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## EEC Competition Law

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# EEC Competition Law

Lucie A. Carswell\*

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This article reviews the major developments in EEC competition law during the period October 1, 1989, through December 31, 1989.

I. DISTRIBUTION

A. *Cosimex - Court of First Instance Ruling*

On December 6, 1989, the Court of First Instance of the European Court handed down its first-ever ruling in *Cosimex GmbH v. Commission*,<sup>1</sup> rejecting the request of the German company Cosimex GmbH (Cosimex) for the adoption of interim measures against the French company Société d'Hygiène Dermatologique de Vichy (Vichy). In its complaint to the Commission, Cosimex alleged that Vichy had pressured wholesalers in France and Belgium to refuse to supply dermatological products to Cosimex in violation of Article 85(1), and requested the Commission to impose interim measures prohibiting Vichy from taking any action to prevent the wholesalers from supplying them with the products. The Commission denied Cosimex's request on the grounds that there was insufficient proof that the wholesalers' refusal to supply resulted from a concerted practice in violation of Article 85(1), but stated that the allegations would be considered in its analysis of Vichy's distribution system under the notification procedure. Cosimex requested the Court of First Instance to annul the Commission's decision and to compel the Commission to reconsider their request for interim measures. The Court, referring to the judgment in *Camera Care*,<sup>2</sup> held that pursuant to the Treaty and Regulation 17, the determination of whether the adoption of interim measures was warranted lay within the competence of the Commission and that it would not be in conformity with the principles guiding the division of competence between Community institutions if the Court forced the Commission to reconsider the request for interim measures.

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1. Case 131/89, O.J. EUR. COMM. (No. C 63) 6 (1990).

2. *Camera Care, Ltd. v. Comm'n*, Case 792/79, Judgment of January 17, 1980 (1980 E. Comm. Ct. J. Rep. 119).

*B. Sandoz - Advocate General's Opinion*

On October 10, 1989, Advocate General Van Gerven delivered his opinion in Case No. 277/87, *Sandoz Prodotti Farmaceutici v. Commission*. The case concerned an appeal by the Italian subsidiary of the Swiss Sandoz group to annul the Commission's decision to impose a fine of ECU 800,000 for restrictive practices preventing parallel imports in violation of Article 85(1). In particular, Sandoz had printed "export forbidden" on its invoices. Sandoz denied the existence of any agreements with its clients concerning parallel imports, stating that the invoice was purely an accounting document which did not form part of any contractual relations. The company further contended that the invoices did not form part of a distribution network or framework agreement falling within Article 85(1), alleging that every sale was a separate and distinct transaction. The Advocate General rejected the party's argument, taking the view that the invoice and words contained therein should be considered part of the overall contractual relations. The Advocate General stated that unilateral actions taken by one party during the contract of which the other party could reasonably be expected to be aware and which were not opposed by that other party may be considered as forming part of a contractual agreement within the meaning of Article 85(1).

As to the amount of the fine, Sandoz argued that the Commission had (i) failed to take into account the effects of the export ban which were not particularly harmful and (ii) erroneously calculated the fine on the basis of global turnover rather than on the basis of turnover only in the part of the market particularly affected by parallel imports. With regard to the latter argument, the Advocate General found that the Commission properly calculated the fine on the basis of global turnover. Global turnover was a proper basis for the fine because the export prohibition had been printed on all the company's invoices, indicating the gravity and extent of the violation, and because parallel imports play an important role in the integration of the pharmaceuticals market. In view of the seriousness of the offenses and the size and economic power of the appellants, the Advocate General considered that the

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amount of the fine was justified. As a result, the Advocate General recommended that the Court reject the request to annul the Commission's decision and also reject the subsidiary's appeal for a reduction of the fine.

### C. Bayer - ECU 500,000 Fine Imposed for Restrictions on Parallel Imports

According to an official press release dated December 14, 1989, the Commission fined Bayer AG, a German chemical undertaking, ECU 500,000 for agreements between Bayer AG and all of its customers operating in the feedingstuffs industry. Under the agreements, customers purchasing the growth promoter "Bayo-n-ox premix 10%" were required to use the product exclusively to cover their own requirements in the factory to which it was delivered. Since the German patent had expired in 1985, the Commission found that the purpose of the obligation was to prevent German purchasers of Bayo-n-ox from reselling and exporting the product to other Member States where patent protection still existed.

### D. Para-Pharmaceutical Products - Negative Clearance

According to an official press release dated December 19, 1989, the Commission decided to grant a negative clearance with respect to a standard agreement between the Belgian Association of Pharmacists (APB) and Belgian or foreign manufacturers of para-pharmaceutical products concerning the distribution of such products in Belgium.<sup>3</sup> The standard agreement gives the manufacturers the right to affix the APB mark of approval on products which have been tested and approved by the APB. The manufacturer undertakes, *inter alia*, to sell products bearing the mark only through affiliated pharmacies but is free to sell the product, without a stamp, through other distribution networks. The

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3. The manufacturers produce items such as toiletries, cosmetics, dietary products, baby foods, and vitamins.

