

## French Antitrust Developments

The Competition Commission, which, on July 19, 1977, replaced the Technical Commission regarding illegal concerted practises and abuse of dominant position, is basically acting under the same Article 50 and subsequent Articles of the Ordinance dated June 30, 1945 (formerly Article 59 *bis* and subsequent Articles); it is, however, assuming a much more active role in the enforcement of competition, pursuant to the abandonment of price controls. Under an instruction dated May 16, 1980, it has been assigned as priority missions to check the practises leading to price increases (or preventing price decreases) and those aiming at the protection of a dominant or status quo position. It is also apparent that the Commission is more and more influenced by the EEC Rulings.

Its role is three-fold:

- i) Advice on illegal concerted practises and abuse of dominant position;
- ii) Advice on concentrations;
- iii) Advice to the government on draft bills concerning competition.

### I—Prevention of Illegal Concerted Practises and Abuse of Dominant Position

#### A. *Prevention of Illegal Concerted Practises*

##### 1. FORM

The concerted practises may result from written agreements or from factual situations.

In case of a GIE,<sup>1</sup> the Commission takes into account the impact on the market of the companies associated within the GIE (Groupement d'Intérêt Economique) in order to determine whether its real purpose is to increase

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<sup>1</sup>A GIE is a type of non-profit legal cooperation among entities with the purpose of encouraging companies in sales, manufacturing or other activities.

or to restrict the competition.<sup>2</sup> On the other hand, the Commission considers that companies in the same group (more than 50 percent owned by the same parent) are not covered by Article 50.<sup>3</sup>

## 2. PRICE FIXING

The Commission, in several of its opinions, found that common lists of prices and/or discounts were illegal when published by professional organizations or groups of enterprises.<sup>4</sup> There are decrees specifically prohibiting the establishment of price lists in certain fields. Professional organizations for importers and wholesalers on December 27, 1979, strongly recommended that their members not publish recommended price lists or uniform sales terms and conditions, except in cases of joint advertising.

The Commission is also of the opinion that agreements concerning the exchange of information between manufacturers, wholesalers or central organizations on prices of competitive products (those which can be substituted one for the other) can have the same restrictive effects, if the buyers and sellers can be identified.<sup>5</sup>

In a widely publicized opinion, issued on September 27, 1979, the Commission recommended heavy fines against a group of manufacturers and distributors in the household appliances and electro acoustical fields who attempted to limit the price decreases beyond a notional "normal margin."<sup>6</sup>

## 3. DIVISION OF THE MARKET AND OTHER AGREEMENTS BETWEEN COMPETITORS

The Commission is of the opinion that the division of a market on a geographical basis between competitors is illegal.<sup>7</sup> It is also of the opinion that agreements fixing production quotas, restricting membership or impos-

<sup>2</sup>Affaire du GIE Inter Nougat, Meeting of the Commission of July 8, 1980, Bulletin Officiel de la Concurrence et de la Consommation, September 12, 1980, Pp. 208 and following. Affaire GIE France Explosifs, Meeting of the Commission of January 11, 1979, Bulletin Officiel des Services des Prix, April 20, 1979, Pp. 115 and following.

<sup>3</sup>Affaire Assainissement en Région Parisienne, Meeting of the Commission of January 24, 1980, B.O.S.P. May 15, 1980, P. 104.

<sup>4</sup>Affaire Négoco du Verre Plat, Fédération Nationale des Entreprises de Miroiterie-Vitrierie, Meeting of the Commission of March 9, 1978, B.O.S.P. of June 1, 1978, P. 190. Affaire Négoco en gros du matériel électrique d'Installation Legrand, Meeting of the Commission of March 23, 1978, B.O.S.P. of June 1, 1978, P. 192.

<sup>5</sup>Affaire Association Confort-Régulation, Meeting of the Commission of June 5, 1980, Bulletin Officiel de la Concurrence et de la Consommation of August 8, 1980, Pp. 181 and following. Affaire Marché du Vinaigre, Meeting of the Commission of October 18, 1979, B.O.S.P. of December 29, 1979, Pp. 332 and following. Affaire des Machines à Bois d'une même marque, Meeting of the Commission of October 11, 1979, Pp. 301 and following. Affaire des vaccins anti-aphteux, Meeting of the Commission of September 10, 1980, B.O.S.P. of October 30, 1980, Pp. 244 and following.

<sup>6</sup>Affaires Darty, Auchan, Conforama, Arthur Martin, Lincoln, Philips, Schneider, Thomson-Brandt, ITT Océanic, Miele, Rosières, B.O.S.P. of February 9, 1980, Pp. 29 and following.

