COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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World rules on competition

In a speech in Fiesole (Italy), on 27 October 2000, at the European Competition Law Conference of the International Bar Association, the Commissioner responsible for Competition Policy, Mario Monti, made a plea for advancing towards closer international co-operation among competition authorities. His views are so close to those expressed in our recent editorials that they merit quotation *in extenso.*

"The European Union," he said, "has long believed that multilateral efforts are necessary to ensure convergence and co-ordination between the vast number of competition enforcement systems around the world. The Commission has been a consistent advocate of ongoing efforts in the various multilateral fora, to achieve a meeting of minds, as well as to enhance cooperation, among antitrust enforcement authorities. Indeed, it was an initiative of the European Commission, shared by the Member States, that prompted the WTO to create a Working Group on Competition.

"Since our proposals were first articulated in 1996, we have pioneered this idea and have actively proposed the negotiation of a Multilateral Framework Agreement on Competition Policy in the WTO. Such a framework would, according to our proposal, include core principles on competition law and enforcement to be respected by WTO members: the adoption of a basic law, the prohibition of hard core cartels, and the provision of systemic guarantees such as due process, transparency, and observance of the principle of non-discrimination. I believe that a framework of this kind would serve to underpin the impressive progress which has been made in trade liberalisation over the past few decades, by ensuring that governmental barriers to trade are not replaced by private ones which have the same effect.

"At the same time, there is in my view a very strong case to be made for establishing an international forum where those responsible for the development and management of competition policy worldwide could discuss the whole range of competition policy issues (whether substantive, systemic or enforcement-related). That is why I was particularly pleased by the proposal, made in Brussels last month by former Assistant Attorney General Joel Klein, for the launch of a so-called "Global Competition Initiative", as well as by remarks in the same vein made by Chairman Robert Pitofsky of the Federal Trade Commission. Acceptance by these influential US antitrust enforcement figures of the importance (even the inevitablity) of multilateralism in competition matters, beyond discussion at the OECD, represents a very important step." Other excerpts from this speech may be found on the European Union's website: Commission ▸ Press Releases ▸ 27 October. ■

ACQUISITIONS (OIL): THE TOTALFINA ELF CASE

Subject: Acquisitions
Conditions (of approval)

Industry: Oil; service stations

Parties: TotalFina Elf
Carrefour and others

Source: Commission Statement dated 7 November 2000

(Note. Cases concluded under the Mergers Regulation often contain a reference to the conditions on which the operation is approved. The interest of the present report lies in the description of the way in which the parties complied with the conditions imposed by the Commission when TotalFina acquired Elf Aquitaine earlier this year. The conditions concerned the sale of service stations to third parties; and it is also interesting to note that the proposed list of purchasers originally put forward by TotalFina Elf was rejected by the Commission, whose aim is to avoid "oligopolistic structures in fuel distribution".)

The Commission has given its agreement to the purchase by Carrefour, Agip, Avia and other companies of 70 motorway service stations belonging to TotalFina Elf. A sell-off of this kind was one of the main conditions imposed by the Commission when it allowed the takeover of Elf Aquitaine by TotalFina at the beginning of the year. If the new TotalFina Elf had kept all of its service stations, it would have secured a dominant position on the French motorways. The arrival of companies such as Carrefour should ensure that customers can enjoy the benefit of effective competition on fuel prices.

On 9 February the Commission authorised the takeover of Elf Aquitaine by TotalFina, one condition being that the new TotalFina Elf was to give up 70 motorway service stations. TotalFina Elf came forward with a proposed list of buyers, but on 13 September the Commission refused to approve that list, on the grounds that the buyers proposed would not have had the necessary incentive to bring sufficient competitive pressure to bear on the merged company. This was the first time the Commission had formally rejected proposed buyers; that fact and the attention given to the sale of the 70 service stations are evidence of the Commission's determination to prevent the establishment or reinforcement of oligopolistic structures in fuel distribution.

The new list of buyers submitted by TotalFina Elf comprises Agip (21 service stations), Thévenin et Ducrot/Avia (12 stations), Picoty/Avia (5 stations), Avia Autoroute (4 stations), BP (3 stations), Carrefour/Carfuel (17 stations), Esso (4 stations) and Shell (4 stations). All of these already operate on the market in the sale of fuel. All of them have a substantial presence on French off-motorway markets, with the exception of Agip. Agip does operate on a number of adjacent

geographic markets, namely Germany, Switzerland, Italy and Spain. All of the buyers are able to supply the service stations independently of TotalFina Elf. The Commission has concluded that they are viable competitors. None of them has links with TotalFina Elf in terms of capital holdings, or any commercial dependence on it. The presence of Carrefour among the buyers should also help to create a more competitive environment on the French motorways. Like other chains of large and medium-sized supermarkets, Carrefour has traditionally exerted effective competitive pressure on the integrated oil companies on the French off-motorway retail market.

The approval of this list of buyers of service stations follows approvals already given to buyers of other assets, especially in petroleum products logistics, which TotalFina Elf agreed to dispose of in order to secure authorisation for the merger. There are still some assets for which TotalFina Elf has to submit the names of buyers for the Commission's approval. ■

The EMI / Time Warner Case

EMI Plc and Time Warner Inc have informed the Commission that they have decided to terminate their agreement and to withdraw the notification they had submitted to the Commission for regulatory clearance. In view of this, the Commission will not take any decision with regard to the notified operation. On 5 May 2000, EMI and Time Warner notified to the Commission an agreement by which they would have combined their music recording and publishing businesses. On 14 June the Commission opened an in-depth investigation over concerns that the operation could create a collective dominant position in national European markets for recording music, a single dominant position in national markets for music publishing, and a single dominant position in the markets for on-line music and software based music. The Commission formalised its preliminary position to the companies in a statement of objections on August 22. EMI and Time Warner submitted undertakings on 19 September the deadline, in this deal, for offering remedies -- which proved insufficient to meet the Commission's concerns. Despite the fact that the deadline had expired, the Commission continued discussions with the parties in order to find a solution. During that process, EMI and Time Warner provided informal proposals that improved substantially the initial remedies. But the Commission still had doubts and in view of the late stage of the procedure could not properly evaluate the undertakings. The Commission will obviously review any new modified agreement that the parties might reach. The Commission is also reviewing Time Warner's proposed merger with AOL, which was the subject of a separate regulatory filing.