Commission had objected to an initial version of the agreement under which manufacturers were prohibited from selling the APB approved products other than through pharmacies, even without the mark, since a requirement that certain products be distributed only through pharmacies violated Article 85(1). Following modification of the agreement to provide that manufacturers and wholesalers are completely free to sell the products through all types of distribution channels, the Commission determined that the agreement no longer fell within the scope of Article 85(1).

## II. COOPERATION, INFORMATION EXCHANGE, AND SPECIALIZATION

### A. *Competition Investigations - Court Clarifies Commission's Powers*

Within a month of its decision in *Hoechst*,<sup>4</sup> the European Court issued four judgments that further clarified the Commission's power to investigate companies under Article 14 of Regulation 17. All four decisions concerned investigations by the Commission into restrictive practices in the polyvinylchloride/polyethylene markets.

In the first two judgments, issued on October 17, 1989, the Court upheld the Commission's order for an investigation under Article 14(3) of Regulation 17/62.<sup>5</sup> The Court reiterated its holding in *Hoechst*, ruling that Article 190 of the Treaty and Article 14(3) of Regulation 17 required the Commission to indicate clearly the suspicions that it wished to verify. The criteria was satisfied in these two cases by reasoning which, although worded in general terms, stated matters indicating the existence and application of agreements or concerted practices in violation of Article 85(1).

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4. *Hoechst AG v. Comm'n*, Joined Cases 46/87 and 227/88, Judgment of September 21, 1989.

5. *Dow Benelux N.V. v. Comm'n*, Case 85/87, O.J. EUR. COMM. (No. C 288) 4 (1989), and *Dow Chem. Ibérica SA, Alcudia SA and Empresa Nacional del Petroleo SA*, Joined Cases 97, 98 and 99/87, O.J. EUR. COMM. (No. C 285) 4 (1989).

In the *Dow Benelux* case,<sup>6</sup> the company sought to rely on Article 20 of Regulation 17 to the effect that information obtained during an investigation could not be used for purposes other than those indicated in the decision ordering the investigation. The parties argued that evidence obtained under a separate decision to investigate some years earlier was inadmissible as evidence on which to base a later decision to investigate. The Court decided, however, that it could not be concluded that the Commission could not open an investigation procedure in order to verify or add to information that it happened to obtain during an earlier investigation if such information indicated the existence of conduct contrary to the competition rules laid down in the Treaty.

The last two judgments,<sup>7</sup> both issued on October 18, 1989, held that the Commission, when pursuing an investigation, could not force a company to answer certain types of questions which would incriminate it. The Court ruled that in order to preserve the effectiveness of Article 11 of Regulation 17, the Commission could require a company to furnish all the necessary information which the Commission had a right to know, and to supply any documents in the company's possession relating to those matters, even if the latter may serve to establish the existence of anti-competitive behavior. However, the Commission could not force an undertaking to respond to questions by which the latter would be directly led to admit the existence of an infringement.

The permissible questions included those which sought to establish factual information as to the dates, frequency of and participants in meetings between producers, and even those relating to price fixing, to the extent that the Commission was attempting to obtain more detailed factual information regarding such initiatives. On the other hand, certain questions on prices were unacceptable in so far as they concerned the objective pursued by such action and were of a conclusive nature. The court rejected one question which sought to obtain detailed information on

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6. *Dow Benelux N.V. v. Comm'n*, Case 85/87, O.J. EUR. COMM. (No. C 288) 4 (1989).

7. *Orkem v. Comm'n*, Case 347/87, and *Solvay v. Comm'n*, Case 27/88, O.J. EUR. COMM. (No. C 288) 5 (1989).



“every step or concerted measure likely to have been considered or adopted to support price initiatives.” The Court ruled that this question obliged companies to admit their participation in agreements intended to fix prices and restrict competition, or to admit that such was their intention. The same applied to questions regarding quotas, targets, and shares between the producers, which had been phrased in such a way that the company would be led to admit its participation in agreements intended to limit or control production or distribution, or to partition markets. As a result, the Court held that the latter two decisions were void as regards the unacceptable questions.

*B. Dutch Bankers' Association - Appeal of Commission Decision*

On October 2, 1989, Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken brought an action in the European Court challenging the Commission's July 19, 1989, decision in which an agreement concerning transfers relating to fund-raising acceptances was deemed restrictive of competition within the meaning of Article 85(1).<sup>8</sup> The Commission found that the provision for an interbank commission on such transfers restricted the scope for the relevant banks to agree bilaterally on reimbursements of costs in a more favorable way, but determined that the agreement fell outside Article 85(1) since it had no effect on trade between Member States. The applicants claimed that the agreement did not restrict competition to an appreciable extent because a similar result would in any event have come about as a result of the free operation of the market and of the fact that a drawee bank had no freedom of choice in the matter of the payee bank which is determined by its customers. The applicants further claimed an infringement of essential procedural requirements under Regulation 17 and also Regulation 99/63.

