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Competition and the Internet

For most commentators, it is almost self-evident that the Internet has salutary effects on commercial competition. It is a low-cost "production factor", freely available to all industries and so expansive as to prevent anyone from exploiting its scarcity value. It facilitates the development of trade on a playing-field as level as everyone could wish. It is associated with unprecedented successes among new entrants. The provision of Internet access and services may be subject to restrictions of competition, of which the Microsoft and other cases are actual or potential examples; but the Internet itself appears to be either beneficial from a competitive point of view or, at the least, a neutral factor.

It is therefore refreshing to find an economist, who works with the Commission in Brussels (but speaks for himself and not for the Commission in this respect) raising some legitimate queries about the effects of the Internet on competition. Bernardo Urrutia presented a paper at UIMP, Barcelona, on 10 July, 2000, in which he offered "some cautious reflections about possible threats to competition" in the light of developments in the use of the Internet. Mr Urrutia states fairly enough its positive aspects. "For many companies, the Internet represents a business opportunity, the possibility of carrying out investment projects with high expected return rates, improving the competitive edge or for the purposes of corporate diversification strategies. For many other companies – for some economic sectors as a whole in some cases – the Internet may represent a serious threat, as the functions they perform will disappear with the development of e-commerce. This would be the case of many intermediary functions (wholesalers, retailers) for which direct Internet competition is possible. The Internet does not only threaten intermediary functions. It is also a challenge for territorial protection agreements, that is, for the reseller who obtains full exclusivity for commercialising some goods in a given territory. The Internet makes it very easy to know at what prices these goods are offered in contiguous or far away territories and provides the means to obtain them from different resellers."

However, in at least two respects, these very advantages may have their drawbacks, leading "to many traditional retailers and businesses categories opposing the new forms of competition over the Internet"; and, "for the purposes of full exploitation of Internet business possibilities, we are witnessing a concentration of economic power ... that could well be necessary for the foundation of the so-called new economy but that could also mean that the market structures in that new economy will be controlled by a limited number of players at world-wide level". The author cites the intended mergers between America on Line and Time Warner and between Vivendi/Canal Plus and Seagram. ■

PRICING POLICY (MOTOR FUEL): COMMISSION MEMORANDUM

Subject: Pricing policy

Industry: Motor fuel

Source: Commission Statement MEMO/00/55, dated 20 September 2000

(Note. It is to the Commission's credit that, at a time when public opinion is seriously disturbed by the problem of excessive petrol and diesel prices, it should be examining the question whether anti-competitive practices in the motor fuel industry are making a substantial contribution to the high price levels. However, it is only too clear from the Commission's statement that, among the factors which make up the final price to consumers, oil company profits are relatively small. Both the crude oil price, dictated largely by OPEC, and - still more - the levels of national taxation, account for rises in price in the last year. As far as OPEC is concerned, the competition rules do not apply, since the prices are not set by undertakings but by sovereign states; and the Commission says that the states concerned are not motivated exclusively by economic considerations. As to tax levels, which are as high as 75% in the United Kingdom, these are not only outside the scope of the competition rules but also outside the jurisdiction of the European Community. The Commission statement accordingly concentrates on the ways in which it may be able to influence the price element by action against cartels and by imposing rigorous conditions on the conclusion of oil company mergers and acquisitions.)

EC competition policy and the motor fuel sector

The Commission meets the national competition authorities on 29 September to discuss competition policy issues in the motor fuel sector. The aim of this meeting, which has been organised since early July, is to exchange experiences and information with the national competition authorities concerning the respective enforcement activities in this sector. Mario Monti, commissioner in charge of competition, has stated that "we are well aware that competition rules alone cannot solve all, or even most, problems in this sector, but we intend to explore to what extent Community and national competition law can contribute to a more competitive motor fuel sector for the benefit of the European citizen."

The structure of motor fuel prices

The price of motor fuels can be divided into three main components: crude oil prices, taxes and costs for refining, marketing and distribution. Crude oil prices have dramatically increased (more than 180% on average) since December 1998. This is mostly, but not only, due to the limitation of output by important producing countries, essentially but not exclusively the OPEC countries. The world-wide economic growth has led to an increase in demand. Currency fluctuations and the depreciation of the Euro against the US dollar have firmly

contributed to the price increase for European refiners, since crude oil is generally quoted in US dollars on the international spot markets.

Member States impose special taxes on motor fuels, which, when added to the price of oil, constitute the base for the VAT. It should be noted that the tax factor is currently the highest of the three main factors affecting the price of motor fuel (from approximately 50% in Portugal, Greece and Luxembourg to 75% in the UK). The special taxes on motor fuels have as one of its main objectives to discourage the use of mineral oils as main source of energy so as to reduce the overall emissions of gases to the atmosphere. This level of taxes on mineral oils should also promote the use of alternative energy sources, including renewable energy, which are more respectful to the environment.

The costs for refining, marketing and distribution are, in relative terms, the lowest of the three price components. It is on this component that EC competition rules can have an impact. However, since the motor fuel price depends largely on the factors described above (crude oil prices, currency fluctuations and taxes), it follows that any anti-trust intervention could only have a limited impact on the price of motor fuel.

Competition enforcement in the upstream market: crude oil production

The production constraints agreed by some producing countries, such as the OPEC members, have restrictive effects similar to a cartel. However, it does not appear possible to apply EC competition law to such restrictive acts when they are adopted by sovereign states and not by undertakings within the meaning of Article 81 of the Treaty. Moreover, the activities of OPEC members relate not only to the conditions under which the natural resources of these states are marketed, but also to the management of those exhaustible resources. It is therefore difficult to conclude that OPEC conducts a purely economic activity. As a result, an action based on Articles 81 and 82 of the Treaty against OPEC does not appear feasible. Similar conclusions have been reached by antitrust authorities in the United States.

Action against possible exploitative parallel conduct of multinational oil firms on the upstream market could be envisaged. However, lessons from recent merger investigations carried out by the Commission, such as Exxon/Mobil and BPAmoco/Arco, show that is difficult to prove that oil companies enjoy single or collective dominant positions on these markets. Even if market power were to be established, any antitrust intervention on the upstream market against the private operators would have a limited impact if the oil producing countries, such as the OPEC members, had to be excluded from it.

