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CONTENTS

201 COMMENT
Cartels, leniency and fines

202 MERGERS (ACCOUNTING)
The Andersen Cases

206 JOINT VENTURES (BREWING)
The BI / Karlsberg Case

208 COMPLAINTS (SPORT)
The International Olympic Committee Case

210 COOPERATION AGREEMENTS (MOBILE PHONES)
The T-Mobile / MM02 Case

212 ACQUISITIONS (SHIPPING)
The P&O Stena Case

216 MERGERS (TELEVISION)
The Via Digital Case

218 ACQUISITIONS (ELECTRICITY)
The LEG / Seeboard Case

219 STATE AIDS
The Biscaye Case 219
The British Post Office Case 221
The Italian Non-Commercial Banks Case 223
The Vauxhall Case 224

MISCELLANEOUS
The GVS / ENI / EnBW Case 205
The Carlsberg and Heineken Cases 206
The IBM / Hitachi Case 207
The Continental Tyre Case 214
The Morgan Stanley / Olivetti Case 215

Cartels, leniency and fines

Over the last three years, the number of Commission officials engaged solely on the investigation of cartel cases has doubled. Together with the introduction of more flexible and efficient management methods, as well as the success of the leniency scheme, this explains why 2001 was a record year both in terms of the number of cases in which the Commission reached a final decision and in the amount of the fines imposed. The year 2001 saw the culmination of investigations into 10 cartels involving a total of 61 firms. Some of the cartels were genuinely international, such as the vitamins cartel, while others affected only the European market. These decisions also show the variety of industries which the Commission has investigated; they include chemicals, banks, airlines, beer and paper.

A big factor in the success rate against most of the cartels was the operation of the leniency scheme. Out of a total of 24 decisions imposing fines since 1996, firms cooperated with the Commission under the scheme in 17 cases. The total number of firms cooperating was more than 80. In view of the high volume of applications for leniency and ensuing decisions, it was clear that the Commission's message to the world of business had been heard and taken seriously. In addition, many Member States, including Germany, France, the United Kingdom and Ireland, have recently adopted their own leniency schemes. Other Member States are considering the possibility.

As to the level of fines imposed on infringing cartels, the recent figures are impressive. From 1969, when the first decision in a cartel case was adopted, to 2001, the Commission has adopted 57 decisions against secret cartels. The fines imposed totalled €3.3 billion. From 1996, following the first Leniency Notice, up to and including 2001, the Commission adopted 24 decisions concerning almost 160 firms, and imposed a total of €2.8 million in fines. In 2001 alone the fines imposed exceeded €1.8 billion. This was more than the total of the fines imposed by the Commission in the whole of the preceding period, from the establishment of the European Community to the year 2000. The year 2001 also saw the heaviest fines yet imposed on individual companies: Hoffmann-La Roche was fined €462 million for its role in the eight vitamins cartels, and Arjo Wiggins Appleton was fined €184 million in the carbonless paper case, which was the heaviest fine ever imposed for a single infringement. ■

MERGERS (ACCOUNTING): THE ANDERSEN CASES

Subject: Mergers

Industry: Accounting

Parties: Ernst & Young Germany
Andersen Germany
Menold & Aulinger
Ernst & Young France
Andersen France

Source: Commission Statements IP/02/1241, dated 27 August 2002, and IP/02/1271, dated 5 September 2002

(Note. This is the last stage in the Commission's involvement in the break-up of the Arthur Andersen auditing firm. Having dealt with the UK merger by Deloitte & Touche, the following two cases relate to the mergers by Ernst & Young Germany and Ernst & Young France. Essentially, the Commission is satisfied that, while the reduction from five to four major firms is from a general competitive point of view regrettable, the mergers proposed in Germany and France will not in practice create or strengthen a dominant position on the European market; and this is the criterion it has to apply. Mergers in other Member States of the European Union involving the remains of Andersen Worldwide are being dealt with on a national basis.)

(I) Germany

The Commission has granted regulatory clearance to the proposed merger between Ernst & Young's German entities, most of Andersen Germany's business and the German based law firm Menold & Aulinger. The Commission examined the merger's impact particularly for audit and accounting services to large and quoted companies headquartered in Germany, which tend to choose one of the Big Five accountancy firm to audit their accounts. It concluded that the merger would not lead to competition problems in this market, given the strong position of the market leaders KPMG and PWC.

On July 23, 2002 Ernst & Young, Andersen Germany and Menold & Aulinger requested regulatory clearance from the Commission for their merger. In the course of the transaction, Andersen Germany's partners will join Ernst & Young and Andersen's business in Germany will be leased to Ernst & Young. The combined entity will closely integrate Andersen Germany's legal branch, which will be simultaneously combined with the currently independent German law firm Menold & Aulinger. The transaction does not involve the business consulting arm of Andersen Germany.

In the present operation, the Commission examined the merger's impact in Germany, in particularly regarding the market for audit and accounting of large quoted companies, which usually retain the services of the Big Five audit and accounting firms. Beside Ernst & Young and Andersen, the Big Five comprise PriceWaterhouseCoopers (PwC), KPMG, and Deloitte Touche Tohmatsu. The Commission considered that there was no danger of a creation of a single dominant position given that Ernst & Young and Andersen combined would only be the third player in the German market for large and quoted companies, clearly behind the market leaders KPMG and PWC, whereas Deloitte & Touche will be the smallest player.

The Commission also examined the extent to which there could be concerns about the reduction of the big auditing firms to four, as it did in the previous decision of July 2002 on the take-over of Andersen UK by Deloitte & Touche, with particular reference to the possible creation or strengthening of a collective dominance position. Similar concerns had already been analysed in 1998 in connection with the merger between Price Waterhouse and Coopers & Lybrand, before which there were six big audit firms.

A careful analysis has shown that, despite the reduction from five to four principal firms, the structure of the German market arising from the transaction is not conducive to collusion involving the merged entity. The reasons for this are the asymmetries between the market participants, with KPMG and PWC remaining the two clear leading firms after the merger in the German market and the merged entity following at a certain distance. Therefore, the Commission does not foresee a risk of a collective dominant position as a result of the transaction. On the basis of this analysis, the Commission concluded that there were no grounds to launch an in-depth investigation and cleared the operation.

The German business of Ernst & Young is a member of the global Ernst & Young network of accounting and professional services firms, which employ over 83,000 people in 125 countries. Andersen Germany 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. Menold & Aulinger is a German law firm specialising in business law.

This merger 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. Subsequently, Andersen US was convicted of obstruction of justice in the US government's probe of the Enron collapse and will terminate the auditing of the accounts of US quoted companies in the near future. As a result, Andersen's national practices worldwide have either already joined or have announced their intention to join one of the remaining Big Four firms, on a national basis. Regarding the European Union, whereas the acquisition of control by Deloitte & Touche of the Andersen UK business had already been cleared by the Commission in July 2002, the merger between Andersen France and Ernst & Young is the subject of a separate decision by the Commission (see below). Other transactions in the European

Union involving national Andersen member firms are being looked at by national competition authorities.