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8. O.J. EUR. COMM. (No. C 293) 10 (1989).

*C. Welded Trellis - Decisions Appealed*

During the period under review, a number of firms have appealed the Commission's August 2, 1989, decision to fine fourteen Community producers of welded steel mesh a sum totaling ECU 9.5 million for agreements and concerted practices designed to fix prices or delivery quotas and share markets between 1981 and 1985.<sup>9</sup> The following are applying to the Court: (i) Belgian firms, Steelinter SA and Usines Gustave Boel SA; (ii) French firms, La Société Metallurgique de Normandie, Tréfilunion, La Société des Treillis et Panneaux Soudés and Sotralentz SA; (iii) Italian firms, Ferriere Nord SpA, ILRO SpA and GB Martinelli fu GB Metallurgica SpA; (iv) a Luxembourg firm, Société Tréfilarbéd Luxembourg-Saarbrücken Sàrl; and (v) a German firm, Baustahlgewebe GmbH.

*D. KSB/Goulds/Lowara/ITT - Proposed Exemption*

On October 12, 1989, the Commission published a notice pursuant to Article 19(3) of Regulation 17 announcing its intention to adopt a favorable decision with respect to agreements between KSB, Goulds, Lowara, and ITT.<sup>10</sup> The agreements in question provide for joint research, development and production of the wet end (parts in contact with fluid) of a new type of single-stage single flow radial centrifugal pump made from chrome-nickel steel, with Lowara as manufacturer of the pump components and each partner assembling the pump individually. The German company, KSB, is the world's leading pump manufacturer. Goulds Pumps, an American registered company, is, together with its wholly-owned Italian subsidiary, Lowara Spa, the third largest pump manufacturer in the world. ITT Fluid Transfer Division is a part of ITT Fluid Technology Corporation which in turn is one of nine main divisions of the ITT Corporation. The pumps that are the subject of the cooperation agreement form part of the market for

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9. O.J. EUR. COMM. (No. C 306) 6 (1989).

10. O.J. EUR. COMM. (No. C 259) 5 (1989).

single-stage, single-flow radial centrifugal pumps for water.

The relevant geographical market is the entire Common Market since the pumps are regularly supplied and purchased in all Member States. KSB's market share in Germany and in France is between twenty and thirty percent, with a substantial market share in both the Benelux countries and in Italy. Lowara has a considerable market share in Italy. Goulds and ITT have insignificant market shares. At the time of notification, the parties estimated their joint share in the Community at under twenty percent. There are some seventy water pump manufacturers in the Community, with fierce competition in prices and quality and an excess capacity situation. In addition, conventional cast-iron pumps are increasingly being supplied from non-Community countries.

Under the first agreement, which remains in effect for a period of ten years, work on research and development is to be decided jointly by the parties and then carried out individually. The agreement also provides that Lowara is the manufacturer of the units.<sup>11</sup> The participants assemble the units into pumps bearing their own proprietary trade mark. Intellectual property rights to developments are owned by the developing participant; the other participants have a perpetual royalty-free license to use any such intellectual property only upon the termination of the agreement or the withdrawal of the participant from the agreement. The participants agree not to exchange any information which would impair the maintenance of competition outside the scope of the agreement. Rights, duties, and interests under the agreement may only be assigned with the written assent of each of the other participants. Upon termination of the agreement all participants receive a complete copy of all the know-how and have perpetual royalty-free non-exclusive licenses. Under the second agreement, the production agreement, Lowara agrees to manufacture the pump components exclusively for the participants.

According to the parties, the agreement is necessary because none of them would, on their own, be able to develop the high-

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11. Lowara began producing the units at the end of 1987.

grade steel parts required, since the development costs are too high compared with the small number of items which an individual manufacturer requires. The parties further contend that such cooperation does not entail any loss of innovative competition, and maintain that in so far as the wet end components of the pump are concerned, the parties were never potential competitors. With regard to the other components and the marketing of the new pumps, the participants continue to be in competition with one another.

