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## COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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## Amendment of the Treaty on European Union (The "Amsterdam Treaty")

Farewell, Article 85 of the EC Treaty, on restrictive agreements, and Article 86, on the abuse of a dominant position ! These are now Articles 81 and 82. Henceforth, Articles 85 and 86 represent the old Articles 89 and 90.

These changes result from Article 12 of the Treaty (the Treaty of Amsterdam) amending the Treaty on European Union (the Treaty of Maastricht). The Amsterdam Treaty, under which all the Articles of the current Treaties are renumbered, came into force on 1 May, 1999. The new numbers of the Articles in the EC Treaty, governing the rules on competition, are set out below.

Meanwhile, there are bound to be some ambiguities, since decisions and case-law will continue to refer to the old Article numbers where they date from before 1 May. Most of the cases referred to in this issue, for example, use the old numbering. We shall do our best, from an editorial point of view, to minimise these ambiguities.

Here are the changes in what used to be Chapter 1 of Title VI of the EC Treaty and is now Chapter 1 of Title V:

*Section 1: Rules applying to undertakings*

Old Article 85 is now Article 81 (Restrictive agreements)
Old Article 86 is now Article 82 (Abuse of a dominant position)
Old Article 87 is now Article 83 (Regulations and directives)
Old Article 88 is now Article 84 (Transitional provisions)
Old Article 89 is now Article 85 (Duties of the Commission)
Old Article 90 is now Article 86 (Public Undertakings)

*Old Section 2 (deleted)*

Old Article 91 has been repealed (Dumping within the common market)

*Section 2: Aids granted by States*

Old Article 92 is now Article 87 (General prohibition of State aids)
Old Article 93 is now Article 88 (Review and control of State aids)
Old Article 94 is now Article 89 (Regulations on State aids)

## ENFORCEMENT OF COMPETITION RULES: COMMISSION'S WHITE PAPER

Subject: Notification
Exemption
National courts

Industry: All industries

Source: Commission Statement IP/99/275, dated 28 April, 1999

*(Note. If space allows a more detailed treatment of the proposals contained in the Commission's White Paper of the reform of the system for enforcing the rules on competition, the subject will covered in subsequent issues. In the meantime, the following statement by the Commission outlines the proposals. Essentially, the reforms are based on the proposition that Article 85 should be directly applicable and should not be subject to the notification and exemption procedures laid down in Regulation 17 of 1962. The Commission is inviting comments on its proposals. It is worth noting that, perhaps in the light of a series of critical court cases, the Commission intends to treat the investigation of complaints as a matter of "greater importance".)*

### Current system of enforcement

In 1962, the Council instituted an enforcement system of EEC competition rules which gave the Commission the exclusive power to exempt restrictive practices (Article 85(3) of the EC Treaty) and required companies to notify their agreements to the Commission before any exemption. It has not been significantly modified since then. This highly centralised authorisation system was necessary in the early 1960s. It ensured the development of a coherent corpus of decisions and proved very effective for the establishment of a culture of competition in Europe.

Today, the EU faces new challenges. Enlargement from a Union of 15 Member States, 11 official languages and over 350 million inhabitants, to one with 20 or 25 Member States is expected. Economic and monetary union is under way and will be certain to have major consequences for competition policy, as will the continuing globalisation of the economy. In this changed environment, a centralised authorisation system will no longer ensure effective application of the EU competition rules. A new system, building on the case-law and decision-making practice of the last 35 years, is needed to meet the challenges of the future

### Proposal for reform

In its White Paper the Commission proposes the abolition of the notification and exemption system laid down in the present Regulation No 17 of 1962. It proposes to send the Council a proposal for a new Regulation which would render Article 85 EC Treaty in its entirety directly applicable by the Commission, national competition authorities and national courts. This is already the case for Article 86 of the EC Treaty (abuses of dominant position).

This reform pursues three main objectives.

## First Objective: Rigorous enforcement of competition law

The Commission must concentrate its limited resources on the most serious infringements of EU law (such as price-fixing and market-sharing cartels) which are almost never notified. The Commission should also concentrate on the most important cases involving a real EU interest.

To this end, the White Paper proposes strengthening the present system for enforcing the prohibition rules in Articles 85(1) EC Treaty and 86 EC Treaty. The aim is to ensure that the Commission has appropriate and efficient means to act against the most serious restrictions of competition.

Investigation of complaints lodged with the Commission will take on greater importance in the new enforcement system. Complaints from victims of anti-competitive practices are a valuable source of market information and the Commission proposes to concentrate more resources on their investigation. To facilitate this goal, procedures for the handling of complaints would be simplified. In particular, a time limit of four months would be introduced within which the Commission would be obliged to inform complainants of whether it intends to investigate their complaint in detail.

This is in line with the ultimate aim of the competition rules which is to ensure that European consumers do not suffer from artificially high prices.

## Second Objective: Effective decentralisation

The Commission alone cannot ensure the effective application of the competition rules. There is an urgent need for more decentralised application which would be achieved by rendering Article 85 EC Treaty in its entirety, together with Article 86, directly applicable. The Commission, national competition authorities and national courts would then have concurrent powers to apply the EU competition rules. This decentralised application would considerably strengthen their effectiveness.

In the new decentralised enforcement system, it would be necessary to ensure a coherent application of the rules throughout the Union. The White Paper proposes several mechanisms to that end. First, the Commission would keep a leading role in determining EU competition policy both through the adoption of legislative and other general measures, such as block exemption regulations and guidelines, and through the adoption of leading decisions in individual cases. Secondly, the Commission would enforce the rules as part of a network of competition authorities in which it would play a central role as guardian of the Treaty. The Commission's right to withdraw from national competition authorities cases, in particular where there was a risk of incoherent application of the rules, would be maintained. Thirdly, the White Paper contains a number of more detailed mechanisms aimed at preventing conflicts between the decisions taken by national courts, national competition authorities and the Commission.

The application of the EU rules by national courts would, as with all other directly applicable provisions of the EC Treaty, be supervised by the European Court of Justice. The Commission also proposes assistance to national courts to help national judges apply the EU competition rules in a coherent manner.

### Third Objective: Simplification of control procedures

The abolition of the notification system would relieve companies of the burden and cost of notifications. A satisfactory degree of legal certainty would be maintained for business; in certain respects it would be enhanced. In particular, the new system would allow companies to obtain civil enforcement of their contracts in national courts from the date of their conclusion if, on balance, they are pro-competitive. Centralised authorisation of individual agreements by the Commission would no longer be required. Companies would also benefit from the fact that this reform would encourage Member State authorities to apply EU competition rules more frequently. This should be a strong factor in favour of market integration.

