. The Government of Gibraltar, responsible for two of the schemes in question, challenged the Commission's decision to initiate the procedures under the state aid rules. The Commission proposed, and the Government of Gibraltar agreed, to seek the expedited procedure for hearing and determining the case. The timing is interesting:

20 August and 7 September 2001: applications lodged with the Court;
12 November 2001: Court agrees to expedited procedure;
5 March 2002: hearing of case;
30 April 2002: judgment by the Court.

There were four other interesting features of the case: first, the argument, won by the applicant, on the locus standi of the Government of Gibraltar; second, the argument, won by the applicant, that the Commission's decision to initiate an investigation was a justiciable act; third, the argument, won by the applicant, that the Commission's decision should be annulled in respect of "exempted companies"; and, fourth, the argument, lost by the applicant, that the Commission decision should annulled in respect of "qualified companies". These categories are explained further in the text of the judgment, of which there is a strictly abbreviated report below.)

Court Statement

On 11 July 2001, the Commission decided to initiate investigation procedures in respect of eleven company taxation schemes in eight Member States. The Commission considers that those tax provisions may constitute State aid and has doubts as to their compatibility with the EC Treaty. Gibraltar is among the territories concerned by those procedures.

Then, by applications lodged on 20 August and 7 September 2001, the Government of Gibraltar sought annulment of the two decisions of 11 July 2001 whereby the Commission had initiated the formal State aid investigation procedure laid down in the EC Treaty in respect of the Gibraltar legislation on two specific categories of company, namely "exempt" companies (T-195/01) and "qualifying" companies (T-207/01), which benefit from tax exemptions under the applicable national law.

On 12 November 2001, the Court of First Instance, upon application by the Commission and with the applicant's consent, decided to adjudicate under an expedited procedure, which has been available pursuant to its Rules of Procedure since February 2001. This marks the first occasion on which the Court of First Instance has made use of that new procedure in an economic case.

The Commission had emphasised that the expedited procedure would allow it to specify quickly the procedure to be followed in all the State aid cases mentioned above. The repercussions on the general practice adopted by the Commission in State aid procedures would be significant.

In the context of the expedited procedure, the Court of First Instance was able to hold the public hearing on 5 March 2002, ie four months after application for that particular procedure was made. The judgment of 30 April 2002 has thus closed a judicial procedure relating to State aid which lasted only eight months, whereas the average duration of a case before the Court of First Instance in 2001 was 19½ months.

The Court of First Instance annulled the decision relating to "exempt" companies, on the ground that the Commission had committed an error in classifying the legislation in issue as a new aid scheme, while the action in respect of "qualified" companies was dismissed as unfounded.

Judgment (Selected Paragraphs)

12. Since Gibraltar is a European territory, within the meaning of Article 299(4) of the EC Treaty, for whose external relations the United Kingdom of Great Britain and Northern Ireland is responsible, the provisions of the Treaty apply to it. However, by virtue of Article 28 of the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, annexed to the Treaty relating to their accession, acts of the institutions of the Community relating, in particular, to the harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar, unless the Council decides otherwise. However, it is not disputed that the rules of Community law on competition, including those relating to State aid granted by the Member States, do apply to Gibraltar.

13. The present cases concern two legislative measures applicable to companies, concerning exempt companies and qualifying companies respectively. Exempt companies are not actually present in Gibraltar while qualifying companies have a bricks and mortar presence there and are active in various sectors.

Findings of the Court on the applicant's locus standi

52. First of all, the fourth paragraph of Article 230 of the EC Treaty provides that a]ny natural or legal person may institute proceedings for annulment. In the present case, it is not disputed that, in British law, the applicant has legal personality and as such must be regarded as a legal person for the purposes of the above-mentioned provision.

53. As regards the applicant's competence to initiate the present action, it follows from the response of the United Kingdom that under the relevant British law the applicant has competence in the specific field with which the present cases are concerned, namely company taxation, as a defined domestic matter. There is nothing in the documents before the Court to invalidate that response.

54. In those circumstances, the reference by the Commission and by the Kingdom of Spain to Case C-298/89, *Gibraltar v Council*, in which the United Kingdom disputed the locus standi of the Government of Gibraltar, is irrelevant, since that case concerned air transport within the Community and was therefore fundamentally different from the present case.

