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La politique de la Commission en matière d'amendes antitrust: récents développements, perspectives d'avenir

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Cet article s'inspire d'une intervention de Gianfranco Rocca, Directeur général adjoint, à l'Institut d'Études Européennes de l'Université Libre de Bruxelles, le 4 février 2003.

La politique d'amendes de la Commission trouve son fondement juridique dans l'article 15(2) du règlement 17 ([1]). Cette disposition permet à l'exécutif européen, par voie de décision, d'infliger aux entreprises et associations d'entreprises coupables d'infraction aux règles communautaires de concurrence une amende pouvant s'élever jusqu'à un maximum de 10% du chiffre d'affaires total réalisé au cours de l'exercice social précédant en général la date d'adoption de la décision.

Ce pouvoir de la Commission d'imposer des sanctions pécuniaires élevées ne laisse pas indifférent. Ses conséquences sont en effet très concrètes. La politique conduite en la matière suscite un intérêt médiatique fort, notamment depuis l'élévation du niveau des sanctions et la montée en puissance de la lutte contre les cartels, qui a conduit à une multiplication des décisions avec amendes.

Parler de la politique actuelle en matière d'amendes revient à se pencher sur une pratique dont les éléments principaux ont été définis dans les lignes directrices sur les amendes ([2]) (ci-après: «les lignes directrices»), publiées par la Commission en janvier 1998. La période actuelle se prête particulièrement bien à l'exercice du bilan. L'année 2002 a été une deuxième année d'activité sans précédents en matière d'amendes, notamment dans le domaine des cartels. En outre, les lignes directrices ont été adoptées et appliquées pour la première fois en janvier 1998 (*Extra d'alliage*). On dispose donc aujourd'hui d'une expérience qui s'étend sur 5 ans, avec une application dans plus de 40 décisions.

La politique d'amendes représente un enjeu considérable, tant pour les entreprises que pour la Commission. Les chiffres parlent d'eux mêmes: En 5 ans, la Commission a imposé quasiment 4 milliards d'euros d'amendes, dont plus de 3 milliards uniquement sur les deux dernières années. Cela démontre non seulement l'importance critique du respect des règles de concurrence par les entreprises mais aussi la nécessité d'une maîtrise, par ces dernières et leurs conseils, des mécanismes de calcul du montant des sanctions. Du point de vue de la Commission, l'enjeu est de garantir une dissuasion effective, tout en conduisant sa politique de manière équilibrée et cohérente, compte tenu des enjeux directs pour les entreprises.

Après un rappel des principes de base qui guident la politique d'amende, on dressera un bilan de la pratique des 5 dernières années, avant d'en tirer quelques enseignements et d'esquisser les pistes susceptibles de guider la poursuite de la réflexion de la Commission en la matière.

1. Fondements théoriques de la politique d'amendes

L'imposition d'une amende répond à un double objectif. Le premier est de restaurer des conditions de concurrence normales sur le marché. L'amende est un signal que l'infraction doit cesser immédiatement et représente, à tout le moins symboliquement, une confiscation des profits illicites engrangés. Le deuxième objectif est la dissuasion. L'amende doit démontrer qu'un comportement illégal est dénué de toute rationalité car il aboutit à une sanction plus lourde que les profits illicites susceptibles d'être réalisés. La dissuasion doit jouer à la fois vis-à-vis de l'entreprise concernée pour décourager toute récidive, mais aussi vis-à-vis de l'ensemble des acteurs de l'économie.

La Commission doit non seulement viser que l'amende soit effectivement dissuasive, mais aussi qu'elle ne soit pas inutilement élevée: c'est le niveau optimal de dissuasion qui est recherché. La mission première de la Commission est en effet de garantir une concurrence effective sur les marchés: non pas d'accabler les entreprises, mais de les faire rationnellement renoncer à enfreindre la loi. La politique d'amende se doit de n'être pas seulement efficace, mais aussi efficiente: la sanction ne doit donc pas excéder ce qui est nécessaire à la discipline du marché.

([1]) Article 23(2) du règlement 1/2003 à compter du 1er mai 2004.

([2]) Lignes directrices pour le calcul des amendes infligées en application de l'article 15 paragraphe 2 du règlement n°17 et de l'article 65 paragraphe 5 du traité CECA, JO C 9, 14.1.1998, p. 3.

Les économistes considèrent en général qu'une amende antitrust devrait s'établir au niveau des dommages causés au marché (ou profits illicites), plus une marge qui garantisse que l'infraction à la loi ne puisse être le produit d'un calcul rationnel. Mais cela ne suffit pas: il faut aussi prendre en compte la probabilité de se faire «attraper»: si une amende de 10 millions d'euros est encourue mais qu'il existe une chance sur dix de se faire prendre, l'effet dissuasif se monte seulement à un million d'euros. Le niveau théorique optimal d'une amende est donc le montant des profits illicitement réalisés plus une marge, multiplié par la probabilité que l'infraction soit découverte.

En matière d'antitrust, la probabilité de détection varie fortement en fonction des infractions commises. Les abus de position dominante ou les restrictions au commerce parallèle s'appuient en général sur des pratiques qui ne sont pas purement clandestines. Les cartels, en revanche, sont totalement secrets et leur probabilité de détection est inéluctablement plus faible. Il est donc peu surprenant que les amendes qui leur sont imposées soient tendanciellement plus élevées. En tout état de cause, il est inhérent à une infraction — quelle qu'elle soit — que sa probabilité de détection reste limitée car aucune autorité de concurrence n'est omnisciente. La Commission s'emploie toutefois sans relâche à progresser dans ce domaine.

A probabilité de détection égale, il est légitime, notamment en ce qui concerne les cartels, que les amendes aient augmenté à partir du moment où la Commission s'est volontairement engagée sur la voie d'une meilleure dissuasion, car les amendes imposées jusqu'alors étaient relativement faibles. C'est ce qui s'est passé après la publication des lignes directrices de 1998. Signalons que du fait même de la difficulté de détection inhérente aux infractions les plus secrètes on considère parfois que les amendes ne deviendraient réellement dissuasives qu'à des niveaux encore plus élevés que ceux qu'elles ont atteint en 2001 et 2002.

Mais la Commission doit aussi prendre en compte un autre paramètre. En menant à bien sa mission de dissuasion, il lui incombe logiquement de s'abstenir de créer, par son intervention même, des conditions de concurrence encore plus difficiles. Or la disparition d'un opérateur, par exemple s'il était mis en liquidation du fait même du montant de l'amende imposée, pourrait aboutir à un affaiblissement de la concurrence sur le marché concerné. On se trouve donc confronté à deux problèmes simultanés: Premièrement, comment traiter la question de la «capacité contributive» («ability to pay») si on accepte qu'une amende ne doit pas, à elle seule, signer l'arrêt de mort d'une entreprise et deuxièmement: Comment s'assurer que les amendes, (même s'il y a capacité à payer) ne soient pas excessivement hautes, et donc économiquement inefficientes?

Pour saisir toute la difficulté de l'exercice, il importe de rappeler qu'à l'heure actuelle, la Commission ne dispose, pour faire respecter les règles de concurrence, que des sanctions pécuniaires sur les entreprises. Aucune poursuite individuelle n'est possible (qu'il s'agisse d'amendes ou de peines d'emprisonnement, comme par exemple aux États-Unis). Cette situation rend la tâche de la Commission difficile. Confinées aux personnes morales, les amendes, fussent-elles «intolérablement» élevées d'un point de vue économique, pourraient ne pas être totalement dissuasives. Dans la situation actuelle, ceux qui commettent directement les infractions ne sont pas toujours les payeurs. Ces derniers (les actionnaires) peuvent donc avoir des difficultés à contrôler les agissements du management. L'existence de poursuites personnelles pourrait justifier que les amendes infligées aux entreprises soient — pour un niveau de dissuasion donné — moins élevées: mais en l'absence de tels pouvoirs, la Commission doit nécessairement imposer des amendes importantes, afin qu'un effort réel de discipline soit déployé au sein des entreprises.

2. La pratique développée sur la base des lignes directrices de 1998

En 1998, la publication des lignes directrices a résulté d'une volonté d'introduire davantage de transparence dans le calcul des amendes par la Commission. Les lignes directrices ont aussi marqué une inflexion nette de l'approche. Jusqu'à cette date, les amendes étaient pour l'essentiel calculées en (faible) proportion du chiffre d'affaires réalisé sur le marché concerné. Cela aboutissait à des amendes excessivement basses, eu égard notamment à la probabilité limitée de détection déjà mentionnée. Il pouvait dès lors demeurer «rationnel», pour une entreprise, de prendre part à un cartel, malgré certains avertissements spectaculaires, comme les décisions *Carton* ([1]) et *Ciment* ([2]) en 1994.

Avec les lignes directrices, on s'inscrit désormais dans une logique de forfait, le montant de départ de l'amende étant fonction de la gravité intrinsèque de l'infraction et de son impact, notamment géographique. Trois catégories d'infraction sont

([1]) Décision du 13 juillet 1994, JO L 243, p. 1.

([2]) Décision du 30 novembre 1994, JO L 343, p. 1.

définies: peu grave (montant de départ de 1000 à 1 million d'euros), grave (de 1 à 20 millions) et très grave (au-delà de 20 millions). Cette logique de forfait poursuit un objectif de dissuasion accrue, grâce à la déconnexion du montant de l'amende vis-à-vis de la valeur économique du marché concerné. L'approche forfaitaire a un effet psychologique fort, mais elle crée des difficultés, notamment pour le traitement des infractions collectives que sont les cartels.

Les lignes directrices ont toutefois prévu des mécanismes permettant, tout en respectant le principe de non-discrimination, un traitement différencié des entreprises en fonction de certains critères objectifs. Sur cette base, la Commission a progressivement développé et raffiné sa pratique décisionnelle, afin de prendre en compte la situation spécifique de chaque entreprise. Le développement de cette «jurisprudence» sophistiquée — chaque affaire est un cas particulier — a pu faire l'objet d'accusations de complexité, voire d'opacité et d'excessive imprévisibilité des amendes. Il faut néanmoins insister sur les efforts déployés pour garantir la transparence et la cohérence de l'approche. Le raisonnement détaillé, reprenant chaque étape définie dans les lignes directrices, qui vient à l'appui de chaque décision, contribue à cela.

L'analyse détaillée de la politique de la Commission impose un constant préalable: quoique les lignes directrices aient été appliquées à l'ensemble des décisions avec amendes, les sanctions sont restées assez nettement différenciées selon le type d'infraction visé. Les abus de position dominante et les restrictions au commerce parallèle ont donné lieu à des amendes tendanciellement moins élevées, ce qui se justifie en définitive par les caractéristiques propres de chaque type d'infraction. Cette différenciation témoigne de la cohérence et de la souplesse des lignes directrices.

En ce qui concerne plus particulièrement les infractions collectives, (qui ont représenté jusqu'ici 2/3 des décisions s'inspirant des lignes directrices), une véritable méthodologie s'est peu à peu développée, du fait de la nécessité, par delà l'approche forfaitaire, d'adapter le montant de l'amende à la situation objective propre de chaque entreprise. Ce principe de différenciation, lorsque celle-ci s'impose, a été avalisé, en continuité avec la jurisprudence préexistante, par le Tribunal de Première Instance dans les affaires *Conduites précalorifugées* ([1]), *British Sugar* ([2]) et *FETTCSA* ([3]) Voyons quelles sont les principales étapes de la méthode développée.

Le calcul du **montant de départ** est le cœur de la politique d'amendes. Il détermine pour une large part le montant final et porte une appréciation sur la gravité d'ensemble de l'infraction. C'est notamment vis-à-vis de ce calcul que la politique de la Commission s'est affinée.

Pour chaque infraction, un montant de départ de référence est fixé. Ce montant est défini par rapport à l'infraction elle-même, et non par rapport à chaque entreprise dans le cas d'infractions collectives. Ce montant est défini par référence aux trois catégories de gravité définies dans les lignes directrices. De facto, la catégorie des infractions «peu graves» n'a été utilisée qu'une fois, dans l'affaire *Nathan-Bricolux*, concernant des restrictions verticales sur un territoire très limité. Cette «sous-utilisation» n'est pas surprenante, car la plupart des infractions concernées n'ont pas vocation à être traitées au niveau communautaire. D'ailleurs, une fois le nouveau règlement 1/2003 entré en vigueur, la Commission n'aura en général plus à traiter des infractions concernant uniquement un, deux voire trois États membres. Cette catégorie est donc vouée à une disparition progressive.

