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"Three Plus"

As part of its plans for streamlining merger procedures, the Commission had favoured the so-called "3 plus" system whereby a merger case would qualify for review at the Community level whenever it was notifiable to at least three national authorities. This solution had found a lot of support within the European Parliament. However, closer analysis of the possible implications of such a system, as well as the evaluation of the feedback the Commission received in response to its Green Paper, has revealed that a "3 plus" system would have too many drawbacks, especially in the absence of harmonised national notification rules. Nevertheless, it is the Commission's understanding that the supporters of the "3 plus" idea have the same objectives as the Commission in its current proposal, in that everyone wants to optimise the allocation of merger cases between the Commission and national competition authorities in the light of the principle of subsidiarity and to reduce the number of so-called "multiple filings" as much as possible.

Fines

Both in legal and in financial terms, procedural law can be just as important as substantive law in competition cases; and at present this is particularly true of the procedural rules governing the imposition and level of fines for infringement of the competition rules of the European Communities. Where the fines imposed are heavy, the possibility that an appeal to the Court of First Instance may reduce the amount in question by two or three million pounds is a powerful incentive for legal advisers to be fully conversant with the procedural pitfalls and escape routes. On the face of it, the Commission's Guidelines on Fining Policy may largely answer some of the questions; but, although the Guidelines were intended to some extent to codify the case law, they themselves are giving rise to judicial interpretation. In this issue, the point is illustrated by the Lysine cartel case (see page 190), in which the members of the cartel collectively secured a reduction in fines of well over €7 million; one of the members had its fine reduced by nearly €3.5 million. (But whether the reductions were enough to pay the legal fees and the court costs is not on record.)

Football

It seems that there is at last closure on the question of UEFA's control over the rights to broadcast matches in the Champions League (see page 184); and the Commission's proposed decision in the Bundesliga case (see page 188) is on similar lines at the national level. However, at the time of writing, the press reports – though the Commission itself has not yet confirmed – that there is a possibility of an investigation into the broadcasting rights acquired by BSkyB. ■

DOMINANT POSITION (COMPUTERS) THE MICROSOFT CASE

Subject: Abuse of dominant position
Tying arrangements
Interoperability
Remedies

Industry: Personal computers; operating systems
(Some implications for other industries)

Parties: Commission of the European Communities
Microsoft

Source: Commission Statement IP/03/1150, dated 6th August 2003

(Note. This is the latest instalment in the long-running saga of the European case, as distinct from the American case, against Microsoft. It appears from the remedies proposed by the Commission that the case has narrowed substantially and may realistically offer a prospect of settlement without recourse to an adverse decision.)

Final Statement of Objections

The Commission has given Microsoft a final opportunity to comment before it concludes its antitrust probe. The Commission has gathered additional evidence from a wide variety of consumers, suppliers and competitors. This evidence confirms and in many respects bolsters the Commission's earlier finding that Microsoft is leveraging its dominant position from the PC into low-end servers and that Microsoft's tying of Windows Media Player to the Windows PC operating system weakens competition on the merits, stifles product innovation, and ultimately reduces consumer choice. The Commission also invites Microsoft to submit its comments on a series of remedies it intends to impose in order to bring the antitrust infringements it has identified to an end. As this complex investigation draws to a close, the Commission will continue to ensure a meticulous respect of due process. Therefore, the Commission has addressed to Microsoft a final Statement of Objections, saying that this Statement of Objections, which includes the identification of appropriate remedies, gives Microsoft a last opportunity to comment before the Commission concludes the case and reaffirming the Commission's determination to ensure that the final outcome of the case is to the benefit of innovation and consumers alike.

The evidence collected

The Commission's Statement of Objections sets out to inform Microsoft of the results of its last extensive market enquiry. The evidence gathered in this market enquiry confirms the allegations concerning lack of interoperability and tying already outlined in the Commission's two previous Statements of Objections. In

the light of this evidence, the Commission's preliminary conclusion is that Microsoft's abuses are still ongoing.

In the field of interoperability, the Commission's evidence confirms that Microsoft is leveraging its overwhelmingly dominant position from the PC into low-end servers, the computers which provide core services to PCs in corporate networks. The Commission contacted a significant number of small, medium and large enterprises selected from all industrial sectors and from across the entire EEA, and requested information on whether interoperability considerations were a factor in their purchasing choices, and whether non-disclosures of such information by Microsoft influenced their purchase decisions. An overwhelming majority of customers responding to this market enquiry highlighted that Microsoft's non-disclosure of interface information - necessary for competing servers to "talk" properly with Windows PCs and servers - did indeed artificially alter their choice in favour of Microsoft's server products. This behaviour is detrimental to competition on the merits.

Tying arrangements

As regards tying, the Commission contacted a large number of suppliers in various segments of the market. The companies constitute a representative sample of randomly selected content owners, content providers, and software developers across the EEA and the United States. All companies were asked to provide information on the specifics of their industries, and what factors determined their business decisions. The replies highlighted that the ubiquity of Windows Media Player on PCs artificially skews their development incentives in favour of Microsoft. This confirms the Commission's preliminary conclusion that Microsoft's tying of Windows Media Player to the Windows operating system weakens competition on the merits, stifles product innovation, and ultimately reduces consumer choice.

Remedies

As regards remedies, the Commission has provisionally identified the core disclosure obligations that would be indispensable for Microsoft's competitors in low-end servers to achieve full interoperability with Windows PCs and servers. Microsoft would be obliged to reveal the necessary interface information so that rival vendors of low-end servers are able to compete on a level playing-field with Microsoft.

With respect to tying, the Commission has set out two alternative proposed remedies. The first would be the untying of Windows Media Player from Windows, whereby Microsoft would be required to offer a version of Windows without Windows Media Player included. This is the normal remedy for a tying infringement. The second would be a "must-carry" provision, whereby Microsoft would be obliged to offer competing media players with Windows. Both solutions seek to ensure that consumers have a fair choice as regards media players. ■

PRICE FIXING (MUSICAL INSTRUMENTS): THE YAMAHA CASE

Subject: Price fixing
Trade restrictions
Market partitioning
Distribution arrangements

Industry: Musical instruments
(Some implications for other industries)

Parties: Commission of the European Communities
Yamaha

Source: Commission Statement IP/03/1028, dated 16 July 2003

(Note. Although this was a classic case of distribution arrangements being used to restrict trade and fix prices, the restrictions were limited and remedied as soon as the Commission intervened. The fine imposed on Yamaha was therefore not as heavy as if the restrictions had been more widespread, more systematic and less promptly ended.)

