March, 2003

Volume 26, Issue 3

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Fiscal aid regimes

From time to time European Community policy in the competition field changes direction; and governments and companies accustomed to seemingly well established rules have to change accordingly. This is particularly true in the case of fiscal aid regimes or corporate taxation schemes. In 1984, the Commission had approved the Belgian coordination centres scheme; and, probably on this account, in the case of the Dutch International Financing Activities scheme, the beneficiaries had legitimate reasons to believe that the scheme was not illegal. However, the Commission is now investigating the schemes in question and intends to conclude that they are, after all, incompatible with the European Community's state aid rules. It seems likely that the Commission will give the two countries a transitional period to phase out the schemes. With respect to the Irish Foreign Income scheme, after careful examination, the competition services have concluded that it no longer constitutes state aid to the companies which currently benefit from it.

According to the Commission, the decisions on the Belgian, Dutch and Irish tax schemes likely to be adopted by the Commission have to be seen in their proper context. These decisions are part of an ambitious strategy against harmful tax competition, which the Commission launched in 1997. This strategy comprises the tax package and vigorous state aid control over corporate taxation. The strategy has paid off: the Council is now close to a final agreement on the tax package; and the individual state aid proceedings opened by the Commission have been a great help in implementing the Code of Conduct on Corporate taxation.

Olympic Airways

Commissioner Mario Monti had some stern things to say about Olympic Airways when he addressed a meeting in Athens on 14th February. "Why," he asked, "should it not be acceptable to grant government support for a national airline?" The answer is that all airlines are struggling with financial difficulties and that it is intrinsically unfair that some benefit from a systematic state support while others have to survive on their own. "Under the European state aid rules, a company can be rescued once. These rules apply to all sectors, including air transport. This is all the more acceptable if the companies concerned were previously operating in a regulated market and have to adapt to a competitive marketplace. However, such restructuring aid must be part of a feasible and coherent plan to restore the firm's long-term viability. In the case of Olympic Airways, the Commission found that the restructuring plan had not been put in place, that none of the financial objectives had been attained and that, in particular, the viability of the company was not assured in the short or medium term. I do not believe that continued state support to an airline company is in the long-term interest of the consumer-taxpayer. Where airlines are subsidised, consumers rarely enjoy low prices." ■

STATE AIDS (BANKING): THE WESTLB CASE

Subject: State aids

Industry: Banking

Parties: WestLB

Source: Commission Statement IP/03/335, dated 6 March 2003, based on a judgment of the Court of First Instance (not yet reported)

(Note. While awaiting the text of the Court's judgment in this case, we reproduce below the Commission's observations on the importance of the case, not least in resolving other similar cases involving German regional banks. At first sight, it is not obvious from the Commission's observations that the Court did in fact annul the Commission's original decision. If the Court's judgment reveals matters calling for a further report, this will appear in due course.)

The Court of First Instance (CFI) delivered judgment on 6 March 2003 in the WestLB case, bringing about a long-awaited clarification of some major policy issues in the field of State aid. The Commission has taken note of this important judgment and, in the light of the judgment, is planning to adopt as quickly as possible a new decision in the case originally coming before it. The Court's ruling also opens the way for the Commission to resolve the six other provincial bank capital transfer cases that are still pending. Overall, the CFI judgment shows the way forward. The CFI confirmed the Commission's analysis that capital injections by the State in favour of public undertakings must be remunerated at market rates to avoid distortions of competition. This holds true even if the beneficiary is not an undertaking facing financial difficulties. In its appeal WestLB had strenuously contested this point. The ruling reinforces the Commission's determination to ensure a level playing field in the German banking sector. It will now carry on with its proceedings against similar capital transfers to six other German regional banks and will start work on a new WestLB decision after a careful examination of the CFI ruling.

As the Commission points out, the distortion of competition is all the greater if the beneficiary is a healthy undertaking, as there is then absolutely no reason for the State to forego a normal return on the invested capital.

The Court's ruling does not affect the abolition of the public sector guarantees, which will take effect from 19 July 2005. The landmark agreement with the German authorities, reached in 2001 and 2002, to abolish these guarantees is, in the Commission's view, by far the most important policy achievement of the present Commission with respect to the German public sector banks; and the CFI's judgment does not have any impact on that agreement.

The Court's ruling comes against the background of a significant increase in the breadth and sophistication of the Commission's State aid policy in the financial services sector. While in the early 1990s the Commission dealt mostly with ad hoc rescue and restructuring operations in favour of ailing banks, it was soon confronted with investment aid in the form of capital injections into banks that were not in distress. The WestLB decision is the most prominent example of investment aid to a bank which is not in distress. Nevertheless, the capital transferred allowed this bank to reinforce its equity capital and, in consequence, increase its commercial activities. In a further step the Commission extended its attention to less visible forms of State support, such as state guarantees in favour of public sector banks. It is this latter least visible category of aid which procures the banks the most significant economic advantages.

In December 1991, the parliament of the Province of North-Rhine-Westphalia voted a law under which funds were transferred to WestLB, thereby increasing the latter's solvency ratio. The Province received a remuneration of 0.6% after tax for the funds transferred to it. While the funds remained earmarked for general interest activities, they also increased WestLB's equity base allowing the bank to increase its commercial activities.

In 1994 the association of German private sector banks, the Bundesverband deutscher Banken (BdB), complained about the remuneration paid by WestLB and other public sector banks in Germany for the capital transferred to them by the regional entities. According to the BdB, this remuneration was significantly below the rate a private bank would have had to pay for its equity capital.

The Commission initiated State aid proceedings in October 1997 and decided in July 1999 that WestLB did indeed benefit from State aid. According to the Commission's assessment the economic advantage in the form of a below market cost of equity - amounted to €807.7 million for the period from 1992 through 1998. This advantage needed to be neutralised by recovering this amount plus interest.