Competition enforcement in the downstream markets: refining, marketing and distribution of motor fuels

The most obvious tool for applying competition rules in the down-stream markets would be to attack any illicit co-operation between the oil companies, whether at

refinery, marketing or distribution level. There is a general perception that prices of motor fuels are the object of co-ordination by major oil companies due to the similar or identical prices. However, the Commission must prove more than parallel pricing behaviour among the oil companies to establish the existence of a cartel, since there may be other economic explanations for such parallelism. Indeed, it can in many cases be explained by the economic conditions and the market structure and not as a result of co-ordination; that is to say, few suppliers sell a homogenous product in a transparent market with inelastic demand. Under such conditions, companies are able to raise their prices to match the price of their competitors without having to reach an agreement or any other form of co-operation. The fact that the markets in most, if not all, Member States are oligopolistic is thus not sufficient to establish the existence of a cartel.

Although prices are currently at a high level, this does not automatically imply an abusive pricing policy by the oil operators. To establish that, one would first need to demonstrate that the operators are dominant on the markets. Second, the pricing policy should constitute an abuse in the form of excessive or discriminatory pricing. In this context, it appears that the increase of the price for motor fuels, in average, largely reflects the increase of the price of crude oil (see annex). As regards the recently announced profits of several major vertically integrated oil companies, it appears that these profits have mainly been achieved at the level of production (up-stream), due to the high crude oil price, and not at the level of distribution (down-stream). It does not appear possible, under EC competition rules, to oblige vertically integrated companies to use their profits from their up-stream activities to lower prices for their down-stream products. Moreover, in a long-term perspective, compensating losses at the distribution level with up-stream profits may distort competition in the market as it could result in non-integrated independent operators being driven out of the distribution market.

Needless to say, if the Commission were to find any evidence of a price cartel or any other anti-competitive behaviour in the motor fuel sector, it would take immediate action. It is the Commission's experience that cartels in the motor fuel sector are usually organised at national level. As a general rule, cases that are purely national in scope are usually not dealt with by the Commission, but by the national competition authorities. A number of national authorities have recently prosecuted cartels and other infringements of competition law within their national territories.

As an example, the Swedish competition authority has recently found a cartel between 90% of the oil suppliers in Sweden who had agreed on the level of rebates and prices to wholesale customers. The Italian competition authority has recently imposed a high fine on oil companies for co-ordinating resale price maintenance at retail level. A third example is the German Federal Cartel Office which has recently adopted a decision ordering vertically integrated companies not to charge different prices to independent resellers from those they charge to their own resellers. Other competition authorities, such as in Denmark, Germany, France and Spain have recently launched investigations in the motor

fuel sector. The above competition authorities will all share their experiences at the meeting of 29 September.

As regards horizontal cooperation at refining level, the cases recently investigated by the Commission have not shown the existence of restrictions of competition. For the moment, these forms of cooperation seem to be driven by the need to reduce the existing refining over-capacity in Europe.

The downstream markets for motor fuel retailing are, in most Member States, mature markets with stagnant or shrinking volume as a general tendency. They are characterised by exclusivity arrangements linking petrol retailers to refiners (so-called vertical restraints). This may lead to market foreclosure, making it difficult for existing operators to increase their market shares through gaining additional retailers and for new entrants to enter the market. In this respect, the Commission adopted in December 1999 a new policy on vertical restraints that will lead to changes in the oil sector. The new Regulation has came into force in June 2000 with a transitional period until the end of 2001 for existing contracts to be adapted to the new policy. The most important change is the shortening of the maximum duration of exclusive service station agreements from 10 years to 5 years. All being well, this will have the beneficial effect of enabling petrol retailers to change supplier more often after the expiry of the 5-year contract. The Commission will monitor to which extent the new policy will promote competition in the market.

Market integration issues

The existing price differences (before taxes) at retail level among the different Member States are somewhat surprising given that oil and refined products are commodities, which are quoted internationally. This may reflect the different cost and market structures across Europe, but it may also be a sign of imperfect market integration within the single market. Indeed, it appears that trade of motor fuel does not, in general, take place on a cross-border basis, but rather on a local basis.

This lack of cross-border trade may result either from co-ordinated business practices (market sharing) or from State measures amounting to barriers to trade. In this latter respect, for example, measures imposing security reserves at national level for every import are often said by market operators to constitute barriers to market penetration and thus not being in line with the principles of the Internal Market and EC Directive 98/93 on security reserves.

Structural measures to improve competitive conditions

It is true that there is a concentrated structure in the motor fuel sector, with oligopolistic dominance in some European markets and possibly single dominance in others. While adopting structural measures to make the markets less concentrated could effectively help in improving the competitive environment, the Commission does not, unlike the US authorities, enjoy such powers under Articles 81 and 82 of the EC Treaty.

On the contrary, structural remedies are applied in the context of EC merger control proceedings. In these cases, merging companies may offer structural undertakings to the Commission in order to remove the Commission's competition concerns. The Commission has recently examined several mergers in the motor fuel sector and intervened when necessary to ensure that the concentrations would not lead to a creation or strengthening of a dominant position. Thus, for instance, in the Exxon/Mobil merger, to eliminate the concerns of the Commission, the parties undertook to divest Mobil's share in Aral, a motor fuel retailing company present in Germany and Austria. The parties also undertook to dissolve the fuel part of the BP/Mobil joint venture which was present across Europe. Subject to these undertakings, the Commission authorised this merger.

Similar undertakings were offered in the TotalFina/Elf merger, notably to sell 70 motorway service stations in France to competitors. TotalFina also undertook to divest a large proportion of its transport and storage logistics. The Commission is currently monitoring that divestiture of motorway service stations is done in a way that promotes competition. In this context, the Commission has provisionally rejected the proposed buyers presented by TotalFinaElf since the buyers are unlikely to exercise competitive pressure on TotalFinaElf.