The Commission has decided to impose a fine of €2.56 million on musical instruments manufacturer Yamaha for restricting trade within the European single market and fixing resale prices in certain Member States of the European Union for such products as pianos, guitars and oboes. Although the restrictions were of a serious nature, they seemed to be limited to certain dealers, products and countries rather than the result of a deliberate strategy, and appear not to have been implemented in full. Furthermore, as soon as the Commission intervened, Yamaha took steps to end the restrictions and to redesign its European distribution system.

Yamaha sells under a selective distribution system a whole range of traditional and electronic musical instruments and equipment in Europe, such as pianos, electronic organs, guitars, saxophones and violins. The company is the European market leader for most musical instruments.

After an investigation, the Commission has concluded that Yamaha has violated the competition rules of the European Communities by entering into agreements or concerted practices aimed at partitioning the market and fixing resale prices. Such practices had the object of restricting competition, within the meaning of Article 81(1) of the EU treaty and Article 53(1) of the European Economic Agreement, in Germany, Italy, France, Austria, Belgium, The Netherlands, Denmark and Iceland.

The restrictions took different forms at different times and in different countries. They included obligations on official dealers to sell only to final customers; obligations on official dealers to purchase exclusively from the Yamaha

subsidiaries; obligations on official dealers to contact Yamaha before exporting via the Internet; and the fixing of resale prices. Agreements or restrictive practices (or both) partitioning the European market and fixing resale prices constitute a violation of the Community's rules, according to an extensive case law.

Although the infringement was qualified as serious, some of the contractual provisions were applied to only a limited number of dealers and products, were not systematically included in all Yamaha agreements throughout the EEA and have not been simultaneously implemented. Moreover, the fact that Yamaha terminated a majority of the restrictions as soon as the Commission intervened was also considered a mitigating circumstance. ■

The CVRD / Caemi Case

The Commission has authorised CVRD's proposed acquisition of sole control of Caemi, currently controlled by the Japanese iron ore trader Mitsui and CVRD. Joint control resulted from a transaction the Commission cleared in October 2001 subject to conditions. The Commission concluded that the subsequent move in the present case from joint to sole control does not give rise to new competition concerns. CVRD will stay responsible for fulfilling the said conditions.

CVRD (Companhia Vale do Rio Doce) and Caemi are Brazilian-based mining companies active in the production and selling of iron ore, kaolin and bauxite. Since CVRD is already present in the shareholding of the target company, this transaction gives raise to a change from joint to sole control. The acquisition of joint control by CVRD and Mitsui took place in the framework of a previous operation cleared by the Commission in October 2001 ("the first transaction"), following a second-phase investigation which identified serious competition concerns in the seaborne (world-wide) iron ore markets for pellets, DR pellets and the combination of DR pellets and DR lump.
In line with the approach adopted by the Commission when clearing the first transaction, the analysis of the present case has focused on the markets for the production and sale of iron ore, which are the only affected markets.

The results of the Commission's enquiry also show that the market dynamics (contractual practice, price settling and discounts policy) have not been significantly altered since the original transaction was authorised. CVRD's competitive position has remained substantially stable over the last 18 months. The Commission has therefore concluded that the notified operation has no significant impact on the relevant markets, as it does not alter the existing competitive situation resulting from the first transaction, no additional competition concerns having been identified.

Source: Commission Statement IP/03/1052, dated 18 July 2003

ABUSE OF DOMINANT POSITION (INTERNET): THE WANADOO CASE

Subject: Abuse of dominant position
Predatory pricing
Market share
Market entry
Fines

Industry: Internet service provision
(Some implications for other industries)

Parties: Commission of the European Communities
Wanadoo Interactive

Source: Commission Statement IP/03/1025, dated 16 July 2003

(Note. In the hands of a corporation with a dominant position on the market, predatory pricing is a powerful tool for putting competitors at a serious disadvantage and sometimes of putting them out of business altogether. Wanadoo suffered losses as the result of its policy – this is inevitable where pricing is below actual or economic cost – but gained a substantial share of the market: from January 2001 to September 2002, its market share rose from 46% to 72%, in a market which saw more than a five-fold increase in size over the same period. Whether the increased market share was enough to offset both the early losses and the relatively heavy fine imposed by the Commission is another matter.)

Commission Decision

The Commission has adopted a decision against Wanadoo Interactive, a subsidiary of France Télécom, for abuse of a dominant position in the form of predatory pricing in ADSL-based Internet access services for the general public. The Commission found that, up to October 2002, the retail prices charged by Wanadoo were below cost. This practice restricted market entry and development potential for competitors, to the detriment of consumers, in a market which is essential to the development of the information society. In view of the gravity of the abuse and the length of the period over which it was committed, the Commission is imposing a fine of €10.35 million.

From the end of 1999 to October 2002, Wanadoo, a 72% owned subsidiary of France Télécom, marketed its ADSL services known as Wanadoo ADSL and eXtense at prices which were below their average costs. It emerged from the Commission's investigations that the prices charged by Wanadoo were well below variable costs until August 2001 and that in the subsequent period they were approximately equivalent to variable costs, but significantly below total costs. Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considers that the abuse started only on that date.

Wanadoo suffered substantial losses up to the end of 2002 as a result of this practice. The practice coincided with a company plan to pre-empt the strategic market for high-speed Internet access. While Wanadoo was suffering large-scale losses on the relevant service, France Télécom, which at that time held almost 100% of the market for wholesale ADSL services for Internet service providers (including Wanadoo), was anticipating considerable profits in the near future on its own wholesale ADSL products.

Wanadoo's policy was deliberate, since the company was fully aware of the level of losses which it was suffering and of the legal risks associated with the launch of its eXtense service. According to in-house company documents, the company was still expecting at the beginning of 2002 to continue selling at a loss in 2003 and 2004.

Market shares

The abuse on which the Commission has taken action was designed to take the lion's share of a booming market, at the expense of other competitors. From January 2001 to September 2002, Wanadoo's market share rose from 46% to 72%, in a market which saw more than a five-fold increase in its size over the same period. This level of market penetration by Wanadoo is roughly what Wanadoo was expecting by 2004. The level of losses required in order to compete with Wanadoo had a dissuasive effect on competitors. At the end of the period during which the abuse was committed, no competitor held more than 10% of the market, and Wanadoo's main competitor had seen its market share tumble. One ADSL service provider (Mangoosta) went out of business in August 2001. The effects of Wanadoo's conduct were not confined to competitors on the ADSL segment, but extended to cable operators offering high-speed Internet access.

