COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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CONTENTS

Music and Competition

One of the themes of the solemnly named "European Competition Day", held on 11th June in Stockholm, was the potential impact of the Competition Rules on the provision of music, whether in discs or on the Internet. (The occasion, whose aim was to emphasise the effect of competition policy on wider choice, better prices and service levels for the benefit of consumers, was arranged jointly by the Swedish Government, which at present holds the presidency of the European Union, and the Commission of the European Communities.)

Speaking for the Commission, Mr Mario Monti drew attention to the investigation into prices for Compact Discs, with the aim of verifying whether manufacturers were trying to impose retail price maintenance upon shops. Although the case had not yet been concluded, Mr Monti indicated that a few suspect practices had already ceased. Another area in which the Commission was giving particular attention to the concerns of individual consumers was that of Digital Video Disc pricing. As a result of complaints received about the effects of the regional coding system for DVDs, the Commission had initiated contacts with the major film production companies. It was important in the Commission's view that, if the complaints were confirmed on the facts, a system should not be permitted which provided greater protection than the actual intellectual property rights themselves.

As for online services, the Commission services are looking into Duet and MusicNet online music joint ventures involving, respectively, two and three of the five major music companies worldwide. According to Mr Monti, these are important cases for the development of music services offered online to consumers. He stressed the importance of allowing consumers to choose between competing service providers and gave as an example the undertakings imposed by the Commission in the AOL / Time Warner case last year. In that case, the undertakings were aimed at separating Bertelsmann from the merged company, ensuring that Bertelsmann's content could not be combined with that of Time Warner to give AOL a dominant position.

In three respects, the Commission is undoubtedly right to pursue these investigations. First, there is on the face of it plenty of evidence that European consumers in particular are being overcharged for music on disc. Second, unless consumers see a more realistic pricing policy adopted by the providers of music, there will be a backlash against the providers' excessive reliance on intellectual property rights. Third, the combination of music providers and large internet service providers, though not fully covered by existing competition rules, presents considerable dangers to consumers.

PRICING POLICY (MOTOR VEHICLES): THE VW CASE

Subject: Pricing policy
Fines
Block exemption

Industry: Motor vehicles
(Some implications for other industries)

Parties: Volkswagen AG

Source: Commission Statement IP/01/760, dated 30 May 2001

(Note. The vocabulary of anti-trust law now includes the expression "price discipline", which falls short of outright price fixing but can earn a substantial fine from the Commission. Having run up against the competition rules in Italy, Volkswagen has now been held to have infringed the rules in Germany. In the present case, VW had taken the view that the action of some dealers who reduced prices below the recommended retail price jeopardized the brand image of the models in question. But VW threatened sanctions against some of its dealers; and its actions were caught not only by the general prohibition of price-fixing in the EC Treaty itself, but also by the "black-list" provisions of the block exemption regulation on motor vehicle distribution. Even if the case had not concerned motor vehicles, it would have been caught by the corresponding provision of the block exemption regulation on vertical restraints.)

The Commission has decided to impose a fine of €30.96m on Volkswagen AG, the biggest German, and European, car manufacturer, for having instructed its German Volkswagen dealers in 1996 and 1997 to show "price discipline" and not to sell the new Passat at prices considerably below the recommended retail price. This is the second Commission decision against Volkswagen, and follows that taken in January 1998. (The 1998 decision found that Volkswagen and its Italian importer had obstructed re-exports of Volkswagen and Audi cars from Italy into other Member states, in particular Germany and Austria. This decision has been largely confirmed by the European Court of First Instance, in its judgment of 6 July 2000; the fine of €102m, reduced to €90m by the Court, is one of the highest ever imposed on a single company.)

Measures taken to limit discounts aim at fixing retail prices and represent a so-called "hard core" restriction of competition: they infringe Article 81(1) of the EC Treaty, which prohibits price fixing measures, and are incompatible with the block exemption regulation applicable to motor vehicle distribution. (Measures of price fixing also figure as a hard core restriction of competition in Article 4(a) of the new general block exemption regulation on vertical restraints (Commission Regulation EC/2790/1999 of 22 December 1999), which applies to all distribution agreements except for distribution agreements concerning motor vehicles to which Regulation EC/1475/95 applies.)

Price comparisons over the last few years have shown that in Germany, new car prices before taxes for models of the Volkswagen brand are substantially higher than in all other Member States except the United Kingdom. (See, for example, the Commission's most recent Report on Car Prices within the European Union.) "Today's decision is once again a clear signal that competition policy serves consumers' interests. It is the first decision regarding resale price maintenance and confirms, in the area of vertical restraints, the Commission's strict policy on price fixing practices," said Competition Commissioner Mario Monti. "Unfortunately this case is also a further example of non-respect of the Block Exemption Regulation. The measures adopted by Volkswagen represent a clear restriction of dealers' freedom to set their own prices, and were aimed at changing their commercial behaviour to the detriment not only of German consumers, but also of those from other Member States. The measures, which aimed at maintaining prices at an artificially high level in a market where new car prices are already among the highest in Europe, constitute by their nature a very serious infringement of European competition rules and must be met with an appropriate sanction". The Commissioner added that the protection of the dealers' freedom to set their prices was one important element of the current motor vehicle block exemption, which would expire next year. In this regard he mentioned that the Commission intended to publish its ideas on the future regime before the end of the year 2001.

This particular case against Volkswagen is based on documents that the Commission received together with a letter of complaint from a consumer and as part of replies from Volkswagen to formal requests for information. These documents show that in 1996 and 1997, Volkswagen sent several circular letters to its German Volkswagen dealer network, urging the dealers not to sell the new VW Passat a prices considerably below the recommended resale price and/or to limit or not to grant discounts to customers. This model was launched on the German market in October 1996 (limousine version) and in June 1997 (estate version). Volkswagen also sent a number of individual letters to certain dealers, who were warned to obey price discipline for this new model, and threatened with legal consequences, such as the termination of their dealer contract, should they disobey these instructions.

Before sending these letters, Volkswagen had become aware of the fact that a number of German dealers had offered this new model for sale at prices below the recommended retail price. Volkswagen sought to justify the measures it took by claiming that they were needed both to support its dealers' profitability and to preserve the brand image of the new model, which in Volkswagen's view would be damaged through certain dealers' pricing policy.