In some cases, Member States may have the power to take structural measures under national legislation. Examples of structural measures include: limiting the growth of existing companies in the motor fuel sector; compulsory divestiture of assets (including divestiture of logistic facilities); facilitation of establishment of new competitors at retail level (such as supermarkets); allocation of new retail outlets on the basis of competition criteria (for example concessions on motorways or concession of public land in town centres) and so on.

Competition rules alone cannot remedy all the problems

The Commission will continue monitoring the competitive conditions in this sector and take action if it has evidence pointing to anti-competitive behaviour within its sphere of competence. It will also co-operate with national competition authorities in the implementation of national competition rules to this sector. While the application of competition rules is a tool to ensure that competition in the motor fuel market is not distorted, these rules alone cannot of course provide a full answer to all the problems caused by the increase of the oil price on the European economy in the absence of other supplementary measures. Such measures could intend to relieve the pressure exerted by supply and demand of crude oil with a view to achieving a reasonable and stable price level, for instance fostering the use of alternative energy sources in order to reduce the long-term demand for motor fuel. ■

We regret that the August, 2000, issue of the newsletter was wrongly shown as Volume 23, Issue 9. It should have been shown as Issue 8. The present issue is Issue 9. There has been no arbitrary jump from 7 to 9; and no issues are missing.

COOPERATION AGREEMENTS (MOTOR VEHICLES): THE GM/FIAT CASE

Subject: Cooperation agreements
Joint ventures

Industry: Motor vehicles

Parties: General Motors Corporation
Fiat SpA

Source: Commission Statement IP/00/932, dated 16 August 2000

(Note. As usual, the Commission has favoured a cooperation agreement whose object is largely a savings in production costs. This agreement goes hand-in-hand with the creation of two main joint ventures, one concerned with production, the other with purchasing. While the Commission has always made clear its willingness to approve cooperation agreements directed towards cheaper or more efficient production, it has not always been so willing to approve joiny purchasing arrangements. In the present case, they form part of an acceptable bundle of proposals.)

The Commission has cleared a cooperation agreement between General Motors and Fiat in the areas of powertrains, joint-purchase of car components and some other joint activities, since it considers that the alliance improves the companies' ability to compete with other car manufacturers in terms of quality, safety standards and prices.

In June 2000, General Motors and Fiat notified to the Commission an agreement to be implemented in Europe and Latin America, by which both parties will cooperate in the areas of powertrains (in particular, engines, gearboxes and suspensions), purchasing of car components and parts, organisation of financial services directed to their dealers and consumers, platform development and R&D programs associated with the production of passenger cars and light commercial vehicles. The two car manufacturers will, nevertheless, continue to compete world-wide in the design of vehicle's components not linked to powertrains as well as on the assembly, distribution, branding, marketing and sale of cars.

The agreement was filed for regulatory clearance under Regulation 17/62, which implements Article 81 of the EC Treaty, banning agreements restrictive of competition or alternatively allowing for an exemption from such rules. After an analysis and consultation with interested third parties, the Commission took the view that, although Fiat and General Motors would coordinate, on an exclusive basis, their activities in the production of powertrains and in the purchasing of components and parts, the alliance should benefit consumers. Components and parts account for a considerable share of the cost of a new car and the increase in the two companies' bargaining power could result in substantial savings which would be passed on to the consumer in terms of better safety standards and lower

prices. The Commission therefore concluded that the conditions for an exemption from the EC competition rules were met.

Fiat and General Motors announced their strategic alliance in March which involves GM taking a 20% equity stake in Fiat Auto Holdings BV, a new holding that controls Fiat Group's auto and light commercial vehicle operations, except for Ferrari and Maserati. In return, Fiat receives approximately 5.6 percent of GM's common stock.

The co-operation agreements provide for the creation of a powertrain joint venture to be located in Turin, Italy, and a purchasing joint venture which will be based in Rüsselsheim in Germany. ■

Three state aid cases in the UK motor vehicle sector

The United Kingdom authorities notified on 25 July 2000 regional investment aid to Nissan Motor Manufacturing Ltd (NMUK), leading to the transformation of the Nissan plant in Sunderland, in order to introduce the new Nissan "Micra" model. The total investment of the project amounts to £ 308.9m and the total proposed aid amounts to £40m. According to the UK authorities, the alternative location to Sunderland would be to carry out the investment in the Renault plant in Flins, France, and no decision as to the site of the production has yet been taken by Nissan. The project timing is from January 2001 until March 2005 and the start of production is planned for January 2003. Since the Commission at this stage has doubts on the necessity and proportionality of the aid, the eligibility of costs and the effects on the production capacity, it decided to open the investigation procedure in the case.

At the same time, the Commission decided to raise no objections to the granting of £5m of aid to Nissan for the Primera project, also at Sunderland. The purpose of the project , which was notified on 22 December 1999, is to transform part of the site, so as to enable the production of the new Nissan Primera. The investments will be carried out over approximately three years and will cost a total of £ 216m. The Commission is satisfied that the aid is in conformity with the Community framework for state aid to the motor vehicle industry and is, therefore, compatible with the EC Treaty.

In the Rover Longbridge case, the Commission initiated on 22 December 1999 a formal investigation procedure as regards £141m of regional investment aid to be granted to the German carmaker BMW's envisaged investment in the Rover Longbridge plant. Since the UK Authorities withdrew their notification of state aid in July 2000, the Commission decided to close the investigation procedure noting the UK withdrawal. BMW had sold the Rover cars production to the British Phoenix consortium on 9 May 2000.

Source: Commission Statement IP/00/1026, dated 20 September, 2000

PRICING POLICY (LEASED LINES): COMMISSION INQUIRY

Subject: Pricing policy

Industry: Telecommunications
Leased lines; internet access

Source: Commission Statement IP/00/1043, dated 22 September 2000
Commission Working Document, dated 8 September, 2000, on the Initial Results of the Leased Lines Sector Inquiry

(Note. One of the Commission's preliminary findings is that prices for leased lines may be excessive. The statement reproduced below gives the Commission's reasons. In the light of the public hearing, the Commission may modify its views. At the end of the statement below, there are one or two excerpts from the Commission's working document, amplifying points made in the statement.)