(II) France

The Commission has granted regulatory clearance to the proposed merger between Ernst & Young France and most of Andersen France's business. The Commission examined the merger's impact particularly for audit and accounting services to large and quoted companies headquartered in France, which need one of the Big Five accountancy firms to audit their accounts. It concluded that the merger would not lead to competition problems in this market.

On 7 July 2002 Ernst & Young and Andersen France requested regulatory clearance from the European Commission for their merger. The transaction consists of the amalgamation of most of Andersen France's business including activities in the area of audit and accounting, tax and legal advice, and corporate finance with Ernst & Young, but does not involve Andersen France's business consulting arm.

Although the merger will create France's biggest firm on the audit and accounting market for large and quoted companies, the Commission found that there was no danger of a creation of a single dominant position. Already before the merger the merging parties had lost a number of large customers due to the loss of Andersen Worldwide's reputation; and they will inevitably lose other significant business as French rules require that a company's accounts be subject to two independent audits (so-called co-auditorship). This will reduce the gap between the merged entity and the other Big Four firms. In any event, the market investigation has shown that large French companies usually appoint their statutory auditor after launching tender procedures and that the Big Four firms are all recognised as credible bidders.

In line with its previous decisions on the UK and German market, the Commission further focussed its investigation on the possible risk of a creation or strengthening of a collective dominant position in the market, as the transaction leads to the reduction of the big auditing firms from five to four. A careful analysis showed that, although Andersen France might be able to continue as an independent audit and accounting firm for smaller clients, it could no longer service its large clients. Large clients demand a global network, a high degree of international expertise and a reputation that only the remaining Big Four firms can offer. Andersen Worldwide was able to offer this, but Andersen France on its own cannot. Furthermore, the hypothetical acquisition of Andersen France by second-tier, French auditing firms, such as Mazars & Guérard or Salustro-Reydel, would not be able to replicate the global network and the reputation required to enter the market for quoted and large companies. Therefore, and as far as large, quoted clients are concerned, a reduction to four was inevitable and would have occurred whether Andersen France was taken over or simply disintegrated. On the basis of this analysis, the Commission concluded that there were no grounds to launch an in-depth investigation and cleared the operation.

The French business of Ernst & Young is a member of the global Ernst & Young network of accounting and professional services firms. Andersen France acts also under the names Barbier Frinault & Associés and Archibald. It was active as member firm of the Andersen Worldwide international network. After the UK case, cleared in July 2002, and the German case, cleared in August 2002, this third decision concludes the Commision's merger investigations on the take-over of the national Andersen entities within the European Union. Other transactions in the European Union involving national Andersen member firms have either already been cleared or are currently being looked at by national competition authorities. ■

The GVS / ENI / EnBW Case

The Commission has decided to undertake an in-depth investigation into the proposed joint acquisition of German regional gas distributor Gasversorgung Süddeutschland (GVS) by Italian energy company ENI SpA and Energie Baden-Württemberg (EnBW), a company partly controlled by France's EdF. The Commission at the current stage has concerns that the deal may reinforce the strong position of GVS in the transmission and distribution of gas in the region of Baden-Württemberg along the French eastern border. Gasversorgung Süddeutschland (GVS) distributes gas and operates a pipeline transport system in the German southern region of Baden-Württemberg.

Energie Baden-Württemberg (ENBW) is a subsidiary of Eléctricité de France (EdF) and OeW, an association of nine public districts in southwest Germany. It is active in the generation, transmission, distribution, supply and trading of electricity as well as gas and district heat.

ENI is active in the exploration and production of oil and natural gas worldwide. Through its shares in various projects, ENI disposes of pipeline transmission capacities in some Member States and outside the European Union.

On the basis of the information available to date, GVS holds a strong position in the distribution and transmission of gas in the region of Baden-Württemberg. EnBW's position in the gas market is less significant than in the electricity market (it is Germany's fourth electricity company), but its activities in the local distribution of gas could reinforce the position of GVS. Therefore, the Commission currently has serious doubts about whether to approve the transaction in its present form. The opening of a second-stage merger investigation is without prejudice of the Commission's final decision. The Commission now has a total of four months within which it will first carry out a detailed investigation of the deal's impact on competition in the market concerned.

Source: Commission Statement IP/02/1312, dated 17 September 2002

JOINT VENTURES (BREWING): THE BI / KARLSBERG CASE

Subject: Joint ventures

Industry: Brewing

Parties: Brauholding International (BI)
Karlsberg Group
Brauerei- Biervertriebsgesellschaft
Bayrische Brauholding AG
Schörghuber Group
Heineken International BV

Source: Commission Statement IP/02/1242, dated 27 August 2002

(Note. Two of the purposes of this brief report are, first, to emphasise the difference between Carlsberg (Denmark) and Karlsberg (Germany) and, second, to draw attention to the Commission's own comment on the limited nature of Heineken's involvement on the German market. Carlsberg and Heineken are the subject of a current investigation by the Commission – see the box below.)

The European Commission has cleared under the Merger Regulation the acquisition of a 45% stake by Brauholding International in the Karlsberg group's subsidiary Brauerei- und Biervertriebsgesellschaft. The transaction will leave the

The Carlsberg and Heineken Cases

The Commission has confirmed that, on 28 August, it carried out unannounced inspections at the premises of Carlsberg, in Copenhagen, and Heineken, in the Netherlands. These inspections are in the context of an ongoing investigation into suspected collusive behaviour between the two beer companies in violation of European Community's rules on competition.

The Commission in February 2002 sent a statement of objections to Denmark's Carlsberg and Heineken of the Netherlands, saying that it believed that the two companies had agreed not to compete actively in each other's home markets. Following the analysis of the companies' replies, the Commission is undertaking further fact finding.

The Commission will give no further details at this stage as it has a duty to keep anti-trust investigations confidential. The present statement was prompted by the companies' own statements and by press queries. Today's inspections do not prejudge the outcome of the investigation. The Commission can confirm that both companies are co-operating with its investigation.

Source: Commission Memorandum MEMO/02/181, dated 28 August 2002

two parents in joint control of a company whose main business is brewing and beer wholesaling in Germany, but this does not give rise to any competition concerns as the German beer market is highly competitive. The joint venture would also operate in other Member States, namely the Netherlands, the United Kingdom, Italy, Spain and Greece. The parties have excluded the beer industry in France.

The Commission's inquiries have established that in the Member States concerned the addition of market shares would be minimal. Because of the large number of competitors on the fragmented German beer market, the transaction does not give rise to competition concerns even in Germany, where the parties do most of their business. This is true whether the relevant market is defined as regional or countrywide.