En revanche, le choix de la classification en «grave» ou «très grave» revêt une importance critique puisque la fourchette indicative va de 1 à 20 millions d'euros pour une infraction «grave», alors que le montant de départ indicatif pour les infractions «très graves» s'établit à un minimum de 20 millions. A cet égard, trois critères sont applicables, qui sont définis dans les lignes directrices: i) *gravité par nature*, ii) *impact concret lorsqu'il peut être mesuré*, et iii) *taille du marché géographique concerné*. L'analyse *cumulative* de ces trois critères permet de conclure.

En ce qui concerne le poids relatif de ces trois critères dans la pratique de la Commission, il importe de souligner que la nature intrinsèque de l'infraction joue un rôle assez décisif dans la classification finale. Une infraction très grave par nature, telle que le «price fixing», pourra déboucher sur une classification finale en infraction très grave même si l'impact concret a été faible et si l'infraction visée s'est limitée au territoire d'un État membre (par exemple, sur ce dernier point: *Bières belges, Banques autrichiennes, Ronds à béton*).

([1]) Arrêt du TPI du 20 mars 2002 dans les affaires T-9/99 et autres.

([2]) Arrêt du TPI du 12 juillet 2001 dans les affaires jointes T-202/98, T-204/98 et T-207/98.

([3]) Arrêt du TPI du 19 mars 2003 dans l'affaire T-213/00.

En ce qui concerne le critère de l'impact concret sur le marché, la Commission a volontairement adopté une approche très circonspecte, consistant à ne pas faire de l'allégation d'absence d'impact une sorte de «circonstance atténuante». La première raison est que dans le cas des restrictions les plus graves («hard-core»), une absence éventuelle d'impact ne serait pas de nature à atténuer la gravité de l'infraction commise. La deuxième raison est qu'il serait vain de tenter d'établir l'impact spécifique d'une infraction. Il est en effet impossible d'isoler avec certitude les effets produits par un cartel d'autres phénomènes économiques concomitants. S'il est le plus souvent impossible pour la Commission de prouver qu'il y a eu un impact, il ne l'est pas moins pour les entreprises de prouver qu'il n'y a *pas* eu d'impact. La pratique a donc largement consisté à conclure qu'à partir du moment où un accord est effectivement mis en œuvre (réunions, échanges de données, annonces de hausses de prix etc.), il y a nécessairement eu impact concret. D'ailleurs il faut rappeler que les lignes directrices parlent d'impact concret «*lorsqu'il est mesurable*». On peut donc considérer que l'impact ne devrait rentrer en ligne de compte dans les conclusions sur la gravité que dans les cas très exceptionnels où il serait possible de quantifier précisément un impact ou, au contraire, une absence totale d'impact.

En ce qui concerne la taille du marché géographique, déjà mentionnée, l'analyse de la Commission a toujours été qu'un marché géographique limité n'entraîne pas nécessairement une classification en infraction «grave» au lieu de «très grave». Ainsi en 2001 et 2002, des infractions ne concernant qu'un seul État membre ont été finalement considérées comme très graves *(Bières Belges, Banques Autrichiennes, Ronds à béton)*. Mais cette pratique n'est pas systématique et des infractions «hard-core» ont pu être considérées comme «graves» en fonction de circonstances spécifiques (*Banques allemandes, Gaz industriels*). Il existe en effet une marge légitime de discrétion pour la Commission, dans le cadre de laquelle divers critères peuvent rentrer en ligne de compte. Il faut donc relativiser les accusations selon lesquelles la politique de la Commission ne prendrait pas en compte la situation spécifique de chaque affaire.

De fait, malgré l'approche «forfaitaire», la valeur du marché concerné a *de facto* été prise en compte dans la fixation des montants de départ. Cela a parfois conduit la Commission à sortir à la baisse des fourchettes indicatives des lignes directrices: Certaines infractions ont été considérées comme «très graves» mais le montant de départ choisi a été largement inférieur à 20 millions d'euros du fait des caractéristiques propres de l'affaire (*Phosphate de Zinc, Ronds à béton*). Si les lignes directrices ont donc abouti à une déconnexion du montant des amendes vis-à-vis du chiffre d'affaires réalisé sur le marché, cet aspect continue à rentrer en ligne de compte.

Afin de permettre un traitement différencié des entreprises malgré la fixation d'un seul montant de départ par infraction, la pratique dite des «groupes» («groupings») s'est généralisée. Elle permet d'ajuster le montant de départ au degré de responsabilité propre de chaque entreprise dans la commission de l'infraction. Ce degré de responsabilité propre est en général considéré comme fidèlement reflété par la part de marché de l'entreprise sur le marché en cause, bien que d'autres critères puissent être utilisés si les circonstances de l'affaire le requièrent (*Viande bovine française*). L'approche classique consiste donc à regrouper les entreprises ayant des parts de marché proches dans un nombre limité de groupes. Le groupe des entreprises ayant les plus grosses parts de marché se verra attribuer le montant de départ déterminé pour l'infraction. Le montant attribué aux autres groupes reflètera en général le rapport de proportion existant entre la part de marché moyenne des entreprises du groupe concerné par rapport à celle du premier groupe.

Il est intéressant de préciser qu'en ce qui concerne les cartels mondiaux, la pratique consiste à prendre en compte, pour le calcul des groupes, les parts de marché des entreprises au niveau mondial, et pas seulement au niveau européen. En effet, puisque l'objectif des groupes est d'évaluer la responsabilité de chaque entreprise dans le cartel, c'est la part de marché mondial qui est représentative dans le cadre d'un cartel mondial.

Puisque les groupes reflètent la responsabilité de l'entreprise dans le cartel à travers sa part de marché, ils ne tiennent pas compte de sa taille globale. Dès lors des entreprises de très grande taille placées dans le second, troisième ou autre groupe peuvent se voir attribuer des montants de départ faibles pour des infractions pourtant considérées comme très graves. Il existe donc un risque que l'effet dissuasif soit trop faible.

Il a donc rapidement été jugé approprié d'appliquer au montant de départ de certaines entreprises un **facteur multiplicateur** reflétant la nécessité d'augmenter l'amende afin de garantir son effet suffisamment dissuasif. Cette pratique a été amorcée avec la décision *Conduites pré-calorifugées* de 1998, où l'amende de l'entreprise ABB s'est vu appliquer un facteur multiplicateur de 2,5. Jusqu'à présent les facteurs multiplicateurs les plus courants sont de 2 ou 2,5. Le facteur le plus

élevé (5) a été appliqué à Interbrew dans l'affaire de la *Bière luxembourgeoise*, mais le montant initial était très faible vu la taille du marché concerné.

Avec l'introduction des facteurs multiplicateurs, on notera que l'amende est devenue pour une part fondée sur la taille globale de l'entreprise, et non plus uniquement liée aux ordres de grandeurs indiqués par les lignes directrices et à la valeur du marché concerné. Cette approche est parfois critiquée par des commentateurs qui estiment que la dissuasion doit être calculée en référence au seul chiffre d'affaire sur le produit concerné, c'est à dire au niveau de la «business unit» concernée par l'infraction. En clair: si une «business unit» est impliquée dans un cartel, la dissuasion devrait être calculée uniquement en référence à cette dernière, car il suffirait d'imposer une amende équivalente aux profits illicites de la *seule* «business unit» pour obtenir une dissuasion suffisante.

L'existence de multiplicateurs importants pourrait, à cet égard, s'analyser comme une compensation de la probabilité limitée de détection qui caractérise les infractions les plus graves. Si les facteurs multiplicateurs n'existaient pas, vu la probabilité limitée de détection, les grands groupes diversifiés pourraient être tentés de multiplier les cartels sur différentes lignes de produits (il existe, hélas, de nombreux exemples concrets). L'objectif de dissuasion effective conduit donc à augmenter l'amende. On remarquera toutefois que les facteurs multiplicateurs sont utilisés uniquement dans le cas de très grands groupes pour lesquels les amendes seraient à défaut dérisoires, et toujours dans des cas où il existe une disparité très forte, au sein d'une même affaire, de la taille des entreprises. En outre, les facteurs multiplicateurs ont jusque là été plafonnés, en moyenne à 2, donc leur progression n'est donc évidemment pas linéaire.

En ce qui concerne la **durée,** il y a peu de choses à dire. La pratique s'est établie de considérer que chaque année pleine d'infraction conduit à une augmentation de 10% du montant de départ. En dessous d'une année pleine, toute période supérieure à 6 mois justifie une augmentation de 5%.

Il importe de souligner cependant qu'au regard des dommages causés au marché sur l'ensemble de la période d'infraction, la méthode de calcul des amendes tend à sous-estimer ces effets puisque la durée ne rentre en compte que de manière assez marginale dans le calcul des amendes. La pratique de la Commission joue donc à l'avantage des entreprises et il faut relativiser le niveau actuel d'amendes: si on définissait un montant par année et qu'on le multipliait par le nombre d'années, ce qui obéirait à une certaine logique, les montants finaux obtenus pourraient se révéler (quand bien les montants de départ seraient fixés à un niveau plus faible) plus élevés pour des infractions de longue durée. Cette approche est par exemple suivie par le Département de la Justice américain.

En ce qui concerne les **circonstances aggravantes ou atténuantes,** la pratique de la Commission est riche. On s'arrêtera donc sur quelques points saillants.

Eu égard aux *circonstances aggravantes*, deux points principaux sont à retenir, à savoir la qualification de «chef de file» de l'infraction et la récidive. Dans chacune de ces circonstances, l'augmentation d'amende la plus fréquente est de 50%, ce qui est considérable. La rigueur de cette politique s'explique parfaitement par la volonté de garantir l'effet préventif et dissuasif des amendes imposées. L'augmentation de l'amende imposée au chef de file a pour objectif de dissuader toute entreprise de jouer un rôle moteur dans une infraction. Quant à la sanction des récidivistes, elle est forte dans la mesure où elle prend acte que la première sanction imposée n'a pas été assez dissuasive.

Au chapitre des *circonstances atténuantes*, il faut noter qu'au moins en ce qui concerne les restrictions par objet, l'argument de l'absence d'impact sur le marché, bien qu'il soit très fréquemment invoqué par les entreprises, ne peut pas être retenu comme circonstance atténuante. La notion de «non-application effective», qui figure dans la liste dressée par les lignes directrices, ne doit surtout pas être confondue avec l'absence (alléguée) d'effets du cartel. Cette notion vise l'appréciation de la conduites individuelle de chaque entreprise, et non pas la celle du degré de mise en œuvre collective (ou de succès) des pratiques illégales. Par ailleurs, il ne peut être envisagé de retenir la circonstance de la «non-application effective» que pour des entreprises qui se seraient systématiquement et clairement abstenue de mettre en pratique les accords restrictifs. Le simple fait de «tricher» dans et sur le dos des autres membres d'un cartel ne constitue pas une circonstance atténuante, comme l'a confirmé la Cour.

Lors des deux dernières années, avec la très forte augmentation du nombre de décisions et des montants élevés des amendes, de **nouvelles questions** se sont posées, auxquelles la Commission s'est efforcée de répondre.

Compte tenu des enjeux financiers en cause et de la méthode utilisée, la question de l'imputation de l'infraction à telle ou telle entité juridique à l'intérieur d'un groupe d'entreprise joue un rôle déterminant. On a vu des entreprises tenter certaines

manœuvres à cet égard, pour se soustraire au paiement de l'amende. La Commission entend donc désormais être particulièrement vigilante, notamment en s'appuyant sur la notion de responsabilité solidaire de toutes les entités d'un groupe impliquées dans l'infraction.

Compte tenu de la taille désormais mondiale d'une grande partie des cartels, les invocations du principe *non bis in idem* au regard des amendes déjà imposées — notamment aux États Unis — se sont multipliées. La Commission a toujours fermement rejeté ces demandes, car les sanctions américaines ne visent que les dommages causés à l'économie américaine, tout comme les amendes européennes ne concernent que les effets produits par le cartel sur le territoire européen.

