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COMPETITION LAW IN THE EUROPEAN COMMUNITIES

CONTENTS

26 COMMENT

The Treaty of Nice
"Rescue Aids"

27 ACQUISITIONS (PACKAGING)

The Tetra Laval / Sidel Case

29 SELECTIVE DISTRIBUTION (MOTOR VEHICLES)

The Audi Case

32 EXCLUSIVITY (BROADCASTING)

The FAPL Case

34 ACQUISITIONS (BROADCASTING)

The Newscorp / Telepiu Case

STATE AIDS

The Altmark Case 36
The Air Lib Case 37
The France Telecom Case 39
The French Wine-Growing Case 42
The ABX Case 50

MISCELLANEOUS

The Celanese / Degussa Case 31
The Microsoft Cases 35
The Siemens / Drügerwerk Case 41

The Treaty of Nice

On 1 February 2003, the Treaty of Nice came into force. The Treaty negotiations were concluded in December 2000; and the Treaty was officially signed on 26 February 2001. Ireland was the last of the 15 Member States to ratify the Treaty: it did so after a referendum held on 20 October 2002 and deposited its instrument of ratification in December 2002. The Treaty stipulates that it comes into force on the first day of the second month following the deposit by the last Member State to ratify. The main purpose of the Treaty is to make such adaptations to the European institutions as are necessary for enlargement of the European Union. The Treaty will also facilitate decision-making in the Council of Ministers by changing the decision rule from unanimity to qualified majority in a number of policy fields. It foresees a major reform of the judicial system to tackle the case overload in the Court of Justice of the European Communities. Finally, it improves the procedure to detect and address a serious breach of fundamental rights by a Member State. It is unlikely to have any direct effect on the substance of competition policy but may affect legislation and judicial procedures in the competition field.

"Rescue Aids"

State aids designed to rescue ailing firms have to be assessed by the Commission according to special criteria, which are set out in the "Community Guidelines on aid for rescuing and restructuring firms in difficulty". According to these Guidelines, the Commission can approve rescue aid as long as it is a one-off support measure to keep a company in business for a limited period necessary to develop either a restructuring or a liquidation plan. In the current case involving the German aircraft manufacturer *Fairchild Dornier*, the Commission doubts whether the criteria are met. First of all, the Guidelines do not allow outright grants but only loans. Secondly, it is not clear whether the assistance is limited to a six month period. Thirdly, the Commission has not received a coherent liquidation plan and there are doubts that the aid is limited to the minimum necessary to keep the company afloat until such a plan can be developed. Fourthly, the Commission notes that Germany is in breach of its commitment to submit a restructuring or liquidation plan within six months after approval of the first rescue aid measure in June 2002. Finally, the Commission doubts that the aid measures could be approved as restructuring aid because there is neither a restructuring plan nor a financial partner that would ensure return to long-term profitability of the company. The outcome in the case is awaited. So, too, is the outcome in another "rescue" case, reported more fully in this issue, involving *France Telecom* (see page 39). *ABX Logistics* were luckier (see page 50); but there the Commission has concluded that "the aid is justified for acute social reasons because it is limited to the minimum amount needed to keep the three direct recipients afloat long enough to take a decision on their future". ■

ACQUISITIONS (PACKAGING): THE TETRA LAVAL / SIDEL CASE

Subject: Acquisitions
Conditions

Industry: Packaging; cartons

Parties: Tetra Laval
Sidel

Source: Commission Statement IP/03/36, dated 13 January 2003

(Note. This case, which has proceeded with relative speed, shows what may happen if the Court annuls a decision by the Commission to prohibit a merger. The Commission has to reopen the case; and in this instance it did so, with a favourable outcome for the parties – subject to certain conditions on licensing.)

The Commission has decided to clear the acquisition of French plastic packaging machines maker Sidel by Swiss-Swedish carton packaging leader Tetra Laval. The decision follows a new investigation in the light of the Court of First Instance's annulment of the Commission's decision of 30 October 2001, which had prohibited the acquisition. The clearance is conditional on the fulfilment by Tetra of a commitment to license its upcoming "Tetra Fast" stretch blow moulding (SBM) technology, which is currently being tested.

Following the judgment of the Court of First Instance (CFI) of 25 October 2002 annulling the Commission's prohibition decision of 30 October 2001, the Commission was required to make a new assessment of the transaction. Under the Merger Regulation, the Commission is required to reassess a transaction if its decision is annulled by the CFI.

Tetra Laval BV is the world's leader for carton packaging with an overall market share in Europe of approximately 80 percent in aseptic carton packaging. Sidel SA is the leading manufacturer of plastic polyethylene terephthalate (PET) packaging equipment and in particular stretch blow-moulding (SBM) machines. SBM machines produce finished PET plastic bottles by stretching and blowing the PET preforms in a mould, which gives the bottle its shape (stretch-blow moulding). The operation concerns the market for the packaging of liquid food products. There are four main packaging materials for such liquids: carton and plastic (including PET and HDPE high-density polyethylene) are two of these, the other two being cans and glass.

The Commission's second investigation of the Tetra Laval/Sidel deal focused on addressing the various points raised in the CFI's Judgment, which required further investigation. On the basis of the Court's ruling, the Commission had to examine the impact of the transaction on the wider SBM machines markets rather than the narrower markets for SBM machines by end-use.

However, the Commission acquired evidence about a new SBM technology called "Tetra Fast", which Tetra has been developing and which had not been analysed in the previous decision. Although this Tetra Fast technology is still being developed it has reached field-testing stage and therefore gives rise to serious doubts as to the creation of a dominant position on wider SBM markets. This is because, in combination with Sidel's clear technological and other advantages, it seems to be capable of having a decisive impact on the merged entity's future positions on SBM markets.

But this concern was removed by Tetra's commitment to license its Tetra Fast technology. The Commission took note of further commitments regarding Tetra's assignment of proprietary SBM technology unrelated to "Tetra Fast" and regarding the PET pre-forms market which Tetra undertook not to re-enter for the next five years. Evaluating the information available after the new investigation within the terms of the CFI's Judgment, the Commission could no longer conclude that the operation would create a dominant position, other than as related to the "Tetra Fast" technology.

On 8 January 2003 the Commission lodged an appeal against the CFI's annulment of its prohibition decision of 30 October 2001 and subsequent separation decision of 30 January 2002 (IP/02/1952). Today's clearance decision, which takes account of the Judgment of the CFI, could be affected by the outcome of the Commission's appeal and by a possible re-examination of the Commission's earlier decision by the Court of Justice or the CFI, in the event of the matter being referred back to it by the Court of Justice.