The Karlsberg group operates in Germany, producing, wholesaling and retailing beer, other beer-based drinks, non-alcoholic beverages and mineral waters. Brauholding International is itself a joint venture, controlled by Bayrische Brauholding AG, which belongs to the Schörghuber group, and Heineken International BV of the Netherlands. Brauholding International's main labels are Paulaner, Hacker-Pschorr and Kulmbacher. Heineken's activities on the beer market in Germany are very limited. ■

The IBM / Hitachi Case

The Commission has given the go-ahead for Hitachi, Ltd., a Japanese manufacturer of electronics, to acquire sole control of the hard-disk drive business of US computer manufacturer IBM Corporation. IBM is a manufacturer of hard disk drives (HDDs) for all major applications including servers, desktops and mobile applications such as notebook computers. Hitachi manufactures HDDs only for the mobile and server segments. As a result of the transaction, Hitachi will have a leading position in HDDs for mobile applications. The Commission has nevertheless concluded that the transaction does not raise serious doubts as to its compatibility with the common market. The Commission considered in particular the following factors. HDD products are standardized; customers are large and sophisticated buyers who source their HDDs needs from multiple suppliers; and supply contracts are non-exclusive and short-term. All of the above result in low switching costs for customers who can and do shift quantities quickly from one supplier to another. On the supply side, HDD manufacturers face relatively low barriers to entry into the mobile HDD segment.

Hitachi, Inc. is a Japanese company with world-wide activities in computers, consumer electronics and semiconductors. International Business Machines Corporation (IBM) is a US-based computer manufacturer whose hard-disk drive business is mainly located in North America and the Pacific Rim region.

Source: Commission Statement IP/02/1194, dated 5 August 2002

COMPLAINTS (SPORT): THE IOC CASE

Subject: Complaints

Industry: Sport; swimming

Parties: The International Olympic Committee
The Fédération Internationale de Natation Amateur (FINA)

Source: Commission Statement IP/02/1211, dated 9 August 2002

(Note. As the Commissioner for Competition fairly says, it was understandable that the complainants would do whatever they could to contest the ban, which had been imposed under the IOC and FINA anti-doping rules. But they failed to show that there had been a restrictive agreement or an abuse of a dominant position. Even if they had been able to show some form of discriminatory treatment, their case might have stood a chance of success: the IOC is fair game for charges of discrimination.)

The Commission has decided that the complaint brought by two swimmers banned for doping is unfounded and that the anti-doping rules of the International Olympic Committee (IOC) and the Fédération Internationale de Natation Amateur (FINA) and the way in which they are applied do not restrict competition. Mario Monti, the Competition Commissioner, said, "Today's decision shows that rules drawn up by sporting organisations to ensure in a proportionate manner the integrity of sporting events by providing for effective control of doping fall outside the scope of Community competition rules."

The two swimmers who brought the complaint had come first and second in the Marathon Swimming World Cup at Salvador de Bahia, Brazil, on 31 January 1999. They tested positive at the event. Analyses revealed that their bodies contained higher-than-permitted levels of nandrolone, norandrosterone and norethiocholanolone metabolites.

On 8 August 1999 the FINA doping panel banned them for four years for a first-time contravention of the doping rules. An appeal was lodged against the decision at the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland), where it was dismissed in a ruling on 29 February 2000. The CAS subsequently amended the decision on 23 May 2001, reducing the ban to two years. One of the swimmers is a member of the Spanish Swimming Federation, which is a member of FINA. The other is a member of the Slovenian Swimming Federation, which is also a member of FINA, and he was able to exercise the rights and freedoms conferred by the Association Agreement between the European Union and Slovenia.

The swimmers believe that the rules adopted by the IOC and FINA regarding the definition of doping, the threshold for defining the presence of a banned substance

in the body as doping and recourse to the CAS restrict competition within the meaning of Articles 81 and 82 of the EC Treaty and unjustifiably restrict the freedom of swimmers to provide services under Article 49 of the Treaty.

Mr Monti said, "it was understandable that the complainants would do whatever they could to contest the ban, which had been imposed under the IOC and FINA anti-doping rules. But this does not justify the intervention of the Commission, which takes the view that it is not its job to take the place of sporting bodies when it comes to choosing the approach they feel is best suited to combating doping."

The Commission noted that the complaint did not contain sufficient details suggesting the existence of a restrictive agreement between the IOC and third parties or of an abuse of a dominant position on the part of the IOC. Similarly, the complaint did not contain details that could lead to the conclusion that a Member State or associated State had infringed Article 49 of the EC Treaty. (Article 49 governs the freedom to provide services.)

Even if the contested anti-doping rules derive from a restrictive agreement, they are not intended to restrict competition between economic operators but to combat doping. The idea of fixing a threshold to take account of the possible endogenous production of banned substances benefits athletes. The penalty for doping - a ban - has an impact on an athlete's freedom of action. However, a restriction on freedom of action is not automatically a restriction on competition within the meaning of Article 81 since the resulting restrictive effects may be inherent in the pursuit of legitimate objectives that are recognised as positive in a particular context.

The Commission therefore believes that the anti-doping rules in question are closely linked to the smooth functioning of competition in sport, that they are necessary for the fight against doping to be effective and that their restrictive effects do not go beyond what is necessary to achieve this objective. Accordingly, they are not caught by the prohibition under Articles 81 and 82 of the EC Treaty. The complainants have two months in which to challenge the Commission's analysis before the European Court in Luxembourg. ■

A Glossary of Terms used in Competition Policy

Two new publications by the Commission are designed to help consumers, small businesses and other non-specialists understand EU jargon. Not many Danish consumers know what a Carlsberg Notice is, despite it bearing the name of the famous brewer. The Glossary helpfully reminds us that it is simply a summary of an agreement that the Commission publishes in the European Community's Official Journal to warn companies and consumer associations that a deal has been filed for regulatory clearance, giving them the opportunity to voice their concerns. The first such Notice was published on a joint venture in 1992 between Carlsberg and tea company Tetley, hence its name. The other publication explains in layman's terms the European competition rules on distribution and supply agreements, otherwise referred to as vertical restraints.

COOPERATION AGREEMENTS (MOBILE PHONES); T-MOBILE / MM02

Subject: Cooperation agreements

Industry: Telecommunication, mobile phones

Parties: T-Mobile Deutschland GmbH
Viag Interkom GmbH, a wholly-owned subsidiary of MM02 plc (formerly known as BT Cellnet)

Source: Commission Statement IP/02/1277, dated 10 September 2002

(Note. This is an unusual application of the rules on competition to cooperation agreements and the first time the rules have been applied to network sharing agreements. Traditionally, the Commission tends to favour cooperation agreements; but the possible complexities of the present case may make it harder than usual to determine the exact boundaries between genuine technical improvements and underlying restrictions of competition. Third party views are awaited.)

