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Ryanair

At the time of going to press, there have been many newspaper and broadcast reports of the case in Strasbourg, in which the local court has ruled that payments made in respect of the activities of Ryanair, the Irish cut-price airline providing a service between Strasbourg and British and Irish airports, are illegal under the State Aid rules of the European Community. Without a full report of the judgment it is impossible to comment in detail. However, there are questions arising from the press reports on which it would be helpful to have further and better particulars. Given that the money paid came from the local Chamber of Commerce, the first question is whether the Chamber of Commerce relies on the collection of funds from local traders or from the French government (or both). If the money does not come, even in part, from French central or local Government sources, the payments do not on the face of it appear to amount to State Aids. On the other hand, if the Chamber of Commerce is itself subsidised, wholly or in part from Government funds, there is a plausible argument that State Aids are involved.

Much has been made of the fact that Strasbourg airport, at which Ryanair has landing rights, is, like many but not all French regional airports, state-owned. On the face of it, this is irrelevant, unless the airport itself, and not just the Chamber of Commerce, grants money or other concessions having a measurable financial value to individual airlines. The second question is therefore whether Strasbourg airport does indeed make any such grant or concession to Ryanair. If not, it is hard to see what the public status of the airport has to do with the problem.

A third question, which has been partly answered by the Strasbourg Chamber of Commerce in interviews with the press, concerns the justification for the subsidy. The answer was simple. The additional influx of tourists due to the Ryanair connection made it worth while for local traders to support the continuation of the service. As their spokesman put it, if 100,000 extra visitors come to Strasbourg and spend a (conservative) average of €50 per head, it is well worth paying €1 million to keep the service running.

Another question concerns the possible claim that the subsidy is discriminatory. Air France, with its long experience of state subsidies, appears to have made the complaint about the subsidy to Ryanair; but it is not clear from the press reports whether Air France wanted to operate the service between Strasbourg and Britain itself or, indeed, whether any other operator was in a position to compete. As other airlines have found, it is quite difficult to match Ryanair's prices, with or without a subsidy. More questions are bound to arise as further details of the case become available. Meanwhile, the Commission is understood to be studying the case. If it reaches some conclusions about the merits of the case, it will have an opportunity to reflect on the effects of its conclusions on the interests both of consumers and of local traders, in Strasbourg and elsewhere. ■

DOMINANT POSITION (PHARMACEUTICALS): THE LOSEC CASE

Subject: Abuse of dominant position
Patents

Industry: Pharmaceuticals
(Some implications for other industries)

Parties: AstraZeneca

Source: Commission Statement IP/03/1136, dated 31 July 2003

(Note. Although patents for the drug Losec were involved in this case, the Commission is at pains to point out that the alleged abuse of a dominant position did not concern the alleged misuse of intellectual property rights, but the alleged misuse of governmental procedures. Under European Community rules, patent owners may obtain supplementary protection for their patents for pharmaceutical products to allow for the lead-time between patenting and marketing. The claim in the present case stems from objections by traders in generic products that the patent owners in question were abusing the supplementary protection procedure to delay market entry for generic products; and the Commission believes that the abuse lay in the patent owners' misrepresentations to the patent authorities. The owners of the patents, AstraZeneca, have a right to reply to the Commission's Statement of Objections. It is interesting to note, by the way, that the Commission has taken into account the fact that misrepresentations before patent offices and misuse of regulatory procedures for the authorisation of medicines have previously been held to be antitrust violations by US Courts and the US Federal Trade Commission.)

The Commission has sent a Statement of Objections to the Anglo-Swedish group AstraZeneca outlining its preliminary findings that it may have misused the patent system and other regulatory procedures for the marketing of pharmaceutical products. The Commission believes that this was abusively done with the purpose of blocking or delaying market entry for generic products. The sending of a Statement of Objections marks the opening of a formal antitrust investigation. AstraZeneca now has the opportunity to present its defence in writing and may, subsequently, request an oral hearing. According to the Commission, this case "is not about the use or enforcement of patent rights which are necessary and even indispensable to foster a competitive European research-based pharmaceutical industry. It is about suspected misuses of governmental systems and procedures which have the effect of blocking or delaying entry to the market of cheaper medicines which involves savings for both health systems and patients".

After investigation of the evidence, including internal company documents obtained at the company's premises in the UK and in Sweden in February 2000, the Commission has come to the preliminary conclusion that AstraZeneca may

have infringed Article 82 of the EU Treaty and Article 54 of the EEA Agreement. Two practices are under scrutiny. The first suspected abuse involves misrepresentations by AstraZeneca before a certain number of national patent offices with a view to obtaining so-called supplementary protection certificates (SPCs) for the medicinal product Losec. Towards the end of the 1990s, Losec had become the world's best-selling prescription medicine ever. Losec revolutionised the treatment of stomach ulcers and other acid-related diseases.

SPCs extend the basic patent protection for medicinal products by a maximum of five years to take into account the period of time that may have elapsed between the filing of a patent application and the later authorisation to market the patented product (Council Regulation EEC/1768/92). According to the SPC legislation, products such as Losec which were already on the market when the legislation entered into force, were entitled to extra protection only if the first market authorisation in the European Union was granted after certain cut-off dates. According to the evidence in the Commission's possession, AstraZeneca concealed from these patent offices the date at which it received its first marketing authorisation for Losec, thereby enabling AstraZeneca to obtain extra protection for Losec in certain countries. In the Commission's view, the company could not have obtained the extra protection in the absence of its misrepresentations.

The second practice under scrutiny relates to the alleged misuse of rules and procedures applied by the national medicines agencies which issue market authorisations for medicinal products. Specifically, the practice relates to AstraZeneca's switch of its Losec capsules (the original formulation) for a tablet formulation of Losec combined with requests by AstraZeneca to certain national medicines agencies to de-register the market authorisations for the capsules. De-registration is relevant for generic producers because generic products, can, in principle, obtain a marketing authorization, and parallel importers can in principle obtain import licenses, only if there is an existing reference authorisation. The Commission believes that both practices were intended to block or delay access to the market for generic versions of Losec and that the second practice was also intended to prevent parallel imports of Losec capsules. The Commission would like to emphasise that the present case under Article 82 of the EC Treaty and Article 54 of the EEA Agreement does not concern the alleged misuse of intellectual property rights, but the alleged misuse of governmental procedures.

Misrepresentations before patent offices and misuse of regulatory procedures for the authorisation of medicines have previously been held to be antitrust violations by US Courts and the US Federal Trade Commission.