55. Consequently, the first objection of inadmissibility must be dismissed in the light of the documents before the Court, without there being any need for the Court to examine that question of admissibility more closely of its own motion.

Court's findings on the legal nature of the contested decisions

68. It is necessary to ascertain the criteria which distinguish a decision to initiate the formal investigation procedure and to assess whether the contested decisions fulfil those criteria or whether, as the Commission claims, they must be regarded as procedural innovations which differ in nature from a 'classic decision initiating that procedure.

69. In that regard, the initiation of the formal investigation by the Commission is provided for, pursuant to Article 88 EC and to Article 4(4) of the regulation on State aid procedure, and also to Articles 13, 16 and 19(2) of that regulation, in four possible situations which are exhaustively listed, namely: for the purpose of examining new notified aid, for the purpose of examining 'possible unlawful aid, in the event of misuse of aid within the meaning of Article 1(g) of that regulation, and where a Member State rejects the appropriate measures proposed by the Commission in respect of an existing aid scheme.

70. In the present case, the last two possibilities must be precluded at the outset. Nor was the national legislation in issue notified in accordance with Article 88(3) EC, since its notification to the Primarolo group - set up by the Council and composed, in particular, of national experts - cannot be treated as formal notification to the Commission for the purposes of the Community rules on State aid. Consequently, the question whether the procedural approach chosen by the Commission in the present case should be classified as the initiation of the formal

examination procedure, with the legal effects that step implies, can be examined solely in relation to the category of 'possible unlawful aid.

71. Under Article 4(4) and Article 6(1) of the regulation on State aid procedure, any formal investigation procedure must be initiated by a decision which includes a 'preliminary assessment by the Commission as to the character of the measure in issue as aid and must set out the doubts which exist concerning its compatibility with the common market. Pursuant to Article 7 of the regulation on State aid procedure, the formal investigation procedure may be closed by a decision finding that the measure in issue does not constitute aid (paragraph 2), by a positive decision declaring the aid compatible with the common market (paragraph 3), by a conditional positive decision (paragraph 4) or by a decision declaring the aid incompatible with the common market (paragraph 5).

72. Those provisions allow the Commission to examine, from all possible aspects, the character of the State measure in question which may constitute new aid or the amendment of existing aid in order to overcome its doubts as to the compatibility of the measure with the common market in the course of the formal investigation (see Case C-400/99, *Italy v Commission* (*Tirrenia*), paragraph 45). The Commission is even required to initiate that procedure, pursuant to Article 4(4) of the regulation on State aid procedure, if the initial analysis of the measures in issue has not enabled all the difficulties raised by the assessment of the measure in question to be overcome (see Case T-95/96, *Gestevisión Telecinco v Commission*, paragraph 52; Case T-11/95, *BP Chemicals v Commission*, paragraph 166; and Case T-73/98, *Prayon-Rupel v Commission*, paragraph 42).

73. At the end of the preliminary state of the investigation into a State measure, the Commission thus has three choices: it may decide that the State measure at issue does not constitute State aid, or it may decide that that measure, although constituting aid, is compatible with the common market, or it may decide to initiate the formal investigation procedure (*Gestevisión Telecinco v Commission*, paragraph 55; and Case T-17/96, *TF1 v Commission*, paragraph 28).

74. It follows from the foregoing that the formal investigation procedure can only be initiated by a 'decision within the meaning of the fourth paragraph of Article 249 EC and that that decision must contain a 'preliminary assessment of the character of the State measure in issue. That assessment is an inherent element of the decision initiating the procedure.

75. As to whether the acts contested in the present case satisfy those criteria, each of them states by way of introduction that the Commission 'has decided to initiate the procedure laid down in Article 88(2) [EC]. Furthermore, each contains a preliminary assessment of the exempt companies legislation or the qualifying companies legislation.