Following careful examination, the Commission has reached the preliminary conclusion, still subject to third-party comment; that it can take a favourable view regarding two sets of agreements to share infrastructure networks for the third generation (3G) of mobile phones. The agreements were filed for approval under the competition rules by mobile network operators T-Mobile and MMO2 and concern the networks that they are building in Germany and in the United Kingdom. The Commission's analysis of the two deals is that the significant cost savings anticipated from the sharing of network elements should lead to quicker 3G network roll-out and services competition, which will benefit consumers, without leading to undue restraints on network competition. Other benefits include greater network coverage and a more limited environmental impact.

Commenting on the case, Competition Commissioner Mario Monti said: "The examination of the network sharing agreements between T-Mobile and MM02, the only two so far to have been filed for regulatory clearance, have led the Commission to believe that, provided that the appropriate safeguards are in place, such co-operation deals can bring benefits for the consumer in terms of a faster introduction of new services, more competition and a lesser impact to the environment. However my definitive view remains subject to comments by third parties. At any rate the Commission will remain vigilant to protect competition in mobile phone markets."

The third generation of mobile communications (3G) will combine wireless mobile technology with high data transmission capacities. 3G systems promise access to Internet services specifically tailored to meet the needs of people on the move, via multimedia applications using image, video, sound as well as voice. Nearly all European Union Member States have awarded 3G licences for mobile

services and networks, most of which through auctions which involved very huge fees for the successful bidders.

The sharing of 3G network elements should result in significant cost savings for the operators and lead to quicker 3G roll-out, greater network coverage and offset some of the potential environmental problems caused by the necessary infrastructure for 3G. Network sharing arrangements are under preparation in a number of EU countries and the Commission has spoken out in favour of such arrangements provided that there remains sufficient competition in the market to ensure that consumers have their fair share of benefits. In this context, Commissioner Mario Monti, responsible for EU competition policy, has instructed his services to deal with the notified cases on a priority basis, and following the period for third party comment a final position can be expected rapidly.

In February 2002, mobile operator T-Mobile Deutschland GmbH and Viag Interkom GmbH, a wholly-owned subsidiary of MM02 Plc (formerly known as BT Cellnet), notified an agreement concerning infrastructure sharing and national roaming for the third generation of GSM (Global System for Mobile communications) phones in Germany and the UK. The applicants sought either a negative clearance under Article 81(1) of the EC Treaty or an exemption from the cartel prohibition under Article 81(3).

This is the first time that the Commission has had to scrutinise 3G network-sharing agreements in the framework of the EU competition rules and the focus of the analysis was on the effects which network sharing could have on the balance between network and services competition. In the agreements concerning both Germany and the UK, T-Mobile and MMO2 have agreed to share sites and provide one another with national roaming facilities. The agreements also provide for the sharing of the radio access network (RAN) but the Commission has reserved its position on this aspect until the operators decide whether or not to proceed with this closer co-operation. The agreements do not relate to 3G downstream services which will be provided to consumers, with respect to which the parties remain entirely independent of each other.

Following a first analysis of the notified agreements the Commission takes the preliminary view based on the criteria provided by Article 81 of the Treaty that they would be eligible for a negative clearance and/or an exemption. The Commission takes this view because it appears that any restrictions of infrastructure competition involved are compensated both by faster network roll-out leading to increased services competition and by other benefits such as the limitation of the environmental impact, as less infrastructure will need to be deployed. Both agreements are not exclusive and generally allow third party site sharing and national roaming subject to limited exceptions. In addition safeguards are in place to limit the exchange of sensitive information between the parties.

Before taking a final decision, the Commission has published a summary of the agreements in the Official Journal of the European Communities, pursuant to

Article 19(3) of Regulation 17/62, inviting interested parties to comment within one month from publication. The first summary was published in OJ C189, of August 9, and the Commission has already received several submissions. The second summary, on the UK market, can be found in OJ C 214, of September 10. The OJ can be consulted on the following website

http://europa.eu.int/comm/competition/antitrust/oj/

Network sharing can involve varying degrees of co-operation and the degree of independence retained by the operators depends on the network elements that are shared. Ranked by the increasing degree to which the network is shared it is possible to distinguish between shared use of:
sites, which ranges from sharing individual mast sites up to grid sharing (requiring a uniform layout of networks), and may include site support infrastructure, such as site support cabinets (SSC);
base stations (Nodes B), antennas and radio network controllers (RNCs), also known as radio access network (RAN) sharing, i.e. the initial transmission equipment;
core networks, including mobile switching centres (MSCs) and various databases, i.e. the intelligent part of the network;
the radio frequencies.

Finally, national roaming concerns a situation where the operators involved do not share any network elements as such but simply use each other's network to provide services to their own customers. See, generally, The Introduction of Third Generation Mobile Communication in the European Union: State of Play and the Way Forward, COM (2001) 141 of 20 March 2001; and Towards the Full Roll-Out of Third Generation Mobile Communications (2002) 301 0f 11 June 2002. ■

ACQUISITIONS (SHIPPING): THE P&O STENA CASE

Subject: Acquisitions

Industry: Shipping

Parties: P&O (UK)
P&O Stena Line
Stena Line UK Ltd

Source: Commission Statement IP/02/1203, dated 8 August 2002

(Note. Readers may well be confused by the seemingly endless permutations in the control over cross-Channel ferry services. The latest development adds in one sense to the confusion by being described in the Commission's Statement as a "de-merger". It is questionable whether this is a correct description of an operation resulting in the acquisition of a joint venture, previously authorized

under Article 81. However that may be, P&O now has sole control over what had been a joint venture with Stena Line; and the Commission considers that, in the light of external competitive factors, such as Eurotunnel, no competition problem arises. It will nevertheless continue to monitor the position.)

The Commission has approved a transaction by which P&O (UK) will acquire full control of P&O Stena Line, the cross-Channel ferry operator which is at present a joint venture between P&O and Stena Line UK Ltd. The analysis carried out by the Commission indicated that the change to sole control, which constitutes a concentration within the meaning of the Merger Regulation, does not raise any competition concerns. The Commission however remains fully committed to following closely cross-Channel market developments in contact with consumer organisations and national authorities.

The Peninsular and Oriental Steam Navigation Co (P&O) is a UK listed company involved, *inter alia*, in maritime shipping and port activities world-wide. In Europe, P&O, apart from its involvement in the P&O Stena Line joint venture, operates passenger and ferry services on the North Sea and the Western Channel. The P&O Stena Line joint venture is the leading ferry operator on the Dover-Calais route, formed in 1998 through a combination of P&O's and the Stena Line UK Ltd's interests on the Short Sea Route. That term describes the routes across the English Channel (between Dover, Folkestone, Ramsgate Newhaven and Calais, Dieppe, Boulogne and Dunkirk) and between Ramsgate and Ostend. P&O will acquire all the remaining shares in P&O Stena Line. The proposed concentration would therefore in effect be a de-merger of P&O's and Stena's interests in this area.

