

Official Journal

of the European Communities

ISSN 0378-6978

L 218

Volume 42

18 August 1999

English edition

Legislation

Contents

I Acts whose publication is obligatory

Commission Regulation (EC) No 1801/1999 of 17 August 1999 establishing the standard import values for determining the entry price of certain fruit and vegetables ... 1

- ★ **Commission Regulation (EC) No 1802/1999 of 17 August 1999 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes originating in Croatia and Ukraine** 3

Commission Regulation (EC) No 1803/1999 of 17 August 1999 amending representative prices and additional duties for the import of certain products in the sugar sector 12

II Acts whose publication is not obligatory

Commission

1999/573/EC:

- ★ **Commission Decision of 20 May 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.592 — Cégétel + 4) ⁽¹⁾ (notified under document number C(1999) 1194)** 14

1999/574/EC:

- ★ **Commission Decision of 27 July 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/36.581 — Télécom Développement) ⁽¹⁾ (notified under document number C(1999) 2299)** 24

Corrigenda

- ★ **Corrigendum to Council Directive 98/57/EC of 20 July 1998 on the control of *Ralstonia solanacearum* (Smith) Yabuuchi et al. (Official Journal of the European Communities L 235 of 21.8.1998)** 30

⁽¹⁾ Text with EEA relevance

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 1801/1999
of 17 August 1999
establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, as last amended by Regulation (EC) No 1498/98 ⁽²⁾, and in particular Article 4 (1) thereof,

- (1) Whereas Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multi-lateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto;

- (2) Whereas, in compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 18 August 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 August 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ OJ L 337, 24.12.1994, p. 66.

⁽²⁾ OJ L 198, 15.7.1998, p. 4.

ANNEX

to the Commission Regulation of 17 August 1999 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0709 90 70	052	40,1
	999	40,1
0805 30 10	388	60,5
	524	80,6
	528	63,4
	999	68,2
	052	101,5
0806 10 10	400	243,1
	600	67,6
	624	107,1
	999	129,8
	388	64,3
0808 10 20, 0808 10 50, 0808 10 90	400	66,8
	508	81,5
	512	45,3
	524	45,3
	528	54,9
	800	86,8
	804	82,2
	999	65,9
	052	93,1
	388	73,6
0808 20 50	528	21,7
	999	62,8
	052	123,5
0809 30 10, 0809 30 90	068	55,1
	999	89,3
	064	58,0
0809 40 05	066	59,0
	068	56,5
	093	66,1
	999	59,9

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 2645/98 (OJ L 335, 10.12.1998, p. 22). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 1802/1999

of 17 August 1999

imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes originating in Croatia and Ukraine

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community ⁽¹⁾, as last amended by Regulation (EC) No 905/98 ⁽²⁾, and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

- (1) On 19 November 1998, the Commission announced, by a notice published in the *Official Journal of the European Communities* ⁽³⁾, the initiation of an anti-dumping proceeding with regard to imports into the Community of certain seamless pipes and tubes originating in Croatia and Ukraine.
- (2) The proceeding was initiated following a complaint lodged in October 1998 by the 'Defence Committee of the Seamless Steel Tube Industry of the European Union' on behalf of Community producers representing 100 % of the Community production of certain seamless pipes and tubes.
- (3) The Commission officially advised the complainant Community producers, exporting producers and importers, suppliers and users known to be concerned as well as associations concerned and representatives of the exporting countries, of the opening of the proceeding. Interested parties were given an opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (4) The Commission sent questionnaires to all parties known to be concerned. Replies were received from 11 Community producers, four exporting producers in the countries concerned and eight importers in the Community.
- (5) The Commission sought and verified all the information it deemed necessary for the purposes of a preliminary determination of dumping, injury and Community interest and carried out verifications at the premises of the following companies:

(a) *Community producers*

- Benteler AG, Paderborn, Germany,
- Dalmine SpA., Dalmine, Italy,
- ESW Röhrenwerke GmbH, Eschweiler, Germany,
- Ovako Steel AB Tube Division, Hofors, Sweden,
- Productos Tubulares SA, Valle de Trápaga, Spain,
- Timken Desford Ltd, Leicester, United Kingdom,
- Tubos Reunidos SA, Amurrio, Spain,
- Vallourec & Mannesmann Deutschland GmbH, Mülheim an der Ruhr, Germany,
- Vallourec & Mannesmann France SA, Boulogne Billancourt, France,
- Voest Alpine Kindberg GmbH, Austria.

(b) *Exporting producers*

- Zeljezara Sisak d.d., Sisak, Croatia.

(c) *Related importer in the Community*

- SEPCO GmbH, Krefeld, Germany.

- (6) The dumping investigation covered the period from 1 November 1997 until 31 October 1998 (hereinafter referred to as the 'investigation period' or 'IP'). The examination of injury covered the period from January 1997 to the end of the IP (hereinafter referred to as 'the period considered').

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

1. *Product under consideration*

- (7) The product under consideration is: seamless pipes, of iron or non-alloy steel, of a kind used for oil and gas pipelines, of an external diameter not exceeding 406,4 mm (currently classifiable under CN codes 7304 10 10 and 7304 10 30); seamless tubes of circular cross-section, of iron or non-alloy steel, cold-drawn or cold-rolled (currently classifiable under CN code 7304 31 99); other tubes of circular cross-section, of iron or non-alloy steel, of an external diameter not exceeding 406,4 mm (currently classifiable under CN codes 7304 39 91 and 7304 39 93), hereinafter referred to as 'seamless tubes'.
- (8) Although there are some technical differences (e.g. standards, steel grades) between the three categories of seamless tubes, these are not such as to establish clear dividing lines since seamless tubes classified under one category can be, and sometimes are, used for the same applications as seamless tubes classified under a different one. In addition, within each category, seamless tubes come in a wide range of specifications but are all considered to be similar or identical in their essential physical and technical characteristics and in their end uses.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 128, 30.4.1998, p. 18.

⁽³⁾ OJ C 353, 19.11.1998, p. 13.

- (9) The Ukrainian exporting producers argued that there were in fact two separate products — line pipes, and commodity tubes, the former being produced to higher standards and sold directly to end users rather than to traders. However, the Commission found that the basic physical and technical characteristics were the same. Also it was found that the alleged distinction was not observed in practice since line pipes are often sold as commodity tubes and that no clear dividing lines exist between these products.
- (10) In line with the position previously adopted by the Council⁽¹⁾, therefore, the Commission found that all seamless tubes falling under the aforementioned CN codes are to be considered as one product for the purposes of this proceeding.

2. Like product

- (11) The products exported to the Community from the two countries concerned, those manufactured and sold in the Community by the Community industry as well as those domestically sold on the Croatian market were found to have the same basic physical and technical characteristics and the same uses and are therefore to be considered as like products within the meaning of Article 1(4) of Regulation (EC) No 384/96 (hereinafter referred to as 'the basic Regulation').
- (12) The Ukrainian exporting producers argued that the tubes they produced to GOST and TU standards, i.e. tubes of lower quality and needing fewer testing requirements, were different from the products produced by the Community industry which are produced to DIN or ASTM standards. The Commission rejected this assertion because quality standards as such cannot be taken into consideration in the determination of the like product. Furthermore the Commission found that these products had the same basic physical and technical characteristics and the same end use as the seamless tubes produced by the Community industry and exported by the other country concerned in the proceeding.

C. DUMPING

1. Croatia

a) Normal value

- (13) In order to establish normal value, it was first determined for the only exporting producer whether the total volume of domestic sales of the product concerned was representative in accordance with Article 2(2) of the basic Regulation, i.e. whether these sales represented more than 5 % of the sales volume of the product concerned exported to the Community.

It was then examined whether, for each product type exported by the Croatian company, domestic sales of the corresponding product type constituted 5 % or more of the sales volume of the same type exported to the Community.

For those products meeting the 5 % test, it was established whether sufficient sales had been made in the ordinary course of trade in accordance with Article 2(4) of the basic Regulation.

Where per product type, the volume of domestic sales above unit cost represented at least 80 % of sales, normal value was established on the basis of the weighted average prices actually paid for all domestic sales. Where, per product type, the volume of profitable transactions was lower than 80 %, but not lower than 10 % of sales, normal value was established on the basis of the weighted average prices actually paid for the remaining profitable sales.

For those product types where the volume of domestic sales was lower than 5 % of the volume exported to the Community, or where there were insufficient domestic sales made in the ordinary course of trade, normal value was constructed on the basis of the cost of manufacturing incurred by the exporting producer concerned for the exported product type in question plus a reasonable amount for selling, general and administrative (SG & A) costs and for profits in accordance with Article 2(3) and (6) of the basic Regulation. The SG & A costs were based on representative domestic sales and the profit margin was based on representative domestic sales made in the ordinary course of trade.

b) Export price

- (14) The export prices were established on the basis of prices paid or payable for the product concerned when sold to the first independent customer in the Community in accordance with Article 2(8) of the basic Regulation.

c) Comparison

- (15) For the purposes of a fair comparison between the normal value and the export price at an ex-works level, due allowance in the form of adjustments was made for differences which were claimed, and demonstrated, to affect prices and price comparability. These adjustments were made, where appropriate, in accordance with Article 2(10) of the basic Regulation, in respect of level of trade, transport and credit costs.
- (16) The adjustment in respect of level of trade was made because it was established that the export price (to traders) was at a different level of trade to normal value (traders and users), and that this difference had affected price comparability.

⁽¹⁾ OJ L 120, 15.5.1993, p. 42.

d) *Dumping margin*

- (17) In accordance with Article 2(11) and (12) of the basic Regulation, the dumping margin for the exporting producer concerned was established on the basis of a comparison of weighted average normal values with weighted average export prices.
- (18) Expressed as a percentage of the cif Community frontier price, the provisional dumping margin for the only Croatian exporting producer is 40,8 %.
- (19) Since the sole known exporting producer accounted for all Croatian exports of the product concerned to the Community, the Commission considers that the residual dumping margin should be set at the same level.

2. **Ukraine**a) *Normal value*

- (20) In the notice of initiation of the proceeding, the Commission proposed Brazil or the United States of America as an appropriate market economy third country for the purpose of establishing normal value. Objections to both countries were raised by the Ukrainian exporting producers within the time limit specified in the notice of initiation. With regard to Brazil, it was argued, *inter alia*, that the Brazilian market was dominated by one producer and that this had an impact on Brazilian prices. With regard to the United States of America, it was claimed that access to raw materials was poor, which raised the costs of domestic producers, and that the exports of the product concerned to the Community were not made in representative quantities, which signified a lack of competitiveness. Wages in the Ukraine and in the United States of America would not be comparable either. The Czech Republic was suggested as an alternative analogue country.
- (21) It was concluded that the objections raised against the choice of Brazil were justified. As for the United States of America, it could not be used as an analogue country either since all eight exporters in the United States of America listed in the complaint refused to cooperate. The complainants then proposed using a privately compiled report containing information on the sales prices of the United States producers in order to establish normal value. This suggestion had to be rejected since the information was not verifiable.
- (22) Three known Czech producers of pipes and tubes were then contacted in order to ask for their cooperation, a proposal they all turned down.
- (23) Croatia, an exporting country also concerned by this investigation, was then proposed. The complainants as well as the Ukrainian exporting producers initially argued against Croatia on the grounds that Croatian production capacity was below 10 % of Ukrainian

capacity and that the Croatian products did not fully cover the size range of the Ukrainian exports.