On 22 September, 2000, Competition Commissioner Mario Monti opened a public hearing in Brussels to discuss the preliminary findings of the Commission's leased lines investigation, the first leg of the telecommunications sector inquiry launched last year. Among the results of the inquiry, the Commission has found that incumbents' prices for leased lines may be excessive for low bandwidths in Luxembourg and Spain and also possibly in Belgium and Sweden. For medium bandwidth incumbents' prices are above average in Italy and Ireland, and possibly in Portugal, Belgium, France and Spain as well. For high bandwidth the prices of the incumbents in Italy and Portugal appear to be above the average, with the UK possibly falling into this category though comparisons are not certain in this area.

"Leased lines are a vital element in the creation of e-Europe," Commissioner Monti said in opening the hearing. "They provide the underlying transmission capacity for the Internet, data services, and voice telephony, which are now offered in liberalised markets for most Member States. If prices do not fall further, innovation and investment will be stifled and consumers will suffer, as access to the Internet will remain too expensive. The Commission will ensure that the results of its inquiry are followed up by national authorities, and if necessary, directly through Commission action."

Attending the hearing is a wide representation of relevant stakeholders in the EU telecommunications sector: incumbent telecom operators, new entrants, big business users and national authorities. The hearing gives the opportunity for all participants to comment on the outcome of the Commission's study and propose ideas for further action. The event is divided into four sessions covering all the key issues: market developments; competition concerns and enforcement; the impact of sector-specific regulation of leased lines provision and pricing; the views of the different stakeholders - market players, users but also the national regulators and competition authorities.

The Commission regards leased line prices as being extremely important for the development of e-Europe, and in particular to reduce prices for consumers and businesses on the Internet. Following the hearing, the Commission initially expects national regulatory authorities to take action where problems have been identified concerning leased line prices. This is in line with the general principles of the Commission's access notice. However, if the case raises a particular Community wide interest or the Commission believes that action by the national authorities is not having the desired effect, the Commission will not hesitate to act under the competition rules of the Treaty.

The sector inquiry

The Commission decided on 27 July 1999 to open an inquiry into the telecommunications sector relating to:

the provision and pricing of leased lines;
mobile roaming services; and
the provision of access to and use of the residential local loop.

All of these areas are vital for the creation of e-Europe as they involve the pricing of important elements which enable Europe's citizens to access the Internet and all the services which operate over it.

The aim of the Commission's inquiry is to establish whether current commercial practices and prices in the telecommunications sector infringe the EC competition rules, in particular the prohibition of restrictive practices and abuses of a dominant position (Articles 81, 82, and/or 86 of the EC Treaty). This is only the third sector inquiry ever launched by the Commission. For the purpose of this inquiry, acting in close co-operation with the Directorate General for Information Society, the Commission's Directorate-General for Competition had prepared extensive formal requests for information. EC competition rules enable the Commission to conduct sector-wide investigations into suspicious pricing structures and practices that may restrict or distort competition. They allow the Commission to send formal requests for information, and provide for sanctions for parties who fail to reply or reply late or incompletely.

Concerning leased lines, the Commission sent more than 100 questionnaires to national competition authorities, telecommunications regulators and incumbent telecommunications operators across the EU, to new entrants supplying and/or purchasing leased lines, as well as to a number of big business users. The preliminary results of the inquiry have been summarised in the above-mentioned working document. As for roaming, the Commission is currently analysing the replies to the relevant questionnaires. Finally, as regards access to and use of the local loop, the Commission has received replies to its questionnaires from the dominant operators and from regulators; it prolonged until 31 October 2000 the deadline for replies by new entrants.

Results of the Commission's inquiry regarding leased lines

The Commission has produced a working document for the public hearing. This document explains the preliminary findings of the Commission's investigation. It

outlines the market trends that the sector inquiry has revealed and identifies a number of apparent market failures. The main findings of the inquiry, although provisional, can be summarised as follows.

Demand for leased lines is dramatically increasing, with the biggest driver being the Internet. The two major categories of users are telecom companies (alternative carriers, new fixed network entrants and mobile networks), Internet Service Providers (ISPs) and big business users. All those categories of users are considered "sophisticated users".

Supply is growing and will further increase once wireless local loop is commercially provided and alternative infrastructure (carrier's carriers) is further deployed. New players have entered the markets well-established operators (MCI WorldCom, Hermes (now GTS), Colt, KPNQWest) as well as new operators (Versatel, Viatel, Global Crossing). Investment is also made by operators of Internet Protocol based transnational networks, which further increases capacity. However, investment is asymmetric, with most of it concentrated in high-capacity, Pan-European fibre networks, and on certain preferred routes within Europe.

The relative weight of the leased lines revenue in the total turnover of the incumbent telecom operators differs largely. Domestic leased lines revenue accounts for from below 1% to above 17% of the total revenue for selected EU incumbents. For international leased lines, the proportion of revenue in the total turnover ranges between 3% and 27%. In the Member States where the liberalisation has been early and decisive, large volumes of sales and higher revenue from leased lines could be due to the maturity of those markets and the expansion of the ISPs, a major demand-driver.

The market definitions that have been used so far must be narrowed due to recent dynamic market developments. Domestic leased lines markets could be thought of as consisting of separate economic markets for short distance leased lines and long distance leased lines additionally segmented according to the bandwidth. The geographic markets for national leased lines can probably be defined as consisting of big metropolitan/rest of the country segments, while the question whether the international leased lines markets are global, EU-wide or narrower, requires a more detailed examination of relevant conditions of competition.

Competition is growing in certain markets (in particular, long-distance and international leased lines). There appears to be a powerful competitive pressure at the retail level, demonstrated by substantial discounts offered by incumbent operators. However, the fairness of certain discount schemes is questionable, and leaves scope for enforcement of competition rules, where the aim is to pre-empt competition.

Using a benchmark for international leased lines confirms that prices among different Member States diverge widely, and this divergence cannot be explained by variation in distance only. Regarding the pricing of leased lines, it appears that distance is relatively unimportant in comparison to density.