The Commission initially granted the creation of the P&O SL joint venture a three-year exemption under Article 81(3) EC which was renewed in 2001 for a further six year period. In last year's investigation the Commission already stated clearly that it would continue to follow developments in cross-Channel transport services.

In the present case, the Commission concluded that the change in control of P&O Stena Line would not lead to the creation of a dominant position for the provision of freight and passenger services between the Continent and the United Kingdom, regardless of how the market was defined. The Commission also examined whether the possibility of sole control over P&O Stena Line would give P&O additional advantages, enabling it to force competitors out of the market and thereafter raise prices. However, the investigation showed that such a scenario was not likely considering the amount of actual or potential competition on the market and the low barriers to entry. Lastly, the Commission concluded that the market did not show the characteristics which would enable the operators (both the ferry operators and Eurotunnel) to act in parallel to raise prices rather than compete. The fact that P&O would now be able to control P&O Stena Line alone would not change that structure.

The conclusion reached by the Commission in this specific transaction does however not affect its commitment to monitor market evolution in order to

ensure that prices and trade conditions are in accordance with the European Community's rules on competition.

On 26 January 1999, the Commission approved the creation of the P&O Stena Line joint venture under Article 81(3) EC. Due to uncertainties as to the future developments in the market, the approval was however limited to three years. In December 2000, the parties applied for a renewal of the exemption until 2020. The application was made under Regulation 4056/86, under which the Commission has 90 days from publication of a summary of the application in the Official Journal of the European Communities to raise serious doubts if there is a need to continue the investigation. If no serious doubts are raised, the agreement is automatically exempted for six years from the date of such publication. The Commission concluded under that investigation that there had been no material changes in the market that would justify denying a further clearance and did not raise serious doubts, with the effect that the P&O Stena Line joint venture was deemed exempted until 7 March 2007. ■

The Continental Tyre Case

(Note. A State aid scheme, which appeared to "entice" an industry from one Member State to another, is shown to be justified under the current rules.)

The Commission has informed the Swedish and Portuguese governments that its investigation into State aid to Mabor-Continental, the Portuguese subsidiary of tyre manufacturer Continental, has provided no indication of a violation of the rules on competition. The closure of Continental's tyre factory in Gislaved in southern Sweden expected this summer and the resulting loss of jobs had raised concern in Sweden as to whether Community rules on state aid had been properly observed, and in particular whether Continental was not relocating production to Portugal, stimulated by the benefits promised by the Portuguese government.

The Commission requested full information from the Portuguese authorities to examine the compatibility of these measures with the state aid provisions of the Treaty: it wanted to verify whether the aid measures awarded to the company were covered by broader state aid schemes already approved by the Commission in the past. No prior notification of individual aid measures is necessary if a Government provides financing under a framework scheme already approved by the Commission. Furthermore, the Commission verified that aid to Mabor-Continental was not required to notify under the provisions of the Multisectoral Framework scheme on regional aid for large investment projects.

In the meantime the Portuguese government has provided the necessary information, which has been examined in-depth. According to the information obtained, the company is to receive a subsidy of around €10 million as well as tax reductions of nearly the same amount. On this basis the Commission concluded that the aid measures were in compliance with aid schemes it had previously authorised and remained well below the allowed regional aid ceiling. Moreover, the aid measures also remained well below the thresholds requiring notofication under the Multisectoral Framework scheme.

Source: Commission Statement IP/02/1210, dated 9 August 2002

The Morgan Stanley / Olivetti - Telecom Italia Case

(Note. The interest of this case lies in the unusual combination of an American investment bank and an Italian telecommunications group for the purpose of exploiting real estate in Milan and Rome. The combination does not appear to create any competition problems.)

The Commission has cleared two joint ventures in the field of sale and lease of real property for commercial use to be set up by US investment bank Morgan Stanley Dean Witter & Co. and Italian information technologies and telecommunications group Olivetti/Telecom Italia. The Commission has concluded that the transaction will not raise competition concerns in the municipalities of Milan and Rome, the only two geographic areas affected by the transaction, given the presence in these areas of other strong and qualified competitors.

Both Morgan Stanley and Olivetti/Telecom Italia have activities, through controlled companies, in the sale and lease of real property for commercial use in Italy, in particular in the sale and lease of offices.

Pursuant to the transaction, two private equity funds controlled by Morgan Stanley and other companies belonging to the Olivetti/Telecom Italia group will set up two joint ventures, called Tiglio I and Tiglio II. The parties will confer on the joint ventures certain activities in the field of sale and lease of immovable property for commercial use so far exclusively controlled by the Olivetti/Telecom Italia group or by the Pirelli Group.

The activities of Morgan Stanley and Olivetti/Telecom Italia in the field of sale and lease of real property for commercial use overlap to some significant extent only in the municipalities of Milan and Rome. However, given the presence of qualified and strong nation-wide competitors such as Beni Stabili, Aedes Immobiliare, Bonaparte, IPI and Withehall, and of a large number of local competitors in the municipalities of Milan and Rome, the joint ventures will not raise serious competition concerns in any of the affected areas.

Morgan Stanley Dean Witter & Co is a US investment banking firm active in global financial services, in particular securities, investment management and credit services. Olivetti/Telecom Italia is an Italian group of companies, controlled by the Italian groups Pirelli and Edizione Holding, active in information technology and telecommunication services.

Source: Commission Statement IP/02/1253, dated 30 August 2002

MERGERS (TELEVISION): THE VIA DIGITAL CASE

Subject: Mergers
National law

Industry: Television, broadcasting

Parties: Via Digital SA
Sogecable SA
(Controlling parties are indicated in the report below)

Source: Commission Statement IP/02/1216, dated 16 August 2002

(Note. Although this case originated with a notification to the Commission under the Mergers Regulation, the Commission has decided to accede to a request by the Spanish Government, in accordance with the terms of the Regulation itself, that the matter should be handled at national level and under national competition law. This is not unreasonable, given that the effects of the merger will be felt almost exclusively in Spain. At the same time, the economic effects of the merger may be farther flung, since some of the controlling parties are from France. Thus, there may be two different concepts of the "Community interest" in a case of this sort.)

The Commission has decided to grant the referral requested by the Spanish Competition Authorities with regard to the integration of the two satellite digital television platforms operating in Spain. The Spanish authorities according to this State's national competition law will therefore assess the operation, which threatens to bring about anti-competitive effects in a number of markets within Spain.