### Background

In the field of competition law applicable to undertakings, the EC Treaty sets out general rules applicable to restrictive practices (Article 85, EC Treaty) and abuses of a dominant position (Article 86, EC Treaty). The Treaty empowers the Council to give effect to these provisions (Article 87, EC Treaty). The first implementing Regulation, Regulation 17, was adopted by the Council in 1962.

Regulation 17 created a system based on direct applicability of the prohibition rule of Article 85(1), EC Treaty, and prior notification of agreements for exemption under Article 85(3), EC Treaty. While the Commission, national courts and national authorities can all apply Article 85(1), EC Treaty, the power to grant exemptions under Article 85(3) was granted exclusively to the Commission. Regulation 17 thus established a highly centralised authorisation system for all agreements requiring exemption.

Article 86, EC Treaty, can already be applied by the Commission, national courts and national authorities.

The proposed reform does not affect the regime for the control of concentrations of a Community dimension (the Merger Regulation), with the sole exception that its scope will be extended to include production joint ventures. □

Readers who are interested in the Conference Report on the recently held Internet Conference, under the aegis of the Franklin Pierce Law Center in Concord, New Hampshire, on "The Impact of Competition (Anti-Trust) rules on Intellectual Property", are invited to communicate with the conference moderator, Bryan Harris, by e-mail: bharris@fplc.edu

## VERTICAL RESTRAINTS: COUNCIL AGREEMENT

Subject: Vertical restraints
Distribution agreements
Supply agreements
Price fixing
Block exemption

Industry: All industries; special rules for motor vehicle industry

Source: Commission Statement IP/99/286, dated 30 April 1999

*(Note. Council agreement on the regulations empowering the Commission to make a general block exemption regulation on vertical restraints, in place of the separate block exemption regulations on supply and distribution agreements, is a further step towards the Commission's objectives in this area. If subsequent steps go according to plan, the Commission's draft regulation will be published shortly and, following consultations with interested parties, will come into force in the year 2000.)*

On 29 April, the Industrial Affairs Council, meeting in Luxembourg, reached a political agreement on two regulations giving the Commission the necessary powers to complete the reform of competition policy applicable to vertical restraints (agreements between producers and distributors), along the lines set out in the Commission communication of 30 September 1998. On that basis, the new rules should be applicable to vertical agreements as from the year 2000. The two new regulations amend Council Regulation No 19/65/EEC of 2 March 1965 and Council Regulation No 17 of 6 February 1962.

The first regulation extends the Commission's legislative powers, allowing it to adopt a regulation, pursuant to Article 85(3) of the EEC Treaty, for vertical agreements. Such agreements are concluded between firms operating at different levels of the production or distribution chain and govern the conditions under which the firms may acquire, sell or re-sell certain goods or services. In practice, this covers all industrial distribution and supply agreements.

On the basis of the powers conferred on it by the Council, the Commission can now draw up and adopt a broad block exemption regulation covering all vertical restraints affecting finished or intermediate products and services, including vertical agreements concluded by certain associations of retailers. The block exemption regulation will nevertheless be subject to certain conditions, and, in particular, will apply only to firms whose market shares do not exceed a specific threshold. On this point, the Commission stated today before the Council that its consultation process will be based on a market share threshold of 30%

In addition, the Commission's block exemption regulation will exclude certain fundamental restrictions, such as practices involving the imposition of resale prices (fixed or minimum prices) and certain forms of territorial protection that may thwart the objective of market integration. The Commission has also stated that, as regards its proposals for the future treatment of motor vehicle distribution, it will re-examine this sector in accordance with the provisions of Regulation No 1475/95 before deciding whether to maintain or abandon the present arrangements, which will expire on 30 September 2002.

The second new regulation broadens the scope of application of Article 4(2) of Regulation No 17, exempting all vertical agreements from the requirement that they be notified prior to individual exemption. The practical advantage of this amendment is that the Commission will in future, even in the event of late notification, be able to adopt an exemption decision taking effect on the date on which the agreement was concluded. This scope for retroactive exemption will give firms greater legal certainty by ensuring that agreements that meet the exemption conditions laid down in Article 85(3) of the BC Treaty can be implemented.

The Council is expected to have formally adopted the two regulations in May. The two regulations will come into force on the third day following their publication in the Official Journal of the European Communities. The Commission will then publish in the Official Journal, following consultation with the Member States, a draft block exemption regulation and draft guidelines intended to clarify its policy on cases not covered by the block exemption regulation. All interested parties will be able to submit their comments on the draft regulation and the draft guidelines. □

## The Ford / Volvo Case

In March, the Commission cleared the acquisition of Volvo Car Corporation's passenger car business by Ford Motor Corporation. The operation affects the passenger car sector where the product lines of Ford and Volvo overlap in certain segments, in particular in the executive, large and sports car segment. However, given the minor overlap of market shares and the strength of the parents' competitors, the operation will have only a limited effect in terms of industry concentration. For all passenger cars, the combined Ford / Volvo market share will not exceed 15% in the European Economic Area (EEA). In certain segments of the passenger car sector, notably for executive and sports cars, Ford / Volvo will have higher combined market shares in some Member States, in particular in Sweden. However, the reinforcement of Ford and Volvo's position in these segments through the merger is limited as the overlap between their product ranges is small. Furthermore, the position of other well established competitors, such as BMW and General Motors, remains unaffected. These competitors will be able to limit the effect of the concentration. The Commission also considers that the merger is not likely to increase entry barriers in the passenger car market or any distinct part of it. For these reasons the Commission has decided not to oppose the operation and to declare it compatible with the Common Market and the EEA Agreement. (Source: IP/99/201, dated 29 March 1999.)

## LICENSING AGREEMENTS (INTERNET): THE MICROSOFT CASE

Subject: Licensing agreements
Distribution agreements
Comfort letters

Industry: Internet service providers; computer software

Parties: Microsoft
Various Internet service providers

Source: Commission Statement IP/99/317, dated 10 May, 1999

(*Note. Microsoft's licensing agreements with Internet service providers have been approved by the Commission, following amendments to the agreements designed to prevent the market from being foreclosed in Microsoft's favour. The Commission is at pains to point out that, in approving the licences, it is not prejudging the question whether Microsoft's general behaviour is or is not an abuse of a dominant position; that the issues in this licensing case are not the same as those raised in the case at present before the US courts; and that approval of the licences could be reviewed if there is any change in the "legal or factual situation".*)

### The notified agreements, as amended

The Commission has approved Microsoft's licensing agreements with Internet Service Providers (ISPs) by means of a comfort letter. Microsoft formally notified these agreements to the Commission in February 1998. In the notified version, Microsoft has removed all the provisions which could be contrary to European competition rules. Mr Karel Van Miert, the Commissioner responsible for competition policy, has therefore written to Microsoft raising no objection to these agreements and declaring them compatible with the common market and the EC Treaty. This clearance covers only the agreements between Microsoft and the ISPs; the Commission has not ruled on the overall behaviour of Microsoft, in particular concerning a possible abuse of a dominant position.