The Commission notes that the fundamental issue involving the WestLB has meanwhile been tackled with the legal split between the commercial bank and the public sector bank, which is a result of the Commission's action against a distorting system of state bank guarantees. For the future this split will ensure a transparent distribution of tasks between the commercial and the public sector activities and will limit the State guarantee to the public sector bank that does not carry out commercial or competitive activities. However, a new decision is required in the WestLB case to neutralise the competitive advantage the bank enjoyed with respect to its purely commercial activities in the past.

The Court's ruling is also important for the ongoing proceedings with respect to capital injections benefiting six further public sector banks. In total seven regional authorities transferred capital to the public sector banks in their region against a very low level of remuneration. Proceedings with respect to the six other banks were initiated in July and November 2002. Nevertheless, individual cases may call for some differentiation in the Commission's analysis. ■

ACQUISITIONS (PHARMACEUTICALS): THE PFIZER CASE

Subject: Acquisitions
Conditions

Industry: Pharmaceuticals

Parties: Pfizer Inc
Pharmacia Corporation

Source: Commission Statement IP/03/293, dated 27 February 2003

(Note. This is a classic instance of divestment in the interests of securing an acquisition. Without the divestments proposed by the parties, it is highly unlikely that the acquisition would have been approved.)

The Commission has authorised the acquisition of Pharmacia Corporation (Pharmacia) by Pfizer Inc (Pfizer) in a deal which creates the largest pharmaceutical company in the world. The approval follows an investigation into a number of treatment areas both in human pharmaceuticals and in animal healthcare, where the transaction raised serious doubts as to its compatibility with the common market. In reaction to the serious doubts raised by the Commission, the parties undertook to alleviate competition concerns. In the absence of such remedies, the merged entity would have been in a position to exploit its likely dominant positions to the detriment of consumers within the community.

The operation, as initially notified to the Commission, raised serious competition concerns in human pharmaceuticals, more particularly, in G4B4 Urinary Incontinence, G4B3 Erectile Dysfunction and C2A Antihypertensives (of Non-Herbal Origin) Plain, and in animal health in the market for Oral Penicillin for Companion Animals, that is, cats and dogs. In examining pharmaceutical markets, the Commission uses the Anatomical Therapeutic Chemical classification (ATC) system, which subdivides medicines into different therapeutic classes. The ATC system is hierarchical and has 16 categories (A, B, C, D, etc.) each with up to four levels. The first level (ATC 1) is the most general and the fourth level (ATC 4) the most detailed.

In the market for G4B3 Erectile Dysfunction, Pfizer markets the blockbuster drug Viagra and commands a very strong market position - up to almost 100% - across the EEA. While no competition concerns were identified at the level of the parties' existing products, the Commission was concerned that the adding of Pharmacia's two pipeline products would have further strengthened Pfizer's existing strong market position. The Commission's concerns were further increased by the fact that Pfizer had begun patent litigation proceedings in the United States against a number of competitors, who are developing similar drugs to Viagra. Although Pfizer's European patent has been held invalid by the European Patent Office, Pfizer has appealed this decision. The Commission

considers that broad patent coverage in the United States and the pending patent issue in Europe create uncertainty among competitors and may affect adversely the development and future launch of competing products.

On the market of G4B4 Urinary Incontinence, Pharmacia has an existing product, Detrusitol, for the treatment of over-active bladder. Detrusitol attains high market shares - ranging from 40% to almost 100% - in most EU Member States. Pfizer is not active on the market but has a compound, Darifenacin, in Phase III development. In the absence of effective actual or potential competition, adding Pfizer's pipeline product to Pharmacia's existing strong market position would have led to serious doubts about this product market.

In the market for C2A Antihypertensives (of non-herbal origin) Plain in the Netherlands, the new entity would have attained a strong market position with a significant increment of market share. The operation would have brought the number one and two market operators together, while the remaining competitors would have been relatively small. The Commission considered that the transaction would give rise to serious doubts, because Pfizer had recently introduced a new patent protected version of its leading product and because it would face only limited competition from the remaining competitors.

As regards Oral Penicillin Antibiotics for Companion Animals in Germany, the parties would have achieved a high combined market share and the transaction would have removed Pfizer's second largest competitor from the German market.

To meet the Commission's concerns about the effects on competition, the parties proposed a set of undertakings. With regard to Erectile Dysfunction, the parties proposed to divest Pharmacia's two products in development: the dopamine D2 receptor (PNU-142774E) and Apomorphine hydrochloride nasal spray, which is being developed by Pharmacia in cooperation with Nastech Pharmaceutical Company, Inc. As regards the market for Urinary Incontinence, the parties proposed to divest Pfizer's Phase III compound Darifenacin world-wide. With regard to Antihypertensives (of Non-Herbal Origin) Plain in the Netherlands, the parties proposed to discontinue selling Ketensin and transfer the rights or assets to the original licensor or to third parties. Finally, with respect to animal health, the parties proposed to divest Pharmacia's product Parkemoxin in Germany. The Commission considers that these undertakings are appropriate to remedy competition concerns and, subject to full compliance with the undertakings, has declared the concentration to be compatible with the common market.

Pursuant to the bilateral agreement of 1991 on antitrust co-operation between the Commission and the United States of America, the Commission has closely co-operated with the Federal Trade Commission (FTC) in the analysis of a number of issues, notably in the areas of urinary incontinence and erectile dysfunction, where the parties have agreed to carry out divestments on a world-wide scale. The investigation of the case in the United States has not yet been concluded and the Commission's decision in this case does not prejudge the outcome of the assessment in the United States. ■

The SBS Incubation Fund

The Commission has decided to open a formal investigation procedure into the United Kingdom's SBS Incubation Fund aid scheme. The Fund would provide soft loans to undertakings which intend to develop and operate office premises meeting the special needs of small firms (so-called "incubators"). Since this scheme does not fulfil the existing regional guidelines, in particular in terms of aid intensity and in terms of its beneficiaries, the Commission has doubts on whether this aid measure can be approved. The opening of the procedure does not prejudge the outcome of the investigation, but intends to give interested parties the opportunity to express their views on the project.