- (24) The Commission however, after careful consideration of all relevant factors, came to the conclusion that Croatia could be used as a reasonable alternative. This was substantiated by the fact that the volume of Croatian domestic sales of the product concerned was representative of Ukrainian exports to the Community during the IP. Croatia is also importing the product concerned as well as exporting it. Finally, the capacity utilisation rate of the Croatian tube company is similar to the weighted average capacity utilisation rate of the three cooperating Ukrainian exporting producers.
 - (25) Parties to the investigation were informed that the Commission envisaged selecting Croatia and were given the opportunity to comment. No comments were received within the time limit set.
 - (26) Normal value was thus established on the basis of the prices and costs of the Croatian producer for products comparable to those sold by the Ukrainian exporting producers to the Community, using the methodology described at recital 13.
- b) *Export price*
- (27) For one exporting producer, after the on-the-spot verification at the premises of one of its related importers in the Community, the information submitted was found not to be reliable. The export sales of this exporting producer were therefore not taken into consideration for the determination of the export price. For the two other Ukrainian exporting producers, all exports were taken into consideration for the determination of the export price.
 - (28) The export price was then established in accordance with Article 2(8) of the basic Regulation, i.e. on the basis of the prices actually paid or payable by independent customers in the Community.
- c) *Comparison*
- (29) It was found that there was no domestic production of cold-drawn seamless tubes in Croatia. However, since Ukrainian exports of this category to the Community only represented 10 % of total Ukrainian exports in the IP, it was considered reasonable to exclude them from the calculations.
 - (30) For the purpose of a fair comparison, due allowance in the form of adjustments was made for differences which were claimed, and demonstrated, to affect price comparability. These adjustments were made, where appropriate, in accordance with Article 2(10) of the basic Regulation, in respect of transport.

- (31) Adjustments for physical characteristics were claimed by two Ukrainian exporting producers, to account for the difference between Ukrainian tubes produced in accordance with GOST and TU standards and standards such as DIN and ASTM, which are commonly used by the Community industry. GOST and TU standard tubes were alleged to be of lower quality and to be subjected to less rigorous testing which meant that they were sold at a discount on the Community market.

The Commission, however, considered that the arguments presented by the Ukrainian exporting producers were not substantiated and that further information on this claim was needed. The Commission has therefore rejected this claim for the purpose of the provisional determination.

d) *Dumping margin*

- (32) On the basis of a comparison of weighted average normal values with weighted average export prices, a country-wide dumping margin was established in accordance with Article 2(11) and (12) of the basic Regulation.
- (33) Expressed as a percentage of the cif Community frontier price, the provisional dumping margin for all Ukrainian companies is 123,7 %.

D. INJURY

1. Definition of the Community industry

a) *Community production*

- (34) The output of all companies producing seamless tubes in the Community during the IP has been taken into account for the determination of Community production. These companies are hereinafter referred to as 'Community producers'.

b) *Community industry*

- (35) It is to be noted that the complaint was lodged on behalf of 12 Community producers of seamless tubes. These 12 producers accounted for the total Community production at the time of the investigation.
- (36) Only 10 out of the 12 complaining Community producers responded to the Commission questionnaire. As concerns the remaining two producers, one did not reply to the questionnaire at all, while the other only replied in part. Both Community producers were there-

fore considered not to be cooperating in the framework of the present investigation.

- (37) The remaining 10 Community producers are Voest Alpine Kindberg (Austria), Vallourec & Mannesmann France (France), Benteler AG (Germany), ESW Röhrenwerke GmbH (Germany), Vallourec & Mannesmann Deutschland GmbH (Germany), Dalmine SpA. (Italy), Productos Tubulares SA (Spain), Tubos Reunidos SA (Spain), Ovako Steel AB Tube Division (Sweden) and Timken Desford Steel Ltd (United Kingdom).
- (38) These producers accounted for 94 % of total Community production in the IP and thus constituted a major proportion of Community production pursuant to Article 5(4) of the basic Regulation. These companies are hereinafter referred to as 'the Community industry'.

2. Preliminary remarks

- (39) For the purposes of the injury and causation analysis, the Commission has taken into account the fact that a previous investigation concerning imports of seamless tubes from Croatia, the Czech Republic, Hungary, Poland, Romania, Russia and the Slovak Republic was concluded by Council Regulation (EC) No 2320/97⁽¹⁾ which imposed anti-dumping measures on these countries.
- (40) Since, for the period from 1995 to August 1996, the previous investigation had established that imports of seamless tubes originating in Croatia had not caused material injury to the Community industry, it was not considered appropriate to reanalyse the impact of imports from the countries concerned on the Community industry during this period.
- (41) It was therefore concluded that for the purposes of analysing injury and causation in the present proceeding, the Commission would only consider data relating to the period January 1997 to October 1998 (i.e. the end of the IP).
- (42) Furthermore, it is to be noted that the situation of the Community industry described below has been assessed in the light of an expected improvement in its situation following the imposition of the abovementioned anti-dumping measures.

3. Community consumption

- (43) Community consumption was based on the questionnaire replies (volume of sales of the Community industry), Eurostat information (volume of imports) and the information available for non-cooperating Community producers' level of sales.
- (44) On the above basis, the apparent Community consumption increased over the period going from 1 087 469 tonnes in 1997 to 1 195 329 tonnes in the IP, which represents an overall increase of 10 %.

⁽¹⁾ OJ L 322, 25.11.1997, p. 1.

4. Imports into the Community from the countries concerned

a) Cumulation

- (45) The Commission examined whether imports of seamless tubes originating in Croatia and Ukraine should be assessed cumulatively in accordance with Article 3(4) of the basic Regulation.
- (46) As stated above, the dumping margins found for Croatia and Ukraine were 40,8 % and 123,7 % respectively and therefore both are well above the *de minimis* level. Import volumes from Croatia and Ukraine are comparable in absolute terms and were found to be significant for both countries. Imports from Croatia amounted to 2,6 % of Community consumption in the IP while imports from Ukraine amounted to 11,2 % of Community consumption in the same period.
- (47) As regards the conditions of competition, the investigation has found that during the IP seamless tubes imported from Croatia and Ukraine were alike in all their basic physical and technical characteristics. Furthermore seamless tubes from Croatia and Ukraine were marketed in the Community through comparable sales channels under similar commercial conditions. The imported seamless tubes were therefore considered to compete with each other and with the seamless tubes produced and sold in the Community.
- (48) In the light of the above, the Commission considered that all the criteria set out in Article 3(4) of the basic Regulation were met. The imports from Croatia and Ukraine were therefore examined cumulatively.

b) Volume and market share of dumped imports

- (49) Imports from Croatia and Ukraine increased significantly going from 83 783 tonnes in 1997 to 164 403 tonnes in the IP. The corresponding market share was 7,7 % in 1997 and 13,8 % in the IP.

c) Prices of dumped imports

i) Evolution of prices

- (50) The average unit prices of the seamless tubes imported from Croatia and sold on the Community market (based on Eurostat), expressed in ECU/kg, were 0,50 in 1997 and 0,51 in the IP. The average unit prices of seamless tubes imported from the Ukraine and sold on the Community market (based on Eurostat), expressed in ECU/kg, were 0,37 in 1997 and 0,38 in the IP.

ii) Price undercutting

Croatia

- (51) For the purpose of analysing price undercutting, in view of the wide range of seamless tubes investigated, the Commission classified the seamless tubes sold by the Community industry and those imported from Croatia according to two criteria: firstly, according to groups of outside diameter and wall thickness, and secondly according to three categories, i.e. line pipes, cold-drawn tubes and commercial tubes. A comparison was then made between the weighted average selling prices of Croatian seamless tubes per group and category, and the weighted average sales prices of the Community industry's seamless tubes in the same group and category. Price comparisons were made on the basis of the sales to the first independent customer in the Community. In order to ensure comparability, the prices of the Community industry and those of the imported products were free of all rebates and taxes and where appropriate, adjusted in terms of transport cost to ex-works or cif Community frontier level respectively. In addition, the import prices were adjusted to include customs clearance and post-importation costs based on information provided by the importers.

Ukraine

- (52) As concerns the analysis of price undercutting regarding sales of Ukrainian tubes, it should be mentioned that the parties concerned did not provide information on outside diameter and wall thickness that was sufficient to allow the Commission to group the products in the same manner as in the case of imports originating in Croatia. In the absence of the abovementioned data the Commission conducted a price undercutting calculation on the basis of the information provided, i.e. by comparing the weighted average selling prices of Ukrainian seamless tubes per CN code with the weighted average sales prices of the Community industry's seamless tubes in the same CN code.
- (53) The price comparisons concerning Ukrainian tubes were limited to sales to the first independent customer in the Community made by the two exporting producers whose sales were used for the establishment of the Ukrainian export price (see recital 27). The prices of the Community industry were free of all rebates and taxes and where appropriate, adjusted in terms of transport cost to ex-works level. The import prices were adjusted to include customs clearance and post-importation costs based on information provided by the importers.
- (54) The results of the comparison showed margins of undercutting for both countries concerned. The weighted average price undercutting margins expressed as a percentage of the Community industry's prices were as follows:

- Croatia: 19,7 %,
- Ukraine: 32,7 %.

5. Situation of the Community industry

a) Production, capacity and capacity utilisation

- (55) Production of the Community industry went from 971 019 tonnes in 1997 to 1 021 869 tonnes in the IP.
- (56) Given that the machinery used in the production of the product concerned is the same as that used for the production of a wide variety of other seamless tubes not at issue in the current proceeding (e.g. precision tubes, stainless steel tubes and tubes exceeding 406,4 mm diameter), it was not considered possible to establish product specific capacity and capacity utilisation figures.
- (57) The figures for capacity and utilisation have been calculated on the basis of the total capacity of the Community industry for all products produced on the same machinery and then allocated on the basis of the production of the product concerned. In this respect production capacity went from 1 329 450 tonnes in 1997 to 1 306 905 tonnes in the IP. The capacity utilisation rate went from 73 % in 1997 to 78 % in the IP.

b) Stocks

- (58) It is to be noted that the Community industry generally produces the product concerned to order, consequently the level of stocks held by the Community industry was found not to be relevant in the assessment of the situation of the Community industry.

c) Volume of sales and market share

- (59) Sales of the Community industry increased overall by 10 % going from 671 390 tonnes in 1997 to 739 142 tonnes in the IP.
- (60) The market share held by the Community industry remained stable going from 61,7 % in 1997 to 61,8 % in the IP.

d) Prices

- (61) On average, unit prices of the product concerned sold by the Community industry on the Community market, expressed in ECU/kg, were 0,62 in 1997 and 0,65 during the IP, corresponding to an increase of 4,8 %.

e) Profitability

- (62) The Community industry experienced financial difficulties related to its sales of the like product during the period under consideration. In 1997 it incurred losses averaging - 2,4 %. In the IP the Community industry improved its profitability reaching the break-even point (+ 0,4 %). This level of profitability is nevertheless insufficient to generate the level of earnings that would be required by the Community industry to cover its costs,

to make a reasonable profit, to recover from the losses incurred in previous years and to ensure its long-term viability.

f) Investments

- (63) Investments (expressed in ECU thousand), increased going from 23 684 in 1997 to 25 020 in the IP. Investments were found mostly to be in replacement machinery.

g) Employment

- (64) Employment in the Community industry fell from 4 012 employees in 1997 to 3 927 employees in the IP.

h) Productivity

- (65) Productivity (volume produced per employee) of the Community industry increased over the period considered (an increase of 8 % was found between 1997 and the IP).

