Notification and authorisation

In his speech to the European Parliament in January, to which we referred in last month's "Comment", the Commissioner responsible for Competition Policy, Mr Monti, made a point which confirms the suspicions of many practitioners in the field of EC competition law. "Serious restrictions are never notified," he said. "The Commission has prohibited only 9 agreements in 35 years on the sole basis of a notification." Although notification of a restrictive practice is a duty under the rules on competition, the sanctions for a breach of the duty, though quite real, are in some respects less pressing than the draftsmen of the rules may have intended. Consequently, notification has been seen by many corporations and their advisers as largely a matter of tactics, rather than of obligations. Moreover, in the determination of the tactics to be adopted in any given case, one of the biggest factors to be taken into account is whether the risk of sanctions may be offset by the disadvantages of publicity. Notification makes a potentially anti-competitive situation public; and publicity may lead to objections and complaints. Legal advisers therefore rightly warn their clients about the dangers of failing to notify a restrictive practice but also warn them of the dangers to which unwelcome publicity may lead. Mr Monti clearly recognises that the procedure for notification and authorisation is not working. This is borne out by the large increase in recent years in the number of formal complaints about competitors' behaviour.

Meanwhile, the Commission is considering the scores of submissions on the proposals contained in last year's White Paper on reforming the competition rules. The debate has focused on the alternatives of a system of authorisation and a system of "legal exception". The Commission's Deputy Director-General for Competition has expressed the matter in this way. "Two kinds of system [for the application of the rules on competition] were conceivable: a system of authorisation similar to the one in the ECSC Treaty or a system of legal exception. Under a system of authorisation, agreements have to be notified to an administrative authority which grants or refuses the benefit of an exemption. Under a system of legal exception, any judge or competent authority before whom a complaint is brought can and must examine whether a restrictive agreement does or does not fulfil the conditions imposed by the Treaty." (Article in "Competition Policy", October, 1999; our translation from the French.) The latter system would mean that "agreements restricting competition ... under Article 81(1) would be lawful *ab initio* to the extent that they met the conditions imposed by Article 81(3)". Thus, neither notification nor authorisation would continue to be necessary. It remains to be seen whether the Commission has received enough support to proceed with this approach. ■

Dominant Position (Computer Software) : the Microsoft Case

Subject: Dominant Position

Industry: Computer software

Parties: Microsoft

Source: Commission Statement IP/00/141, dated 10 February 2000

(Note. This is a helpful and interesting statement about the ways in which the Commission has been involved in the problems of reconciling Microsoft's business policy with the rules on competition. The paragraph outlining the difference between the European and American charges could perhaps have been clearer: the Commission says that the US proceedings "seem to revolve" around the question of market dominance for PC operating systems. Yet several of the past and current cases referred to by the Commission towards the end of its statement are concerned with, or at least overlap, a similar question. The outcome of the various cases in the USA and Europe is of incalculable importance to consumers, a point which is not given prominence in the statement.)

On the basis of information received from end-users, small and medium-sized enterprises active in the IT (information technology) sector and competitors of Microsoft, the Competition Directorate General of the Commission has formally requested Microsoft to provide information about the new technical features of Windows 2000 in the context of EC competition law. This information should allow the Commission to verify allegations that Microsoft has designed Windows 2000 in a way which will permit leveraging of its dominance in PC operating systems onto the market for server operating systems and ultimately that for thriving e-commerce.

According to allegations received by the Commission, Microsoft, by virtue of Windows 2000, has bundled its PC operating system with its own server software and other Microsoft software products (that is, "middleware" which provides functionality enhancing the performance of client/server operating systems such as back office or security tasks) in a way which permits only Microsoft's products to be fully interoperable. Microsoft's competitors, which do not have access to the interfaces would therefore, according to the allegations, be put at a significant competitive disadvantage which would ultimately allow Microsoft to extend its dominance in PC operating systems into the closely related markets for server operating system software and "middleware". According to the allegations, in order to ensure full exploitation of functionalities embedded in Windows 2000 for PCs, customers would *de facto* be obliged to purchase Windows 2000 for servers.

As a result of the information it has so far obtained, the Commission has sent a formal request for information to Microsoft in accordance with Article 11 of Regulation 17/62. The Commission will examine whether the above allegations concerning an infringement of EC competition law caused by the design of Windows 2000 are well founded.

Background: How does this investigation relate to the US trial ?

The Commission points out that it is important to differentiate between the trial in the USA and the Commission's first step in a preliminary examination of the allegations with which it has been confronted. The US and EC proceedings are different. The allegations which the Commission has now decided to examine more closely centre on Microsoft leveraging its dominance from one market (PC operating systems) onto other markets, whereas in the US the main thrust of the proceedings seems to revolve around Microsoft protecting its dominance on the market for PC operating systems.

Timeframe and next steps: What are the next steps in the Commission's investigation ?

The Commission has given Microsoft four weeks to respond to its questions. Their answers will then have to be carefully analysed. It is on the basis of this analysis that the Commission will decide its next steps. At this stage it is impossible to forecast the outcome of the examination. Generally speaking, the Commission's options are laid down in Regulation 17/62. In this context, if the Commission considers that EC competition law is being infringed, it can initiate a formal examination procedure by sending a statement including the objections raised against the company concerned.

At this stage, this is only one option among others depending on the outcome of the examination. The Commission needs to examine Microsoft's answers and supplementary information from other sources first to be able to assess the merits of the allegations. This is not the first time nor the first examination in which the Commission has been confronted with allegations concerning the competitive impact of Windows 2000.

Legal framework: What is the legal framework in which DG COMP's investigation is situated ?

The examination is taking place in the framework of Regulation 17/62 implementing Articles 81 and 82 of the EC Treaty. The formal request has been sent on the basis of Article 11 of Regulation 17/62. The Commission has thus started a so-called *ex officio* procedure. It should be emphasised that at this stage the Commission has initiated an examination but has not opened a formal procedure against Microsoft.

Sources of information and allegations: Why is the Commission concerned about Windows 2000 ?

The Commission has been approached by end-users, small and medium-sized enterprises active in the IT sector and competitors of Microsoft who had been given access to beta versions of Windows 2000. The parties who have contacted the Commission do not want to be named. Nevertheless, their submissions were sufficiently substantiated to justify the Commission's formal request to Microsoft for information.

Charge in legal terms: What exactly is the charge against Microsoft ?