The case arose out of complaints in 1999 from two generics companies, which claimed that AstraZeneca was misusing patent and other regulatory rules to obtain extra protection for Losec. AstraZeneca is the product of a merger in 1999 between Sweden's Astra AB and the UK company Zeneca plc. The Statement of Objections is addressed to AstraZeneca AB (Sweden) and its UK parent company AstraZeneca Plc. ■

DOMINANT POSITION (PHARMARCEUTICAL DATA): THE IMS CASE

Subject: Abuse of dominant position
Copyright
Unfair competition

Industry: Pharmaceutical data collection

Parties: IMS Health
NDC Health

Source: Commission Statement IP/03/1159, dated 13 August 2003

(Note. This is not the same case as the one involving IMS and at present awaiting judgment by the Court of First Instance. It is, however, similar, with the surprising twist that the German Court has made a ruling favourable to the position adopted by the Commission in the earlier case. This has enabled the Commission to withdraw its earlier decision on interim measures. The proceedings in the Court of First Instance are nevertheless continuing on the substantive issues raised by the first case; and the Advocate General's Opinion is expected later this year. A further twist to the case is that the German Court has also held that copying IMS's system of data collection is a breach of German unfair competition law.)

The European Commission has withdrawn its interim measures decision adopted on 3 July 2001 against IMS Health (IMS), the world leader in data collection on pharmaceutical sales and prescriptions. A judgment from the Frankfurt Higher Regional Court, while recognising that IMS Health's 1860 brick structure was protected by national copyright, now allows NDC Health (NDC) to market a brick structure which meets customers' needs. Therefore there is no longer any urgency requiring the Commission's intervention.

In its September 2002 judgment, the Frankfurt Higher Regional Court held that third parties could not be barred from developing another structure based on administrative and postal divisions "even if the resulting structure might have a similar number of brick segments to the 1860 structure and might be deemed to be derived from that structure". Therefore other brick structures very similar to the 1860 structure could be developed for the collection of pharmaceutical sales data and used legitimately to produce and market pharmaceutical sales reports. The Court also found that Pharma Intranet Information (PI) (now a subsidiary of NDC) had breached the German unfair competition law, by copying the 1860 structure and using it.

In a separate case, the Frankfurt Provincial Court had asked the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Article 82 of the Treaty in the context of a parallel action for copyright

infringement before the German courts, again involving IMS Health and NDC Health. The Opinion of the Advocate General is expected later in the year.

In July 2001, the Commission found that IMS had no objective justification for refusing to grant a licence for the 1860 brick structure to NDC. The Commission considered that there was a prima facie case of behaviour constituting an abuse of a dominant position under Article 82. The use of the 1860 brick structure was considered as being indispensable to carrying on business on the relevant market because there was no actual or potential substitute for it.

The Commission found that the refusal by IMS to license the 1860 brick structure created a risk of serious and irreparable harm to the complainant, NDC. The Commission therefore adopted the Decision of 3 July 2001 ordering IMS, by way of interim measures, to license the 1860 brick structure to its then competitors on the market for German regional pharmaceutical sales data services. IMS, in return, was entitled to royalties to be agreed with by the parties within a two week period of the date of the request for a licence failing which appropriate royalties would be determined by independent experts. On 26 October 2001 the President of the Court of First Instance suspended the execution of the Commission's decision; and the President of the Court of Justice later confirmed the suspension; this was, however, without prejudice to the substantive issues. ■

The DSM / Roche Case

The Commission has cleared the proposed acquisition of the Vitamins and Fine Chemicals division of Swiss company Roche by Dutch-based company DSM. The Commission had identified competition concerns in one market for feed enzymes, which are animal feed additives. DSM submitted a package of undertakings aimed at terminating its alliance with the German chemicals company, BASF, for the production and distribution of feed enzymes and transferring its activities in the production of feed enzymes to a purchaser to be approved by the Commission. After careful evaluation of the package of undertakings, the Commission concluded that the remedies removed its competition concerns and would restore effective competition.

DSM and Roche Vitamins and Fine Chemicals (RV&FC)are active in a broad range of product areas, however, the only overlaps are in feed enzymes which are added to animal feed. DSM and RV&FC belong to two different vertical alliances. DSM has an alliance with BASF and RV&FC with Novozymes, a Danish producer of industrial enzymes. In their respective alliances DSM and Novozymes are mainly responsible for research and development and production while BASF and RV&FC are mainly responsible for sales and distribution. Both alliances provide for a high level of economic integration and mutual interdependence. The acquisition of RV&FC by DSM would have created a structural link between the two alliances and led to near monopolies on the market for phytase at both the levels of production and distribution. However, the operation is also being reviewed by the US Federal Trade Commission with which the Commission is closely co-operating.

Source: Commission Statement IP/03/1079, 23 July 2003

MARKET ENTRY (RAILWAYS): THE ITALIAN RAILWAY CASE

Subject: Market entry
Abuse of dominant position
Access to facilities

Industry: Railways

Parties: Ferrovie dello Stato
Georg Verkehrsorganisation

Source: Commission Statement IP/03/1182, dated 28 August 2003

(Note. Once again, market entry is facilitated by a combination of statute law and the application of the rules on competition, in this case the prohibition of an abuse of a dominant position. By applying the rules, resulting in undertakings by the infringing body, access to essential facilities is guaranteed.)

The Commission has adopted a decision requiring Ferrovie dello Stato (FS), the Italian State-owned railway company, to allow new train operators to provide cross-border passenger services into Italy. The decision finds that FS has prevented Georg Verkehrsorganisation (GVG), a small German railway operator, from providing passenger services from Germany to Milan, by refusing to enter into an "international grouping", by refusing to discuss terms for access to the track and by refusing to provide traction services. This has deprived rail passengers of the benefits of price competition and customer choice. With a view to settling the case, FS has made substantial undertakings, granting GVG access and opening the market for other railway operators too. The decision illustrates the Commission's determination to apply the competition rules as a tool to ensure effective market opening in the European Union's railway sector.

The Commission regards the case as a landmark decision for competition in European rail transport. The decision is also in line with European Union legislation which, since 1991, has required railway companies wanting to start new, competing, international services to enter into an agreement with a company on the other side of the border. (Council Directive EEC/440/91 on the development of the Community's railways provides in Article 10(1) that "international groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertakings constituting the said groupings are established".) All the available evidence is that the introduction of competition, if properly regulated, delivers better rail services at less cost to the taxpayer than railway companies operating in closed markets. This decision opens up choice for consumers and will improve railways' attractiveness compared to other modes of transport.