The objective of this measure is to facilitate the development of office infrastructure for small firms during their start-up phase. The Fund, which will have a €115 million budget over four years, will be able to grant soft loans to undertakings that intend to set up and operate this infrastructure, but could not get funding for such a project on the capital markets. The loans will cover up to 50% of the investment costs of the infrastructure projects, but may also cover part of the working capital necessary during the initial operation of the infrastructure projects. Loans would be available throughout England. Aid provided to the incubators may be transferred in part to the end-users of these incubators, i.e., small firms in their start-up phase. The UK authorities, however, undertook to keep this possible aid to the end-users below the applicable Commission Regulation's de minimis threshold of €100,000 over a three year period.

Under the current proposal, the Fund could grant aid even to large firms setting up office infrastructure in the most developed areas of the United Kingdom. This is not in line with the Guidelines on national regional aid, which provide that investment aid to large enterprises should be limited to the most needy regions. Furthermore, the scheme provides that the aid granted to an individual incubator will always be limited to the minimum necessary. It is unclear whether this provision will enable the UK to respect the aid intensity ceilings applicable under the regional guidelines or Commission Regulation EC/70/2001 on State aid to Small and Medium-sized Enterprises. Finally, the loans will cover part of the working capital of the incubators, which may constitute operating aid. Under the regional aid guidelines, operating aid is allowed only in the least developed regions in a Member State. For these reasons, the Commission has doubts on whether the envisaged aid measures are in line with State aid rules. Finally, the British authorities argued that the notified arrangements were justified because the aid to the end-users was de minimis and that the aid to the companies operating the incubators is kept to the minimum necessary. At this stage, it is not clear by which means fulfilment of these conditions should be ensured.

Source: Commission Statement IP/03/176, dated 5 February 2003

EXEMPTION (AIR TRANSPORT): PROPOSED REGULATION

Subject: Exemption
Block exemption

Industry: Air Transport

Source: Commission Statement IP/03/284, dated 26 February 2003

(Note. It is understandable that the Commission should wish to have certain powers conferred on it under a proposal for a Council Regulation in the area of arrangements made between EU and non-EU air carriers. But it is less clear from the Commission statement that there is a serious gap in the application of Article 81 of the EC Treaty to infringements of the competition rules. It is questionable whether the Commission is right in saying that it has no jurisdiction in respect of alliances between EU and non-EU carriers; but it is certainly correct that regulations along the lines of the present rules applying to alliances between EU carriers would simplify the position. The proposed Regulation will be a Council Regulation; it will confer delegated powers on the Commission, including the power to make block exemption regulations. This follows the usual pattern.)

The Commission has adopted a proposal for a Regulation, which would give it clear powers to review cases relating to air transport between the Community and third countries. This would end the present anomaly where the Commission has jurisdiction on an all-European alliance, but not on an alliance with, for example, a US carrier. In the Commission's view, "putting an end to this anomaly is all the more urgent in view of the recent European Court open-skies ruling which recognises EU competence on air transport relations with third countries and is expected to lead to more consolidation in the sector".

The proposed regulation will give the Commission effective and efficient powers to examine alliances between EU and non-EU airlines, similar to those that it already has to review alliances between EU-based airlines. (The draft Regulation concerns air transport between the EU and third countries, which covers, for example, transatlantic airline alliances, but not mergers for which the Merger Regulation applies regardless of the origin of the airlines. Airline alliances are co-operative arrangements and cover often issues such as flight schedules and frequencies, pricing, code-sharing, the joint use of airport facilities and infrastructure and the pooling of frequent flyer programmes.)

The Commission is also proposing to have the power to grant block exemptions when justified. It hopes that, if approved, the new Regulation will come into force on 1 May 2004, at the same time as the new antitrust Regulation 1/2003, which lays down the rules and procedures to enforce Articles 81 and 82 of the EC Treaty.

At present, the Commission considers that it lacks adequate enforcement powers for the application of the European competition rules to air transport between the European Union and non-member states. This has so far been felt in particular in cases relating to transatlantic or other alliances between EU and non-EU carriers and is clearly an anomaly, given that the Commission was granted the power in the eighties (Regulation EEC/3975/87) to apply the competition rules to air transport between airports in the European Communities, including alliances between European airlines. No specific rules or procedures exist for cases relating to air transport between the Community and third countries.

One direct result of this, according to the Commission, is that the examination of such alliances can take years: six exactly in the case of the alliance between Lufthansa, SAS and United Airlines, on the one hand, and the alliance between KLM and Northwest, on the other. This does not mean that the airlines concerned had to wait six years before they put in place their code-sharing or revenue-sharing or pooled their frequent flyers programmes, which usually characterise these link-ups. But the fact that the Commission cannot reach a decision in a shorter period of time creates legal uncertainty.

The airline industry is the only sector where the Commission has no clear-cut powers to enforce the competition rules in so far as it involves non-EU carriers. For all other economic sectors, with a few minor exceptions, procedural implementing regulations have been adopted and are fully applicable when the effects of anti-competitive agreements or abusive behaviour are felt on the EU market. Regulation EC/1/2003, which will replace Regulation 17/62 and the procedural provisions of Regulation EEC/3975/87, will not change this.

The Commission believes that the recent Court judgment in the "open skies" cases increases the need for a coherent European policy for international air transport. The Commission has in this regard proposed a package of measures on how to move forward and believes that competition is an essential part of the Community's policy for international air transport. The main purpose of the proposed Council Regulation is to ensure a more effective and efficient framework for anti-trust procedures with regard to air transport between the Community and third countries. To that end the Commission is proposing the deletion of the provision in Regulation 1/2003, which currently excludes from its scope air transport between the EU and third countries, with the result that all enforcement rules in Regulation 1/2003 will also apply to such transport. The Commission is also proposing the repeal of Regulation 3975/87, as it will have practically no further meaning following the amendment to Regulation 1/2003 and the introduction of the proposed Regulation.