Price-fixing measures are incompatible with Article 81(1)(a) of the EC Treaty, and are "black listed" in Article 6(1)(6) of Regulation 1475/95, the block exemption regulation applicable to motor vehicle distribution and servicing, which provides that the exemption shall not apply where "the manufacturer, ... directly or indirectly restricts the dealer's freedom to determine prices and discounts in reselling contract goods". The Regulation asserts the right of

European consumers to obtain competitive prices from dealers, including appropriate discounts. The measures adopted by Volkswagen, and applied for almost three years, were liable to maintain or to reinforce an artificially high price zone for the new VW Passat model in Germany. During this time, consumers would have had to pay higher prices for the Volkswagen Passat, a model with German sales of about 400,000 units during the three years in question. The measures were also liable to dampen private exports from and to increase private imports into Germany.

The object of Volkswagen's measures was to fix resale prices and thus to eliminate an essential element of competition for dealers: the ability to sell new cars at discounted prices. As car dealers normally grant discounts to customers with the sale of new cars, Volkswagen's instructions can be seen as an effort to eliminate or restrict price competition by compelling the dealers to deviate from their normal commercial behaviour. The measures in question, which concerned all German Volkswagen dealers, not only aimed to restrict intra-brand competition between German Volkswagen dealers, but also between Volkswagen dealers in Germany and Volkswagen dealers abroad. Leaving the quality of service aside, the ability to set their own resale prices is the most important tool available to dealers for competing with other dealers. Such measures represent a severe interference with competition and are therefore by their nature a very serious infringement of competition rules. The VW Passat is a popular model in Germany, especially when compared with other models in the same segment of the market. All these considerations support the conclusion that the measures adopted by Volkswagen led to an appreciable restriction of price competition.

In determining the level of the fine, the Commission took account of the fact that the infringement concerned one model (in two versions) from Volkswagen's entire product range. This model has, however, a large share of vehicle sales within a segment for which demand in Germany is strong. The circular letters were addressed to the whole German VW dealer network and thus concerned all sales of the VW Passat in Germany. As regards the geographic scope of the infringement, the Commission considers that its main impact was on one Member State (Germany), which accounts for a large share of all car sales in the EU. It would also be likely to have had an effect on consumers from other Member States.

In the light of all these considerations, and for the purpose of determining the fine, the Commission considered the infringement "serious". Moreover, as an aggravating circumstance, the Commission took into account among other things that Volkswagen had requested its dealers in the first circular letter to send to it copies of all advertisements of other Volkswagen dealers "without price discipline". ■

The Court cases reported in this issue are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.

REBATES (POSTAL SERVICES): THE BELGIAN POST OFFICE CASE

Subject: Abuse of dominant position
Rebates
Monopoly
Tying

Industry: Postal services
(Some implications for most industries)

Parties: La Poste (Belgium)
Hays Management Services SA (complainant)

Source: Commission Statement IP/01/791, dated 6 June 2001

(Note. If the complainant in this case is correct, the Belgian Post Office is fighting a rearguard action, before the threatened liberalization of postal services takes place in the next two or three years, to drive out competitors while it still enjoys a statutory monopoly. The main weapon it is using is the special rebate, never popular with the Commission, combined with a certain pressure on customers to sign up for an additional service. In the light of Article 82(d) of the EC Treaty, it will be interesting to see whether the Post Office argues that the supplementary obligations which it is seeking to impose do "have a connection with the original contracts".)

Commission's Statement of Objections

The Commission has addressed a Statement of Objections to the incumbent Belgian postal operator, La Poste. According to the Commission's preliminary investigation, La Poste granted rebates on its traditional mail service - where it has a statutory monopoly - to customers who have agreed in addition to subscribe to a new business mail service which it launched at the beginning of 2000. This new service competes with the document exchange service offered by the complainant in the case, Hays Management Services SA. Due to the attractive rebates offered by La Poste with respect to letter mail in the monopoly, many clients opted for the business mail service provided by La Poste and abandoned Hays. If the current trend is not reversed, Hays expects to be forced out of the Belgian market by the end of the year 2001.

Business mail services offer a series of features complying with the special needs of business customers, such as a special delivery before business hours and a special pick-up after business hours. These characteristics are limited to the mail items they exchange among themselves as part of their professional activities. As opposed to the general letter mail service that is protected by the postal monopoly, business mail services are not destined to the public at large but to other subscribers of the service. These subscribers form a so-called closed user group.

According to the Commission, if the progressive liberalisation of postal services is to become a success, incumbent operators enjoying a statutory monopoly must not be allowed to extend their dominance to new services by abusing their unique market position, in this case, the use of discounts in the monopoly area by La Poste as a means to attract clients to other services endangers the viability of competition in those areas which are open to alternative operators.

The formal complaint

On 7 April 2000, Hays lodged a complaint with the Commission against La Poste. Since 1982, Hays has been the only alternative provider of a business letter mail infrastructure in Belgium (the document exchange or DX service). Hays is the Belgian subsidiary of Hays plc., a United Kingdom based provider of express courier, documents exchange and parcel delivery services. Documents can also be sent from Belgium to Hays' document exchanges located in the United Kingdom, Ireland and France. In its complaint, Hays alleges that La Poste, anticipating a further liberalisation of postal services in Belgium, has now embarked on a plan of driving Hays out of the Belgian market. In this respect, Hays alleges that La Poste offers a new business letter mail service for insurance companies and insurance brokers, which is closely modelled on the existing Hays DX service. In order to induce Hays' customers to subscribe to this service, La Poste allegedly offers a substantial rebate on the general letter mail which is protected by its statutory monopoly to all subscribers of its new business mail service.

The Commision's investigation has revealed that the new business mail service of La Poste and the Hays DX service form part of the same relevant market and compete directly with each other. They are both business mail services supplied to a closed user group comprising, in the case at issue, insurance companies and insurance brokers in Belgium.

During the course of the investigation, the following facts emerged. After Hays' customers in the insurance sector indicated that they were not interested in the new business mail service offered by La Poste, within days, the latter unilaterally terminated the preferential tariffs that these customers enjoyed previously when sending their general letter mail. Second, in the ensuing negotiations launched by the insurance companies in order to regain the preferential tariff, La Poste made it clear that the preferential tariff was linked to a subscription to the new business mail service. Third, in their negotiations with the insurance brokers, La Poste also stated that any tariff preference for the general letter mail protected by the monopoly was linked to a subscription to the new business mail service.