GVG has been seeking access to the Italian railway market since 1995 to provide a twice-daily passenger service from various points in Germany via Basle to Milan. The service would reduce journey times by about an hour, mainly because it would be non-stop and timed to interconnect at Basel with Intercity trains from and to Germany. To be able to provide the service, GVG has to have access to the Swiss and Italian railway networks. It obtained the necessary trainpath in Switzerland in 1996. But the company also has to form an international grouping with an Italian railway undertaking, pursuant to the Directive, and FS is the only Italian train operator currently equipped to enter into such a grouping. Furthermore, GVG needs traction services (that is, locomotives and train crew), which, at this stage in the European railway liberalisation process, it needs to rent and only FS is capable of providing.

Following discussions with the Commission and in order to come to a settlement, FS has entered into an international grouping agreement with GVG and has agreed on the terms of a traction contract with the company. FS and its subsidiary RFI, which manages the Italian railway infrastructure, have promised to use their best endeavours to provide GVG with train paths. FS has also undertaken to enter into international grouping agreements with any duly licensed train operator, which has concrete proposals to start an international rail service into Italy. Furthermore, FS has undertaken that, for a period of five years, it will provide traction to other railway companies for such services. Accordingly, the Commission has come to the conclusion that the infringement has been terminated and, in view of the novelty of the case and the substantial commitments offered by FS, has decided not to impose a fine.

This is a landmark decision for competition in European rail transport. It means that, as long as the international grouping requirement remains on the statute book, the refusal of a dominant train operator to enter into such an arrangement amounts to an abuse of the competition rules if the national flag carrier is the only possible partner with whom the grouping can be formed. Likewise, a refusal to provide traction services, in circumstances where there is no realistic alternative supplier, will also be deemed abusive. And there can be no excuse for refusing to discuss terms for access to the tracks.

At this stage of the liberalisation process of the European Union's railway sector, the legal requirement to enter into an international grouping, the dependency on vertically integrated flag carriers to provide access to the national railway network and the need to ensure traction in different Member States constitute an almost insurmountable mix of technical, legal and economic barriers to entry. It is therefore not surprising that there are virtually no international passenger railway services in competition with national flag carriers. By addressing these three most important access barriers, this decision will greatly facilitate entry into the market of international rail passenger services.

GVG is based in Frankfurt and is active in air and rail transport. It has been operating passenger trains since 1995 and now operates more than 200 services in the long distance market in several European countries. FS is the Italian state-owned railway operator. ■

LICENSING (COMPACT DISCS): THE PHILIPS/SONY CASE

Subject: Licensing
Patents
Technology transfer
"Comfort letter"

Industry: Electronics; compact disc manufacture

Parties: Philips
Sony

Source: Commission Statement IP/03/1152, dated 7th August 2003

(Note. Although there were complaints by other traders about the compatibility of the licensing agreements in question, the Commission has come to the conclusion that the agreements are consistent with the principles set out in the block exemption regulation on technology transfer agreements. References to "essential patents" in this report are taken to have the meaning assigned to them under the block exemption regulation.)

The Commission has cleared a set of bilateral agreements establishing the worldwide Philips/Sony CD Disc Licensing Program and has also cleared a standard joint licence agreement, modified following discussions with the Commission to make it fully compliant with the competition rules of the European Community (the 2003 SLA). The 2003 SLA covers only patents held by either Philips or Sony and which are essential to manufacture several standard types of pre-recorded CD discs (CD Audio, CD ROM, CD TEXT and CD Extra discs). The Commission found that the 2003 SLA, by which Philips and Sony offer access to their patents for any one or more of the different CD disc types, while each retains the right to license the patents separately, does not restrict competition.

This clearance marks the end of the Commission's investigation into the Philips/Sony CD disc Licensing Program. The inquiry was started after the Commission received several complaints by CD disc manufacturers alleging that both the bilateral agreements between Philips and Sony and the different versions in use of the standard joint licence agreement ran counter to Articles 81 and 82 EC Treaty.

Following a thorough assessment of the relevant facts and in view of the improvements made as to the structure, transparency and administration of the Program the Commission cleared the bilateral agreements establishing the joint CD Disc Licensing Program by means of a "comfort letter". Clearance is based on the conclusion that the agreements establishing the joint CD Disc Licensing Program are covered by the block exemption regulation concerning certain categories of technology transfer agreements.

The Commission has also cleared the 2003 SLA to be offered by Philips to third parties. The 2003 SLA covers the patents of Philips or of Sony as well as patents based on joint inventions of Philips and Sony, which are essential for compliance with the different specifications of the different types of CD discs. The Commission concluded that the new 2003 SLA does not appreciably restrict competition within the meaning of Article 81(1) of the EC Treaty.

The 2003 SLA has been overhauled in order to comply fully with the competition rules. The most important changes incorporated are as follows.

- The SLA 2003 explicitly recognises Philips' and Sony's right to license their respective patents separately and to give non-assertion undertakings with regard to jointly owned patents, whether within or outside the standard specifications of the CD systems.
- The SLA 2003 provides for options of any Licensee as to different types of CD-Discs. The agreement specifies the patents required to the manufacturing of each type of CD discs.

The Commission is satisfied that only essential patents are included now in the different patent lists annexed to the 2003 SLA. In respect of each type of CD Discs, Philips and Sony have one essential patent each or at least a joint essential patent in Europe. A recognised and independent patent expert has certified that the patents covered by the SLA 2003 are essential patents. As regards CD extra and CD text, the independent expert has not yet concluded its analysis of the assessment of a couple of patents per format. However, the new SLA states that, if the independent expert concludes that any patent is not essential, the patent will be deleted from the relevant annex. The licensee will have the right to continue to use the patent; but the term of the agreement will be adjusted accordingly.

Still concerning the CD Extra format, Sony has two pending applications for which patents have not been granted yet. If these patents are granted and if the expert consider them to be essential, they will be included in the relevant patent annex. However, such inclusion will have no effects on the conditions of the SLA, as regards the royalty, the duration of the agreement or that of the grant back obligation. Licensees are only obliged to license back their patents essential for the type(s) of CD Discs they have selected and for CD Players, also to other Licensees having selected the same type of CD Disc, and for CD Players.

Royalty payment obligations have been clarified to reflect the territorial scope and duration of the licensed patents. Furthermore, licensees will be obliged to give information to Philips only in respect of royalty bearing CD discs produced and sold. Conditions for access to the reduced compliance royalty rate have been clarified and made more attractive. In particular,

- Philips will offer to all EEA licensees a one time only credit on royalty payments for the specific costs incurred by an initial audit covering the last three years, required to benefit from the reduced compliance royalty rate, up to a maximum amount of $25,000,

- compliant licensees that send the above audit before 1 December 2003 can apply the reduced compliance royalty rate retroactively with effect as from 1 July 2002, and
- licensees that have produced fewer than 5 million CD discs in the preceding year will be exempted from the obligation to present yearly audits in order to show continued compliance for that year.