On 27 February 1998, Microsoft, the computer software manufacturer, formally notified to the Commission, pursuant to Article 4 of Council Regulation No 17, a set of agreements made with some European ISPs for the licensing and distribution of its Internet Explorer products. An ISP is a company that maintains a permanent connection to the Internet and enables its subscribers to connect to the Internet via a telephone link to the ISP. The ISPs may also provide its subscribers with World Wide Web (WWW) pages.

Microsoft's formal notification of its agreements followed an inquiry launched by the Commission's Directorate-General for Competition (DG IV) into a previous version of the agreements. During this inquiry, DG IV advised Microsoft to re-examine the agreements in the light of European Union (EU) competition rules to ensure that they did not contain restrictions that might have the effect of illegally foreclosing the market for Internet browser software from Microsoft's competitors and of illegally promoting the use of Microsoft's proprietary technology on the Internet.

Microsoft subsequently amended its agreements and notified the revised agreements to the Commission. The two main changes are, first, that the ISPs' failure to attain minimum distribution volumes or percentages of Internet Explorer browser technology will no longer result in termination of their agreements; and, secondly, that ISPs are now allowed to promote and advertise competing browser software. Considering that Microsoft has removed the said clauses and that the notified agreements no longer infringe EU competition rules, the Commission has cleared the agreements by way of an administrative letter (so-called comfort letter) pursuant to Article 81(1) [previously Article 85(1)] of the EC Treaty.

Under the approved agreements, Microsoft promotes the ISPs by including them in a list of available services pre-installed on new Personal Computers which use Microsoft's proprietary Windows operating system. Microsoft also licences its Internet Explorer software to ISPs who make it available to their subscribers. In return the ISP pays Microsoft a fee for every subscriber gained via this feature and promotes Internet Explorer products. Under the agreements, ISPs can further be granted a license to customise Microsoft's Internet Explorer software in accordance with specific instructions and use the Internet Explorer logo in conjunction with its use and distribution of the licensed software. (Further details of the notification of the Microsoft Internet Explorer Licensing Agreements were published in the Official Journal of the European Communities on 9 June 1998.)

The comfort letter covers only the agreements between Microsoft and ISPs. The Commission has not therefore given any ruling on the global behaviour of Microsoft concerning a possible abuse of dominant position. In particular, this case is quite different in scope and substance from the court case currently pending in the US. However, the Commission could reopen its investigation into Microsoft's ISP agreements if there were any future change in the factual or legal situation affecting any essential aspect of these agreements that warranted a further inquiry.

## Background

- March 1997: DO IV opens first investigation into the agreements between Microsoft and European ISPs.

- February 98: Revision of Microsoft's software licensing agreements with ISPs. Microsoft removes the clauses imposing on the ISPs minimum distribution volumes and exclusive promotion of the Internet Explorer products. Microsoft formally notifies the new version of the agreements to the European Commission.

- June 98: Commission publishes a description of Microsoft's ISP agreements as revised in the Official Journal of the European Communities.)

- May 99: DG IV issues comfort letter clearing the notified agreements. □

## SUPPLY RESTRICTIONS (LINERS): THE EATA CASE

Subject: Supply restrictions
Trade associations

Industry: Liners, shipping

Parties: Members of the European Asia Trades Agreement (now defunct)

Source: Commission Statement IP/99/313, dated May 10, 1999

*(Note. Although the European Asia Trades Agreement has been terminated, the Commission felt it necessary to state its position on the practice of increasing prices by restricting the supply of shipping space.)*

The Commission has adopted a decision prohibiting the Europe Asia Trades Agreement (EATA). The purpose of the EATA was to increase prices by establishing a capacity management programme concerning scheduled maritime transport services for the carriage of containerised cargo from North Europe to the Far East The Commission has never permitted capacity management agreements on the export trades to the European Union (EU) from Asia or the USA respectively. The EATA was terminated in September 1997. The Commission has nonetheless adopted a formal decision to increase legal certainty in the interest both of liner conferences and of third parties who seek redress before a national court

A capacity management programme is an agreement under which the parties agree not to use a proportion of the space on their vessels for the carriage of goods in a particular trade. The proportion set aside is part of the forecast excess of supply over demand. In 1994 the Commission prohibited a similar arrangement on the transatlantic trades: the Trans-Atlantic Agreement (TAA).

In the case of the EATA up to 17% of the capacity of certain vessels was withdrawn from supply. On all occasions, only the supply of eastbound capacity was restricted with the result that Community exporters bore the brunt of the anti-competitive effects of the EATA. Whereas the EATA only operated eastbound, the TAA only operated westbound. Thus, Community exporters were doubly penalised by capacity management agreements which have never been permitted on the export trades from the US to the EU or on the export trades from Asia to the EU.

### Background

Although, the EATA was terminated in September 1997, the Commission considers that it is nonetheless in the Community interest to adopt the decision for the following reasons:

first, the parties to the EATA are likely to benefit from the increased legal certainty arising from a formal Commission decision concerning the practices in question;

secondly, the EU regulation on the application of Articles 85 and 86 of the EC Treaty to maritime transport£provides that companies do not need to notify an agreement or arrangement for the Commission to exempt it, so a formal Commission decision concerning the practices in question also increases legal certainty to the benefit of other liner shipping companies;

thirdly, national courts and competition authorities in the Member States may benefit from a clear statement of the Commission's position in the event that any third party seeks to obtain redress under national law for any harm they have suffered as a result of the practices in question; and

finally, in view of the practice of the Commission to increase the penalties imposed in the case of recidivist infringement of Community competition law, it is important that a formal decision be adopted in this case for the purposes of future enforcement action. □

## The Air France (Amadeus) Case

The Commission has decided to open a formal procedure against Air France for possible abuse of a dominant position. On the basis of its initial inquiry, the Commission considers that the French airline has discriminated against SABRE, a computerised reservation system (CRS) owned by American Airlines, to favour a CRS which it partly owns, Amadeus.

The Commission objects to Air France's having provided Amadeus with more accurate information and on a more timely basis than it did to other CRSs, thereby putting the latter at a competitive disadvantage. This practice concerned a limited number of Air France's domestic and international tariffs between 1992 and 1997. CRSs have a very significant role in the travel industry. They are the most widely used tool for travel agents to obtain information on travel services and to make reservations for their customers.