Compte tenu du montant élevé des amendes et de la situation financière parfois très délicate des entreprises impliquées dans ces cartels, l'incapacité à payer a été évoquée à plusieurs reprise à l'appui d'une demande de réduction de l'amende. Il s'agit d'une question épineuse pour la Commission. A cet égard, la Commission a développé une approche volontairement restrictive. Tout en procédant à un examen préalable précis, fondé sur certains ratios financiers, de la situation des entreprises concernées, la Commission a jusqu'ici toujours refusé de réduire une amende au titre de l'incapacité à payer, en cohérence avec une jurisprudence de la Cour très stricte en la matière. Signalons en outre qu'il est virtuellement impossible, compte tenu de la multitude de facteurs qui rentrent en jeu, de déterminer au moment de la décision le seuil à partir duquel la vie de l'entreprise serait irrémédiablement mise en danger. Toute politique laxiste en la matière pourrait avoir pour effet de créer un sentiment d'immunité dans le chef d'entreprises en mauvaise santé financière.

Avec la multiplication des décisions et compte tenu de l'implication des entreprises dans plusieurs cartels, la question s'est également posée de la légitimité de l'imposition successive d'amendes élevées dans un laps de temps très court, alors même que les infractions ont été commises de manière simultanée. D'une manière générale, le fait de s'être récemment vu infliger une amende ne justifie en aucune manière qu'une nouvelle amende doive être réduite, ce qui reviendrait à conférer *de facto* une immunité de sanctions à certaines entreprises. Le problème s'est toutefois posé d'entreprises en situation financière délicate auxquelles de lourdes amendes avaient été imposées. A titre tout à fait exceptionnel, la Commission a tenu compte de la conjonction de ces deux facteurs et a octroyé, à ce titre, une réduction d'amende à une entreprise (*Spécialités graphites*).

3. Enseignements et perspectives d'évolution

Au terme de cinq ans de mise en pratique, il est possible de tirer un certain nombre d'enseignements, qui permettent de dessiner en pointillé les principaux axes qui devraient orienter toute réflexion sur le futur de la politique d'amendes.

Les lignes directrices ont permis de rendre plus transparente la politique d'amendes, en rendant publics les éléments principaux d'une véritable méthodologie. Les critères rentrant en compte dans la détermination des montants sont désormais connus. Par ailleurs, après plus de 40 décisions, une pratique détaillée s'est développé, en s'affinant. Les entreprises et leurs conseils sont donc aujourd'hui en mesure d'évaluer la fourchette de leur exposition.

Les entreprises visées auront toujours beau jeu de reprocher à la Commission une prévisibilité insuffisante. Il faut à cet égard insister sur deux choses. En premier lieu, chaque affaire présente par définition des spécificités propres. En outre la politique d'amendes est, comme son nom l'indique, une «politique» qui ne peut s'appliquer mécaniquement. Il est donc légitime que la Commission dispose à cet égard d'une marge significative de discrétion. En second lieu, pour être efficace une politique de dissuasion doit se garder d'opérer une «tarification» excessivement détaillée des infractions: un certain degré d'«imprévisibilité» permet d'empêcher les entreprises de céder à la tentation du simple bilan «coût/bénéfices» d'une infraction à la loi.

Cela dit, toute méthodologie à vocation à s'améliorer et il faut réfléchir à la manière de remédier aux faiblesses éventuelles identifiées. Quelles sont-elles? Si réflexion de fond il devait y avoir, elle devrait logiquement porter principalement sur trois éléments, à savoir la méthode de calcul du montant de départ (c'est le cœur de l'amende), la place à accorder à la composante «durée» d'une amende et à la prise en compte de la capacité contributive réelle de l'entreprise.

En ce qui concerne le montant de départ, trois «points sensibles» peuvent être identifiés. En premier lieu, le système forfaitaire, s'il a servi de signal fort aux marchés, a abouti à des systèmes correctifs assez complexes qui ne se basent pas sur des données quantitatives strictes, mais davantage sur des ordres de grandeur, d'où l'exposition à une accusation d'arbitraire. En second lieu, la méthode actuelle mêle intimement des considérations de politique de concurrence relatives à la gravité et des données objectives sur les entreprises (part de marché, taille globale). D'où le risque que les

entreprises perçoivent le calcul des montants de départ comme une «boîte noire». Enfin, troisièmement, malgré les systèmes correctifs l'approche forfaitaire débouche encore parfois sur un niveau relativement faible des amendes imposées aux très grandes entreprises et à une rigidité à la baisse des amendes aux petites ou moyennes entreprises dans le cas d'infractions très graves, au risque que la Commission soit accusée de les punir de manière injuste.

Il pourrait donc être pertinent de conduire une réflexion sur les modalités les plus appropriées de détermination du montant de départ au regard des différents éléments à prendre en compte.

Il serait par ailleurs pertinent d'examiner la composante de durée de l'infraction, qui représente actuellement une partie faible de l'amende globale imposée. Or les dommages causés sont quant à eux proportionnels à la durée de l'infraction. Il y aurait donc une logique à ce que l'amende suive la même règle de proportionnalité. C'est en tout cas une piste à explorer.

Enfin, il est loisible de s'interroger sur l'approche la meilleure en termes d'analyse et de prise en compte de la capacité contributive réelle d'une entreprise, qui est un élément clé du succès une politique de dissuasion optimale. La Commission est susceptible de se pencher plus avant sur cette question car elle risque d'être confrontée à des demandes récurrentes de la part des entreprises.

Une politique d'amendes peut et doit être évolutive, mais elle doit rester inspirée par les principes de dissuasion (plus que de répression) et de transparence maximale, sans préjudice toutefois de la marge de discrétion qui est inhérente à toute politique. Les lignes directrices de 1998 ont constitué un progrès majeur, même si elles ne résolvent pas tous les problèmes. La réflexion sur les éventuelles améliorations à apporter est une constante de l'action de la Commission.

Il ne serait pas opportun de conclure cet article sans évoquer deux autres questions qui, sans relever directement de la politique d'amendes, entretiennent un lien étroit avec elle. Il s'agit de la nouvelle politique de clémence de la Commission et de l'enjeu des actions en dommage et intérêts pour la mise en œuvre d'une politique de concurrence efficace.

La nouvelle communication sur la clémence de février 2002 ([1]) a marqué une inflexion très nette dans la politique en la matière. La possibilité d'obtenir de la Commission une immunité conditionnelle d'amendes devrait conduire les entreprises à saisir une occasion unique de se mettre en règle avec les règles de concurrence. En effet, la nouvelle politique de clémence contribue à une augmentation sensible de la probabilité de détection. Cette situation devrait renforcer le caractère dissuasif des amendes, même si leurs montants devaient rester à des niveaux similaires à ceux que l'on connaît actuellement.

Par ailleurs, la Commission porte un grand intérêt à la problématique des actions en dommages et intérêts dans les affaires de concurrence. La culture de l'action privée est encore peu développée en Europe, mais cela pourrait changer rapidement. Un tel développement pourrait contribuer de manière décisive à une discipline accrue des marchés.

([1]) Communication de la Commission sur l'immunité d'amendes et la réduction de leur montant dans les affaires portant sur des ententes, JO C 45, 19.2.2002, p. 3.

The Commission closes probe into pay-TV industry in Italy approving Newscorp/Telepiù merger deal

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On 2 April 2003, after an in-depth investigation, the Commission gave the green light to the merger between the two existing satellite pay-TV platforms in Italy subject to a complex package of conditions which will be applicable until 2011. The investigation revealed that the survival of two operators in pay TV market in Italy would have been very unlikely.

The background and the transaction

On 16 October 2002, The News Corporation (Newscorp) notified a transaction to the Commission whereby it would acquire sole control of Telepiù from the Vivendi group and would subsequently merge Telepiù with Stream, the pay-TV platform it controls. For the third time in two years the Italian satellite pay-TVs attempted to merge their activities. The two previous in-depth examinations of similar proposed transactions were made by the Italian antitrust authority.

The situation of the Italian pay-TV operators has been characterised by severe financial difficulties since the beginning of their operations (1991 for Telepiù and 1998 for Stream). These financial strains have various explanations, which may go beyond simple economic reasons. In Italy the penetration of pay-TV services is lower than in other large European countries (UK, France and Spain). This is *inter alia* due to a widespread nation-wide free-to-air TV offer and, to a lesser extent, the piracy of pay-TV broadcasts.

Newscorp will hold 80,1% and Telecom Italia will have a percentage not exceeding 19,9% of the share capital in the new entity and a member in the board of directors.

The analysis

Market definition

The Commission established, similarly to previous analyses in the sector, that in Italy pay-TV is a relevant market distinct from free-to-air TV. Although there are twelve existing nation-wide free-to-air broadcasters (mainly Mediaset and RAI channels) and an array of local broadcasters which may influence the degree of penetration of pay-TV services (and hence the profitability of pay operators), Italian consumers are ready to pay an 'extra fee' (the subscription) in order to obtain the 'extra utility' (i.e. the specific content) of pay-TV services. In addition, from the supply-side viewpoint, pay-TV is differentiated from free-to-air TV on the basis of the type of content (i.e. premium content), the program schedules and the business model.

Overall effects of the merger

The concentration would have led to the creation of a lasting near-monopoly in the Italian pay-TV market, would have raised barriers to entry in satellite pay-TV and would have created a monopsonist position in Italy as regards the acquisition of some types of premium programme content (particularly the exclusive rights to certain football matches that take place every year where national teams participate — i.e. the Italian Serie A and Serie B — and blockbuster movies). This would have foreclosed third parties' access to premium content, the driver of pay-TV subscriptions and the key to successful pay-TV operations.

Horizontal effects in pay-TV

Although it is possible to provide pay-TV services via various broadcasting systems (satellite, cable, DTT, and in the future x-DSL technologies ([1]), the Italian pay-TV market is essentially limited to DTH (direct-to-home) satellite transmission, where both Telepiù and Stream were active. The only existing competitor of the combined platform is a cable operator (e.Biscom) which has limited capacity (it reaches consumers in a limited number of major Italian cities). DTT technology is in its infancy in Italy.

Vertical effects in pay-TV

The merger would have raised barriers to entry as regards satellite DTH pay-TV: Newscorp would have become the 'gatekeeper' in respect of the only available technical satellite platform ([2]). Furthermore, the merger would be likely to lead to

([1]) X-DSL (Digital Subscriber Line) are high-speed broadband interconnections; DTT means Digital Terrestrial Television.

([2]) The technical platform can be defined as the system controlling conditional access and the provision of the related technical services. Technical services that can be provided through the platform comprise conditional access management, transit through the decoders and inclusion in the pre-defined list of services (automatic tuning), digitalisation and encryption, satellite up-link and particularly, access to the Electronic Programme Guide (EPG).

the use of the Newscorp proprietary standard for the conditional access system (CAS), a technology that allows broadcasters to encrypt the digital transmission signal. All potential DTH competitors wishing to set up an alternative DTH pay-TV would depend on the combined entity for access to technology (CAS) and/or to infrastructure (technical platform).

The possession of the only technical platform and of a proprietary CAS, which is most likely to be 'the standard' CAS would have raised further barriers to entry to the market for pay-TV services. It would have increased the incentive and the ability of the combined platform to pursue exclusionary strategies or raise rivals' costs in order to foreclose the market and maintain its monopolistic position for DTH pay-TV.

Foreclosure of premium content

As a consequence of the merger, Stream and Telepiù exclusive rights (on all means of transmission) and in particular for premium films (all output deals with Hollywood Majors and main Italian film producers), and for football (all contracts with Serie A and Serie B teams in particular) would have accrued to the combined platform. The merger would therefore have impeded potential third parties' access to 'driver' content for pay-TV.

Furthermore, as a consequence of the existence of black-out rights on second-window releases by the combined platform, third parties would have been foreclosed from access to this 'second-tier' content, which potentially offers a more affordable way to develop pay-TV operations.

Failing company defence argument

Late in the procedure, Newscorp argued that the conditions for the so-called 'failing company defence' were met in this case since, in the absence of the merger or in the hypothesis of the merger being blocked, Stream would inevitably exit the market and Telepiù would then be in a position comparable to that of the combined platform after the merger. In effect, according to Newscorp, there would have been no 'causal link' between the merger and the deterioration of the competitive structure of the market, due to the transaction.