Finally, the Commission proposes that it should have the power to grant block exemptions, as it can already do at present in the case of air transport between European airports. There are two such block-exemption regulations already in force and they concern tariff consultation for interlining and the allocation of landing and take-off slots at airports. ■

BLOCK EXEMPTION (INSURANCE): COMMISSION REGULATION

Subject: Exemption
Block exemption
Cooperation agreements
Information agreements
Pricing policy

Industry: Insurance

Source: Commission Regulation EC/358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector; Commission Statement IP/03/291, dated 27 February 2003

(Note. This is the latest in a series of block exemption regulations by the Commission: it conditionally authorises certain types of co-operation agreements between insurance companies. The agreements covered include the establishment of non-binding standard policy conditions, the exchange of statistical information for the calculation of risks and the creation of insurance pools. The Regulation was agreed after an extensive consultation of Member States and interested parties and is intended to improve on an existing Regulation, which will expire at the end of March 2003.

The Regulation exempts from the general prohibition contained in Article 81(1) of the EC treaty a certain number of agreements, provided that co-operation does not go beyond what is justified by consumer interest, and in particular does not concern the coverage, terms, or the premiums charged in insurance policies offered to consumers. The agreements covered are: the joint calculations of risks, and joint studies on future risks; the establishment of non-binding standard policy conditions; the establishment and management of insurance pools; and the testing and acceptance of security equipment. The Regulation aims to achieve a balance between the provision of legal certainty to the insurance sector and the need to exempt only agreements that clearly present efficiency gains and consumer benefits.

In the Commission's view, it is important for insurers to have accurate information about the risks which they insure, including future risks. This is not always possible with the information available to them internally; and, for this reason, some exchange of statistical information and joint calculation of risks is authorised. The scope of the exemption is largely unchanged in this area.

Standard insurance policy conditions for many types of insurance policy are produced by national associations. The basic scope of the block exemption in this area is unchanged, although some additional conditions for exemption have been added. In maintaining the scope of the exemption, the Commission has taken into consideration that non-binding standard policy conditions procure

efficiencies for insurance undertakings and can have benefits for consumer organisations and brokers.

Insurance pools involving a number of insurers are frequent for the coverage of large or exceptional risks, such as aviation, nuclear and environmental risks, for which individual insurance companies are reluctant to insure the entire risk alone. In this area, the scope of the block exemption has been extended as compared with the earlier Regulation. First, the market share thresholds for pools to be exempted have been increased (from 10% to 20% in the case of co-insurance pools, and from 15% to 25% in the case of co-reinsurance pools). Secondly, for pools which are newly-created in order to cover a "new risk", a new three-year exemption has been introduced, with no market share threshold. The rationale is that co-operation resulting in the creation of new commercial products can be exempted without a market share threshold for a limited start-up period.

The Regulation is designed to reflect new developments in the insurance markets, in particular the insurance industry's responses to existing risks that are increasing significantly, such as the risk of terrorist attacks. Since the exemptions granted in this regulation are only the minimum level of authorised industry co-operation, they do not prevent industry from co-operating in other ways where this becomes necessary to provide efficient insurance products in the interest of consumers. This may for instance be the case where risks become so large that they can be covered only by several insurers operating together. To be able to give appropriate guidance on evolving market developments, the Commission is currently examining a number of individual cases concerning in particular terrorist risk insurance pools and hopes to reach conclusions shortly.

In most Member States, there are agreements between insurers on technical specifications for safety equipment; on this basis, devices are tested, and lists of "approved" devices drawn up. Following comments received on the first draft, the scope of the new Regulation is now in line with the harmonised single market rules applying to security devices. This is because, where Community harmonisation laws are in force, agreements between insurers which effectively impose on security devices higher requirements than those imposed by legislation have a major impact on the market for such devices, as a device which insurers are reluctant to insure will have great difficulty gaining access to the market. Taking this factor into consideration, the Regulation provides that agreements between insurers going beyond harmonising legislation cannot be subject to block exemption.)

Commission Regulation EC/358/2003 of 27 February 2003 on the application of Article 81(3)of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation EEC/1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements,

decisions and concerted practices in the insurance sector, and in particular Article 1(1)(a), (b),(c) and (e) thereof,
Having published a draft of this Regulation,
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation EEC/1534/91 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices in the insurance sector which have as their object cooperation with respect to:
—the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims,
—the establishment of common standard policy conditions,
—the common coverage of certain types of risks,
—the settlement of claims,
—the testing and acceptance of security devices,
—registers of, and information on, aggravated risks.

(2) Pursuant to Council Regulation EEC/1534/91,the Commission adopted Regulation EEC/3932/92 of 21 December 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, Regulation EEC/3932/92,as amended by the Act of Accession of Austria, Finland and Sweden, expires on 31 March 2003.

(3) Regulation EEC/932/92 does not grant an exemption to agreements concerning the settlement of claims and registers of, and information on, aggravated risks. The Commission considered that it lacked sufficient experience in handling individual cases to make use of the power conferred by Council Regulation EEC/1534/91 in those fields. This situation has not changed.

(4) On 12 May 1999,the Commission adopted a Report (COM(1999)192 final) to the Council and the European Parliament on the operation of Regulation EEC/3932/92. On 15 December 1999, the Economic and Social Committee adopted an opinion on the Commission's report. On 19 May 2000,the Parliament adopted a Resolution on the Commission's report. On 28 June 2000, the Commission held a consultation meeting with interested parties, including representatives of the insurance sector and national competition authorities, on the Regulation. On 9 July 2002,the Commission published in the Official Journal a draft of the present Regulation, with an invitation to interested parties to submit comments not later than 30 September 2002.

(5) A new Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify administrative supervision to as great an extent as possible. Account must also be taken of the Commission's experience in this field since 1992,and the results of

the consultations on the 1999 Report and consultations leading up to the adoption of this Regulation.