There is no accusation yet. This is important to remember. The Commission is at present in a preliminary examination stage. The allegations which have been made would indicate the applicability of Article 82 of the EC Treaty. Article 82 prohibits abusive and exclusionary behaviour by undertakings in a dominant position. According to the allegations which have been received Microsoft, through Windows 2000, has bundled its PC operating system with its own server software and other Microsoft software products (that is, "middleware") in a way which permits only Microsoft's products to be fully interoperable. Microsoft's competitors, which do not have access to the interfaces would therefore, according to the allegations, be put at a significant competitive disadvantage which would ultimately allow Microsoft to extend its dominance in PC operating systems into the closely related markets for server operating system software and "middleware". According to the allegations, to ensure full exploitation of functionalities embedded in Windows 2000 for PCs, customers would *de facto* be obliged to purchase Windows 2000 for servers. Microsoft would thereby shift outwards to the server market the technical barriers to entry which so far have afforded it its arguably strong position in the market for PC operating systems.

E-commerce: What about the danger for e-commerce ?

We will, no doubt, need to obtain further clarification on this point, both from Microsoft and its competitors. What appears so far is that whoever gains dominance in the server software market is likely to control e-commerce too. According to what is claimed by Microsoft's competitors and customers, Microsoft's Windows 2000 will leverage Microsoft's dominance in PC operating systems to server operating systems. This could tip the e-commerce market to Microsoft's favour.

Past Commission cases involving Microsoft

Microsoft Licensing Agreements with PC Manufacturers

In 1993, the US Justice Department took over a deadlocked investigation of Microsoft. At about the same time Novell filed a complaint with the Commission concerning Microsoft. By mid 1994, largely due to constructive exchanges of views on the issues, the two investigations had reached a common set of concerns about Microsoft's licensing of its MS-DOS and Windows products to PC manufacturers.

Negotiations between Microsoft and a joint US Justice Department and Commission team led to an agreed settlement under which Microsoft undertook to change its licensing agreements with PC manufacturers. This took the form of an Undertaking to the Commission and a Consent Decree in the US. The Undertaking was received by the Commission in July 1994 and ratified by the US court in 1995.

Santa Cruz v. Microsoft

In 1997 Microsoft's competitor Santa Cruz Operation (SCO), a Californian software company specialising in systems for network computing, complained to both the Commission and the US Justice Department about its contractual relationship with Microsoft invoking restraints of competition due to the agreements and referred to Microsoft dominant position. The Commission discussed the case with the US Justice Department, which felt that it would take more time to address these concerns under US Law. They agreed to the Commission moving first. A Statement of Objections was sent and Microsoft waived its rights under the contract clauses to which the Commission objected before a scheduled oral hearing. These changes addressed the competition concerns in both the EEA and the US. The case was closed.

Microsoft Internet Explorer

In early 1997, the Commission launched an ex-officio investigation of certain Microsoft contracts with European Internet Services Providers (ISP). During this inquiry, Microsoft was informally requested to re-examine the agreements in the light of European competition rules to ensure that they did not contain restrictions which 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. Considering that Microsoft removed illegal clauses and that the notified agreements no longer infringed EC competition rules, the Commission cleared the agreements by way of a comfort letter pursuant to Article 81(1). The comfort letter only covers the agreements between Microsoft and ISPs. In this particular case, the Commission did not give any ruling on the global behaviour of Microsoft concerning a possible abuse of dominant position.

Micro Leader v Microsoft

The charge brought against Microsoft was that it applied different prices to equivalent transactions with trading partners. Micro Leader is a wholesaler of software in France. It imported Microsoft software (operating systems, application programs) from Canada to France to sell it there. The software was allegedly identical to that supplied by Microsoft's French distribution channels but cheaper. Microsoft considered that the imports led to unfair competition in France and brought to bear its intellectual property rights concerning the software. Micro Leader filed a complaint with the Commission relying both on the concept of an abuse of a dominant position and on the concept of agreements between companies with a view to restricting competition (Article 81 of the Treaty). The Commission decided to reject the complaint on the grounds that the complainant had not provided sufficient evidence for its charges.

Micro Leader appealed at the Court of First Instance (CFI). The CFI upheld the Commission's arguments as far as the charge of restrictive agreements contrary to Article 81 was concerned. Nevertheless, it annulled the decision with reference to Article 82: according to the judgment, Micro Leader had provided sufficient

indications that Microsoft did charge higher prices in France than in Quebec. The CFI furthermore stated that in exceptional circumstances intellectual property rights would not necessarily constitute a valid defence if a conduct were found to constitute an abuse of a dominant position. We have already started re-examining the case in accordance with the CFI's findings. Microsoft will have to provide information on its pricing policy and provide reasons for any possible differences in prices for prima facie identical products. ■

The Emerson / Ericsson Case

The European Commission has cleared the acquisition of Ericsson Energy Systems (EES) of Sweden by the American company Emerson Electric. Both companies are active in the manufacturing of energy systems for the telecommunications sector. The Commission found that the combined market shares of Emerson and EES were relatively modest and the operation would not impede competition in the EEA.

Emerson Electric Co. ('Emerson') which manufactures a broad range of products for process control, automation, air conditioning, and other applications has purchased Ericsson Energy Systems ('EES') from the Swedish telecommunications manufacturer Ericsson AB. EES has factories in Sweden, and also in Latin America, the Far East and elsewhere, from which products are sold to telecommunications manufacturers and operators worldwide.

Energy systems include embedded power supplies such as AC/DC converters, which are sold to telecoms manufacturers for integration into the telecoms equipment itself; power systems which are stand-alone systems, functionally similar to embedded systems, which are sold to telecoms operators; and systems which provide the refined temperature and humidity control required in telecoms or informatics operating installations. The Commission has found that the geographic markets for all three types of product are at least EEA wide, in view of the fact that manufacturers tend to locate their factories in a limited number of locations from which they ship their products throughout the EEA or the world, in view of significant intra-EEA trade flows, and in view of relatively low transport costs. The combined EEA shares of Emerson and EES for all three types of product are relatively modest.

The EEA markets for the relevant products include strong competitors such as Lucent, Alcatel and Marconi. Customers include companies such as Vodaphone, Telefonica and Cable and Wireless, who should be able to exercise a significant degree of buying power. In view of the above the Commission has decided not to oppose the operation. (Source: Commission Statement IP/00/267, dated 16 March 2000.)

MERGERS (TELECOMMUNICATIONS): THE MCI WORLDCOM / SPRINT CASE

Subject: Mergers

Industry: Telecommunications

Parties: MCI WorldCom
Sprint

Source: Commission Statement IP/00/174, dated 21 February 2000

(Note. The full or second-phase investigation into merger proposals is still sufficiently uncommon to merit special attention; and, in the present case, it will be important to know what market share the merged companies would have in Europe and the extent to which Internet connectivity would be affected. The usual problem with external mergers will remain: whether a merger between two non-European entities can be totally prohibited by the European authorities. Relations between the US and EU authorities, which are collaborating in this case, will probably be kept in good repair if the Commission concentrates on the conditions which it would be reasonable to impose if the merger as such is not in the best interests of the common market.)