76. Thus, in contested decision I, the Commission states that, on the basis of the information communicated by the United Kingdom authorities, the legislation in issue appears to contain at least two changes which can be considered as notifiable events (point 9). The Commission concludes that, having regard to

those substant[ive] modifications, the exempt companies legislation cannot be regarded as existing aid but must be regarded as unlawful aid (point 16). It further states that the observations submitted by the United Kingdom Government and the Government of Gibraltar are not sufficient to dispel its doubts as to the nature of the legislation in issue as existing State aid (points 34 and 35) and, last, that the aid does not appear to qualify for any of the exceptions provided for in Article 87(3) EC (point 48).

77. In contested decision II, the Commission states that the legislation in issue does not seem to fall within the definition of existing aid and 'has to be considered at this stage as a non-notified aid (point 1). The Commission notes that the legislation appears to constitute aid within the meaning of Article 87(1) of the EC Treaty (point 17) and concludes that it can, at this stage, be considered as an operating aid, which does not appear to qualify for the exceptions provided for in Article 87(3) of the EC Treaty (points 23 and 24).

78. Consequently, in spite of the argument which the Commission bases on what it claims to be a procedural innovation, the contested decisions, far from being characterised by a complete absence of preliminary legal assessment, are indeed decisions initiating the formal investigation procedure within the meaning of the regulation on State aid procedure and the relevant case-law.

79. The finding that the Commission provisionally concluded that the legislation in issue constitutes unlawful aid that is incompatible with the common market is not invalidated by the invitation (in point 49 and point 25 of the contested decisions, respectively) to interested parties to express their views on the possible recovery of the aid 'in the event that [it] would be qualified as being illegal and incompatible with the common market. That merely constitutes a precautionary reminder that a final decision, adopted at the close of the formal investigation and in the light of the observations submitted by the interested parties, might contain a different legal classification from the preliminary assessment made in the decision initiating the procedure.

80. It was in regard to a decision to initiate the formal investigation procedure in respect of allegedly unlawful aid that the Court of Justice held in *Tirrenia* that [r]egarding aid in the course of implementation the payment of which is continuing and which the Member State regards as existing aid, the contrary classification as new aid, even if provisional, adopted by the Commission in its decision to initiate the procedure under Article 88(2) of the EC Treaty in relation to that aid, has independent legal effects (paragraph 57). Such a decision, according to the Court of Justice, 'implies that the Commission does not intend to examine the aid in the context of the permanent examination of existing aid schemes provided for by Article 88(1) of the EC Treaty and Articles 17 to 19 of the regulation on procedure in State aid cases (paragraph 58) and 'necessarily alters the legal position of the measure under consideration and that of the undertakings which are its beneficiaries, particularly as regards the pursuit of its implementation (paragraph 59). The Court of Justice further held (paragraph 59):

> Whereas, until the adoption of such a decision, the Member State, the beneficiary undertakings and other economic operators may think that the

measure is being lawfully carried out as an existing aid, after its adoption there is at the very least a significant element of doubt as to the legality of that measure which ... must lead the Member State to suspend payment, since the initiation of the procedure under Article 88(2) EC excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued,

81. That reasoning of the Court of Justice related to a decision of the Commission to initiate the formal investigation procedure in which the Member State was neither ordered to suspend implementation of the measures referred to, in accordance with Article 11(1) of the regulation on State aid procedure (paragraph 55), nor ordered provisionally to recover the aid which had already been paid (Article 11(2) of the regulation on State aid procedure). Contrary to the Commission's argument, therefore, the fact that it did not make use of the possibilities provided for in Article 11 has no relevance to the classification of the legal nature of a decision to initiate the formal investigation procedure.

82. Consequently, even though the classification of the aid corresponds to an objective situation which does not depend on the assessment made at the stage of the initiation of the formal investigation procedure and though the mere initiation of that procedure does not have the same immediately binding character as a suspension injunction addressed to the Member Sate concerned (*Tirrenia*, paragraphs 58 and 60), the fact that the Commission chose to initiate the formal investigation procedure and provisionally classified the legislation in issue as new aid, instead of following the procedure in respect of possible existing aid, has legal effects such as those described by the Court of Justice in *Tirrenia*.

83. Furthermore, in spite of the provisional nature of the legal assessments which it contains, each decision to initiate the formal investigation procedure, such as the contested decisions in the present case, is definitive in so far as the Commission's choice in initiating that procedure produces effects at least until it is closed.