The policy of La Poste described above makes the granting of a preferential tariff on the general letter mail product covered by the statutory monopoly subject to the acceptance by the insurance companies and brokers of a supplementary contract covering the new business mail service. Such a policy contravenes Article 82(d) of the EC Treaty, which prohibits the tying of two distinct services. ■

PROCEDURE (ALL INDUSTRIES): COMMISSION STATEMENT

Subject: Procedure
Hearing Officer

Industry: All industries

Source: Commission Statement IP/01/736, dated 23 May 2001

(Note. Although the proposed changes in the role of the Hearing Officer are generally welcome, it is still the case that the Hearing Officer is an official of the Commission. But, instead of being attached to the Director-General for Competition, he will be attached to the Commissioner. Other changes include greater transparency of the Hearing Officer's contribution to the final Decision reached by the Commission; and slightly greater increases in the scope and independence of his authority.)

The Commission has decided to take action to enhance the role of the Hearing Officer in its merger reviews and anti-trust proceedings. The Hearing Officer plays an important role in safeguarding the right of defence, a key principle of law to which the Commission is fully committed. From now on, the Hearing Officer will be attached directly to the Competition Commissioner and his or her report will be made available to the parties and will be published in the European Union's Official Journal, greatly contributing to a better transparency in the competition decision-making process.

"This new Mandate of the Hearing Officer will substantially improve the overall accountability of the Commission's decision-making process in merger and anti-trust proceedings, ensuring that all fundamental rights of parties and economic operators involved in its procedures are respected," Competition Commissioner Mario Monti said. "This also delivers on my promise, shortly after I was appointed, to enhance the role of the Hearing Officer as a guardian of basic procedural rights, such as the right to be heard or to have access to the files of the Commission."

The right to be heard is an established principle of European Community law. The principle has most recently been restated in the EU Charter of Fundamental Rights, as part of the right of every person "to have his or her affairs handled impartially, fairly and within a reasonable time". Safeguarding that right during the Commission's competition procedures is a special responsibility of the Hearing Officer.

The position of Hearing Officer was created in 1982. His initial responsibility was limited to the organisation, chairmanship and conduct of the oral hearing in antitrust proceedings and later on also in merger proceedings. Subsequently, this remit was updated and widened in 1994 to ensure adequate protection for the

rights of parties, with particular regard to confidentiality of documents and business secrets and adequate access to the case files of the Commission.

Main aspects of the reform

Position and appointment of the Hearing Officer

The Hearing Officer will no longer belong to the Directorate General for Competition, but will be directly attached to the office of the Commissioner in charge of competition policy to reinforce his independence. All Commission decisions on the appointment, termination of appointment or transfer of Hearing Officers will be published in the Official Journal of the European Communities. The new Mandate explicitly refers to the possibility that, in line with the staff regulations, the position of Hearing Officer should be filled by suitably qualified candidates from outside the Commission.

Procedural rights of the Hearing Officer

The main instrument with which the Hearing Officer exercises influence on a proceeding is his report on the draft Decision. Previously this document was not made available to the undertakings, nor published, nor systematically submitted to the College of Commissioners. From now on, the final report on the respect of the procedural rights of the parties will:

be communicated to the Member States,
be attached systematically to the draft Commission decision submitted to the College and
be disclosed to the parties and published together with the final decision.

This will give greater visibility and more weight to the Hearing Officer, reinforcing the protection of the legitimate interest of the parties in the fair conduct of the proceedings as well as greatly enhancing the transparency of the Commission's procedure.

Tasks of the Hearing Officer

Changes in the Hearing Officer's tasks include: involvement of the Hearing Officer in monitoring the market test phase of the procedure; specifying the Hearing Officer's powers with regard to granting or denying confidentiality when the Commission is disclosing information by publication in the Official Journal; and emphasizing more strongly the general function of the Hearing Officer as an independent guarantor of the fundamental procedural rights of all parties.

This new Mandate of the Hearing Officers follows the Commission's decision last year to upgrade this function. It aims to reinforce the independence and authority of the Hearing Officer and to enhance the objectivity and quality of the Commission's competition proceedings and the resulting decisions.

The Commission will soon launch a procedure to appoint two new Hearing Officers to deal with an increased workload in the merger and antitrust areas. ■

STATE AIDS (BANKS): COMMISSION COMMUNICATION

Subject: State aids

Industry: Banks; credit and other financial institutions

Source: Commission Statement IP/01/739, dated 23 May 2001

(Note. Essentially, what the Commission is seeking to achieve in this Communication is the adaptation of the state aid rules, designed to meet what the Commissioner describes as the more sophisticated ways in which Member States are introducing measures to boost their risk capital markets. The state aid rules need to accommodate this trend, without lowering the Commission's guard against the distortions which inappropriate measures can cause. In the early 1990s, the European Community's record in the field of state aids to financial institutions was not a happy one; if the Commission's new policy is successful, its record in the next decade may well be to its credit.)

The Commission has adopted a Communication on state aid and risk capital, which sets out how the Commission will assess, under the state aid rules, measures designed to promote the growth of risk capital markets. An increase in risk capital is an objective which the European Union has been pursuing particularly strongly since the Lisbon European Council in March 2000. The Commission has recognised that public funds may play a part in achieving this. At the same time, it wants to maintain a careful control on state aid within the European Union and has found that existing state aid rules are not well adapted to the types of measures which have been developed by Member States' authorities to stimulate an increase in risk capital activity.

The document is a response to the request by Finance Ministers of the European Union, made in September 2000 in Versailles, for clarification of the approach to the assessment of risk capital measures under the state aid rules. The request was made in the light of the experience both of the Commission and of the Member States with certain such measures which clearly constituted state aid and could not be found compatible with existing state aid rules. Existing rules generally insist that state aid should be linked to certain specific types of expenditure (fixed investments, research and development, training and the like, known as eligible costs), whereas risk capital is often aimed simply at providing working capital for new and growing businesses. A further problem was that measures were being designed not to provide funding directly, but rather to provide incentives to potential investors to do so. Such measures were not compatible with the existing rules.

The document makes clear that Governments can take many measures to promote risk capital which have no state aid impact. Indeed, the Commission makes it clear that the philosophy underlying the strategy for developing the risk capital market in the European Union attributes primary importance to the

creation of an environment favourable to creating and sustaining new and innovative businesses, through structural and horizontal measures. However, the Commission has also recognised a role for public funding of risk capital measures limited to addressing identifiable market failures. Even this may not constitute state aid if public capital is provided on terms which would be acceptable to a private investor operating under normal market economy conditions.

Where public intervention does constitute state aid, the Commission will now be prepared to apply different criteria from the link to eligible costs when assessing that intervention under the state aid rules. In line with its previously stated position quoted above, it will insist that the measure is addressing an identified market failure. This condition will be assumed to be met at lower transaction levels (€500,000, rising to €750,000 or €1,000,000 in regions eligible for regional aid under Articles 87(3)(c) and (a) respectively of the EC Treaty).