The Commission has decided to open a full investigation into the proposed merger between telecom companies MCI WorldCom and Sprint. The Commission will make a detailed assessment of the impact of the transaction on competition conditions in various areas of the telecom industry. More particularly, the focus areas of the investigation will be the provision of top level connectivity services in the Internet (that is, those networks to which anybody must directly or indirectly have access to have universal reach on the Internet), of global telecommunication services to multinational companies and of termination in the US of international voice telephony calls. A final decision by the Commission is expected by early July.

MCI WorldCom is a global telecommunication company. It provides a wide range of telecommunications services to businesses and consumers, including local, long distance and international calls, freephone, calling card and debit card services. MCI WorldCom also provides, mainly through its subsidiary UUNet, Internet services. Sprint provides in the USA local, long-distance, and wireless communications and Internet services. Sprint's activities in Europe are largely conducted through its participation in Global One, a joint venture with Deutsche Telekom and France Telecom.

The Commission has raised serious doubts as to the compatibility of the proposed merger between MCI WorldCom and Sprint mainly because of its impact on competition in the market for top level Internet connectivity. In its 1998 WorldCom/ MCI decision, the Commission found that the combination of MCI's and WorldCom's Internet activities would have led to the creation of a dominant position on the market for top-level connectivity. This merger was

allowed to go through only after MCI had undertaken to divest its Internet business. The transaction under review raises similar issues with MCI WorldCom still enjoying an undisputed leadership role and Sprint being probably the second player in this market.

The Commission will also investigate the effect on competition the notified transaction may have with regard to the market for the provision of global telecommunications services to multinational companies where together with the Concert alliance the merged entity would appear to control the majority of the market. The Commission will also look at how the market for international voice telephony on the EU/US route may be affected as the notified merger may lead to MCI WorldCom / Sprint and AT&T having bottleneck control on the US-end for termination of international voice telephony traffic.

On 2 February 2000, the notifying parties submitted the undertaking that Sprint would use every endeavour to complete, without undue delay, its withdrawal from the Global One joint venture. The parties argued that the proposed commitment would remove any concerns regarding the compatibility of the notified concentration as regards any affected market (notably global telecommunications services to multinational companies, international voice telephony and Internet services). However, given the negligible involvement of Global One in the market for top level Internet connectivity, this undertaking could not remove the serious doubts raised by the notified operation.

Finally, pursuant to the bilateral agreement of 1991 on antitrust co-operation between the European Commission and the United States of America, the European Commission and the Department of Justice have been collaborating and will continue to do so, especially if the two authorities identify common competition concerns which may require a jointly pursued remedial action. ■

Fiscal State Aids

In a recent statement concerning the control of fiscal state aids, Commissioner Monti said: "It is of course disappointing that almost four years after the informal Council in Verona - which marked the beginning of a concerted effort to tackle harmful tax competition in the Community - and more than two years after the agreement of 1 December 1997 on a package including the Code of Conduct for Business Taxation, considerable uncertainty still surrounds the implementation of that package in spite of the determination shown by most Members States and by the Commission. I have instructed the Commission's Competition Department to examine all the relevant cases of fiscal state aids in business taxation, so as to allow the Commission to comply fully and promptly with its own institutional obligations. This work is by no means an interference with Member States' competence in tax matters. The Commission has exclusive powers to control State aid in the Community and the Member States themselves have repeatedly asked the Commission to exercise these powers also in the area of fiscal state aids." (Source: Commission Statement IP/00/182, dated 23 February 2000.)

DOMINANT POSITION (REMAILING): THE DEUTSCHE POST CASE

Subject: Dominant position
Exclusive rights

Industry: Remailing; postal services

Parties: Deutsche Post AG
Gesellschaft fur Zahlungssysteme mbH
Citicorp Kartenservice GmbH

Source: Court Statement 5/2000, dated 10 February 2000, relating to Joined Cases C-147/97 and C-148/97 (Deutsche Post v GZS)

(Note. Remailing, and the role of national post offices, continue to cause difficulties from the point of view of the rules on competition. However, the Court of Justice has now held that, in the absence of an agreement between the postal services of the Member States concerned fixing "terminal dues" on the basis of the actual costs of processing and delivering incoming trans-border mail, a Member State may grant its postal services the statutory right to charge internal postage on items of mail where senders resident in that State post items, or cause them to be posted, in large quantities with the postal services of another Member State for sending back to the first Member State. But the postal services may demand from the senders only the difference between the "terminal dues" (paid by the postal services of the Member State from which the mail is sent) and the full internal postage, as otherwise they would abuse their dominant position within the meaning of Community competition law.)

Case 148/97

Citicorp Kartenservice GmbH ("CKG"), whose registered office is in Frankfurt am Main, is a company in the Citibank group which attends to the preparation and dispatch of statements, confirmations, bills and payment or billing requests for customers holding Visa cards in particular.

In 1993 the Citibank group set up a centralised body responsible for the preparation and dispatch of statements and other standardised banking statements of account, namely Citicorp European Service Center BV ("the CESC"), whose registered office is in Arnhem, Netherlands.

Until 30 June 1995 the data processing was carried out at CKG's computer centre, in Frankfurt am Main. After receiving the data by electronic transfer, the CESC carried out the printing on standardised forms which were then placed in envelopes, and the envelopes were franked for dispatch. Those items of mail were finally handed over to the Netherlands Post Office ("PTT Post") in Arnhem for onward carriage. PTT Post transmitted them to Deutsche Post in order for it to deliver them to addressees resident in Germany (since 1 July 1995 the data have been sent to the Netherlands by satellite from the data-processing centre of the Citibank group in Sioux Falls-South Dakota, United States).

The CESC also prints out and sends from the Netherlands approximately 42,000,000 items of mail per year to addressees resident in other Member States of the European Union (France, Belgium, Spain, Portugal, Greece).

In the case of items of mail to addressees resident in Germany, PTT Post receives, in the Netherlands, the normal postage for international mail (that is to say approximately DEM 0.55). It pays Deutsche Post the "terminal dues" (at the material time, from DEM 0.37 to DEM 0.40 per letter).

Deutsche Post claimed postage at its internal rate (DEM 1 per letter) in respect of the "remailing" of each of CKG's letters delivered in Germany. For the period from 24 February 1995 to 9 July 1995 Deutsche Post sought payment of a sum of DEM 3,668, 916. When CKG refused to pay the sum demanded, Deutsche Post brought the case before the Landgericht (Regional Court) Frankfurt am Main.