The 'failing company defence' is a legal and economic concept accepted by competition authorities and used twice in the past by the Commission ([1]). In particular, the existence of a causal link between a concentration and the deterioration of the competitive structure of the market (caused by the merger) can be excluded and the merger be regarded as 'rescue merger', if the competitive situation in the market resulting from the concentration is expected to deteriorate in a similar fashion even if the merger were prohibited. The Commission applied the following criteria in order to verify whether the condition for a 'failing firm defence' were met in this case: 1) the failing company would be shortly forced out of the market if not taken over; 2) there would be no less anti-competitive alternative to the merger; 3) in the absence of the merger, the assets to be purchased would disappear from the market, or the acquiring company would gain the market share of the acquired company.

In the present case the first two of these very strict legal requirements were not met (the third being left open). It is worth noting that the alleged failing company (Stream) is a 'division' of Newscorp (the acquiring company). Clearly, this was not a case of the whole Newscorp exiting the market, but rather of a decision to be taken by Newscorp's management to abandon a non profitable business (Stream).

However, whilst rejecting the 'defence', the Commission took due account of the chronic financial difficulties faced by both companies, of the specific features of the Italian market and of the disruption that the possible closure of Stream would cause to Italian pay-TV subscribers. Overall, it was considered that an authorisation of the merger subject to appropriate conditions would be more beneficial to consumers than a prohibition decision followed most probably by the closure of Stream by its owners.

Undertakings

The challenge was, therefore, to obtain sufficient and adequate conditions from the merged satellite pay-TV platform to ensure that the market would remain open and that the combined entity would be subject to competitive constraints. Barriers to entry had to be lowered to the maximum extent possible to favour actual competition and the emergence of potential competitors capable of disciplining the merged entity.

The underlying philosophy of the undertakings accepted by the Commission is aimed at ensuring, in the long term (until 2011), third party access to

([1]) Cases IV/M.308 Kali+Salz/MDK/Treuhand and M. 2314 BASF/Eurodiol/Pantochim. The Commission's decision in Kali+Salz/MDK/Treuhand was also subject to a judgement of the Court of Justice, joined cases C-68/94 and C-30/95, France c. Commission, in which the Court set out its interpretation of the 'failing firm' doctrine. Other cases where this concept was indirectly considered are the so-called 'Andersen mergers' of 2002.

premium content, to the technical platform and to CAS and at ensuring that the combined platform had no involvement in alternative means of transmission (such as DTT). At the same time, an effective system of implementation is put in place with a key role entrusted to the Italian Communication authority.

Regarding *access to premium content* (in particular football and movies), Newscorp waived its exclusivity and protection rights on means of transmission other than DTH. Therefore, all operators (actual and potential) on cable, DTT, x-DSL, etc. will be able to buy those contents directly from rights owners. As regards on-going contracts, rights owners are granted a unilateral termination right which ensures that potential DTH operators would be able to contest those rights vis-à-vis the combined platform. As regards future contracts, their duration will be limited (2 years for football contracts, 3 years for movie contracts), in order to allow, at regular intervals, 'contestability' for rights to premium content.

A system of *'wholesale offer'* of premium content is put in place in order to allow third parties active on means of transmission other than DTH to gain critical mass and to be able to negotiate at a later stage directly with content providers. This offer is to be unbundled (in terms of content), non exclusive and is to be based on the 'retail-minus' pricing principle.

Furthermore, in order to favour possible entry of an alternative DTH operator, Newscorp undertook, as regards future (and re-negotiation of present) agreements concerning movie rights, not to seek to acquire protection rights regarding DTH. Therefore, 'second window' releases (to date subject, in Italy, to black-out due to existing hold-back rights) could be exploited by a newcomer wishing to enter into the DTH pay-TV business by enabling him to offer 'second-tier' premium content.

Regarding *access to platform*, Newscorp undertook to grant full access to its platform (and to related technical services) to third parties on fair, transparent, non discriminatory terms. This encompasses *inter alia* fair licensing of Newscorp's CAS and the possibility for free-to-air and pay- DTH channels to be included in the EPGs (electronic program guide) of the combined platform.

Newscorp undertook to *divest* Telepiù's *digital and analogue terrestrial assets* and related frequencies, and will refrain from DTT activities in the future (both as a network and as a retail operator). The fact that the purchaser of those assets and frequencies will have to be a company wishing to include pay-TV elements (one or more channels) in its business plan is a factor that further favours the emergence of potential (and, in the future, actual) competition in the relevant market also from that means of transmission.

It is essential that this complex package of undertakings is *effectively implemented*. To achieve this a dispute settlement mechanism which involves, for the most important issues of the package (access to platform and premium 'wholesale offer'), arbitration by the Italian Communication authority is put in place. Other aspects of the remedy package are subject to international arbitration.

Minority participation of Telecom Italia

Telecom Italia maintains a minority shareholding (around 20%) in the combined platform and has a member in the board of directors ('the link'). Pre-merger Telecom Italia was active in the pay-TV business as a 50/50 partner of Newscorp in Stream, and was/is the dominant player in Italy in various markets where convergence between the media and telecom services is taking place.

Although theoretically this link could have had adverse effects on competition, the investigation carried out by the Commission allowed to conclude that there was insufficient evidence that adverse effects would materialise after the merger as a result of the link. In particular, through this operation Telecom Italia will reduce its stake to a non-controlling participation in the merged entity, and is effectively exiting the market for pay-TV. The evidence was not sufficient to show that, on the one hand, through this link a competitive constraint (represented by the telecom incumbent) in pay-TV vis-à-vis the combined platform would have been sterilised or removed. On the other hand, the evidence was insufficient to show that the link would strengthen the pre-merger dominant position held by Telecom Italia in some telecom services markets in Italy.

Newscorp offered a set of behavioural undertakings regarding its relationship with Telecom Italia which included no positive discrimination vis-à-vis Telecom Italia and no bundling of pay-TV and Internet broadband access services. The Commission took note of those commitments, without making them a condition for the clearance decision.

Conclusion

The authorisation of the transaction subject to a complex package of commitments in this case is a function of the situation existing in the Italian pay-TV business, in which the survival of two operators is very unlikely. In this situation, the prospects of the closure of Stream by Newscorp's management were particularly serious. In the event of closure consumers would have had to face a situation in which there would be only one operator in Italy and where that operator had no restraints on its business behaviour. For this reason, the Commission decided to authorise the present transaction conditionally. Although the merged entity will enjoy a near monopoly position, the strict package of remedies will impose severe restraints on the merged entity for a long period. At the same time, conditions are put in place in order to favour the emergence of new competitors in the medium term both on DTH and on other means of transmission.

Commission proposes effective enforcement rules for air transport between the Community and third countries

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1. Introduction

On 24 February 2003 the Commission adopted a Proposal for a Council Regulation amending two existing regulations in the air transport sector ([1]) as well as amending Regulation (EC) No 1/2003 on the implementation of Articles 81 and 82 of the Treaty ([2]). The purpose of the proposed Regulation, which is based on Article 83 of the Treaty, is to create an effective framework for enforcing the EC competition rules with regard to air transport between the Community and third countries. Although there is no doubt that the EC competition rules fully apply to this field of air transport ([3]), effective enforcement rules are currently lacking. In particular the Commission's experience in examining transatlantic aviation alliance cases under the EC competition rules has shown that there is an important need to restore this anomaly.

In this article the background of the Commission's Proposal is explained, followed by a description of its main content and its most important differences with earlier proposals in this field.

2. Background

2.1. General

At the moment the Commission lacks effective enforcement powers for the application of the EC competition rules to air transport between the EU and third countries since Regulation (EEC) 3975/87, which implements the EC competition rules in the air transport sector, applies only to air transport between Community airports (Article 1). Regulation (EC) 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which will replace the procedural provisions of Regulation (EEC) No 3975/87 as from 1 May 2004, will not change this ([4]).

In concrete terms this means that for the assessment of cases relating to air transport between the Community and third countries (such as for example global aviation alliances like *Star Alliance, Wings* and *Skyteam*) the Commission will have to (continue to) rely on the proceedings of Article 85 (ex 89) of the Treaty. This provision empowers the Commission, if it finds that there has been an infringement of the EC competition rules, to propose appropriate measures to bring it to an end and, if this is not done, record such infringement in a reasoned decision. However, Article 85 does not provide the Commission with the appropriate fact-finding tools, nor does it enable the Commission to require undertakings to bring an end to infringements and to impose remedies and penalties. Clearly from a regulatory point of view this is an anomaly. For all other economic sectors, with a few minor exceptions in the field of maritime transport, procedural implementing regulations have been adopted and are fully applicable when the effects of anti-competitive agreements or abusive behaviour are felt on the EU market.

In the past, most recently in 1997 ([5]), the Commission has submitted various proposals with the aim to extend the scope of Regulation (EEC) No 3975/87 to cover also air transport between the Community and third countries and — in close relation to that — proposals empowering the Commission to issue block exemption regulations for such forms of transport. However, the Council has so far not decided on this important issue.

Recent developments have made the need for appropriate enforcement tools to apply the competition rules to air transport between the Community and third countries even more pressing. In particular, the number of international alliances and other forms of co-operation agreements in the aviation sector between Community airlines and carriers from third countries has increased significantly in recent years. The Commission's investigation has so far primarily focussed on transatlantic aviation alliance cases and these investigations have clearly shown that the current procedural and administrative framework of

([1]) That is Regulation (EEC) No 3975/87 laying down the procedure for the application of the EC competition rules in the air transport sector and Regulation (EEC) No 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.

([2]) COM(2003) 91 final. See also press release IP/03/284 of 26 February 2003, available at the Competition DG's web-site.

([3]) *Nouvelles Frontières* (joint cases 209-213/84 [1986] ECR 1425). Obviously Community competition law would only apply if there is an effect on trade between Member States. Such an effect would have to be determined on a case-by-case basis.

([4]) Article 32 point c of this Regulation excludes air transport between Community airports and third countries from its scope.

handling such cases is extremely complicated and time-consuming. Furthermore, it follows from the so-called 'open skies' judgments of the European Court of Justice of 5 November 2002 that there is a need for a coherent policy for international aviation, including an effective enforcement of the Community competition rules. This latter aspect is worth a few words of further explanation.

2.2. The implications of the 'open skies' judgments

In 1998 the Commission brought actions under Article 226 (ex 169) of the Treaty against 8 Member States ([1]), charging them with breaches of Community Law as a result of the conclusion of bilateral agreements in the field of air transport services with the United States. In its judgments of 5 November 2002 ([2]) the Court ruled that the Community has exclusive competence in certain areas where the Community had included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries. The Court identified three specific areas of Community exclusive competence: airport slots ([3]), computer reservation systems and intra-Community fares and rates. Consequently, the Member States concerned, by including these provisions in their bilateral aviation agreements had infringed Community Law. Moreover, the Court held that the clause on ownership and control of airlines ([4]) in the bilateral agreements amounts to discrimination excluding air carriers of other Member States from the benefit of national treatment in the host Member State, which is forbidden by the Community rules on the right of establishment enshrined in Article 43 of the Treaty.

In its Communication of 19 November 2002 ([5]) on the consequences of the Court judgments for European air transport policy, the Commission emphasised the need to devise a comprehensive international policy for the aviation sector and identified some key principles and initial priorities for action, including measures to ensure that effective competition is preserved and promoted. Only by overcoming the limitations of the existing investigation and enforcement regime could a fully effective co-ordinated air transport policy be achieved ([6]). There is no longer any reason for competition rules applied to air transport within the Community to be different from those involving third countries. The Commission should have the same enforcement powers when dealing with, for example, intra-Community co-operation arrangements between airlines as with co-operation agreements between a Community carrier and a carrier from a third country.

There was therefore an urgent need to re-launch the 1997 proposals establishing effective enforcement rules for air transport between the Community and third countries. Given the changed context since 1997, it was held to be more appropriate to replace the 1997 proposals by a new Proposal, which although it differs in some aspects from the earlier proposals, has the same objective. The proposals submitted by the Commission in 1997 amending Council Regulations (EEC) No 3975/87 and No 3976/87 have been withdrawn accordingly.