The comparison of prices of national leased lines confirmed very divergent ways of pricing leased lines by the incumbents in different Member States. Possibly excessive prices have been identified in the bandwidths of 2 Megabytes per second - Mbps - (incumbents' prices in Luxembourg and Spain are above the average, with Belgium and Sweden possibly in this group as well), 34 Mbps (price above the average for the incumbents in Italy and Ireland, but possibly also those in Portugal, Belgium, France and Spain) and 155 Mbps (not all the offers are in volumes that allow consistent comparisons, however, the prices of the incumbents in Italy and Portugal appear to be above the average, with the UK possibly falling into this category).

Non-price related problems in the competitive provision of leased lines have been also highlighted in the replies. The two most important seem to be potentially abusive strategic discounting (this may be the case in Spain, the Netherlands and Finland, but the issue has been raised with respect to other incumbents as well), and discriminative delays in the provision of leased lines, in particular in France, Ireland and Italy.

The above findings of the Commission are based on the replies to the Questionnaire sent to the EU incumbents, as well as to a sample of users and new entrants. The market trends described by those findings may continue to be present in the year of 2000, but it is also possible that other trends have emerged in the meantime.

[Note: All the Questionnaires can be found on the following web-site: http://europa.eu.int/comm/competition/antitrust/others/, under "Sector Inquiries" – "Leased Lines".]

Extracts from the Working Document

3.4 The replies to the questionnaire indicate that during the 1997-1999 period, leased lines tariffs still varied widely between Member States, to an extent which probably cannot be explained by underlying cost differences. It appears that many Member States have implemented the requirement in the Community law to ensure cost orientation of tariffs by imposing price caps. Given the retained very strong market position of the incumbent operators, action based on competition rules could be justified in cases of excessive pricing or discriminatory or predatory discounting, as well as in cases of discriminatory delays in delivering leased lines.

3.5 Factors other than prices, such as long delays in provision and poor quality of service, as well as some institutional regulatory factors have been mentioned among the main factors slowing down the roll out of new infrastructure. Particular issues that have been mentioned in the replies include: onerous licensing procedures or unreasonably long delays in obtaining licenses, lengthy and cumbersome procedures to obtain permission to perform civil-works. Further investigation of these issues appears warranted, at least in order to substantiate claims that have been made by respondents. ■

DOMINANT POSITION (PENSION SCHEMES): THE PAVLOV CASE

Subject: Dominant position
Exclusivity
Undertaking
Associations of undertakings

Industry: Occupational pension schemes
(Some implications for other industries)

Parties: Pavel Pavlov et al
Stichting Pensioenfonds Medische Specialisten
Netherlands Government (intervener)
French Government (intervener)
Greek Government (intervener)

Source: Judgment of the Court of Justice of the European Communities in Joined Cases C-180/98 to C-184/98 (Pavel et al v SPMS), dated 12 September, 2000

(Note. At first sight, it may seem strange that the question whether an occupational pension scheme fund should be treated as an undertaking for the purposes of the rules on competition; and stranger still that participants in the scheme should claim that their compulsory membership of the scheme should constitute an infringement of those rules. Nevertheless, although the participants lost their case, it was a close run thing: some of their substantial pleas were upheld. The more general interest of the case lies in the close examination by the Court of what constitutes an undertaking; what constitutes an economic activity; what degree of exclusivity can legitimately be conferred by the State on a given supplier of services; and whether a dominant position in this context necessarily leads to an abuse. Under each of these headings, the Court reviews all the relevant case-law and expands their interpretation.

For the purposes of the judgment, the Court rehearses the facts at great length; but, in the report which follows, the facts are summarised as concisely as possible and the law is set out almost in full. The legal question of the admissibility of the action is summarised. The judgment refers to Articles 85, 86 and 90, of the EC Treaty: these are now Articles 81, 82 and 86.)

The Facts

[Three questions were raised in five actions brought by five medical specialists, Messrs Pavlov, Van der Schaaf, Kooyman, Weber and Slappendel against Stichting Pensioenfonds Medische Specialisten (Pension Fund for Medical Specialists, hereinafter "the Fund") concerning the refusal of Mr Pavlov and the other applicants to pay contributions to the Fund on the ground, in particular,

that compulsory membership of the Fund, by virtue of which the contributions were claimed from them, is contrary to Articles 85, 86 and 90 of the Treaty.

Compulsory membership derived from the Netherlands Law of 29 June 1972 on Compulsory Membership of an Occupational Pension Scheme, hereinafter "the BprW". Under Article 27 of the BprW, failure to take up membership of a compulsory scheme attracts penalties; and Article 31 of the BprW provides that occupational pension funds may issue binding enforcement orders for the purpose of recovering arrears of contributions. The Fund is a non-profit-making body and any surpluses are distributed to pensioners and members in the form of increases in their pension rights.]

46. Mr Pavlov and the other applicants submitted in the proceedings that compulsory membership of the Fund was contrary to a number of provisions of the EC Treaty.

47. The national court notes that, by judgments of 22 October 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has already referred to the Court a question concerning the compatibility with Community law of compulsory membership of an occupational pension scheme, but that the Court did not answer that question in its judgment (Joined Cases C-430/93 and C-431/93 (*Van Schijndel and Van Veen*)).

48. It was in those circumstances that the Cantonal Court, Nijmegen, stayed proceedings and referred to the Court the following questions for a preliminary ruling:

1 Given the aims of the BprW as described above ..., is an occupational pension fund, membership of which has been made, pursuant to and in accordance with the BprW, compulsory for all, or for one or more specified groups of members of a profession, with that compulsory membership having the legal effects ... entailed by that Law, to be regarded as an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty establishing the European Economic Community?

2 If so, is the fact of making membership of the occupational pension scheme for medical specialists ... compulsory a measure adopted by a Member State which nullifies the useful effect of the competition rules applicable to undertakings, or is this the case only under certain conditions, and if so, under which?

3 If the last question must be answered in the negative, can other circumstances render compulsory membership incompatible with Article 90 of the Treaty, and if so, which?

[Paragraph 49 is formal. Paragraphs 50 to 56 concern the admissibility of the proceedings, challenged by the Greek government on the grounds that the information provided was insufficient. The Court point out that the information provided in orders for reference must not only be such as to enable the Court to

provide a useful answer but must also give the governments of the Member States and other interested parties an opportunity to submit observations; the Court cited, inter alia, Case C-67/96 (*Albany*), paragraph 39, and Joined Cases C-115/97, C-116/97 and C-117/97 (*Brentjens*), paragraph 38. The Greek government's challenge was dismissed and the proceedings declared admissible. The Court then went on to answer the three questions before it, though not in the same order in which they had been submitted.]