Background

In October 2001, the Commission prohibited the deal on the grounds that the combination of Tetra Laval with Sidel would: 1) lead to the creation of a dominant position in the European market for PET packaging equipment used for sensitive products and; 2) to the strengthening of a dominant position in aseptic carton packaging equipment and aseptic cartons in Europe. Aseptic packaging is used for long life liquids, which do not require chilled distribution. This decision was annulled by the CFI's Judgment of 25 October 2002. The annulment of the prohibition decision triggered a new re-examination, which started on 18 November 2002 after Tetra provided the Commission with updated information.

The proposed acquisition was first notified to the Commission on 18 May 2001 following a takeover bid for Sidel on 27 March 2001 through Tetra's French subsidiary Tetra Laval. The existence of the Tetra Fast technology is a new element, which has surfaced since the annulled Decision. Conventional stretch blow moulding involves using a compressor generating approximately 40 bar of pressure for blowing the bottle from the heated pre-form. The Tetra Fast technology, by contrast, is based on the concept of using a hydrogen/oxygen (explosive) chemical reaction to form PET bottles, instead of using compressed air. The explosive process has a sterilising effect and is capable of achieving substantial cost savings. ■

SELECTIVE DISTRIBUTION (MOTOR VEHICLES): THE AUDI CASE

Subject: Selective distribution
Block exemption

Industry: Motor vehicles

Parties: Audi AG
Volkswagen Group

Source: Commission Statement IP/03/80, dated 20 January 2003

(Note. This case has some value to those anxious to act without delay on the recently adopted block exemption on selective distribution in the motor vehicle sector. Taken together with the Opel case, referred to in the text of the report, some guidance is offered to traders, dealers and consumers on the way in which, in practice, the block exemption rules are intended to work.)

The Commission has reached agreement with Audi AG, the German car manufacturer belonging to the Volkswagen group, on the authorisation of repair shops in the Audi network. Audi has undertaken to establish a system of qualitative selective distribution for the provision of after-sales services to benefit from the new block exemption regulation. This permits former Audi dealers or repairers who meet the relevant quality criteria to remain active in the market as members of Audi's network. In addition, Volkswagen AG will ensure that the same policy will be followed by all the other brands of the Volkswagen group.

According to the Commission, the settlement achieved with Volkswagen and Audi provides the first example of action taken with respect to the new rules in the motor vehicle sector. It is intended to serve as guidance to the entire motor vehicle sector. As a result of the precedent set, many small repairers will be able to stay on within Audi's authorised network, and will have a better opportunity to compete.

The new block exemption regulation for the motor vehicle sector aims to increase competition for both the sale of new motor vehicles and the provision of after-sales repair and maintenance services. Since September 2002, the Commission has received many formal complaints and letters from Audi dealers and authorised Audi repairers whose agreements were terminated by Audi. These complaints relate to Audi's refusal to prolong agreements with former dealers or repairers who nevertheless fulfil the qualitative criteria for authorisation as Audi repairers.

The new motor vehicle block exemption regulation entered into force on 1 October 2002. It foresees a transitional period in respect of certain agreements, which may therefore benefit from the former motor vehicle block exemption regulation until 30 September 2003. To take advantage of the transitional period,

agreements have to satisfy two conditions: first, they must already have been in force on 30 September 2002 and second, they must satisfy the conditions for exemption provided for in the former block exemption regulation.

To ensure the provision of repair and maintenance services for the cars of its brand, Audi has established a network of authorised dealers, who sell new cars and at the same time provide these after-sales services. In addition, Audi has concluded agreements with authorised Audi repairers who only provide after-sales services.

The agreements between Audi and its authorised repairers cannot benefit from the transitional period. Such agreements, which relate purely to servicing, were not covered by the former block exemption, as they do not provide for a link between the sale of new vehicles and the servicing of vehicles, the existence of which was one of the conditions for the application of the former block exemption regulation. Consequently, to benefit from the new block exemption, Audi has now agreed to apply a system of qualitative selective distribution with regard to its after-sales services. This means that Audi will only use qualitative criteria for the selection of authorised repairers, and will conclude servicing agreements with repairers that satisfy these criteria. Moreover, Audi must not apply these criteria in a discriminatory manner.

As far as the practical implementation of this solution is concerned, Audi has extended agreements with authorised Audi dealers or repairers in respect of which termination has taken effect since the new block exemption regulation came into force on 1 October 2002, as well as those where termination will take effect in the near future (that is, before the end of the transitional period on 30 September 2003) as service agreements. To this effect, Audi is contacting the operators concerned and allowing them either to stay in the Audi network as authorised repairers or to re-enter it, as the case may be. In this respect, it is presumed that dealer/repairers whose agreements were brought to an end a short time ago, still fulfil the qualitative criteria currently applicable to authorised Audi repairers.

Audi will communicate the qualitative criteria currently applicable to authorised Audi repairers without delay to former authorised Audi dealers or repairers whose agreements were brought to an end before the entry into force of the new Regulation and who are now applying to become authorised Audi repairers once more. In these cases it can equally be presumed that these operators still fulfil the qualitative criteria currently applicable to authorised Audi repairers. Once a repairer declares that it fulfils these criteria, Audi should immediately assess whether the criteria are fulfilled and, in the affirmative, allow the candidate to become an authorised Audi repairer. Audi will apply the same procedure with regard to independent repairers who have never been members of the Audi network but who now want to become authorised Audi repairers. Volkswagen AG and Audi AG have confirmed to the Commission that they will fully comply with the obligations described above for all brands of the Volkswagen group.

Any manufacturer who operates a network of service outlets and has a market share of over 30% for the relevant repair and maintenance services will not be able to benefit from the transition period provided for by the new Regulation with regard to its servicing agreements. Consequently, such a manufacturer must now establish a qualitative selective distribution system for its networks of authorised repairers. In contrast, to benefit from the block exemption, a manufacturer with a market share of over 30% who does not operate a network of service outlets outside his dealer network, and whose dealer network complies in all respects with the former motor vehicle block exemption regulation, will have to apply qualitative selection after the end of the transitional period on 30 September 2003 at the latest.