On July 3, the Commission received a notification under the Merger Regulation requesting clearance for the integration of DTS Distribuidora de Televisión Digital S.A. (Vía Digital), the second pay TV operator in Spain, in Sogecable S.A., the dominant pay TV operator in Spain, by way of exchange of shares. The former is controlled by the Spanish undertaking Grupo Admira Media S.A., belonging to the Telefónica group. The latter is controlled jointly by the Spanish media group Promotora de Informaciones S.A. (Prisa) and Groupe Canal + S.A., belonging to Vivendi Universal. According to the notification, after the merger Sogecable will continue to be controlled by Prisa and Canal+, while Telefónica will hold a significant participation in the merged entity.

On 12 July, the Spanish government requested the Commission, according to article 9(2)(a) of the Merger Regulation, to refer the case to its competition authorities on the basis that the merger threatens to create a dominant position impeding competition in distinct markets within Spain.

The Commission's review of the case confirmed that the concentration would threaten to create or strengthen a dominant position in the following markets geographically limited to Spain: pay TV, where the two parties are currently the two largest competitors and have combined market shares of around 80% (in terms of number of subscribers) and 80-95% in terms of sales; acquisition of exclusive rights for premium films and acquisition and exploitation of football matches in which Spanish teams participate (these TV contents are the main drivers for customers that decide to subscribe to a pay TV), other sports and sale of TV channels.

The Commission investigated further the effects of the transaction on several telecommunication markets, such as the provision of services of Internet access, services of fixed telephony or provision of infrastructures, and also took into consideration Telefónica's developing activities in pay TV (in particular, its project Imagenio, which will provide pay TV services, Internet access and fixed telephony through ADSL). The investigation showed that the creation of a structural link between the dominant operators in pay TV (and audiovisual content) and telecommunications in Spain risks a strengthening of Telefónica's dominant position in a number of telecommunication markets.

The Commission reached the conclusion that, in this case, given the national scope of the markets affected by the transaction, the Spanish Authorities were particularly well placed to carry out a thorough investigation of the operation, and that it was therefore appropriate to refer the case to Spain. The Spanish authorities will now assess the transaction under their national competition law. According to the Merger Regulation, the publication of any report or the announcement of the findings of the examination of the concentration by the Spanish Authorities shall take place not more than four months after the Commission's referral.

Sogecable is a Spanish company whose principal areas of business are the operation of terrestrial television (Canal+ analogue) and direct-to-home satellite pay television services (Canal Satélite Digital), the production and distribution of films, the acquisition and sale of sports rights and the provision of technology services. Sogecable is controlled by Prisa (Promotora de Informaciones S.A., the Spanish media group, which publishes El País and Cinco Días), and by Canal + SA.

Vía Digital offers pay TV via satellite in Spain and is controlled by Telefónica through Admira Media. The remaining capital is divided among institutional shareholders, mainly TV operators (Televisa, Canal 9, Direct TV, TVG, TVC, Telemadrid). ■

Competition Law in the European Communities now has its reconstructed website in full operation. Apart from the usual information about the publishers, the editor, the subscription rates and so on, the website includes a list of questions raised in each issue, as well as the index for the previous year. The website is: www.competition-law.com

ACQUISITIONS (ELECTRICITY): THE LEG / SEEBOARD CASE

Subject: Acquisitions

Industry: Electricity

Parties: London Electricity Group
Seaboard Group plc (formerly owned by AEP (US))
Electricité de France

Source: Commission Statement IP/02/1166, dated 26 July 2002

(Note. This case reflects two trends in the electricity supply industry in Britain: first, as the Commission points out, the supply activity in the UK used to feature strong regional characteristics but is today moving to competition at a national level; second, the ownership of the electricity industry is becoming increasingly internationalized. But competition does not appear to be prejudiced.)

The Commission has authorised the acquisition of Seeboard Group plc, formerly belonging to AEP of the US, by London Electricity Group, the British arm of Electricité de France. London Electricity Group (LEG), an integrated British electricity company historically based in the London area and South West England, intends to acquire Seeboard, another integrated British electricity company whose historical base is South East England, which will boost its customer base in the UK. The Commission's market investigation has shown that the operation will not lead to any competition concerns either in the wholesale or in the retail market of electricity. Even with the Electricité de France sales at the Channel interconnector taken into account, the combined entity will remain a second-tier player in the British electricity generation market, which is already very competitive. In the distribution business, the transaction will not lead to overlaps since distribution is based on an exclusive authorised area, London and South West England for LEG and South Eastern England for Seeboard, and is fully regulated by the Office of Gas and Electricity Markets (Ofgem). The supply activity in the UK used to feature strong regional characteristics but is today moving to competition at a national level. Whichever scale is considered, the acquisition will lead to only marginal overlaps in a competitive market and therefore does not give rise to competition concerns. The Commission has also analysed the competitive impact in other activities, namely the management and operation of network assets, the connection works and the metering activities, which have been traditionally linked to the distribution business and where Ofgem is trying to enhance competition. The Commission investigation showed that only meter reading and meter operation markets are actually emerging, but in none of these activities the operation give rise to any competition concern. Throughout its investigation, the European Commission has worked in close relationship with the Office of Fair Trading (OFT), with the British merger control authority, and with Ofgem, the British electricity markets regulator. ■

STATE AIDS (BUSINESS CENTRES): THE BISCAYE CASE

Subject: State aids
Tax concessions
Reimbursement

Industry: General business activities (see report below)

Parties: Basque province of Biscaye

Source: Commission Statement IP/02/1236, dated 26 August 2002

(Note. Tax systems are a notorious vehicle for the introduction of special concessions to businesses, giving them an unfair advantage over competitors and constituting a form of State aid. But it is a fine dividing line between what concessions are permissible and what are not: the third paragraph in the report below has to be read rather carefully to appreciate how the line must be drawn. Moreover, the Commission itself has changed its tune in recent years. Giving as its reasons the new circumstances of the "single market", it has taken a tougher stance in the past twelve months than it had previously; and it is because of the uncertainty created by its earlier approval of similar concessions in Belgium that it has decided, quite fairly, not to insist on reimbursement of the amounts involved in effect in the Biscaye case.)

The Commission has declared illegal the special tax regime available to so-called coordination centres located in the Spanish province of Biscaye, in the Basque region. The scheme was abolished by the Spanish government earlier this year after the Commission started formal proceedings against it and 10 other special corporate tax regimes in July 2001 over concerns that they were distorting competition and trade in the European Union. Under EU rules, the Commission must take a decision once it has started formal proceedings. Because at the time of the implementation of the scheme the Biscaye authorities had legitimate reasons to believe that the scheme was not a state aid, the Commission has decided not to seek the reimbursement of the fiscal advantages that might have been received. But the Commission pointed out that the case marked further progress in abolishing disguised state aid to businesses through special tax arrangements; and that the Spanish authorities had already abolished the scheme.