*E. Italian Fire Insurers - Proposed Exemption*

In an Article 19(3) notice, published during the period under review,<sup>12</sup> the Commission indicated that it would adopt a favorable decision with respect to an agreement concluded by a non-profit association of insurance companies known as the "Concordato Italiano Incendio Rischi Industriali" (CIIRI). CIIRI's activities concern the insurance of industrial risks located in Italy and supplementary fire and consequential loss insurance. Association membership is open to all fire insurance companies authorized to do business in Italy, and in February, 1988, when the notice was published, the membership included twenty-eight companies, covering approximately fifty percent of the industrial fire insurance market. The association involves, *inter alia*, cooperation in the form of the collection of industrial fire insurance statistics for the calculation of premiums, the updating of required premium rates and the fixing with the member concerned of required premiums for risks which because of their size or nature are not included in the tariff. Members are then invited to quote risks on the basis of the required rates of the industrial fire insurance tariff to which they can add commissions and general costs calculated on the basis of their own viability. Members are also provided with a standard fire insurance policy. The CIIRI must be notified of any departure from the standard agreement if such departure is likely to affect the uniformity of statistics. The agreement which entered into force on

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12. O.J. EUR. COMM. (No. C 259) 3 (1989).

January 1, 1988, is valid for two years but has been tacitly renewed. The Commission required various modifications (not specified in the notice) before adopting a favorable attitude to the eventual form of the agreement.

*F. AMB/La Fondiaria Assicurazioni - Comfort Letter*

According to a November 7, 1989, official press release, the Commission sent a "comfort letter" to Aachener und Munchener Beteiligungs-Aktiengesellschaft (AMB), a German insurance group, and La Fondiaria Assicurazioni SpA, an Italian insurance company, regarding their joint acquisition of Volksfürsorge Deutsche Lebensversicherung AG (VDLAG), and an accompanying cooperation agreement. All three are parent companies of insurance groups with activities in various insurance classes in their respective national markets. The first two parties each acquired twenty-five percent plus one share of VDLAG. This acquisition was part of a general cooperative plan reached between AMB and La Fondiaria under which each party would offer the other the opportunity to participate in its activities, including new business initiatives in other Member States. The parties agreed to cooperate in the management of VDLAG with AMB taking the leading role. The parties also have concluded an agreement with Beteiligungsgesellschaft für Gemeinwirtschaft, a holding company owned by German trade unions which retains the remainder of the shares of VDLAG, providing for cooperation as far as the management of the VDLAG is concerned. The Commission anticipated no appreciable or unacceptable reduction in competition as a result of this agreement.

*G. Interbank Agreements on Interest Rates - Commission Surveillance*

According to a November 16, 1989, official press release, the European Commissioner for Competition and Financial Affairs, Sir Leon Brittan, wrote a letter to the European Banking Federation, explaining that interbank agreements concerning interest rates

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restrict competition in the same way as price cartels. Sir Brittan indicated that agreements on interest rates should be avoided or abandoned, but the letter was of a general nature, and did not mention any specific agreements. The Commissioner also indicated that the normal use of monetary instruments would not infringe Community competition rules providing that public authorities did not encourage the formation of illicit cartels or reinforce their effects.

### *H. IATA - Exemption Doubtful*

According to press reports, the Commission decided on December 4, 1989, to express doubts<sup>13</sup> on the availability of an exemption under Article 85(3) for the International Air Transport Association (IATA) system of cargo tariff coordination for international air freight transport between Community airports. Although most of the 100 IATA "resolutions" concerned agreements fixing fares and conditions of carriage, the resolutions also involved so-called "interlining" arrangements, whereby airlines could interchange the handling of a product. According to the press reports, the Commission stated that the resolutions notified were likely to restrict competition and that IATA had not shown that the restrictions relating to interlining agreements and certain types of cargo were recompensed by advantages for consumers.

### *I. Air France and Air Inter - Exemption Doubtful*

According to press reports published during the period under review, on October 25, 1989, the Commission decided to express doubts on the request for an exemption under Article 85(3) for a route-swapping deal between Air France and Air Inter. The deal, which came into effect March 1989, allowed Air France to serve French domestic routes from Paris to Bordeaux, Lyon, Marseille,

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13. The Commission is empowered to express such doubts under Article 5 of Regulation 3975/87.

Montpellier, and Nantes, under the flag of the domestic carrier, Air Inter. Similarly, Air Inter was permitted to operate international routes to London, Athens, Rome, Madrid, and Ibiza under Air France's flag. The deal allowed each airline to serve routes normally the exclusive reserve of the other, though the legal rights to the route remained unchanged. The Commission stated that the companies were unable to show that the agreement was indispensable for introducing new flights, that the rate autonomy of each airline was assured or that the sharing of operation profits did not prevent the companies from operating the lines in question in a truly independent way. Thus, the Commission decided that agreement either had to be abandoned or be substantially modified to conform with competition rules.