(6) Regulation EEC/1534/91 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

(7) Nevertheless, it is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics based approach which assesses the impact of agreements on the relevant market. However, it should be recognised that in the insurance sector there are certain types of collaboration involving all the undertakings on a relevant insurance market which can be regarded as normally satisfying the conditions laid down in Article 81(3) of the Treaty.

(8) For the application of Article 81(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.

(9) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3) of the Treaty.

(10) Collaboration between insurance undertakings or within associations of undertakings in the calculation of the average cost of covering a specified risk in the past or, for life insurance, tables of mortality rates or of the frequency of illness, accident and invalidity, makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. This can in turn facilitate market entry and thus benefit consumers. The same applies to joint studies on the probable impact of extraneous circumstances that may influence the frequency or scale of claims, or the yield of different types of investments. It is, however, necessary to ensure that such collaboration is only exempted to the extent to which it is necessary to attain these objectives. It is therefore appropriate to stipulate that agreements on commercial premiums are not exempted; indeed, commercial premiums may be lower than the amounts indicated by the results of the calculations tables or studies in question, since insurers can use the revenues from their investments in order to reduce their premiums. Moreover, the calculations, tables or studies in question should be non-binding and serve only for reference purposes.

(11) Moreover, the broader the categories into which statistics on the cost of covering a specified risk in the past are grouped, the less leeway insurance undertakings have to calculate premiums on a narrower basis. It is therefore appropriate to exempt joint calculations of the past cost of risks on condition that the available statistics are provided with as much detail and differentiation as is actuarially adequate.

(12) Furthermore, since access to such calculations, tables and studies is necessary both for insurance undertakings active on the geographic or product market in question and also for those considering entering that market, such insurance undertakings must be granted access to such calculations tables and studies on reasonable and nondiscriminatory terms, as compared with insurance undertakings already present on that market. Such terms might for example include a commitment from an insurance undertaking not yet present on the market to provide statistical information on claims, should it ever enter the market. They might also include membership of the association of insurers responsible for producing the calculations, as long as access to such membership is itself available on reasonable and non-discriminatory terms to insurance undertakings not yet active on the market in question. However, any fee charged for access to such calculations or related studies to insurance undertakings which have not contributed to them, would not be considered reasonable for this purpose if it were so high as to constitute a barrier to entry on the market.

(13) The reliability of joint calculations, tables and studies becomes greater as the amount of statistics on which they are based is increased. Insurers with high market shares may generate sufficient statistics internally to be able to make reliable calculations, but those with small market shares will not be able to do so, much less new entrants. The inclusion in such joint calculations, tables and studies of information from all insurers on a market, including large ones, promotes competition by helping smaller insurers, and facilitates market entry. Given this specificity of the insurance sector, it is not appropriate to subject any exemption for such joint calculations and joint studies to market share thresholds.

(14) Standard policy conditions or standard individual clauses and standard models illustrating the profits of a life assurance policy can produce benefits. For example, they can bring efficiency gains for insurers; they can facilitate market entry by small or inexperienced insurers; they can help insurers to meet legal obligations; and they can be used by consumer organisations as a benchmark to compare insurance policies offered by different insurers.

(15) However, standard policy conditions must not lead either to the standardisation of products or to the creation of a significant imbalance between the rights and obligations arising from the contract. Accordingly, the exemption should only apply to standard policy conditions on condition that they are not binding, and expressly mention that participating undertakings are free to offer different policy conditions to their customers. Moreover, standard policy conditions may not contain any systematic exclusion of specific types of risk without providing for the express possibility of including that cover by agreement and may not provide for the contractual relationship with the policyholder to be

maintained for an excessive period or go beyond the initial object of the policy. This is without prejudice to obligations arising from Community or national law to include certain risks in certain policies.

(16) In addition, it is necessary to stipulate that the common standard policy conditions must be generally available to any interested person, and in particular to the policy-holder, so as to ensure that there is real transparency and therefore benefit for consumers.

(17) The inclusion in an insurance policy of risks to which a significant number of policy-holders is not simultaneously exposed may hinder innovation, given that the bundling of unrelated risks can be a disincentive for insurers to offer separate and specific insurance cover for them. A clause which imposes such comprehensive cover should therefore not be covered by the block exemption. Where there is a legal requirement on insurers to include in policies cover for risks to which a significant number of policyholders are not simultaneously exposed, then the inclusion in an non-binding model contract of a standard clause reflecting such a legal requirement does not constitute a restriction of competition and falls outside the scope of Article 81(1) of the Treaty.

(18) Co-insurance or co-reinsurance groups (often called 'pools'), can allow insurers and reinsurers to provide insurance or reinsurance for risks for which they might only offer insufficient cover in the absence of the pool. They can also help insurance and reinsurance undertakings to acquire experience of risks with which they are unfamiliar. However, such groups can involve restrictions of competition, such as the standardisation of policy conditions and even of amounts of cover and premiums. It is therefore appropriate to lay down the circumstances in which such groups can benefit from exemption.

(19) For genuinely new risks it is not possible to know in advance what subscription capacity is necessary to cover the risk, nor whether two or more such groups could co-exist for the purposes of providing this type of insurance. A pooling arrangement which is for the co-insurance or co-reinsurance exclusively of such new risks (not of a mixture of new risks and existing risks) can therefore be exempted for a limited period of time. Three years should constitute an adequate period for the constitution of sufficient historical information on claims to assess the necessity or otherwise of one single pool. This Regulation therefore grants an exemption to any such group which is newly-created in order to cover a new risk, for the first three years of its existence.

(20) The definition of 'new risks 'clarifies that only risks which did not exist before are included in the definition, thus excluding for example risks which hitherto existed but were not insured. Moreover, a risk whose nature changes significantly (for example a considerable increase in terrorist activity) falls outside the definition, as the risk itself is not new in that case. A new risk, by its nature, requires an entirely new insurance product, and cannot be covered by additions or modifications to an existing insurance product.