The second question

57. By its second question, which it is appropriate to consider first, the national court is asking essentially whether Article 5 of the EC Treaty (now Article 10) and Article 85 of that Treaty prohibit a Member State's public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

58. To answer the second question, it is necessary to consider first of all whether a decision taken by a liberal profession's representative body to set up, for the members of that profession, a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession is contrary to Article 85 of the Treaty.

59. It must be observed at the outset that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted those who drafted the Treaty to provide expressly in Article 85(2) of the Treaty that agreements or decisions prohibited under that provision are to be automatically void.

60. Next, it should be observed that, in the *Brentjens* case and in Case C-219/97 (*Drijvende Bokken*), the Court held that a decision taken by an organisation representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the Treaty.

61. The Fund, the Netherlands Government and the Commission, the latter in alternative argument, submit that there is no significant difference between the national rules governing the sectoral pensions which were at issue in *Albany*, *Brentjens* and *Drijvende Bokken* and those governing the occupational pension schemes at issue in the main proceedings. The reasons which led the Court in those earlier cases to hold that a decision by an organisation representing employers and workers to set up a sectoral pension fund and to request the public authorities to make membership of that fund compulsory did not fall within the scope of Article 85 of the Treaty also hold good with regard to a similar decision

emanating, as in the present cases, from the members of a liberal profession, and take such a decision outside the scope of Article 85 of the Treaty, even if the members of the profession are not acting within the context of a collective agreement.

[In paragraphs 62 to 66, the Court refers to the way in which the Fund, the Netherlands Government and the Commission, expand the foregoing point.]

67. It should be borne in mind that, at paragraphs 64, 61 and 51 respectively of the judgments in *Albany, Brentjens* and *Drijvende Bokken*, the Court held that agreements concluded in the context of collective bargaining between employers and employees and aimed at improving employment conditions are not, by reason of their nature and purpose, to be regarded as falling within the scope of Article 85(1) of the Treaty.

68. Such exclusion from the scope of Article 85(1) of the Treaty cannot be applied to an agreement which, while being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees.

69. On this point, it should be emphasised that the Treaty contains no provisions, like Articles 118 and 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 to 143) or Articles 1 and 4 of the Agreement on social policy, encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions and providing that, at the request of members of the professions, such agreements be made compulsory by the public authorities, for all the members of the profession in question.

70. That being so, Article 85(1) of the Treaty must be interpreted as meaning that a decision taken by the members of a liberal profession to set up a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all the members of that profession does not, by reason of its nature or purpose, falls outside the scope of that provision.

71. Therefore, it is necessary to ascertain whether the conditions for application of Article 85(1) of the Treaty are fulfilled and, first of all, whether or not the representative body in question in the main action, namely the LSV, is an association of undertakings.

[In the context of this case, the medical specialists' profession is represented by the Landelijke Specialisten Vereniging der Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (National Association of Specialists of the Royal Netherlands Society for the Promotion of Medicine), referred to here as the LSV.]

72. In this connection, it should be pointed out that, on the date on which the LSV applied to the public authorities to make membership of the Fund compulsory, that organisation was made up solely of self-employed medical specialists.

73. Thus it is necessary to consider whether those independent medical specialists are undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

74. The Court has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed (see, in particular, Case C-41/90 (*Höfner and Elser*), paragraph 21, Joined Cases C-159/91 and C-160/91 (*Poucet and Pistre*), paragraph 17, Case C-244/94 (*Fédération Française des Sociétés d'Assurance*), paragraph 14, *Albany*, paragraph 77, *Brentjens*, paragraph 77, and *Drijvende Bokken*, paragraph 67).

75. It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity: Case 118/85 (*Commission v Italy*), paragraph 7, and Case C-35/96 (*Commission v Italy*), paragraph 36).

76. In the present cases, the medical specialists who are members of the LSV provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.

77. The self-employed medical specialists who are members of the LSV therefore carry on an economic activity and are thus undertakings within the meaning of Articles 85, 96and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, Case C-35/96 (*Commission v Italy*), paragraphs 37 and 38).

78. Nevertheless, the Commission contends that, when they are contributing to their own supplementary pension scheme, the medical specialists are not acting as undertakings within the meaning of Community competition law. A medical specialist who sets up a supplementary pension for himself is, the Commission submits, acting as an end user and the decision he takes in that context falls outside the scope of the competition rules. Such a decision can, it says, be compared to a decision to make investments on the financial markets or to purchase a holiday home.

79. It should be observed in response to that contention that the fact that a self-employed medical specialist pays contributions to a supplementary occupational pension scheme is closely linked to the practice of his profession. The medical specialist's membership of such a scheme stems from the practice of his profession. The supplementary occupational pension scheme at issue in the main proceedings, which covers all members of the profession, allows its members to

set aside part of their professional income in order to guarantee themselves, and on certain conditions, a surviving spouse or child, a certain level of income after they have ceased practising.

80. The link between the payment of contributions by every self-employed medical specialist to the same supplementary occupational pension scheme and professional practice is also especially close for the reason that the scheme is characterised by a high degree of solidarity between all medical practitioners. That is evidenced, in particular, by the fact that contributions are not linked to risk, the fact that all members of the profession must be accepted into the scheme without a prior medical examination, the fact that, in the event of disability, the fund assumes payment of contributions in order to maintain the accrual of pension rights, the fact that retroactive pension rights are granted to members who were already practising when the scheme came into effect and the fact that pension payments are index-linked so as to maintain their value.

81. In those circumstances, medical specialists cannot be regarded as acting as final consumers when they make contributions to their own supplementary pension scheme.

82. It must therefore be concluded that, when they decided, through the LSV, to contribute collectively to a single occupational pension fund, medical specialists were acting as undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

Association of undertakings

83. The next question to be examined is, therefore, whether the LSV is to be regarded as an association of undertakings for the purposes of the provisions just mentioned.