6. Conclusion on injury

- (66) It is to be noted that from 1997 to the IP, although the Community industry saw an improvement in profitability, going from a loss-making situation in 1997 (- 2,4 %) to a situation of break-even in the IP (+ 0,4 %) this level of profitability was considered to be largely insufficient to enable the Community industry to ensure its long-term viability. Furthermore, the Community industry's market share remained stable, showing that it was unable to regain previously lost market share as had been expected given the imposition of anti-dumping measures on imports of the product concerned originating in the Czech Republic, Hungary, Poland, Romania, Russia and the Slovak Republic in November 1997.
- (67) It is therefore provisionally concluded that the Community industry has suffered material injury within the meaning of Article 3 of the basic Regulation.

E. CAUSATION

1. Effect of the dumped imports

- (68) It is to be noted that in a price sensitive market, such as is the case for seamless tubes, price undercutting of the magnitude found (between 19,7 and 32,7 %) has an immediate and significant impact. The high volume of imports from Croatia and Ukraine (164 403 tonnes in the IP) and the low prices of these imports (ECU/kg 0,40 on average in the IP) which significantly undercut those of the Community industry coincided with the Community industry's poor financial results and the lack of improvement in its market position.

- (69) This should be seen in the light of the imposition of anti-dumping measures on imports of the product concerned originating in the Czech Republic, Hungary, Poland, Romania, Russia and the Slovak Republic, following which their cumulated market share decreased from 19 % in 1997 to 14,8 % in the IP and the value of these imports increased (going from ECU/kg 0,44 in 1997 to ECU/kg 0,47 in the IP). The Community industry was expected to benefit from this development by regaining some lost market share; however, its market share remained stable between 1997 and the IP.

2. Effect of other factors

a) Other imports

- (70) As concerns the imports from the Czech Republic, Hungary, Poland, Romania, Russia and the Slovak Republic, after the imposition of anti-dumping measures in November 1997 their imports decreased significantly (from a market share of 19 % in 1997 to 14,8 % in the IP) and the unit value of these imports increased in the same period (from ECU/kg 0,44 in 1997 to ECU/kg 0,47 in the IP). As regards these imports, it should be noted that anti-dumping measures have been in force since November 1997.

- (71) Imports from other third countries neither covered by the previous investigation nor the present one were found to have decreased their market share from 6,4 % in 1997 to 4,5 % in the IP. The unit value of these imports (based on Eurostat) was found to be significantly higher than both the imports from Croatia or Ukraine.

b) Product substitution

- (72) Certain exporting producers argued that products other than those concerned by the current proceeding, in particular welded tubes, were being used as substitutes for seamless tubes. Consequently, it was argued that any injury suffered by the Community industry was attributable to a reduction in demand for seamless tubes.
- (73) In this respect the Commission did not find any application where seamless tubes had been substituted for welded tubes. Furthermore, the investigation has shown that the market for seamless tubes did not decrease, on the contrary an increase of 11 % over the period investigated was found.

3. Conclusion on causation

On the basis of the above, it was concluded that the imports from the two countries concerned have caused material injury to the Community industry. Indeed, imports from Croatia and Ukraine have impeded the full recovery of the injurious situation of the Community industry, found in the context of the previous anti-

dumping proceeding concerning this product. This conclusion is reached in particular in view of the analysis of the effect of other third country imports of the product concerned. Data relating to such imports does not suggest that their market impact is such as to break the causal link between imports originating in Croatia and the Ukraine and the situation of the Community industry.

F. COMMUNITY INTEREST

1. Preliminary remarks

- (74) The Commission provisionally examined, on the basis of the information submitted, whether, despite the dumping and injury findings, compelling reasons exist which would lead to the conclusion that it is not in the Community interest to impose measures in the present case.

For this purpose, the Commission has considered the impact of measures for all parties involved in the proceeding.

It is recalled that Regulation (EC) No 2320/97 had concluded that no reasons existed not to impose measures on grounds of Community interest.

2. Collection of Community interest data

- (75) In order to assess the impact of the imposition of measures, the Commission requested information from all interested parties known, including the Community producers, importers/traders and users. It should be noted that no replies were received from the user industries. On the basis of the information received from the cooperating parties, the Commission reached the following conclusions.

3. Impact of measures on the Community industry

- (76) It is to be noted that further to the imposition of measures in November 1997, the Community industry's situation improved slightly, showing that measures in this sector were effective, although, as has been explained above, the Community industry was impeded from fully benefiting from the existing measures due to the dumped imports from Croatia and Ukraine.

- (77) Given that the Community industry had not been able to fully recover from its financial difficulties, the Commission considers that the imposition of measures would be effective in affording the industry the opportunity to recover from the injury suffered. In particular given the high volume of imported seamless tubes from the countries concerned, the imposition of measures is likely to allow the Community industry to regain lost market share and consequently to improve profitability.

4. Impact of measures on importers/traders

- (78) It is to be recalled that Regulation (EC) No 2320/97 had foreseen that the imposition of anti-dumping measures would not have more than a minimal impact on the overall situation of the importers/traders of seamless tubes given the wide diversity of products in which they trade.
- (79) The Commission has provisionally also concluded in the present investigation that given that seamless tubes represent only a small part in the diverse range of the products commercialised by the importers/traders, and the fact that a number of alternative sources of supply of seamless tubes exist that are not subject to anti-dumping measures, including seamless tubes produced by the Community industry, it is unlikely that the imposition of measures would have a significant impact on the situation of these importers/traders.

5. Impact of measures on users

- (80) It is to be recalled that Regulation (EC) No 2320/97 had foreseen that the imposition of anti-dumping measures would only have a negligible impact on the situation of the user industries of seamless tubes, (including the chemical and petrochemical industries, power stations, the automobile and construction industries), given that the seamless tubes represent only a small element in the overall costs of these industries. It is to be noted that there exists a substantial number of companies in the Community producing tubes (12) and that there are a high number of exporters in other countries having an important share of the Community market. The existence of a multitude of alternative sources of supply guarantees effective competition on the market to the benefit of the user industries.
- (81) Given that no representations have been made contradicting the previous findings and in view of the lack of cooperation of users in the present investigation, it is expected that any price effect resulting from anti-dumping measures would be negligible with respect to downstream industrial users.

6. Conclusion on Community interest

- (82) Given the increased volume of imports from both Croatia and Ukraine, in particular following the imposition of anti-dumping measures in November 1997, and the exporting producers' behaviour on the Community market in significantly undercutting the prices of the Community industry, there is a likelihood that, in the absence of measures, this trend in imports will continue not only preventing the Community industry from benefiting from the imposition of measures in the previous case but also further aggravating the injurious situation of the Community industry.

- (83) Given the sharp increase in volume of dumped imports from Croatia and Ukraine following Regulation (EC) No 2320/97, it is expected that the imposition of measures on imports from these countries would be effective in addressing the material injury caused by these imports. It is therefore considered to be in the interest of the Community industry to impose measures.

As regards both the importers/traders and the user industries, any impact on prices of seamless tubes is expected only to be marginal.

The Commission has therefore concluded that, in these circumstances, there are no compelling reasons not to impose measures on grounds of Community interest.

G. PROVISIONAL ANTI-DUMPING MEASURES

1. Injury elimination level

- (84) Having established that the dumped imports under consideration have caused material injury to the Community industry and that there are no compelling reasons not to take action, the measures envisaged should be imposed at a level sufficient to eliminate the injury caused by these imports without exceeding the dumping margins found.
- (85) The removal of such injury requires that the industry should be put in a position where the prices of imports of the product concerned originating in the countries concerned should be increased to a non-injurious level.
- (86) For the purposes of calculating the necessary price increase, i.e. the injury margin, the Commission considered that the prices of the dumped imports had to be compared with actual sales prices of the Community industry plus a reasonable level of profit which the industry might be expected to make in the absence of injurious dumping from the countries under investigation.
- (87) On this basis, the weighted average export prices for those products used in the determination of price undercutting were compared, on a cif Community frontier level, adjusted to take account of customs duty paid and an allowance in respect of post-importation costs, with the actual weighted average selling prices charged by the Community industry, increased, where appropriate, to reach a reasonable profit margin, in this case established at 5 %. This profit margin, which is the same as the one used in the previous investigation concerning the Czech Republic, Hungary, Poland, Romania, Russia and the Slovak Republic, was considered, for the purpose of a provisional determination, to be the minimum profit level that industry might be expected to achieve in the absence of injurious dumping from the countries under investigation.

This comparison showed the following injury margins:

- Croatia: 31,2 %,
- Ukraine: 56,5 %.

2. Provisional measures

- (88) For the purpose of establishing the level of the provisional duty, account was taken of the level of dumping found and the amount of duty necessary to eliminate the injury sustained to the Community industry.
- (89) Since the dumping margins found are higher than the injury elimination margins, the anti-dumping duties should be based at the provisional stage on the injury elimination margins.

3. Final provision

- (90) In the interest of sound administration, a period should be fixed within which the interested parties may make their views known in writing and request a hearing. Furthermore it should be stated that the findings made for the purposes of this Regulation are provisional and may have to be reconsidered for the purposes of any definitive measures —

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on the following imports originating in Croatia and Ukraine:
- seamless pipes, of iron or non-alloy steel, of a kind used for oil and gas pipelines, of an external diameter not exceeding 406,4 mm falling within CN codes 7304 10 10 and 7304 10 30,

- seamless tubes of circular cross-section, of iron or non-alloy steel, cold-drawn or cold-rolled falling within CN code 7304 31 99,
- other tubes of circular cross-section, of iron or non-alloy steel, of an external diameter not exceeding 406,4 mm falling within CN codes 7304 39 91 and 7304 39 93.

The rate of duty applicable to the net free-at-Community-frontier price of imports of the product concerned originating in Croatia shall be 31,2 %, and it shall be 56,5 % for imports of the product concerned originating in Ukraine.

2. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

3. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

Article 2

Without prejudice to Article 20 of Regulation (EC) No 384/96, the interested parties may make known their views in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

Pursuant to Article 21(4) of Regulation (EC) No 384/96, the parties which made themselves known within the time limit specified in the notice of initiation may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

Article 1 of this Regulation shall apply for a period of six months.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 August 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION REGULATION (EC) No 1803/1999
of 17 August 1999
amending representative prices and additional duties for the import of certain products in the
sugar sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector ⁽¹⁾, as last amended by Commission Regulation (EC) No 1148/98 ⁽²⁾,

Having regard to Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses ⁽³⁾, as last amended by Regulation (EC) No 624/98 ⁽⁴⁾, and in particular the second subparagraph of Article 1(2), and Article 3(1) thereof,

- (1) Whereas the amounts of the representative prices and additional duties applicable to the import of white sugar, raw sugar and certain syrups are fixed by Commission Regulation (EC) No 1441/1999 ⁽⁵⁾, as amended by Regulation (EC) No 1627/1999 ⁽⁶⁾;

- (2) Whereas it follows from applying the general and detailed fixing rules contained in Regulation (EC) No 1423/95 to the information known to the Commission that the representative prices and additional duties at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 1 of Regulation (EC) No 1423/95 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 18 August 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 August 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ OJ L 177, 1.7.1981, p. 4.