If the market failure condition is met, the Commission will assess the measure against certain criteria, notably: the size of the enterprises targeted by the measure (with a preference for small, start-up and early stage enterprises); the existence of safeguards to reduce distortion of competition between investors; and the nature of the investment decisions, which should be profit-driven (that could be shown to be the case in particular where the measure includes the contribution of significant amounts of capital provided by market investors). ■

The Intel Case

What the Commission sees as misleading press reports have prompted the Commission's spokesman for competition matters to confirm that it had asked the United States company Intel Corporation to react to allegations that it had abused its dominant position in the market for Windows-capable microprocessors by engaging in abusive marketing practices.

The Commission is examining two different complaints against Intel. It is not taking up previous efforts by the US Federal Trade Commission to investigate the same company, as suggested by a newspaper article.

The Commission is already examining Intel's replies. It has also sent request for information to several personal computer manufacturers and retailers. The investigation is at a very early stage and, and the Commission has not made any finding that Intel has actually committed an infringement of European Union competition law.

(Source: Commission Memorandum 01/129 dated 6th April, 2001.)

STATE AIDS (BROADCASTING): THE SIC CASE

Subject: State aids
Complaints

Industry: Broadcasting

Parties: SIC - Sociedade Independente de Comunicação SA
Commission of the European Communities
RTP - Radiotelevisão Portuguesa SA (intervener)
Portuguese Republic (intervener)
United Kingdom (intervener)

Source: Judgment of the Court of First Instance, dated 10 May 2000 in Case T-46/97 (SIC - Sociedade Independente de Comunicação SA v Commission of the European Communities)

(Note. This was an application for the annulment of (i) the Commission's decision of 7 November 1996 concerning a proceeding under Article 93 of the EC Treaty (now Article 88 EC) on the financing of public television channels, notified to the applicant on 6 January 1997, and (ii) the decision allegedly contained in a letter from the Commission of 20 December 1996 concerning the complaint by the applicant against RTP - Radiotelevisão Portuguesa SA. The application was largely successful; and the main interest of the case lies in the manner in which the Court interpreted the rules, both of substance and of procedure, on the award of state aids, particularly in the paragraphs of the judgment set out below.)

1. RTP - Radiotelevisão Portuguesa SA, which was formerly a public corporation, has since 1992, the date on which the Portuguese State audiovisual monopoly ended, been a limited liability company with public capital. RTP is the holder of the concession for the Portuguese public television service, and operates Channels 1 and 2 and the Portuguese-language channel RTP Internacional. Whilst private Portuguese television channels are financed exclusively by advertising revenues, RTP receives in addition to such revenues public financing granted annually in connection with its public service obligations, amounting from 1992 to 1995 to between 15% and 18% of its total annual resources.

2. SIC - Sociedade Independente de Communicação SA is a commercial television company incorporated under Portuguese law, which has been running one of the main private television channels in Portugal since October 1992.

3. On 30 July 1993, SIC referred a complaint to the Commission ('the first complaint) concerning the methods by which RTP's channels were financed and seeking a declaration, first, that a series of measures taken by the Portuguese Republic in favour of RTP was incompatible with the common market within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

and secondly, that there had been an infringement of Article 93(3) of the EC Treaty (now Article 88(3) EC) for failure to give prior notification of the measures complained of ...

70. In the context of Article 93 of the Treaty, a distinction must be drawn between, on the one hand, the preliminary stage of the procedure for reviewing aid under Article 93(3), which is intended merely to allow the Commission to form a prima facie opinion on the character of the measure in question as State aid and the partial or complete conformity of the aid in question with the common market, and, on the other hand, the formal stage of the examination under Article 93(2). It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see, *inter alia*, Case C-198/91, *Cook v Commission*, paragraph 22; Case C-225/91, *Matra v Commission*, paragraph 16).

71. It is settled case-law that the procedure under Article 93(2) is essential whenever the Commission has serious difficulty in determining whether aid is compatible with the common market. It follows that when the Commission gives a favourable decision on aid it may restrict itself to the preliminary examination under Article 93(3) only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the common market, it is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 93(2) (*Sytraval and Brink's France*, paragraph 39, and the case-law cited therein).

72. It also follows from that case-law that the Commission is required to initiate the procedure provided for in Article 93(2) of the Treaty if an initial examination does not enable it to resolve all the difficulties raised by the question whether a State measure submitted to it for review constitutes aid for the purposes of Article 92(1) of the Treaty, unless, in the course of that initial examination, the Commission is able to satisfy itself that the measure at issue is in any event compatible with the common market, even if it is aid (Case T-11/95, *BP Chemicals v Commission*, paragraph 166).

73. In this case, it is undisputed that the Commission adopted the Decision without initiating the procedure laid down by Article 93(2) of the Treaty and took the view that the six categories of measure submitted for its assessment did not constitute aid within the meaning of Article 92(1) of the Treaty. It should also be noted that the Commission did not consider whether those measures, if they were to be classified as aid, would be compatible with the common market either under Article 92(2) or (3) of the Treaty, or under Article 90(2) of the Treaty.

74. It is therefore necessary to see whether, in so far as they concern the four categories of measure concerned in this action, the assessments on which the Commission relied in order to adopt a decision favourable to those measures at

the conclusion of the preliminary examination stage were sufficiently complex to justify initiating the procedure under Article 93(2) of the Treaty.

75. As regards, first, the grants paid by the Portuguese State to RTP by way of compensation, the Commission found in the Decision that they did not constitute aid within the meaning of Article 92(1) of the Treaty because they were intended to offset the actual cost of meeting the public service obligations assumed by RTP. It should be remembered in particular that, with regard to the compensation paid from 1993 to 1995, the Commission took the view that 'the financial advantage resulting [from those] transfers did not exceed what was strictly necessary in order to meet the public service obligations required by the terms of the concession (see paragraph 22 above). In respect of 1992, the Commission also relied on the absence of over-compensation, such absence being deduced from the small amount of the compensation paid to RTP that year, in concluding that the compensation did not constitute aid.

76. Article 92(1) of the Treaty provides that save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

77. The Court has consistently held that the aim of that provision is to prevent trade between Member States being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, paragraph 12; *SFEI*, paragraph 58).