The SLA 2003 will terminate at the date of expiration of the last essential patent in the Territory for the type(s) of CD Discs selected by Licensee. For the EEA definitive cut off dates per type of CD Discs have been set for each EEA country. The SLA 2003 can be entered into by all existing Licensees in lieu of their existing license agreements. Switching will be free of charge for existing licensees.

Finally, Philips Licensing website (http://www.licensing.philips.com/) now provides clear information as to the Licensing Program, the patents involved and the essential character thereof, as well as a software tool freely downloadable for Licensees, to differentiate between different types of CD-ROM discs. Philips has informed the Commission that it intends to inform all EEA licensees of all the above changes and benefits by means of a letter to be sent shortly. As part of that letter, Philips will grant a one-time credit of $10,000 on royalties due to each EEA licensee.

Since the 1970s, Philips and Sony have engaged in joint research and development in the field of optical data storage technology which resulted in joint inventions protected by patents in many EEA countries as well as in other parts of the world. In the early 1980s, at a time when vinyl discs and magnetic tapes were the prevailing audio storage media on the market, Philips and Sony jointly developed the CD system standard specifications as part of an innovation program regarding digital audio recording initiated by the Electronics Industry Association of Japan. The CD system was one among several other systems presented by the participants in this program. The adoption of the system by music companies and consumer electronics manufacturers was strongly facilitated by the availability of the combined patents of Philips and Sony under reasonable and non-discriminatory terms. The CD system specifications and the licenses offered were subsequently extended to newly developed formats, such as CD-ROM, CD-I, CD-V and CD-Extra, of which only the CD-ROM format became successful once it was widely adopted by the computer industry. ■

VFR v Commission

Although the ECSC Treaty has expired, litigation on the provisions of the Treaty is still alive. The Court of First Instance delivered judgment in a case on 8th July 2003, which had been started when the Treaty was still in force. The Verband der Freien Rohrwerke had taken action against the Commission in respect of a Decision based partly on Article 66 of the ECSC Treaty and partly on the Mergers Regulation, a creature of the EC Treaty. The issues are somewhat academic; but, for those interested, it is Case T-374/00.

DOMINANT POSITION (GAS PIPELINES): THE MARATHON CASE

Subject: Abuse of dominant position
Access to facilities

Industry: Gas supply

Parties: BEB
Marathon

Source: Commission Statement IP/03/1129, dated 29 July 2003

(Note. Some of the cases involving access to necessary facilities are not "pure" competition cases, since they involve statutory requirements over and above the competition rules. Thus, in the present case, there is a statutory requirement that access to gas pipelines should be available: the European gas directives of 1998 and 2003 provide for a so-called Third Party Access regime. However, as the Commission Statement points out, refusals to grant access can also be, and have been in the present case, tackled as a potential abuse of a dominant position or a restrictive concerted practice.)

The Commission's competition department has closed its probe into the alleged anti-competitive behaviour by BEB, a German joint venture of ExxonMobil and Shell. The investigation focused on BEB's refusal to grant Norwegian gas producer Marathon access to its Northern German pipeline network. In return for the closing of the case, BEB offered to make further improvements to its access regime for gas pipelines and storage facilities, which will facilitate third parties' use of BEB's network. BEB undertook in particular to abandon the transport system currently applied across Germany (including the area covered by BEB's network) and to replace it with a new user-friendly system for its network (the so-called entry/exit system).

The Commission considers that the settlement of the Marathon case with BEB means a significant step forward for the German gas market, which is currently lagging behind in the liberalisation process. It welcomes the fact that BEB is willing to introduce an entry/exit system for its network, which better reflects physical gas flows and costs incurred when transporting gas: other German companies are encouraged to follow BEB's example. In the medium term the Commission also hopes that Germany develops into one large entry/exit zone covering all networks be they supra-regional, regional or local. The Commission is fully committed to fostering the liberalisation process by chasing anti-competitive behaviour.

BEB's current system is based on capacity reservations for each pipeline section in accordance with the "contractual path", even if the gas does not physically flow through these pipelines. The new system will allow users to book the capacity at the points where they intend to inject gas (entry points) and separately at the

points where they envisage to off-take gas (exit points). It is expected that the so-called entry/exit model will facilitate domestic as well as cross-border transport for third parties as it does already in other Member States. The closure of the case for BEB follows similar settlements with the German gas company Thyssengas, a subsidiary of the electricity company RWE, and Dutch gas company Gasunie, one of the largest European gas companies, in which ExxonMobil, Shell and the Dutch state hold stakes. The investigation of the two other European gas companies, which had rejected Marathon's access request, will be continued.

The origins of the case date back to the nineties, when the Norwegian subsidiary of US oil and gas producer Marathon requested, on various occasions, access to the pipelines of five continental European gas companies. In the past the Commission services have reached a settlement of the case with the Dutch company Gasunie and the German company Thyssengas. The remaining two companies concerned by the case are large German and French operators.

Refusals to grant access to gas pipelines are not only incompatible with the European gas directives of 1998 and 2003, which provide for a so-called Third Party Access (TPA) regime, that is, a regime allowing gas suppliers and shippers to use the gas pipelines owned by the other operators. Refusals to grant access can also be, and have been in the present case, tackled as a potential abuse of a dominant position or a restrictive concerted practice (in the latter case when the refusal is carried out jointly).

In the case in question the Commission services and BEB reached a settlement of the dispute. The undertaking offered by BEB focus on five points:

a) transparency,
b) balancing,
c) booking procedures,
d) congestion management and
e) entry-exit system.

To improve the transparency of its network BEB will publish and update regularly on its Internet site - in absolute figures - the available transport capacity at all entry and all major exit points of its transmission network. The same applies to its storage facilities. This will make it easier for shippers to obtain information about available transmission and storage capacity.

As regards balancing, BEB will help shippers having a flexible supply source to avoid imbalances, by means of the introduction of a free-of-charge "on-line balancing", which will ensure that input and output of gas in the BEB system will remain in balance at all times. At the same time BEB will introduce a bulletin board which will allow shippers to make contact with each other to optimise their transport and storage requirements. Finally, BEB will allow companies to use its storage facilities even if the technical minimum flow requirements are not fulfilled. The only condition is that at the same time other shippers (individually or jointly) fulfil the minimum flow requirements (the so-called back pack principle).

BEB also undertakes to improve its handling of access requests by introducing, as of July 2005, online screen-based booking procedures, which will lead to the elimination of what are at times lengthy response times. Online bookings are particularly relevant for short term trading. In the meantime BEB will shorten its maximum response time for replying to access request.