A similar solution was achieved in September 2002 as regards authorised repairers for cars of the Opel brand. These cases provide guidance for other motor vehicle manufacturers in similar circumstances with regard to their after-sales servicing networks. The Commission is confident that its monitoring will be helpful for consumers, vehicle manufacturers and other interested parties with regard to the application of the new rules. ■

The Celanese / Degussa Case

The Commission has decided to open a detailed investigation into a proposed joint venture between German companies Celanese and Degussa. On 18 December 2002, the Commission received notification of the proposed operation whereby Celanese Chemicals Europe GmbH, a subsidiary of Celanese AG, and Degussa AG's Oxeno Olefinchemie GmbH create a 50/50 joint venture in the field of propylene-based oxo chemicals in Europe. The joint venture will merge the commercial, technical and operational C3-oxo business activities of Celanese in Oberhausen, Germany, with those of Degussa's Oxeno subsidiary in Marl, also in Germany. Oxo Chemicals are primarily used as chemical intermediates, solvents and plasticizers. A preliminary examination has identified competition concerns in a number of markets where the combined entity would have very high market shares. According to the information available, the joint venture would have market shares of between 40 and 55% of the products concerned in Europe, well ahead of competitors BASF of Germany, Perstorp Oxo of Sweden and Atofina of France. In its in-depth investigation the Commission will seek to establish whether such high market shares could give the combined entity a dominant position in the products at stake. Degussa is the world's largest producer of specialty chemicals. It is controlled by German energy group E.ON AG. Celanese is also a chemicals company with a world-wide presence, but specialises in basic chemical products, acetates, technical synthetic materials and food additives.

Source: Commission Statement IP/03/154, dated 31 January 2003

EXCLUSIVITY (BROADCASTING): THE FAPL CASE

Subject: Exclusivity
Joint selling
Price fixing

Industry: Football; sports

Parties: Football Association Premier League (FAPL)

Source: Commission Statement IP/02/1951, dated 20 December 2002

(Note. It is perhaps an exaggeration to say, as the Commission does in its Statement below, that joint selling is tantamount to price fixing. A more persuasive point made in the Commission's Statement is that one effect of joint selling of media rights, especially when coupled with exclusivity, is that only big media groups can afford the acquisition and exploitation of the bundle of rights on offer. If the FAPL can make some concessions to the Commission, probably in the form of a willingness to allow important exceptions to its present policy, there is a fair chance that the Commission will approve an amended scheme.)

The Commission has sent a Statement of Objections to the English Football Association Premier League (FAPL) over the joint selling of the media rights to Premier League matches. Joint selling is tantamount to price-fixing, which could be exempted only if the restrictions of competition were strictly necessary to ensure the legitimate goals pursued by the arrangements for example solidarity among clubs and if they resulted in benefits for other interested parties, in particular football fans. These same considerations have led the Commission in June to reach a preliminary positive view on the modified rules of UEFA for the joint selling of the media rights to the final stages of the Champions League.

In June 2001 the Commission opened an investigation on its own initiative into the joint selling of media rights to the English Premier League. A year later, in June 2002, the Premier League notified its Regulations concerning the joint selling of the commercial rights to the Premier League and requested clearance under European Community competition rules.

The Premier League sells packages of media rights on behalf of the League clubs to television companies in Britain and Ireland on an exclusive basis. Under these arrangements, clubs are prevented from selling any rights on their own, even those that are not included in the packages. In practice, this means that at present only 25% of the Premier League matches are broadcast live.

One effect of joint selling, especially when coupled with exclusivity, is that only big media groups can afford the acquisition and exploitation of the bundle of rights. This leads to higher prices and shuts out competitors from key content. Football fans are also potentially harmed since they are offered less football on

TV, or no coverage at all in those cases where they do not subscribe to pay-TV as there are no live matches on free TV. The lack of competition may also limit the packages of rights available for new media and new technologies, in particular the third-generation of mobile phones, which could see their introduction slowed down as a result.

All these anti-competitive effects do not mean, however, that joint selling is to be banned outright. Article 81(3) requires the Commission to assess whether agreements, which on the face of it are anti-competitive, could bring benefits, not least to the consumer, in which case they could be exempted.

The Commission fully accepts that sport is not to be treated like any other sector and respects the declaration of the European Council in Nice in December 2000, which encourages a redistribution of part of the revenue from the sales of TV rights at the appropriate levels. Furthermore, in June the Commission reached a preliminary settlement with European football governing body UEFA regarding the joint selling of the Champions League. Under the proposed settlement, the Commission would accept a limited joint selling agreement subject to a number of conditions, leading to more matches being made available live, and greater individual selling of rights by the clubs.

As regards the Premier League, the Commission considers that the current joint selling arrangements are anti-competitive because they have the effect of foreclosing the market for other broadcasters and ultimately limit media coverage of soccer events to the detriment of consumers. The Commission believes at this stage that the selling of the media rights as practised by the FAPL is not indispensable for guaranteeing solidarity among clubs participating in the English leagues and that it is possible to achieve solidarity without incurring anti-competitive effects.

The Commission will examine carefully and with an open mind any proposals that the FAPL may submit to render the current arrangements compatible with European competition law and to guarantee open access to media coverage of football. The sending of a Statement of Objections does not prejudge the final outcome of the investigation and respects the rights of the notifying party and other interested parties to be heard. The FAPL has two and a half months to reply to the Commission's objections. It can also request a hearing at which it would be able to submit its arguments directly to the representatives of the national competition authorities. ■

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.

ACQUISITIONS (BROADCASTING): THE NEWSCORP / TELEPIU CASE

Subject: Acquisitions

Industry: Broadcasting; television
(Some implications for other sectors of the press and media)

Parties: Newscorp
Telepiu
Vivendi Universal
Telecom Italia
Stream

Source: Commission Statement IP/02/1782, dated 29 November 2002

(Note. Media acquisitions and mergers always have a certain sensitivity; and, in the present case, the Commission is troubled by two aspects of the proposed operations. The first concerns the effects on the Italian pay-TV market, in which the combined firms would have a near monopoly. The second concerns the wider market implications, given the participation of Telecom Italia and the possible effects on other media. Since the investigation is proving complex, the Commission needs more time. The reasons for proceeding to an "in-depth" or "second-stage" probe are confined to cases in which the Commission has serious doubts about a case: it would be wrong for this provision to be used solely to give the Commission further time to investigate.)