Case C-147/97

Gesellschaft für Zahlungssysteme mbH ("GZS") is the largest operator in respect of transactions carried out using Eurocard credit cards in Germany. In the course of its data-processing operations it draws up, for the card holders and the authorised traders, monthly statements which are sent by post.

Since the summer of 1995 GZS has transmitted by electronic data transfer to its Danish contractual partner the data needed to draw up the statements of approximately 7,000,000 credit-card holders, in order for the statements to be sent by the Danish post office. The latter transmits them to Deutsche Post for onward carriage in Germany and delivery to addressees resident in that Member State. The Danish postal service receives the postage charged in Denmark for international mail, which is lower than the internal rate in force in Germany. It pays Deutsche Post the "terminal dues" (DEM 0.36 per letter).

Deutsche Post demanded from GZS payment of internal postal charges of DEM 623 984. When GZS refused to pay that sum, Deutsche Post brought the case before the Provincial Court in Frankfurt am Main.

The Frankfurt court dismissed both of Deutsche Post's actions. On appeal, the Provincial Court of Appeal in Frankfurt was uncertain whether the Universal Postal Convention ("the UPC", transposed into German law in 1989), which allows the Contracting States to charge postage at their internal rates on items which are remailed, was compatible with Community law. It therefore decided to stay proceedings and refer the question to the Court of Justice.

Judgment of the Court of Justice

The German court asked whether it was contrary to the provisions of the EC Treaty relating, in particular, to undertakings entrusted by a Member State with the operation of services of general economic interest and to the prohibition on abuse of a dominant position, for a body such as Deutsche Post to exercise the

right provided for by the UPC to charge internal postage on items of mail posted in large quantities with the postal services of another Member State.

The Court noted first of all that a body such as Deutsche Post, which has exclusive rights as regards the collection, carriage and delivery of mail, must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of the EC Treaty.

It then pointed out that, in accordance with settled case-law, an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as holding a dominant position within the meaning of the EC Treaty.

According to the Court, one of the fundamental principles of the UPC is the obligation of the postal administration of the Contracting State to which international mail is sent to forward and deliver it to addressees resident in its territory using the most rapid means of its postal service. For the postal services of the Member States, performance of the obligations flowing from the UPC is in itself a service of general economic interest within the meaning of the EC Treaty. German legislation assigns the operation of that service to Deutsche Post.

Under the UPC, the postal services of the Contracting States may charge postage on items of mail at their internal rates in certain circumstances.

The grant to a body such as Deutsche Post of the right to treat international items of mail as internal post in such cases creates a situation where it may be led, to the detriment of users of postal services, to abuse its dominant position resulting from the exclusive right granted to it to forward and deliver those items to the addressees.

It was accordingly necessary for the Court to examine the extent to which exercise of such a right is necessary to enable a body of that kind to perform its task of general interest pursuant to the obligations flowing from the UPC and, in particular, to operate under economically acceptable conditions.

If the body were obliged to forward and deliver to addressees resident in Germany mail posted in large quantities by senders resident in Germany using postal services of other Member States, without any provision allowing it to be financially compensated for all the costs occasioned by that obligation, the performance, in economically balanced conditions, of that task of general interest would be jeopardised.

It must be regarded as justified under Community law, for the purposes of the performance, in economically balanced conditions, of the task of general interest entrusted to Deutsche Post by the UPC, to treat cross-border mail as internal mail and, consequently, to charge internal postage.

On the other hand, in so far as part of the forwarding and delivery costs is offset by terminal dues paid by the postal services of other Member States, it is not necessary, in order for a body such as Deutsche Post to fulfil the obligations flowing from the UPC, that postage be charged at the full internal rate on items

posted in large quantities with those services. The exercise by such a body of the right to demand the full amount of the internal postage, without the senders having any choice but to pay it in full, may be regarded as an abuse of a dominant position within the meaning of Community competition law. ■

The Volvo / Scania Case

The Commission has decided to prohibit the acquisition by Volvo of Scania. Both are Swedish manufacturers of trucks, buses and engines. This decision follows an in-depth investigation of the relevant markets for heavy trucks, city buses, inter-city buses and touring coaches. In adopting this decision, the Commission concluded that the remedies proposed by Volvo were insufficient to resolve the competition concerns resulting from the proposed acquisition of Scania. Both Volvo and Scania are Swedish companies, with activities across Europe and beyond, primarily in the manufacture and sales of trucks, buses and engines.

In its decision, the Commission has concluded that the concentration as originally notified would have caused serious competition concerns by creating dominant positions in the respective markets for:

heavy trucks in Sweden, Norway, Finland and Ireland;
touring coaches in Finland and the United Kingdom;
inter-city buses in Sweden, Denmark, Norway and Finland;
for city buses in Sweden, Denmark, Norway, Finland and Ireland.

The combined market share of Volvo and Scania is very high in each of these markets, ranging from around 90% (in the Swedish heavy truck market and the Finnish and Irish city bus markets) to around 50% (in the UK coach market and the Irish heavy truck market). The parties' market positions have been largely symmetrical in all markets and the merger would in most of these markets combine the two largest competitors.
The market investigation conducted by the Commission confirms that Volvo and Scania have been each other's closest competitors and that they are competing strongly.

On 21 February 2000, Volvo proposed a number of undertakings intended to address these concerns. After consulting the other market participants, as well as Member States, the Commission concluded that the proposed undertakings were insufficient to resolve the competition concerns resulting from the proposed acquisition of Scania. The undertakings would not significantly facilitate access to the markets by competitors. Given the gravity of the competition concerns resulting from the proposed merger between the two closest competitors, and the fact that Volvo was unable to propose undertakings that would have removed all competition concerns, the Commission had no other choice but to prohibit the merger. (Source: Commission Statement IP/00/257, dated 14 March 2000.)

PROCEDURE (PLASTIC BOTTLES): THE STORK CASE

Subject: Procedure
Complaints
Comfort letters
National courts
Cooperation agreements
Exclusive supply
Non-competition

Industry: Plastic bottles
(Implications for most industries)

Parties: Stork Amsterdam BV
Commission of the European Communities
Serac Group (Intervener)

Source: Judgment of the Court of First Instance in Case T-241/97 *(Stork Amsterdam BV v Commission of the European Communities)*, dated 17 February 2000

(Note. This case is an invaluable source of reference to those wishing to ascertain whether a given communication from the Commission is subject to legal challenge and, more specifically, whether and to what extent they may challenge a rejection of their complaint. Not only does the case cover in detail the relevant case-law: it also provides a graphic statement of the procedure adopted by the Commission when corresponding with a complainant. The facts, which are set out in paragraphs 1 to 20 below, are therefore of more interest than usual. The forms of order sought by the parties and the statement of the main plea are set out in paragraphs 21 to 32. The parties' arguments, in paragraphs 33 to 48 of the judgment, are omitted from the report below. The Court's findings are set out in paragraphs 49 to 85. The Commission's decision to reject the complaint in question was annulled.)