As regards congestion management, BEB undertakes to introduce a "use it or lose it" principle for capacity reservations of its own gas trading branch. This undertaking means that third parties are entitled to use, on request, unused transport capacity originally booked by BEB's trading branch. BEB will also facilitate the creation of a secondary market by allowing customers to sell or sublease capacity booked from BEB.

Last, BEB is offering to introduce a so-called entry/exit regime. Under this regime shippers book capacity at the relevant entry and exit points separately. The fees to be paid for transport (entry charges and exit charges) no longer relate to a hypothetical "contractual path", that is, the distance between the entry and exit points, which is currently applied in Germany. BEB is, however, entitled to take existing competition into account. The current German system in many instances neither reflects the physical flow of gas nor the cost that this entails. The entry/exit system removes this concern and is therefore considered superior. It also facilitates booking procedures as it no longer requires a capacity reservation for each pipeline section "used for the fulfilment of the transport contracts". An important aspect of the undertaking is also that BEB is open to discuss with adjacent pipeline system operators possible cooperation to extend the entry/exit system to larger territories.

Most of the undertakings will come into force immediately; however, for certain additional IT, preparation is required. The undertakings will remain in place until January 2007. An independent auditor, who will report regularly to the Commission services, will monitor compliance. For further details reference may be made to BEB's internet site where the non-confidential version of the text setting out the undertakings will be published. The Commission services believe that BEB's undertakings will lead to a significant improvement of BEB's Third Party Access regime, particularly the entry/exit model, which has been discussed in Germany for more than two years. It therefore decided to close the Marathon case for BEB in return for the undertakings taking effect. The investigation of the remaining operators will continue. ■

Framework Directive for Electronic Communications Networks

The European Community has adopted a new regulatory framework for electronic communications networks and services; this came into force on 25 July 2003. The aim is to introduce a streamlined process in this sector based on competition law principles.

Source: Commission Statement IP/03/1089, dated 23 July 2003

BLOCK EXEMPTION (MOTOR VEHICLES): COMMISSION REPORT

Subject: Block exemption
Distribution arrangements
Price differentials

Industry: Motor vehicles (cars)

Source: Commission Statement IP/03/1117, dated 25 July 2003

(Note. The Commission appears to be disappointed that the latest car price report shows that the positive impact of the new block exemption is yet to come; but, since the rules under the block exemption regulation do not have to be implemented until 1 October 2003 and since the process envisaged under the regulation will not be complete until October 2005, the Commission hopes that future reports on car prices will show more signs of the regulation's effects.)

The latest report on car prices released by the Commission shows that price differentials for new cars are still substantial, although some convergence is taking place. The figures available as of 1 May 2003 show that many European consumers can still make significant savings by buying their cars in other Member States, and that competition and cross-border trade have not yet brought about significant price convergence. Pre-tax car prices are lowest in Denmark, Greece and the Netherlands. Prices in Germany, the biggest market, and Austria, remain among the highest within the euro zone.

The Commission expects prices to converge further once the new regulation on motor vehicle distribution (Regulation EC/1400/2002) has been phased in. The new rules, which have to be fully implemented by the car industry by 1 October 2003, are expected to strengthen the position of dealers and repair shops and allow them to develop their business to the benefit of customers. In the Commission's view, the new rules on motor vehicle distribution have not yet reached their full potential, for one thing because we are still in the one-year transitional period. But the Commission is confident that, once the changes are fully implemented on 1 October 2003, real progress will be made towards more consumer choice and competition. Moreover, the effects of the new rules will not be limited to car prices but will also be felt as regards repairs and servicing. Dealers and repairers clearly show that they are fully aware of the greater economic freedom created by the new regulation and are determined to benefit from new opportunities, such as multi-branding. The Commission's Competition service is monitoring the implementation of the new rules and will intervene wherever agreements on car distribution or repair unduly restrict the opportunities afforded by the regulation.

A further decisive step towards greater market integration will take place on 1 October 2005. After this date manufacturers will no longer be able to stop dealers from opening extra outlets where they wish, including in other Member States.

This move will serve as a powerful catalyst and will further improve market integration by allowing dealers in low-price Member States to set up shop in European Union countries where prices are normally higher.

With respect to the existing price differentials, the Commission notes that the report shows slight though insufficient progress towards a truly single market for car distribution. European consumers would be well advised to compare prices in different Member States so that they can make a fully informed purchase decision. A consumer who buys a car at a lower price in another Member State should not face any anti-competitive obstacles. This latest report is based on car prices as they stood on 1 May 2003. The price differentials set out below are based on the manufacturers' recommended retail prices net of tax. The full report gives prices both before and after tax. It compares prices for a total of 91 models which represent the best-sellers of a total of 26 manufacturers.

Overall situation in the European Union

According to the report, differences in prices are less extreme than those recorded in previous surveys. The standard deviation of prices between national markets fell from 10.6% to 8.6% when compared to the report published a year ago. This convergence takes place in the context of stable car prices in real terms within the Union as a whole. Nevertheless, price differentials between the cheapest and the most expensive Member State remain substantial in some cases. Prices for 8.5% of the car models surveyed in the report are 20% or more higher in the most expensive Member State than in the cheapest one. The widest price difference recorded in the report concerns the Fiat Seicento, the price of which in Austria is 45.5% higher than in Spain.

In absolute terms, more illustrative than percentages for end consumers, a car belonging to the "middle segment" such as the Peugeot 406 in segment D will cost €5,000 less in Greece, the cheapest Member State, than in Germany, the most expensive Member State within the euro zone. A Volkswagen Passat may cost €4,600 euro more in Germany than in Greece. Substantial savings are thus possible for cross-border shoppers.

These figures show that neither competition between dealers from different Member States nor the level of cross-border purchases has yet proved to be a sufficient competitive constraint on manufacturers, since markets remain relatively fragmented. Once they come fully into effect, the new rules governing car distribution should increase competitive pressure and further integrate markets. They should also simplify cross-border purchases, whether made directly by consumers, or through an intermediary who buys on their behalf.

Germany and, to a lesser extent, Austria, rank now as the most expensive markets in the Union for the models surveyed. In Germany, a total of 35 models are sold to consumers at the highest prices in the euro zone, and 24 of these are between 20% and 42% more expensive than in the cheapest national market within the euro zone. 11 models in Austria are sold at prices more than 20% higher than those in the cheapest euro zone market. The number of examples of

such high price differentials has nonetheless decreased since the previous survey, when 31 models in Germany and 19 in Austria fell into this category. Within the euro zone, the cheapest market is Greece, where one out of three models is sold at the lowest price in the euro zone. Finland is also relatively inexpensive. Outside the euro zone, prices in Denmark are the lowest in the Union: 7% below those in Greece.