84. The Fund argues that it would be discriminatory to treat the LSV as an association of undertakings and not other professional organisations, such as the Netherlands Bar Association, which are governed by a public-law statute and which, as such, have regulatory powers.

85. Suffice it to say in this regard that the fact that a professional organisation is governed by a public-law statute does not preclude the application of Article 85 of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. So, the legal framework within which an association decision is taken and the legal definition given to that framework by the national legal system are irrelevant as far as the applicability of the Community rules on competition and, in particular, Article 85 of the Treaty, are concerned: Case 123/83 (*BNIC v Clair*), paragraph 17, and Case C-35/96 (*Commission v Italy*), paragraph 40.

86. Nor, contrary to what the Fund maintains, can the LSV be taken outside the scope of Article 85 of the Treaty by the fact that its main task is to protect the interests of medical specialists, and in particular their income, which is made up

in part by supplementary pensions, in negotiations with the Netherlands authorities concerning the cost of medical services.

87. Admittedly, a decision taken by a body having regulatory powers within a given sector might fall outside the scope of Article 85 of the Treaty where that body is composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria: Case C-96/94 (*Centro Servizi Spediporto v Spedizioni Marittima del Golfo*), paragraphs 23 to 25, and Case C-35/96 (*Commission v Italy*), paragraphs 41 to 44.

88. However, that is not the situation in the present cases, for at the time when the LSV decided to set up the Fund and to apply to the public authorities for a decision making membership compulsory, it was composed exclusively of self-employed medical specialists, whose economic interests it defended.

89. That being so, the LSV must be regarded as an association of undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

Prevention, restriction or distortion of competition

90. It is therefore necessary to consider, secondly, whether a decision by the members of a liberal profession to set up a pension fund responsible for the management of a supplementary pension scheme and to apply to the public authorities for a decision making membership of the fund compulsory for all members of that profession has as its object or effect the prevention, restriction or distortion of competition within the common market.

91. It is settled case-law that, in defining the criteria for the application of Article 85(1) of the Treaty to a specific case, account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions: Case C-399/93 *(Oude Luttikhuis and Others)*, paragraph 10).

92. In this respect, it must be borne in mind that a decision of the kind just mentioned means that all the members of a profession arrange their supplementary pension with one body and under the same conditions, except for their basic pension, which they may freely obtain from any authorised insurance company.

93. The conclusion must be that such a decision, which standardises in part the costs and supplementary pension benefits of medical specialists, restricts competition as far as concerns one cost factor of specialist medical services, inasmuch as one of its effects is that those medical practitioners do not compete with one another to obtain less costly insurance for that part of their pension.

94. However, as the Advocate General observes, ... the restrictive effects of such a decision on the specialist medical services market are limited.

95. The decision in question produces restrictive effects only in relation to one cost factor of the services offered by self-employed medical specialists, namely the supplementary pension scheme, which is insignificant in comparison with other factors, such as medical fees or the cost of medical equipment. The cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by self-employed medical specialists.

96. Furthermore, it should be observed that the implementation of a supplementary pension scheme managed by a single fund allows self-employed medical specialists to share the risks insured against whilst achieving economies of scale in the management of contributions and payment of pensions and in the investment of assets.

97. It follows from the foregoing that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme does not appreciably restrict competition within the common market.

98. As for the request, made to the public authorities by an organisation representing the members of a profession, to make membership of the occupational pension fund it has set up compulsory, it is made under a scheme identical to those existing under the national law of a number of countries concerning the exercise of regulatory authority in the social domain. Such regimes are designed to promote the creation of supplementary pensions of the second type and include a number of safeguards whose observance the competent Minister must ensure, so that a request by the members of a profession for membership to be made compulsory cannot constitute an infringement of Article 85(1) of the Treaty.

99. That being so, it must be held that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession, is not contrary to Article 85(1) of the Treaty.

100. Thus, for the same reasons, a decision by the Member State in question to make membership of such a fund compulsory for all members of the profession is not contrary to Articles 5 and 85 of the Treaty either.

101. The answer to be given to the second question must therefore be that Articles 5 and 85 of the EC Treaty do not preclude public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

The first question

102. By its first question, which it is appropriate to consider secondly, the national court asks essentially whether a pension fund responsible for managing a supplementary pension scheme set up by a profession's representative body and of which membership has been made compulsory by the public authorities for all

members of that profession is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

103. According to the Fund and the governments which have submitted observations pursuant to Article 20 of the EC Statute of the Court of Justice, such a fund does not constitute an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. In this connection, they set forth the various characteristics of the occupational pension fund and of the supplementary pension scheme which it manages.

[In paragraphs 104 to 106, they make three points: first, that compulsory membership, for all members of a profession, of a supplementary pension scheme, or at least of the most important part of that scheme, has an essential social function in the pension system applicable in the Netherlands; secondly, that the occupational pension fund is non-profit-making; and thirdly, that the occupational pension fund operates on the basis of the principle of solidarity.]

107. On that basis, the Fund and the governments who have submitted observations maintain that the Fund is a body entrusted with the management of a social security scheme, like that involved in *Poucet and Pistre*, cited above, but unlike the body at issue in *Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche*, cited above, which was held to be an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

108. As was pointed out in paragraph 74 of the present judgment, in the context of Community competition law, the Court has held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.

109. The Court also held, at paragraph 19 of its judgment in *Poucet and Pistre*, cited above, that that concept did not include bodies entrusted with the management of certain compulsory social security schemes, based on the principle of solidarity. First of all, under the sickness and maternity scheme forming part of the system in question, benefits were the same for all beneficiaries, even though contributions were proportional to income. Next, under the old-age pension scheme, pensions were funded by those in employment. Furthermore, statutory pension entitlements were not proportional to the contributions paid into the old-age pension scheme. Finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single body and for membership of the schemes to be compulsory.

110. In contrast, in *Fédération Française des Sociétés d'Assurance and Others*, cited above, the Court held that a non-profit-making body which managed an old-age pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. Optional membership, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid

by beneficiaries and on the performance of the investments made by the managing body meant that that body carried on an economic activity in competition with life-assurance companies. Neither the social objective pursued, nor the fact that the body was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which it was subject in making investments altered the fact that the managing body was carrying on an economic activity.