The abuse came to an end in October 2002, with the entry into force of new wholesale prices charged by France Télécom, more than 30% down on the previous prices charged. Since then, the French high-speed Internet access market has been growing much more rapidly and in a more balanced way as far as the various competitors are concerned. Between December 2000 and September 2002, the market had seen a five-fold increase in size. Later, market growth picked up strongly, with the ending of the abuse, and the number of Internet subscribers grew more between September 2002 and March 2003 (seven months) than between March 2001 and August 2002 (seventeen months).

The Commission's decision marks the end of an investigation initiated in September 2001 on the basis of information obtained as part of the sector enquiry into local loop unbundling. Although the abuse has been discontinued, the Commission felt it important to adopt a decision because of the risk of the abuse being repeated. The Commission considers that practices designed to capture strategic markets such as the high-speed Internet access market call for particular vigilance.

The decision follows the decision of 21 May in which the Commission fined Deutsche Telekom for the prices it charged for access to the local loop. The two decisions reflect the Commission's determination to prevent exclusionary practices by incumbent operators on strategic markets. The Commission may undertake investigations in other Member States of the same type as that carried out in the Wanadoo case.

Background

High-speed Internet access allows download speeds ten times faster than those possible with low-speed Internet access. The ease of Internet use and the volumes of data exchange which it allows mean that it is a strategic market essential to the development of the information society. ADSL (assymetric digital subscriber line) provides high-speed Internet access using a telephone line. Cable modem technology, which uses cable television networks, is an alternative to ADSL technology in areas served by cable networks.
The decision relates to two ADSL services provided by Wanadoo, both allowing download speeds of 128 kbit/s and upload speeds of 512 kbit/s: the first is the Wanadoo ADSL service, launched in November 1999, while the other is the eXtense service, launched in January 2001. The two services are very comparable. However, in the case of the ADSL service, the subscriber concludes two separate contracts, one with France Télécom for the supply of the ADSL access service known as Netissimo, the other with Wanadoo for the supply of the Internet access service proper. In the case of the eXtense service, the subscriber concludes a single contract, with Wanadoo, which provides the whole of the service (ADSL access plus Internet access). The inception of the abuse coincided with the deployment of the eXtense facility, which came at the same time as the stepping-up of Wanadoo's commercial efforts.

Community case law (Case C-62/86, Akzo v Commission; Case C-333/94, Tetra Pak) applies two tests to establish whether an abuse in the form of predatory pricing has been committed: where variable costs are not covered, an abuse is automatically presumed; where variable costs are covered, but total costs are not, the pricing is deemed to constitute an abuse if it forms part of a plan to eliminate competitors. The two tests have been applied in the Commission's decision, for the periods before and after August 2001. In this instance, the Commission carried out adjustments to costs and revenue so as to take account of the characteristics of a strongly growing market. In particular, customer acquisition costs were spread and written off over a number of years.

The investigations began in September 2001. An initial statement of objections was sent to Wanadoo in December 2001. Following an inspection on the company's premises carried out in April 2002, a further statement of objections was sent to Wanadoo in August 2002. ■

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.

EXCLUSIVITY (MEDIA RIGHTS): THE UEFA CASE

Subject: Exclusivity

Industry: Broadcasting; press; football

Parties: Commission of the European Communities
UEFA

Source: Commission Statement IP/03/1105, and MEMO/03/156, both dated 24 July 2003

(Note. The Commission's statement and memorandum, reproduced below, give the details of the final decision by the Commission in the matter of joint selling arrangements by the European soccer organization, UEFA. Essentially, UEFA will continue to market centrally the rights to live television matches, subject to the creation of various rights "packages" giving the winning broadcasters certain options.)

Commission Decision

The Commission has taken a final decision exempting the new joint selling arrangements of European soccer organisation UEFA for the media rights to the Champions League. The new policy will allow UEFA to continue selling the rights to its successful Champions League brand while bringing football within the reach of more broadcasters as well as Internet and telephone operators, and permitting clubs to market part of these rights individually. In the Commission's view, the decision will provide a broader and more varied offer of football on television; it will allow clubs to develop the rights for their own fan base and will give an impulse for the emerging new media markets such as UMTS services; and it will show that the marketing of football rights can be made compatible with the competition rules without calling into question their sale by a central body to the benefit of all stakeholders in the game.

The Commission originally objected to the joint selling arrangements, which were notified in 1999, because UEFA sold all Champions League TV rights in one package to a single broadcaster on an exclusive basis for up to four years at a time. The buyers were often free-TV broadcasters that could sub-licence some rights to pay-TV broadcasters. One of the important drawbacks of the original joint selling arrangement was that not all matches were seen live on TV while Internet and phone operators were simply denied access to the rights.

UEFA's joint selling arrangement therefore had the negative effect of restricting competition between broadcasters. By barring access to key sport content it also stifled the development of sport services on the Internet and of the new generation of mobile phones. This was not in the interest of broadcasters, clubs, fans and consumers.

UEFA's new joint selling arrangement

As a result of the Commission's objections, UEFA proposed a new joint selling arrangement, which solves the Commission's concerns, and which is operational starting with the 2003/2004-football season. According to the new system:
- UEFA will continue to market centrally the rights to live TV transmission of the Tuesday and Wednesday night matches. The main rights will be split into two separate rights packages (the Gold and Silver packages) giving the winning broadcasters the right to pick the two best matches.
- UEFA will initially have the exclusive right to sell the remaining live rights of the Champions League. However, if it does not manage to sell this so-called Bronze package within a certain cut-off date, the individual clubs will be able to market the matches themselves.

The new joint selling system also affords opportunities to new media operators as both UEFA and the football clubs will be able to offer Champions League content to Internet and operators seeking to launch or boost the new generation of mobile phone services using the UMTS technology. Individual football clubs will also, for the first time, have the right to exploit TV rights on a deferred basis and to use archive content, for example, for the production of videos, therefore provide their fans with a better and more varied offer. UEFA will not sell the rights for a period longer than three years and will do so through a public tender procedure allowing all broadcasters to put in bids.

UEFA's new joint selling system represents an improvement on the preliminary compromise reached with the Commission in July 2002 and which was subject to public consultation (see Official Journal C196 of 17 August 2002). It particularly agreed that football clubs would not be prevented from selling live rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster.