Owing to the depreciation of the £ against the €, the United Kingdom is no longer the most expensive car market within the Union in euro terms. However, in the UK and Ireland, car prices do also include the additional cost of meeting right-hand drive specifications. The report shows that for British and Irish consumers buying a car in another Member State, the supplement for right-hand drive specification is generally lowest for Rover and Volvo cars (less than 4%), and highest (+/- 10%) for models produced by the Volkswagen group (VW, Audi, Seat and Skoda).

Some highlights within the euro zone

Price differences for a selection of best-selling cars (expressed as percentages of prices in euro before tax, comparing the most expensive with the cheapest euro zone market) on 1 May 2003 were as follows:

Small segments A and B	1/5/2003	1/11/2002	1/5/2002
Opel Corsa	16.8%	13.3%	18.1%
Ford Fiesta	19.7%	25.8%	n.a.
Renault Clio	14.0%	13.8%	19.5%
Peugeot 106	29.8%	26.8%	24.4%
VW Polo	17.8%	18.0%	22.6%

Medium segment C	1/05/2003	1/11/2002	1/5/2002
VW Golf	29.3%	32.2%	30.5%
Opel Astra	16.2%	25.6%	21.4%
Ford Focus	24.4%	26.6%	24.4%
Renault Mégane	19.7%	11.5%	26.5%
Peugeot 307	18.3%	23.1%	27.2%

Large segments D, E and F	1/05/2003	1/11/2002	1/5/2002
BMW 318I	15.8%	10.4%	11.2%
Audi A 4	10.4%	13.2%	11.9%
Ford Mondeo	22.6%	22.7%	21.5%
Opel Vectra	14.4%	22.7%	28.0%
VW Passat	36.4%	26.9%	27.3%

Price differentials across car segments

Overall, price convergence for the most popular car models within different car segments has not greatly varied since the last report. In line with the previous survey, the report shows that price variations for small and relatively cheap cars are getting similar to those for more powerful and expensive ones. For the first three segments (A to C), which are those with the highest volumes of sales and number of models, average price differentials within the euro zone are moving towards the same order of magnitude as differentials in higher priced segments D, E, F and G.

Manufacturers' pricing policies

Across the euro zone, cars made by the PSA group (Peugeot, Citroën), and the Volkswagen group (VW, Audi, Seat and Skoda) are those which have the widest intra-brand price differences. On the other hand, certain manufacturers such as BMW, DaimlerChrysler (which includes Mercedes), General Motors (which includes Opel/Vauxhall and Saab) and, to a lesser extent, Renault, limit price differentials within the euro zone to 20% or less.

Methodology

The methodology used is the same as that employed in previous reports: a total of 18 European and 8 Japanese manufacturers supplied the Commission with their recommended retail prices, as of 1 May 2003, for 91 of their best-selling models. The reference price for the calculation of differentials for any model is that of the cheapest country within the euro zone. Prices are adjusted for differences in standard equipment, and are given in euro and, where applicable, local currency, both before and after tax. Prices for major options and for right-hand drive specification are also supplied, together with other information. For some models, further options and variations in standard equipment may exist on certain national markets. It should also be noted that actual retail prices may differ from recommended list prices, as dealers must be free to propose lower prices and to offer additional financial benefits to customers, depending on the market.

With a view to increasing transparency and providing better information to the public, the Competition Directorate General provides easy access to data by making a condensed electronic version of the report, including the table of manufacturers' prices, available on its Website:

http://europa.eu.int/comm/competition/car_sector/

Full paper copies of the report are available at the Commission Offices in the Member States, the addresses of which are available at:

http://europa.eu.int/comm/offices.htm

Information centres for car buyers (telephone "hotlines") can be found at:

http://europa.eu.int/comm/competition/car_sector/

The block exemption regulation for the motor vehicle sector is EC/1400/02 and was set out in full in our October 2002 issue, at page 232. ■

STATE AIDS (PUBLIC TRANSPORT): THE ALTMARK CASE

Subject: State aids

Industry: Public transport
(Some implications for other industries)

Parties: Altmark Trans GmbH
Regierungspräsidium Magdeburg
Nahverkehrsgesellschaft Altmark GmbH

Source: Court of Justice Press Release 64/03, relating to the Court's judgment, dated 24 July 2003 in Case C-280/00 (*Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*)

(Note. In this case, the court ruled that financial support, which merely represented compensation for public service obligations imposed by the Member States, did not have the characteristics of state aid. However, for such compensation not to be classified as State aid in a specific case, four conditions had to be satisfied. These are set out in the report below.)

A Community regulation on public service obligations aims to eliminate disparities resulting from obligations inherent in the concept of a public service imposed on land transport undertakings by Member States which are liable to cause substantial distortion to conditions of competition. It is therefore necessary to terminate public service obligations, although it may be essential to maintain them in certain cases to ensure the provision of adequate transport services.

The German legislature originally made express use of the option allowed by that Community regulation of excluding its application to urban, suburban and regional transport. Since 1996 German law expressly provides that local and regional transport services are subject to the regulation in certain situations.

In 1990 Altmark Trans obtained licences and subsidies for passenger transport by bus in the Landkreis (district) of Stendal. In 1994 the German authorities renewed Altmark's licences and rejected an application for licences by Nahverkehrsgesellschaft Altmark. The latter company brought proceedings before the German courts, claiming that Altmark Trans was not financially viable because it could not have survived without public subsidies, and the licences were therefore unlawful.

The Bundesverwaltungsgericht (Federal Administrative Court), as the final court of appeal, made a reference to the Court of Justice, as it wished to know:

- whether the subsidies granted to Altmark Trans by the Landkreis of Stendal were State aid prohibited by the EC Treaty, and

- whether the German authorities were entitled to provide that regional transport services operated commercially were not subject to the 1969 regulation on public service obligations.

The Court of Justice pointed out that, according to settled case-law, for a State measure to be classifiable as State aid within the meaning of the EC Treaty, it must be capable of being regarded as an "advantage" conferred on the recipient undertaking which that undertaking would not have obtained under normal market conditions.

The Court held that there was no such advantage where a State financial measure had to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. However, for such compensation to escape classification as State aid in a particular case, four conditions had to be satisfied.

First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Fourth, where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined by a comparison with an analysis of the costs which a typical transport undertaking would incur (taking into account the receipts and a reasonable profit from discharging the obligations).