3. Essence of the proposed regulation

3.1. Purpose

As is explained in further detail in the Explanatory Memorandum to the Proposal, the purpose of the proposed Council Regulation is primarily to ensure a more effective and efficient framework for anti-trust procedures with regard to air transport between the Community and third countries. To that end it is proposed to delete the provision in Regulation (EC) No 1/2003, which currently excludes from its scope air transport between the Community and third countries (that is, Article 32 point c). As a consequence, Regulation (EC) No 1/2003, would as from 1 May 2004, apply to this part of air transport like for intra-Community

([5]) COM(97) 218 final of 16.5.1997 (OJ C 165, 31.5.1997, p. 13).

([1]) That is, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany (which all entered into full 'open skies' agreements with the US) and the UK (in respect of its more restrictive Bermuda II agreement).

([2]) Cases C-466/98, C-467/98, C-468/98, C-471/98, C-475/98 and C-476/98.

([3]) As concerns airport slots however, the Court concluded that it had not been established that the agreements concerned contained provisions in this regard.

([4]) Under this clause the US is in principle under an obligation to grant the rights provided for in the agreements to carriers controlled by the Member State with which it has concluded an agreement and is entitled to refuse those rights to carriers controlled by other Member States which are established in that Member State.

([5]) COM(2002) 649 final.

([6]) Furthermore, in its Communication of 26 February 2003 on relations between the Community and third countries in the field of air transport and an accompanying Proposal for a European Parliament and Council Regulation on the negotiation and implementation of air service agreements between Member States and third countries (COM(2003) 94) final the Commission presented a package of measures that would create a legal framework for handling all (not just those vis-à-vis the United States) bilateral relationships between the European Union and the rest of the world in the field of air transport.

transport and practically all other fields of economic activity ([1]).

3.2. Repeal of Regulation (EEC) No 3975/87

Since Regulation (EEC) No 3975/87 will practically not have any further meaning following the amendments by Regulation (EC) No 1/2003 ([2]) and the proposed Regulation, it is proposed to use this opportunity to repeal Regulation (EEC) No 3975/87 in its entirety, with the exception of a specific transitional provision ([3]). Essentially the only remaining substantive provision in Regulation (EEC) No 3975/87 would be the exception for certain purely technical agreements in Article 2, which has been interpreted by the Commission in a very strict sense and has merely a declaratory character. Moreover, in appropriate cases, there would be alternative ways for the Commission to provide its views on purely technical provisions falling outside the scope of Article 81(1) of the Treaty, e.g. by deciding in an individual case on the inapplicability of Article 81, where the Community public interest so requires, or by possibly issuing a Commission notice. Consequently, there would be no need to retain Regulation (EEC) No 3975/87 and the Proposal therefore proposes to repeal Regulation (EEC) No 3975/87 in its entirety.

3.3. Increased scope enabling block exemption regulation

Finally, the proposed broadening of the Commission's enforcement powers to air transport between the Community and third countries should logically be combined with the power of the Commission to grant also block exemptions in those cases, as it can already do at present in the case of air transport between Community airports pursuant to Council Regulation (EEC) No 3976/87. Therefore, the proposed Regulation extends the scope of Regulation (EEC) No 3976/87, which enables the Commission to issue block exemption regulations, in particular with regard to certain listed activities in the air transport sector.

The list in Article 2(2) of Regulation (EEC) No 3976/87 covers currently a number of activities, including joint planning and co-ordination of schedules, passenger tariff consultations and freight tariff consultations, joint operations on new less busy scheduled air services, slot allocation at airports and airport scheduling and common purchase, development and operation of computer reservation systems. In the past the Commission issued block exemptions for all of these activities, however over the years, when liberalisation in the air transport market advanced and competition came the main driving factor there was less and less need for such group exemptions. Consequently, most block exemptions were not renewed and at present the only remaining block exemptions in the air transport sector are those laid down in Regulation (EEC) No 1617/93, that is for IATA passenger tariff conferences and slot consultations. Both block exemptions have recently been renewed by the Commission until 30 June 2005, under certain additional obligations. Once the proposed Council Regulation has been adopted, it would seem logical to extend the scope of these block exemptions also to air transport between the Community and third countries.

3.4. Entry into force

In order to avoid a complicated transitional regime, the proposed Regulation is envisaged to become applicable as from the same date that Regulation (EC) No 1/2003 itself will apply, therefore as from 1 May 2004. This would ensure that as from that date the same competition enforcement rules apply to the whole air transport sector, regardless of whether intra-Community transport or transport between the Community and third countries is concerned.

4. Main differences compared to the 1997 proposals

As said above, although the purpose of the Proposal remains the same, it differs in a number of aspects from the proposals that were submitted to the Council in 1997. Naturally it takes into account new developments that took place in the meantime, such as the Commission's increasing experience in assessing transatlantic alliance cases and the implications of the 'open skies' judgment

([1]) The exceptions for inland and maritime transport (Article 32 point a and b of Regulation (EC) No 1/2003 respectively) will however remain.

([2]) Regulation (EC) No 1/2003 will, as from 1 May 2004, repeal all existing procedural provisions of Regulation (EEC) No 3975/87. As a result, Regulation (EEC) No 3975/87 will as from that date basically become an empty shell. It has to be noted that the situation for the other two Regulations in the transport sector, that is Regulation (EEC) No 1017/68 (inland transport) and Regulation (EEC) No 4056/86 (maritime transport), is different since these contain a number of important substantive provisions, such as e.g. a block exception for SME (article 4 of Regulation (EEC) No 1017/68) and a block exemption for liner conferences (Article 3 of Regulation (EEC) No 4056/86).

([3]) That is, Article 6(3), providing for a transitional provision for revoking/amending exemptions granted under the Regulation before 1 May 2004.

of the Court of Justice. Furthermore the following differences are worthwhile mentioning:

First, the 1997 proposals contained a specific clause providing for a procedure in case of conflict between international law and EC competition law ([1]). The idea at the time was apparently in particular that bilateral aviation agreements which Member States concluded with third countries might contain clauses which infringe EC competition law and that a consultation procedure with the competent authorities of the countries concerned should be foreseen for such situations. However, strictly speaking a conflict of laws arises only in a situation where one jurisdiction requires a party to perform some action which another jurisdiction prohibits. It is questionable whether a conflict of laws clause in a specific transport Regulation serves a useful purpose. It seems unnecessary because Member States are not entitled to conclude agreements which would run counter to EC law or which would be of exclusive Community competence. In any event, after the Court's ruling in the open skies cases and the Commission's conclusion from that judgment that a new EU/US agreement should be negotiated to replace the existing bilateral agreements and the implications the judgment has for other bilateral relationships between EU Member States and foreign countries ([2]) the need for such a clause would be even less obvious. The Proposal does therefore not contain such a clause.

Secondly, in 1997 rather than amending Regulation (EEC) No 3976/87, the Commission proposed a new Council Regulation empowering the Commission to issue block exemptions with regard to certain activities relating to air transport between the Community and third countries. The proposed Regulation was largely similar to Regulation (EEC) No 3976/87, but differed from that Regulation in particular as concerns the list of activities for which the Commission could adopt block exemptions. On the one hand this list was more limited, not including activities such as consultations on cargo tariffs and computer reservation systems ([3]). On the other hand the list in the proposed Regulation went further, including also the sharing of revenues and co-ordination of capacity 'to take account of the situation on certain Community third country routes'. Although not entirely clear, the background for this was apparently that the bilateral aviation agreements that the Member States had concluded with some third countries might contain such clauses.

However, in the meantime the Commission's further developed alliance policy has made it clear that revenue sharing and capacity co-ordination are activities which do not normally stand alone but are usually part of aviation co-operation agreements, comprising a range of activities on which participating carriers do no longer compete and which in principle are caught by Article 81(1) of the Treaty. The possibilities of granting an exemption to an aviation alliance covering such activities is then in principle assessed on a case-by-case basis. There seems to be no reason to treat alliances between EU carriers and carriers from third countries differently from intra-Community alliances in this respect. Therefore, in the absence of a clear justification for deviating from the activities listed in Regulation (EEC) No 3976/87 for air transport between the Community and third countries, a simple amendment of the scope of Regulation (EEC) No 3976/87 could achieve the envisaged powers to issue block exemptions for air transport between the Community and third countries.

Thirdly, as already mentioned rather than proposing to amend the scope of Regulation (EEC) No 3975/87 as was done in 1997, the Proposal makes the amendment through Regulation (EC) No 1/2003 which has been adopted in the meantime and proposes to repeal the remaining provisions of Regulation (EEC) No 3975/87.

In light of the above it was also possible to draft the new Proposal in such a way that there is just one Proposal instead of the two separate proposals that were prepared in 1997, providing for simplification, in line with the Commission's general policy in this respect.

5. Conclusion

The Proposal has been submitted to the Council and the Parliament (consultation procedure) on 24 February 2003. In order to end the unsatisfactory present situation as soon as possible it would be particularly important to have the Proposal adopted in due time before Regulation (EC) No 1/2003 becomes applicable, i.e. before 1 May 2004.

([1]) A similar provision is laid down in Article 9 of Regulation (EEC) No 4056/86, laying down rules for the application of Articles 81 and 82 of the Treaty to maritime transport. In the consultation paper on the review of this Regulation (available at the Competition DG's website) the question has however been raised whether this provision serves a useful purpose.

([2]) Communications of 18 November 2002 (COM(2002) 649/3) and of 26 February 2003 (COM(2003) 94).

([3]) The Memorandum to the 1997 Proposal does not explain why these activities, included in Regulation (EEC) No 3976/87 were not taken over, however this might be explained by the fact that the Commission in the meantime held that there was no longer a need for group exempting such activities and accordingly had withdrawn or was considering to withdraw the respective block exemptions.

The European Commission's 2002 Leniency Notice after one year of operation

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As François Arbault and Francisco Peiro have rightly stated in their Article 'The Commission's new notice on immunity and reduction of fines in cartel case: building on success' in the June 2002 issue of the Competition Policy Newsletter, the Commission's leniency notice of February 2002 ([2]) (the Notice) offers much greater legal certainty than the former 1996 notice ([3]) in guaranteeing immunity to companies involved in cartel behavior if they are the first to denounce a cartel ([4]). The Notice also offers clearer rules regarding reductions of fines for subsequent applicants. In the second part of their article, Arbault and Peiro spell out the conditions imposed by the Notice. There is no need to repeat these. The purpose of this Article is to explain the Commission's actual operation of the Notice, as it can be distilled from its first year of application. In doing so, some interpretative issues raised by Jarrett Arp and Christof Swaak, a US and EU lawyer respectively, will be responded to ([5]).

Some figures

To set the scene, and mindful that action speaks louder than words, it may be useful to provide some figures on the actual use companies have made of the Notice. In the first year, more than twenty applications for immunity were received in separate cases. For cartels, this is a huge number. By comparison, during the six years of operation of the 1996 Notice, leniency was requested in a total of sixteen separate cases ([6]). Moreover, those requests concerned mainly reductions of fines. In fact, under the 1996 Notice, full immunity was granted in only three cases in six years. Apart from the strongly increased number of applications, the main difference with the 1996 Notice is therefore that under the 1996 Notice most leniency applications were made following Commission inspections, with the objective of receiving a reduction in the fines to be imposed, whereas under the 2002 Notice, most applications are immunity applications, made before the Commission has taken any investigative steps.

Clearly, therefore, the 2002 Notice has been very successful so far in persuading companies to come clean. Indeed, one can observe something of a snowball effect. Some applicants have taken the opportunity of full immunity offered by the Notice to make a clean sweep in the company and present the Commission with immunity applications for every cartel they could discover internally, while pursuing at the same time strict internal compliance programs to ensure a new business philosophy for the future. Then, as the Commission started to investigate the cartels denounced to it, a second wave of applications was made by companies seeking the largest possible reduction of fines. These new applicants have sometimes also brought in new cases in other product areas. And so, one case leads to the next.

Were these companies right in applying for immunity or reduction of fines? After all, as Arp and Swaak say, 'if the Commission appears inclined to deny full immunity to otherwise qualifying candidates in close cases based on subjective interpretive issues, the EC policy — and in turn the analogue policies of other jurisdictions — will not be as successful as they could be' ([7]). Fortunately, it can be said that virtually every new application for immunity made until now has led, within just a few weeks of the application, to an official Commission Decision granting the applicant conditional immunity from fines ([8]). More than ten such decisions have already been taken, and several others are in

([1]) This article is a slightly modified version of an article previously published in the US journal Antitrust, Spring 2003, pp. 84-89. The author gratefully acknowledges the permission of the American Bar Association to re-publish this article.