Exclusivity and joint selling

Joint selling on an exclusive basis restricts competition - whether in the sports or in any other sector - because it has the effect of reducing output and limiting price competition. The sale of the entire rights on an exclusive basis and for a long period of time has the effect of reinforcing the position of the incumbent television companies as the only ones with the financial strength to win the bids. This, in turn, leads to unsatisfied demand from broadcasters and a lesser ability to make an attractive offer to customers. Sports and films are two key ingredients for television and for pay-TV channels in particular. They are also proving increasingly critical for the development of new technologies.

Therefore the Commission could only exempt the joint marketing of the rights to the Champions League if the arrangements were modified to meet the conditions foreseen in Article 81(3) of the EU Treaty. This provision allows the Commission to exempt restrictive agreements if they contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". The Commission is also examining joint selling arrangements to national football leagues.

Background note on the UEFA Champions league

The Champions League is the most prestigious European football club competition. It pits Europe's top football clubs against each other and is organised every year by UEFA, the European Football Organisation and is one of the most watched events on television, representing around 20% of all the football rights paid broadcasters in the European Union for 1999/2000 season.

The UEFA Champions League is open to all national league champions as well as some of the second-best teams. Some countries can field in more clubs, however, according to an UEFA's coefficient ranking list. Including the qualifying stages, a total number of 72 football clubs participates in the UEFA Champions League. The Champions League starts in September with the 32 teams that qualified for the so-called last stage. For the 2003/04 season, a new format for the 32-team group stage (eight groups with four teams each) will be introduced. Following the three qualifying knockout rounds, there will be two different phases, beginning with a league format stage followed by a knockout stage, including the 1/8 finals, the quarter-finals, semi-finals and the final in May. The Champions League matches are played on Tuesdays and Wednesdays.

The Commission initiated its investigation into the joint selling by UEFA of the TV rights because UEFA notified the arrangement to the Commission on 1 February 1999. UEFA was seeking a legal guarantee that the arrangement did not fall in the category of agreements that are prohibited by Article 81(1) of the EC Treaty, or alternatively an exemption from the Community's competition rules. Competition law is not concerned with pure sporting rules, but only the economic activities connected with sports events. The Court of Justice ruled in 1974 that, as an economic activity, sport was subject to Community legislation (Case 36/74, Walgrave v Union Cycliste Internationale). The sale of broadcasting rights to sport events is a commercial activity and an extremely valuable one for that matter both for broadcasters, clubs and advertising companies.

UEFA used to sell the TV rights to a single broadcaster per Member State on an exclusive basis for periods of up to four years. The rights were split into primary and secondary rights. UEFA imposed minimum broadcasting obligations on the TV companies that won the rights. In big football nations, the broadcaster had to televise a Tuesday match live on either free TV or pay-TV and a Wednesday match live on free TV. In the smaller member associations, the contract broadcaster had to televise a Tuesday match live on free TV, if a club from that country was playing, and on Wednesday. The contract broadcaster had to broadcast highlights on free TV both nights. Once the minimum broadcast obligations were complied with any additional rights could be exploited by free TV or pay-TV.

Joint selling of free-TV and pay-TV rights combined with exclusivity has an important effect on the structure of the TV broadcasting markets since premium football is, in most countries, the driving force not only for the development of pay-TV services but also a 'must-have' content for free-television. Football is also expected to be a driving content for the rollout of new media such as Internet and

UMTS services a potential that does not appear to be exploited currently. In many countries the national football association sell the TV rights to a whole tournament in one exclusive package to one broadcaster only. Because the winning broadcaster gets all rights, there is fierce competition for the TV rights whose value can only be afforded by large broadcasters. This may increase media concentration and competition between broadcasters. If one broadcaster holds all relevant football TV rights in a Member State, it will become extremely difficult for competing broadcasters to establish themselves in that market. If different packages of rights were sold, several broadcasters would be able to compete for the rights, including smaller, regional or thematic channels.

UEFA and others have admitted that restrictions imposed on the sale of the media rights are intended to increase revenues. They have argued this is acceptable because the money is put into football. However, joint selling is a concern for all competition authorities, both on the EU and at national level, because of the commercial power this confers on the joint sales organisation, and because of the market power also enjoyed by the licensees of the rights, usually the incumbent TV players. This usually also has a negative impact on consumers as they pay more and get less for their money as they would if there was competition.

While joint selling arrangements clearly fall within the scope of Article 81(1), the Commission considers that, in certain circumstances, joint selling may be an efficient way to organise the selling of TV rights for international sports events as well as to guarantee the integrity and to protect the nature and the interest of competition. A single point of sale of media rights is an efficient trading method for the parties involved and joint selling may also be an efficient way to promote a brand such as the Champions League. However, the manner in which the TV rights are sold may not be so restrictive as to outweigh the benefits provided. According to Article 81(3) of the EC Treaty there must be a balance between the restrictions on competition and the benefits derived thereof.

The Commission is convinced that furthering competition in the broadcasting market - which this settlement is designed to achieve - will lead to better TV coverage and lower subscription fees for the consumers. Moreover, it is likely that there will be a better variety of games on TV providing more local games also to be broadcast. The Commission's intervention is likely to expand the offer of both live and deferred football on free and pay-TV as well as on the Internet. The fact that joint selling is maintained in respect of the vast majority of the live rights will avoid a situation where fans will have to switch from channel to channel to follow the UEFA Champions League.

Under UEFA's new sales policy the media rights will no longer be offered to a single operator only but split up into a large number of smaller rights' packages; the Gold and Silver packages have not gone to the same broadcaster in any of the big broadcasting markets, which the Commission takes as a good sign of the new joint selling arrangement creating more competition in the market.

In joint selling arrangements, the broadcasters that bid for the exclusive rights are reluctant to give licenses to Internet or UMTS operators, preferring to monopolise the rights. The settlement will help to remedy this, as UEFA has committed itself to make the rights available also for new media operators. Clubs will also be able to retail new media services. This is likely to contribute to a more rapid rollout of new media services to the benefit of consumers.

Diversification of income sources is good for clubs as it makes them less dependent on a single source of income. If one contractual partner out of several goes bust it is less serious for the football clubs than when they only have a single contract partner that runs into financial difficulties. The result of the Commission's action will be a greater disparity between large and small clubs. There is need for solidarity (the redistribution of revenue to ensure a more balanced sporting competition); and, if the changes expected under the joint selling arrangement alters the balance of income of the clubs significantly, then it is for the clubs themselves to implement the necessary adjustments to their solidarity mechanisms.