Under the EC competition rules, such an opening of the procedure should not be interpreted as a final condemnation. It is rather a step in the procedure allowing Air France to express its views on the matter. The Commission will take a final view on this matter only after Air France has had an opportunity to respond to the objections raised.

This case was referred to the Commission by the US Department of Justice under the Positive Comity provisions of the 1991 EU/US cooperation Agreement in the field of competition. Pursuant to this agreement the Commission kept the DoJ closely informed of its analysis and on the progress of the procedure. (Source: Commission Statement IP/991171, dated 15 March 1999.)

## MERGERS (PETROCHEMICALS): THE TOTAL/PETROFINA CASE

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|---|---|
| Subject: | Mergers<br>Undertakings by parties |
| Industry: | Petrochemicals, oil, speciality chemicals, rubber products |
| Parties: | Total (France)<br>PetroFina (Belgium) |
| Source: | Commission Statement IP/99/197, dated 26 March 1999 |

*(Note. Both in the United States and in the European Union, there is a strong tendency for oil companies to merge; and this merger is the latest on the European side. The parties have offered undertakings in respect of petroleum storage depots.)*

The Commission has cleared a concentration by which the French oil company Total acquires the control of the Belgian oil and petrochemical company PetroFina. The clearance is subject to conditions, following the undertakings proposed by the parties in view of eliminating competition concerns in the market for non-forecourt sales of fuels in the Northern part of France. Moreover, part of the operation, notably the concentration of petroleum storage infrastructure in the Southern part of France, will be reviewed by the French competition authorities, following their request for a partial referral of the case. The transaction will be effected through the acquisition by Total of 40.9% of PetroFina's capital, as well as through a public bid launched by Total on the remaining shares of PetroFina, currently held by the public.

Total is a French limited company active in the production of hydrocarbons, refining, distribution of petroleum products, and speciality chemicals, including coatings. PetroFina is a Belgian limited company active in the oil and petrochemical industry. The economic sectors concerned by the operation are those of oil and gas, including the upstream, that is, exploration, production, refining, logistics and distribution of refined products to end users and resellers; petrochemicals (only PetroFina being active in this field in Europe); speciality chemicals such as inks, coatings, adhesives et resins (only Total being active in this field, except for PetroFina's presence in coatings); and technical and home products made of rubber (only Total).

The operation raised competition concerns in the market for non-forecourt sales of refined petroleum products (gasoline, diesel, heating oil) in five areas of the Northern part of France (Pas-de-Calais, Nord, Aisne, Ardennes, Somme). As opposed to sales through gas stations owned by Total or PetroFina, non-forecourt sales are those made to either resellers (hypermarkets and unbranded gas stations) or large end users (such as transport groups, industry and so on). These areas depend mainly on fuels supplies from Total's refinery in Dunkirk and PetroFina's storage depot in Feluy (Belgium).

To remedy this problem, the parties undertook to divest part of their shares in petroleum storage depots. The undertakings aim at making alternative supplies available. The divested storage capacity is enough to enable the acquirer to market quantities of refined products corresponding to, or exceeding, Fina's historical sales on this market. Given the high cross price elasticity of refined petroleum products, the freed storage capacity is expected to have constraining effects on the offer of refined products from Dunkirk and Feluy. On top of these structural undertakings, the parties undertook to offer their regular clients of the storage depots at Valenciennes and Feluy contracts for the purchase of refined petroleum products for a duration of three years under PLATT'S-ARA conditions. This measure is of a transitional nature, aiming at enabling the current customers of the parties to satisfy their needs in refined petroleum products without any rupture resulting from the transaction. The parties' undertakings have been tested and have qualified for a clearance decision.

In addition, following a reasoned request by the French competition authorities (DGCCRF), part of the file has been referred to France. More precisely, the DGCCRF will review the effects of the operation on the petroleum storage infrastructure in the area between the West of the Rhone river and Perpignan, including the city of Toulouse. In this area the operation creates significant overlapping in the parties' petroleum storage facilities. The merger review procedure in France does not have the effect of suspending the operation, which can therefore go ahead, even while the review by the DGCCRF is taking place.

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## ACQUISITIONS (CHINA CLAY): THE IMETAL / ECC CASE

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|---|---|
| Subject: | Acquisitions<br>Undertakings by parties<br>National laws<br>US / EC Agreement |
| Industry: | China clay, kaolin, molochite |
| Parties: | Imetal SA<br>English China Clay |
| Source: | Commission Statement IP/99/263, dated 27 April, 1999 |

*(Note. The main interest in this case lies in the interest shown by the US and French governments respectively.)*

The Commission has decided to approve the acquisition of English China Clays plc (ECC) by Imetal SA subject to certain changes. The operation had an impact on the markets for fused silica, kaolin and certain refractory clays. Imetal has addressed the Commission's concerns by undertaking to divest an Imetal kaolin plant in the US, ECC's activities in fused silica, and Imetal's stake in AGS-BMP in France. Imetal will also submit an acceptable structural solution to the problem arising from its simultaneous presence on both the market for Molochite, a unique refractory clay, and the market for kiln furniture, whose manufacturers need Molochite. mis transaction was also subject to US anti-trust approval. The Commission and the Department of Justice have worked in close cooperation on this case.

On 11 January 1999, Imetal made a public offer for the entire issued share capital of ECC which is still pending. Imetal's operations include: building materials; industrial minerals; and metal processing. The ECC group is principally focused on mineral products (primarily kaolin - China Clay - and calcium carbonates). The market investigation by the Commission revealed the existence of a number of affected markets. These include: fused silica, kaolin for paper applications, kaolin for ceramics, high value refractory clays. For fused silica the transaction was found to give rise to a significant overlap, both parties being active in this market. After investigation it appeared that a high market share would arise from the concentration. Imetal has therefore proposed to divest ECC's activities in fused silica, which were acquired by ECC in late 1998.

On the basis that coated kaolin is imported into Europe, for example from the USA, due to Its significantly higher price, it was concluded that the geographic market was world-wide in scope. As to the impact of the operation, the Commission considered that there were serious competition concerns arising from the merger due to the strength of both Imetal and ECC in world-wide markets for this product. To meet these concerns, Imetal has agreed to divest a kaolin plant in the US by way of a remedy.

The Commission considered the horizontal and vertical effects in the market for refractory clays. The concentration would have a significant horizontal impact on high value refractory clays which are used in two value added applications (investment castings and kiln furniture). Imetal has a strong worldwide position in the production of these clays for both applications. ECC produces one high value special calcined refractory clay (named Molochite). The Commission concluded that the operation would have serious competition effects on these high value refractory clays. Imetal proposes therefore to divest its stake in the French group AGS-SMP.