The Commission has decided to start a detailed investigation into the planned acquisition of the Italian pay-TV company Telepiù by the Australian company Newscorp, which it will then merge with Stream, its own pay-TV operation in Italy. The investigation will enable the Commission to carry out a further analysis of the impact of the merger in Italy and, in particular, to conclude whether the package of undertakings already submitted by Newscorp truly favours the emergence of new competitors in order to prevent a monopoly in the pay-TV market.

Telepiù was created in 1991 as an analogue pay-TV platform and since 1997 Vivendi Universal has wholly controlled it. Stream started operating as a satellite pay-TV platform in Italy in 1998. Since 2000, it has been jointly controlled by NewsCorp and Telecom Italia on a fifty-fifty basis supported by a shareholders' agreement. On October 16, 2001, Newscorp notified the Commission of an agreement under which it would acquire control of Telepiù, which would then be merged with Stream. The Italian telecommunications operator Telecom Italia would hold a 20% stake in the new combined entity.

The merger would create a near monopoly in Italy since Stream and Telepiù are currently the only providers of pay-TV in the country, although cable operator e.Biscom has recently started to provide video on demand services to its clients.

The operation also raises competition concerns regarding the acquisition of broadcasting rights for "premium" content such as blockbuster movies and football matches. The in-depth investigation will enable the Commission to assess carefully the impact of the merger in the marketplace before taking a final decision.

The proposed transaction constitutes the "mirror image" of a previously aborted deal between Telepiù's parent Vivendi and Newscorp which would have led to the acquisition of Stream by Vivendi. This inverted operation did not meet the turnover thresholds set in the Merger Regulation which determine the exclusive jurisdiction of the Commission over a deal. Instead it was notified to the Italian Authorities, which cleared it in May, 2001, subject to conditions. The deal was subsequently abandoned and the current operation was notified to the Commission because in this case it did meet the turnover thresholds.

In the course of the first-phase examination of the new case, the Commission received from Newscorp a package of undertakings identical to the onesimposed by the Italian Antitrust Authority as conditions for clearance. The comprehensive remedy package is aimed at creating the conditions for effective potential competition in the affected markets. However, the sheer complexity of the remedies proposed and the limited time available to carry out a proper assessment have made it impossible to conclude, in the short time available in first phase, whether they would be sufficient to remove, in a clear-cut manner, all competition concerns. Furthermore, extra time and investigation will also help shed additional light on the potential side-effects of the transaction on certain telecommunication-related markets (such as broadband Internet access). This has proved necessary in the light of the participation of Telecom Italia in the merged entity and the possible competitive concerns arising from such participation. ■

The Microsoft Cases

Readers may have seen reports in the press about Microsoft's agreement with a Commission Working Party to implement a comprehensive package of data protection measures, which will mean making substantial changes to the existing .NET Passport system. The most important result of the changes is that users will get much more information and choice as to which data they want to provide and under which conditions these data will be processed by Microsoft or the participating websites. The Commission is, however, at pains to point out that the task of the Working Party on Data Protection is not related to and has no influence on the Commission's ongoing competition case against Microsoft.

Source: Commission Statement IP/03/151, dated 30th January 2003

STATE AIDS (PUBLIC SERVICES): THE ALTMARK CASE

Subject: State aids

Parties: (See below)

Source: Opinion of the Advocate General, dated 14 January 2003, in Case C-280/00 (*Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*)

(Note. An important principle is discussed by the Advocate General in a case before the Court of Justice of the European Communities: he takes the view that the financing of public services constitutes State aid for the purposes of European Community law. It should be noted that the Opinions expressed by Advocates General are of "persuasive", but not binding, effect in law: the Court does not have to follow what the Advocates General recommend. Their function is to propose to the Court, acting with complete independence, a legal solution to the cases assigned to them. The judges of the Court of Justice are now starting their deliberations in the present case. Judgment will be delivered at a later date.)

In the Advocate General's view in this case, Member States must in principle notify their financing plans to the Commission and may not implement them without prior authorisation from the Commission. The Advocate General states that this review machinery is not liable to disrupt the functioning of public services in the Member States. The question of the financing of public services is currently the subject of several cases before the Court of Justice. In view of the importance of the question, the Court, in order to answer a question put by a German court, decided to have recourse to an exceptional procedure.

The case concerns a public bus transport service in the District of Stendal in Germany. In 1994 the District issued transport licences to Altmark and granted it subsidies to cover the costs of discharging its public service obligations. A competing company, NVGA, brought proceedings before the German courts, claiming that the subsidies paid to Altmark were contrary to the Community rules on State aid. The Federal Administrative Court asked the Court of Justice for a ruling on the nature of those subsidies. Altmark and NVGA submitted arguments to the Court at a first hearing in late 2001. However, in view of the importance of the question, the Court decided to arrange a second hearing to request all the Member States and the Council and the Commission to put forward their points of view. Advocate General Léger has now delivered his second Opinion in this case.

The Advocate General considers that State financing of public services constitutes State aid within the meaning of the Treaty. In his view, such financing is normally subject to the Community machinery for review of aid. That means that, in principle, Member States must notify their financing plans to the Commission and that they may not grant that financing without prior

authorisation from the Commission. At the hearing, some Member States submitted that this review machinery could endanger the functioning of public services. They consider that the procedure for examining aid is relatively long and that, for certain kinds of public services, it is difficult to wait for the Commission's authorisation. The Advocate General examines this argument in detail. He explains that , for several reasons, the aid review machinery is not liable to disrupt the functioning of public services.

First, the Advocate General points out that the Treaty rules apply only to aid paid to entities that carry on an economic activity. It follows, in his view, that the financing of certain essential sectors of the State, such as compulsory social security schemes or compulsory education, does not have to be examined by the Commission.

Second, the Advocate General points out that, with respect to financing that does have to be notified, the Commission is obliged to carry out an initial examination of the aid within two months from notification. If it does not react within that period, the Member States may grant the financing without waiting for authorisation. Moreover, in cases of particular urgency, the Treaty provides for a duty of sincere cooperation between the Commission and the Member States, which should make it possible to give priority treatment to such cases.