Facts

1 Stork Amsterdam BV (hereinafter Stork) is a company incorporated under Netherlands law which produces machines for manufacturing plastic bottles by means of the blow moulding technique.

2 On 14 August 1987 Stork and Serac SA (now Serac Group, hereinafter referred to as Serac), a company incorporated under French law which produces machines for aseptically filling plastic bottles, entered into a cooperation agreement (hereinafter the cooperation agreement or the agreement) to market complete production lines for manufacturing such bottles and filling them aseptically with liquid foods. The two companies undertook to purchase from each other the machines they produced and to sell them as complete lines under the name Stork-Serac or Serac-Stork. The agreement also imposed a duty on

either company to make available to the other the know-how needed for marketing, installing and servicing the machines (clause 5 of the agreement).

3 Clause 6 of the agreement contained a restrictive covenant against competition which provided as follows:

> 6.1 Each party agrees to refrain ... [from developing, manufacturing and selling] directly or indirectly through agents or subsidiaries of any [kind] equipment or parts thereof competing with or similar to the other [party's equipment] involved in this cooperation.
>
> 6.2 In the event that a potential customer requires either from Stork or from Serac equipment made by third parties for filling or blow moulding, the selling party shall seek approval from the other party, which approval will not unreasonably be withheld. In the event that one party [sells] a third [party's] competitive machine without [the] approval of the other party, the other party is entitled to a penalty to be paid as liquidated damages of 30% (thirty per cent) of the replaced machine.
>
> 6.3 Only in [the] case of termination of this agreement in accordance with Art. 14 [that is to say, after the agreement has been in force for five years and on expiry of twelve months' written notice of termination] the obligation [not to compete] as agreed in Art. 6.1 shall remain in force for the terminating party [for] four years after such termination.

4 In 1989, Stork sought Serac's agreement to terminate the cooperation agreement, in particular by letter of 13 July 1989, in which it also threatened to submit a complaint to the Commission alleging infringement of Article 85 of the EC Treaty (now Article 81 EC) should Serac refuse to agree to terminate the agreement.

5 In the absence of any positive reply from Serac, Stork lodged a complaint with the Commission on 20 September 1989 with a view to obtaining a declaration that the cooperation agreement was incompatible with Article 85 of the Treaty. Stork argued that Serac had infringed Article 85 by failing to terminate the agreement.

6 On 24 January 1990 Serac sent a copy of the agreement to the Commission in order to obtain negative clearance or exemption, at the same time informing the Commission that it would be content with a simple comfort letter.

7 The Commission responded to Stork's complaint and to Serac's notification by letter of 20 March 1991, signed by J. Dubois, acting Director of the Directorate-General for Competition (DG IV). The letter proposed an amicable solution to the dispute, which was put forward in response to the complaint and notification and the supplementary information supplied to the Commission by both companies. Analysing the cooperation agreement, Mr Dubois indicated that, while it did not qualify for exemption, it was sufficiently similar to the type of agreement covered by Commission Regulation (EEC) 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to

categories of specialisation agreements (OJ 1985 L 53, p. 1, hereinafter 'Regulation No 417/85), the principal differences being in clauses 6.2 and 6.3. Mr Dubois stated that, on the basis of the information available to him, he took the view that those clauses restricted competition and were not indispensable to the attainment of the objectives of the agreement. He therefore suggested that they be amended to bring the agreement into line with the spirit of Regulation 417/85.

8 The amendment proposed for clause 6.2 (which concerns exclusive mutual supply) was to make the clause conform to Article 2(b) of Regulation No 417/85 by enabling either party to obtain supplies without incurring a penalty from third parties offering more favourable supply terms. To the same end of making the agreement comply with Regulation 417/85, Mr Dubois also stated that clause 6.3 (concerning the duty not to compete for a period of four years following termination) should be suppressed.

9 Mr Dubois added that, given the limited economic importance of the matter at Community level, it did not seem to him appropriate, at [that] stage, to recommend to the Commission the formal opening of a procedure. In the event that the parties failed to agree to amend the clauses as he had suggested, they were invited to bring the matter before the proper national court or the competent national administrative authorities, calling attention to the Commission's letter.

10 The letter addressed to Stork contained an additional paragraph which read:

> Failing a reaction on your part within four weeks from your receipt of this letter, I shall close the file; it could, however, be reopened at any time should a change in the factual or legal circumstances require a new examination of the situation.

11 By letter of 19 July 1991, Serac informed the Commission that the parties expected to settle their dispute amicably. However, discussions between them failed to reach a conclusion and the agreement expired on 14 August 1992 without having been amended.

12 On 21 December 1992 Serac sent another letter to Mr Dubois, inviting the Commission to reconsider its analysis of the matter. Serac argued, inter alia, that the suggestion made by the Commission in its letter of 20 March 1991 to amend or delete certain clauses in the agreement reflected a poor understanding of the market in question and an incorrect assessment of the effect of the cooperation agreement on competition. Serac went on to confirm that it would not rely on clause 6.3 of the cooperation agreement, provided only that no use was made of confidential know-how divulged while the agreement was in force.

13 By letter of 25 February 1993 F. Giuffrida, Head of Unit within DG IV, replied that the arguments put forward by Serac were not such as to call into question the Commission's position as expressed in its letter of 20 March 1991 according to which clauses 6.2 and 6.3 of the agreement were too restrictive of competition and not indispensable to attaining the objectives of the agreement.

He ended his letter by saying it therefore seems to me that this matter should be considered closed. The Commission sent a copy of that letter to Stork.

14 On 15 May 1993 Serac brought an action for annulment of the decision contained in the Commission's letter of 25 February 1993 before the Court of First Instance (Case T-31/93).

15 On 16 July 1993 the Commission raised an objection of inadmissibility, arguing that Mr Giuffrida's letter did not constitute an actionable measure but merely expressed the Commission's provisional view. It was not intended to produce legal effects and did not contain any definitive decision on the complaint or the notification. In the memorandum in which it raised the objection of inadmissibility, the Commission also announced that it was to pursue its analysis of the matter. In those circumstances, Serac withdrew its action and the case was removed from the register by order of the President of the Court of First Instance of 20 December 1993.