⁽²⁾ OJ L 159, 3.6.1998, p. 38.

⁽³⁾ OJ L 141, 24.6.1995, p. 16.

⁽⁴⁾ OJ L 85, 20.3.1998, p. 5.

⁽⁵⁾ OJ L 166, 1.7.1999, p. 77.

⁽⁶⁾ OJ L 192, 24.7.1999, p. 45.

ANNEX

to the Commission Regulation of 17 August 1999 amending representative prices and the amounts of additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 99

(EUR)

CN code	Amount of representative prices per 100 kg net of product concerned	Amount of additional duty per 100 kg net of product concerned
1701 11 10 ⁽¹⁾	13,56	10,15
1701 11 90 ⁽¹⁾	13,56	16,51
1701 12 10 ⁽¹⁾	13,56	9,92
1701 12 90 ⁽¹⁾	13,56	15,94
1701 91 00 ⁽²⁾	16,53	18,84
1701 99 10 ⁽²⁾	16,53	13,39
1701 99 90 ⁽²⁾	16,53	13,39
1702 90 99 ⁽³⁾	0,17	0,47

⁽¹⁾ For the standard quality as defined in Article 1 of amended Council Regulation (EEC) No 431/68 (OJ L 89, 10.4.1968, p. 3).

⁽²⁾ For the standard quality as defined in Article 1 of Council Regulation (EEC) No 793/72 (OJ L 94, 21.4.1972, p. 1).

⁽³⁾ By 1 % sucrose content.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 May 1999

relating to a proceeding under Article 81 of the EC Treaty

(Case IV/36.592 — Cégétel + 4)

(notified under document number C(1999) 1194)

(Only the English, French and German texts are authentic)

(Text with EEA relevance)

(1999/573/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Australia, Finland and Sweden, and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted pursuant to Articles 2 and 4 of Regulation No 17 on 18 July 1997,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17 ⁽²⁾,

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

- (1) On 18 July 1997 the Commission received a notification pursuant to Article 4 of Regulation No 17 concerning a set of agreements, by which Compagnie générale des

eaux SA ('CGE'), British Telecommunications plc ('BT'), Mannesmann AG and SBC International Inc. ('SBCI') agreed on their respective contributions, interests and commercial relationships in connection with Cégétel (Compagnie générale de télécommunications).

- (2) This notification concerns the restructuring of Cégétel, a company which was created at the end of 1995 by CGE and has since been active on previously liberalised segments of the telecommunications market particularly in mobile telephony (Société française de radiotéléphonie — SFR) and in paging (Société française de transmission de données par radio — TDR).

It is related to the notification of the agreements between the SNCF (Société nationale des chemins de fer français) and Cégétel concerning Télécom Développement ('TD') (see notice pursuant to Article 19(3) of Regulation No 17 — Case IV/36.581 ⁽³⁾), a jointly controlled subsidiary to which SNCF has contributed its existing telecommunications network (9 000 km of optical fibre cables), now being developed into an alternative long-distance infrastructure network, by the additional roll-out of 6 000 km of optical fibre cables.

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ C 238, 29.7.1998, p. 3.

⁽³⁾ OJ C 293, 22.9.1998, p. 4.

- (3) The purpose of the restructuring is to enable Cégétel to become the second full-service telecommunications operator in France, by offering a full range of telecommunications services, including fixed voice telephony. Cégétel has acquired the existing corporate telecommunications business of BT's affiliate in France ('BT France'). In partnership with SNCF, Cégétel is now constructing, through TD, a national, fixed, long-distance network. TD produces fixed long-distance, voice-telephony services and transmission capacities, which are commercialised to residential customers by Cégétel Le 7, and to business customers by Cégétel Enterprises. These two companies will in fact address all the telecommunications needs of their respective customer segments.
- (4) TD, Cégétel Le 7 and Cégétel Enterprises were granted the necessary licences in December 1997 and March 1998 (pursuant to Articles L 33-1 and L 34-1 of the French Posts and Telecommunications Code. Cégétel has been one of the first alternative operators to be granted a short 'E-prefix' for carrier selection and to start its long-distance services for residential customers. Cégétel launched its fixed, long-distance, telecommunications services in February 1998.

B. THE PARTIES

- (5) CGE, now named Vivendi, is a diversified company, providing a full range of services: water supply, waste management, building and public works, real estate and communication (multimedia, cable television, telecommunications). CGE's worldwide turnover in financial year 1996 was ECU 25 552 million (FRF 165 914 million), 3,6 % of which was in the telecommunications sector (mainly through SFR and TDR). It was not previously active in the fixed telecommunications market in France.
- (6) BT is the historical telecommunications operator in the United Kingdom and is now active worldwide. BT's worldwide turnover for the year ending 31 March 1997 was GBP 14 935 million (ECU 18 352 million). BT is the majority owner of Concert Communications (Concert) which provides value added and enhanced services to multinational companies. Prior to the 1998 full liberalisation, BT was already present in many other European countries, through joint ventures, in liberalised segments, like mobile communications and/or corporate telecommunications services. Through joint ventures similar to Cégétel it now enters the fixed voice-

telephony market in several of these countries. BT was previously active, through its subsidiary BT France, on the French market for liberalised corporate telecommunications services, with a very low market share (less than [...]) (*).

- (7) Mannesmann AG is the ultimate parent of a diversified industrial group, with a worldwide turnover of DEM 34 683 (ECU 18 163 million). Mannesmann AG intends to become the second telecommunications operator in Germany, through its joint venture with Deutsche Bahn. Mannesmann AG operates the second GSM mobile network in Germany. Mannesmann was not previously active on the French telecommunications market, except through an interest in TDR.
- (8) SBCI is a wholly owned subsidiary of SBC Communications Inc. SBC is one of the seven regional telecommunications operators in the United States. It is one of the world's leading diversified telecommunications companies, with nearly 114 000 employees. SBCI was not previously active on the French telecommunications market, except through a 10 % interest in SFR.

C. THE NOTIFIED OPERATION

- (9) The notification contains a set of agreements concerning this operation, all dated 14 May 1997. The main agreements are: the shareholders' agreement, the master agreement, the framework cooperation agreement for international traffic operations, the Concert distribution agreement and the framework network supply and customer service agreement for Concert services.

Shareholding

- (10) CGE (currently named Vivendi) initially held 100 % of Cégétel. As a result of the agreements, the parties hold, directly or indirectly, the following participations in Cégétel: Vivendi (44 %), BT (26 %), Mannesmann (15 %), SBCI (15 %).

Management

- (11) Cégétel is managed by a board of directors, which comprises nine directors (five from Vivendi, two from BT, one from Mannesmann, one from SBCI), from whom a chairman is appointed.
- (12) The board of directors is assisted by several committees, in particular an executive committee, which is designed to play a key role in determining the common position of the shareholders regarding major strategic decisions, notably [...]. (*) The executive committee comprises the 'directeur général' of Cégétel, the 'directeurs généraux adjoints' of Cégétel, and one representative of each shareholder. It is chaired by either Cégétel's 'directeur général' or by the Vivendi representative at the executive committee.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

- (13) The executive committee is designed to operate by unanimous consent, but a dispute resolution mechanism is provided for. In the event that no agreement is reached on a matter, this matter is finally decided by the board of directors (at a 'final board meeting') by simple majority, subject to veto right and specific consent rights.

All parties hold veto rights concerning in particular [...] (*). BT has a specific veto right to [...] (*).

The parties hold specifies consent rights, pursuant to which a limited number of matters (notably [...] (*) must be agreed upon by at least one representative of each party in the final board.

Scope of business activities

- (14) Cégétel is active in France only, including overseas departments and territories. Under Article 2(1) (1) of the shareholders' agreement, it is prohibited from investing in infrastructure outside France.
- (15) Cégétel and the companies controlled by it offer a full range of domestic and international telecommunications products and services, in particular newly liberalised voice telephony services, as well as various voice and data services to end-users both residential and corporate, the distribution of Concert services, delivery of these services through the construction and operation of a domestic network and/or interconnection with other operators, international services, infrastructure services, outsourcing and facilities management, Internet access provision. Cégétel intends to have a market share in long-distance and international fixed voice telephony of approximately [...] (*) in 2006.

Cégétel will further develop its mobile telecommunications activities in France, which are currently carried out by its subsidiary SFR.

- (16) Telephony over cable-TV networks is not included in Cégétel's scope of business at this stage, unless the parties unanimously agree otherwise.

Non-compete clause

- (17) All parties agree, in Article 2(4), that Cégétel and its subsidiaries shall be the sole entities through which they will set up and carry out any telecommunications activity in France, subject to any applicable competition rules relating to passive sales. Some very specific inter-

national telecommunications activities are excluded from this non-compete clause (for example, [...] (*), etc.).

Preferred-supplier principle

- (18) Article 6 of the shareholders' agreement provides that commercial contracts between Cégétel and any of the four shareholders or between Cégétel and its subsidiaries will be concluded on a preferred supplier basis. This means that when Cégétel is the purchasing party, it will select one of the shareholders as the supplier in priority to third parties, where the terms offered by this shareholder match or are more favourable than any agreement that could reasonably be reached with a third party, considering all relevant factors (price, volume, quality of service, etc.). Conversely, a shareholder will select Cégétel as its supplier where the terms offered by Cégétel are at least as favourable as any offer that could be made by a third party.

Preferred-supplier and preferred-customer principles for the international traffic between Cégétel and BT

- (19) Cégétel and BT will cooperate for the development of Cégétel's international traffic, on a 'preferred-supplier' basis, as was explained in recital 18 and on a 'preferred-customers' basis. BT will be the preferred supplier of Cégétel for termination of outgoing international traffic products and services⁽¹⁾. Cégétel will be the preferred supplier of BT for termination of incoming international wholesale voice traffic⁽²⁾ in France.

Cégétel will be BT's favoured customer for outgoing international wholesale voice traffic: BT will offer to Cégétel terms and conditions that are at least as favourable to Cégétel as those conditions that BT offers to other licensed operators in France. BT will be Cégétel's favoured customer for termination of incoming international voice traffic in France: Cégétel will offer to BT terms and conditions that are at least as favourable to BT as those conditions that Cégétel offers to any other operator in the United Kingdom. The other shareholders have the option of entering into similar arrangements.

The Concert distribution agreement

- (20) Cégétel is appointed as exclusive distributor of Concert's value added and enhanced international services ('global products') within France and agrees to obtain from BT all its requirements for global products. In the event that Cégétel is expressly required by a customer in France to provide a global product other than a Concert service, the case would be reported to the executive committee. The framework network supply and customer services agreement for Concert services contains provisions, to ensure that BT and Cégétel's networks interoperate to provide a seamless, managed, end-to-end service for Concert customers. Cégétel is restricted from providing support services related to non-Concert global services.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

⁽¹⁾ In this recital, outgoing international traffic refers to traffic from France to any other country and incoming international traffic refers to traffic from any other country to France.