78. In order to determine whether a State measure constitutes aid, therefore, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (*SFEI*,paragraph 60; Case C-342/96, *Spain v Commission*, paragraph 41; Case C-256/97, *DM Transport*, paragraph 22).

79. In this case, as the Commission itself stated in the Decision, the grants paid each year to RTP by way of compensation have the result of giving that undertaking a financial advantage.

80. The Decision also indicates that the grants paid to RTP between 1992 and 1995 represented between 15% and 18% of its annual resources, while at the same time RTP also enjoyed advertising revenue like other television channels with which it is in direct competition in the advertising market.

81. Therefore, in so far as the Commission found in the Decision that RTP enjoyed a financial advantage as a result of the grants in question, which appear to be capable of distorting existing competition with other television operators, the validity of its assessment that those measures did not constitute State aid was, at the least, capable of raising serious difficulties.

82. The fact that, according to the Decision, the grants were merely intended to offset the additional cost of the public service tasks assumed by RTP cannot prevent them from being classified as aid within the meaning of Article 92 of the Treaty.

83. Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case C-56/93, *Belgium v Commission*, paragraph 79; Case C-241/94, *France v Commission*, paragraph 20). It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94, *Ladbroke Racing v Commission*, paragraph 52).

84. As the case-law shows, the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article 92(1) of the Treaty, although that aspect may be taken into account when considering whether the aid in question is compatible with the common market under Article 90(2) of the Treaty (*FFSA*, paragraphs 178 and 199, confirmed by the order in Case C-174/97 P, *FFSA v Commission*, paragraph 33). It should be noted that, in this case, unlike the *FFSA* case, the Commission did not apply the derogation allowed for by Article 90(2) of the Treaty in its Decision, nor, a fortiori, did it apply the specific conditions laid down by that provision, which, moreover, it does not claim to have done.

85. It follows that the assessment on which the Commission relied in concluding that the grants to RTP by way of compensation did not constitute aid presented serious difficulties which, to the extent that the compatibility of those grants with the common market was not established, required the initiation of the procedure under Article 93(2) of the Treaty. ■

The Plasterboard Cartel Case

Since the autumn of 1998 the Commission has been investigating the existence of a possible price-fixing cartel in the market of plasterboard (a plaster product used in the construction industry). Following a thorough investigation that included inspections at the premises of several plasterboard producers in the course of 1998 and 1999, the Commission recently sent a Statement of Objections to five companies. The Commission will not yet reveal the identity of the companies concerned. It is for them to decide whether or not to do so.

(Source: Commission Memorandum 01/149, dated 23 April 2001.)

STATE AIDS (AGRICULTURE): THE AGRANA CASE

Subject: State aids
Time-limits
Procedure

Industry: Agricultural products
Implications for all industries

Parties: Agrana Zucker & Staerke AG
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 7 June 2001, in Case T-187/99 (Agrana Zucker und Stärke-GmbH v Commission of the European Communities)

(This was an action for annulment of a Commission Decision on State aid. The short point of general interest concerned the time-limit for investigation by the Commission, with particular reference to the "Lorenz" rule. Under this rule, the Commission is required to act with reasonable dispatch: if it has not done so within two months, and if due notice is sent to the Commission, the aid may go ahead. In the present case, the Austrian Government planned to grant aid to Agrana Stärke-GmbH to build and convert starch production facilities. However, the second condition under the Lorenz rule, that due notice must be given to the Commission, had not been met. The excerpt from the judgment, in the report below, is confined to the Court's discussion of the rule.)

The applicant's plea

30. The applicant observes that, according to settled case-law, the Commission is required to act promptly during the first stage of the procedure relating to State aids and to take into account the interest of Member States to be informed quickly whether the planned measures can be implemented (see Case 120/73 *Lorenz*. If it fails to adopt a position within a period of two months ('the Lorenz time-limit) the Commission is not acting as promptly as it is required to do. Once that time-limit has expired the Member State concerned can implement the plan. The applicant argues that the Commission did not observe the time-limit in this case.

31. It points out that it was only by a letter of 18 August 1997, delivered to the Republic of Austria's Permanent Representation to the European Communities on 19 August 1997, that is to say, two months and three days after the final information was supplied, that the examination procedure provided for in Article 88(2) EC was initiated. The Lorenz time-limit was therefore not observed. Consequently, the prohibition on implementing the aid plan, contained in Article 88(3) EC, no longer applied and the provision in the contested decision to the effect that the aid plan cannot therefore be implemented was incorrect. The contested decision should therefore be declared void.

32. The applicant agrees that the Austrian Government was informed by fax of 30 July 1997 that the Commission had decided to initiate the procedure under Article 88(2) EC, that is to say, within the two-month time-limit. However, the applicant contends that that communication did not constitute a decision suspending the Lorenz time-limit. The Commission's decision to initiate the procedure concerned should have taken the form of a decision under Article 249 EC, which should therefore have stated the reasons on which it was based. However, according to the applicant, the fax concerned did not contain any reasons and so it did not enable the Austrian Government to assess the scope of the decision and to submit its observations.

33. The applicant also acknowledges that the Republic of Austria did not give any notice that the two-month time-limit had expired, as provided for in *Lorenz*. However, in the applicant's submission, since notice is only required in order to ensure that the aid plan is implemented in the manner described in the notification, failure to give notice does not preclude the aid from being regarded as existing aid.

34. Lastly it states that it follows from the preceding considerations that the Commission was entitled to consider the contested aid only in accordance with the provisions relating to existing aid.

35. The Commission challenges the contention that it failed to observe the Lorenz time-limit in this case. It argues, in particular, that the applicant is wrong to state that the procedure under Article 88(2) EC must be initiated by a reasoned decision under Article 249 EC. The Commission observed the time-limit by communicating to the Austrian Government its decision to initiate the procedure by fax of 30 July 1997. In any event, since no notice was given when the two-month time-limit had expired, an essential condition for the application of the *Lorenz* case-law was missing and so the aid in question did not in any case constitute existing aid for the purposes of Article 88(1) EC.

Findings of the Court

36. The first point to be noted is that Article 88 EC provides for a procedure for prior examination of new aid which Member States intend to introduce, in the absence of which the aid is regarded as having been introduced unlawfully. Under the first sentence of Article 88(3) EC, as interpreted by the case-law of the Court of Justice, the Commission must be informed of any plans to grant or alter aid before they are put into effect. The Commission is then to carry out an initial examination of the proposed aid. If there are serious doubts following such examination as to whether a plan is compatible with the common market, the Commission must without delay initiate the procedure provided for in the first subparagraph of Article 88(2) EC.