The Commission does not treat sport in the same as any other sector. Sporting rules such as promotion and relegation, appeals procedures and so on are unaffected. But the commercial reality of sports events is inescapable. So too are the importance and popularity of football in all the Member States. Fans are willing to spend a lot of time and money on football attending matches, buying merchandising and paying to watch it on television. Sports clubs and associations are commercial organisations as well as sporting ones. They pay taxes on their profits and are listed on stock exchanges. They compete for players and for sponsorship. The sale of their media rights profoundly affects media markets. The competition rules are there to protect consumers.

The Bundesliga Case

The Commission is planning to exempt the new system for marketing the rights to broadcast first and second division Bundesliga matches from the antitrust rules. The plan submitted by the German Football League (DFL) will ensure more variety and competition in the broadcasting of games from the Bundesliga first and second divisions. It is also expected to give a boost to the new media, UMTS and broadband Internet. In the Commission's view, the traditional central marketing system restricts competition between clubs and between media companies, exacerbating trends towards concentration in the sector. Under the new system, all broadcasting rights will no longer be sold to a single broadcaster in one package. For the first time, broadcasting rights will be unbundled and offered for sale transparently in a number of separate packages. In future, it will be possible to show all games live over the Internet and via mobile phones. First and second division Bundesliga clubs will also be allowed to sell some broadcasting rights themselves. At the next stage of the procedure the market participants will have the opportunity to present their views.

Source: Commission Statement IP/03/1106, dated 24 July 2003

The Konica / Minolta Case

The Commission has cleared the proposed acquisition of Minolta by Konica, two Japanese manufacturers of cameras, photocopiers and other imaging products. The Commission had concerns that the deal might create a dominant position in the market for photometers, which are devices used by professional photographers to measure light exposure. But Konica offered to divest its approximately 40% stake in Sekonic, a Japanese manufacturer of photometers, which removes the competition concerns. The Commission's investigation had shown that the activities of Konica and Minolta were largely complementary although they overlapped in several product markets. In the market for photocopiers and cameras, there are no competition concerns since the merged entity will still lag behind market leaders Ricoh and Canon (photocopiers) and Olympus (cameras). The only competition concerns related to the market for photometers, where the merged entity would have gained a dominant position and would have been able to act independently from consumers and competitors. These concerns were eliminated by Konica's offer of divestiture.

Source: Commission Statement IP/03/1004, dated 11 July 2003

Japan / European Union Competition Agreement

Japan and the European Union have signed an agreement designed to strengthen co-operation between their competition authorities to the benefit of companies and consumers in both jurisdictions. This is the third such agreement signed by the European Union after agreements concluded with the United States and with Canada. The agreement provides a concrete framework for co-operation between the Commission of the European Communities and the Japan Fair Trade Commission. It provides for reciprocal information on the enforcement activities of each authority that might affect the important interests of the other party. Typically, the Commission will routinely notify its Japanese counterpart of any merger proceedings or other proceedings against Japanese companies as well as cases where anti-competitive activities are carried out in Japan. This also applies to the other party. The Agreement provides for co-ordination and co-operation of enforcement activities to the extent consistent with each party's laws. Under the agreement the EU and Japan may request the other party to start enforcement actions against anti-competitive behaviour carried out in the territory of the other party. It enhances international co-operation in the fight against cartels and provides for regular contacts in order to discuss policy issues and enforcement efforts and priorities. The Agreement came into force on 9 August 2003.

Source: Commission Statement IP/03/995, dated 10 July 2003

FINES (LYSINE): THE LYSINE CARTEL CASE

Subject: Fines
Pricing policy
Sales restrictions
Information exchanges
Oligopoly

Industry: Lysine; animal feedstuffs
(Implications for most industries)

Parties: Cheil Jedang Corporation
Archer Daniels Midland
(For full list see table in report below)

Sources: Judgments of the Court of First Instance, dated 9 July 2003, in Joined Cases T-220/00, T-223/00, T-224/00 and T-230/00 (*Cheil Jedang Corporation and Others v Commission of the European Communities*); Court Press Release NI-58/03

(Note. This case has two points of interest and importance. The first concerns the policy on assessing fines: the Court's long and detailed judgment gives parties, including the Commission, full guidance on the appropriate levels of fines. In the cases involved in the lysine cartel, the Court made a reduction of €7,316,760 in the fines imposed by the Commission. The judgment is summarized in the Court's press release, the contents of which are set out below; the relevant paragraphs of the judgment run to some two hundred and fifty paragraphs. The second point concerns matters of substance, with particular reference to the impact of the cartel on the market. The purpose of the Court's observations on this aspect of the case is partly to examine the economic issues but mainly to test the argument, put forward by one of the applicants, Archer Daniels Midland, that the seriousness of the circumstances and hence the level of the fine needed to be judged in the light of the actual economic effects of the cartel's activities and not on some theoretical assessment. To a limited extent, this plea succeeded. The relevant paragraphs of the Court's judgment are set out in full in the second part of the report below.)

Text of the Court Statement

Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs which contain insufficient natural lysine, for example cereals, which enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals.

In 1995, following a secret investigation by the Federal Bureau of Investigation, searches were carried out in the United States at the premises of several companies operating in the lysine market. Following those investigations, Archer

Daniels Midland, Kyowa Hakko Kogyo, Sewon, Cheil Jedang and Ajinomoto were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995.

In July 1996 Ajinomoto offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area (EEA). The Commission sent to the undertakings requests for information concerning their conduct on the amino acids market and the meetings of the cartel.

By decision of 7 June 2000 the Commission found that there had been a series of agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA, from July 1990 to June 1995.

In that decision, the Commission applied the method set out in the Guidelines for calculating fines imposed pursuant to Article 15(2) of Council Regulation No 17. The Commission found, first, that the undertakings had all committed a very serious infringement. However, it applied differential treatment to them, taking the view, on the basis of their total turnover during the last year of the period of the infringement, that there was a considerable disparity of size between the undertakings. After considering the gravity of the infringement, the Commission then took into account its duration and thus determined the basic amount of the fine for each of the undertakings. That amount was increased and/or reduced to take account of aggravating or mitigating circumstances, such as a role as ringleader or, conversely, a passive role played by an undertaking in the cartel.