⁽²⁾ International wholesale voice traffic means international basic voice services provided by an operator to another operator, but not on the basis of proportionate return nor of proportionate accounting rates.

D. THE RELEVANT MARKET

*Mobile telecommunications services***Product market**

- (21) Cégétel will address all segments of the French telecommunications market, both for fixed services and mobile services.
- (22) For fixed telecommunications services, it is the Commission's established practice to consider the relevant product markets as being the markets for domestic and international voice and data telecommunications services, with a segmentation between the voice market (in which both private households and business customers participate) and the data market (primarily used by business), and further segmentation into domestic and international markets. However, the precise product-market delimitation in this case can be left open since even on the narrowest possible definition the proposed transaction does not give rise to competition problems.
- (23) For mobile telecommunications services, the parties submit that this market includes all mobile voice services notwithstanding the standard they use (analogue, GSM, DCS 1800). However, the precise product-market delimitation in this case can be left open since even in the narrowest possible definition the proposed transaction does not give rise to any competition problem.

Geographical market

- (24) The scope of the geographic market in telecommunications is determined: (i) by the extent and the coverage of the network and the customers that can economically be reached and whose demand may be met; and (ii) by the legal and regulatory system and the right to provide a service.

Fixed telecommunications services

- (25) having regard to the licensing and regulatory framework for the provision of basic fixed telecommunications services, the geographic market for these services must be regarded as being national in scope.
- (26) On the other hand, the demand for customised packages of corporate telecommunications services like Concert exists in at least three distinct geographic markets, namely at global, cross-border regional and national levels (see Decision 96/546/EC in Case IV/35.337 — Atlas, at recital 12 ⁽¹⁾).

- (27) As regards the market for GSM service provision, the Commission has held in the past that there is an increasing trend towards a European market, due to a certain degree of substitutability throughout Europe between the various subscriptions allowed by 'roaming' agreements. The parties submit that, in view of the licensing and regulatory framework within which these services are provided, the relevant geographic market is France. They also submit that it is very unlikely that a French customer could consider taking a subscription in another Member State, notably because of the high international roaming charges. However, the definition of the relevant geographic market for mobile telecommunications may be left open since, given the amendments to the non-competition provisions mentioned in recital 31, the notified transaction does not give rise to competition problems.

Market shares of the parties

- (28) Except concerning the mobile telecommunications services, the parties' market shares on the described segments are currently negligible (below [...] ^(*) in 1997). SFR, a subsidiary of Cégétel, holds a market share of approximately 38 % in mobile telephony in France.

The main competitors on these markets

- (29) In France, as well as in most European countries, the incumbent telecommunications operator (in this case France Télécom), holds a dominant position in nearly all segments of the fixed telecommunications market, due to its former legal monopoly on infrastructure and services. On the mobile telecommunications market, France Télécom holds a market share of approximately 51 %, in terms of number of subscribers.
- (30) Many companies have entered or intend to enter the French telecommunications market, either globally (9 Telecom) or on specific segments: resale of voice telephony services (Axis, Kertel, etc.), telecommunications networks or services for corporate clients (WorldCom, Siris, Colt, Omnicom, etc.), local access (Lyonnaise des Eaux), and so on. By July 1998, 37 licences had already been delivered for telecommunications network and/or services provision, 18 applications for a licence were being analysed by the national telecommunications regulator. Seven operators had been granted a 'short prefix' for carrier selection.

Three operators are providing mobile telecommunications services in France: France Télécom, SFR and Bouygues Telecom.

⁽¹⁾ OJ L 239, 19.9.1996, p. 23.

^(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

E. CHANGES MADE FOLLOWING THE COMMISSION'S INTERVENTION

- (31) The Commission informed the parties that, given the potential substitutability throughout Europe between the various GSM subscriptions allowed by roaming agreements, the application of the non-compete clause to the marketing and sales of GSM services by the shareholders (sale of SIM cards) appeared to be incompatible with Community competition rules. Consequently the parties have agreed to amend the original agreements to exclude from the non-compete clause the provision by Cégétel's shareholders other than Vivendi of SIM cards to end-users located in France, and to allow Cégétel and the companies controlled by it to sell GSM services (SIM cards) outside France.

F. NO COMMENTS FROM THIRD PARTIES

- (32) Following the publication of a notice pursuant to Article 19(3) of Regulation No 17, the Commission did not receive any comments from third parties.

II. LEGAL ASSESSMENT

A. ARTICLE 81(1)

- (33) Cégétel combines the activities of its parent companies on the telecommunications market in France and will develop and provide new services on this market. This venture entails changes in the structures of the parent companies: Vivendi contributes to Cégétel its subsidiaries which were already active on the market, primarily in mobile and paging; Cégétel takes over the majority of business activities of BT France.
- (34) Cégétel is established on a lasting basis evidenced by, among other things, a substantial financial commitment by its parents. Indeed, Cégétel is incorporated under French law as a 'société anonyme'. After the restructuring, the shareholders' equity in Cégétel is estimated at [...] (*) and Cégétel's net liquid assets are [...] (*), and Cégétel controls 80 % of SFR, 100 % of TDR and Cégétel Enterprises.

Applicability of Article 81(1) to the restructuring of Cégétel

The context

- (35) This operation has to be assessed in the context of full liberalisation of the French telecommunications sector. France Télécom had until 1 January 1998 a monopoly over public voice telephony, by far the most important segment of the market. Before this date, competing voice services were allowed only within closed user groups and over private corporate networks. In this context, the operation appears to be pro-competitive. Cégétel is a new entrant on the French telecommunications market as a full service telecommunications operator. Before the restructuring, it was only active in the provision of mobile telecommunications services through SFR. Neither Vivendi had previously entered the fixed voice telephony market, nor BT, SBCI or Mannesmann had been active as a full service telecommunications operator outside their national markets; their presence in the French telecommunications market was confined to limited activities in previously liberalised segments.
- (36) The French telecommunications services market is one of Europe's largest. As other newly liberalised telecommunication markets, it is characterised by a number of barriers to entry, including the substantial amount of investment required (in six years, Cégétel will invest [...] (*) in fixed activity, mainly for network rollout, the fast evolving technology and commercial landscape that makes rapidity a key factor in a successful entry in such market, the long established dominance of the incumbent operator, France Télécom, which has scheduled progressive decrease of its tariffs, the necessity to establish a strong brand image to overcome the customers' loyalty to France Télécom and the substantial amount of universal service financing.

No actual competitors in the relevant market

- (37) BT and SBCI are incumbent telecommunications operators on other national markets and have telecommunications activities, on liberalised segments of the markets, or interests in telecommunications operators in many countries, although they had not entered markets, other than their own national markets, as full service operators prior to the 1998 full liberalisation. Mannesmann is a new entrant in this sector in Germany and has already started to expand into telecommunications markets in other European countries through alliances, but had not entered fixed voice telephony markets prior to the 1998 liberalisation. BT and Mannesmann actually compete, through joint ventures, with each other on some markets, in Germany and Italy for example.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(38) However, before the notified operation, the parties did not compete to a significant extent with each other in the French telecommunications market. Their activities on this market were extremely limited (except in mobile telephony). The only segment on which some parties could be considered as currently competing with each other is the provision of corporate telecommunications services — essentially data services, virtual private networks (VPN). However, such competition was very limited, given their very low market shares and the dominance of France Télécom: Cégétel was only active on this market to a very limited extent (through its previous participation in Siris) and BT France's share of the market for corporate telecommunications services was below [...] (*) in 1996. At the end of 1996, Cégétel withdrew from Siris, a venture set up in 1995 with Unisource and which remains active in the corporate telecommunications market in France. Mannesmann and SBCI had no direct activities in the telecommunications sector in France.

(39) For the provision of mobile telecommunications services, the parties can be regarded as actual or potential competitors, only if the relevant market is considered to be European-wide. BT and Mannesmann have indeed participations in various mobile-telephony operators across Europe. However, potential competition between the parent companies and SFR on this market is not altered by the Cégétel agreements: these agreements only concern the French market, and the sale of SIM cards (GSM subscription) has been excluded from the non-compete clause.

No reduction of potential competition

(40) It must also be analysed whether this operation restricts potential competition on the relevant markets. Formally, it could be considered that the parent companies had and still retain the necessary financial and technical resources to enter separately these markets. Probably, the parties could individually have entered 'niche' segments of the telecommunications market in France but, given notably the amount of investment required, they would not have been able to engage in the same global telecommunications activities as Cégétel and to provide a full range of telecommunications services with the same efficiency.

(41) Even if BT or SBCI are incumbent operators on their home market, they have to be considered as a new entrant in France and in any other national telecommunications markets, as regards the newly liberalised

segment of fixed voice telephony, which represent by far the most important part of the market.

(42) The strategies in the telecommunications sector of BT, SBCI and Mannesmann are European-wide or worldwide. BT and Mannesmann are currently developing activities in several newly liberalised telecommunications markets in Europe. They enter these markets through alliances with local or international partners in order to combine financial resources and complementary strengths. For example, partners with a mobile-telephony licence and/or with a privileged access to an infrastructure represent an important advantage. They could obviously not follow such global strategies if they entered each market alone: this would require enormous financial resources. For instance, in Cégétel business plan, the cumulated capital expenditure for the fixed services is estimated at [...] (*) in six years, most of it being spent in the first three years, primarily on the network roll-out.

(43) The restructuring of Cégétel, which has the same aim and effect as a genuine company formation, allows a fusion of the parties' strengths in order to enter a market strongly dominated by France Télécom. The combination of their significant financial commitments, their extensive knowledge of telecommunications markets and their experience in building up and managing new telecommunications activities will allow Cégétel to offer new services more quickly, cheaply and of a more advanced nature than the parties would have been capable of separately. Their respective strengths indeed appear to be complementary and will allow significant synergies: Vivendi has contributed to Cégétel the highest financial investment, together with its subsidiaries which were already active in mobile telecommunications. BT has contributed its existing activities on the French market for corporate services, its technological and marketing expertise and the highly sophisticated Concert services. SBCI has an extensive marketing and commercial experience gained in one of the most competitive markets in the world. Mannesmann has the experience of building up and operating a large terrestrial network, especially in the case of backbone networks based on railway infrastructure.

(44) The fact that Cégétel will address all segments of the market will allow cost savings resulting from economies of scale at a technological and operational level. For example, Cégétel's network activities, carried out through its joint venture with SNCF, will benefit from the traffic generated by SFR, by the local fibre-optic networks built for business customers and possibly from the international traffic generated by the networks of its parents in the United Kingdom, Germany and the United States.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

- (45) Even on specific segments on which the parties could in theory have entered alone (like data services or VPN for corporate users), potential competition is not reduced. Cégétel will compete strongly with France Télécom on these segments, and probably more effectively than the parties would have been able to do separately, because of the efficiencies underlined in the previous points. Furthermore, as was indicated in recital 30, Cégétel will face many competitors on every segments of the relevant markets. BT is the only European incumbent operator involved in the Cégétel alliance and potential competition exists from many other telecommunications operators.

Conclusion

- (46) In conclusion, Cégétel creates a more effective competition to the incumbent operator than the parent companies would have been capable to create separately. Cégétel's restructuring does not restrict actual or potential competition on the French fixed voice telephony market (since the parties could not enter this market alone), for on any other relevant segments of the telecommunications market (since Cégétel will be able to compete strongly on these segments and since there are numerous other competitors), nor on the potential European market for mobile telecommunications services. Therefore, Cégétel's restructuring falls outside the scope of Article 81(1) of the Treaty.