84. First, even a final decision of the Commission which, after classifying the State measures in issue as new aid, declares the aid compatible with the common market, does not have the consequence of regularising ex post facto the implementing measures which would have to be deemed to have been adopted in breach of the prohibition laid down in the final sentence of Article 88(3) of the EC Treaty: Case C-312/90, *Spain v Commission* (*Cenemesa*), paragraph 23.

85. Second, the decision initiating the procedure may, in any event, be invoked before a national court (*Tirrenia*, paragraph 59) and thus exposes the beneficiaries of the measure in issue and territorial entities such as the applicant to the risk that the national court will order suspension of the measure and/or recovery of the payments made, in order to ensure compliance with the last sentence of Article 88(3) EC, since the direct effect of the prohibition on implementation of the proposed measure laid down in that article extends to all aid which has been implemented without being notified (Case 120/73, *Lorenz*, paragraph 8; and Case C-39/94, *SFEI and Others*, paragraph 39). Those beneficiaries and

territorial entities therefore run a higher economic and financial risk than if the formal investigation procedure had not been initiated. It is particularly for that reason that the decision to initiate that procedure is liable to affect their legal situation (see, by analogy, Case T-46/93, *Scottish Football v Commission*, paragraph 13).

86. It follows that the procedural choice made by the Commission must be amenable to judicial review in a case such as this. The initiation of the formal investigation procedure produces the legal effects described above, while, in the context of the examination of existing aid, the legal situation does not change until such time as the Member State concerned accepts proposals for appropriate measures or the Commission adopts a final decision (*Tirrenia*, paragraph 61).

87. Accordingly, the second plea of inadmissibility cannot be upheld either.

Findings of the Court: Contested decision I: exempt companies

105. As to whether the Commission was justified in initiating the formal investigation procedure or whether it should have examined the State measure in issue in the context of the permanent review of existing State aid systems provided for in Article 88(1) of the EC Treaty and in Articles 17 to 19 of the regulation on State aid procedure, it should be observed, first of all, that in the present case the procedure was initiated because the Commission had serious doubt as to the classification of that scheme as 'possible unlawful aid and as to its compatibility with the common market. Unlawful aid is defined in Article 1(f) of the regulation on State aid procedure as new aid put into effect in contravention of Article [88(3) of the EC Treaty].

106. It is common ground that the original 1967 tax scheme - on the assumption that it can be classified as an aid scheme - in any event constituted existing aid within the meaning of Article 1(b)(i) of the regulation on State aid procedure when the United Kingdom acceded to the Community on 1 January 1973.

107. Contested decision I expressly states that that original scheme was the subject of two amendments, in 1978 and in 1983. Those amendments are classified as substantive, so that 'the exempt companies legislation cannot be regarded as an existing but an illegal aid (point 16 of the decision). Furthermore, the decision refers to all exempt companies existing in Gibraltar and not only to the companies affected by the 1978 and 1983 amendments (point 38).

108. The Commission therefore provisionally considered that both amendments, adopted after the United Kingdom's accession to the Community, changed the original tax scheme in its entirety into a system of new aid.

109. Under Article 1(c) of the regulation on State aid procedure, alterations to existing aid are to be regarded as new aid. According to that unequivocal provision, it is not altered existing aid that must be regarded as new aid, but only the alteration as such that is liable to be classified as new aid.

110. That analysis is confirmed by Case C-44/93, *Namur-Les assurances du crédit*, paragraphs 13 and 16, where the Court of Justice held that measures 'to ... alter aid must be regarded as new aid and that plans to ... alter aid cannot be put into effect before the procedure has resulted in a final Commission decision.

111. Accordingly, it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.

112. In the present case, the Commission itself stated, in point 12 of contested decision I, that the 1978 amendment introduced an exemption from stamp duty on the issue of life insurance policies by exempt companies, on annuities payable by exempt companies and on certain transactions relating to such policies or annuities, the advantage thus granted to exempt companies not having been available under the original legislation. In points 13 and 14 of that decision, the Commission states that the 1983 amendment extended eligibility for the tax scheme in issue to a new category of undertakings which had not previously satisfied the requirements of the original 1967 scheme.