Only if those four conditions are satisfied may it be considered that an undertaking has not enjoyed a real financial advantage which would have the effect of putting it in a more favourable competitive position than the undertakings competing with it, so that it is not therefore State aid within the mening of the EC Treaty. However, it must be emphasised that, in the present case, the German court will have to examine whether the subsidies in question were granted in conformity with the rules of the EC Treaty on State aid only if it concludes that the Community regulation concerned does not apply in Germany. In other words, if that Community regulation applies in the present case, there is no need to have recourse to the general provisions of the EC Treaty.

The Court has ruled that the German legislature may, in principle, make partial application of the exception provided for in the Community regulation for urban, suburban and regional transport, since by so doing it comes closer to the objectives pursued by that regulation. However, a Member State may make partial application of that exception only where the principle of legal certainty is duly complied with, which means that the German law must delimit clearly the use made of that exception, so as to make it possible to determine the situations in which the exception applies and those in which the Community regulation applies. ■

STATE AIDS (ELECTRICITY SUPPLY): THE BRITISH ENERGY CASE

Subject: State aids
Restructuring

Industry: Electricity; nuclear fuel

Parties: British Energy plc
British Nuclear Fuel Ltd

Source: Commission Statement IP/03/1082, 23 July 2003

(Note. There is a fine dividing line between state aid for industries calling for support and state aid for industries promising to implement a restructuring plan and thereafter stand on their own legs. The distinctions are drawn in the Community Guidelines on Rescue and Restructuring Aid, by which the plans for British Energy will be judged. The plans will be further judged in the light of the requirements of the European Atomic Energy Treaty (Euratom), a reminder that, although the European Coal and Steel Community Treaty has vanished, there are still two Communities on which the European Union is founded.)

The Commission has begun an in-depth probe to examine the restructuring aid that the UK Government envisages for British Energy plc. The proposed restructuring plan will be analysed under the Community Guidelines on rescue and restructuring aid, while fully recognising that issues covered by the Euratom Treaty will be assessed, taking into account the latter Treaty's provisions. Initiation of the formal investigation procedure opens the way for an in-depth examination, but does not prejudge its final outcome. The decision to initiate the procedure is published in the Official Journal. Competitors and other interested parties are invited to submit their observations.

On 7 March 2003 the UK authorities notified a restructuring plan in favour of British Energy ("BE"). The plan aims at restoring the long-term viability of BE. BE has faced financial difficulties since September 2002, mainly on account of a large drop in the prices for wholesale electricity following the introduction of new electricity trading arrangements in England and Wales. The notified restructuring plan entails the UK Government assuming the funding of BE's nuclear liabilities, in particular with respect to the management of fuel loaded prior to the restructuring and to the decommissioning of BE's nuclear plants at the end of their commercial lives. The plan also comprises the re-negotiation of fuel supply and spent fuel management contracts between BE and British Nuclear Fuel Limited (BNFL), as well as a standstill agreement and a number of financial restructuring arrangements with BE's major creditors. BE has devised a new trading strategy and will dispose of its North American assets. Finally, BE was granted a 3 months' deferment of business rates by local authorities.

The Commission's in-depth probe aims to assess whether the plan will lead to the restoration of BE's viability within a reasonable time period. It will also evaluate whether BE makes a significant contribution to the restructuring effort from its own resources and whether the distortion inherent in the restructuring aid is limited to the strict minimum. Finally, the Commission will carry out an assessment whether the aid is necessary to ensure nuclear safety and security of electricity supply.

BE is one of the most important suppliers of electricity in the UK. It was privatised in 1996 and operates six nuclear power stations in England and two nuclear power plants in Scotland. It is the only private operator of nuclear plants in the UK. It supplies electricity on the wholesale market and to certain large industrial and commercial customers. It does not serve other retail customers. The decrease in electricity wholesale prices, which followed the introduction of a new electricity trading system in England and Wales, has severely reduced the cash-flow BE could generate with the supply of nuclear energy. In September 2002, it turned to the United Kingdom Government for support and was granted two credit facilities.

On 11 November 2002, the Commission decided not to raise objections with respect to the rescue aid granted by the UK Government. Approval of the rescue aid was based on the UK Government's undertaking to present to the Commission a comprehensive restructuring plan for British Energy plc within six months after the rescue aid had been authorised. It was on 7 March 2003, that the UK Government submitted British Energy's restructuring plan to the Commission. ■

The MobilCom Case

Here is another case involving an interpretation of the Commission's Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty. It arises essentially from the withdrawal of support by France Telecom for MobilCom's 3G business, leaving Mobilcom in difficulties, which the German authorities have tried to correct by means of guarantees. The Commission has decided to widen the inquiry into an extension of Mobilcom's support, which concerns loans totalling €138.3 million. This gives all parties, and in particular MobilCom AG's competitors, the opportunity to submit their observations on the extension of the guarantees. The Commission is not satisfied at this stage that MobilCom is unable to go some way towards repaying the loans by rapidly selling off available assets. There would also seem to be a realistic possibility, at least in the medium term, of replacing the state-guaranteed loans with financing from other sources which would not carry any state guarantee. Meanwhile, the Commission doubts whether the state guarantees are indispensable to the successful restructuring of the company, and if so for how long.

Source: Commission Statement IP/03/972, dated 9 July 2003

STATE AIDS (MAIL ORDER): THE OTTO VERSAND CASE

Subject: State aids
Multi-sectoral Framework
Regional aid

Industry: Logistics Centre for the distribution of mail order goods

Parties: German Government
Otto Versand GmbH & Co. KG

Source: Commission Statement IP/03/1087, dated 23 July 2003

(Note. Here is another European Community "Framework", under which plans for state aid can be assessed by the Commission. Regional aid usually has a fair wind, especially if applied to what was formerly East Germany.)

The Commission has authorised Germany to grant a proposed €27.4 million in aid to help Otto Versand to extend an existing logistics centre for the distribution of mail order goods in Haldensleben, Sachsen-Anhalt. The aid will help create jobs, has limited impact on competition and its intensity of 23.625% remains below the ceiling of aid allowable under the applicable rules for this project.

Germany notified in March 2003, under the Multisectoral Framework on regional aid for large investment projects, an aid of €27,405,000 in favour of Otto GmbH & Co. KG for an investment in the Eastern German region of Sachsen-Anhalt. Otto group is active in the field of mail order of retail goods. The project concerns the extension of the capacity of an existing logistics centre in Haldensleben by about one third and the rebuilding and extension of all the functional parts of the centre in order to keep up with increased distribution demands. From this logistics centre, non-food mail order goods are transported to regional distribution centres and hence to the customers.