As to vertical concerns, the Commission noted that, following this acquisition, Imetal would own a monopoly supply of a critical raw material for all kiln furniture manufacturers while simultaneously being active as a competitor in this same industry. With this in mind Imetal has proposed to meet the Commission's concerns through structural remedies (either a divestiture or an alternative solution equally satisfactory to be agreed with the Commission). The Commission has decided therefore in accordance with Article 6(I)(b) of the EC Merger Regulation to allow this concentration to be completed subject to the undertakings Imetal has offered.

As many of the affected product markets have been worldwide in scope and Imetal has worldwide production facilities, the Commission's examination has involved close liaison with the US Department of Justice. This liaison has helped in the identification of, and agreement with Imetal on, common remedies. □

## PRICING POLICY (TELECOMMUNICATIONS): COMMISSION STATEMENT

Subject: Pricing policy

Industry: Telecommunications; mobile and fixed telephone services

Source: Commission Statement 1P/99/298, dated 4 May, 1999

*(Note. Whether the substantial price reductions in this field took place in response to the Commission's investigations, or because of national authorities' investigations, or simply as a result of market forces, including consumer pressure, the outcome is salutary, as the country-by-country summary in the report which follows clearly shows.)*

The Commission has decided to conclude the European Union (EU)-wide investigation into fixed and mobile operators' interconnection rates. This follows an assessment of the substantial price reductions, of more than 80% in some cases, which have taken place in response to the investigation. In conducting the inquiry, launched in February 1998, the Commission co-operated closely with national competition agencies and national regulatory authorities (NRAs) in the EU Member States. Following the successful conclusion of the investigation into mobile/fixed telephony prices, the Commission intends to pursue the scrutiny of competitive conditions within an overall sector enquiry of telecoms on key issues, including current roaming conditions between mobile operators

After an inquiry initially involving 45 companies in the fifteen EU Member States, the Commission decided in July 1998 to open fourteen cases where the situation indicated a possible distortion of market conditions. Those cases fell within three categories:

I) Mobile to fixed termination rates: that is, cases concerning a possible discrimination by incumbent telecommunications operators towards mobile operators with regard to the fees demanded for termination of mobile phone calls in the public telephony network (the Commission opened four cases regarding the present telecommunications organisations (TOs) in Germany, Spain, the Netherlands and Italy respectively);

ii) Fixed operators' retention on fixed to mobile calls: that is, cases concerning the retention applied by incumbent operators on the calls from their fixed public switched telecommunications network (PSTN) to mobile networks (the Commission opened eight cases, in regard of the operators in Belgium, Ireland, United Kingdom (BT), Austria, Spain, Netherlands, Italy and Germany respectively); and

iii) Mobile termination rates: that is, cases concerning the termination fees charged by mobile operators for terminating calls in their networks (the Commission opened five cases, one per mobile operator in Italy (2 companies) and Germany (3 companies))

In terms of the charges applied by the fixed operators to the mobile operators for termination of mobile calls in the PSTN, prices have declined significantly in four of the six cases under investigation up to 82%. All operators now charge either below or close to EU best practice rates.

In terms of the margin retained by the fixed operators on the price of fixed-to-mobile calls, the decline in percentage of the 1998 retention rates compared with the 1999 rates in the cases investigated was 31 to 80%.

The Commission will close the remaining cases concerning Deutsche Telekom and Telekom Austria, once these operators have implemented the necessary reductions.

The Commission has also suspended its own investigation regarding the tariffs applied by the German and Italian mobile operators for termination of calls in their respective networks in view of the investigations carried out by the national authorities.

### A) Mobile to fixed termination rate cases

*Germany*

In July 1998 the Commission determined that Deutsche Telekom charged excessively for the termination of mobile calls in its fixed network. In February 1999 the German NRAor RegTP informed the Commission that, following its investigation into the matter, it would adopt a formal decision within some weeks. In accordance with its general approach when there is ongoing action at national level, the Commission suspended its own investigation into this case. The file will thus be closed after implementation of the measures envisaged by the RegTP.

*Italy*

In July 1998 the Commission determined that Telecom Italia's termination charges for mobile calls in its network were higher than charges for terminating a call which originated from the fixed network. Telecom Italia has subsequently informed the Commission that it now charges the same price for mobile and fixed operators for terminating calls in its PSTN. The new pricing has also resulted in a significant cost reduction for mobile operators. The Commission is satisfied that the discrimination it objected to has ended and has closed this investigation.

*Spain*

According to the Commission, the Spanish incumbent TO, Telefonica, was charging mobile operators excessively for terminating calls on its network. Since the Commission opened its investigation into the matter the Spanish NRA or CMT has imposed changes on Telefonica's call termination policy.

The Spanish government approved Telefonica's reference interconnection offer after the operator had complied with CMT's requirements. The Commission is satisfied with the result and has closed the investigation.

*Netherlands*

In December 1998 the Dutch NRA or OPTA informed the Commission that its own investigation showed that there might have been a difference in prices KPN charged from mobile and fixed operators for terminating calls in its network, but that KPN had meanwhile abolished such difference. KPN currently offers a single tariff for terminating calls. This tariff applies to both fixed and mobile operators and does not distinguish in any way where the call originates. This arrangement has also been confirmed by other Dutch operators contacted by OPTA. The Commission has therefore closed the case.

## B) Retention cases

*Netherlands*

OPTA informed the Commission in November 1998 that it had finalised its investigation into the new retail tariffs proposed by KPN. As part of its investigation OPTA checked the cost-oriented nature of the fixed part of the fixed to mobile calls and has told Commission that it is satisfied with the findings. As a result the Commission has closed the case.

*Belgium*

The Belgian TO, Belgacom, has informed the Commission of the new termination rates for the two mobile operators. The prices have been backdated to September 1998. As a result of these new prices Belgacom's retention rate falls just below the level at which the Commission instigates a formal investigation. The Commission considers the case closed.

*Ireland*

The Commission stated in July 1998 that the Irish TO, Telecom Eireann, was possibly off-setting the reductions in its mobile units termination rates by increasing its retention on fixed to mobile calls. However, Telecom Eireann has since announced new retail prices for mobile to fixed calls, significantly reducing its retention for these calls. The Commission is satisfied with the new prices and has closed its investigation.