113. According to the Commission's own reasoning, therefore, the two amendments in issue are mere additions to the original 1967 scheme which, first, extended the exempt operations to a single category of additional operations, namely life insurance, and, second, added a single category of companies to the beneficiaries of the tax exemption, namely branches of certain companies. On the other hand, there is no evidence in the case-file that those developments affected the intrinsic functioning of the initial tax scheme as regards the other operations and categories of company. The 1978 and 1983 amendments must therefore be regarded as severable elements of the original 1967 tax scheme, so that - on the assumption that they may be classified as aid - they cannot alter the character of existing aid of the original scheme.

114. That analysis is not contradicted by *Namur-Les assurances du crédit* (cited above, paragraph 28), where the Court of Justice held that whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it. Although it is true that in the present case the 1978 and 1983 amendments were inserted into the original 1967 legislation, the fact remains that those amendments are severable from the original scheme. In *Namur-Les assurances du crédit* the question of the severable nature of the amendment was not raised and the Court of Justice did not adjudicate on that point.

115. It follows from the foregoing that in initiating the formal investigation procedure in respect of the whole of the exempt companies legislation and in provisionally classifying that scheme as new aid in its entirety, the Commission infringed Article 88 EC and Article 1 of the regulation on State aid procedure. Accordingly, contested decision I must be annulled in its entirety, without there being any need to consider the other pleas and arguments put forward against it.

116. Furthermore, the partial annulment of that decision, confined to the introduction of the amendments in issue into the original scheme, is precluded, since the Court cannot substitute itself for the Commission and decide that there are grounds for maintaining the formal investigation procedure in relation only to the 1978 and 1983 amendments.

Contested decision II: qualifying companies

117. The qualifying companies tax scheme dates from 1983 and was therefore enacted after the accession of the United Kingdom to the Community: accordingly, it cannot be regarded as existing aid within the meaning of Article 1(b)(i) of the regulation on State aid procedure.

118. Furthermore, the Commission's choice of the formal investigation procedure instead of the existing aid procedure can be criticised by the Court only on the basis of the pleas and arguments put forward by the applicant in support of the form of order which it seeks. However, none of the arguments or pleas put forward by the applicant in the present dispute is really directed against the Commission's presentation of the elements of fact and of law or against its preliminary legal assessment in contested decision II, on the basis of which it reached the provisional conclusion that the scheme in issue constitutes new aid and is incompatible with the common market.

119. The applicant confines its pleadings to a description of historical developments, the uncertain legal situation existing in 1983, the subsequent liberation of movements of capital and the clarification of the concept of aid of a fiscal nature which was only provided towards the end of the 1990s. Furthermore, it merely states, generally, that the rules on State aid constitute a living law and that the concept of aid changes over time, a phenomenon which is recognised by Article 1(b)(v) of the regulation on State aid procedure. Last, it maintains that it would be sensible and fair to conclude that, in 2001, the 1983 qualifying companies legislation constitutes existing aid, while to classify it as new would be wholly illogical and contrary to the normal and usual meaning of the applicable Community provisions.

120. It must be held that those general arguments are not capable of establishing that the 1983 tax scheme must, owing to its intrinsic characteristics, be classified as an existing aid scheme.

121. Furthermore, the Court of Justice held in Case C-295/97, *Piaggio*, paragraphs 45 to 48, that the answer to the question whether aid is new cannot depend on a subjective assessment by the Commission. Thus, in 1999 the Court of Justice condemned the conduct of the Commission in regard to a national law dating from 1979 which had been classified by the Commission as existing State aid for reasons of practical expediency, which included the Commission's own doubts, which had extended over 14 years, concerning the classification of that law as State aid. The Court of First Instance therefore finds whether a specific State measure is to be classified as existing aid or as new aid must be determined

without reference to the time which has elapsed since the measure in question was introduced and independently of any previous administrative practice.

122. In so far as the applicant maintains that the tax scheme in issue must be classified as existing aid because it was brought to the knowledge of the Primarolo group, it has already been held (paragraph 70 above) that that notification cannot be treated as formal notification to the Commission for the purposes of the Community rules on State aid.