37. It is clear, moreover, from the last sentence of Article 88(3) EC that the Member State concerned must not put the planned aid into effect at any time during the preliminary period. Where the examination procedure provided for in

Article 88(2) EC is initiated, the prohibition continues until the Commission reaches a decision on the compatibility of the aid plan with the common market. However, according to settled case-law, if the Commission has not responded within two months of full notification the Member State concerned may put the proposed aid into effect provided that it has given prior notice to the Commission, and that aid will then come under the scheme for existing aid (see *Lorenz*, paragraph 6, Case C-312/90, *Spain* v *Commission*, paragraph 18; Case C-39/94, *SFEI and Others*, paragraph 38; and Case C-367/95 P, *Commission* v *Sytraval and Brink's France*, paragraph 37).

38. In this particular case, it should be pointed out that the applicant does not dispute that the Republic of Austria was informed, within the two-month time-limit, in afax sent by the Commission on 30 July 1997, of the Commission's decision to initiate the *inter partes* procedure provided for in Article 88(2) EC. Since the Commission duly 'responded within the appropriate time-limit, that fax was sufficient to stop the Lorenz time-limit from running.

39. In any event, it is undisputed in this case that the Republic of Austria failed to give the Commission notice of its intention to put the planned aid into effect. Contrary to what the applicant contends, the function of such notice is not merely to ensure that the aid plan is implemented in the manner described in the notification; it is designed to meet the requirements of legal certainty (see *Lorenz*, paragraph 4). Compliance with that obligation is designed to establish, in the interest of the parties concerned and of the national courts, the date from which the aid falls under the scheme for existing aid. Since that obligation has not been met the aid concerned cannot be regarded as existing aid.

40. It follows from the foregoing considerations that the plea must be rejected. ■

The TGI Case

The Commission has declared State aid, which had not been notified, to be incompatible with the common market in a case in which €2,045,000 had been paid to Technische Glaswerke Ilmenau GmbH (TGI), of Thüringen, Germany. The German Government must recover the unlawful payment. TGI was founded in 1994 for the purpose of taking over four of the twelve production lines of the former Ilmenauer Glaswerke GmbH, a company liquidated in 1994. The purchase price amounted to €2,991,000. In December 1998 Germany informed the Commission of the waiver of €2,045,000 of the original purchase price in the context of a restructuring of the company. The Commission had doubts about the viability of the company and the proportionality of the aid. Germany took the position that the waiver was in line with the behaviour of a private creditor seeking to maximise the payment of the purchase price, as insistance on the payment of the full price would probably have driven the company into bankruptcy. The Commission disagreed. The conditions set out in the Community guidelines on rescuing and restructuring firms in difficulties had not been fulfilled. (Source: Commission Statement IP/01/786, dated 6 June, 2001.)

COMPLAINTS (POSTAL SERVICES): THE IEEC CASE

Subject: Complaints
Procedure

Industry: Postal services; remail
Implications for most industries

Parties: International Express Carriers Conference (IECC)
Commission of the European Communities
La Poste (intervener)
United Kingdom (intervener)
The Post Office (intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 17 May 2001, in Case C-449/98 P (*International Express Carriers Conference (IECC) v Commission of the European Communities*)

(Note. In view of the continued importance of the complaints procedure under the EC Rules on Competition, any case shedding light on the legal aspects of formal complaints is also likely to be important. The present case is useful in parts, which have been carefully selected for the purposes of the report below. It is one of those cases in which the appellants have submitted a multitude of pleas, perhaps in the hope that, even if only one of them succeeds, the Commission's contested Decision may be annulled. There were nine pleas, several with a number of "limbs": they are of unequal importance. The Court dismissed most of them fairly perfunctorily. The remaining pleas, though unsuccessful, were discussed by the Court in some detail and contain a warning to future complainants about some of the hazards of basing a case on a misreading of the earlier case-law. This is particularly true of the criteria for assessment of the Community interest laid down in the Automec case: see paragraph 44 below. The scheme of the report below is as follows:

Paragraphs 1 to 10:	*Background and Facts*
Paragraph 25:	*The Appellants' nine Pleas in Law*
Paragraphs 30 to 41:	*The 1st Limb of the 2nd Plea (Community interest)*
Paragraphs 44 to 54:	*The 3rd and 4th Limbs (Commission discretion)*
Paragraphs 73 to 77:	*The 6th Plea (discrimination)*
Paragraphs 85 to 98:	*The 9th Plea (retrospective assessment)*

Background

1. By application lodged at the Court Registry on 8 December 1998, International Express Carriers Conference (the IECC) brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Case T-110/95, *IECC* v *Commission* (the contested judgment), whereby the Court of First Instance dismissed as unfounded the IECC's

application for annulment of the Commission Decision of 17 February 1995 rejecting its complaint in respect of the application of Article 85 of the EC Treaty (now Article 81 EC) to the CEPT Agreement (the contested decision).

Facts of the case

2. The IECC is an organisation representing the interests of certain undertakings which provide express mail services. Its members, who are private operators, offer, *inter alia*, remail services, consisting in the transportation of mail originating in Country A to the territory of Country B to be placed there with the local public postal operator (public postal operator) for final transmission by the latter on its own territory ('ABB remail) or to Country A (ABA remail) or Country C (ABC remail).

3. Remail allows large-scale senders of cross-border mail to select the national postal administration or administrations which offer the best service at the best price for the distribution of cross-border mail. It follows that, by using private operators, remail causes the public postal operators to compete for the distribution of international mail.

4. On 13 July 1988, the IECC lodged a complaint with the Commission under Article 3(2) of Council Regulation 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty).

5. The complaint consisted of two parts based, first, on Article 85 of the EC Treaty and, second, on Article 86 of the Treaty (now Article 82 EC). In the first part of the complaint, the only part relevant to the present appeal, the IECC alleged that a number of public postal operators established in the European Community and in non-member countries, meeting in Berne in October 1987, had concluded a price-fixing agreement in regard to terminal dues, called 'the CEPT Agreement.

6. The IECC stated, more specifically, that in April 1987 a large number of public postal operators in the Community had, during a meeting held in the United Kingdom, considered whether a common policy ought to be adopted to face the challenge of competition from private companies offering remail services. A working party established within the European Conference of Postal and Telecommunications Administrations had subsequently proposed, in substance, an increase in terminal dues, the adoption of a code of conduct and improvements in customer services. The IECC claimed that in October 1987 this working party had accordingly adopted a new terminal dues arrangement, the CEPT Agreement, which proposed a new fixed rate which was in fact higher than the previous rate but which did not reflect the differences in distribution costs borne by the receiving postal administrations.