*United Kingdom*

In the UK the Monopolies and Mergers Commission (MMC) concluded that BT's retention rates were excessive. The MMC has recommended to the UK NRA or Oftel that retention rates should be reduced from the current level and be subject to price control for the following two years. Oftel has informed the Commission that it intends to implement these changes fully and is currently drawing up the regulatory measures needed. The Commission has therefore closed the case.

*Italy*

The Italian TO, Telecom Italia, has informed the Commission that a new regulatory framework has applied to fixed operator retentions since January 1999. The Italian NRA has modified fixed-to-mobile retail tariffs and this has significantly reduced Telecom Italia's retention rate.

On 17 March, 1999, the Italian NRA informed the Commission of new retail pricing structure on fixed-to-mobile calls, to become effective 17 April, 1999. The NRA states that the decision is an interim stage towards a new structure in the pricing of fixed to mobile calls. The Commission is satisfied with the tariff decrease and has closed its investigation.

*Spain*

Telefonica has provided the Commission with new figures for its retention rate in November 1998. It has also provided the Commission with copies of the interconnection agreements between Telefonica and the two mobile operators Airtel and Telefonica Moviles. The agreements show in detail the distribution of the reduction between the operators. The data clearly show that a considerable reduction has taken place in the revenue for fixed network therefore satisfying the Commission's concerns. The Commission considers the problem to be solved and has closed the case.

### C) Mobile termination cases

*Germany*

Since November 1998, RegTP has been investigating, in co-operation with the German Federal Cartel Office (Bundeskartellamt), the alleged collusive behaviour of T-Mobil, Mannesmann and E-Plus on the fees for terminating calls in their respective networks. Consequently, the Commission has suspended its own investigation on those cases and is awaiting the outcome of the investigation undertaken at national level.

*Italy*

The Commission is following the developments on the proceedings started in January 1999 by the NRA regarding Telecom Italia Mobile (TIM) and Omnitel's simultaneous decision to decrease peak hour tariffs while increasing business contract and off-peak family rates. As in the German case, the Commission has suspended its own investigation of those cases while awaiting the outcome of the investigation undertaken at national level. The Commission moreover remains in close contact with the NRA which, by July 1999, will take a final decision on these rates.

### D) Quantitative assessment

To be able to examine the quantitative results of the changes in retention rates and mobile to fixed termination charges under investigation, the Commission requested independent consultants to carried out a new market survey. To ensure the fairness and coherence of the comparison of the data from 1998, on which basis the start of the investigation was decided, and the situation in March 1999, the consultants were asked to repeat two of the previous tests employed in the initial study. The results are as follows.

### (I) Discrimination in mobile-to-fixed termination cases

Data have been tested to compare mobile-to-fixed termination charges with both fixed-to-fixed termination charges and a so-called EU "best practice". The EU best practice was established from a 1998 KPMG assessment. For the updated report, the consultants checked the rates as in the previous report against the rates now in force in four countries - Germany, The Netherlands, Spain and Italy. The consultants conclude that, in all cases, the structure of the fixed operator's termination rates had changed so that it no longer discriminated against the mobile operators. All operators are now either below or close to the EU best practice rates:

*Germany*

Deutsche Telekom has informed the RegTP of its new charges for mobile termination. These rates are considerably lower than the previous ones. City tariff has been reduced by 80%, local tariff by 78% and national tariff by 81%. The rates are still slightly above the EU best practice rates, but considerably closer than before.

*Spain*

Telefonica's termination rates for fixed-to-fixed calls have declined 66% for provincial and 25% for inter-provincial calls. For mobile-to-fixed calls the decline is even larger, 82% for provincial and 77% for inter provincial calls. On provincial calls, Telefonica is now below EU best practice. Inter-provincial rates are still higher than EU best practice, but only marginally.

*Netherlands*

KPN's termination charges for mobile-to fixed calls have fallen by 52% for local and around 73% for national calls. For fixed calls rates have declined 15% for local and 20% for national calls. Termination for both local and national calls is below EU best practice.

*Italy*

Telecom Italia's termination rate for calls from the mobile networks has declined by 77% for local and 55% for single tandem calls. Rates for calls from fixed networks have declined by around 35% for local and 25% for single tandem calls. Both rates are below EU best practice.

### (ii) Retention by the fixed operators

This concerns the comparison of the net revenue retained by seven fixed operators on a fixed-to-mobile call. The purpose of this test in the previous report was to spot excessive net revenues of the fixed operator on a fixed-to-mobile call by comparing the net revenue retained in each EU Member State.

The 1998 report identified eight fixed operators who were retaining 100% or more above the EU best practice. These operators were: Belgacom, Telecom Eireann, BT, P&T-Austria, Telefonica, KPN, Telecom Italia and Deutsche Telekom (on calls to T-Mobil). The survey carried out now by the consultants for the retention rate has included 12 operators from six countries. The data obtained show that rates have fallen between 31% and 80%, due to a combination of changes in termination and retail rates. The Dutch and the UK operators were slightly above the EU best practice rate, all others were below.

The list below represents the decline in percentage of the 1998 retention rates compared with the 1999 rates.

| | |
|---|---|
| Proximus | -31% |
| Mobistar | -32% |
| KPN Mobile | -55% |
| Libertel | -55% |
| TIM | -80% |
| Omnitel | -80% |
| Eircell | -66% |
| Esat Digifone | -66% |
| Vodafone | -58% |
| Cellnet | -58% |
| Telefonica Moviles | -64% |
| Airtel | -64% |

## Forthcoming Reports

There has recently been an avalanche of Court judgments and Commission decisions in the competition field. In the ordinary way, this causes no great difficulty. However, the recent judgments and decisions have been inordinately long: the judgment in the LVM case, for example, takes up over 400 pages. We nevertheless plan, in the next two or three issues, to cover the Court's judgments in the LVM and Endemol cases and the Commission's decision in the British Sugar case.