*J. Air France - Further Deals Not Exempted*

According to press reports, the Commission on November 9, 1989, expressed doubts that further route-swap pacts between Air France and Iberia Airlines, Alitalia and Sabena, respectively, would obtain exemptions under Article 85(3). The Commission was of the view that there was insufficient evidence to suggest that such pacts were indispensable for the maintenance in operation of the routes concerned, and moreover that the joint operation was likely to restrict the possibility of any competition on those routes. The routes concerned were (i) Air France and Air Iberia - six weekly flights on the Paris-Bilbao-Santiago route; (ii) Air France and Alitalia - the Paris-Milan and Paris-Turin routes; and (iii) Air France and Sabena - the Paris-Brussels, Bordeaux/Toulouse-Brussels, Lyon/Marseille-Brussels routes. All the swap agreements had actually been in operation for a considerable period of time. As a result of the Commission's objections, the deals will have to be radically modified or abandoned.

*K. Air France - Three Agreements with Small Airlines*

According to press reports, the Commission decided on November 13, 1989, to exempt under Article 5 of Regulation

3975/87 route-swap deals between (i) Air France and Luftverkehrs AG; (ii) Air France and Brymon; and (iii) Sabena and London City Airways that had resulted in the opening of new routes. The routes concerned were (i) Air France and Luftverkehrs AG - Paris-Nurenbürg; (ii) Air France and Bryman - Paris-London City Airport; and (iii) Sabena and London City Airways - Brussels-London City Airport. The Commission granted an exemption for six years, but reserved the right to re-evaluate the exemption after two years. The Commission granted these agreements an exemption because (i) they concerned cooperation between a national airline and a smaller airline resulting in the opening of new routes; and (ii) in certain circumstances, the new organization of a route or the opening of a new route would only be possible through the conclusion of a joint operation agreement.

### III. JOINT VENTURES

#### A. *Cekacan - Proposed Exemption*

On November 21, 1989, the Commission published a notice pursuant to Article 19(3) of Regulation 17 announcing its intention to adopt a favorable decision with respect to an agreement between the Swedish firm, Akerlund and Rausing<sup>14</sup> (A&R), and the German firm, Europa Carton Aktiengesellschaft<sup>15</sup> (ECA).<sup>16</sup> The product consists of a new type of hermetic packaging in laminated cardboard, primarily intended for dry, oxygen-sensitive food products. Ceka International, a division of A&R, obtained ownership of the Cekacan patents, know-how, and trademarks, after it purchased the Swedish company, Esselte Pac Aktiebolag. Thereupon, ECA became A&R's licensee with an exclusive right to exploit Cekacan machines for manufacture of the product in Germany until the signature of the cooperation agreement in

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14. Akerlund and Rausing's activities mainly comprise of packaging foodstuffs.

15. Europa Carton Aktiengesellschaft's activities are chiefly in the paperboard and paperboard packaging sector.

16. O.J. EUR. COMM. (No. C 293) 4 (1989).



question. This license which had originally been held by ECA from the Esselte company would, however, come into force again in an amended version in the event of termination of the cooperation agreement.

Pursuant to the agreement, the parties set up for an unspecified period a limited liability company in Hamburg known as Ceka Europe, of which seventy-four percent is owned by A&R and twenty-six percent by ECA. The new company will be responsible for marketing the Cekacan method within a given territory comprising several Member States and Austria and Switzerland. Ceka Europe will also be responsible for leasing and installing Cekacan machines in customers' premises, and holds the exclusive distribution rights from A&R and ECA for the materials and services necessary for the manufacture of Cekacan packages. Thus, in order to supply customers with the materials for Cekacan packages, A&R and ECA are obliged to go through Ceka Europe. The two parties have undertaken not to compete against Ceka Europe in the relevant territory by manufacturing and/or directly or indirectly selling the products under contract and/or Cekacan machines. Under the agreement, A&R also has a right of first refusal, until January 1, 1995, to supply up to 100 percent of Ceka Europe's requirements. After that date, Ceka Europe will be free to purchase new machine installations from other suppliers though A&R is to remain as the preferred supplier. ECA has the right of first refusal up to January 1, 1995, to supply Ceka Europe with a large percentage of its requirements for printing and cutting laminates. After January 1, 1995, Ceka Europe will be entitled to obtain printing and cutting services from other suppliers for new machine installations though ECA is to remain the preferred supplier.

The agreement will take effect for an initial period of three years and will be automatically renewed unless terminated by one of the parties or if it becomes impossible for shareholders to agree on a matter defined as a major issue. Upon termination of the agreement, the amended original license would come into effect, with customers shared out between ECA and A&R so that ECA is allocated customers domiciled in Germany and A&R takes over all

other customers. A&R would also have the right to purchase all ECA's shares in Ceka Europe. Following discussions with the Commission, the parties agreed to remove a clause in their amended license requiring ECA to purchase all requirements in laminates for the body and bottom of the product from A&R. In the event of the revival of the original license agreement, ECA would be free to supply Cekaan packages to customers outside Germany, either actively or passively. Under the amended agreement, ECA will also have the right to respond to inquiries from countries other than Germany concerning the leasing of machines. On the basis of the foregoing and in particular the modifications agreed by the parties, the Commission proposed to take a favorable view of the agreement.