(21) For risks which are not new, it is recognised that such co-insurance and co-reinsurance groups which involve a restriction of competition can also, in certain limited circumstances, involve benefits such as to justify an exemption under Article 81(3) of the Treaty, even if they could be replaced by two or more competing insurance entities. They may for example, allow their members to gain the necessary experience of the sector of insurance involved, they may allow cost savings, or reduction of premiums through joint reinsurance on advantageous terms. However, any exemption for such groups is not justified if the group in question benefits from a significant level of market power, since in those circumstances the restriction of competition deriving from the existence of the pool would normally outweigh any possible advantages.

(22) This Regulation therefore grants an exemption to any such co-insurance or co-reinsurance group which has existed for more than three years, or which is not created in order to cover a new risk, on condition that the insurance products underwritten within the group by its members do not exceed the following thresholds: 25% of the relevant market in the case of co-reinsurance groups, and 20% in the case of co-insurance groups. The threshold for co-insurance groups is lower because the co-insurance pools may involve uniform policy conditions and commercial premiums. These exemptions however only apply if the group in question meets the further conditions laid out in this Regulation, which are intended to keep to a minimum the restrictions of competition between the members of the group.

(23) Pools falling outside the scope of this Regulation may be eligible for an individual exemption, depending on the details of the pool itself and the specific conditions of the market in question. Considering that many insurance markets are constantly evolving, an individual analysis would be necessary in such cases in order to determine whether or not the conditions of Article 81(3) of the Treaty are met.

(24) The adoption by an association or associations of insurance or reinsurance undertakings of technical specifications, rules or codes of practice concerning safety devices, and of procedures for evaluating the compliance of safety devices with those technical specifications, rules or codes of practice, can be beneficial in providing a benchmark to insurers and reinsurers when assessing the extent of the risk they are asked to cover in a specific case, which depends on the quality of security equipment and of its installation and maintenance. However, where there exist Community-level technical specifications, classification systems, rules, procedures or codes of practice harmonised in line with Community legislation covering the free movement of goods, it is not appropriate to exempt by regulation any agreements among insurers on the same subject, since the objective of such harmonisation at European level is to lay down exhaustive and adequate levels of security for security devices which apply uniformly across the Community. Any agreement among insurers on different requirements for safety devices could undermine the achievement of that objective.

(25) As concerns the installation and maintenance of security devices, in so far as no such Community-level harmonisation exists, agreements between insurers

laying down technical specifications or approval procedures that are used in one or several Member States can be exempted by regulation; however, the exemption should be subjected to certain conditions, in particular that each insurance undertaking must remain free to accept for insurance, on whatever terms and conditions it wishes, devices and installation and maintenance undertakings not approved jointly.

(26) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 81(3) of the Treaty, as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice, the Commission may withdraw the benefit of the block exemption. This may occur in particular where studies on the impact of future developments are based on unjustifiable hypotheses; or where recommended standard policy conditions contain clauses which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract; or where groups are used or managed in such a way as to give one or more participating undertakings the means of acquiring or reinforcing a position of significant market power on the relevant market, or if these groups result in market sharing.

(27) In order to facilitate the conclusion of agreements, some of which can involve significant investment decisions, the period of validity of this Regulation should be fixed at seven years.

(28) This Regulation is without prejudice to the application of Article 82 of the Treaty.

(29) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation.

CHAPTER I: EXEMPTION AND DEFINITIONS

Article 1: Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to agreements entered into between two or more undertakings in the insurance sector (hereinafter referred to as 'the parties') with respect to:

(a) the joint establishment and distribution of:
—calculations of the average cost of covering a specified risk in the past (hereinafter 'calculations ');
—in connection with insurance involving an element of capitalisation, mortality tables, and tables showing the frequency of illness, accident and invalidity (hereinafter 'tables ');

(b) the joint carrying-out of studies on the probable impact of general circumstances external to the interested undertakings,either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment (hereinafter 'studies'),and the distribution of the results of such studies;

(c) the joint establishment and distribution of non-binding standard policy conditions for direct insurance (hereinafter 'standard policy conditions');

(d) the joint establishment and distribution of non-binding models illustrating the profits to be realised from an insurance policy involving an element of capitalisation (herein-after 'models');

(e) the setting-up and operation of groups of insurance undertakings or of insurance undertakings and reinsurance undertakings for the common coverage of a specific category of risks in the form of co-insurance or co-reinsurance; and

(f) the establishment, recognition and distribution of:
—technical specifications, rules or codes of practice concerning those types of security devices for which there do not exist at Community level technical specifications, classification systems, rules, procedures or codes of practice harmonised in line with Community legislation covering the free movement of goods, and procedures for assessing and approving the compliance of security devices with such specifications, rules or codes of practice,
—technical specifications, rules or codes of practice for the installation and maintenance of security devices, and procedures for assessing and approving the compliance of undertakings which install or maintain security devices with such specifications, rules or codes of practice.

Article 2: Definitions

For the purposes of the present Regulation, the following definitions shall apply:

1. 'Agreement' means an agreement, a decision of an association of undertakings or a concerted practice;

2. 'Participating undertakings' means undertakings party to the agreement and their respective connected undertakings;

3. 'Connected undertakings' means:

(a) undertakings in which a party to the agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c),or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

(i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

4. 'Standard policy conditions' refers to any clauses contained in model or reference insurance policies prepared jointly by insurers or by bodies or associations of insurers;

5. 'Co-insurance groups' means groups set up by insurance undertakings which:

(i) agree to underwrite in the name and for the account of all the participants the insurance of a specified risk category; or

(ii) entrust the underwriting and management of the insurance of a specified risk category in their name and on their behalf to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;

6. 'Co-reinsurance groups' means groups set up by insurance undertakings, possibly with the assistance of one or more re-insurance undertakings:

(i) in order to reinsure mutually all or part of their liabilities in respect of a specified risk category;

(ii) incidentally, to accept in the name and on behalf of all the participants the re-insurance of the same category of risks;

7. 'New risks' means risks which did not exist before, and for which insurance cover requires the development of an entirely new insurance product, not involving an extension, improvement or replacement of an existing insurance product.