In its decision, the Commission imposed total fines of around €110 million on the companies participating in the cartel.

In their actions before the Court of First Instance, Archer Daniels Midland, Kyowa Hakko Kogyo, Daesang-Sewon and Cheil Jedang complained of the procedure adopted in fixing the fine. In particular, two of them objected to the fact that they had already been fined in the United States for their participation in that same world-wide cartel, a fact which the Commission had not taken into account.

The Court of First Instance finds that the principle of non bis in idem, according to which a person who has already been tried may not be prosecuted or fined for the same conduct, cannot be applied in the present case, because the procedures initiated and fines imposed by the Commission, on the one hand, and by the authorities of a non-Member State, in this case the United States, on the other, do not pursue the same objectives. Furthermore, although fairness requires the Commission to take account, when fixing the amount of a fine, of penalties already imposed on the undertaking in question for infringements of the cartel law of a Member State, the Court considers that there is no such obligation on the Commission where the previous fines were imposed by authorities or courts of a non-Member State.

The Court finds, however, that the Commission did not apply the reductions granted on account of mitigating circumstances in the same way to all the undertakings concerned.

It finds that the percentage increases or reductions adopted on account of aggravating or mitigating circumstances must be applied to the basic amount of the fine, determined by reference to the gravity and duration of the infringement, and not to the amount of an increase previously applied in respect of the duration of the infringement or to the figure resulting from the first increase or reduction adopted to reflect an aggravating or a mitigating circumstance. That method of calculating the fines ensures equal treatment between the various undertakings participating in one and the same cartel.

Number of the case	Name of the applicant	Amount of fine imposed by the Commission (€)	Judgment of the Court (€)
T-220/00	Cheil Jedang Corp	12,200,000	Fine reduced to 10,080,000
T-223/00	Kyowa Hakka Kogyo Co Ltd; Kyowa Hakka Europe GmbH	13,200,000	Original fine upheld
T-224/00	Archer Daniels Midland Company; Archer Daniels Midland Ingredients Ltd	47,300,000	Fine reduced to 43,875,000
T-230/00	Daesang Corporation Sewon Europe GmbH	8,900,000	Fine reduced to 7,128,240
	Total	81,600,000	74,283,240

Note: An appeal limited to questions of law may be brought before the Court of Justice of the EC against the decision of the Court of First Instance within two months of notification of the judgment.

Extracts from the Judgment in the Archer Daniels Midland case

Facts

1. The applicants, Archer Daniels Midland Company (hereinafter ADM Company) and its European subsidiary Archer Daniels Midland Ingredients Ltd (hereinafter ADM Ingredients), operate in the cereals and oil seed processing sector. They entered the lysine market in 1991.

2. Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs, such as cereals, which contain insufficient natural lysine; this enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals. Feedstuffs to which synthetic lysine is added may also substitute for feedstuffs which do contain a sufficient quantity of lysine in the natural state, such as soybean.

3. In 1995, following a secret investigation by the Federal Bureau of Investigation (FBI), searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 ADM Company, together with Kyowa Hakko Kogyo Co. Ltd (Kyowa Hakko Kogyo), Sewon Corp. Ltd, Cheil Jedang Corp. (Cheil) and Ajinomoto Co. Inc., were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the American Department of Justice, the companies were fined by the judge in charge of the case. Kyowa Hakko Kogyo and Ajinomoto Co. Inc. were each fined $10 million, ADM Company was fined $70 million and Cheil $1.25 million. The fine imposed on Sewon Corporation Ltd was, it says, $328 000. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

4. In July 1996, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, the Leniency Notice), Ajinomoto Co. Inc. offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area (EEA).

5. On 11 and 12 June 1997 the Commission carried out investigations at the European premises of ADM Company and Kyowa Hakko Europe GmbH (Kyowa Europe) pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962. Following those investigations, Kyowa Hakko Kogyo and Kyowa Europe informed the Commission of their wish to cooperate and gave it certain information concerning, in particular, a chronology of the meetings which had taken place between lysine producers.

6. On 28 July 1997 the Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to ADM Company and ADM Ingredients, to Sewon Corp. Ltd and its European subsidiary Sewon Europe GmbH (hereinafter together referred to as Sewon) and to Cheil concerning their conduct in the amino acids market and certain cartel meetings specified in the requests for information.

Following a letter from the Commission dated 14 October 1997, reminding them they had not answered, ADM Ingredients replied to the Commission's request for information concerning the lysine market. ADM Company offered no reply.

7. On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to ADM Company and ADM Ingredients (hereinafter together referred to as ADM) and the other companies concerned... In its statement of objections the Commission charged the companies in question with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes from September 1990 (in the case of Ajinomoto, Kyowa and Sewon), March 1991 (Cheil) and June 1992 (ADM) to June 1995. On receiving the statement of objections, the applicants informed the Commission that they did not substantially contest the facts.

8. On 17 August 1999, after a hearing of the companies held on 1 March 1999, the Commission sent them a supplementary statement of objections concerning the duration of the cartel, in which it alleged that Ajinomoto, Kyowa and Sewon had taken part in the cartel since at least June 1990, Cheil since at least the beginning of 1991 and the applicants since 23 June 1992. The applicants replied to this supplementary statement of objections on 6 October 1999, confirming that they did not substantially contest the facts.

Commission Decision

9. On completion of this administrative procedure, the Commission adopted Decision 2001/418/EC of 7 June 2000...

10. The Decision includes the following provisions:

Article 1

[ADM Company] and its European subsidiary [ADM Ingredients], Ajinomoto Company Incorporated and its European subsidiary Eurolysine SA, Kyowa Hakko Kogyo Company Limited and its European subsidiary Kyowa Hakko Kogyo Europe GmbH, Daesang Corporation and its European subsidiary Sewon Europe GmbH, as well as [Cheil] have infringed Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement by participating in agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA. The duration of the infringement was as follows: (a) in the case of [ADM Company] and [ADM Ingredients] from 23 June 1992 to 27 June 1995; (b) in the case of Ajinomoto Company Incorporated and Eurolysine SA from at least July 1990 to 27 June 1995; (c) in the case of Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH from at least July 1990 to 27 June 1995; (d) in the case of Daesang Corporation and Sewon Europe GmbH from at least July 1990 to 27 June 1995; and (e) in the case of [Cheil] from 27 August 1992 to 27 June 1995.

Article 2

[This concerns the level of fines and is indicated in the Table above.]