16 On 5 October 1994, pursuant to Article 11 of Council Regulation 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter Regulation 17), the Commission sent to each party identical requests for information soliciting the latest data on the market share of the different types of packaging (brick, plastic or glass bottles, cartons ...) [for] each segment of the liquid milk market, the purpose of those requests being to enable the Commission to assess the compatibility of [the agreement] with EC rules on competition and in particular Article 85 of the EC Treaty ..., in full knowledge of the facts and in the correct economic context.

17 The two parties sent the information requested and the matter was subsequently reviewed by the Commission together with Stork's counsel on 14 November 1994 and Serac's counsel on 13 December 1994.

18 By letter of 23 January 1996, pursuant to Article 6 of Regulation 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17, G. Rocca informed Stork, on behalf of Alexander Schaub, Director-General of DG IV, of the reasons why its complaint had been rejected. After setting out his analysis of the matter with regard to Article 85 of the Treaty, Mr Rocca concluded that it was not realistic to say that the agreement affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question, all the more [so] since on 21 December 1992 Serac renounced its right under clause 6.3 (which concerned exclusive rights after termination of the agreement). The Commission's letter ended with a warning that the institution would not adopt a definitive position until it had received Stork's comments and any further information it wished to submit, which should be in writing and should reach the Commission within four weeks.

19 Stork sent a reply to the Commission on 22 March 1996, refuting the Commission's arguments and questioning whether the Commission was entitled to conduct a fresh analysis of the matter after its letters of 20 March 1991 and 25 February 1993.

20 By letter of 20 June 1997 the Commission informed Stork of its decision to reject its complaint of 20 September 1989 (Decision IV/F 1/33.302 Stork, hereinafter the contested decision). Adopting essentially the same analysis of the agreement as that contained in its letter of 23 January 1996, the Commission concluded that, whilst the clauses in the agreement restricting competition fell within Article 85(1) of the Treaty, the conditions for applying Article 85(3) had been satisfied.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 21 August 1997, the applicant brought the present action for annulment of the Commission's decision set out in the letter of 20 June 1997.

22 By order of the President of the First Chamber of the Court of First Instance of 20 April 1998, Serac was given leave to intervene in support of the form of order sought by the Commission.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure. As a measure of organisation of procedure, the Court requested the parties to reply in writing to certain questions before the hearing.

24 The parties presented oral argument and gave their answers to the Court's questions at the hearing on 22 April 1999.

25 The applicant claims that the Court should:

annul the contested decision;

order the Commission to pay the costs.

26 The Commission contends that the Court should:

dismiss the application;

order the applicant to pay the costs of the action.

27 The intervener contends that the Court should:

dismiss the application brought by Stork;

order Stork to pay all the costs of the action, including those incurred by reason of its intervention.

Law

28 The applicant makes three pleas in law in support of its claim. It alleges, first, that the Commission lacked power to adopt the contested decision, or that

the adoption of the contested decision was an abuse of power, given that the Commission's letters of March 1991 and February 1993 already contained a definitive decision and the matter must be regarded as having been closed after the letter of 25 February 1993 at the latest. Secondly, the contested decision is vitiated by errors of fact and law. Thirdly, there is no statement of reasons, or only an inadequate statement of reasons, for the contested decision.

29 The Commission disputes the applicant's claims and asks that the Court dismiss the application.

The first plea, alleging that the Commission lacked power to adopt the contested decision, or that the adoption of the contested decision was an abuse of power

30 The applicant's first plea challenges the Commission's right to reopen the procedure relating to the complaint and the notification, and its right to adopt the contested decision. The plea is divided into two limbs, the first alleging that the letters of 20 March 1991 and 25 February 1993 contained an actionable decision and that the matter must be regarded as having been closed after the second letter at the latest, given that no new factor had arisen to warrant re-examination of the file. The second limb alleges that, by reopening the administrative procedure on 5 October 1994 and adopting its final decision on 20 June 1997, the Commission failed to fulfil its obligation to adopt a decision on the applicant's complaint of 20 September 1989 within a reasonable time.

31 In its reply, in connection with its second plea for annulment, the applicant also argues that the decision to reopen the procedure was adopted in breach of Article 190 of the EC Treaty (now Article 253 EC).

32 The Court takes the view that, in order to determine whether the first plea is well founded, the first limb of that plea should be considered together with the plea disputing the adequacy of the statement of reasons given for reopening the procedure.

Arguments of the parties

[Paragraphs 33 to 48 are omitted.]

Findings of the Court

The legal nature of the Commission's letters of March 1991 and February 1993

49 According to settled case-law, any measure the legal effects of which are binding on and capable of affecting the interests of the applicant, by bringing about a distinct change in his legal position, is an act or a decision which may be the subject of an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). In particular, in cases of acts or decisions drawn up in a procedure involving several stages, and particularly at the end of an internal procedure, it is only those measures which definitively determine the

position of the institution upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision. Moreover, the particular form in which acts and decisions are adopted is, in principle, immaterial so far as concerns the possibility of their being challenged by an action for annulment (Case 60/81, *IBM v Commission*, paragraph 9, and *Automec I*, paragraph 42).

50 To assess the legal nature of the letters in question in the light of those principles, it is appropriate to consider them in the context of the procedure for investigating claims made under Article 3(2) of Regulation 17.

51 The procedure for examining a complaint comprises three successive stages. During the first stage, following the submission of the complaint, the Commission collects the information which it needs to enable it to decide how it will deal with the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing the complainant an opportunity to expand on his allegations in the light of any initial reaction from Commission officials. During the second stage, the Commission may indicate, in a notification to the complainant, the reasons why it does not propose to pursue the complaint, in which case it must offer the complainant the opportunity to submit any comments it may have within a time-limit which it fixes for that purpose. In the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant. Although Article 6 of Regulation 99/63 does not expressly provide for the possibility, this stage may end with a final decision (*Automec I*, paragraphs 45 to 47 and Case T-37/92, *BEUC and NCC v Commission*, paragraph 29).

52 Neither the preliminary observations, if any, made in the context of the first stage of the procedure for considering complaints, nor notifications under Article 6 of Regulation 99/63, can be regarded as measures open to challenge (*Automec I*, paragraphs 45 and 46).

53 On the other hand, comfort letters definitively rejecting a complaint and closing the file may be the subject of an action, since they have the content and effect of a decision, inasmuch as they close the investigation, contain an assessment of the agreements in question and prevent the applicants from requiring the reopening of the investigation unless they put forward new evidence (Case 210/81, *Demo-Studio Schmidt v Commission*, paragraphs 14 and 15; Case 298/83, *CICCE v Commission*, paragraph 18, and Joined Cases 142/84 and 156/84, *BAT and Reynolds v Commission*, paragraph 12).