Applicability of Article 81(1) of the Treaty to other contractual provisions

- (47) It must be examined whether the following provisions further restrict competition:
- the general restriction on competition in Article 2(4),
 - the appointment of Cégétel as the exclusive distributor of Concert services in France, the obligation in Cégétel to obtain all its requirements in global products from Concert and the restriction on Cégétel to provide support services for non-Concert services,
 - the preferred supplier and preferred customer provisions as described in recitals 18 and 19.

(a) Restriction on competition

- (48) The general restriction of competition on the parent companies in the expression of the firm commitment of the shareholders towards Cégétel and is necessary to guarantee Cégétel's shareholders that each one will focus its efforts on the French market in the joint venture. As

long as the parties keep their current influence over Cégétel's operation, as it is described in recitals 11, 12 and 13, this clause can be regarded as ancillary to the creation and successful operation of a new full service telecommunications operator in the French market through Cégétel's restructuring and will therefore not be subject of an assessment under Article 81 of the Treaty separate from that of Cégétel's restructuring itself.

(b) Exclusive distribution of Concert services

- (49) Prior to this operation, BT France was the exclusive distributor of Concert services in France. The general exclusive distribution scheme for Concert services was exempted by Commission Decision 94/579/EC — Case IV/34.857 ('BT/MCI') ⁽¹⁾.
- (50) In that Decision, the Commission concluded that the exclusive arrangements for the distribution of Concert services fell within the provisions of Article 81(1) of the Treaty. The same conclusion is reached for the exclusive arrangements for the distribution of Concert services in France: the appointment of Cégétel as exclusive distributor of Concert services in France falls under Article 81(1) of the Treaty because it has as its object or produces as its effect the isolation of France against imports of these services from other Member States, which may affect competition within the Community. In addition, it cannot be considered as ancillary to the restructuring of the joint venture.

Effect on trade between Member States

- (51) In view of the international nature of Concert services and since Cégétel aims at becoming the second full-service telecommunications operator in France, these exclusive distribution arrangements will substantially affect trade between France and other Member States.

(c) Preferred-supplier and preferred-customer provisions

- (52) The preferred-supplier mechanism in the framework cooperation agreement for international traffic guarantees a regular and steady supply of the international traffic between BT and Cégétel. This preference given by BT to Cégétel for incoming traffic in France represents one of the contributions to the joint venture expected from BT. On the other hand, BT was prepared to invest in Cégétel and transfer its existing activities in France to it only if it could maintain all the synergies between its operation in France and its operations in other countries, notably for international traffic.

⁽¹⁾ OJ L 223, 27.8.1994, p. 36.

- (53) This mechanism does not give the 'preferred supplier' the option of reviewing any offers which are submitted by any other supplier and does not automatically result in a situation where the preferred supplier is obliged to match any better offer. Thus, it does not result in any price transparency, which would be to the prejudice of third-party suppliers. It does not limit price competition, since Cégétel remains free to choose other suppliers if they offer better conditions than BT.
- (54) The preferred-customer principles ensure that Cégétel will get access to BT's services for termination in the United Kingdom of international calls from France at the best conditions available and that BT will have access Cégétel's services for termination in France of international calls from the UK at the best conditions available.
- (55) The clauses allow for cooperation between Cégétel and its parent companies for the future development of Cégétel's business at lower costs. The Commission concludes that, as far as restricting competition is concerned, the provisions are ancillary to the restructuring of Cégétel and will not be subject to a separate assessment under Article 81 of the Treaty.
- (56) The same conclusions can be reached in regard to the general preferred-supplier principle between Cégétel, its subsidiaries and its parent companies, as provided by Article 6 of the shareholders' agreement.

B. APPLICATION OF ARTICLE 81(3) OF THE TREATY TO THE EXCLUSIVE DISTRIBUTION OF CONCERT SERVICES IN FRANCE

Technical and economic progress

- (57) By appointing a single distributor in France, BT will not need to maintain numerous business relations with a large number of distributors there, and hence will be in a position to reduce its transaction costs, allowing for the realisation of efficiencies in distribution. BT will also be able to overcome more easily distribution difficulties in the provision of Concert services and to protect better its intellectual property rights. The ability to provide customers with a single contact point for anything relating to the services provided is a competitive advantage in this kind of service.
- (58) Moreover, the exclusivity given to Cégétel will facilitate the promotion of Concert services and lead to intensive marketing while at the same time nationalising distribution. Exclusivity will ensure an adequate level of quality in the provisions of additional support services by Cégétel as a distributor. On the contrary, the appointment of numerous distributors could lead to underinvestment in those activities. This intensified promotion

will stimulate competition between the different providers of global services and can be considered as the most effective way to compete effectively with France Télécom in the market for global services.

- (59) Moreover, the appointment of Cégétel as exclusive distributor of Concert services, which is one of the important contributions of BT to the joint venture underlined above, by completing the array of services being offered by it to customers, will allow Cégétel to better position itself as a fully-fledged competitor of France Télécom (the exclusive distributor in France of GlobalOne services).
- (60) Finally, the economies of scale allowed by Cégétel, mentioned in recital 44, will improve the competitiveness of Concert services in France. Cégétel has more resources and advantages to distribute Concert services effectively than BT France had before the operation.

Benefits to the consumers

- (61) Through the notified arrangements BT will assist Cégétel in launching and improving a wide range of sophisticated Concert services quickly and effectively. Customers will benefit from the efficiencies in the distribution underlined above, from appropriate support from Cégétel, and from the rapid availability of Concert services in France. Telecommunications users will also benefit from an intensified promotion of Concert services, which will increase competition on this segment of the French telecommunications market.
- (62) In addition, the exclusivity offered to Cégétel is not absolute: neither BT nor any other member of the Concert alliance will be prohibited from having customers in France when a customer requests such services from them. As pointed out in the BT/MCI decision, potential users of Concert services are usually highly sophisticated telecommunications purchasers requiring cross-border services, and have a considerable bargaining power, which gives rise to pressure on margins and an expected high level of competition among suppliers. Parallel imports of Concert services are thus a real possibility.

Indispensability

- (63) The exclusive nature of the Concert distribution agreement itself is indispensable for achieving the pro-competitive efficiencies described above. Indeed, this exclusivity is indispensable in order to concentrate Cégétel marketing and sales efforts on Concert services, allowing it to compete vigorously with other providers of global telecommunications services.

(64) Furthermore, the prohibition imposed on Cégétel from selling, or providing support services for, services competing with Concert services is also indispensable to assure BT that Cégétel will concentrate its efforts on the distribution of Concert services. These clauses also enable BT and Concert to plan sales of the services with greater precision and for a longer period, and ensure that the distributor's requirements will be met on a regular basis. The 'framework network' agreement, designed to ensure that BT and Cégétel's networks inter-operate to enable a seamless managed end-to-end service to Concert customer, is necessary to enable the distribution of Concert services in France.

(65) In addition, as recognised by the Commission in previous decisions concerning joint ventures active on the market for global telecommunications services (see Atlas Decision, at recital 58, and Decision 97/780/EC — Unisource — at recital 93) ⁽¹⁾, exclusive distribution protects the intellectual property rights of Concert's parent companies better than other arrangements.

(66) In any event, the exclusivity given to Cégétel will not be absolute. Neither BT nor any other member of the Concert alliance is prohibited from having customers in France when a customer requests such services from them. Conversely, the Concert distribution agreement allows passive sales by Cégétel into territories where BT or a third party is the appointed Concert distributor.

No elimination of competition

(67) Concert services will be in competition with other lines of global products, notably GlobalOne services distributed by France Télécom, the dominant provider of telecommunications services and networks in France. As was said in recital 30, many firms will provide corporate international telecommunications services in France (Siris, WorldCom, Colt, etc.). These services will, at least partially, compete with Concert services. Several of these operators will develop their own networks. The parties also expect competition, at least for components of value-added telecommunications services, coming from players including computer and data-processing companies (like IBM), and information service companies (like GEIS). Moreover, multinational or other big companies often have the ability to manage their own private network solutions. In addition, passive sales from

distributors of Concert services in other countries will also be possible.

Conclusion

(68) The Commission concludes that all conditions for an individual exemption pursuant to Article 81(3) of the Treaty are met in respect of the exclusive arrangements for the distribution of Concert services in France.

C. DURATION OF THE EXEMPTION

(69) Pursuant to Article 8 of the Regulation No 17, a decision in application of Article 81(3) of the Treaty must be issued for a specified period. Pursuant to Article 6 of the Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. In the present case, given the time necessary for Cégétel to capture a significant market share for corporate telecommunications services in France and to be paid back from its investments for fixed telecommunications services a long exemption period can be granted. In so far as the decision grants exemption, it should take effect for 10 years from the date of notification,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement in respect of the notified agreements relating to the restructuring of Cégétel, including the ancillary provisions regarding: (i) the general restriction on competition contained in the shareholder's agreement and binding on each party, as long as the respective influence of such party over Cegetel's operation remains unchanged relative to the situation described in recitals 11, 12 and 13 of this Decision; (ii) the preferred-supplier and preferred-customer provisions.

Article 2

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are hereby declared inapplicable, for a period of 10 years from 18 July 1997, to the arrangements for the exclusive distribution of Concert services by Cégétel in France.

⁽¹⁾ OJ L 318, 20.11.1997, p. 1.

Article 3

This Decision is addressed to:

Vivendi SA
52, rue d'Anjou
F-75008 Paris

British Telecommunications plc
81 Newgate Street
London EC1A 7AJ
United Kingdom

Mannesmann AG
Mannesmannufer 2
D-40213 Düsseldorf

SBCI Inc
2 Read's Way, Suite 117, Corporate Commons
Newcastle
Delaware 19720
USA.

Done at Brussels, 20 May 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION
of 27 July 1999
relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement
(Case IV/36.581 — Télécom Développement)
(notified under document number C(1999) 2299)
(Only the French text is authentic)
(Text with EEA relevance)
(1999/574/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

B. THE PARTIES

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EC Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾,

Having regard to the application for negative clearance and the notification for exemption submitted on 9 July 1997 pursuant to Articles 2 and 4 of Regulation No 17,

Having regard to the summary of the application and notification published ⁽³⁾ pursuant to Article 19(3) of Regulation No 17,

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

- (1) On 11 April 1997 Cégétel SA (Cégétel), a new telecommunications operator in France, and Société nationale des chemins de fer français (SNCF), the French national railway company, concluded a number of agreements, under which they will cooperate through a jointly-owned subsidiary, Télécom Développement (TD), to develop and run a national long-distance telecommunications network along the French national railway network.
- (2) The notified transaction is linked to the creation of Cégétel. By its decision of 20 May 1999 in Case IV/36.592 ⁽⁴⁾, the Commission declared that the agreements setting up Cégétel as a telecommunications operator in France do not give grounds for objection under Article 81(1) of the EC Treaty.