Source: Commission Statement IP/00/1122, dated 5 October 2000.

JOINT VENTURES (POSTAL SERVICES): THE POST OFFICES CASE

Subject: Joint ventures
Dominant position

Industry: Postal services

Parties: The Post Office (UK)
TNT Post Group NV (Netherlands)
Singapore Post Private Ltd
Delta
NewCo

Source: Commission Statement IP/00/1317, dated 16 November 2000

(Note. Once again, the Commission is keeping a sharp eye on the activities of the "public postal operators" in the Member States; in this instance, with special reference to outbound cross-border mail services. Post Offices are in a strong position to exercise a dominant position on the market; and the Commission is right to look closely at what is planned. This does not mean, however, that the proposed joint ventures will be prohibited: the in-depth investigation will not be concluded until early in the new year.)

The Commission has opened an in-depth investigation into the proposed creation of two global joint ventures for international mail by The Post Office (TPO) of Britain, TNT Post Group NV (TPG) of the Netherlands, and Singapore Post Private Limited (SPPL). The Commission considers that one of the ventures named Delta raises serious doubts since it may lead to a significant reinforcement of the market positions of the incumbent Public Postal Operators (PPOs) in the Netherlands and in the UK markets for outbound cross-border mail.

TPO, TPG and SPPL are the national postal operators in their respective home countries and provide a full range of postal services including outbound cross-border mail services, or outgoing international mail. TPO, TPG and SPPL intend to set up two joint ventures: Delta and NewCo, which will be active in the provision of outbound cross-border mail services for business customers and to a limited extent outbound cross-border parcel services. Delta will be active world-wide with the exception of the Asia Pacific region, which will be covered by NewCo.

The Commission has serious concerns that the operation could lead to the creation or a strengthening of a dominant position on the outbound cross-border mail market in the United Kingdom and in the Netherlands.
Delta will provide services to business customers. Both TPG and TPO will remain active in the provision of these services in addition to Delta in their respective home countries. In those countries the combined market shares of the

incumbent PPOs together with the joint venture will be at least ten times higher than that of the next largest competitor. Furthermore, in both the United Kingdom and the Netherlands an important active competitor would be removed through the transaction.

There are also risks that the operation could have adverse vertical effects in the United Kingdom and in the Netherlands, that may have the effect of foreclosure. In addition to PPOs, consolidators also offer outbound cross-border business mail services. Consolidators collect and group outbound cross-border mail to a specific destination and subsequently negotiate a special rate with the public postal operators with whom they choose to co-operate in order to distribute the "consolidated" mail in the country of destination. Through the transaction one of the main PPOs available to consolidators in the United Kingdom an in the Netherlands would be removed. ■

Motor Vehicle Distribution

The Commission has adopted an evaluation report on Regulation 1475/95 on motor vehicle distribution and servicing agreements; the Regulation lays down specific competition rules for this particular sector. The report is a factual analysis of the current regime of block exemption from the normal rules which vehicle manufacturers can use as a binding framework for their distribution systems. The report does not contain any proposals for the future. It analyses in particular whether or not the assumptions on which the Regulation is based are still valid and whether the objectives that it pursues have been met. Interested third parties who wish to comment on the report should do so before 16 January 2001. A hearing will be organised in February 2001.

The report comes to the conclusion that the block exemption has not achieved part of the aims stated by the Commission in 1995 when it renewed its permission to use selective distribution networks for the sale of motor cars. Consumers in particular do not seem to derive from this distribution system the fair share of the benefits of the creation of a European single market in 1993. Before the end of the year 2001, the Commission intends to publish proposals for the new motor vehicle distribution and servicing regime that will be applicable after Regulation 1475/95 expires on 30 September 2002. The proposals will take into account comments received from interested parties and views aired at the hearing. The new framework will be decided by the Commission in the first half of the year 2002 at the latest.

The evaluation report on Regulation 1475/95 had to be drawn up by the Commission by 31 December 2000 pursuant to Article 11(3) of the Regulation. The report is based on these replies to questionnaires, recent studies on the motor vehicle industry and motor vehicle distribution, the Commission's biannual car price report and the Commission's own experience in dealing with competition issues within the motor vehicle industry. The report is published on the Internet under http://europa.eu.int/comm/competition/car_sector/

PRICING POLICY (CARTONBOARD): THE CASCADES AND OTHER CASES

Subject: Pricing policy
Market sharing
Supply restrictions

Industry: Cartonboard
(Implications for most other industries)

Parties: 13 Manufacturers listed in the judgment
The Commission

Source: Court of Justice Press Release 84/00, dated 16 November 2000; Judgment of the Court of Justice in Cases C-248/98P, C-279/98P, C-280/98P, C-282/98P, C-283/98P, C-286/98P, C-291/98P, C-294/98P, C-297/98P and C-298/98P

(Note. This is nearly the last chapter in the saga of the Cartonboard Cartel. For some of the members of the cartel, the end of the story will be written by the Court of First Instance, to whom several of the cases have been remitted. Originally, 19 members were fined by the Commission; 17 applied to the Court of First Instance; 13 appealed to the Court of Justice. The general report below gives the results of the 10 appeals to which the 13 companies were parties. A specific report on the KNP case follows, with a detailed examination of the principal arguments.)

On 13 July 1994 the Commission imposed fines totalling €131,750,000 on 19 producers of cartonboard on the ground that they had infringed Community competition law. The British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and the Fédération Française du Cartonnage had complained to the Commission in 1990. The Commission had concluded that, from mid-1986 until at least April 1991, those undertakings had infringed Community competition law by participating in an agreement and concerted practice (implementation of simultaneous and uniform price increases, maintenance of market shares at constant levels, concerted measures to control supply to the Community market).