The total proposed aid intensity amounts to 23.625 % based on the eligible investment costs of €116 million. The regional aid ceiling in the assisted area concerned is 28%. According to Germany, the project will lead to the creation of 292 direct jobs and of at least further 175 jobs in Sachsen-Anhalt and adjacent regions. In assessing the compatibility of the aid under the Multisectoral Framework, the Commission has to take into account the capacity and market situation in the sector, the number of jobs directly created by the project and the beneficial effects of the investment on the economy of the assisted regions. The Commission's investigation showed that, although the market for mail order in growing more slowly than the overall manufacturing industry over the last years, the project is expected to have a beneficial effect on the regional economy. Following the provisions of the Multisectoral Framework, the Commission considers that aid up to 23.625 % of the investment cost can, in this case, be approved. ■

STATE AIDS (BUSINESS CENTRES): THE BELGIAN TAX CASE

Subject: State aids
Procedure

Industry: Business Centres

Parties: Commission of the European Communities
Council of the European Communities
Belgium

Source: Commission Statement IP/03/1032, dated 16 July 2003

(Note. There is usually a certain interest in cases in which one European Community institution takes legal proceedings against another. In the present case, the Commission is proposing to take the Council to court in connection with a case involving the compatibility of Belgian state aid to coordination or business centers. The Commission's case is that, in matters of state aid, the Council's role under the Treaty is restricted. The Council may act before the Commission investigates a case, or while Commission inquiries are in progress, but not after the investigation is complete and a decision has been taken; and, in this instance, the Commission had taken the decision in February of this year. The decision ran counter to the Belgian tax scheme; but, in addition to seeking a Court order of annulment of the Commission's decision, Belgium also "appealed" – successfully – to the Council. The Court will presumably have to rule on the substance of the matter when hearing Belgium's application and on the question of jurisdiction when hearing the Commission's application.)

The Commission has decided to bring an action before the Court of Justice seeking the annulment of the Council decision which authorised Belgium to renew the application of a preferential tax scheme to certain coordination centres whose approval was to expire before the end of 2005. The Council took this decision on 16 July; the Commission considers that the Council's decision is unlawful, because it came after a final decision taken by the Commission on 17 February. In general only the Commission has power to rule on the compatibility of state aid with the Treaty. In matters of state aid the Council's role under the Treaty is restricted. The Council may act before the Commission investigates a case, or while Commission inquiries are in progress, but not after the investigation is complete and a decision has been taken. For the Council to take a decision on a case that the Commission has already decided upsets the institutional balance of powers laid down in the Treaty. It also casts doubt on the integrity and effectiveness of the system of control of state aid. The Commission has therefore decided to bring the matter before the Court, as it did in similar circumstances in March 2002, when the Council allowed Portugal to grant aid to pig farmers.

On 11 November 1998 the Commission adopted a notice on the application of the state aid rules to measures relating to direct business taxation, and on 11 July 2001 it launched a wide-ranging inquiry into 15 tax schemes, one of which was the Belgian coordination centres scheme. On 17 February 2003, after thorough investigation, the Commission decided that the tax arrangements applying to coordination centres were incompatible with the rules on state aid.

As a transitional measure the Commission authorised coordination centres to continue their activities until the expiry of the approval they had been granted by the tax authorities. But it prohibited any renewal of approvals that had run their course. The Council decision on coordination centres overturns the Commission decision. The Commission will argue in Court that, by taking this decision, the Council is infringing the Treaty, which does not empower it to change state aid decisions already adopted by the Commission.

The scheme had previously been approved twice, in 1984 and 1987; the Commission therefore acknowledged that the coordination centres had a legitimate expectation that the scheme was permissible, and it did not order that the aid already granted be recovered. It also authorised existing coordination centres to go on being assisted under the scheme until their approvals expired, and in any event no later than 31 December 2010. But it took the view that coordination centres whose approval expired in the ordinary way before that date were not entitled to renewal of the preferential tax scheme.

Belgium contested this point, and applied to the Council for authorisation to renew the arrangements under the third subparagraph of Article 88(2) of the Treaty. That provision empowers the Council to decide that an aid measure is to be considered compatible with the common market if such a decision is justified by exceptional circumstances. At its meeting on 16 July the Council granted Belgium's request.

When it made its application to the Council, Belgium also brought several actions before the Court, essentially seeking the annulment of the Commission's decision of 17 February. On 26 June, pending a judgment on the substance of the case, the President of the Court made an order suspending the Commission decision in so far as it prohibited the renewal of the scheme in the case of centres whose approval expired after 17 February.

The reasoning and indeed the wording of the President's order suggest that the aid granted on this basis will not be recoverable from the centres even if the Court should ultimately dismiss Belgium's action on the substance. ■

The Commission has decided to initiate a formal investigation concerning aid amounting to €178 million for a €219 million investment planned by car maker De Tomaso in Cutro (Calabria, Southern Italy). At this stage, the Commission has not been able to establish that the planned aid meets the criteria of the Community framework for state aid to the motor vehicle industry.

STATE AIDS (AIRCRAFT): THE GAMESA CASE

Subject: State aids
Conditions (of approval)
Research and development

Industry: Aircraft manufacture
(Some implications for other industries on the question of R & D)

Parties: Government of Spain
Basque Government
GAMESA
EMBRAER

Source: Commission Statement IP/03/1085, dated 23 July 2003

(Note. This brief report emphasizes the distinction which the Commission has to draw between genuine research and development on the one hand and matters "too close to the market to be termed R&D". Firms in doubt about the distinction are referred to the "Framework" rules or guidelines published by the Commission in 1996.)

The Commission has decided to authorise the Basque Government's plan for granting a subsidised loan to GAMESA for its participation in the development of two new regional aircraft by the Brazilian manufacturer EMBRAER: the ERJ-170 and ERJ-190. Authorisation is subject to the condition that the gross grant equivalent of the aid does not exceed 30% of eligible costs, that is, €27.77 million. The Commission's investigation was to check that the planned loan notified by the Spanish authorities was compatible with the Community rules on state aid for research and development (R&D). At the time the Commission had doubts about the incentive effect of the aid and the eligibility of certain certification activities and maintenance studies, which it considered too within the meaning of the Community framework for state aid for research and development. (The "Framework" was published in the Official Journal, C.45 of 1996.) The inquiry gave the Spanish authorities the opportunity to submit their observations on the doubts expressed by the Commission. No third party made any comments.

After analysing the information supplied, the Commission concluded that the incentive effect could be established. But it also concluded that the doubts it had about the certification activities and maintenance studies being too close to the market still applied. The Commission accordingly concluded that the planned aid could be considered compatible with the EC Treaty under Article 87(3)(c), provided that the cost of certification activities and maintenance studies was deducted from the eligible costs and that the gross grant equivalent of the aid did not exceed 30% of the eligible costs after this deduction (a basic rate of 25% for pre-competitive development activities plus a 5% bonus because of the region in which the research is to be carried out). ■