7. The public postal operators parties to the CEPT Agreement agreed to increase the rates of terminal dues by 10% in 1991, 5% in 1992 and a further 5% in 1993. Following the last increase, the CEPT rate was established at 1.491 DTS (droits de tirage spéciaux - special sorting dues) per kilogramme and 0.147 DTS per item.

8. The CEPT agreement on terminal dues remained in force until 31 December 1995.

9. On 17 January 1995, 14 public postal operators, 12 of them from the European Community, signed a preliminary agreement on terminal dues designed to replace the 1987 CEPT Agreement. The new agreement, referred to as the REIMS Agreement (System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation) (the preliminary REIMS Agreement), essentially provides for a system whereby the receiving post office would charge the originating post office a fixed percentage of the former's domestic tariff for any post received. A definitive version of this agreement was signed on 13 December 1995 and notified to the Commission on 19 January 1996 for exemption under Article 85(3) of the Treaty. The agreement entered into force on 1 January 1996.

[Paragraphs 10 to 24 cover the procedure before the Commission and the contested decision]

The appellants' nine pleas in law

25. The IECC puts forward nine pleas in law in support of its appeal. The first plea alleges that certain findings made by the Court of First Instance were factually incorrect. By the second plea, which consists of four limbs, the IECC submits insubstance that the Court of First Instance erred in law in defining the legal concept of Community interest and in examining the lawfulness of the application of that concept by the Commission. The third plea alleges infringement of Article 85 of the Treaty, read in conjunction with Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 89 of the EC Treaty (now, after amendment, Article 85 EC) and Article 155 of the EC Treaty (now Article 211 EC). The fourth plea alleges breach of the principle that the lawfulness of a contested decision can be assessed only in the light of the elements of law and of fact in existence on the date of adoption of the decision. By the fifth plea, which consists of three limbs, the IECC criticises the inconsistency and inadequacy of the legal reasoning followed by the Court of First Instance, which is tantamount to a failure to state the full reasons for the contested judgment. The sixth plea alleges a breach of the general principle of non-discrimination. The seventh plea relies on a breach of the general principle of legal certainty. The eighth plea alleges a breach of the legal concept of misuse of powers. Last, by the ninth plea the IECC alleges that there has been an infringement of Article 62 of the Rules of Procedure.

[Paragraphs 26 to 29 cover the first plea]

The Community interest

30. By its second plea in law, which consists of four limbs, the IECC maintains that the Court of First Instance committed an error of law as regards the scope,

the definition and the application of Article 3 of Regulation 17 and the legal concept of Community interest.

31. In the first limb of this plea, the IECC maintains that the Court of First Instance erred in relying on Article 3 of Regulation 17 in order to justify the Commission's rejection of its complaint for lack of Community interest when the complaint had already been thoroughly examined.

32. The IECC submits, first, that, in accordance with Case T-24/90 *Automec* v *Commission*, it is with a view to determining whether or not it is necessary to investigate a complaint that the Commission may consider it appropriate to assess whether or not a Community interest exists. Article 3 of Regulation 17 does not deal with the Commission's obligations in relation to the investigation of a complaint. The Court of First Instance therefore erred in paragraph 49 of the contested judgment in relying on that provision in order to reject the IECC's argument based on the advanced state of the investigation.

33. Second, Article 3 of Regulation 17 does not confer on the Commission an unlimited discretion not to adopt a decision on whether or not there is an infringement of Article 85 or 86 of the Treaty. Having regard to the existence of a restriction on competition as manifest as a price-fixing agreement - in this case the CEPT Agreement -, the Commission had exclusive power to deal with the matter, the exercise of which could not involve the use of any discretion.

34. In that regard, it should be pointed out that, according to the actual wording of Article 3(1) of Regulation No 17, where the Commission finds that there is infringement of Article 85 or Article 86 of the Treaty, it 'may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

35. Admittedly, it is settled case-law that a complainant is entitled to have any uncertainty as to the outcome of his complaint dispelled by means of a Commission decision, which may be the subject-matter of an application for judicial review (Case C-282/95 P, *Guérin automobiles* v *Commission* (paragraph 36). However, Article 3 of Regulation 17 does not give a person making an application under that article the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement and does not oblige the Commission to continue the proceedings, whatever the circumstances, right up to the stage of a final decision (Case 125/78, *GEMA* v *Commission*, paragraph 18, and Case *Ufex and Others* v *Commission*, paragraph 87).

36. The Commission, entrusted by Article 89(1) of the Treaty with the task of ensuring application of the principles laid down in Articles 85 and 86, is responsible for defining and implementing the orientation of Community competition policy. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it (*Ufex and Others* v *Commission*, paragraphs 88 and 89).

37. The existence of that discretion does not depend on the more or less advanced stage of the investigation of a case. However, that element forms part of the circumstances of the case which the Commission is required to take into consideration when exercising its discretion.

38. In those circumstances, the Court of First Instance did not err in law when, in paragraph 49 of the contested judgment, it relied on Article 3 of Regulation No 17 in dismissing the plea that the Commission was not entitled to reject IECC's complaint on the ground of insufficient Community interest.

39. Nor did the Court of First Instance, in following such an interpretation, confer unlimited discretion on the Commission, as the IECC claims. In the contested judgment, the Court of First Instance properly drew attention to the existence and scope of the review of the legality of a decision rejecting a complaint which it must undertake.

40. As regards the IECC's argument that the Commission has no discretion in the matter and is required to take a final decision as to the existence or otherwise of an alleged infringement of Article 85 of the Treaty in a case such as the present, where there was a manifest restriction of competition following a price-fixing agreement, it is sufficient to observe, as the Advocate General has done in points 44 to 47 of his Opinion, that, contrary to what the IECC claims, the existence of such an agreement was not established by the Commission in the contested decision.

41. The first limb of the second plea in law is therefore unfounded.

[Paragraphs 42 and 43 cover the second limb of the second plea]

The Commission's discretion

44. By the third and fourth limbs of the second plea in law, which can be examined together, the IECC claims essentially that the Court of First Instance infringed the concept of Community interest in limiting its review of the Commission's assessment of the Community interest to a single, and not entirely clear, criterion, relating to the amendment in a manner conducive to the general interest of the anti-competitive conduct of the undertakings to which the complaint was addressed, instead of verifying the criteria for assessment of the Community interest set out in paragraph 86 of *Automec* v *Commission*, cited above, and referred to by the Court of First Instance itself in paragraph 51 of the contested judgment. The Court of First Instance also failed to fulfil its obligation to review the Commission's application of the concept of Community interest and, more particularly, to ascertain whether the impugned anti-competitive conduct had actually been brought to an end and whether the effects of the anti-competitive agreement forming the subject-matter of the complaint were continuing.

