EXEMPTION (PACKAGING): THE DSD(II) CASE

Subject: Exemption
Conditions of exemption

Industry: Packaging
(Some implications for other industries)

Parties: Duales System Deutschland AG (DSD)

Source: Commission Statement IP/01/1279, dated 17 September 2001

(Note. In our May, 2001, issue, on page 104, we reported the Commission's decision on the abuse of a dominant position by DSD. The present report describes the action taken to enable DSD to continue its operations on terms which the Commission can accept. Essentially, this involves shorter contractual periods and greater transparency of tendering. Meanwhile, DSD has lodged an application with the Court of First Instance for annulment of the Commission's earlier Decision, so this is probably not the end of the affair.)

The Commission has adopted a favourable decision, subject to conditions, on a set of contracts concluded by DSD concerning its system of selective collection and recovery of sales packaging waste. Following the decision in this same case on April 20, 2001, the present decision defines clear principles for the competitive assessment of exclusive, long-term service agreements in the waste management sector. As applied to DSD's service agreements, these have led to significantly reduced contractual periods. In addition, the principle of free and unimpeded access to the collection infrastructure for competitors of DSD has been established. This decision takes into account the objectives of the relevant environmental legislation; and it is expected that the consumer will benefit from overall lower disposal costs.

Under this decision, which certifies that there are no grounds for action in respect of DSD's statutes and guarantee agreements and which exempts the service agreements, the Commission has defined two principles of its competition policy for the waste disposal sector. First, the Commission makes clear that it can accept long-term, exclusivity provisions in favour of the collectors in the service agreements concluded between DSD and its collectors, only when the indispensability of such provisions is justified on the basis of convincing economic evidence. In the present case this assessment has led to significantly reduced contractual periods, leading to a 4 years early tendering procedure. Secondly, by this decision, the Commission emphasizes the importance it attaches to free and unimpeded access to the collection infrastructure for competitors of DSD. Together with the decision adopted in this case earlier this year, concerning the payment provision of the trade mark agreement concluded between DSD and the companies covered by the German Packaging Ordinance,

this decision lays down the necessary conditions for competition in the collection and recovery of sales packaging waste in Germany.

DSD is at present the only company running a countrywide system for the collection and recycling of sales packaging in Germany. Last year it had a turnover of DM 4 billion. DSD itself does not collect the waste but uses local collecting companies and has concluded Service Agreements with these undertakings. There are 546 collection districts in Germany. As originally notified, the service agreement had raised serious competition concerns about the exclusivity provisions in favour of the collectors. According to the Service Agreement the collector has the exclusive task of collecting and sorting sales packaging in a designated district. The assessment of this exclusivity provision showed - taking into account the market position of DSD and the duration of the service agreement - that access to the relevant market by domestic and foreign collectors was greatly obstructed and went a long way towards partitioning a substantial part of the common market. Article 81 of the EC Treaty is therefore applicable to the exclusivity clause in the Service Agreement.

Most of the Service Agreements initially notified were to run until the end of 2007 thereby having overall contractual duration times of up to 15 years. Consequently the Commission scrutinised whether such long-term exclusive agreements were indeed necessary. The results of the analysis undertaken by the Commission suggested rather that if the Service Agreements were to run until the end of 2003 collectors would have sufficient time to achieve an economically satisfactory recovery of their investment. The Commission informed the applicants of this finding, and the applicants then set a termination date of 31 December 2003 for the Agreements. This allows the Commission to exempt service agreements containing an exclusivity clause running no further than the end of 2003. The exemption decision is issued for the period 1 January 1996 to 31 December 2003. Afterwards these service agreements have to be put out for tender according to the German Packaging Ordinance. The Commission's assessment was further influenced by the need for competitors of DSD to share the collection facilities of the collectors. Although DSD had already given commitments regarding the joint use of collection facilities by competitors, the Commission considers it necessary, in view of the vital importance of unimpeded access to the collection infrastructure for competition on a market characterised by special supply conditions, to attach conditions to this Decision to ensure that competition on the relevant markets is not restricted.

When the main contents of the DSD notification were published in March, 1997, comments were received from third parties indicating that the notified agreements could lead to a restriction of competition. In addition, in November, 1999, hair care product manufacturers and others addressed a formal complaint to the Commission. The complainants wished to organise a self-management system for the collection and recycling of packaging of products used by hairdressers and accused DSD of abusive behaviour. The complaints and investigations led to the Commission's Decision of 20 April, 2001. On July 5, 2001 DSD appealed against this decision at the Court of First Instance in Luxembourg. ■

Pirelli-Edizione / Olivetti-Telecom Italia

(Note. This case illustrates once again the complex commercial interrelations among the major Italian industrial corporations.)

The Commission has approved a concentration consisting of the acquisition by Pirelli SpA and Edizione Holding SpA of joint control of Olivetti SpA and indirectly of the undertakings controlled by the latter, namely Telecom Italia SpA and its group. To remove competition concerns, Edizione undertakes to sell its direct and indirect shareholdings in the capital of Blu, one of Italy's four second generation mobile phone operators, the biggest of which is Telecom Italia's TIM. In the market for transmission capacity, Edizione has also undertaken to transfer the exclusive control of Autostrade Telecomunicazioni to one or more independent third parties, with the possibility of maintaining, subject to Commission approval, only a minority share in the Italian backbone operator.

Pirelli is active in the manufacturing and sale of tyres as well as cables for the telecommunications sector and for the transmission of electricity. It has also a presence in the management and sale of real states. Edizione is an holding company, controlled by the Benetton family, which is active in a number of sectors, including textiles and clothing industry, road infrastructure and telecommunications, catering, real estate, agriculture and merchant banking. Edizione controls Autostrade Telecomunicazioni, which operates in the transmission capacity market using Autostrade's optical fibre network, and Blu, one of Italy's four mobile phone operators. Olivetti, which is the target company, operates in the sector of information systems and related services. Olivetti is the parent company of Telecom Italia, the incumbent telecoms operator in Italy, owning the country's largest mobile phone operator Telecom Italia Mobile (TIM).

The Commission's investigation revealed serious concerns in the markets for transmission capacity and for mobile telephony, both in Italy. In the transmission capacity market, the operation will eliminate Autostrade as an important competitor, therefore reinforcing Telecom Italia's dominant position. As for the Italian market for mobile voice telephony, the investigation showed that the concentration might strengthen a possible dominant position enjoyed by TIM. Besides TIM and Blu there are only two second generation mobile operators in Italy, Omnitel and Wind, and barriers to entry are high. To address these competition concerns, the parties undertook to remove the overlap in the transmission capacity market by transferring the exclusive control of Autostrade Telecomunicazioni to one or more independent third parties. In the market for mobile voice telephony, Edizione undertakes to sell its direct and indirect shareholdings in Blu. The implementation of the latter commitment will ensure that Edizione will be prevented from having a controlling position in two of the four Italian second generation mobile operators.

Source: Commission Statement IP/01/1299, dated 20 September 2001