*B. Pan European Mobile Telephone - Proposed Exemption*

On December 7, 1989, the Commission published a notice pursuant to Article 19(3) of Regulation 17 announcing its intention to adopt a favorable decision with respect to ECR 900, a consortium formed by the German company, AEG AG, the Dutch company, Alcatel NV, and the Finnish company, Oy Nokia Ab. ECR 900 provides for the joint development, manufacture and distribution of a pan-European digital cellular mobile telephone communication system.<sup>17</sup> The cooperation does not extend to the end-products (mobile telephones) through which the users are connected up to the system. The planned telephone system known as GSM is a new telecommunication system which uses a new digital cellular technique to improve communications between the users of a mobile telephone network. In particular, the system results in a substantial increase in speech quality and in the total number of users possible, and allows additional data and information technology services to be linked up. In addition, new protective arrangements, such as authentication and encoding mechanisms could be incorporated. Communication obstacles due to differences in systems across geographical frontiers would be

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17. O.J. EUR. COMM. (No. C 308) 5 (1989).

removed and the way would be open for a single European communication network, allowing a user to be contacted anywhere in Europe. The potential buyers in the network area covered by the GSM system are at present the national network operators in the European Conference of Post and Telecommunications Authorities (CEPT) countries and undertakings acting on their behalf. In addition to the parties subject to the notification, the following firms and consortia have emerged as suppliers: Bosch-Philips-ANT, Matra-Ericsson, RacalPlessey-Orbitel, Ericsson, Motorola, and Siemens.

Under the agreement, the parties will cooperate in the development and manufacture, refinement of technical specifications, and joint and exclusive distribution of the GSM system and parts thereof in CEPT countries. The parties are setting up the ECR 900 consortium for the purpose of the submission of tenders for the GSM system. Although commitments with respect to CEPT countries require the prior agreement of all parties, if one party does not wish to participate in a tender, the other parties are free to do so. During the term of the agreement, the parties may not submit other tenders or conclude other contracts in the CEPT countries in respect of the GSM system. Outside of CEPT countries, each party is entitled to pursue business with respect to those parts of the GSM system in whose development it was involved. There is to be free exchange of documentation in the case of developments in which several parties are involved, but not of technical documentation where only one party is involved. Parties are prevented from using technical documentation obtained due to joint development activities until the eighth month before expiry of the agreement. Thereafter, each party has the non-exclusive rights to use such documentation in order to manufacture the GSM System or parts thereof. In the five years following the expiration of the agreement, however, the granting to third parties of a sub-license with respect to the right requires the prior agreement of the party concerned, with any license fees being divided equally between them. After this five year period, parties are free to grant sub-licenses without sharing fees. The agreement may be terminated by each party for the first time on December 31,

1993, and thereafter at the end of each year. In the event a party terminates the agreement, the other parties may decide to continue their agreement. If the French, German, or other important postal authority of a CEPT country has not selected the GSM system by December 31, 1992, the agreement ends automatically.

#### IV. ABUSE OF A DOMINANT POSITION

##### *A. Building Materials Sector - Commission Intervention*

According to press reports dated November 27, 1989, a German company which refused to supply spare parts for machinery it had sold to a U.K. building materials firm, acknowledged that such a refusal constituted both a restrictive practice under Article 85 and an abuse of a dominant market position under Article 86, following contact with the Commission. A complaint by the British firm, which bought the machinery, alleged that the German firm had refused to supply spare parts in order to protect a longstanding customer in the relevant territory. The German firm ultimately recognized that collusion of this nature with its older customer was a restrictive practice and that as the sole supplier of the spare parts in question, a refusal to fill orders from a new customer constituted an abuse of a dominant position. The case is of greater importance, however, in that the Commission commented that the matter could have been submitted to the national courts. The national courts are empowered to award compensation beyond which the Commission is authorized.

#### V. MERGER CONTROL

##### *A. Merger Regulation Adopted*

On December 21, 1989, the Council adopted Regulation 4064/89 on the control of concentrations between undertakings.<sup>18</sup> The Regulation applies to all concentrations with a Community

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18. O.J. EUR. COMM. (No. L 395) 1 (1989).

dimension which under Article 1(2) exists when (i) aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 billion and (ii) the aggregate Community-wide turnover of at least two of the undertakings concerned is more than ECU 250 million. The Regulation does not apply where each of the undertakings concerned achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

Concentrations are deemed to arise when (i) two or more previously independent undertakings merge or (ii) undertakings, or persons already controlling at least one undertaking, acquire by purchase of securities or assets or by contract or any other means, direct or indirect control of the whole or parts of one or more undertakings.<sup>19</sup> Joint ventures or agreements whereby undertakings remain independent after the operation in question are not covered by the regulation unless they result in the formation of a joint venture which forms a lasting, autonomous economic entity. Concentrations are appraised with a view to establishing whether they are "incompatible with the Common Market." Articles 2(2) and 2(3) of the Regulation provide that the decisive criterion is whether a concentration creates or strengthens a dominant position as a result of which effective competition is significantly impeded in the Common Market or a substantial part thereof.