The actual effect of the cartel on the market

142. First of all, in paragraphs 228 to 230 of the Decision, the Commission concluded that the agreements in issue infringed Article 81(1) EC and found that, because they fixed prices, established sales quotas and instituted a system for the exchange of information, they had an anticompetitive object. The Commission did not, in the context of this assessment, go on to examine any restriction on competition that might have been brought about by the agreements, as was its right (see, for example, Case C-49/92 P, *Commission* v *Anic Partecipazioni*, paragraph 99).

143. Nevertheless, in assessing the gravity of the infringement, the Commission did rely on the actual impact of the cartel on the lysine market in the EEA (paragraphs 261 to 296 of the Decision), as it is required to do by the first paragraph of Section 1.A of the Guidelines, in cases where it appears that this can be measured.

144. Thus, in paragraph 261 of the Decision, the Commission expressed its view that the infringement, committed by undertakings that were practically the only lysine producers in the world, had the effect of raising prices higher than they would otherwise have been and restricting sales quantities, and therefore had an actual impact on the lysine market in the EEA.

145. As regards the effect the cartel is alleged to have had on sales volumes, the Commission observed, in paragraph 267 of the Decision, on the basis of a table illustrating the producers' market shares worldwide in 1994, that the shares actually achieved were almost identical to what had been allocated to each of them under their quota agreements. The applicants say that this is pure coincidence because the production quota agreements were expressed in terms of volume; they emphasise that in 1994 ADM's total sales exceeded the quota allotted to it.

146. That argument is not sufficient to rebut the Commission's evidence that the quotas allotted were complied with, evidence which is corroborated in paragraph 269 of the Decision by the fact that, at their meeting in Atlanta on 18 January 1995, the producers concluded that the difference between allocated quotas and actual sales of each company was not excessive and therefore the price level could be maintained (see also paragraphs 153 to 156 of the Decision).

147. That being so, it must be held that the Commission has proved to the requisite legal standard that the quotas agreement had the effect of limiting sales and preserving market shares.

The effect of the cartel on prices

148. Nevertheless, in reviewing the Commission's appraisal of the actual impact of the cartel on the market, it is particularly important that the Court examine the Commission's assessment of the cartel's effect on prices (see, to that effect, Case T-308/94, *Cascades* v *Commission*, paragraph 173, and Case T-347/94, *Mayr-*

Melnhof v *Commission*, paragraph 225). As was emphasised in the judgments just mentioned, with regard to a cartel that had a similar purpose, and as is confirmed by the statements made by the producers at their meeting on 18 January 1995, the object of the collusion on market shares was to ensure the success of the concerted price initiatives.

149. In the present case, the Commission formed the view that the infringement constituted by the agreement on prices had the effect of raising prices higher than they would otherwise have been (paragraph 261 of the Decision).

150. In so far as concerns the particular effect of causing price increases, it should be recalled that, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others* v *Commission*, paragraph 612, and Case C-219/95 P, *Ferriere Nord* v *Commission*, paragraph 38). It is clear from case-law that, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, cited above, paragraphs 619 and 620, *Mayr-Melnhof* v *Commission*, cited above, paragraph 235, and *Thyssen Stahl* v *Commission*, cited above, paragraph 645).

151. It follows, first, that in the case of price agreements, there must be a finding by the Commission that such agreements have in fact enabled the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel.

152. Secondly, it follows that, in making its assessment, the Commission must take into account all the objective conditions in the relevant market and have regard to the economic context and, if appropriate, also the legislative background. It is clear from the judgments of the Court of First Instance in the cartonboard cartel case that account should be taken of the existence of any objective economic factors which indicate that, had there been a free play of competition, prices would not have developed in the same way as the prices which were actually charged (*Cascades* v *Commission*, cited above, paragraphs 183 and 184, and *Mayr-Melnhof*, cited above, paragraphs 234 and 235).

153. It is clear from the Decision in the present case that the Commission took into account four factors in reaching its conclusion that the effect had in fact been to increase prices.

154. First of all, the Commission noted that ADM Company's entry into the market in 1991 initially put significant downward pressure on prices, causing them to fall by 50% during the summer of 1992 and that, following the conclusion of the agreements between the undertakings concerned, lysine prices in Europe rose significantly and within six months were brought back to approximately 80% of their price at the beginning of 1991 (paragraph 262 of the Decision). That factor, the relevance of which is clear, is not really in dispute. Nevertheless, the

applicants argue, in their second complaint, that ADM Company's entry into the market had a positive effect. However, as the Commission rightly points out, any positive effect that might have been expected to arise from this new competitor's entry into a previously closed lysine market was completely cancelled out by the cartel in which it then participated.

155. Secondly, the Commission pointed to the increase in lysine prices which occurred in July 1993 after ADM Company had lowered its prices and the lysine producers had concluded a new agreement in June of that year (paragraph 263 of the Decision).

156. Thirdly, the Commission observed that the price agreements concluded after the loss of American soybean crops in the Mississippi flood in the summer of 1993 (see the agreement signed in Paris on 5 October 1993, paragraph 112 et seq. of the Decision) enabled prices to be kept relatively high (approximately DEM 5 per kilogram) until the beginning of 1995, even though production capacity had doubled and demand had risen by only 60% (paragraph 264 of the Decision).

157. The applicants maintain that that conclusion is incorrect. On the contrary, it was the paucity of substitutes for synthetic lysine brought about by the Mississippi flood that caused prices to increase.

158. On this point it should be emphasised that the loss of a large proportion of American soybean crops, from which natural lysine - a substitute for synthetic lysine - is derived, could certainly have caused an increase in the price of the cereals to which, in the case of animal foodstuffs, synthetic lysine is added, but it could also have led to the creation of excess stocks of lysine. It was on the basis of those considerations, aired at their meeting in Paris on 5 October 1993, that the producers expressed their concern that prices could fall significantly and decided to reduce their supply by almost half (paragraph 114 of the Decision). The Commission was thus entitled to deduce from this circumstance, taken together with the doubling of production capacity between 1993 and 1995 and a lesser increase in demand, that prices were artificially high. The applicants' argument, mentioned in paragraph 157 of the present judgment, must therefore be rejected.

159. The fourth and last factor mentioned in the Decision is the Commission's assertion that "[i]t is inconceivable that the parties would have repeatedly agreed to meet in locations across the world to fix prices ... over such a long period without there being an impact on the lysine market" (paragraph 286 of the Decision). As the applicants maintain, this assertion has no probative force because it is based on pure conjecture rather than objective economic factors. It must therefore be rejected.