54 In the present case, it is necessary to establish whether the letters of 1991 and 1993 belong to the first stage of the procedure for examining complaints, as the Commission maintains, or whether they are to be regarded as recording a decision to take no further action, producing legal effects, and thus belong to the last stage of that procedure, as Stork asserts.

55 The author of the Commission's letter of 20 March 1991, Mr Dubois, refers to clauses 6.2 and 6.3 of the agreement and begins:

> On the basis of the information presently in my possession, those clauses do appear to be restrictive of competition, and not indispensable to the attainment of the objectives of [the agreement].

The letter then went on to suggest that clause 6.3 be deleted and clause 6.2 be amended to comply with the spirit of Regulation 417/85 which, as matters stood, did not cover the agreement.

56 Mr Dubois continued:

> Given the relatively small economic importance of [the matter] within the communities as a whole, it does not appear appropriate, at this stage, to recommend to the Commission the formal opening of a procedure. If, therefore, you are unable to agree ... the modification of the clauses mentioned in the sense indicated above, I suggest that you should take the matter to the national courts, or the national competition policy authorities, bringing this letter to their attention.

57 The copy of the letter sent to Stork contained an additional paragraph worded as follows:

> Failing a reaction on your part within four weeks from your receipt of this letter, I shall close this file; it could, however, be reopened at any time should a change in the factual or legal circumstances require a new examination of the situation.

58 In reply to Serac's letter of 21 December 1992 requesting the Commission to reconsider its analysis, Mr Giuffrida, Head of Unit at DG IV, wrote in his letter of 25 February 1993 (a copy of which was sent to Stork):

> I have given your letter of 21 December 1992 my fullest consideration. However, on reflection, I do not think that the arguments raised are such as to call into question the content of the letter ... of 20 March 1991 in which it was stated that clauses 6.2 and 6.3 of your agreement ... with Stork were too restrictive of competition and not indispensable to attaining the objectives of [that agreement]. It therefore seems to me that this matter should be considered closed.

59 It is clear from the letters of 20 March 1991 and 25 February 1993 that, after analysing the agreement, the Commission decided not to take further action on the matter in view of its limited economic importance at the Community level. Moreover, the Commission offered the parties a means of resolving the dispute amicably, suggesting certain amendments to the agreement, and, should they fail to incorporate those amendments and continue to disagree, invited them to bring the matter before the competent national authorities or the proper national court.

60 The letter of 20 March 1991, in particular, bears all the hallmarks of a notification under Article 6 of Regulation 99/63: it indicates the reasons for which the Commission considers there to be insufficient grounds for allowing the

complaint, explicitly refers to closing the file and imposes a time-limit on the complainant for the submission of any observations (*BEUC*, paragraph 34).

61 In that context, the letter of 25 February 1993 provided confirmation that, in the absence of any response to the letter of 20 March 1991, the matter had been closed, given the limited economic importance of the agreement at the Community level.

62 Against that background, the defendant's argument that the letters of 20 March 1991 and 25 February 1993 must be regarded as expressing preliminary observations made informally by Commission officials in the context of the first of the three stages of the inquiry procedure cannot be accepted. On the contrary, having regard to their content and the context in which they were drafted, they must be regarded as recording a decision to take no further action on the complaint submitted by Stork and thus as belonging to the last stage in the procedure for examining a complaint.

63 It cannot, therefore, be said that those letters merely contain preliminary observations or preparatory measures. On the contrary, they contain a clear appraisal of the agreement and, in particular, of its economic importance. That appraisal was made on the basis of all the information which the Commission deemed it necessary to gather. All the indications are that the decision mentioned in the letters to take no further action on the matter was meant to constitute the final step in the administrative procedure whereby the institution's position is finally determined. That decision cannot be followed by any other measure capable of being the subject of annulment proceedings (Case C-39/93 P, *SFEI and Others v Commission*, paragraph 28).

64 The finality of that decision is not called into question by Mr Dubois' statement in his letter of 20 March 1991 that it did not seem to him appropriate at [that] stage to recommend to the Commission the formal opening of a procedure. Those words signal the possibility of subsequently initiating a procedure and conducting a thoroughgoing investigation of the matter. Indeed, the statement should be regarded as referring to the other two facts mentioned in the letter, namely that the analysis carried out and the decision taken were based on the information available and that the file could be reopened if new points of fact or law arose warranting it.

65 Furthermore, the defendant's argument that the fact that the letters were not signed by or on behalf of the Member of the Commission responsible for competition matters proves that they merely communicated an initial, provisional opinion must also be rejected. According to settled case-law, the form in which acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge by way of annulment proceedings. It is necessary to look to their substance in order to ascertain whether they are actionable measures for the purposes of the Article 173 of the Treaty (*IBM*, paragraph 9).

66 In the present case, given that the two letters in question contain an appraisal of the complaint submitted to the Commission, their legal nature cannot

be called into question on the sole ground that they emanate from a member of the Commission's staff. To accept such an argument would render Article 3 of Regulation 17 wholly ineffective (*BEUC*, paragraph 38).

67 As regards the argument that the applicant accepted that the letters of March 1991 and February 1993 constituted preliminary observations in that it replied to the request for information sent to it by the Commission in October 1994, it should be remembered that, according to settled case-law, measures of a purely preparatory character may not themselves be the subject of an application for annulment, but any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step (*IBM*, paragraph 12). Thus, in order to dispute the validity of the decision to reopen the procedure, the applicant had to await, as indeed it did, the decision adopted on completion of the inquiries launched by the request for information which the Commission sent it in October 1994. Only at the end of that procedure was the applicant in a position to assess the merits of the decision and, more specifically, whether it was necessary to re-examine the matter, having regard, in particular, to any new points of fact or law garnered and taken into consideration by the Commission.

68 The Commission's letters of 20 March 1991 and 25 February 1993 must therefore be regarded as containing a decision and producing legal effects in so far as they record a decision to take no further action on the complaint submitted by Stork, after analysis of the agreement, which itself was deemed as being of limited economic importance at the Community level.

69 Having thus established the legal nature of the letters, it is necessary to assess their legal consequences, in order to ascertain whether, in the present case, the Commission was entitled to reopen the administrative procedure, and, if so, whether it was entitled to adopt the contested decision.

The decision to reopen the administrative procedure

70 It should be observed at the outset that, as the institution responsible for implementing Community competition policy, the Commission has a certain discretion within the limits of the applicable rules in dealing with complaints submitted pursuant to Article 3 of Regulation 17. It may, in particular, set different priorities for the complaints submitted to it and may close a matter without initiating procedures intended to establish whether or not Community law has been infringed if it forms the view that the matter in question is not of sufficient Community interest to warrant investigation of the complaint (*Automec II*, paragraphs 73 to 77 and 83 to 85).