A coordination centre provides banking, marketing, insurance, logistics and other services to the companies of the international group to which it belongs. The Biscaye special tax provision provided for an alternative method to calculate the income tax applicable to the co-ordination centres based in the province -- the so-called "cost plus". It was available only to companies which satisfied certain capital, turnover and employment requirements.

The cost plus method is an alternative method of taxation, which is normally aimed at overcoming the difficulty of assessing cross-border commercial

transactions between companies belonging to a same group and at limiting the scope for avoiding tax. In the cost plus method, the taxable profit is obtained by applying on all the expenses (the cost) incurred by the coordination centre a margin (the cost plus) expressed in percentage terms. Although this method of taxation does not constitute state aid *per se*, its practical application can give rise to State aid, for example when certain expenses are not taken into consideration for the determination of the taxable profit or by applying an inappropriately low margin.

The Commission has concluded that the Biscaye regime excluded financial costs from the calculation to determine the tax base. This reduced the tax burden on companies approved under the scheme and was not compatible with EU state aid rules.

The Biscaye regime was modelled on the Belgian coordination centres scheme, itself considered as not being an aid by the Commission in 1984, but for which a formal investigation was initiated in February 2002, following the refusal by Belgium of the appropriate measures proposed by the Commission in July 2001 (see below). The Biscaye authorities, therefore, had legitimate reasons to believe that the scheme did not constitute aid at the time it was implemented. Therefore the Commission has not ordered recovery of the aid. The Biscaye coordination centres scheme was abolished on 30 April 2002.

On 11 July 2001, the Commission started formal investigation procedures into 11 special taxation arrangements for companies in eight Member States, including the Biscaye coordination centres. In addition, the Commission invited four Member States to put an end to existing fiscal advantages no longer justified in the light of the economic changes in the European Union's single market. These include the Belgian coordination centres. Existing aid refers to measures which were either in force before the accession of a country to the European Union, or were in the past declared by the Commission as not being state aid or being compatible with the EU rules and are now, due to the evolution of the single market, considered as state aid. Besides Biscaye and Belgium, the Commission last year also took issue with the coordination centres of France, Germany and Luxembourg. ■

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Fairford Press is now a limited liability company under British law and is expected to take over responsibility for (among other publications) *Competition Law in the European Communities* from 1st January 2003. It remains a family firm; and the editor continues to be Bryan Harris, Professor of European Union Law at the Franklin Pierce Law Center, Concord, New Hampshire, where he gives courses on Anti-Trust Law and Intellectual Property Law in the European Union. Mark Harris, Managing Director of 3W-Marketing Ltd, advises on website, electronic and distribution matters (see www.3w-marketing.com)

STATE AIDS (POSTAL SERVICES): THE BRITISH POST OFFICE CASE

Subject: State aids

Industry: Postal services; associated counter services

Parties: Post Office Ltd (a 100% subsidiary of "Consignia plc")

Source: Commission Statement IP/02/1328, dated 18 September 2002

(Note. In restructuring the British Post Office system, the United Kingdom has had two major problems and two major legal advantages, from the point of view of the rules on competition. The problems are, first, the combination of postal services and social services; the second, the largely uneconomic, but socially important, role played by sub-post offices, most of them combined with small general stores. The restructuring clearly calls for some government help. Here the advantages are, first, that recent Court rulings on the equivalence between public financing and private financing may justify what could otherwise amount to a state aid; and, second, that an overwhelming proportion of the transactions effected over post office counters give the post offices the status of "public undertakings entrusted with public service obligations" – see the last sentence.)

The Commission has decided not to raise objections under the European Community's rules on competition, including the state aid rules, to the measures notified by the UK Government under the heading "Reinvention of the urban postal counter network". In the Commission's view the Government resources to be dedicated to the project will not exceed the net additional costs of the related public service.

The "reinvention of the urban postal counter network" is aimed at restoring the urban post office network to sustainability by reducing its size while both keeping to the newly redefined urban counter cover obligation (95% of urban residents must live within a mile of a post office) and optimising counter location. The proposed programme, which has still to be approved by the UK Parliament, comprises two measures financed by the State through a refund to the postal counter network, Post Office Ltd (POL), of the related expenses. The first refund is based on the payment of a termination indemnity by POL for investment loss to some 3,000 "sub-postmasters" - the agents who run mainly on an individual basis 17,000 out of 17,600 post office counters - whose counters will close (£180m maximum). The second refund is based on an investment grant paid also by POL to those sub-postmasters whose counters are expected to experience a surge in business as a result of the other counter closures so that the appropriate investments are made to prevent any discontinuity in public service delivery throughout the transfer period (£30m maximum).

POL, a 100% subsidiary of Government-owned "Consignia plc" (the oddly named UK Post Office), is the largest retailer in Europe by number of outlets. It

acts as a main interface between Government and citizens while providing over-the-counter access. POL's services are used disproportionately by those in the lower socio-economic groups who are not particularly well catered for by retailers and banks, especially the aged and those living on social security. Over 80% of POL's turnover is attributable to public services (services of general economic interest and universal postal services). The losses of POL, which is essentially a public service network, are caused to a major extent by the obligation to provide a country-wide network leading to the maintenance of uneconomic counters. The postmasters' severance indemnities, which are aimed at making the urban network sustainable, represent an additional cost attributable to the universal counter cover obligation. Since the actual severance indemnities payments to sub-postmasters will be exactly refunded to POL within the agreed ceilings and since "Consignia's" postal activities are not making any surplus monopoly profit out of the reserved area, as shown by the separate postal service accounts, there is no risk of over-compensation of the specific additional costs incurred by POL. As a matter of fact, POL's losses are threatening the viability of "Consignia" as a whole and the very delivery or the universal postal service.

Similarly, the investment grants awarded to sub-postmasters will be refunded to POL on the basis of the payments actually effected. Without any Government intervention, there is a genuine risk, in the Commission's opinion, that the remaining sub-postmasters do not invest in what is necessary to absorb the extra flow of business, essentially of a public nature, resulting from the counter closures, thus causing a discontinuity in the delivery of a quality public service.

The restrictive number of items qualifying for grants to sub-postmasters are specifically aimed at preventing public service disruption and any loss in delivery quality over the transfer period. Taking into account the modest size of the investment grant which has, in addition, to be matched by the sub-postmasters involved, the Commission is satisfied that the maximum compensation for the urban counter up-grade is not likely to overcompensate the additional costs of ensuring public service continuity. In the unlikely case where an over-compensation would occur, the United Kingdom Government has committed itself to recovering the excess compensation within reasonable delays on the basis of a separation of accounts applying the principles of the Transparency Directive (2000). This undertaking has also enabled the Commission to deal with the notification without prejudice to subsequent notifications.