Third, the Advocate General notes that the Commission could adopt a "regulation for exemption by category". Such regulations define the conditions under which certain categories of aid are compatible with the Treaty. Aid paid in accordance with those regulations is then exempted from the obligation to notify. Consequently, if the Commission were to adopt such a regulation, the Member States could finance public services without having to wait for authorisation from the Commission. In those circumstances, the Advocate General considers that the Community machinery for review of aid (whether by individual decisions or by exemption regulations) is not liable to harm the quality and continuity of public services in the Member States. ■

The Air Lib Case

STATE AIDS (AVIATION): THE AIR LIB CASE

Subject: State aids

Industry: Aviation, airlines

Parties: Air Lib

Source: Commission Statement IP/03/94, 21 January 2003

(Note. Rescue aid by the state is a controversial subject; and there is a fine line between the kinds of state aid that are permissible under the Commission's Guidelines and those that are not. In addition, special rules apply to state aids in

the aviation sector. The present case reflects the difficulties involved in assessing the overall benefits of state aids in these circumstances.)

The Commission has decided to start a formal investigation into the measures taken by France to support Air Lib, in view of France's decision to extend rescue aid to the company for a total of twelve months, France's failure to notify a restructuring plan and the possible existence of other sources of public funding. The Commission doubts whether these measures, which could in particular be used to develop the company's network, are compatible with the competition rules of the European Community. These measures include in particular rescue aid totalling €30.5 million, which was granted following the compulsory liquidation of Swissair, the former shareholder in AOM and Air Liberté, which Air Lib took over in 2001. Following Swissair's bankruptcy petition in the autumn 2001, Air Lib failed to receive €70 million out of the €230 million it was expecting from Swissair.

In addition to the rescue aid package set up in January 2002, which was notified to the Commission after it had been paid and was renewed on several further occasions without a restructuring plan being submitted, the Commission is also planning to investigate the deferment of payment of social security contributions and airport charges million which have been mentioned in the press but have not been notified by France to the Commission. Although competition rules permit the payment of rescue aid to prepare measures to restore a company's viability and of restructuring aid to ensure that these measures are actually introduced, the aid must meet certain conditions, especially in the aviation sector. (See the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ No C 288/1999) and Communication from the European Commission concerning the application of Articles 87 and 88 of the EC Treaty to State aid in the aviation sector (OJ No C 350/1994).) The Commission's investigation will therefore focus on determining whether the measures taken by France to support Air Lib are compatible with the proper functioning of the internal market.

The Commission will therefore focus on: whether Air Lib, as a newly created company, is eligible for rescue and restructuring aid; the extended duration of the rescue aid of twelve months, given the failure to notify a restructuring plan; the fact that aid should be limited to six months and may be renewed only in exceptional cases after the Commission has given prior authorisation; other contributions from public funds to rescue the company in the form of loans, payment periods, guarantees and any other benefits, including tax benefits, which have not been notified to the Commission; and whether these public funds are not already being used by Air Lib to finance restructuring and expansion which could exacerbate its competitors' difficulties.

The investigation will also look at the opening of new national, Community and international routes and the new low-cost fares which the company seems to have introduced. ■

STATE AIDS (TELECOMS): THE FRANCE TELECOM CASE

Subject: State aids

Industry: Telecommunications

Parties: France Telecom

Source: Commission Statement IP/03/150, 30 January 2003

(Note. Two points of particular importance to traders competing with France Telecom in the relevant markets are raised in this case. The first concerns the extent to which state aid may be granted for commercial purposes in circumstances comparable to the process for obtaining private capital. The second concerns the extent to which a special tax regime may legitimately apply to a trader competing in an open market. The result of the Commission's investigation will be important, not least because of the large sums involved, and, if unfavourable to France Telecom, may well be challenged by the French Republic in the Court of Justice.)

Reason for the investigation

The Commission has decided to begin a formal investigation into the granting to France Télécom (FT), via a public institution, of a shareholder's advance in the form of a maximum credit line of €9 billion to cover its debts. In view of the fact that the state support is provided through a complex financial transaction, the Commission will examine in detail the way in which the shareholder's advance is granted. The procedure also covers the business tax scheme applicable to FT. A formal investigation procedure does not prejudge the final decision. One of its aims is to give the Member State concerned and FT's competitors the opportunity to make their views known.

The Commission's doubts about the possible presence of aid in the two measures, the shareholder's advance and the business tax, were not dispelled after it had examined the information presented by France. Nor can it conclude from the information in its possession whether the aid, if any, is compatible with the proper functioning of the internal market. To obtain all the information necessary for a detailed assessment of the measures, the Commission has decided, in accordance with the Treaty, to initiate the formal investigation procedure.

Financial measures put in place by the State in support of FT

At the beginning of December 2002, the French authorities officially informed the Commission that FT was facing financial difficulties. To remedy the situation, the French authorities notified the Commission that they planned to increase the firm's capital by means of a rights issue to which the State and private shareholders would subscribe in proportion to their current stakes.

As the French authorities considered that it would not be possible to recapitalise FT in the near future, they announced that a shareholder's advance in the form of a credit line not exceeding €9 billion would be granted ahead of their participation in the rights issue. According to the French authorities, the advance would carry interest at market rates. On the basis of the information in its possession, the Commission cannot rule out the possibility that the financial measures put in place by the State for FT contain elements of state aid.

First, the Commission wonders whether the French authorities are providing FT with funding that it could have obtained under normal market conditions. Second, a formal investigation procedure is being carried out to determine whether the State has acted like a private investor. Inasmuch as an advance anticipates a stake to be acquired by the State in a later rights issue, such a public measure taken in the absence of any private investment cannot be regarded as concomitant with a private measure.

As regards a possible advantage conferred on FT outside normal market conditions, it seems that the French authorities themselves admit that FT was in such a parlous financial state that, until the shareholder's advance was announced, it had been unable to raise capital on the market on appropriate terms. At the same time, as the French authorities leave no doubt that the credit line anticipates the State's contribution to boosting FT's own resources, a formal investigation has to be undertaken into whether the credit line enabled FT to bring forward its return to the bond market. This is because, following the announcement and granting of the advance and presentation of the recovery plan, FT has been able to return to the bond market for the first time after 18 months and to raise very large amounts.

In addition, the conditions under which the advance would be remunerated are not sufficiently clear to rule out the possibility that FT is enjoying an advantage not available under normal market conditions. Furthermore, when the French authorities took their investment decision, they appeared to have had no guarantee as regards the confidence of the market and its participation in a rights issue, the banks having made their subscription conditional on prior examination of FT's business plan and its initial results.

Finally, the Commission also needs further proof from the French authorities that the return on the invested capital would have been acceptable to a private investor. On the one hand, FT was heavily indebted and the State's investment according to its own description was exceptional while, on the other hand, the French authorities have not provided the Commission with the full business plan for FT or any adequate evidence of a return acceptable to a private investor.