17 undertakings and four Finnish firms (members of a trade association, "Finnboard", held responsible by the Commission) brought actions to contest that Decision before the Court of First Instance, which delivered its judgments on 14 May 1998 and reduced the total amount of fines to €120,330,000. 10 appeals were brought before the Court of Justice of the European Communities by 13 undertakings seeking annulment or reduction of the fines as fixed by the Court of First Instance.

In its judgments on the appeals the Court of Justice points out that the Court of First Instance has jurisdiction in two respects to review Commission decisions

imposing fines on undertakings for infringement of the competition rules. It reviews the legality of, and in particular the statement of reasons for, those decisions. The Court of First Instance also has jurisdiction to assess the appropriateness of the amount of the fines. With regard more specifically to review of compliance with the duty to state reasons, the Court of Justice explains that in that context the Commission does not have to indicate in its Decision the figures relating to the method of calculating the fines, even if that may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its review of the legality of the Decision.

In Case C-279/98 P, Cascades SA (France), the fine imposed by the Commission, which was not annulled by the Court of First Instance, amounted to €16,200,000. The Court of Justice has referred the case back to the Court of First Instance for a fresh assessment of the fine: it considers that Djupafors and Duffel participated in the infringement independently from mid-1986 until their acquisition by Cascades SA in March 1989. They pursued their activities as subsidiaries and must therefore, in the Court's view, themselves answer for their infringements prior to their acquisition. The judgment has therefore been annulled on the ground that it contains an error of law; in order to fix the fine, the Court of First Instance will have to assess the participation of those two subsidiaries in the infringement found.

In Case C-280/98 P, Moritz J. Weig GmbH & Co Kg (Germany), the Commission imposed a fine of €3,000,000 which was reduced by the Court of First Instance to €2,500,000 in order to take account of the actual duration of its participation in the infringement. According to the Court of First Instance, Weig had not participated during the first 22 months of the infringement (out of a total duration of 60 months). The Court of Justice has reduced the amount of the fine to €1,900,000; it held that that Court of First Instance had violated the principle of equal treatment by not applying to the company concerned the same method of calculating the fine as adopted by the Court of First Instance in order to fix the amount of the fine imposed on the other undertakings which had cooperated with the Commission (relevant turnover x percentage in respect of the gravity of the infringement x percentage in respect of duration = total, less reduction for cooperation).

In Case C-286/98 P, Stora Kopparbergs Bergslags AB (Sweden), the Commission imposed a fine of €11,250,000. The Court has referred the case back to the Court of First Instance for re-assessment of the amount of the fine. The Court of Justice points out that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. On the other hand, the Court considers that the unlawful conduct of subsidiaries acquired during the infringement cannot be attributed to the parent company prior to their acquisition by it: Stora acquired Feldmühle and CBC only in September 1990 and responsibility for their actions therefore had to be attributed to the legal person that directed the operation of their businesses in the period preceding their acquisition.

In Case C-291/98 P, Sarrió SA (Spain), the Commission had imposed a fine of €15,500,000. The Court of First Instance reduced the fine to €14,000,000, as Prat Carton, a subsidiary company of Sarrió, had participated in only some aspects of the infringement. The Court of Justice has reduced the fine to €13,750,000. The Court considers that the method adopted in order to calculate the fines of all the other undertakings involved had been departed from without explanation. The amount of the fine must therefore be reduced by €250,000.

In Case C-248/98 P, NV Koninklijke Knp Bt (Netherlands). the Commission had imposed a fine of €3,000,000, which was reduced by the Court of First Instance to €2,700,000. The Court has reduced the amount of the fine to €2,600,000. The Court has done so because the Court of First Instance failed to deal with KNP's argument that it should have been responsible for the conduct of its subsidiary company, Badische, only with effect from its acquisition, that is to say from 1 January 1987.

The appeals brought by Enso Española Sa (Spain; Case C-282/98 P), Mo Och Domsjö Ab (Sweden; Case C-283/98 P), Metsä-Serla Sales Oy (Finland; C-298/98 P), Metsä-Serla Oyj, Upm-Kymmene Oyj, Tamrock Oy, Kyro Oyj Abp (Finland; Case C-294/98 P), Sca Holding Ltd (United Kingdom; Case C-297/98 P) have on the other hand been dismissed, since they have not succeeded in showing that the reasoning of the Court of First Instance was faulty. The amounts of their fines are therefore unchanged. ■

The Telefonica / Sogecable Case

The Commission has decided to end a procedure which might have led to fines against Telefónica and Sogecable because of the sheer size of football rights acquired and exploited jointly by the two largest pay-television platforms in Spain. Following the Commission's warning in April, the companies agreed to give rivals access to the football rights, which are a key ingredient for a successful pay-TV operation, and allowed them to set their own prices triggering a healthy competition for consumers. The case relates to the notification by Telefónica and Sogecable, which is owned by Canal+ of France and the Spanish media group Prisa, of an agreement whereby they jointly acquire and exploit the broadcasting rights to Spanish First League football matches for 11 seasons ending in 2009 through their joint venture Audiovisual Sport. The Commission took the view that the agreement presented serious breaches of competition law since it would have had the effect of foreclosing the Spanish pay-TV market whose success depends heavily on the broadcasting of football matches like in many other countries. Even if the threat of fines has been withdrawn, a number of remaining issues need careful consideration before concluding whether or not the Audiovisual system can benefit from an exemption to the Community anti-trust rules. The common exploitation in Audiovisual Sport of the football rights could lead to a powerful joint buying arrangement between Telefónica and Sogecable which could reduce the price paid to the football clubs. The parties have strongly contested this alleged anti-competitive effect. The Commission will also consider the duration of the notified agreements. It intends to take a final decision in 2001. (Source: Commission Statement IP/00/1352, dated 23 November 2000.)