([2]) OJ C 45, 19.2.2002, pp. 3 to 5.

([3]) OJ C 207, 18.7.1996, pp. 4 to 6.

([4]) François Arbault and Francisco Peiro: The Commission's new notice on immunity and reduction of fines in cartel cases: building on success, Competition Policy Newsletter, Number 2, June 2002, p. 19.

([5]) Jarrett Arp and Christof Swaak: 'Immunity from Fines for Cartel Conduct Under the European Commission's New Leniency Notice', Antitrust, Summer 2002, pp. 59-66.

([6]) Arbault and Peiro, p. 15.

([7]) Arp and Swaak, p. 63.

([8]) The immunity is conditional upon compliance with the conditions in point 11 of the Notice. See further below under 'Requirements For A Successful Immunity Application'.

the pipeline at the time of writing ([1]). There have, of course, been several instances where immunity could not be granted because it had already been given to another, prior applicant. In those cases, applicants have, until now, chosen to apply for a reduction of fines. In some of these cases, the Commission has already informed the applicant of its intention to grant a reduction of between 30 and 50%, while other cases are still under consideration ([2]). But for applicants for immunity in new cases, there has been, to the author's knowledge, only one company that simply did not provide enough information for the Commission to be able to grant conditional immunity. There have been no 'subjective interpretive issues' that have prevented applicants from getting immunity. Indeed, most participants in these proceedings would probably agree that the Commission has shown considerable pragmatism in its interpretation and application of the Notice with a view to enhancing its effectiveness in providing immunity and revealing cartels ([3]).

The main reason why the Commission has been able to grant conditional immunity in so many cases, is that the threshold of point 8(a) of the Notice ([4]) is low, much lower than the threshold in the 1996 Notice ([5]). It is precisely the combination of the instrument of immunity with the Commission's own powers of investigation that makes the current Notice so effective. Most conditional immunity decisions until now have indeed been decisions on the basis of point 8(a) of the Notice, rather than point 8(b) ([6]) and they have, in most cases, been followed by surprise inspections (so-called dawn-raids) by the Commission. Where appropriate, these have been coordinated with competition authorities in other jurisdictions, notably those in the United States, Canada and Japan ([7]).

Experience in handling immunity applications by US companies or European companies with important business interests in the United States has led the Commission to introduce a procedure not foreseen in the Notice, that of the oral application ([8]).

First inquiries

Arp and Swaak raise the question whether the Commission will allow non-prejudicial immunity inquiries, i.e. anonymous inquiries into the availability of immunity without any need to apply ([9]). The short answer to this is «no». It would be too easy for a cartel member to abuse such a possibility to get confirmation that none of the other members has blown the whistle, that the cartel is therefore safe, and then simply to walk away. In the Commission's practice, it is not necessary, in a first inquiry, for an applicant to identify itself. But it must necessarily identify at least the larger product sector within which the product concerned is located, before the Commission can determine whether immunity is available. An example would be the construction sector, the transport sector, or the chemical sector. Then, if the Commission already has information of its own or has received a prior immunity application regarding this larger product sector, the applicant will have to become more specific, until the Commission can state with certainty whether immunity is available. This logical necessity to reveal at least the product sector in which the cartel operates probably deters any abusive inquiries. In any case, the Commission has not had any abusive inquiries. All inquiries that were made have been serious ones, and if

([1]) February 2003. By comparison, in the six years of operation of the 1996 Notice, full immunity was granted in only three cases. Conditional immunity Decisions are not published, for understandable reasons.

([2]) Applications for reductions of fines take longer for the Commission to evaluate than immunity applications. This is because the Commission must compare the information received in the application for a reduction of fine with the information already in its possession (because of a prior immunity application or the Commission's own investigation) and come to a position on whether the new information constitutes significant added value. See points 26, 21 and 22 of the Notice. It is, however, Commission policy to inform applicants as soon as possible in writing after the Commission has reached a position, thereby creating legal certainty for the applicant and clarifying the position of other applicants. If the Commission comes to a positive preliminary conclusion, it will issue a formal Decision announcing its intention to grant a reduction within a certain band. See point 23(b) of the Notice.

([3]) The basic rationale behind the new Notice was clearly stated by Commissioner Monti when he announced the new policy: 'This new Notice should not, in any way, be understood as reflecting a more lenient approach in the fight against price-fixing and other anti-competitive practices. On the contrary, the new policy will increase the likelihood that cartels will be detected which, together with the Commission's determination to impose fines at dissuasive levels, should deter companies from entering into collusive behaviour in the first place'. Commission press release of 13 February 2002, entitled 'Commission adopts new leniency policy for companies which give information on cartels,' IP/02/247, p. 3.

([4]) '…the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with an alleged cartel affecting the Community'.

([5]) Under the 1996 Notice, a company had to be the first to 'adduce decisive evidence of the cartel's existence'.

([6]) Immunity can be given under point 8(b) if 'the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC'.

([7]) It is Commission policy not to publicise the particulars of surprise inspections.

([8]) This procedure will be described further below under 'Oral Applications'.

([9]) Arp and Swaak, p. 63.

immunity was available, all of them have resulted in actual applications. The Commission does indeed expect applicants to proceed with the application and submit the evidence as soon as they receive confirmation that immunity is available. If immunity is not available, the potential applicant is of course free not to apply for a reduction of fine, although until now those companies that were in this situation have chosen to apply for a reduction of fine.

Requirements for a successful immunity application

Immunity can only be granted once for a particular infringement. In cases where no inspection has been carried out yet, applicants usually apply for immunity under, point 8(a) or, in the alternative, 8(b) of the Notice and submit all the information at their disposal, as they are required to do ([1]). Whether the Commission grants immunity under point 8(a) or point 8(b), the practical consequences for the applicant are the same, namely conditional immunity from fines. If the Commission has not yet undertaken an inspection, it will usually grant conditional immunity under point 8(a). To qualify under point 8(a), evidence regarding names, functions, and office locations of participants of other companies in the cartel is especially important, and sometimes overlooked by applicants.

The Commission will not consider other applications for immunity before it has taken a position on an existing application ([2]). The point in time at which an application is made is therefore of great importance, as it will determine the place in line of the applicant. The Commission does not operate an official 'marker' system, whereby an applicant could secure its place simply by informing the Commission that it wants to apply. In order to be recognized as an application, the application has to be substantial and provide all the evidence and information the applicant has at its disposal at that point in time. However, it does happen that a company is in a great hurry to apply. Provided the application then has sufficient 'meat' to it, the Commission will accept it and grant the applicant an additional one or maximum two weeks within which to supplement its application. The date of application will, however, be the first date. Other applications for the same infringement will not be considered until the Commission has taken a position on the first application. However, the moment a second applicant submits evidence, the first applicant can no longer supplement its application with further evidence. Its application will then be evaluated on the basis of the evidence it had submitted until the moment the second application was made. It is therefore in the interest of applicants to file a maximum of evidence immediately.

Whether the application is made under point 8(a) or 8(b) of the Notice, it should ideally contain the following information:

— A corporate statement, especially prepared for and addressed to the Commission, in which the company formally applies for immunity from fines and describes its participation in a cartel. Based on the information in the applicant's possession at the time of the application, this statement should describe the product or service concerned, the production process, the market, the customers and, in particular, the precise functioning of the cartel, including its membership, period of functioning, geographic area covered, activities, internal rules, meetings and other contacts;

— This synthesis should be supported by copies of previously existing documents, whenever such documents are available to the applicant. All written evidence that can be found should be submitted.

— The written evidence may be supplemented by written statements of company employees or former employees on behalf of the corporate applicant, describing their participation in the cartel.

— Especially important for the Commission's purposes under point 8(a) of the Notice, the application should include precise information about the names, functions, and office locations of participants of other companies in the cartel.

— If the company is represented by counsel, the application should include a power of attorney.

The company must, in accordance with point 11 of the Notice, cooperate fully with the Commission throughout the administrative procedure. In this respect, it should make all efforts to supply whatever additional (relevant) information the Commission may request from it. This includes taking legally available measures to ensure that officials still working for the company participate in explanatory meetings with the Commission (if so requested by the Commission) and making best efforts to persuade officials no longer in its employment to co-operate (again, if so requested by the Commission). Moreover, the applicant should, throughout the Commission's administrative procedure, spontaneously offer whatever additional relevant information it uncovers.

([1]) See point 13(a) of the Notice.

([2]) See point 18 of the Notice.

This duty of full cooperation includes, in the interpretation of the Commission, the obligation not to reveal to third parties the existence of the immunity application, without prior approval from the Commission. The Commission is aware, for example, that companies quoted on the US stock exchange have certain publication obligations under SEC rules regarding risks to investors. The Commission will not, however, accept any publication by the applicant before it has undertaken surprise inspections. These usually take place within weeks of an application. Violation of this obligation could endanger the inspections and would disqualify the applicant for immunity. Following the inspection, there is, in general, no longer a predominant necessity for the Commission to preserve the confidentiality of the immunity application.

In order to qualify for immunity, the applicant must not have coerced other companies to participate in the cartel ([1]). This requirement has been significantly limited compared to the 1996 leniency notice (where a company could not qualify if it had instigated the cartel activity or had played a determining role). The purpose clearly is to encourage immunity applicants to come forward, even if they would have been considered under the 1996 notice to be 'ringleaders'. The advantage to society of uncovering and terminating cartels is considered greater than any ethical considerations about punishing each and every active cartel member. But the Commission draws the line where actual coercion is used to force other companies to participate in the cartel.

The applicant must also have ended its involvement in the cartel no later than the moment when the evidence is submitted ([2]). Application of this condition requires a delicate balance with the need to ensure that the other members of the cartel do not prematurely become aware that one of them has blown the whistle. Active continued participation in the cartel cannot be allowed. The applicant must stop going to cartel meetings and must stop seeking or using information from the cartel. But often the other cartel members will still call or fax the applicant to pass on information (for instance about intended price increases). This kind of passive participation may be accepted by the Commission, as long as the applicant does not act on the information. In the short run, the creation of a 'Chinese wall' within the company around those who receive information from the cartel may be necessary. Once inspections have taken place, the applicant should take more structural steps to follow its own autonomous commercial policy. Evidence thereof must be supplied to the Commission.

Hypothetical applications

To provide greater reassurance to nervous potential applicants, the Commission has devised the mechanism of the hypothetical application ([3]). Its main advantage compared to the normal procedure is that applicants will receive a Commission Decision ensuring them conditional immunity before they have to provide the actual evidence. This procedure has now been used a number of times, in particular by US companies.

In a hypothetical application, the applicant initially presents the evidence in hypothetical terms only, i.e. in the form of a descriptive list of the evidence it can disclose. A hypothetical application is like a normal 8(a) or 8(b) application, except that it takes place in two stages ([4]). In a first Decision, the Commission determines that the evidence as described in the list will meet the requirements of points 8(a) or 8(b). After this first Decision has been issued and the applicant has revealed the evidence, the Commission will verify whether the evidence received corresponds to the description of it in the list. If so, the Commission grants conditional immunity in a second Decision. The substantial evaluation of the evidence therefore takes place at the stage of the first decision. This is why the hypothetical list initially supplied should be sufficiently detailed to permit an evaluation of whether the actual evidence will meet the conditions of points 8(a) or 8(b). The description of a document should for instance be: report of a meeting among cartel members A, B, C and D in place X on date Y to discuss prices and market sharing agreements in country Z. The Commission also insists that the evidence described in the list must already be in the possession of the applicant when the list is handed over.

Oral applications

The Commission considers that a written corporate statement, in which the company describes its participation in a cartel with effects in the EU, and which has been produced for the sole purpose of applying for immunity under the Commission's leniency program, should not be discoverable in third country jurisdictions, including the United States. In this respect, the Commission recently intervened

([1]) Point 11 of the Notice.

([2]) Idem.

([3]) Points 13(b) and 16 of the Notice.