If the Commission finds in the course of its official investigation that the financial support granted by the State constitutes state aid, it will have to determine whether the rescue and restructuring guidelines apply and whether the support measures are compatible with the proper functioning of the internal market. (The Guidelines were published in the Official Journal, C.288 of 199; see paragraphs

5(a) and 6.) In view of the doubts concerning classification of the measures as aid and their compatibility with the rules on state aid, the Commission, in accordance with the case law of the Court of Justice, has decided to initiate formal investigation proceedings.

Business tax scheme applicable to FT

The investigation into the business tax scheme applicable to FT follows a complaint made in 2001. After requesting the French authorities to supply certain information, the Commission completed its preliminary analysis.
As regards the scheme, French Law 90/568 of 2 July 1990 exempts FT from the ordinary law scheme provided for in the General Tax Code. In practice, there were two schemes: a transitional scheme, then the definitive scheme. The transitional scheme, applicable from 1 January 1991 to 1 January 1994, stipulated that FT was not subject to business tax as such. From 1994, the definitive scheme provided that the business tax would be calculated and recovered according to the rules falling outside the scope of French ordinary law: the basis of assessment used is limited to the place of principal establishment, the basis of assessment for FT is reduced in relation to the tax payable by other firms, and the rate of tax payable by FT is different from the rates applied to other firms.

The business tax scheme appears to meet the criteria for defining a measure as state aid under the Treaty. It appears to be have conferred an advantage on FT inasmuch as it paid a lower business tax than it would normally have had to pay under the rules of ordinary law. The Commission cannot therefore rule out the possibility that the business tax scheme applicable to FT contains elements of state aid and it has serious doubts as to the compatibility of any such aid with the proper operation of the internal market. In view of its doubts, it has decided, in accordance with the case law of the Court of Justice, to initiate the formal investigation procedure provided for in Article 88(2) of the Treaty. ■

The Siemens/Drägerwerk Case

The Commission has decided to open a detailed investigation into a planned joint venture whereby the German company Siemens transfers its medical ventilators, anaesthesia delivery systems and patient monitoring businesses to Dräger Medical, currently wholly-owned by German Drägerwerk. Siemens and Drägerwerk would jointly-control Dräger Medical. The proposed transaction will affect markets for various kinds of hospital equipment: it will combine the two leading suppliers of ventilators and lead to high market shares in anaesthetic delivery systems.

Source: Commission Statement IP/03/100, dated 22 January 2003

STATE AIDS (WINE-GROWING): FRANCE v COMMISSION

Subject: State aids
Prohibition
Agriculture

Industry: Wine-growing)
(Some implications for other agricultural industries)

Parties: French Republic
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities, dated 12 December 2002, in Case C-456/00 (*French Republic v Commission of the European Communities*)

(There are two special points of interest in this case. The first concerns the interaction between the rules on competition and the common agricultural policy. As a broad principle, the agricultural sector, as distinct from the sector comprising processed agricultural products, lies outside the ordinary scope of the rules on competition; and, in the present case, the Court explicitly states that the state aid provisions of the Treaty cannot override the provisions of the common agricultural policy, even when the latter provisions are contained in secondary legislation. "As is clear from the Court's case-law, Article 36 EC recognises the priority of the common agricultural policy over the objectives of the Treaty in the field of competition": see paragraph 33 below. The second point of interest lies in the Commission's own invocation of the foregoing principle to support its decision. Far from contesting the principle, the Commission relies on it. "The aid scheme at issue finances additional vine-planting. It results in an increase in the production of 'normal wine', which is prohibited by the common organisation of the market in wine": see paragraph 27 below. The Court upheld this view, adding for good measure the observation that the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context and that the Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers: see paragraph 41 below.)

Judgment

1. By application lodged at the Court Registry on 18 December 2000, the French Republic brought an action under Article 230 EC for annulment of Commission Decision 2001/52/EC of 20 September 2000 on the State aid implemented by France in the wine-growing sector ('the contested decision').

Relevant provisions

2. The first paragraph of Article 36 EC states:
'The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33.'

3. Article 87(1) EC provides:
'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

4. Article 87(3) EC states:
'The following may be considered to be compatible with the common market:
...
(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.'

5. Council Regulation EEC/822/87 of 16 March 1987 on the common organisation of the market in wine consolidated the rules concerning the common organisation of the market in wine.

6. Article 6(1) of Regulation 822/87 provides:
'All new planting of vines shall be prohibited until 31 August 1990 ...'

7. Article 14 of Regulation 822/87 as amended by Council Regulation EEC/2253/88 of 19 July 1988 states:
'1. The granting of national aid for the planting of category 3 areas cultivated for the production of table wines shall be prohibited.
2. As regards the planting of wine-growing areas other than those referred to in paragraph 1, the granting of national aid shall be prohibited except where it is:
- laid down by specific Community provisions,
- allowed pursuant to Articles [87] to [89] of the Treaty and contains criteria which should, in particular, enable the objective of reducing production quantity or of improving quality to be attained without leading to increased production. ...
3. The prohibition referred to in paragraph 2 shall apply as from 1 September 1988. ...
...'

8. Article 76 of Regulation 822/87 states:
'Save as otherwise provided in this Regulation, Articles [87], [88] and [89] of the Treaty shall apply to the production of and trade in the products listed in Article 1.'

9. Regulation 822/87 has been replaced by Council Regulation EC/ 1493/1999 of 17 May 1999 on the common organisation of the market in wine, in which the first subparagraph of Article 2(1) provides:
'Planting with vines of wine grape varieties classified pursuant to Article 19(1) shall be prohibited until 31 July 2010 ...'

10. Article 11(1), (2) and (3) of Regulation 1493/1999 states:
'1. A system for the restructuring and conversion of vineyards is hereby established.
2. The objective of the system shall be the adaptation of production to market demand.
3. The system shall cover one or more of the following measures:
(a) varietal conversion, including by means of grafting-on;
(b) relocation of vineyards;
(c) improvements to vineyard management techniques related to the objective of the system.
The system shall not cover the normal renewal of vineyards which have come to the end of their natural life.'

11. As provided in Article 15 of Regulation No 1493/1999, the detailed rules for the implementation of Chapter III of that regulation, which is headed 'Restructuring and conversion' and comprises Articles 11 to 15, may in particular include 'provisions aiming to prevent an increase in production potential'.