ANNULMENT (CARTONBOARD): THE KNP CASE

Subject: Annulment (of Commission Decision)
Fines

Industry: Cartonboard
(Implications for most other industries)

Parties: Koninklijke KNP BP
Commission

Source: Judgment of the Court, dated 16 November 2000, in Case C-248/98 P (*NV Koninklijke KNP BP v Commission*)

(Note. Any case in which a party succeeds in having an unwelcome Commission Decision wholly or partly annulled, and a fine which has been imposed by the Commission substantially reduced, is likely to have lessons for other parties in a similar position; and the present case has a full discussion of the circumstances in which even the judgment of the Court of First Instance may turn out to be overturned. This case is also interesting, in that it indicates the circumstances in which the Court of Justice may take a final decision itself or will remit the case to the Court of First Instance for reconsideration. The report below gives the basic facts of the case and the principal elements of the reasons for the Court's ruling.)

Judgment

1. By application lodged at the Registry of the Court of Justice on 9 July 1998, NV Koninklijke KNP BT brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 14 May 1998 in Case T-309/94 KNP BT v Commission [1998] ECR II-1007 (hereinafter 'the contested judgment), in which the Court of First Instance annulled part of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 - Cartonboard) (OJ 1994 L 243, p. 1, hereinafter 'the Decision) and dismissed the remainder of the application.

Facts

2. In the Decision the Commission imposed fines on 19 producers supplying cartonboard in the Community on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

3. According to the contested judgment, the Decision followed informal complaints lodged in 1990 by the British Printing Industries Federation, a trade organisation representing the majority of printed carton producers in the United Kingdom, and by the FédérationFrançaise du Cartonnage, and investigations which Commission officials, acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85

and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) had carried out in April 1991, without prior notice, at the premises of a number of undertakings and trade associations operating in the cartonboard sector.

4. The evidence obtained from those investigations and following requests for information and documents led the Commission to conclude that from mid-1986 until at least (in most cases) April 1991 the undertakings concerned had participated in an infringement of Article 85(1) of the Treaty. The Commission therefore decided to initiate a proceeding under Article 85 of the Treaty and, by letter of 21 December 1992, served a statement of objections on each of the undertakings concerned, all of which submitted written replies. Nine undertakings requested an oral hearing.

5. At the end of that procedure the Commission adopted the Decision, which includes the following provisions:

"Article 1

"Buchmann GmbH, Cascades SA, Enso-Gutzeit Oy, Europa Carton AG, Finnboard - the Finnish Board Mills Association, Fiskeby Board AB, Gruber & Weber GmbH & Co KG, Kartonfabriek de Eendracht NV (trading as BPB de Eendracht NV), NV Koninklijke KNP BT NV (formerly Koninklijke Nederlandse Papierfabrieken NV), Laakmann Karton GmbH & Co KG, Mo Och Domsjö AB (MoDo), Mayr-Melnhof Gesellschaft mbH, Papeteries de Lancey SA, Rena Kartonfabrik A/S, Sarrió SpA, SCA Holding Ltd (formerly Reed Paper & Board (UK) Ltd), Stora Kopparbergs Bergslags AB, Enso Española SA (formerly Tampella Española SA) and Moritz J. Weig GmbH & Co KG have infringed Article 85(1) of the EC Treaty by participating, in the case of Buchmann and Rena from about March 1988 until at least the end of 1990, in the case of Enso Española, from at least March 1988 until at least the end of April 1991, in the case of Gruber & Weber from at least 1988 until late 1990, in the other cases, from mid-1986 until at least April 1991, in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the Community

- met regularly in a series of secret and institutionalised meetings to discuss and agree a common industry plan to restrict competition,

- agreed regular price increases for each grade of the product in each national currency,

- planned and implemented simultaneous and uniform price increases throughout the Community,

- reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time,

- increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the said concerted price rises,

- exchanged commercial information on deliveries, prices, plant standstills, order backlogs and machine utilisation rates in support of the above measures.

(...)

"Article 3

"The following fines are hereby imposed on the undertakings named herein in respect of the infringement found in Article 1:

(...)

(ix) NV Koninklijke KNP BT NV, a fine of ECU 3 000 000;

(...)"

[Paragraphs 7 to 18 give details of the Decision and of the proceedings in the Court of First Instance.]

The appeal

19. In its appeal the appellant submits that the Court should set aside the contested judgment and annul the Decision and cancel, or at least reduce, the fine imposed on it. In the alternative, it requests that the case be referred back to the Court of First Instance.

20. The appellant relies on four pleas in law in support of its appeal.

The first plea

21. By its first plea the appellant complains that the Court of First Instance did not annul the Decision on the ground that it contained an inadequate statement of reasons and itself failed to observe the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC) because it did not give reasons for its refusal to annul the Decision.

22. According to the appellant, the Decision does not contain sufficient information regarding the method of fixing the fine and the extent of the participation by the appellant's two subsidiaries (KNP Vouwkarton and Badische), either in terms of turnover or the duration and gravity of the infringement. It was not until one month before the hearing, or at the hearing, that the Commission provided clarification in that respect.

23. According to the applicant, it is settled law that the Commission must indicate, in the decision itself, how the fine was fixed. That is *a fortiori* the case where, as in the present case, the conduct of several undertakings has been attributed to the appellant.

24. The appellant adds that, contrary to the case-law of the Court of Justice, the Court of First Instance held, in paragraph 79 of the contested judgment, that Commission's obligation to state reasons could be moderated in the present case because of the existence of 'specific circumstances, even though the Commission, which had applied a mathematical formula, could have set out that formula in the Decision, as the Court of First Instance in fact pointed out in paragraph 78 of the contested judgment.

25. It is irrelevant that the extent of that obligation to state reasons was clarified by the Court of First Instance only in its judgments in *Tréfilunion v Commission, Société Métallurgique de Normandie v Commission and Société des Treillis et Panneaux Soudés v Commission*, the Welded Steel Mesh judgments, referred to in paragraph 77 of the contested judgment, since the obligation to state reasons stems from Article 190 of the Treaty and not from the case-law of the Court of First Instance.