71 The rules limiting the Commission's discretion in this regard include those relating to the procedural rights provided for by Regulation 17 and Regulation 99/63 for persons who have lodged a complaint with the Commission.

72 On the one hand, in accordance with Article 3 of Regulation 17 and Article 6 of Regulation 99/63, the Commission must examine carefully the factual and legal particulars brought to its notice by the complainant in order to

decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States. On the other hand, persons who have lodged a complaint with the Commission have the right to be informed of the reasons why the Commission intends to reject their complaint (*Automec II*, paragraphs 72 and 79).

73 According to settled case-law, the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient information to enable them to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the measure (Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission*, paragraph 226).

74 The obligation to state the reasons for a measure with sufficient precision, enshrined in Article 190 of the Treaty, is one of the fundamental principles of Community law which the Court has to ensure are observed, if necessary by considering of its own motion a plea of failure to fulfil that obligation (Case T-61/89, *Dansk Pelsdyravlerforening v Commission*, paragraph 129).

75 In the present case, therefore, the defendant's objection of inadmissibility regarding the applicant's claim that the statement of reasons for the contested decision is defective because it failed to set out the reasons for the Commission's having changed its opinion of the economic importance of the agreement and decided to conduct a thoroughgoing re-examination of the matter must be rejected.

76 As to the substance, it should be remembered that the Commission informed the applicant by its letters of 20 March 1991 and 25 February 1993 of the decision to take no further action on the matter because of its limited economic importance at Community level. By re-activating the procedure, by decision notified to the parties by letter of 5 October 1994, the Commission went back on its previous position regarding the economic importance of the agreement at Community level (see paragraph 42, above).

77 The reasons for that change of position were not explained by the Commission. Nor can they be inferred from the context of such a decision. Moreover, in its pleadings and in its oral replies to the Court of First Instance's questions regarding the reasons for reopening the file, the Commission stated that it initiated the inquiry in 1994 in response to the action brought by Serac and in order to avoid a contentious procedure. It did not refer to the reasons give in its letters of 1991 and 1993 for closing the matter, namely that the agreement was of limited economic importance.

78 The inadequacy of the statement of reasons is all the more serious because the obligation to state reasons, the scope of which must be determined in the light of the particular circumstances of the case, is a particularly broad one in the present case.

79 The Commission had already taken a decision on the agreement, which had expired in August 1992, well before the Commission's second letter of 25 February 1993 confirmed that the matter was closed. Moreover, it is clear from the documents before the Court that the decision to take no further action recorded in the letters of 1991 and 1993 was adopted following exchanges between the Commission and the two parties to the agreement, during which the Commission was able to gain a full understanding of the point of view of each party.

80 It is therefore clear that the decision to reopen the administrative procedure which resulted in the adoption of the contested decision was not based on the presence or awareness of new points of fact or law warranting re-examination of the matter (see, to that effect, Case C-279/95 P, *Langnese-Iglo v Commission*, paragraph 30, and Case T-7/93, *Langnese-Iglo v Commission*, paragraph 40).

81 In those circumstances, the Court holds that the applicant was not in a position to ascertain the reasons for the contested decision which implied that the Commission, in taking the view that the matter was of sufficient economic importance to warrant its staff conducting a thoroughgoing examination, had gone back on its initial position.

82 It follows that the applicant's first plea is well founded in so far as it disputes the Commission's entitlement to adopt a fresh decision on a complaint relating to a matter which had already been closed because of its limited economic importance at Community level, without properly stating the reasons (in particular, the existence of fresh evidence) for reopening the administrative procedure which had led to that decision.

83 For those reasons the contested decision must be annulled and it is unnecessary to consider the other pleas raised by the applicant.

84 Moreover, according to settled case-law, comfort letters such as the two letters of 1991 and 1993, which reflect the Commission's assessment and bring its examination to an end, do not have the effect of preventing a national court before which the agreement in question is alleged to be incompatible with Article 85 of the Treaty, from reaching a different finding as regards that agreement on the basis of the information available to it. While such letters do not bind the national court, the opinion expressed in them constitutes a factor which a national court may take into account in considering whether the agreement or conduct in question is compatible with the provisions of Article 85 of the Treaty (Case 31/80, *L'Oréal*, paragraphs 11 and 12).

85 In the present case, the national courts before which the agreement may be alleged to be incompatible with Article 85 of the Treaty will, on assessing the agreement, be entirely at liberty to take into account, as factual evidence, the whole of the procedure conducted by the Commission.

Costs

86 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, and the applicant has applied for costs against the Commission, the latter will be ordered to bear its own costs and to pay those incurred by the applicant, apart from those occasioned by the intervention of Serac. Since the applicant did not apply for an order that Serac pay the costs occasioned by its intervention, the intervener will bear its own costs. The applicant will bear the costs it has incurred as a result of Serac's intervention.

Court's Ruling

The Court hereby:

1 Annuls the Commission's decision contained in its letter of 20 June 1997, rejecting the complaint made by the applicant seeking a declaration that a cooperation agreement between Stork Amsterdam BV and Serac Group for marketing production lines for manufacturing plastic bottles and aseptically filling them with liquid foods is incompatible with Article 85 of the EC Treaty (now Article 81 EC);

2 Orders the Commission to bear its own costs and to pay those incurred by the applicant, apart from those occasioned to the applicant by the intervention of Serac which shall bear its own costs, and the applicant to bear the costs it has incurred as a result of Serac's intervention. ■

Price-fixing: Books

Commissioner Mario Monti made the following statement on 23 February 2000 (ref IP/00/183). "The German and Austrian publishers have now accepted the Commission's position with regard to the application of fixed book prices. I very much welcome this development; it means that we have finally reached the solution which the Commission and my predecessor Mr. Karel Van Miert in particular had always tried to achieve: to make sure that cross-border trade in the EU is not impeded by practices contrary to a free market economy. It is a solution which is also fully supported by my colleague, the Commissioner for Culture and Education Ms. Viviane Reding, with whom I have maintained regular contacts on this matter. The present cross-border system between Germany and Austria of fixed booked prices which contains elements contrary to EU competition rules will be replaced by national systems no later than 30 June this year. I understand that in Germany a new contractual arrangement will be established between the publishers and booksellers while Austria plans the introduction of legislation. In either case publishers from other Member States will not be included in a national system of fixed book prices and such prices cannot be imposed on direct cross-border sales of books to end consumers."