12. Article 71(1) of Regulation No 1493/1999 states:
'Save as otherwise provided in this Regulation, Articles 87, 88 and 89 of the Treaty shall apply to the production of and trade in the products covered by this Regulation.'

Background to the dispute

13. By letter of 3 February 1999, the French Government notified the Commission of a proposed aid scheme intended to encourage cognac producers to switch to production of local wine ('vin de pays'). The aid, which was to relate to 1 000 hectares in Charentes (France), was designed to promote the grubbing of vines of the ugni blanc variety, the yield from which is used mainly for cognac production, and their replacement with varieties of vine from which quality local wines could be produced.

14. In October 1999 the Commission decided to initiate the investigation procedure provided for in Article 88(2) EC with regard to three of the four measures notified by the French Government.

15. At the end of that procedure, the Commission adopted the contested decision, whose operative part is worded as follows:

'Article 1

1. The measure implemented by France consisting of a supplement to national aid for improving the vine population of wine-growing holdings in the Cognac region for the 1998/1999 and 1999/2000 wine years is an unlawful aid incompatible

with Articles 87, 88 and 89 of the Treaty and does not qualify for the derogation provided for in Article 87(3) of the Treaty.
2. The accompanying measure providing for technical support to producers is incompatible with Articles 87, 88 and 89 of the Treaty and does not qualify for the derogation provided for in Article 87(3) of the Treaty.

Article 2

France shall be required to cancel the aid schemes referred to in Article 1.

Article 3

France shall take the measures necessary to recover the aid granted to beneficiaries under the schemes referred to in Article 1.

Article 4

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

Article 5

This Decision is addressed to the French Republic.'

16. Meanwhile the French Government, without awaiting completion of the investigation procedure, had adopted two decrees on the conditions for granting the aid for improving the vine population of wine-growing holdings in the Cognac region: a decree of 12 March 1999 (JORF of 11 April 1999, p. 5387) relating to the 1998/99 wine year and a further decree of 6 April 2000 (JORF of 23 April 2000, p. 6260) relating to the 1999/2000 wine year.

Arguments of the parties

17. In support of its action for annulment, the French Government puts forward a single plea, alleging that the Commission erred in law when interpreting Regulations 822/87 and 1493/1999.

18. First of all, the French Government submits that the aid at issue complies with the objective, laid down in Article 14(2) of Regulation 822/87, of reducing production quantity or of improving quality without increasing production. That objective is also found in Regulation 1493/1999.

19. The conversion of areas planted with vines of the ugni blanc variety whose average yield is approximately 150 hl/ha to vines for the production of Charentes local wines which are subject to a yield ceiling of 80 hl/ha entails a reduction in the volume of wine produced.

20. The French Government rejects the Commission's conclusion that aid for the conversion of vineyards planted with vines of the ugni blanc variety to vines intended exclusively for the production of local wines is comparable to financing the planting of additional vines, which have been prohibited since 1988. In its view, it is not possible to carry out a varietal conversion without planting new vines, of a less productive variety, to replace the old ones. Furthermore, inasmuch as the new vines merely replace grubbed vines, it cannot be claimed that additional planting is involved.

21. In the French Government's submission, the Commission is wrong to consider that the present case involves conversion from vines used for the

production of spirits to vines producing 'normal wine', resulting in an increase in the production of such wine. That concept of 'normal wine' is meaningless under the common organisation of the market in wine, which does not distinguish between wines intended for cognac production and other wines. Nor is there any obligation to produce cognac from wine which comes from ugni blanc vines.

22. According to the French Government, Regulation 1493/1999 does not establish a correlation between the conversion of an area and any obligation on the Member States to reduce production on unconverted areas. Nor does Article 11 of that regulation provide that conversion of a given area must be accompanied by the grubbing of an equivalent acreage of vines. The Commission cannot impose conditions other than those prescribed by the regulation.

23. Second, the French Government maintains that the course of development of the wine market can be assessed only over a long period. The constant increase in worldwide sales of French local wine that was recorded for the period 1994-98 constitutes a general trend which a slight decline over the years 1998-99 is not sufficient to call into question.

24. Finally, in the absence of an appropriate analysis of the wine market, the Commission remains vague when seeking to prove that the aid at issue results in distortions of competition.

25. In the Commission's submission, it follows from the Court's case-law that, as regards national aid in the agricultural sector, recourse by a Member State to Articles 87 EC, 88 EC and 89 EC cannot prevail over the regulation governing the common organisation of the market in question (Case 177/78, *McCarren*).

26. As to reductions in yield and in production acreage, the Commission, relying on the classification of cognac as a potable spirit obtained from wine, submits that the present case is concerned not so much with the conversion of high-yield wine-producing vines as with the conversion of vines intended for the production of wine which is used to make spirits to vines producing 'normal wine'.

27. The aid scheme at issue finances additional vine-planting. It results in an increase in the production of 'normal wine', which is prohibited by the common organisation of the market in wine.

28. The Commission states that it was not a question of imposing conditions for authorisation of the aid at issue but quite simply of assessing the adverse impact of such aid on competition. It was for that reason that it examined whether the French authorities had in fact laid down measures reducing the impact of the aid on the market, by a reduction of yields, in particular those of vines of the ugni blanc variety, and by a reduction of production acreage in the region, as the French Government had proposed. After establishing that the national authorities had not given effect to those objectives, that is to say that they had not adopted measures to reduce the aid's impact, the Commission concluded that the aid was not compatible with the new Community requirements in the wine-growing sector.

29. As regards bringing production into line with demand and distortions of competition, the Commission states that the information concerning market growth supplied by the French Government is not confirmed by the data from the Office National Interprofessionel des Vins (National Inter-Trade Wine Office) concerning the fall in prices for local wines. Those data show that the market in local wines is experiencing difficulties.

Findings of the Court

Introductory remarks

30. First of all, while the procedure provided for in Articles 87 EC and 88 EC leaves a wide discretion to the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market, it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty (see, in particular, Case C-225/91, *Matra v Commission*, paragraph 41).

31. Also, where there is a regulation on the common organisation of the market in a given area, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it (Case C-1/96, Compassion in World Farming, paragraph 41, and Case C-507/99, Denkavit, paragraph 32).