26. The Commission contends, in the light of the case-law of the Court of Justice (see Case C-219/95 P, *Ferriere Nord v Commission*, paragraph 32, et seq, and the order in *SPO and Others v Commission*, paragraph 54), that both the Commission and the Court of First Instance, where the latter amends the amount of a fine in a specific case in the exercise of its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation 17, have a margin of discretion when they determine the amount of the fine. The existence of that discretion implies that it is not absolutely necessary for the statement of reasons to set out in minute detail the method by which the amount of the fine was calculated.

27. The Commission observes that the Court of First Instance held in paragraph 74 of the contested judgment that points 169 to 172 of the Decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and the duration of the infringement committed by each of the undertakings in question.

28. Points 75 to 79 of the contested judgment are, according to the Commission, superfluous. The Commission contends, moreover, that the appellant's reading of those judgments is incorrect. In those judgments the Court of First Instance found, as it did in the contested judgment, that the statement of reasons for the Commission's decision was adequate, while expressing the wish that there should be greater transparency as to the method of calculation adopted. In so doing, the Court of First Instance did not treat the lack of transparency as amounting to a failure to state adequate reasons for the Decision. At most, the position adopted by the Court of First Instance reflects the principle of good administrative practice, in the sense that addressees of decisions should not be forced to bring proceedings before the Court of First Instance in order to ascertain all the details of the method of calculation used by the Commission. However, such considerations could not in themselves constitute a ground of annulment of the Decision.

29. Last, the Commission states that those implications of the Welded Steel Mesh judgments have recently been confirmed by the Court of First Instance. It has held that the information which it is desirable that the Commission should communicate to the addressee of a Decision must not be regarded as an additional statement of reasons, but solely as the translation into figures of criteria set out in the Decision in so far as they are capable of being quantified (see, in particular, the judgments in Case T-151/94, *British Steel v Commission*, paragraphs 627 and 628, and in Case T-305/94, *Limburgse Vinyl Maatschappij and Others v Commission*, paragraphs 1180 to 1184).

30. It is necessary, first, to set out the various stages in the reasoning adopted by the Court of First Instance in response to the plea alleging infringement of the duty to state reasons in regard to the calculation of the fines.

31. The Court of First Instance first of all referred, in paragraph 67 of the contested judgment, to the settled case-law to the effect that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged, the scope of that obligation being dependent on the nature of the act in question and on the context in which it was adopted (see, in particular, besides the case-law cited by the Court of First Instance, Case C-22/94, *Irish Farmers Association and Others v Ministry for Agriculture, Food and Forestry, Ireland, and the Attorney General*, paragraph 39).

32. The Court of First Instance then explained in paragraph 68 of the contested judgment that as regards a decision which, as in this case, imposes fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of the infringements depends on numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up (order in Case C-137/95 P, *SPO and Others v Commission*, paragraph 54).

33. In that regard, the Court of First Instance held in paragraph 74 of the contested judgment that: 'points 169 to 172 of the Decision, interpreted in the light of the detailed statement in the Decision of the allegations of fact against each of its addressees, contain a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question (see, to the same effect, Case T-2/89, *Petrofina v Commission*, paragraph 264).

34. However, in paragraphs 75 to 79 of the contested judgment the Court of First Instance qualified, somewhat ambiguously, that statement in paragraph 74.

35. According to paragraphs 75 and 76 of the contested judgment, the Decision does not indicate the precise figures systematically taken into account by the

Commission in fixing the amount of the fines, albeit it could have disclosed them and this would have enabled the undertakings better to assess whether the Commission had erred when fixing the amount of each individual fine and whether that amount was justified by reference to the general criteria applied. The Court added, in paragraph 77, that according to the Welded Steel Mesh judgments it is desirable for undertakings to be able to ascertain in detail the method used for calculating the fine imposed without having to bring court proceedings against the Commission's decision in order to do so.

36. It concluded, in paragraph 79 of the contested judgment, that there had been an absence of specific grounds in the Decision regarding the method of calculation of the fines, which was justified in the specific circumstances of the case, namely the disclosure of the method of calculating the fines during the proceedings before the Court of First Instance and the novelty of the interpretation of Article 190 of the Treaty given in the Welded Steel Mesh judgments.

37. Before examining, in the light of the arguments submitted by the appellant, the correctness of the findings by the Court of First Instance regarding the consequences which disclosure of calculations during the proceedings before it and the novelty of the Welded Steel Mesh judgments may have in regard to fulfilment of the obligation to state reasons, it is necessary to determine whether fulfilment of the duty to state reasons laid down in Article 190 of the Treaty required the Commission to set out in the Decision, not only the factors which enabled it to determine the gravity and duration of the infringement, but also a more detailed explanation of the method of calculating the fines.

38. The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules.

39. First, under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) it has the task of reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 190 of the Treaty, infringement of which renders a decision liable to annulment.

40. Second, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 172 of the Treaty (now Article 229 EC) and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons under Article 190 of the Treaty, to be set out in the decision.

41. As regards review of compliance with the duty to state reasons, the second subparagraph of Article 15(2) of Regulation No 17 provides that "[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement".

42. In those circumstances, in the light of the case-law referred to in paragraphs 67 and 68 of the contested judgment, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons.

43. The Court of First Instance correctly held in paragraph 74 of the contested judgment that the Commission had satisfied that requirement. It must be observed, as the Court of First Instance observed, that points 167 to 172 of the Decision set out the criteria used by the Commission in order to calculate the fines. First, point 167 concerns in particular the duration of the infringement. It also sets out, as does point 168, the considerations on which the Commission relied in assessing the gravity of the infringement and the general level of the fines. Point 169 contains the factors taken into account by the Commission in determining the amount to be imposed on each undertaking. Point 170 identifies the undertakings which were to be regarded as ringleaders of the cartel, and which should accordingly bear special responsibility in comparison with the other undertakings. Lastly, points 171 and 172 of the Decision set out the effect on the amount of the fines of the cooperation by various manufacturers with the Commission during its investigations in order to establish the facts or when they replied to the statement of objections.