8. 'Security devices' means components and equipment designed for loss prevention and reduction, and systems formed from such elements.

9. 'Commercial premium' means the price which is charged to the purchaser of an insurance policy.

CHAPTER II: JOINT CALCULATIONS, TABLES AND STUDIES

Article 3: Conditions for exemption

1. The exemption provided for in Article 1(a) shall apply on condition that the calculations or tables:

(a) are based on the assembly of data, spread over a number of risk-years chosen as an observation period, which relate to identical or comparable risks in sufficient number to constitute a base which can be handled statistically and which will yield figures on (inter alia):
—the number of claims during the said period,
—the number of individual risks insured in each risk-year of the chosen observation period,
—the total amounts paid or payable in respect of claims arisen during the said period,
—the total amount of capital insured for each risk-year during the chosen observation period;

(b) include as detailed a breakdown of the available statistics as is actuarially adequate;

(c) do not include in any way elements for contingencies, income deriving from reserves, administrative or commercial costs or fiscal or parafiscal contributions, and take into account neither revenues from investments nor anticipated profits.

2. The exemptions provided for in both Article 1(a) and Article 1(b) shall apply on condition that the calculations, tables or study results:

(a) do not identify the insurance undertakings concerned or any insured party;

(b) when compiled and distributed, include a statement that they are non-binding;

(c) are made available on reasonable and non-discriminatory terms, to any insurance undertaking which requests a copy of them, including insurance undertakings which are not active on the geographical or product market to which those calculations, tables or study results refer.

Article 4: Agreements not covered by the exemption

The exemption provided for in Article 1 shall not apply where participating undertakings enter into an undertaking or commitment among themselves, or oblige other undertakings, not to use calculations or tables that differ from those established pursuant to Article 1(a), or not to depart from the results of the studies referred to in Article 1(b).

CHAPTER III: STANDARD POLICY CONDITIONS AND MODELS

Article 5: Conditions for exemption

1. The exemption provided for in Article 1(c) shall apply on condition that the standard policy conditions:

(a) are established and distributed with an explicit statement that they are non-binding and that their use is not in any way recommended;

(b) expressly mention that participating undertakings are free to offer different policy conditions to their customers; and

(c) are accessible to any interested person and provided simply upon request.

2. The exemption provided for in Article 1(d) shall apply on condition that the non-binding models are established and distributed only by way of guidance.

Article 6: Agreements not covered by the exemption

1. The exemption provided for in Article 1(c) shall not apply where the standard policy conditions contain clauses which:

(a) contain any indication of the level of commercial premiums;

(b) indicate the amount of the cover or the part which the policyholder must pay himself (the 'excess');

(c) impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed;

(d) allow the insurer to maintain the policy in the event that he cancels part of the cover, increases the premium without the risk or the scope of the cover being changed (without prejudice to indexation clauses),or otherwise alters the policy conditions without the express consent of the policy-holder;

(e) allow the insurer to modify the term of the policy without the express consent of the policyholder;

(f) impose on the policyholder in the non-life assurance sector a contract period of more than three years;

(g) impose a renewal period of more than one year where the policy is automatically renewed unless notice is given upon the expiry of a given period;

(h) require the policyholder to agree to the reinstatement of a policy which has been suspended on account of the disappearance of the insured risk, if he is once again exposed to a risk of the same nature;

(i) require the policyholder to obtain cover from the same insurer for different risks;

(j) require the policyholder, in the event of disposal of the object of insurance, to make the acquirer take over the insurance policy;

(k) exclude or limit the cover of a risk if the policyholder uses security devices, or installing or maintenance undertakings, which are not approved in accordance with the relevant specifications agreed by an association or associations of insurers in one or several other Member States or at the European level.

2. The exemption provided for in Article 1(c) shall not benefit undertakings or associations of undertakings which agree, or agree to oblige other undertakings, not to apply conditions other than standard policy conditions established pursuant to an agreement between the participating undertakings.

3. Without prejudice to the establishment of specific insurance conditions for particular social or occupational categories of the population, the exemption provided for in Article 1(c) shall not apply to agreements decisions and concerted practices which exclude the coverage of certain risk categories because of the characteristics associated with the policyholder.

4. The exemption provided for in Article 1(d) shall not apply where, without prejudice to legally imposed obligations, the non-binding models include only specified interest rates or contain figures indicating administrative costs.

5. The exemption provided for in Article 1(d) shall not benefit undertakings or associations of undertakings which concert or undertake among themselves, or oblige other undertakings, not to apply models illustrating the benefits of an insurance policy other than those established pursuant to an agreement between the participating undertakings.

CHAPTER IV: COMMON COVERAGE OF CERTAIN TYPES OF RISKS

Article 7: Application of exemption and market share thresholds

1. As concerns co-insurance or co-reinsurance groups which are created after the date of entry into force of the present Regulation in order exclusively to cover new risks, the exemption provided for in Article 1(e) shall apply for a period of three years from the date of the first establishment of the group, regardless of the market share of the group.

2. As concerns co-insurance or co-reinsurance groups which do not fall within the scope of the first paragraph (for the reason that they have been in existence for over three years or have not been created in order to cover a new risk),the exemption provided for in Article 1(e) shall apply as long as the present Regulation remains in force, on condition that the insurance products underwritten within the grouping arrangement by the participating undertakings or on their behalf do not, in any of the markets concerned, represent:

(a) in the case of co-insurance groups, more than 20% of the relevant market;

(b) in the case of co-reinsurance groups, more than 25% of the relevant market.

3. For the purposes of applying the market share threshold provided for in the second paragraph the following rules shall apply:

(a) the market share shall be calculated on the basis of the gross premium income; if gross premium income data are not available, estimates based on other reliable market information, including insurance cover provided or insured risk value, may be used to establish the market share of the undertaking concerned;

(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share held by the undertakings referred to in Article 2(3)(e) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 2(3)(a).