45. In that regard, it should first be observed that the Commission, in the exercise of its discretion, must take into consideration all the relevant matters of law and

of fact in order to decide what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention (Case 210/81 *Demo-Studio Schmidt* v *Commission*, paragraph 19; Case 298/83, *CICCE* v *Commission*, paragraph 18; Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 20; and *Ufex and Others* v *Commission*, cited above, paragraph 86).

46. However, in view of the fact that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment to which the Commission may refer should not be limited nor, conversely, should it be required to have recourse exclusively to certain criteria (*Ufex and Others* v *Commission*, paragraph 79).

47. Consequently, in considering that the Commission was correct to give priority to a single criterion for assessing the Community interest instead of specifically examining the criteria referred to in *Automec* v *Commission*, the Court of First Instance did not err in law.

48. Next, it should be pointed out that, in paragraph 57 of the contested judgment, the Court of First Instance considered that, subject to the requirement that it give reasons for such a decision, the Commission may decide that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest.

49. In the circumstances of the present case, the Court of First Instance was able, without erring in law, to take the view that such a criterion, which is in itself sufficiently clear and complete, could serve as a valid basis for the Commission's assessment of the Community interest, subject to the express reservation that it give reasons for applying it.

50. Last, the IECC is wrong to criticise the Court of First Instance for having failed to fulfil its obligation to check the application of that criterion, more particularly as regards the end of the anti-competitive conduct forming the subject-matter of the complaint and the effects thereof.

51. In that regard, it should first of all be stated that the chosen criterion required that the facts under examination allowed the Commission to found a legitimate belief that the conduct of the undertakings concerned would be amended. It was not therefore necessary for the amendment of that conduct to be fully completed by the time of the contested decision.

52. Second, in paragraph 63 of the contested judgment the Court of First Instance considered whether the Commission had complied with that condition when examining and rejecting the IECC's complaint alleging a manifest error of assessment by the Commission in that regard. The finding made by the Court of First Instance on that point was a finding of fact and cannot therefore be challenged in an appeal.

53. The third and fourth limbs of the second plea in law are accordingly unfounded in part and inadmissible in part.

54. In those circumstances, the second plea in law must be dismissed in its entirety.

[Paragraphs 55 to 72 cover the third, fourth and fifth pleas]

Discrimination: cases with identical or comparable situations

73. By its sixth plea in law, the IECC maintains that, by rejecting, in paragraph 109 of the contested judgment, the complaint alleging a breach of the principle of non-discrimination on the ground that the IECC had not established that, in a situation identical to that of the present case, the Commission would, in contrast to its position in this case, have taken a decision against the undertakings in question, the Court of First Instance committed a double error.

74. First, by comparing the Commission's conduct in the present case with what it would have been in an "identical situation", and not in a "comparable situation", it extended to the extreme the concept of the principle of non-discrimination.

75. Second, both the Commission and the Court of First Instance, in paragraphs 99 and 100 of the judgment in Joined Cases T-133/95 and T-204/95, *IECC* v *Commission*, delivered on the same day as the contested judgment, expressly recognised that the CEPT Agreement was a price-fixing agreement. Such agreements are generally regarded as void. Since the draft REIMS Agreement belonged to the same category of agreements, it too should have been regarded as void. The Commission, in adopting the contested decision, and then the Court of First Instance, in upholding it, therefore discriminated against the IECC by weighing the allegedly pro-competitive effects of that draft agreement.

76. In that regard, while the adjective "comparable" would admittedly have been more appropriate than the adjective "identical" in paragraph 109 of the contested judgment, the IECC's arguments are not of such a kind as to call into question the validity of the Court of First Instance's conclusion that the IECC had not established that the Commission would have taken a different approach in comparable cases. The IECC's argument that the CEPT Agreement was expressly recognised by the Commission as a price-fixing agreement, and as thus coming within a category of agreements that are automatically void, cannot be upheld. As already stated in paragraph 40 above, the Commission did not make such a finding.

77. The sixth plea in law must therefore be rejected as unfounded.

[Paragraphs 78 to 84 cover the seventh and eighth pleas. The ninth plea is IECC's "final plea in law".]]

Retrospection: facts arising after the Decision

85. By its final plea in law, the IECC criticises the Court of First Instance for having rejected, in paragraph 25 of the contested judgment, its requests that the oral procedure be re-opened pursuant to Article 62 of the Rules of Procedure of the Court of First Instance on the ground, in particular, that certain documents produced in support of those requests are limited to establishing the existence of facts which clearly postdated the contested decision and ... cannot therefore affect that decision's validity. The IECC claims that the refusal to take those documents into consideration, on the sole ground that they postdated the contested decision and without have sought to establish whether any developments subsequent to that decision were capable of shedding light on the factual and/or legal situation existing when it was adopted, was contrary to Article 62 of the Rules of Procedure.

86. In that regard, it should be pointed out that the Court of First Instance, in the part of its reasoning challenged by this plea in law, referred to evidence produced by the IECC which merely showed the existence of facts which clearly postdated the adoption of the contested decision. Thus, the IECC, by criticising the Court of First Instance for having refused to take into consideration the documents produced by the IECC on the sole ground that they postdated the contested decision, has misread paragraph 25 of the contested judgment.

87. Furthermore, in the context of an application for annulment under Article 173 of the Treaty the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76, *France* v *Commission*, paragraph 7), and cannot depend on retrospective considerations of its efficacy (see Joined Cases C-133/93, C-300/93 and C-362/93, *Crispoltoni and Others*, paragraph 43, and Case C-375/96, *Zaninotto*, paragraph 66).

88. In the present case, the Court of First Instance's finding that the documents produced by the IECC related to facts which clearly postdated the contested decision was made in the context of a purely factual assessment that cannot be challenged in an appeal and, having regard to what is stated in the preceding paragraph of this judgment, the Court of First Instance did not err in law in excluding such documents from consideration.

89. The ninth plea in law must therefore be rejected as unfounded.

[Paragraphs 90 and 91 deal with dismissal and costs]

Court's ruling

The Court hereby: 1.Dismisses the appeal;

2.Orders International Express Carriers Conference (IECC) to pay the costs. ■