44. The fact that more specific information, such as the turnover achieved by the undertakings or the rates of reduction applied by the Commission, were communicated subsequently, at a press conference or during the proceedings before the Court of First Instance, is not such as to call in question the finding in paragraph 74 of the contested judgment. Where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in relation to review by the Community court of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision.

45. Admittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 42 of this judgment, in particular by indicating the figures which, especially in regard to the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement.

46. It may indeed be desirable for the Commission to make use of that possibility in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and facilitate the exercise by the Court of First Instance of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed. However, as the Commission has submitted,

the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons.

47. Consequently, the Court of First Instance could not, consistently with Article 190 of the Treaty, find, as it did in paragraph 78 of the contested judgment, that 'the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision. Nor, without contradicting itself in the grounds of its judgment, could it, after finding in paragraph 74 of the contested judgment that the Decision contained a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by each of the undertakings in question, then refer, as it did in paragraph 79 of the contested judgment, to the absence of specific grounds in the Decision regarding the method of calculation of the fines.

48. However, the error of law so committed by the Court of First Instance is not such as to cause the contested judgment to be set aside, since, having regard to the considerations, set out above, the Court of First Instance validly rejected, notwithstanding paragraphs 75 to 79 of the contested judgment, the plea of infringement of the duty to state reasons in regard to calculation of the fines.

49. As there was no obligation on the Commission, as part of its duty to state reasons, to indicate in the Decision the figures relating to the method of calculating the fines, there is no need to examine the various objections raised by the applicant which are based on that erroneous premiss.

50. The first plea must therefore be rejected.

The second plea

51. By its second plea the appellant complains, first, that the Court of First Instance did not deal with its argument that the Commission had abused its powers in ordering it to pay a fine in respect of the period after the end of 1989 or, in the alternative, should have imposed on it only a very low fine, having regard to the marginal nature of its participation in the cartel. In failing to take account of those special circumstances, the Court of First Instance infringed Article 190 of the Treaty.

52. Second, the appellant complains that the Court of First Instance applied the rate of 7.5% to its turnover for the period in question, which is inappropriate in view of the purely marginal nature of its participation in the cartel.

53. As regards the first part of this plea, it must be held that, as the Commission has stated, it is clear from paragraphs 55 to 59 of the contested judgment that the Court of First Instance replied to the appellant's argument in order to refute it. The complaint that there was an inadequate statement of reasons must therefore be rejected.

54. As to the second part of this plea, it should be observed that the Court of First Instance has unlimited jurisdiction when it rules on the amount of fines imposed on undertakings for infringements of Community law and that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance in the matter (*Ferriere Nord v Commission*, cited above, paragraph 31).

55. In the present case, the appellant merely contests the assessment by the Court of First Instance of the appropriate amount of the fine but does not state why, as a matter of law, it should be declared unlawful by the Court of Justice. The second part of the plea must therefore be rejected as inadmissible.

56. The second plea must therefore be rejected.

The third plea

57. By its third plea the appellant submits that the Court of First Instance wrongly held in paragraph 112 of the contested judgment that, as regards intra-group sales of cartonboard, 'the appellant has not adduced any evidence to show that the Commission should not have taken them into account when it calculated the fine.

58. It states that, so far as concerns Badische, it became apparent only at the hearing that the Commission had included internal sales of the product concerned (to a sister company which converted it into cartons) in the turnover used as a basis for calculating the fine. The appellant then pleaded that such transactions had had no influence on the Community market and could not be taken into account in order to determine the fine.

59. In those circumstances, by asserting that the appellant had not supplied 'any evidence in that regard, the Court of First Instance infringed its rights of defence, the duty to state reasons, the principles of equal treatment and proportionality, and Article 15 of Regulation No 17.

60. According to the Commission, contrary to the appellant's claims, the appellant had long known that its group turnover had been taken into account in order to determine its market shares. Although it is true that this point was raised by the appellant during the hearing, it did not explain why sales to a sister company should have been deducted. Consequently, the conclusion reached by the Court of First Instance at paragraph 112 of the contested judgment is correct.

61. The plea here under consideration is inoperative. Even if the appellant had in fact adduced the necessary evidence at the hearing before the Court of First Instance to support its argument that the Commission had wrongly taken into account intra-group sales of cartonboard in order to fix the fine, that argument could not be upheld in the light of Article 15(2) of Regulation No 17 which aims to ensure that the penalty is proportionate to the undertaking's size on the product market in respect of which the infringement was committed (see, to that effect, Joined Cases 100/80 to 103/80, *Musique Diffusion Française and Others v Commission*, paragraph 119).

62. As the Court of First Instance itself rightly held in its judgment in Case T-304/94, *Europa Carton v Commission*, paragraph 128: "To ignore the value of the applicant's internal cartonboard deliveries would inevitably give an unjustified advantage to vertically integrated companies. In such a case the benefit derived from the cartel might not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates."

63. The third plea must therefore be rejected.

The fourth plea

64. By its fourth plea the appellant submits that the Commission, when fixing the fine, wrongly attributed to it responsibility for the infringement committed by Badische with effect from mid-1986, it having acquired that company only on 1 January 1987, and complains that the Court of First Instance endorsed that attribution of responsibility without explanation, even though the appellant had contested it. When assessing the fine the Court of First Instance thus infringed the duty to state reasons, the principles of equal treatment and of proportionality and Article 15 of Regulation No 17.

65. The Commission contends that this plea is inadmissible because neither in the written procedure nor in the hearing before the Court of First Instance did the appellant contest the attribution to it of the infringement by Badische.

66. Although in fact according to paragraph 17 of the contested judgment, with effect from 31 December 1986, "KNP ... acquired the German packaging producer Herzberger Papierfabrik Ludwig Osthushenrich GmbH und Co. KG, whose production unit, Badische Cartonfabrik ... participated in meetings of the PC, the JMC and the Economic Committee", the Court of First Instance nevertheless held in paragraph 55 that the Commission was "entitled to attribute Badische's unlawful conduct to the applicant" and, in paragraph 104, "rightly took the view that the applicant had participated in the cartel from mid-1986 until April 1991". However, nowhere in the contested judgment has the Court of First Instance given reasons for the attribution of responsibility to KNP for Badische's participation in the cartel over the period prior to its acquisition.