- (3) SNCF is the state-owned railways operator in France, with both industrial and commercial activities, providing transport services on the nationwide rail network. Its core activities are passenger and freight transport, and related and complementary activities. SNCF has its own telecommunications network to satisfy its own needs. The aggregate turnover of SNCF for 1997 was EUR 6 573 million.
- (4) Cégétel is a telecommunications operator, created in 1996, owned by the French water utility company Vivendi SA ⁽⁵⁾, British Telecommunications plc (BT), Mannesmann AG and indirectly by SBC International Inc. ⁽⁶⁾. Since 1 February 1998, Cégétel has offered a full range of telecommunications services to all the different segments of the French market. Cégétel also operates a nationwide GSM network through its subsidiary Société française de radiotéléphonie (SFR). The aggregate turnover of the Cégétel group in 1997 was approximately EUR 1 610 million.
- (5) TD is a private company with limited liability incorporated under French law, created in 1996 by SNCF, in which by virtue of the notified agreements Cégétel becomes a shareholder.

C. TRANSACTION

- (6) The notification relates to the Framework Agreement dated 11 April 1997, the purpose of which is to define the principles governing the relations between SNCF and Cégétel, both with respect to the shareholding of Cégétel in TD and as regards the modalities of deployment of the network and operation of telecommunications services.
- (7) The aim of TD is to develop and run a national, long-distance telecommunications network based on:
 - (a) the surplus transmission capacity on the existing SNCF telecommunications network;

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ C 293, 22.9.1998, p. 4.

⁽⁴⁾ See p. 14 of this Official Journal.

⁽⁵⁾ Previously known as 'Compagnie Generale des Eaux (CGE)'.

⁽⁶⁾ SBCI is a wholly owned subsidiary of SBC Communications Inc. SBC is a US company active mainly in the telecommunications services sector.

- (b) the optical fibre cables made available to it by Cégétel or its subsidiaries; and
 - (c) additional investment for using its own cables as part of an installation plan laid down in the agreements for the initial period 1997-2000.
- (8) TD holds a licence to operate long-distance, public-access networks. The notified agreements provide also for TD to develop and deploy a long-distance telecommunications service in France capable of constituting an alternative to the offer of the incumbent operator.
- (9) On the basis of this network, owned by TD, Cégétel intends to become the second full service telecommunications operator in France by offering a complete range of telecommunication services including voice telephony between fixed points and transmission capacity for other operators.
- (10) TD will not provide a connection service for end-users, namely businesses or individuals, except for the connections required by SNCF. Under Article 1 of the framework agreement, TD will provide:
- (a) a long-distance interconnection service for telecommunications operators;
 - (b) long-distance transmission capacities for Cégétel and Cégétel subsidiaries but also for other network operators and telecommunications services providers;
 - (c) an end-to-end, long-distance voice telephony service, which is to be distributed exclusively by Cégétel's subsidiaries, 'Cégétel Le 7' (?) (residential market) and 'Cégétel Entreprise' (businesses) jointly owned with TD.
- (11) As a result of the clauses on the acquisition of an interest in the share capital of TD by Cégétel, the capital share of TD will be divided up as follows:
- SNCF: between slightly more than 50 % and 60 %,
 - Cégétel: between 40 % and slightly less than 50 %,
 - third party (if any): 10 %.
- (12) TD is governed by a management board (the 'Directoire'), a supervisory board and a shareholders' committee. The management board, which is entrusted with the day-to-day business of TD, is composed of five members, two appointed on a proposal from SNCF, two on a proposal from Cégétel, and a qualified person unconnected with either of the Parties (the president) appointed by the supervisory board, by joint agreement between the Parties. The supervisory board exercises supervision over the management board's conduct of

business and is made up of an odd number of members. The number of members appointed by the shareholders meeting on proposal by SNCF will always be greater by one member than the number of members appointed by Cégétel. The president of the supervisory board will be one of the members chosen by the members of the supervisory board appointed on a proposal from SNCF. The shareholders committee, made up of 10 members, half appointed by Cégétel and half by SNCF, is set up to determine the joint position of the Parties on a number of issues, including the strategic decisions and orientation of TD, the adoption and modification of the business plan and annual budget and acquisitions of assets or realisation of important investments.

D. RELEVANT MARKET

(a) Product market

- (13) TD acts as an operator of a telecommunications network alternative to the network of the incumbent operator France Télécom. It will provide; mainly for Cégétel but also for other operators, transmission capacity for national, long-distance telecommunications traffic and, on an exclusive basis for Cégétel, long-distance, voice-telephony services. The notified agreements will therefore address: (i) the market for carrier's carrier services; and (ii) the market for the provision of fixed, long-distance telecommunications services. These two markets have been defined in a number of previous Commission decisions⁽⁸⁾. As in past decisions, moreover, the precise product market delimitation in this case can be left open since even on the narrowest possible definitions the proposed transaction does not give rise to competition problems.

(b) Geographic market

- (14) The scope of the geographic market in telecommunications is determined (i) by the extent and the coverage of the network and the customers that can economically be reached and whose demand may be met; and (ii) the legal and regulatory system in force in the territory where the operator is active.
- (15) Having regard to the licensing and regulatory framework for the provision of fixed, long-distance telecommunications services, the geographic market for these services must be regarded as being national in scope. Furthermore, the TD network will be limited to the territory of France. Accordingly, the relevant geographic market for the provision of carrier's carrier services is France.

(c) Situation of the parties on the telecommunications market

- (16) SNCF is not commercially active in the telecommunications sector. TD and Cégétel only entered the long-distance, voice-telephony market (deregulated in France on 1 January 1998) on 1 February 1998. In 1997, TD had had a negligible share of the transmission capacity supply market.

(?) Previously known as 'Télécom Développement Services (TDS)'.

⁽⁸⁾ See Commission Decision 96/547/EC, Case IV/35.617, Phoenix/Global One (OJ L 239, 19.9.1996, p. 57); Commission Decision 97/780/EC, Case IV/35.830, Unisource (OJ L 318, 20.11.1997, p. 1); and Commission Decision 1999/573/EC, Case IV/36.592, Cégétel (see p. 14 of this Official Journal).

(d) Main competitors

- (17) Until 31 December 1997, France Télécom had a monopoly on the long-distance voice-telephony market in France, and it still has a significant market power on that market. Similarly, France Télécom has a very strong position on the markets for long-distance, transmission capacity supply and for the provision of interconnection services, with a market share exceeding 95 % in both of them.
- (18) Many companies have entered or intend to enter the French telecommunications market, either as full service telecommunication operators (9 Telecom) or on specific market segments: resale of voice-telephony services (Axis, Kertel, and others), telecommunications networks (Hermes, Colt, Esprit Telecom), services for corporate clients (WorldCom, Siris, Colt, Omnicom, and others), or local access (Lyonnaise Cable), and so on. As of 8 April 1999, 59 licences⁽⁹⁾ had already been delivered for telecommunications network and/or services provision by the national telecommunications regulator. Seven operators had been granted a 'short prefix' for carrier pre-selection.

E. THE NOTIFIED AGREEMENTS**Agreements**

- (19) The principles and detailed rules for the collaboration between the Parties have been defined in the 'Agreement' between SNCF and Cégétel for their partnership within the company Télécom Développement. This agreement (hereinafter the 'framework agreement'), signed on 11 April 1997, includes:
- a deployment plan for the TD network (Annex 2 to the framework agreement),
 - an initial business plan relating to the development of TD (Annex 9 to the framework agreement),
 - a marketing agreement aimed at organising the conditions of the distribution by Cégétel of the long-distance telephone services of TD, the supply of an interconnection service, and the supply of long-distance transmission capacity (Annex 3 to the framework agreement),
 - a contract relating to the deployment by SNCF of the TD network (Annex 5 to the framework agreement),
 - a contract relating to the maintenance by SNCF of the TD network (Annex 6 to the framework agreement).

Contractual provisions

- (a) *Contribution to TD of the existing optical fibre cable network capacity*
- (20) In an agreement concluded on 22 November 1996, SNCF contributed to TD exclusive rights for the use of

the surplus capacity on its existing optical fibre network. Furthermore, Cégétel transferred its own long-distance optical fibre network and those of its subsidiaries to TD. Cégétel Longue Distance was taken over by TD.

(b) Priority use of railway land

- (21) In an agreement concluded on 22 November 1996, SNCF granted⁽¹⁰⁾ TD a non-exclusive right to occupy public railway land for a period of 30 years, to allow it to deploy a telecommunications network. In order to enable TD to complete the installation of its network in the shortest possible time, SNCF has also granted it a 'priority right of access' to SNCF's land, guaranteed by a penalty clause applicable for a period of three and a half years, from 1997 to 2000.
- (22) The precise details regarding the scope of this priority access and the arrangements for its application were amended following intervention by the Commission, as is described in recitals 28, 29 and 30.

(c) Exclusive distribution of voice-telephony services

- (23) A joint company between Cégétel and TD, Cégétel Le 7, in which Cégétel has an 80 % stake and TD a 20 % stake, will be solely responsible for marketing TD's long-distance telephony services for the general public. Similarly, end-to-end, voice-telephony services for corporate clients will be exclusively distributed by Cégétel Entreprise, also owned 80 %/20 % by Cégétel and TD.

(d) Exclusive supply of transmission capacity

- (24) Cégétel has signed an exclusive supply agreement with TD, on behalf of both itself and its subsidiaries, under the terms of which they undertake that TD is their sole supplier for the provision of transmission capacity for long-distance telecommunications traffic in France. However, Cégétel is permitted to use other suppliers if TD's prices should at any time prove to be above the market price. In addition, TD may buy capacity from other operators to meet Cégétel's requirements. In addition, Cégétel is bound by its previous supply agreements.

(e) Non-competition

- (25) SNCF has undertaken not to engage, either directly or indirectly via a subsidiary, in any activity in the telecommunications field that would be in competition with TD or the Cégétel group.

⁽⁹⁾ Source: Autorité de Régulation des Télécommunications, Licences L.33-1 (licence d'opérateur de réseaux) et L.34-1 (licence de fournisseur de service téléphonique au public).

⁽¹⁰⁾ Under French Law 97-135 of 13 February 1997, SNCF transferred the ownership of the railway infrastructures (notably tracks, platforms and merchandise) to 'Réseau Ferré de France' (RFF), the company which that Law creates. As a temporary measure, the Law establishes that any acts relating to the property transferred to RFF, concluded by SNCF from 1 January 1997 and until the implementing regulations were promulgated, would be deemed to have been concluded on behalf of RFF (Article 16 of the Law). For this reason, Article 36 of the framework agreement between SNCF and Cégétel states that the provisions relating to the assets transferred to RFF pursuant to the Law of 13 February 1997 are deemed to have been concluded on behalf of RFF.

- (26) Cégétel has promised to abstain from any investments in long-distance telecommunications networks, apart from its investment in TD.
- (27) TD has undertaken not to compete with Cégétel Le 7 and Cégétel Entreprises as regards the marketing of telecommunications services.