4. If the market share referred to in point (a) of the second paragraph is initially not more than 20% but subsequently rises above this level without exceeding 22%, the exemption provided for in Article 1(e) shall continue to apply for a period of two consecutive calendar years following the year in which the 20% threshold was first exceeded.

5. If the market share referred to in point (a) of the second paragraph is initially not more than 20% but subsequently rises above 22%, the exemption provided for in Article 1(e) shall continue to apply for one calendar year following the year in which the level of 22% was first exceeded.

6. The benefit of paragraphs 4 and 5 may not be combined so as to exceed a period of two calendar years.

7. If the market share referred to in point (b) of the second paragraph is initially not more than 25% but subsequently rises above this level without exceeding 27%, the exemption provided for in Article 1(e) shall continue to apply for a period of two consecutive calendar years following the year in which the 25% threshold was first exceeded.

8. If the market share referred to in point (b) of the second paragraph is initially not more than 25% but subsequently rises above 27%, the exemption provided for in Article 1(e) shall continue to apply for one calendar year following the year in which the level of 27% was first exceeded.

9. The benefit of paragraphs 7 and 8 may not be combined so as to exceed a period of two calendar years.

Article 8: Conditions for exemption

The exemption provided for in Article 1(e) shall apply on condition that:

(a) each participating undertaking has the right to withdraw from the group, subject to a period of notice of not more than one year, without incurring any sanctions;

(b) the rules of the group do not oblige any member of the group to insure or re-insure through the group, in whole or in part, any risk of the type covered by the group;

(c) the rules of the group do not restrict the activity of the group or its members to the insurance or reinsurance of risks located in any particular geographical part of the European Union;

(d) the agreement does not limit output or sales;

(e) the agreement does not allocate markets or customers;

(f) the members of a co-reinsurance group do not agree on the commercial premiums which they charge in direct insurance; and

(g) no member of the group, or undertaking which exercises a determining influence on the commercial policy of the group, is also a member of, or exercises a determining influence on the commercial policy of, a different group active on the same relevant market.

CHAPTER V: SECURITY DEVICES

Article 9: Conditions for exemption

The exemption provided for in Article 1(f) shall apply on condition that:

(a) the technical specifications and compliance assessment procedures are precise, technically justified and in proportion to the performance to be attained by the security device concerned;

(b) the rules for the evaluation of installation undertakings and maintenance undertakings are objective, relate to their technical competence and are applied in a non-discriminatory manner;

(c) such specifications and rules are established and distributed with an accompanying statement that insurance undertakings are free to accept for insurance, on whatever terms and conditions they wish, other security devices or installation and maintenance undertakings which do not comply with these technical specifications or rules;

(d) such specifications and rules are provided simply upon request to any interested person;

(e) any lists of security devices and installation and maintenance undertakings compliant with specifications include a classification based on the level of performance obtained;

(f) a request for an assessment may be submitted at any time by any applicant;

(g) the evaluation of conformity does not impose on the applicant any expenses that are disproportionate to the costs of the approval procedure;

(h) the devices and installation undertakings and maintenance undertakings that meet the assessment criteria are certified to this effect in a non-discriminatory manner within a period of six months of the date of application, except where technical considerations justify a reasonable additional period;

(i) the fact of compliance or approval is certified in writing;

(j) the grounds for a refusal to issue the certificate of compliance are given in writing by attaching a duplicate copy of the records of the tests and controls that have been carried out;

(k) the grounds for a refusal to take into account a request for assessment are provided in writing; and

(l) the specifications and rules are applied by bodies accredited to norms in the series EN 45 000 and EN ISO/IEC 17025.

CHAPTER VI: MISCELLANEOUS PROVISIONS

Article 10: Withdrawal

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Council Regulation EEC/1534/91, where either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest, it finds in a particular case that an agreement to which the exemption provided for in Article 1 applies nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where,

(a) studies to which the exemption in Article 1(b) applies are based on unjustifiable hypotheses;

(b) standard policy conditions to which the exemption in Article 1(c) applies contain clauses which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract;

(c) in relation to the common coverage of certain types of risks to which the exemption in Article 1(e) applies, the setting-up or operation of a group results, through the conditions governing admission, the definition of the risks to be covered, the agreements on retrocession or by any other means, in the sharing of the markets for the insurance products concerned or for neighbouring products.

Article 11: Transitional period

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 April 2003 to 31 March 2004 in respect of agreements already in force on 31 March 2003 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation EEC/3932/92.

Article 12: Period of validity

This Regulation shall enter into force on 1 April 2003. It shall expire on 31 March 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States. ■

The FENIN Case

In Case T-319/99, which has not yet been reported, the Court of First Instance reiterated the Court's views on what constituted an undertaking for the purposes of the Community's rules on competition. FENIN is an association of undertakings marketing medical goods and equipment in Spain. The bodies running the Spanish health system (SNS) purchase from FENIN medical goods and equipment for use in Spanish hospitals. According to FENIN, the average delay in paying for those goods is 300 days. Yet FENIN is not able to exert any pressure on the SNS bodies because they enjoy a dominant position. FENIN therefore brought a complaint before the Commission alleging that the SNS bodies were abusing their dominant position. However, on the view that the bodies running the SNS were not acting as undertakings, the Commission rejected that complaint. FENIN then brought an action before the Court of First Instance challenging the Commission's decision. The Court pointed out that an undertaking, for the purposes of Community competition law, includes any body carrying on an economic activity, irrespective of its legal nature and the manner in which it is financed. It is the business of offering goods or services in a particular market, rather than the simple fact of making purchases, which characterises an activity as an economic activity. Consequently, when a body or organisation purchases goods or equipment for use in an activity which is not economic in nature - for example, one which is purely social - it is not acting as an undertaking, even if it wields considerable economic power.