<sup>7</sup>Affaire Fabricants d'émulsions routières de bitume, Meeting of the Commission of November 23, 1978, B.O.S.P. of January 11, 1979, Pp. 3 and following.

ing quality labels are illegal.<sup>8</sup>

#### 4. EXCLUSIVE DISTRIBUTORSHIPS

The Commission expressed the opinion that exclusive distribution contracts may be illegal, when the product or the service is not new on the French market or is being successfully sold in it.

In the Commission's opinion, in these cases, there is no economic justification for restricting the sale of the product or the service. Such agreements were held illegal where a manufacturer and/or the distributor(s) were deemed to have a dominant or very strong market position.

The Commission even took the position in its opinion dated September 27, 1979, that an exclusive territory could not validly be assigned to a distributor selected on the basis of its technical qualifications, even though such distributor was not in a strong market position.<sup>9</sup>

A conclusion as to the principles may not, however, be drawn from such case, since the Commission emphasized that each distributorship agreement needed to be evaluated within its economic context.

#### 5. COOPERATIVE SELLING AGREEMENTS

Even though such agreements are generally not illegal, it is the view of the Commission that in case distributors receive a discriminatory price reduction in exchange for an undertaking not to distribute competitive products, the agreement is illegal.

#### 6. THE GROUPEMENTS D'ACHAT (PURCHASING ORGANIZATIONS)

Similarly, even though such organizations are generally looked upon with favor by the authorities, the Commission is of the opinion that the boycott of non-members by such an organization (which can be effective if it has a dominant position) is illegal. A non-competition agreement concluded between wholesalers who are members of such organization is also considered to be illegal by the Commission.<sup>10</sup>

#### 7. DISCOUNTS

The Commission expressed in several cases the opinion that the discounts based on the purchases (or potential purchases) of clients of a cartel are illegal.<sup>11</sup>

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<sup>8</sup>Affaire Section de l'assurance construction, Meeting of the Commission of December 20, 1979, Bulletin Officiel de la Concurrence et de la Consommation, June 14, 1980, Pp. 146 and following. Affaire Fabricants de Nougat, Meeting of the Commission of July 8, 1980, Bulletin Officiel de la Concurrence et de la Consommation, September 12, 1980, Pp. 208 and following.

<sup>9</sup>Bulletin Officiel du Service des Prix, February 9, 1980, P. 32.

<sup>10</sup>Affaire Commercialisation des briquets non rechargeables, Meeting of the Commission of May 11, 1978, B.O.S.P. of June 1, 1978, P. 194.

<sup>11</sup>Affaire du Secteur des tubes d'acier, Syndicat National du Commerce des tubes et rac-

## 8. ILLEGAL AGREEMENTS IN PUBLIC BIDS

Advance agreements between bidders as to which will be the lowest bidder in public bids were considered illegal and have been most severely sanctioned, i.e. all such cases were referred to the Courts for action.<sup>12</sup>

B. *Abuse of a Dominant Position*

1. The concept of "dominant position" is being progressively defined.

The Commission considers that the relevant market must be determined on the basis of the following three criteria (to be considered together): (i) whether a product or service can be substituted for another; (ii) the size of the market (by localization or allocation); (iii) the type of customers and its specific needs.

A dominant position can be held by one company or by several companies who are parties to an agreement, or even by companies completely independent of each other who may not have concluded any "entente" (concerted practise).

The fact that a Company or a group of companies or several independent companies hold an important percentage of the market, may lead to a presumption of a dominant position. However, two companies were found to have a dominant position even though they held only 20 and 36 percent of the market.<sup>13</sup> On the other hand, in the Zinc and Feudor cases, two companies were not considered to have a dominant position, even though they held a very large share of the market.<sup>14</sup>

The products used by the manufacturers themselves need not be taken into account in the computation of their share of the market.

In order to determine whether a company is in a dominant position, the Commission examines the ease of penetration of the market, the importance of the investments required, the existence of potential competition, the technological advance, the behavior, etc.

A company is deemed to be in a dominant position when it can ignore the competition and choose the position or role it will play vis-à-vis its competitors, its suppliers or its clients.

2. Once a dominant position has been established, it is necessary for the

cords, Meeting of the Commission of January 12, 1978, B.O.S.P. of June 1, 1978, Pp. 187 and following, particularly P. 189.