Concentrations with a Community dimension must be notified to the Commission not more than one week after the conclusion of either the agreement or the announcement of the public bid or the acquisition of a controlling interest, whichever is first. The concentration must then be suspended for the first three weeks following notification. Within one month of notification, the Commission must decide whether or not to initiate proceedings, and within four months of initiating proceedings, the Commission must, with certain exceptions, issue its final decision on the merger. During this time the parties are free to propose changes to the merger in order to avoid a negative decision. The powers to investigate and to impose financial penalties are similar to those

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19. *Id.* at 4.

provided for under Regulation 17. . Where the Commission finds that a concentration is incompatible with the Common Market but has already been implemented, the Commission may, by decision, require divestiture. The Commission may impose fines not exceeding ten percent of the aggregate turnover of the undertakings concerned where undertakings fail to suspend the concentration as required or put into effect concentrations declared incompatible with the Common Market. The Member States cannot apply their national legislation to any concentration that falls within the scope of the Regulation, with two exceptions: (i) the Member States can take appropriate measures to protect "legitimate interests" such as public security, plurality of the media, prudential rules and other legitimate interests recognized by the Commission (Article 21(3)) or (ii) if the Commission finds that a concentration threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded within a Member State, which presents all the characteristics of a "distinct market," then it can refer the concentration to the competent authorities of the Member State which is then free to apply its own national competition laws.

Implementing legislation will be adopted with respect to the details concerning notifications, time limits and hearings. The Regulation comes into force on September 21, 1990.

#### *B. Stena/Houlder - Commission Investigation*

According to an official press release dated October 23, 1989, the Commission, following a complaint by the French company Comex SA (Comex) concerning the acquisition of an off-shore diving services company (Houlder Offshore) by Stena U.K., Ltd. (Stena), required modification of the terms of the acquisition before allowing the deal to go ahead. Through the acquisition, Stena acquired control of two diving support vessels which had been available to Comex for inspection, maintenance, repair and construction work on offshore stations. Stena further acquired control of shareholdings owned by Houlder Offshore in two competing companies, fifty percent in Comex Houlder, Ltd. and

thirteen percent in the complainant, Comex. Stena is a competitor of Comex for the execution of undersea works. By acquiring the two diving support vessels upon which Comex largely depended, Stena was likely to either restrict Comex's access to such vessels or increase the cost of such access. Further, Stena's shareholdings could create a structural link between two important competitors in a highly concentrated market that was likely to influence the competitive behavior of both Comex and Stena. As a result, the Commission required amendments to ensure Stena and Comex remain independent competitors. Stena is to sell the shareholdings previously owned by Houlder Offshore to the Comex Group and to lease one of the diving support vessels to Comex for two years, thus guaranteeing Comex access to an essential input for the execution of its undersea diving services. Following modifications to the agreement, the Commission determined that effective competition was thereby guaranteed and terminated its investigation.

*C. Coats/Tootal - Acquisition not opposed*

According to press reports dated November 24, 1989, the Commission has decided not to intervene in the bid by the U.K. textile producer Coats Viyella to purchase its U.K. competitor, Tootal. The decision was apparently based on the fact that over two-thirds of both companies' aggregate turnover was generated in the United Kingdom alone and reflected the logic that would hold if the regulation on merger controls were in place. The takeover would not fall within the scope of the Commission's competence under the new merger regulation.

VI. INTELLECTUAL PROPERTY

*A. Film Purchases by German Television Stations - Exemption*

On October 3, 1989, the Commission published its decision to grant an exemption for agreements which allowed an association of German broadcasting companies (ARD) to acquire the rights to