160. It must be observed that the applicants do not really dispute the correlation which the Commission finds between the price initiatives and the prices actually charged in the market by the cartel members (paragraphs 262 to 264 of the Decision). They merely say that the prices which ADM's clients were charged were on occasion lower than the agreed prices. In this connection, it should be observed that, since this was an agreement relating to price objectives, rather than

to fixed prices, it is clear that implementation of that agreement simply meant that the parties would endeavour to achieve those objectives. Moreover, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, cited above, paragraphs 150 and 152).

161. On the other hand, the applicants maintain that the Commission omitted to take into account other relevant factors capable of countering those on which it based its conclusion that price increases were brought about, namely:
- the constraints on price-fixing arising from the existence of substitute products and the potential entry of new competitors in the market,
- the oligopolistic structure of the market, which, according to two economic studies, explains ADM's conduct (application of the game theory inspired by Cournot's oligopoly model).

Constraints on price fixing as the result of substitutability

162. First of all, the Commission was, according to the applicants, wrong to take the view that the constraints just mentioned did not keep lysine prices at the level they would have been absent any collusion.

163. As far as the substitutability of products is concerned, it is clear from paragraphs 43 to 48 and 274 to 276 of the Decision that the Commission did indeed take account of that factor as a determinant of lysine prices. After observing that it is technically possible to substitute natural lysine for synthetic lysine, provided other substances are added to obtain the proper protein balance, the Commission acknowledged (in paragraph 275 of the Decision), in response to a similar argument put forward by Ajinomoto during the administrative procedure, that where the price of soybean meal (from which natural lysine is derived) is sufficiently low, natural lysine may then be substituted for synthetic lysine, the price of soybean meal providing a price ceiling for the producers in question. However, the Commission then went on to emphasise (in paragraph 276 of the Decision) that the price of soybean meal remained sufficiently high during the period of the infringement to enable the parties involved in the cartel to increase their prices.

164. The applicants do not explicitly contest this conclusion but merely call into question the probative value of the extract from an economic report set out in paragraph 276 of the Decision. In this connection, they maintain that the report related to the American market and that it was not disclosed to them during the administrative procedure. The content of the report may undoubtedly be regarded as irrelevant to the conclusion drawn in paragraph 276 of the Decision because it is not evidence as such but a theoretical explanation of the phenomenon observed using data gathered in the United States. Moreover, the Commission itself indicates that it has not relied on the report as evidence. It should be remembered in this connection that the Commission was here merely replying to an argument put forward during the administrative procedure by Ajinomoto, not ADM. The

question of non-disclosure of the studies in issue will be considered in paragraph 327 of the present judgment.

165. As regards the potential entry of new competitors in the market during the period of the infringement, the applicants offer no information, such as the names of undertakings that might have been inclined to enter the market, that might lend credence to its argument. It is not disputed that the production of synthetic lysine requires substantial investments to be made and relies on advanced technology (paragraphs 29 and 30 of the Decision) and this explains why the market remained particularly closed.

Effects of oligopoly on the market

166. Secondly, as regards specifically the oligopolistic nature of the market, the applicants complain that the Commission dismissed the two economic studies relied on by ADM during the administrative procedure, which in fact tend to show that ADM had behaved as a cheat within the cartel. On the basis of a model of a game theory inspired by Cournot's oligopoly model, which gave rise to the notion of oligopoly, they seek to show that the Commission has failed to prove that prices actually charged were higher than those which would have been charged in the context of a non-cooperative oligopoly.

167. It must be observed that, by this argument, the applicants seek only to allege that ADM's conduct within the cartel was that of a cheat. The argument must therefore be held to be inoperative. Indeed that also applies to the argument that the agreement for the exchange of information increased competition and the assertion that ADM provided incorrect information. In fact, as was stated in paragraph 160 of the present judgment, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, cited above, paragraphs 150 and 152).

168. It must also be observed that a concerted increase in prices has an even more deleterious effect on a market that is already oligopolistic. Such a structure is an objective economic factor likely to attenuate the effects of competition between producers. Conduct on the part of undertakings like that of ADM definitively reduces competition even further, particularly where there is price-fixing. Consequently, the applicants cannot rely on the oligopolistic nature of the market to justify their assertion that the infringement had no actual effect on the market (see, to that effect, *Thyssen Stahl* v *Commission*, cited above, paragraph 302).

169. In addition to the fact that ADM itself admits that two of the meetings of lysine producers, those of 8 December 1993 and 10 March 1994, had a statistically significant positive effect in raising lysine prices (paragraph 284 of the Decision), the applicants have failed to produce any specific evidence capable of countering the evidence put forward by the Commission and the necessary conclusion is therefore that the Commission has proved to a sufficient legal standard that the cartel had an adverse effect on the market.

170. The Commission's argument that, by disputing the causal link between the cartel and the increase in prices, the applicants are calling into question the substantive truth of the facts and thus justifying its application for the fine to be increased should be examined in the context of the Commission's counterclaim for the fine to be increased.

171. It follows from all the foregoing considerations concerning the nature of the infringement and its actual effects that the Commission was entitled, particularly in view of the extent of the geographical market in question (the EEA), to conclude that the cartel constituted a very serious infringement within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines. ■

Commission's new Chief Competition Economist

The Commission has appointed Professor Lars-Hendrik Röller as the Chief Competition Economist in its Directorate-General for Competition. Mr Röller is currently Professor of Economics at Humboldt University in Berlin. He is also Director of the Institute for Competitiveness and Industrial Change in Berlin. Since 1996, he has been programme director of the industrial organisation group of the London-based Centre for Economic Policy Research (CEPR). He had previously held posts at a number of academic institutions, including the French-based European Institute of Business Management INSEAD, Stanford University, New York University and the Universitat Autonoma de Barcelona.

Professor Röller is expected to take up the post on 1st September. The Chief Economist will report directly to the Director General of Competition and have a dedicated staff of approximately 10 specialised economists. The appointment will be for a period of 3 years, non-renewable, as decided by the Commission in December 2002 as part of the Commission's merger control review package. His role, however, extends beyond mergers to include anti-trust and state aid control.

He will have three main tasks:
- guidance on economics and econometrics in the application of competition rules of the European Communities (which may include contributing to the development of general policy instruments);
- general guidance in individual competition cases from their early stages; and
- detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis.

Source: Commission Statement IP/03/1027, dated 16 July 2003