67. As the Advocate General has observed in points 48 and 50 of his Opinion, and contrary to the Commission's contentions, the appellant, in its written pleadings, expressly requested the Court of First Instance to draw the appropriate conclusion from the fact that Badische had become part of its group with effect only from 1 January 1987.

68. Consequently, by failing to deal with the appellant's argument that it should in any event be liable for Badische's infringements only with effect from its acquisition, the Court of First Instance infringed the duty to state reasons.

69. For that reason, paragraph 1 of the operative part of the contested judgment must be annulled.

70. Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, the Court of Justice is to set aside the decision of the Court of First Instance if the appeal is well founded. It may either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. Since the state of the proceedings so permits, final judgment must be given on the amount of the fine to be imposed on the appellant.

The action for annulment

71. As regards the duration of the period of the infringement to be attributed to the appellant and, in particular, the attribution to it of Badische's infringement over the period prior to its acquisition by the appellant, it should be noted that it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking.

72. In the present case it is undisputed that Badische participated in the cartel from mid-1986 until 1 January 1987 when it was the production unit of the German packaging producer Herzberger Papierfabrik Ludwig Osthushenrich GmbH und Co. KG. The latter entity was acquired, without loss of legal personality, by the appellant only on 31 December 1986, which, according to the second paragraph of point 149 of the Decision, became its 95% owner throughout the period of the infringement in question.

73. For the reasons given in paragraphs 46 to 50 of the contested judgment, the appellant must be held responsible for the infringement committed by Badische over the period from January 1987 to April 1991. As the Court of First Instance observed:

"46. First, the applicant does not contend that it was unable to exert a decisive influence on the commercial policy of KNP Vouwkarton and Badische.

"47. Moreover, it is not disputed that a member of the applicant's management board participated in, and even presided over, the meetings of the PWG until 1988. According to the Decision, the main discussions with an anti-competitive object took place in the PWG and that finding is not disputed by the applicant.

"48. In those circumstances, the Commission has proved that, through the involvement of the member of its management board, the applicant was actively implicated in the anti-competitive conduct of KNP Vouwkarton. In involving itself in that way in the participation of one of its subsidiaries in the cartel, the applicant was aware, and must also have approved of, Badische's participation in the infringement in which KNP Vouwkarton took part.

"49. The applicant's responsibility is not affected by the fact that the attendance of the member of its management board at meetings of the bodies of the PG Paperboard ceased in 1988. It was for the applicant, as parent company, to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of an infringement of which it was aware. Furthermore, the applicant has not disputed that it did not even attempt to prevent the continuation of the infringement.

"50. It also follows that the sale of KNP Vouwkarton to Mayr-Melnhof with effect from 1 January 1990 did not affect the applicant's responsibility for Badische's continuing anti-competitive conduct."

74. Having regard to the reasons given in the contested judgment, as supplemented by the foregoing considerations, the fine imposed on the appellant will be fixed at €2,600,000.

Costs

75. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

76. As the appellant has been unsuccessful in the majority of its pleas in the appeal, it will be ordered to bear its own costs and to pay two-thirds of the Commission's costs relating to the proceedings before the Court of Justice.

Court's Ruling

The Court hereby:

1. Sets aside paragraph 1 of the operative part of the judgment of the Court of First Instance of 14 May1998 in Case T-309/94 KNP BT v Commission;

2. Sets the amount of the fine imposed on NV Koninklijke KNP BT by Article 3 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 - Cartonboard) at €2,600,000;

3. Dismisses the remainder of the appeal;

4. Orders NV Koninklijke KNP BT to bear its own costs and to pay two-thirds of the costs of the Commission of the European Communities relating to the proceedings before the Court of Justice;

5. Orders the Commission of the European Communities to bear one-third of its own costs relating to the proceedings before the Court of Justice. ■

STANDARDISATION AGREEMENTS: COMMISSION DRAFT GUIDELINES

Subject: Standardisation agreements
Relevant market
Market power
Exemption

Industry: Most industries

Source: Commission paper entitled Draft Guidelines on the Application of Article 81 to horizontal cooperation

(Note. This extract from the Commission's draft guidelines on horizontal agreements is the latest in the series of reports begun in our July issue. It is concerned with standardization agreements, which are defined in paragraphs 151 and 152. On the face of it, standardization agreements are a desirable, and in many markets a necessary, condition for an industry to function efficiently. At the same time, it would be unwise for anti-trust authorities to be too relaxed about this type of agreement, since it might not be unduly difficult to use standards as the means to restrict competition and to create cartels. Whether the standards are developed by industry or laid down by public bodies, they can still be misused for commercial purposes; and, as the Commission rightly points out in paragraph 154, the involvement of public bodies is subject to the obligations of Member States regarding the preservation of undistorted competition in the Community. The Guidelines usefully set out the circumstances in which standardization agreements do not restrict competition, those in which agreements usually restrict competition and those in which the agreements may restrict competition. It also sets out the circumstances in which restrictive standardization agreements may nevertheless be exempted.)

6. AGREEMENTS ON STANDARDS

6.1. Definition

151. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply. (Standardisation can take different forms, ranging from the adoption of national consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between single companies. Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.) Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in markets where compatibility and interoperability with other products or Systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard.

152. Not covered by these guidelines are standards related to the provision of professional services, such as rules of admission to a liberal profession.

6.2. Relevant markets

153. Standardisation agreements produce their effects on three possible markets, which will be defined according to the Commission notice on market definition. First, the product market(s) to which the standard(s) relates. Standards on entirely new products may raise issues similar to those raised for R&D agreements, as far as market definition is concerned. Second, the service market for standard setting, if different standard seuing bodies or agreements exist. Third, where relevant, the distinct market for testing and certification.