American feature films and television films from MGM/UA Co.<sup>20</sup> Through its subsidiary (Degeto Film GmbH), ARD concluded three agreements with Algemene Financieringsmaatschappij Nefico BV<sup>21</sup> (Nefico). Under the agreements, which entered into force with retroactive effect on October 1, 1983, ARD acquired exclusive television rights to fourteen "James Bond" films, 1,350 other feature films selected from MGM/UA's film library, all available cartoons, and a total of 416 hours of television products to be selected from the existing and future library of MGM/UA. In addition, ARD was granted exclusive rights in *inter alia* Germany, West Berlin, and German-speaking parts of Europe, to all new "James Bond" films and all other new films released by MGM/UA between January 1, 1984, and December 31, 1998. The duration of the license for each individual film is normally fifteen years. Films may, with certain exceptions, be broadcast any number of times by terrestrial transmission, cable or satellite. The ARD organizations also acquired rights of first negotiation if MGM/UA wishes to conclude a similar agreement with a third party until 1997 or an output agreement for films newly produced or acquired after December 31, 1998. After the Commission had sent a list of objections challenging the exclusivity of the rights acquired and the lack of access by third parties to the films, ARD concluded further agreements with TEC. These allowed TEC by means of so-called "windows" to license specific films to third parties for designated periods of between two and six years in the normal case, beginning in some cases before and in some cases during use by ARD broadcasting organizations. The periods thus amounted to a temporary lifting of the exclusivity of rights, during which time ARD would not use the films. ARD would provide such third parties with a German version of the film if available, and if unavailable, would contribute fifty percent of the necessary

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20. O.J. EUR. COMM. (No. L 284) 36 (1989).

21. Algemene Financieringsmaatschappij Nefico BV (Nefico) is a subsidiary of MGM/UA Entertainment Co. (MGM/UA) which was subsequently acquired by Turner Broadcasting Systems, Inc. (TBS). The rights and obligations of Nefico have now been assumed in part by Turner Entertainment, Co. (TEC), a subsidiary of TBS, and in part by United Artists Corporation -- now Metro-Goldwyn-Mayer/United Artists Communications (MGM/UA Co).



dubbing costs. ARD also agreed to release the television product which they had not themselves selected from the 416 hours allotted to them. The ARD has further agreed to allow third parties to broadcast the films in a foreign language version in the license territory or to broadcast them into the territory from outside. The ARD organizations also gave unilateral irrevocable grants of similar effect to the MGM/UA.

In its analysis of the agreements under Article 85(1), the Commission left open the question whether the rights granted to the ARD organizations amounted to licenses in the legal and technical sense or whether they involved assignment of rights for a limited period and to a limited extent. In the latter case, the restriction of competition lay in the fact that despite the transfer of property, the broadcasting organizations could not grant sub-licenses in Germany. On the other hand, if the rights granted involve licenses, then the restriction derived from the duration and scope of the exclusivity, following the Court's judgment in *Coditel II*. The Commission concluded that both the extent of rights and period of the licenses in this case went well beyond previous acquisition practice of the ARD organizations and exceeded the necessary requirement of program acquisition and planning. Further, although the films acquired represented only four and one-half percent of the total stock available worldwide, the quality of the films meant that the rights acquired had an importance beyond the quantity involved. The staggering of the licensed periods meant that the duration of exclusivity extended beyond the actual license period of fifteen years, some fifteen year licenses only starting in 1998, with the result that other TV stations could not have access to certain films even before the ARD license period began. Also restrictive were the right of first negotiation and the selection arrangements which resulted in MGM/UA not being able to grant any licenses to third parties during October 1983-87, the selection period, even for films which would not be subsequently selected.

Nevertheless, the Commission granted an exemption under Article 85(3) taking into account the agreements of ARD with TEC and the irrevocable grant to MGM/UA by ARD in respect of the

“windows” concluded at the Commission’s request. The Commission considered that the agreements improved the distribution of goods by allowing old films to become accessible to German viewers for the first time. Further, the “windows” arrangement permitted films to be shown by other broadcasting organizations before or alternating with ARD organizations, the staggering of such “windows” ensuring that a large number of films could be licensed to third parties each year. A large proportion of films could thus be shown before the ARD organizations themselves broadcast them. New private stations benefitted from the fact that dubbed versions were supplied and that where such versions were not yet available, ARD organizations paid fifty percent of the cost of dubbing. The lower price per film resulting from the large number of films in the agreement enabled ARD organizations to acquire more films than would otherwise have been possible. The remaining exclusivity was necessary in order to allow a fair return from the investments by ARD organizations.

## VII. POLICY

### *A. Telecommunications - Council Meeting*

According to a press release dated December 7, 1989, the council has reached agreement regarding two proposed directives which will ensure the liberalization and harmonization of telecommunications in the Community.

With respect to the proposed deregulation directive, agreement was reached on the material contents with the result that private undertakings will be permitted to provide all telecommunication services other than voice telephony, satellite transmission, and telex services, while data-switching services are to be partially liberalized. The proposal was adopted by the Commission on the basis of Article 90 of the Treaty, which relates to its powers to adopt directives under anti-monopoly provisions. A majority of Member States contest the use of this article demanding instead that the Commission should use Article 100A of the Single

European Act.

On the same day, the Council adopted a common position concerning a proposal for a directive on the establishment of the internal market for telecommunications services, through the implementation of an open network provision. Under the common position, the harmonization of specialist connections and telephony would commence from the date of the adoption of the directive and a further directive for data-switching services would be adopted in 1992.