As the compensation which will be paid to POL under the two measures is likely not to exceed the net cost of ensuring the continuity of the public service and as the mechanisms will be put in place to ensure that, should any over-compensation occur, it will be detected through POL's separation of accounts and recovered within reasonable delays, the Commission has concluded, in the light of the recent Court jurisprudence, that the notified measures do not constitute state aids. Moreover, even if the measures were considered to be state aids, they would be compatible with the Treaty's rules on undertakings entrusted with public service obligations (Article 86(2). ■

STATE AIDS (BANKING): THE ITALIAN BANKS CASE

Subject: State aids
Undertakings

Industry: Banking

Parties: Italian non-commercial banks ("banking foundations")

Source: Commission Statement IP/02/1231, dated 23 August 2001

(Note. Much of the case law of the Court of Justice is concerned with the definition of an "undertaking" for the purposes of the rules on competition; and the essence of the definition is that an undertaking consists of an entity engaged in economic activity. If an entity is not engaged in an economic activity, it is not an undertaking within the meaning of the relevant articles of the EC Treaty and is therefore outside the scope of the competition rules. At first sight, banking is an economic activity; and there have been several decisions in recent years directed against banks where the competition rules have been infringed. But, where the banks perform non-economic tasks, such as the management of their own assets and the donation of grants to non-profit-making organizations, it is a different story. For these reasons, the Commission has held that Italian "banking foundations" are not covered by the rules on competition; specifically, in this case, by the rules on state aids.)

The Commission has ruled that certain Italian fiscal measures introduced in 1998 and 1999 in favour of banking foundations are not subject to the European Union's state aid rules. This is because the Commission considers that the activity of managing own assets and using the proceeds to donate grants to not-for-profit entities is not an economic activity. Therefore banking foundations are not to be considered as undertakings within the meaning of the relevant rules on competition. This decision is different and separate from a decision of December 2001, which found that other fiscal advantages granted through the same law, which benefited Italian banks, were illegal and had to be reimbursed.

Commenting on the decision Competition Commissioner Mario Monti said: "Today's decision shows that the Commission carefully draws a line between economic activities, to which the state aid provisions have to be applied in order to protect fair competition in the Union, and non-economic activities which are not subject to these provisions. When foundations fulfill a purely social or educational role the tax advantage from which they benefit is, therefore, not covered by the European state aid rules. At the same time, the Commission has been applying the state aid rules to the banking sector in an increasingly stricter way, as seen in the recent decisions on the German public banks and on the Italian and French cases."

The fiscal measures which are the subject of the Commission decision were introduced by Law N° 461 of 23 December 1998 and the related Legislative Decree N° 153 of 17 May 1999 and concern the attribution to banking foundations of the legal status of "non-commercial entities". This legal status implies a 50% reduction of the standard company income tax in Italy (IRPEG). Other advantages concern the tax exemption on the sale by foundations of the holdings they have in banks or on the acquisition of instrumental goods.

The Commission has taken the view that, since the donation of funds does not represent an economic activity, foundations that do not perform other tasks cannot derive from the legislative measures any competitive advantage in any specific market. Accordingly, the measures do not constitute state aid. The Commission was able to reach this decision only after the Italian government strengthened the separation between banks and foundations in article 11 of law n° 448 of 28 December 2001. The new legislation prevents joint control of banking institutions by more than one foundation and introduces stricter rules on incompatibility between managing positions. This excludes the exercise of banking activity by the foundations (through controlled banks).

The decision, however, indicates that, if foundations were to carry out economic activities and insofar as these activities would affect trade between Member States, any tax advantage could represent state aid and would have to be notified to the Commission.

Today's decision complements and does not contradict a separate decision of 11 December 2001, which ruled that another aspect of the Italian legislative decree n°153/99 was incompatible with the European Community's state aid rules. Last year's decision concerned fiscal advantages granted to banks to encourage the restructuring and consolidation of the Italian banking sector. The Commission considered that the measures were distorting competition, by favouring undertakings in a sector where trade between Member States was present. ■

The Vauxhall Case

STATE AIDS (MOTOR VEHICLES): THE VAUXHALL CASE

Subject: State aids
Necessity
Proportionality (cost-benefit analysis)

Industry: Motor vehicles

Parties: Vauxhall Motors Ltd (UK) (subsidiary of General Motors, US)

Source: Commission Statement IP/02/1327, dated 18 September 2002

(Note. There are two points of interest in this case. The first is that, while the state aid approved by the Commission will tip the balance between the choice of

Belgium and the choice of the United Kingdom for the choice of location – a matter of contention noted in the Continental Tyre case referred to earlier in this issue – a proportionality test, involving a cost-benefit analysis of the merits of the two sites, persuaded the Commission that the aid was justified. The second point is that there are, under the framework scheme for state aids to the motor vehicle industry, some restrictions on the accumulation of aid; and it is therefore a condition in this case that the UK could not grant further training subsidies for the same project under the specific Community training aid regulation.)

The Commission has taken a positive but conditional decision with regard to planned regional aid for investment by Vauxhall Motors Ltd., a UK subsidiary of General Motors of the US, at its plant in Ellesmere Port, in Cheshire. The Commission has concluded, after a careful investigation under the European Union's rules on aid to the motor vehicle industry, that it could clear the £10 million (around €15.92 million) that the UK authorities plan to grant in regional aid. The UK government had argued that the subsidies were needed to compensate Vauxhall for the higher costs of investing in Ellesmere Port rather than in Belgium, the alternative investment location, among others for the higher costs of training the workforce. The Commission agreed to this, but pointed out that the UK could not grant further training subsidies for the same project under the specific Community training aid regulation.

In August 2001 the United Kingdom authorities notified the Commission that they intended to grant £10 million in regional subsidies to help towards an investment of Vauxhall Motors at Ellesmere Port. According to the United Kingdom, parent company General Motors Europe considered two alternative sites for the project, Ellesmere Port and the Antwerp plant in Belgium. No comments from third parties were received; but the framework scheme for state aid to the motor vehicle industry requires the Commission to ensure that any aid granted in this sector is both necessary and proportional. As for necessity, the aid recipient must clearly prove that it has an economically viable alternative location for its project. The Commission concluded that the plant in Antwerp (Belgium) was indeed considered by General Motors Europe and was a credible commercial alternative and that the aid was necessary for the realisation of the project in Ellesmere Port.

To assess the proportionality of the aid, a cost-benefit analysis is carried out. This compares the costs, which an investor would bear in order to carry out the project in the region in question, with the costs for an identical project in the alternative location. It becomes thus possible to determine the specific regional handicaps of the project. The aid may neither exceed the regional aid ceiling applicable to new investments in that area nor the regional handicap calculated in the cost benefit analysis. In the project at stake, the cost-benefit analysis compared the costs of the project at Ellesmere Port with those of the alternative location in Antwerp. The analysis found that the proposal satisfied the ceilings under the scheme; but the Commission decided to take a conditional decision stating that no further, specific training aid could be granted for the project. ■