## PRICE FIXING (STEEL): THE BRITISH STEEL CASE

Subject: Price fixing
Market sharing
Information agreements
Fines

Industry: Steel; steel beams

Parties: British Steel plc
(See also paragraph 3 of the judgment below)
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-151/94 (British Steel plc v Commission of the European Communities) dated 11 March 1999

*(Note. ECSC Treaty decisions are not always relevant to the interests of industries other than those covered by that Treaty. In the present case, however, there are some general points of interest, particularly about price fixing, market sharing and systems for the exchange of information. Article 65 of the ECSC Treaty - which has not been renumbered under the Amsterdam Treaty - corresponds broadly to the old Article 85 of the EC Treaty in prohibiting restrictive agreements and concerted practices. The proceedings here result from an application, principally, for the annulment of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams. Since the judgment is long, amounting to no fewer than 700 paragraphs, the report which follows is restricted to a summary of the contents, with some illustrative paragraphs and the court's ruling.*

*Much of the judgment is concerned with the arrangements made by the Commission in connection with the "crisis cartel" of the 1980s, of which the present case is in some respects a consequence. Although these arrangements are peculiar to the steel industry, they have a moral for all industries. There was a time when it was Commission policy to encourage certain arrangements, in the interests of the restructuring of the European steel industry, to promote market sharing and price support; and the present case may be seen in some respects as a hangover from that policy. Interference with competitive conditions, even for the best reasons of public policy, can have serious long-term consequences and may encourage industries to continue practices which, though accepted and indeed encouraged by the authorities during a period of crisis, become infringements of the competition rules when the crisis is over. These considerations carried some weight with the court, which made a general reduction in the level of fines imposed under the Commission's decision. Every other argument was rejected, except the relatively narrow point that British Steel had not participated in an agreement to share the Italian market. The fact that the Court upheld this point resulted in a further reduction of the fine imposed on British Steel under the Commission's decision; and the judgment is another useful source of information about the criteria for setting the levels of fines.)*

## A Preliminary observations

1 The present action seeks the annulment of Commission Decision 94/215/BC SC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p.1, hereinafter "the Decision"), by which the Commission found that seventeen European steel undertakings and one of their trade associations had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) of the ECSC Treaty, and imposed fines on fourteen undertakings operating within that sector for infringements committed between 1 July 1988 and 31 December 1990.

2 The applicant, British Steel plc ("British Steel" or "the applicant"), is the largest crude steel producer in the United Kingdom. In the business year ending on 31 March 1990, it had a consolidated turnover of UK £5,113m and its sales of beams in 1990 totalled UK £286.5m. It was the largest Community producer of beams in 1989.

3 Ten other parties to which the Decision was addressed have also brought actions before the Court. They are.

NMH Stahlwerke GmbH (NMH), in Case T-134/94;
Eurofer ASBL (Eurofer), in Case T-136/94;
ARBED SA (ARBED), in Case T-137/94;
Cockerill-Sambre SA (Cockerill-Sambre), in Case T-138/94;
Thyssen Stahl AG (Thyssen), in Case T-141/94;
Unimetal Societe Francaise des Aciers Longs SA (Uminetal), in Case T-145/94;
Krupp Hoesch Stahl AG (Krupp Hoesch), in Case T-147/94;
Preussag Stahl AG (Preussag), in Case T-148/94;
Siderflrgica Aristrain Madrid SL (Aristrain), in Case T-156/94; and
Empresa Nacional Siderurgica SA (Ensidesa), in Case T-157/94.

[Paragraphs 5 to 38 of the judgment refer to the relations between the steel industry and the Commission from 1970 to 1990 and, in particular to:

the crisis in the 1970s and the creation of Eurofer,
the quota system established from 1980 to 1988,
events preceding the end of the "manifest crisis regime" on 30 June 1988,
the monitoring system implemented with effect from 1 July 1988,
the Stainless Steel decision of 18 July 1990 and
the Commission's reflections on the future of the ECSC Treaty after 1990.]

[Paragraphs 39 to 48 describe the administrative procedure before the Commission and paragraphs 49 to 73 describe the procedure before the Court of First Instance. The operative part of the Commission's decision is set out in full in paragraph 47.]

[Paragraphs 74 to 103 consider and reject the applicant's plea that the rights of the defence had been infringed. Paragraphs 104 to 154 consider and reject the applicant's plea that essential procedural requirements within the Commission had been infringed; the Court looked at allegations of a lack of a quorum in the Commission's proceedings, at the allegation that there was a difference between the decision adopted by the Commission and the version of the decision notified to the applicant, at the alleged lack of authentication of the decision and the fact that there was no indication of the date on which the minutes of the Commission's meeting were signed. The court's observations provide a useful guide to future litigants on the extent to which this kind of argument is sustainable.]

[Paragraphs 155 to 239 consider the facts set out in the Commission's decision, on the basis of which the infringements were found. In particular, the paragraphs of the Court's judgment look at:

agreements allegedly concluded in 1986 and 1987,

the agreement on prices in Germany and France allegedly concluded before 2 February 1988,

target prices allegedly fixed before 25 July 1988,

target prices allegedly fixed on 18 October 1988,

target prices allegedly set at the meeting on 10 January 1989,

target prices for the Italian and Spanish markets allegedly set at the meeting on 7 February 1989,

target prices allegedly agreed on at the meeting of 19 April 1989,

fixing of the prices applicable in the United Kingdom from June 1989,

the agreement allegedly reached at the meeting of 11 July 1989 to carry forward to the fourth quarter of 1989, on the German market, the target prices for the third quarter of that year,

the decision allegedly adopted at the meeting of 12 December 1989 concerning the target prices to be achieved in the first quarter of 1990,

fixing of prices for category 2c on the French market, as revealed by the announcement of Unimetal during the meeting on 14 February 1990, fixing of the prices applicable in the United Kingdom in the second quarter of 1990,

fixing of the prices applicable in the United Kingdom in the third quarter of 1990 and

the expert economic report submitted by the applicants.

In paragraph 159 of the judgment, there is a salutary reminder of the way in which the Court is obliged to examine this evidence.]

159 Before examining individually the agreements and concerted practices detailed in the [Commission's] decision, it should be observed first of all that the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact (see the Opinion of Mr Vesterdorf, acting as Advocate-General, in case T-1/89, Rhone-Poulenc v Commission)

[Paragraphs 240 to 482 of the judgment are concerned with the legal analysis of the facts. For the most part, particularly in the discussion of price fixing and market sharing, rules peculiar to the ECSC Treaty are applied. However, in the discussion of information exchanges, the case law developed under the old Articles 85 and 86 of the EC Treaty is invoked. Paragraph 400 illustrates the point: it follows a reference to the special requirement that steel producers should cooperate with the Commission in certain ways.]

400 Subject to that reservation, and regard being had in particular to the fundamental principle of the {ECSC] Treaty that the competition to which it refers consists in the interplay on the market of the strengths and strategies of independent and opposed economic units, the Court finds that the Commission did not err in law in referring, at recital 271 of the decision, to certain decisions it had adopted under the EC Treaty in cases involving oligopolistic markets. With particular regard to the United Kingdom Agricultural Tractor Registration Exchange decision, it must be pointed out that both this court and the court of

justice have ruled that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders: Case T-35/92, John Deere v Commission, paragraph 51; and Case C-7/95P, John Deere v Commission, paragraphs 88 to 90. The Court considers that the same applies a fortiori where, as here, the information exchanged was the subject of regular discussions between the participating undertakings.