<sup>12</sup>Affaire des Entreprises de Travaux Publics dans les Départements du Cher et de l'Indre, Meeting of the Commission of June 22, 1978, B.O.S.P. of August 11, 1978, Pp. 263 and following. Affaire des Entreprises de Travaux Publics dans la Région Parisienne, Meeting of the Commission of November 30, 1978, B.O.S.P. of January 11, 1979, Pp. 4 and following. Affaire Secteur de l'Assainissement en Région Parisienne, Decision of the Commission of January 24, 1980, B.O.S.P. of May 15, 1980, P. 104.

<sup>13</sup>Affaire Vinaigre, B.O.S.P. of December 29, 1979, Pp. 332 and following, Meeting of the Commission of October 18, 1979.

<sup>14</sup>B.O.S.P. of June 1, 1978, P. 194; B.O.S.P. of May 19, 1979, P. 143.

Commission to prove that it is used to hinder the normal functioning of the market. The Commission considers that certain contractual provisions, which are not abusive in themselves, should be prohibited, since they prevent any potential competition (e.g., excessive duration of contracts, exclusive distributorship or supply agreements, purchase or sales quotas, determination of the profit margin of the distributors, refusal to sell, creation of a joint subsidiary, discriminatory pricing, etc.).

### C. *Excuse*

Under Article 51, section 2, of the ordinance, an enterprise may be absolved from its illegal practises, if it can demonstrate that it was necessary for the development of the economic progress. The burden of proof is on the claimant who must be able to show that the economic advantage outweighed the disadvantages of the illegal practises and that such progress would not otherwise have been possible. It is to be noted that the company must acknowledge the concerted practise or the dominant position in order to be able to claim the benefit of Article 51. In the *Zinc* case, the Commission admitted the validity of a cartel, subject to certain conditions, in order to avoid an economic crisis.<sup>15</sup>

### D. *Sanctions*

The Commission takes into account the economic effects of the incriminated practises. It further takes into account certain aggravating circumstances, such as bad faith, duration of the practise or attenuating circumstances, such as the financial situation of the companies, the purpose of the practises, the attitude of the public authorities, etc.

In most cases, the Commission chose to recommend exemplary fines or injunctions, rather than sending the cases to the courts. Only the cases relating to public bids have been referred to the Court so far.<sup>16</sup>

It also verifies whether its injunctions are being applied and in case of non-compliance, heavy fines may be assessed.<sup>17</sup>

## II—Advice on Concentrations

There are only four cases so far, since the notification is optional and since the limits are relatively high: 40 percent or 25 percent of the market according to whether the concentration is horizontal or not. Furthermore, the Commission does not have the right to take the initiative of an investi-

<sup>15</sup>Meeting of the Commission of February 8, 1979, B.O.S.P. of May 19, 1979, P. 143.

<sup>16</sup>Affaire de la Confection Militaire, Meeting of the Commission of January 25, 1979, B.O.S.P. of April 5, 1979, Pp. 97 and following. Affaire Marché d'Electrification rurale du Département des Ardennes, Meeting of the Commission of March 15, 1979, B.O.S.P. of May 5, 1979, Pp. 126 and following.

<sup>17</sup>Affaire Decaux, Meeting of the Commission of April 24, 1980 (1 million French francs).

gation, but may only act upon the request of the minister. The first case concerned the merger of manufacturing assets of small welded steel pipes (Vallourec) with pipes of Providence.<sup>18</sup>

The Commission considered that the economic advantages of the merger outweighed its anti-competitive aspects, provided certain guarantees were given by the parties, i.e. that the surviving company will not further increase its influence on the market of steel pipes in France and that the surviving company will not impose any exclusivity undertaking to its selling network. Any further concentration plan whatsoever among them would have to be notified to the minister.

The Commission took a similar position in the case of the merger between Segma and Generale Occidentale.<sup>19</sup>

### **III—Advice to the Government on Draft Bills Concerning Competition**

The Commission has been consulted fourteen times since its origin, mostly by the government. However, those opinions have not been published, except for the one dated January 10, 1980, relating to sales with an abnormally low profit margin for well-known products (prix d'appel) in order to attract the clientele.

### **Conclusion**

Inquiries of the administration relating to competition are increasing significantly. They have recently focused on distribution and consumer goods and services. The development of the activities of the competition Commission as well as that of the EEC antitrust division should cause the companies to have their position continuously reviewed in order to ensure compliance with the rapidly evolving regulations in this field.

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<sup>18</sup>B.O.S.P. of May 19, 1979.

<sup>19</sup>B.O.S.P. No. 24 of December 1, 1979, Meeting of November 15, 1979.