32. It follows that the Commission's assessment of State aid in a sector where common organisation of the market has been established involves examining the effect which such aid may have on the operation of that common organisation. In other words, as the Court has held, recourse by a Member State to the provisions of Articles 87 EC, 88 EC and 89 EC cannot receive priority over the provisions of the regulation on the common organisation of the market concerned (*McCarren*, cited above, paragraph 11).

33. Furthermore, as is clear from the Court's case-law, Article 36 EC recognises the priority of the common agricultural policy over the objectives of the Treaty in the field of competition (Case C-280/93, Germany v Council, paragraph 61).

34. Since the aid at issue was found in the contested decision to be unlawful on the ground that it did not meet the requirements laid down by the common organisation of the market in wine, it should be established whether, in the present case, the Commission interpreted correctly the provisions governing that common organisation of the market.

Substance

35. Balance between production and demand on the wine market is one of the objectives of the common organisation of the market in wine.

36. In order to attain such an objective, the provisions governing the common organisation of the market in wine have, for a long time, prohibited either the new planting of vines (Article 6(1) of Regulation 822/87, which was in force when the aid at issue was notified to the Commission, and Article 2(1) of Regulation 1493/1999, which has been in force since 21 July 1999) or national planting aid which does not enable production quantities to be reduced (Article 14(2) of Regulation 822/87). Provisions aiming to prevent an increase in production potential are also envisaged under Regulation 1493/1999 (subparagraph (c) of the second paragraph of Article 15 of that regulation).

37. In addition, since cognac is a potable spirit obtained from wine, it is excluded from the category of agricultural products (Case 123/83, *Clair*, paragraph 15) and, consequently, is not among the products regulated under the common organisation of the market in wine.

38. In that context, if areas planted with vines of the ugni blanc variety, the yield from which is used to make a spirit which, as an industrial product, is not sold on the wine market, are converted into areas intended for the production of local wines sold on that market, the quantity of such wines produced in the region in question will necessarily increase.

39. As has been pointed out in paragraph 35 of this judgment, an increase in wine production runs counter to one of the objectives of the common organisation of the market in wine. Accordingly, the Commission was fully entitled to find in the contested decision that the aid at issue was incompatible with the provisions governing the common organisation of a market.

40. The Commission nevertheless examined, in paragraphs 37 to 49 of the contested decision, whether the French Government had implemented measures capable of mitigating the negative effects on the market of the aid in question, in accordance with the derogation laid down in Article 87(3)(c) EC.

41. In this connection it should be remembered, first, that the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (see, inter alia, Case C-156/98, *Germany v Commission*, paragraph 67, and Case C-310/99, *Italy v Commission*, paragraph 45), and second, that the Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers (see Case C-288/96, *Germany v Commission*, paragraph 26, and *Italy v Commission*, cited above, paragraph 46).

42. In the light of those principles, the French Government's argument that the Commission erred in law by imposing, under Article 11 of Regulation 1493/1999, conditions relating to reductions in yield and production acreage which are not provided for in that provision cannot be upheld.

43. Examination of the contested decision shows that the Commission at no time imposed such conditions on the basis of Article 11 of Regulation No 1493/1999. Furthermore, as the Advocate General has observed in point 45 of his Opinion, that article does not lay down rules relating to the grant of national aid for the reconstruction and conversion of vineyards, but sets up a Community support scheme in whose financing the Member States are in principle unable to participate.

44. The Commission merely examined, in the exercise of the discretion available to it, whether the measures announced by the French authorities themselves concerning the reduction of yields and production potential would be sufficient to mitigate the impact of the aid in question on the market. At the end of its examination, it concluded that they were insufficient.

45. Furthermore, the assessments of an economic nature carried out by the Commission with regard to bringing production into line with demand and distortions of competition likewise fall within the scope of its discretion.

46. The Commission correctly found, taking account of, first, the information supplied by the Office National Interprofessionel des Vins concerning the fall in the average price of local wines in the 1999/2000 wine year, which was the result of a reduction in demand recognised by the French Government, and second, the objective of maintaining balance in the market pursued by the common organisation of the market in wine, that an increase in the production of local wines in France would be likely to create distortions of competition in a wine market where growth does not appear certain.

47. Moreover, it should be noted that the French Government did not adduce any evidence to support the conclusion that the Commission exceeded the limits of its discretion in finding that the aid at issue did not meet the requisite conditions for falling within the derogation provided for in Article 87(3)(c) EC.

48. The French Government merely maintained that the course of development of the wine market could be assessed only over a long period and that the Commission remained vague when seeking to prove that the aid at issue resulted in distortions of competition.

49. In those circumstances, and given that the statement of reasons for the contested decision discloses in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review, that statement of reasons complies with the requirements established by the Court's case-law (see, in particular, Case C-17/99, *France v Commission*, paragraph 35, and *Italy v Commission*, cited above, paragraph 48).

50. In the light of all the foregoing considerations, the plea alleging that the Commission erred in law must be rejected.

51. The action must therefore be dismissed.

Costs

52. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

Court's Ruling

The Court hereby:
1. Dismisses the action;
2. Orders the French Republic to pay the costs. ■

State Aid: the ABX Case

A case in which "rescue aid" was approved by the Commission, on the basis of its own published Guidelines (see the reference on page 38 of this issue), concerned three bridging loans to companies belonging to ABX Logistics in France, Germany and the Netherlands, whose parent company is Belgian Railways. The rescue aid, which must be repaid in the medium term, is intended to enable the three recipients to remain temporarily afloat and to avoid job losses, which should benefit all of ABX's activities. A decision on the recipient companies' future will have to be taken within six months of today's date. The companies consist of about 107 consolidated subsidiaries spread across several countries and continents. ABX is a supplier of transport and logistics services. Since the three direct recipients are in financial difficulty due to a lack of funds available to them directly or within their respective national holding companies, they are allowed to receive loans from Belgian Railways in the form of rescue aid. The three bridging loans may be up to a combined maximum of €123 million and are for six months. If the recipients filed for bankruptcy, it would have disastrous direct repercussions on 7,619 jobs (4,578 in France, 2,702 in Germany and 339 in the Netherlands). The Commission has examined the aid in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty and concluded that the aid is justified for acute social reasons and because it is limited to the minimum amount needed to keep the three direct recipients afloat long enough to take a decision on their future. Following this approval, the Belgian authorities must, within six months of today, send the Commission either a restructuring plan, a bankruptcy plan or proof that the rescue aid has been fully repaid.

Source: Commission Statement IP/03/93, dated 21 January 2003