[Paragraphs 483 to 588 are concerned with the extent to which the Commission was involved in the infringements of which the applicant was accused. This is a pertinent point in the context of the peculiar interference of the Commission in the activities of the steel industry, particularly during the period of the "manifest crisis regime". Indeed, the court looked separately at the involvement of the Commission both during that period and afterwards. However, the court concluded, in paragraph 546, that there was "no evidence before this Court to suggest that the Commission encouraged or tolerated, on this occasion, the various forms of collusion of which the applicant was accused in the Decision"]

[Paragraphs 589 to 699 of the judgment are concerned with the applicant's allegations of the Commission's misuse of powers and, in particular, with the following matters, all of which should be noted by those making similar claims in future litigation:

- the statement of reasons in the Decision explaining the fine,
- the increase in the fine on account of re-offending,
- the criterion of turnover used in calculating the fine,
- the economic impact of the infringements,
- "aggravating circumstances",
- "extenuating circumstances",
- the duration of the infringement,
- the fine imposed on the applicant for its participation in the information-exchange systems,
- double application of the base rate used to fix the fine,
- the general level of the fines imposed in the Decision in comparison with other ECSC decisions of the Commission and with the provisions of Article 65(5) of the ECSC Treaty,
- a comparison between the fines imposed by the Decision and those imposed by the Cement decision and
- the Court's exercise of its unlimited jurisdiction.

Many of the applicant's arguments and Court's dicta in this section have a bearing on the appropriate line which parties faced with heavy fines may be well advised to follow. A selection from the paragraphs of this section of the Court's judgment is given below.]

592 According to settled case law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed for dealing with the circumstances of the case (see, for example, Case C-331/88, Fedesa et al, paragraph 24; Case T-143/89, Ferriere Nord v Commission, paragraph 68; and Case T-57/91, NALOO v Commission, paragraph 327).

593 The prosecution and punishment of infringements in competition matters are a legitimate objective of Community action ...

[In paragraph 613, the Court notes the applicant's point that, "at the press briefing on 16 February, 1994, Mr Van Miert [Commissioner for Competition Policy] recognised that, during the aftermath of the crisis regime, there could have been some ambiguity, and that the Commission's decision itself acknowledged, in recital 311, that there might have been misunderstandings about the operation of Article 65 of the [ECSC] Treaty during the crisis regime". The Court does not seem to have reacted to this point, except to the extent that it reviewed the "economic impact" of the infringements: see paragraph 660 below.]

[The following paragraphs refer to the increase in the fine on account of re-offending or "recidivism", as the Court calls it]

631 Recitals 305 and 306 of the Decision read as follows:
The Commission press release of 2 May 1988 made at the time of the inspection in the Stainless Steel case leading to Decision 90/417/ECSC gave a clear warning that the Commission would not tolerate illegal arrangements organised by the industry. In addition, some of the undertakings involved (British Steel, Thyssen and Usinor Sacilor) were fined for their participation in the Stainless Steel flat products cartel in that Decision which was published in the Official Journal of the European Communities in August 1990 and was widely discussed in both the specialised and general press. The attitude of the Commission towards illegal agreements and concerted practices had therefore been clear from at least May 1988.

632 It appears from the answers given by the Commission during these proceedings that, in the case of the three undertakings mentioned in recital 306 (the applicant, Unimetal and Thyssen), the total amount of the basic fine, obtained by adding the sub-amounts for the various infringements listed in Article 1, was increased by one third by reason of the recidivist nature of those three undertakings' conduct, regard being had to the Stainless Steel case closed by decision of 18 July 1990.

633 The Court finds that recitals 305 and 306 of the Decision do not contain a sufficient statement of reasons to enable the undertakings in question to ascertain that their fine was thus increased on account of re-offending, to comprehend the size of that increase, or to ascertain the reasons for which the Commission considered that such an increase was justified.

634 Recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements. In this case, the only factor of this kind relates to the fact that the applicant was penalised by the Stainless Steel decision of 18 July 1990. Yet the greater part of the infringement period, from 30 June 1988 to the end of 1990, taken into account in the present case against the applicant, pre-dates the Stainless Steel decision.

635 It follows that, in so far as the increase in the fine imposed on the applicant, in particular, was based on the consideration that the Commission had already penalised it for similar infringements in the Stainless Steel decision, the Decision is vitiated by an error of law, since that fact cannot be taken into account as an aggravating circumstance in relation to infringements committed before the Stainless Steel decision was adopted.

640 Furthermore, the Decision makes no reference to the statement of objections in the Stainless Steel case. The reasons for a decision must appear in the actual

body of the decision and, save in exceptional circumstances, explanations given ex post facto cannot be taken into account: see, most recently, Case T-334/94, Sarrio v Commission, paragraph 350.

641 In any event, a statement of objections is, by its very nature, merely a preparatory act not in the nature of a decision and does not require the undertaking concerned to alter or reconsider its commercial practices: Case 60/81, IBM v Commission, paragraphs 17 to 19; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, Cimenteries CBR and Others v Commission, paragraph 34). Furthermore, the Commission has indicated before the Court neither the date nor the content of the statement of objections on which it relies.

642 It follows that Article 4 of the Decision must be annulled to the extent to which it imposed on the applicant an increase in the fine for the recidivist nature of its conduct.

[On the economic impact of the infringement, the following paragraph is important.]

660 The Court finds that, in recital 303 of the Decision, the Commission exaggerated the economic impact of the price-fixing agreements found here, as compared with the competition which would have existed had it not been for such infringements, having regard to the favourable economic climate and the latitude given to undertakings to conduct general discussions on price forecasts, between themselves and with DG III, in the context of meetings organised by DG III on a regular basis.

661 Taking those matters into account, the Court holds, in the exercise of its unlimited jurisdiction, that the fine imposed on the applicant for the various price-fixing agreements and concerted practices should be reduced by 15%. On the other hand, it finds that there are no grounds for granting such a reduction in relation to either the market-sharing agreements or the exchanges of information on orders and deliveries, to which the same considerations do not apply.

## Court's Ruling

The Court: 1 Annuls Article 1 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding under Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams in so far as it finds that the applicant participated in an agreement to share the Italian market which lasted three months;

2 Sets the amount of the fine imposed on the applicant by Article 4 of Decision 94/215/ECSC at € 20,000,000;

3 Dismisses the remainder of the action;

4 Orders the applicant to bear its own costs and to pay half of the defendant's costs. The defendant shall bear half of its own costs. □

The Court case reported in this issue is taken from the web-site of the Court of Justice of the European Communities. It is not a definitive text and may be subject to linguistic and other amendments. It is freely available for public use.