([4]) See point 16 of the Notice. The same rule applies that the Commission will not consider any other applications for immunity before it has taken a position on an existing hypothetical application. To be able to do so, it is clear that the Commission will need to know the product sector, at least, even if all the other information remains hypothetical in the first stage.

successfully as *amicus curiae* in a case before the US District Court in the Northern District of California, where the District Court Judge denied the plaintiff's request for discovery of the defendant's written corporate statement to the Commission ([1]). It is to be hoped that this jurisprudence will become generally accepted in the United States. The effectiveness of the world-wide fight against cartels, including by the US authorities, can only suffer if the Commission's leniency policy were undermined by EU immunity applications turning up in US courts.

Arp and Swaak ask whether the Commission will also accept oral applications ([2]). The answer is 'yes'. As long as the new and encouraging US jurisprudence mentioned above is not yet generally accepted, the Commission will allow corporate statements to be made orally only. It will do so where a serious risk exists that the applicant will face civil legal actions in third country jurisdictions that may result in the production of the corporate statement to the Commission in which the company describes its participation in a cartel (which may be global in scope). The forced production of such a document by the company could result in awards of very significant damages. While the Commission certainly does not want to hinder civil litigation, in any jurisdiction, neither does it believe that plaintiffs in civil litigation should gratuitously benefit from the entirely unrelated and autonomous procedure of the Commission's leniency program, thereby undermining the latter program in the process.

In such cases, in order not to deter applications, the Commission may agree to take notes registering the information given orally. To avoid possible misunderstandings and omissions, the oral statement in which the information is given may be taped and transcribed. The minutes drafted by the Commission services are considered to contain corporate statements as evidence. It is therefore essential that the minutes be reviewed and their accuracy certified by the applicant or its legal representative. Their status is, however, that of an official Commission document and not a company document.

When it comes to documents that already existed in the company and that do not have to be especially prepared for the Commission, such as reports on meetings of the cartel, these were already discoverable in third country jurisdictions and they remain so. For the same reason, copies of these documents have to be submitted to the Commission as part of the application. The Commission does not claim that these documents become non-discoverable by reason of their inclusion in an EU immunity application.

In the context of oral applications, it can be agreed that all documents produced by the Commission (including the acknowledgement of receipt and the decision granting conditional immunity) will be notified at the premises of the Commission and will not be sent to the applicant. The notification of the decision to grant conditional immunity will then be made in agreement with the applicant, for instance by presenting the decision to the applicant and having him or her sign for (oral) notification.

Confidentiality

Immunity applicants usually want to preserve confidentiality regarding their application, in particular towards the other cartel members, even after inspections have taken place. The Commission services will not, without the applicant's prior permission, reveal its name to any private parties until the statement of objections is issued (but no later). This is usually at least a year after inspections have taken place. But the applicant should realize that if a second formal immunity application is made for the same facts, the Commission services have to inform the second applicant that another immunity application has already been made (without, however, revealing the identity of the applicant).

The Commission services also will not, without the agreement of the applicant, pass on information from an immunity application made to the Commission under Community law to a Member State for the purpose of an investigation under national law. This is different, of course, if the Commission handles the case itself, under Community law. In that case, the Commission is required to pass on information from the immunity application to the Member State in the course of the normal preparation of inspections ([3]) and subsequently to prepare a Commission decision fining the cartel ([4]). In this respect, Member State authorities are subject to the obligation of professional secrecy of Article 20 of Regulation No 17 and cannot use the information they receive for purposes of national law enforcement ([5]).

([1]) *In re Methionine*, Case No. C-99-3491 CRB (N.D. Cal. July 29, 2002). The Commission's intervention was unsuccessful, however, in a similar case before the District Court for the District of Columbia, *In re Vitamins Antitrust Legislation*, Misc. No. 99-197 (TFH) MDL No. 1285 (D.D.C. Dec. 18, 2002). The case is currently on appeal.

([2]) Arp and Swaak, p. 63.

([3]) See Articles 14.2 and 14.5 of Regulation No 17, Official Journal English Special Edition, Series I (59-62), p. 87.

([4]) See Article 10 of Regulation No 17.

([5]) For discussion of the situation under the new Regulation 1/2003, see below under 'Member States'.

Moreover, in the case of an international cartel, the applicant may decide to also apply for leniency with the US Department of Justice and anti-trust authorities in other jurisdictions (notably, in Canada, Japan and Australia). In such cases, the Commission will ask the applicant to provide a waiver so that the Commission can fully discuss the case with these authorities and share information. Such a waiver allows, in particular, coordination of simultaneous surprise inspections in various parts of the world.

The decision granting conditional immunity

In order to enhance legal certainty, the Commission grants conditional immunity through a formal Commission Decision, signed by the Commissioner in charge of competition matters by delegated authority from the College. It normally takes about 14 days to issue such a Decision, starting from the day the evidence is provided. The Decision is addressed to the company making the application. Hypothetical applications take about twice as long to process, as they require two Commission Decisions.

Each separate infringement reported in the immunity application will be evaluated separately in terms of whether the information supplied qualifies for immunity. Whether separate infringements exist can only be decided on a case-by-case basis depending on whether the product markets are different, the geographic markets are different, the cartel members are different and other factors. The Decision granting conditional immunity is not published. It is relatively short and does not go much beyond the language of the Notice itself. No other conditions for immunity are posed than those mentioned in the Notice itself. The only clarification that is made (at this time of writing) is that the obligation of full co-operation in point 11 of the Notice includes the obligation not to reveal to third parties the existence of the immunity application, without prior approval from the Commission. The Decision states clearly that at the end of the administrative procedure, the Commission will grant the applicant immunity from fines with regard to any infringement(s) that the Commission has found as a result of its investigation in connection with the evidence the applicant submitted in relation to the alleged cartel, provided that the applicant has met the conditions set out in point 11 of the Notice.

Arp and Swaak observe that conditional immunity letters of the US Department of Justice contain 'many of the precise obligations and burdens attendant to satisfying the conditions of immunity' ([1]). As is clear from the above, the Commission's practice is different, at least in this relatively early stage of application. The Commission cannot introduce in its immunity Decisions any conditions that are not covered by the conditions in the Notice itself. The Commission may specify certain conditions of the Notice, such as the duty of continued cooperation in the example above. But it cannot invent new ones without adding those to the Notice, given that the Notice creates legitimate expectations upon which companies can rely ([2]).

Rejection of an application for immunity

If, on the basis of the Commission services' analysis of the dossier, it is concluded that the application does not qualify for immunity, a letter is sent at services level informing the applicant that the Commission services consider that the evidence does not meet the requirements set out in points 8(a) or 8(b) of the Notice. This letter is not a legal act that can be challenged in its own right. But if the Commission were to impose a fine on the applicant in its Decision prohibiting the cartel, this Decision can, of course, be challenged before the Court of First Instance.

If immunity is rejected, the application may still be considered for a reduction of fines, if this is requested. The applicant may also try to submit a new immunity application that does meet the conditions of points 8(a) or 8(b).

Member States

Arp and Swaak note that, in view of the trend in some Member States to render cartel behavior a criminal offense, the Commission's leniency program risks being undermined if the immunity granted by the Commission does not protect the employees of the company concerned from criminal prosecution in the Member States ([1]).

It should be underlined at the outset that until now, there have been no instances where the Commission granted a company immunity and a Member State prosecuted employees of that company. In practice, cartel cases have been dealt with either by the Commission, or, when the infringement was focused on a single national territory, by a Member State.

This kind of practical division of labor will be continued under the newly adopted Regulation 1/2003, which will replace Regulation 17/62 as of

([1]) Arp and Swaak, p. 64.

([2]) Point 29 of the Notice.

1 May next year ([1]). It is accepted by all Member States that the Commission is particularly well placed to deal with a case if more than three Member States are substantially affected by an agreement or practice. This will be the case for the great majority of immunity applications filed with the Commission. Once the Commission has initiated proceedings, Article 11(6) of Regulation 1/2003 provides that Member States are relieved of their competence to apply Articles 81 and 82 of the Treaty. They are then also no longer able to apply national competition law ([2]).

The Commission may occasionally want to transfer an immunity case to a Member State, because the agreement or practice is focused on its territory. However, if a Member State were unable to provide immunity under equivalent conditions as those applied by the Commission, the Commission could decide to handle the case itself and not refer it to a Member State. Ultimately, the Commission could, if necessary, even take a case previously referred to a Member State back by invoking Article 11(6) of Regulation 1/2003 which, as mentioned, releases the Member State of its competence.

With respect to individuals, Article 12(3) of Regulation 1/2003 provides that information which the Commission exchanges with Member States can only be used by them in evidence to impose sanctions on natural persons if the information has been collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for under the rules of the receiving authority. This condition is clearly not met in the case of immunity applications filed with the Commission, as their voluntary, co-operative nature is entirely different from the nature of criminal proceedings. Therefore, any information from immunity applications which the Commission exchanges with Member States under Article 12 of Regulation 1/2003 cannot be used in evidence by Member States to impose sanctions on employees or former employees of the immunity applicant that have co-operated with the Commission in the context of the immunity application.

This does not, in theory, preclude a Member State from acting against individuals on the basis of national laws that are not competition laws, provided it does not use in evidence information received through the Network under Article 12. If a Member State were to bring criminal proceedings against the employees of a company that had received immunity from the Commission, based for instance on the Commission's Statement of Objections or final Decision in the case, such action would indeed be at cross purposes with the Commission's leniency policy. It is, therefore, desirable in the view of the author that this scenario, which until now has remained entirely theoretical, be adequately dealt with in the close cooperation between Member States and the Commission leading up to the entry into force of Regulation 1/2003.

Conclusion

Judging by the number of applications made so far, the Commission's 2002 leniency notice has been very well received by the business and legal community. In its first year of application of the Notice, the Commission has tried to be pragmatic and flexible, with a view to allowing the highest number of applications to succeed and thereby to reveal and fine as many cartels as possible. Conditional immunity has been granted in virtually all applications made so far, other than those cases where another company had filed for immunity first.

Two aspects of the leniency policy in particular require the continued attention of the Commission in the year ahead:

Firstly, the Commission must ensure that its leniency policy is not undermined by the risk of discovery of applicants' corporate statements in third country jurisdictions. Preferably this issue should be resolved by foreign courts recognizing that such documents especially prepared for the Commission's leniency program are not subject to discovery. If not, the trend towards oral applications will be increased.

Secondly, the Commission must ensure that its leniency policy is not undermined by the risk of criminal sanctions being imposed in Member States on employees of companies that have received immunity from the Commission. As neither the Commission nor Member States can possibly benefit from a faltering leniency policy, they will have to resolve this issue in close co-operation before Regulation 1/2003 enters into force in May 2004.

([1]) OJ L 1, 4.1.2003, p. 1 and Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Statement entered into the Council Minutes.

([2]) Article 3.1 of Regulation 1/2003.

Coordination centres: the end of an era? Not quite ...

Paul GREEN, Directorate-General Competition, unit G-3

Introduction

On 17 February 2003, the Commission adopted final negative decisions in its State aid investigations into three special tax schemes. They were the coordination centres regime in Belgium ([1]), the international financing activities (IFA) regime in the Netherlands ([2]) and the foreign income scheme in Ireland ([3]). The decisions marked an important step in the Commission's campaign against fiscal aid schemes. The regimes in question had been three of the fifteen corporate tax measures against which the Commission had opened formal State aid action on 11 July 2001.

I do not intend to review the background to these fifteen cases here. My colleague, Mehdi Hocine, set out the political and legal context to the Commission's action in his article on fiscal aid measures in the February 2002 edition of the Competition Policy Newsletter ([4]). But it is worth recalling that the July 2001 initiative represented a concerted assault on certain tax practices across the European Union. And it has not been without controversy. Three of the July 2001 decisions to open formal State investigations have been challenged in the Court of First Instance ([5]). A fourth challenge followed when the Commission opened its formal investigation into the Belgian coordination centres regime following Belgium's refusal to agree to phase out the measure ([6]).

The 17 February decisions

Why are the 17 February decisions so important? First, of the fifteen tax schemes examined, twelve of the investigations had now been closed, leaving just the French headquarters regime and the two Gibraltar 'offshore' schemes under scrutiny. But more significantly, two of the schemes concerned, Belgian coordination centres and Dutch international financing activities, were by far the most substantial of the group of fifteen in economic terms. In excess of 200 multinational groups had established coordination centres in Belgium, through which many tens of billions of euros are channelled each year. In the Netherlands, the companies benefiting from the IFA scheme (around 100) had placed many billions of euros into the tax-free reserves provided for by the regime.