6.3. Assessment under Article 81(I)

154. Agreements to set standards may be either concluded between private undertakings or set under the aegis of pub he bodies or bodies having been entrusted with the operation of services of general economic interest, such as the standards bodies recognised under Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations. The involvement of such bodies is subject to the obligations of Member States regarding the preservation of non distorted competition in the Community. (Under Article 4(2)(3) of Council Regulation 17/62, agreements which have as their sole object the development or the uniform application of standards and types need not, but may, be notified to the Commission.)

6.3.1. Nature of the agreement

6.3.1.2. Agreements that do not fall under Article 81(1)

155. Where participation in standard setting is unrestricted and transparent, standardisation agreements as defined above, which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by the recognised standards bodies which are based on non-discriminatory, open and transparent procedures.

156. No appreciable restriction exists for those standards that have a negligible coverage of the relevant market, as long as it remains so. No appreciable restriction is found either in agreements which pool together SMEs to standardise access forms or conditions to collective tenders or those that standardise aspects like minor product characteristics, forms and reports, which have an insignificant effect on the main factors affecting competition in the relevant markets.

6.3.1.2. Agreements that almost always fall under Article 81(1)

157. Agreements that use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors

will almost always be caught by Article 81(1). For instance, an agreement whereby a national association of manufacturers would set a standard and put pressure on third parties not to market products that do not comply with the standard would be in this category.

6.3.1.3. Agreements that may fall under Article 81(1)

158. Standardisation agreements may be caught by Article 81(1) insofar as they grant the parties joint control over production and/or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or purchasers of the standardised products. The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardisation, as defined above, on the other.

159. The existence of a restriction of competition in standardisation agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardisation agreements may restrict competition where they prevent the parties from either developing alternative standards or commercialising products that do not comply with the standard. Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.

6.3.2. Market power and market structures

160. High market shares held by the parties in the market(s) affected will not necessarily be a concern for standardisation agreements. Their effectiveness is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may discriminate or foreclose third parties or segment markets according to their geographic scope of application. Thus, the assessment whether the agreement restricts competition will focus, necessarily on an individual basis, on the extent to which such barriers to entry are likely to be overcome.

6.4. Assessment under Article 81(3)

6.4.1. Economic benefits

161. The Commission generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. To materialise those economic benefits, the necessary information to apply the standard must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in a transparent

manner. It will be for the parties to demonstrate that any restrictions on the setting, use or access to the standard provide economic benefits.

162. In order to reap technical or economic benefits, standards should not limit innovation. This will depend primarily on the lifetime of the associated products, in connection with the market development stage (fast growing, growing, stagnant...). The effects on innovation must be analysed on a case-by-case basis. The parties may also have to provide evidence that collective standardisation is efficiency-enhancing for the consumer when a new standard may trigger unduly rapid obsolescence of existing products, without objective additional benefits.

6.4.2. Indispensability

163. By their nature, standards will not include all possible specifications or technologies. In some cases, it would be necessary for the benefit of the consumers or the economy at large to have only one technological solution. However, this standard must be set on a nondiscriminatory basis. Ideally, standards should be technology neutral. In any event, it must be justifiable why one standard is chosen over another.

164. All competitors in the market(s) affected by the standard should have the possibility of being involved in discussions. Therefore, participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation or unless recognised procedures are foreseen for the collective representation of interests, as in formal standards bodies.

165. As a general rule there should be a clear distinction between the setting of a standard and, where necessary, the related R&D, and the commercial exploitation of that standard. Agreements on standards should cover no more than what is necessary to ensure their aims whether this is technical compatibility, or a certain level of quality. For instance, it should be very clearly demonstrated why it is indispensable for the economic benefits to materialise that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.

6.4.3. No elimination of competition

166. There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.

167. To the extent that private organisations or groups of companies Set a standard or their proprietary technology becomes a de facto standard, then competition will be eliminated if third parties are foreclosed from access to this standard.

6.5. Examples

168. Example 1. *Situation:* Standard EN 60603-7:1993 defines the requirements to connect television receivers to video-generating accessories such as video recorders and video games. Although the standard is not legally binding, in practice manufacturers both of television receivers and of video games use the standard, as the market requires so. *Analysis:* Article 81(1) is not infringed. The standard has been adopted by recognised standards bodies, at national, European and international level, through open and transparent procedures, and is based on national consensus reflecting the position of manufacturers and consumers. All manufacturers are allowed to use the standard.

169. Example 2. *Situation:* A number of videocassette manufacturers agree to develop a quality mark or standard to denote the fact that the videocassette meets certain minimum technical specifications. The manufacturers are free to produce videocassettes which do not conform to the standard and the standard is freely available to other developers. *Analysis:* Provided that the agreement does not otherwise restrict competition, Article 81(1) is not infringed, as participation in standard setting is unrestricted and transparent, and the standardisation agreement does not set an obligation to comply with the standard. If the parties agreed only to produce videocassettes which conform to the new standard, the agreement would limit technical development and prevent the parties from selling different products which would infringe Article 81(1).

170. Example 3. *Situation:* A group of competitors active in various markets which are interdependent with products that must be compatible, and with over 80% of the relevant markets, agree to jointly develop a new standard that will be introduced in competition with other standards already present in the market, widely applied by their competitors. The various products complying with the new standard will not be compatible with existing standards. Because of the significant investment needed to shift and to maintain production under the new standard, the parties agree to commit a certain volume of sales to products complying with the new standard so as to create a "critical mass" in the market. They also agree to limit their individual production volume of products not complying with the standard to the level attained last year. *Analysis:* This agreement, owing to the parties' market power and the restrictions on production, falls under Article 81(1), while not being likely to fulfil the conditions of Article 81(3), unless access to technical information were provided on a non-discriminatory basis and on reasonable terms to other suppliers wishing to compete. ■

Horizontal Agreements

The last report in this series will appear in our next issue (December, 2000). It will be on the subject of environmental agreements. These are agreements under which competing traders agree on certain environmental objectives, such as pollution abatement.