111. Following the judgment in *Fédération Française des Sociétés d'Assurance and Others*, the Court held *in Albany, Brentjens* and *Drijvende Bokken* that a pension fund entrusted with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, of which membership had been made compulsory by the public authorities for all workers in that sector, was an undertaking within the meaning of Article 85 et seq. of the Treaty.

112. In reaching that conclusion, the Court found that the sectoral pension funds in question in the cases mentioned in the paragraph above themselves determined the amount of the contributions and benefits, that they operated in accordance with the principle of capitalisation and that, by contrast with the benefits provided by bodies charged with the management of compulsory social security schemes of the kind in point in *Poucet and Pistre*, the amount of benefits provided by the funds depended on the performance of the investments which they made and in respect of which they were subject, like an insurance company, to supervision by the Insurance Board. Furthermore, the fact that a sectoral pension fund was in certain circumstances required or empowered to exempt undertakings from membership meant that it was carrying on an economic activity in competition with insurance companies (see *Albany*, paragraphs 81 to 84, *Brentjens*, paragraphs 81 to 84, and *Drijvende Bokken*, paragraphs 71 to 74).

113. The same is true of the occupational pension fund at issue in the case in the main proceedings.

114. The Fund itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation. Thus, the level of benefits provided by the Fund depends on the performance of the investments which it makes and in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

115. Those characteristics, together with the fact that medical specialists may opt to purchase their basic pension either from the Fund or from an authorised insurance company and the fact that the Fund has power to grant certain categories of medical specialists exemption from membership as regards the other components of the pension scheme, indicate that the Fund carries on an economic activity in competition with insurance companies.

116. It must therefore be concluded that a body such as the Fund is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

117. The fact that the Fund is non-profit-making and the solidarity aspects emphasised by the Fund and the governments which have submitted observations are not sufficient to relieve the Fund of its status as an undertaking within the meaning of the competition rules of the Treaty (see *Albany*, paragraph 85, *Brentjens*, paragraph 85, and *Drijvende Bokken*, paragraph 75).

118. It is true that the pursuit of a social objective, the above-mentioned solidarity aspects and the restrictions or controls on investments made by the Fund may render the service provided by the Fund less competitive than comparable services provided by insurance companies. Although such constraints do not prevent the activity engaged in by the Fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme (see *Albany*, paragraph 86, *Brentjens*, paragraph 86, and *Drijvende Bokken*, paragraph 76).

119. The answer to the first question must therefore be that a pension fund, such as that in question in the main proceedings, which itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

The third question

120. By its third question, the national court asks essentially whether Articles 86 and 90 of the Treaty preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession.

121. It is clear from the answer given to the first question that, as far as the provision of the basic pension is concerned, the Fund constitutes an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty and operates in competition with insurance companies. As regards that part of the supplementary pension scheme, the Fund does not therefore enjoy any exclusive right within the meaning of Article 90(1) of the Treaty.

122. On the other hand, a decision by the public authorities to make membership of the Fund compulsory as far as it concerns the second part of the pension scheme, which includes the indexation mechanism, retroactive pension rights, the continuing accrual of pension rights in the event of a member's disability and additional survivors' benefits necessarily implies the grant to the Fund of an exclusive right to collect and administer the contributions paid with a view to creating those rights. Such a fund must therefore be regarded as an undertaking to which exclusive rights of the kind referred to in Article 90(1) of the Treaty have been granted by the public authorities.

Dominant position on the market

123. That being so, it is necessary to establish whether the Fund occupies a dominant position on a substantial part of the common market.

124. On this point the Fund and the Netherlands Government submit that the Fund does not occupy a dominant position within the meaning of Article 86 of the Treaty. The market for supplementary pensions for self-employed medical specialists in the Netherlands is not a market for services distinct from the market in the Netherlands for all supplementary pensions.

125. In this regard it is sufficient to note, as the Commission has quite rightly pointed out, that granting the Fund the exclusive right to manage the second part of the supplementary occupational pension scheme for medical specialists in the Netherlands means that those medical specialists are precluded from arranging that part of their pension scheme with another insurer.

126. The Fund therefore has a legal monopoly in the supply of certain insurance services in a professional sector of a Member State and thus on a substantial part of the common market. In that respect it must be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty: see Case C-179/90 (*Merci Convenzionali Porto di Genova*), paragraph 14, and Case C-18/88 (*GB-Inno-BM*), paragraph 17).

127. However, the mere creation of a dominant position through the grant of exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses: *Höfner and Elser*, cited above, paragraph 29; Case C-260/89 (*ERT*), paragraph 37; *Merci Convenzionali Porto di Genova*, cited above, paragraphs 16 and 17; Case C-323/93 (*Centre d'Insémination de la Crespelle*), paragraph 18; and Case C-163/96 (*Raso and Others*), paragraph 27). As is clear from paragraph 31 of the judgment in *Höfner and Elser*, there is an abusive practice contrary to Article 90(1) of the Treaty, in particular, where a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which the undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind.

128. There is no evidence in the case-file forwarded by the national court or in the written and oral observations made by the Fund, the governments which have submitted observations and the Commission, that the Fund, merely by exercising the exclusive rights granted to it, would be led to abuse its dominant position or that the pension services offered by the Fund might not meet the needs of medical specialists.

129. It should be observed in this regard that Mr Pavlov and the other applicants had not expressed any desire to arrange their supplementary pensions with an insurance company; they argue that they do not belong to the Fund, but instead belong to another occupational pension fund, membership of which had also been made compulsory.

130. The answer to be given to the third question must therefore be that Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession.

Costs

131. The costs incurred by the Netherlands, Greek and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Court's ruling

The Court hereby rules:

1. Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

2. A pension fund, such as that in question in the main proceedings, which itself determines the amount of the contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of Articles 85 of the Treaty and 86 and 90 of the EC Treaty (now Articles 82 and 86).

3. Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession. ■

Stop Press: The Commission has imposed a fine of €43m on Opel Motors for sales restrictions. A Full report will appear in the October issue.