F. CONTRACTUAL CHANGES

- (28) On 18 March 1998, the Commission informed the parties that it considered the clause governing the priority use of railway premises by TD as falling within the scope of Article 81 (1) of the EC Treaty and that, as it stood, it was not eligible for an exemption under Article 81(3). On 20 April 1998, the parties proposed amending the clause in question in order to clarify the scope and practical application of the priority access granted to TD, and thus to spell out clearly the conditions under which the penalties provided for in the agreements would be applicable. Taking into account the Commission's observations, the parties introduced on 31 July 1998 an amendment to the original agreements under which they make provision for: (i) equal treatment for third parties in those exceptional cases where the railway infrastructures in question are the only means of putting in its cables (narrow valley structures); and (ii) that SNCF (or, where appropriate, Réseau Ferré de France: see footnote 10) remain free to give access to the railway infrastructures to other telecommunications operators, provided that this can be done without interfering with the development of TD's network.
- (29) These amendments allow SNCF to give access to its infrastructures to other operators, provided that this can be done without interfering with the development of TD's own network.
- (30) Furthermore, the priority right is limited to the minimum period required to implement the network (1997-2000), and there is an explicit undertaking that the priority rights shall not apply in the event of other companies' seeking access to specific portions of railway-owned land if the installation of cables on these sites is the only way of creating a telecommunications network.

G. THIRD PARTY OBSERVATIONS

- (31) Following the publication pursuant to Article 19(3) of Regulation 17, comments were received from four interested parties. The comments focused, in particular, on the changes submitted by the Parties regarding the priority use of railway land by TD, the conditional access to the railway premises under the agreement during the period of deployment of TD's network and to the alternatives to the rail network infrastructures in France for the purposes of installation of telecommunications networks. These comments were fully assessed by the Commission but proved not to be such as to cause

the Commission to change its favourable position in the light of the contractual changes agreed by the Parties.

II. LEGAL ASSESSMENT

A. APPLICATION OF ARTICLE 81(1) OF THE EC TREATY TO THE ENTRY OF CÉGÉTEL INTO THE CAPITAL SHARE OF TD

- (32) SNCF and Cégétel are neither actual nor potential competitors. They operate on completely different markets. Cégétel is present, or emerging, on most segments of the telecommunications market in France, whilst SNCF, which is contributing the infrastructures on the basis of which the services will be developed and exploited, is not commercially active in the telecommunications sector. Moreover, neither SNCF nor Cégétel are present on the market for carriers' carrier services on which TD will mainly operate.
- (33) SNCF is the state-owned railway operator and does not intend to become a telecommunications operator. TD was not created by SNCF in order to act as a telecommunications operator, but merely to deploy a telecommunications network previously used for its own internal needs. The French authorities have confirmed that the purpose of TD, as a subsidiary company of SNCF, is to be limited to the activity of exploiting that network⁽¹¹⁾. Through the notified agreement, Cégétel will be able to have access to the French nationwide railway infrastructures for the purpose of building up a telecommunications network of its own. In exchange, SNCF will receive an atypical financial return from its assets and will obtain telecommunications capacity for its own internal purposes.
- (34) Furthermore, the deployment of a telecommunications network with national coverage takes a number of years and requires substantial investment. TD could not reasonably be expected to undertake such investments without the support of a full service telecommunications operator aiming to establish itself on the basis of infrastructure and services alternative to those provided by the incumbent operator in France.
- (35) Cégétel is a new entrant in the French telecommunications markets facing strong competition from France Télécom. It does not have its own backbone network and has been, until now, dependent on the incumbent operator for the infrastructure by means of which it offers its services. By means of TD, Cégétel will be able to have access to the French nationwide railway infrastructures for the purpose of building up a telecommunications network of its own. This network will be the first nationwide alternative network (to the one controlled by the incumbent operator) to be put into service in France. Although for the purposes of creating telecommunications networks there are a number of alternative infrastructures to that of the railways, which Cégétel could in fact have studied before deciding to acquire an interest in TD, it is unlikely that without TD's existing network and the priority usage of the railway premises of SNCF, Cégétel could have been present on the long-distance, voice-telephony market (including switched transit or dedicated transit services) as early as 1 February 1998.

⁽¹¹⁾ As confirmed by a letter of the French Secretary of State for Transport to the President of SNCF dated 17 July 1996.

- (36) The notified agreements provide for an allocation of tasks between, on the one hand, TD, which will be in charge of the technical aspects of the establishment, maintenance and operation of the telecommunications network, and, on the other hand, Cégétel, which through Cégétel Le 7 et Cégétel Entreprises will provide commercial telecommunication services to end-users.
- (37) The French telecommunications market has only relatively recently been fully liberalised (1 January 1998) and new entrants are exposed to strong pressure from the incumbent operator which has traditionally represented the sole source of domestic transmission lines in that country. Liberalisation of alternative infrastructures occurred in France on 1 July 1996. A number of telecommunications operators are building or have announced plans to build national fibre optic networks in France, including Hermes ⁽¹²⁾, COLT, Worldcom/MCI and Cable & Wireless. Against that background, it does not appear that the notified agreement has the effect of preventing, restricting or distorting competition within the relevant market referred to above. By enabling Cégétel to build up its own network and offer long-distance services over the transmission capacity developed by TD, the agreements will allow that company to compete more effectively on the market by ending its dependency on the incumbent operator for its backbone network.
- (38) The agreements are not likely to affect the competitive position of third parties, in so far as SNCF is not unduly precluded from granting access to its infrastructures to other operators. Furthermore, third-party operators would benefit from the existence of the additional transmission capacity for telecommunications services that TD will create.
- (39) The Commission has itself recognised that new licensed operators such as TD required access to pathways across public and private property to enable them to roll out their networks, as well as acknowledging the merits of facility sharing in terms of town planning, and for environmental and economic reasons, albeit in an interconnection context ⁽¹³⁾.
- (40) In conclusion, on the basis of the arguments set out above, the acquisition of a shareholding by Cégétel in the share capital of TD falls outside the scope of Article 81(1) of the EC Treaty.

B. APPLICATION OF ARTICLE 81(1) OF THE EC TREATY TO THE CONTRACTUAL PROVISIONS

- (41) On the basis of arguments developed below, the contractual provisions identified in recitals 28, 29 and 30 are ancillary to the activity of TD in as much as they are directly linked to, and necessary for, such activity. Given the financial investment required to deploy an alternative nationwide telecommunications network

which constitutes the basis of the operation of Cégétel, itself a new entrant into the French telecommunications market, those provisions ensure TD the conditions of operation required to secure its entry into the market within a short period of time.

(a) Exclusive use by TD of the SNCF optical fibres

- (42) By means of this provision, SNCF ensures that its venture TD will have the necessary resources for carrying on its main business. This is an exclusive right which concerns the very nature of the contribution agreement. This provision also arises from the SNCF's decision not to act as a telecommunications operator and to transfer to its subsidiary TD all the activities relating to the operation of the network built up on the railway facilities. Furthermore, the task of TD involves the configuration and maintenance of a nationwide telecommunications network starting from the optical fibres already deployed by SNCF. Those fibres require an upgrading in order to increase their capacity and ensure their integration into the network. The management, integration and upgrading of such network would be extremely difficult unless the exclusive use of all the fibres which constitute the network has been secured.

(b) Priority use of railway land

- (43) The purpose of this provision is to secure for TD its means of operation by ensuring that the deployment of the telecommunications network will take place within the schedule contained in its business plan. Cégétel is relying solely on the long-distance network of TD for the transport of the long-distance telecommunications traffic. The priority use of railway land is justified in view of the conditions of deployment of the network imposed by the law and of the requirements of continuity of railroad transport operation and security of circulation of trains. The wording of the agreements, as amended by the Parties (see recitals 28, 29 and 30), does not imply that any exclusivity is given to TD and does not prevent third parties from having access to the railway land ⁽¹⁴⁾ for the purposes of laying cables, and thus does not hinder the construction of networks by competing operators.

(c) Exclusive distribution of TD's voice-telephony services by Cégétel

- (44) The commercialisation agreement provides that TD will not, by itself, market voice-telephony services to end-users, and will instead provide those services to Cégétel (See Article 2(1) of the commercialisation agreement). The strategy agreed between the two parent companies results in TD being in charge of the technical aspects of the setting up and operation of the network and Cégétel, through Cégétel Le 7 and Cégétel Entreprises, assumes

⁽¹²⁾ SNCF is an indirect shareholder of Hermes through a 9 % shareholding in HitTail BV.

⁽¹³⁾ See Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10), as last amended by Directive 96/16/EC (OJ L 74, 22.3.1996, p. 13).

⁽¹⁴⁾ The arrangements for implementation of works on railways have to comply with the provisions of French Law 97-135 of 13 February 1997 (*Journal officiel de la République Française*, 15.2.1997, Annex 5).

the commercial operation of client services. This provision reflects SNCF's intention to limit the activity of TD to the operation and exploitation of the telecommunications network. As a result of that limitation, the commercialisation agreement ensures that TD will find a demand for its long-distance voice-telephony services which will be marketed by Cégétel. The agreement ensures therefore that TD will have sufficient demand for its services to sustain its entry into the market and contributes to its long-term viability as operator.

(d) Exclusive supply clause

- (45) Similarly, the obligation contained in Articles 4(4) and (5) of the framework agreement, by requiring Cégétel to establish its operation on TD's network, ensures that the venture company has an effective and profitable minimum volume of activities, as well as regular profits. It should be recalled, however, that this undertaking is considerably reduced on the one hand by Cégétel's option of being supplied by a third party if the TD prices are less favourable than those on the market, and on the other hand by Cégétel's adherence to previous supply undertakings.
- (46) On the basis of the particular circumstances of this case, it can be concluded that the exclusive use of the SNCF optical fibre cable network capacity, the priority use of railway land resulting from the amendments introduced by the parties on 31 July 1998, the exclusive distribution of voice-telephony services and the exclusive supply clause are directly related and necessary to the successful implementation of the network and operation of TD. Hence, they have to be regarded as ancillary restraints to the project intended by the Parties under the competition rules of the EC Treaty.
- (47) Ancillary restraints are to be assessed together with the creation of the company. In this respect, as the agreements between SNCF and Cégétel concerning TD have been found not to fall within the scope of Article 81(1) of the EC Treaty, it follows that the provisions detailed above do not do so either.

(e) Non-competition

- (48) The non-compete terms applicable to SNCF (Articles 3 and 36 of the framework agreement) and to Cégétel (Article 4(8) of the framework agreement) guarantee that Cégétel and SNCF, two non-competitors who have entered a product market which is new to both of them,

will concentrate their efforts on TD. Furthermore, given that the telecommunications network operated by TD, which is built upon the premises of French railway infrastructures, is essential for Cégétel's operation as a full telecommunications operator, those terms are necessary in order to ensure that TD becomes stable on the market. The non-compete obligation binding on TD ensures that TD will concentrate its efforts on the exploitation of the telecommunications network,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement in respect of the notified agreements relating to the cooperation between Société nationale des chemins de fer français and Cégétel SA through their joint subsidiary Télécom Développement.

Article 2

This Decision is addressed to:

1. Société nationale des chemins de fer français
88, rue St. Lazare
F-75 009 Paris
2. Cégétel SA
52, rue d'Anjou
F-75 008 Paris
3. Télécom Développement
88, rue St. Lazare
F-75 009 Paris.

Done at Brussels, 27 July 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

CORRIGENDA**Corrigendum to Council Directive 98/57/EC of 20 July 1998 on the control of *Ralstonia solanacearum* (Smith) Yabuuchi et al.**

(Official Journal of the European Communities L 235 of 21 August 1998)

On page 19, in Annex III, point 2.4(ii), second indent:

for: '... $N > 10^3$ cells...',

read: '... $N < 10^3$ cells...'.