123. As regards the reference to the Commission's two proposals for appropriate measures concerning the Irish corporation tax scheme, the factual and legal situation forming the background to those proposals is quite different from the situation prevailing in the present case. Those proposals therefore do not serve as a precedent for classifying the tax scheme at issue in the present dispute as existing aid.

124. The applicant further emphasises the small size of Gibraltar, and claims that the impact of the scheme in issue on competition within the common market and on trade between Member States has always been marginal, since the number of qualifying companies registered in Gibraltar after 18 years during which the scheme has been in force is only 150. Nor has the Commission, it alleges, carried out an economic analysis of that impact.

125. It must be pointed out that that argument contains no figures relating to the volume of the tax measures in issue or on the size of the companies benefiting from it in terms of turnover and advantages. It is sufficient to point out, therefore, that it is settled case-law that the relatively low amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade may be affected (see Case T-14/96, *BAI v Commission*, paragraph 77, and the case-law cited there). Furthermore, in order for the classification as State aid to be upheld, it is sufficient that the State measures in issue 'threaten to distort competition and are capable of having an impact on trade between Member States.

126. Consequently, in the absence of information on the part of the applicant, the finding made in contested decision II (point 14) that the qualifying companies benefiting from the scheme in issue are liable, actually or potentially, to trade with companies in other Member States, all the more so because they are not normally allowed to trade in Gibraltar, has not been validly contested.

127. Moreover, the Commission correctly contended that the formal investigation procedure, in so far as it allows the economic operators concerned to be involved in the procedure leading to the adoption of the final decision, constitutes the appropriate procedural framework for the economic analysis which the applicant would have it carry out.

128. As regards the argument that the initiation of the formal investigation procedure will cause irreparable harm to Gibraltar's position as an international financial centre, since the risk that the tax scheme in issue will be abolished

represents a real threat to the economic viability of Gibraltar, it is sufficient to observe (see paragraphs 72 and 121 above) that the Commission is required to initiate the formal investigation procedure if, after provisionally classifying the measure in issue as new aid, it experiences serious difficulties in assessing its compatibility with the common market. The economic risks caused by the decision to initiate that procedure of which the applicant complains cannot of themselves affect the legality of such a decision. Consequently, this argument must be rejected.

129. In so far as the applicant relies, last, on the principles of proportionality, legitimate expectations and legal certainty, it follows from the foregoing that the mere fact that for a relatively long period the Commission did not open an investigation into a State measure cannot in itself confer on that measure the objective nature of existing aid, if it does constitute aid (*Piaggio*, paragraphs 45 to 47). As the Commission correctly stated, any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid paid in the past (Case 223/85, *RSV v Commission*, paragraphs 16 and 17; and Case C-5/89, *Commission v Germany*, paragraphs 16 and 17).

130. The same applies to the limitation period provided for in Article 15 of the regulation on State aid procedure, which does not in any way express a general principle whereby new aid is transformed into existing aid but merely precludes recovery of aid established more then 10 years before the Commission first intervened.

131. It follows from the foregoing that the pleas alleging infringement of Article 88 EC and Article 1 of the regulation on State aid procedure and breach of the principles of proportionality, legal certainty and legitimate expectations must be rejected in so far as they relate to the action against contested decision II.

Court's Ruling

The Court of First Instance (Second Chamber, Extended Composition), hereby:

1. In Case T-195/01: (a) Annuls decision SG (2001) D/289755 of the Commission of 11 July 2001 initiating the procedure laid down in Article 88(2) EC in respect of the Gibraltar exempt companies legislation;
(b) Orders the Commission to pay the costs incurred by the Government of Gibraltar and to bear its own costs, with the exception of the costs of the interlocutory proceedings in Case T-195/01 R, which shall be paid in their entirety by the Government of Gibraltar;
(c) Orders the Kingdom of Spain to bear its own costs;

2. In Case T-207/01: (a) Dismisses the application;
(b) Orders the Government of Gibraltar to pay the costs incurred by the Commission and to bear its own costs, including those incurred in the interlocutory proceedings in Case T-207/01 R;
(c) Orders the Kingdom of Spain to bear its own costs. ■