The mother of all coordination centres

The Belgian coordination centres regime dates back to 1983. In 1984 the Commission decided that the measure, after certain modifications, did not constitute State aid. A coordination centre is an undertaking forming part of a multinational group. Its purpose is to provide services (such as banking, insurance, marketing, personnel management, public relations, legal advice) to other companies in the group. A company obtains coordination centre status through a renewble ten-year agreement granted by the Belgian tax authorities. Its taxable revenues are determined according to the so-called 'cost plus' method.

Cost-plus is an alternative method for determining the taxable income of a company. It is normally aimed at overcoming the difficulties involved in assessing cross-border transactions between companies forming part of the same group (i.e. establishing the price at which the good or service is provided to the related company). It reduces the scope both for tax avoidance and for disputes between the two tax authorities assessing the cross border transactions. In the cost-plus method, the taxable profit is calculated by applying a margin (the 'plus') to all the expenses (the 'cost') associated with a transaction or group of transactions. With an appropriate margin, the cost plus method arrives at a figure for taxable income comparable to that which would have been obtained if the transactions concerned had been carried out on a fully commercial basis between independent undertakings.

Following the review of Member States' tax systems as part of the Code of Conduct initia-

([1]) Decision C(2003) 564.

([2]) Decision C(2003) 568.

([3]) Decision C(2003) 569.

([4]) Aides fiscales: la Commission procède a l'examen approfondi du critère de la selectivité dans la domaine de la fiscalité directe des entreprises.

([5]) Cases T-195/01, T-207/01 & T-9/02.

([6]) Case T-276/02.

tive ([1]), the Commission reconsidered its 1984 assessment of the Belgian scheme. In accordance with established procedure for existing aid measures ([2]), the Commission formally proposed to Belgium that the coordination centres regime be phased out. When Belgium refused to accept the proposal, the Commission initiated the formal State aid investigation procedure ([3]).

With hindsight, in the light of today's more refined and tougher approach in the policing of State aid, the 1984 decision appears erroneous. At best, it relied on a very generous interpretation of the notion of aid. In its new decision of 17 February against the scheme, the Commission has concluded that Belgium applies the cost-plus method in a way that gives rise to State aid. First, the Belgian authorities systematically use a default margin of 8% for the services provided by a coordination centre without verifying if this rate reflects the economic reality of the underlying transactions. Second, significant operating expenses are excluded from the total costs of the centre when calculating the taxable income. Finally, coordination centres enjoy additional benefits such as exemptions from property taxes, from capital duty and from withholding taxes on the distribution of income.

The offspring

The Belgian regime has been quite successful in persuading multinational companies to establish coordination centres in Belgium. Among them figure some of the best-known global corporations. This success did not go unnoticed. Other tax jurisdictions within the EU enacted similar legislation, with the specific aim, in some cases at least, of providing a tax framework to attract multinational companies. Regimes analogous to the Belgian coordination centres scheme were created in Germany, France, Luxembourg and Spain ([4]). In its final negative decisions ([5]) to date against these regimes, the Commission's analysis of the application of the cost plus method identified the systematic use of low or default margins and the exclusion of certain expenses from the costs of the centre. However, the impact of these regimes was relatively modest. In most cases, only a handful of companies took advantage of these regimes.

The maverick of the family is the Dutch IFA regime. Under the scheme, multinational companies are able to place up to 80% of their foreign-source financial profits in a tax-free reserve for up to 10 years. Depending on the purpose for which they are used, funds released from the reserve escape tax altogether or are taxed at a reduced rate. Although in substance it bears only a slight resemblance to its siblings, the Commission believes that when established in 1996, the IFA regime constituted a response by the Dutch authorities to Belgium's success in attracting the corporate treasury functions of multinational companies. As with the rest of the family, the Commission has found that the tax benefits of the IFA regime constitute State aid.

Where there is discord, let there be harmony

Some commentators have suggested that the Commission is using its powers under Articles 87-88 of the EC Treaty to pursue a tax harmonising agenda. This is not the case. The Commission is simply fulfilling its role of controlling State aid. Commissioner Monti has said, for example, that 'State aid action can not be used as an alternative tool to achieve harmonisation in the field of taxation, which concerns the alignment of the general fiscal systems in Member States' ([6]). With coordination centres, the Commission has been very clear: cost-plus, when correctly applied, does not give rise to State aid.

Another observation has been that the Commission is widening the notion of specific or selective ([7]). Although it may be true that the Commission has only recently turned its attention to measures such as coordination centres, this does not mean that there has been any attempt to widen the definition of State aid. The Court of Justice has repeatedly ruled that the qualification of a measure

([1]) See OJ C 2, 6.1.1998, p. 2.

([2]) Article 18 of Regulation 659/1999, OJ L 83, 27.3.1999, p. 1.

([3]) OJ C 147, 26.6.2002, p. 2.

([4]) Legislation was adopted in Viscaya as well as in Navarra, Álava and Guipúzcoa. In the latter three provinces, no coordination centre was established and the legislation was repealed before July 2001. As a result, only the Viscaya scheme was subject to a formal State aid investigation.

([5]) Decisions C(2002) 3298, 5.9.2002 (Germany); C(2002) 3740 & C(2002) 3741, 16.10.2002 (Luxembourg); OJ L 31, 6.2.2003, p. 26 (Spain).

([6]) Speech at Universiteit Nyenrode, 22.1.2002.

([7]) One of the four cumulative criteria that a measure must fulfil if it is to constitute State aid is that it must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The others are that it grants an advantage, that the advantage is financed through State resources and that the measure distorts or threatens to distort trade and competition between Member States.

as State aid is objective ([1]). The fact that such objectivity is applied by the Commission in its assessment of novel situations is entirely natural and ought not to give rise to either comment or alarm. A specific regime for coordination centres is by its very nature selective. But if it grants no advantage, then it is not State aid.

No recovery

As an 'existing' measure, the legality of the Belgian coordination centres regime in State aid terms was not in doubt. Accordingly, in its decision considering the scheme to constitute State aid incompatible with the common market, the Commission could order the abolition of the scheme, but it could not order the recovery of tax benefits enjoyed in the past. In fact, in line with usual practice in existing aid cases, the Commission has provided for a transitional period to allow for a smooth phasing-out of the regime. So although no new coordination centres can enter the regime, the benefits for those already approved will cease by the end of 2010 at the latest.

In contrast, all the other coordination centres regimes in other Member States were illegal: they had not been notified to the Commission, still less approved under the State aid rules. It is a well-established principle of Community law that diligent businessmen/businesswomen can very easily establish from the Member State concerned whether or not a particular measure has been notified and approved in accordance with the State aid acquis. They cannot therefore escape the obligation to repay illegal State aid if it is subsequently found to be incompatible with State aid rules.

However, the approval of the Belgian regime was in the public domain. The Commission had also made a public statement to the effect that flat-rate tax provisions in certain Member States for the headquarters of multinational groups did not constitute State aid. Accordingly, companies that entered into coordination centres regimes had no reason to doubt their legality. In the very particular circumstances of the coordination centres cases, these "legitimate expectations" of the companies concerned, encouraged by the Commission's own actions, prevented the Commission from ordering the recovery of the tax benefits paid out under the schemes.

The end of an era?

Not quite. A phoenix could yet arise from the smouldering ashes of the Belgian coordination centres scheme.

There is one common feature in all the final negative decisions on coordination centres. The Commission has been very careful to make clear that there is nothing wrong, in principle, in using the cost-plus method for determining taxable income where there are difficulties in establishing cross-border transfer prices. When used correctly, it does not give rise to State aid but merely produces a figure for profit comparable to that which would have been obtained if the transactions concerned had taken place between independent companies. However, in each of these cases, cost-plus was incorrectly applied, granting tax advantages to the companies in the scheme, or at least creating a risk that a tax advantage could be obtained.

The renaissance might start at the heart of Europe. Belgium has notified a replacement regime on which the Commission has opened a formal investigation. The problems with the notified scheme relate primarily to the plans of the Belgian authorities to maintain the exemptions from capital duty and from withholding taxes. In addition, the Commission has misgivings about the apparent exemption from Belgian taxes of special advantages granted to coordination centres by other firms in the group, such as inflated payments for services rendered. However, the Commission has already approved ([2]), in principle, the broad outline of the cost-plus methodology envisaged under this new coordination centres regime. Nevertheless, it remains to be seen whether a regime approved under the State aid rules, completely shorn of its tax advantages, will be sufficiently attractive to multinational companies for them to create separate companies located in Belgium to 'coordinate' some of their intra-group activities.

([1]) See, for example: case T-67/94, Ladbroke Racing v Commission, ECR [1998] II-0001, paragraph 52; joined cases T-269/99, T271/99 & T272/99, Diputación Foral de Guipúzcoa & other v Commission, paragraphs 77-80 (not yet published in the ECR).

([2]) Decision C(2003) 1215 adopted on 23 April 2003.

Where state guarantees supporting commercial banking activities distort competition, they must be abolished: the case of CDC IXIS

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Introduction

Commission decisions have consistently confirmed that the financial sector is subject to competition rules, including those relating to state aid, in exactly the same way as other sectors of the economy are. Whilst acknowledging banks' special responsibilities in respect to depositors and the need to guard against systemic risk, the Commission has considered that measures should be put in place and indeed are put in place by the market and the appropriate regulatory authorities, to meet these situations. Therefore, banks cannot plead that they should benefit from a special treatment with respect to state aid rules.

This has given rise over a period of time to a number of sometimes widely publicised cases in which state aid to financial institutions has been investigated then authorised or refused, always according to the same rules of analysis used for undertakings of all sectors of the economy. At a certain period these have mainly been in rescue and restructuring cases or at other periods, cases concerning capital injections by state bodies in various forms. For example, in March 2003 the Court of First Instance has upheld that the Commission's approach to determining the state resources which constitute state aid to a bank and to the German bank WestLB in particular, is correct in principle ([1]) (*cf 'The judgment of the Court of First Instance concerning the transfer of capital to Westdeutsche Landesbank Girozentral (WestLB)' in this issue of the newsletter*). Capital injection decisions consistently refer to the now well established market investor principle which stipulates that for a capital injection using state resources not to be considered as state aid, it must be able to demonstrate that a private investor would have behaved in the same way.

State guarantees

A series of decisions have now been taken relating to another form of state aid. This is state guarantees given to financial institutions which are active in competitive markets rather than activities of public interest. State guarantees vary in form and scope, but their effects are extremely similar. They give payment assurance to creditors. This allows a creditor to deal with a guaranteed institution without taking account of an underlying risk as it would do in dealing with any similar institution not benefiting from such a guarantee. Consequently, for example, rating agencies ([2]) are willing to attribute the famous 'triple A' rating to institutions benefiting from a state guarantee, more easily and more quickly than to other similar institutions because the guarantee provides that the state will pay if the bank cannot. Such advantages clearly distort competition. This is why the Commission proposed that the German Authorities should abolish the guarantees after a transition period given to a number of public banks such as the Landesbanken. Agreement on the conditions for the phasing out of the guarantees was reached in 2002 and the law amending provisions for public sector banks has already been adopted.

Recently the French Authorities have accepted the Commission's proposal on the phasing out of the guarantee to CDC IXIS, the commercial subsidiary of the French state bank Caisse des Dépôts et Consignations (CDC).

What is CDC IXIS?

CDC is a public financial institution created in the 19th century whose mission was to conduct a number of public services on behalf of the state. Over time, its portfolio of activities evolved, reaching a situation where CDC decided to clarify its legal and business structure by creating a separate legal entity, CDC IXIS, to which its commercial banking activities were transferred at the end of 2000. CDC decided to support its subsidiary by giving a guarantee covering a large part of CDC IXIS activities.

CDC IXIS may not be a household name as its customers are exclusively institutional investors, major securities issuers and companies. Contrary to most commercial banking institutions whose activity

([1]) Albeit considered by the Court to be insufficiently substantiated in the specific case.

([2]) The companies Standards and Poors, Moodys and Fitch IBCA are internationally recognised institutions which are specialised in the evaluation of credit risk. Using certain methodologies they rate issuers of debt instruments such as bonds according to a company's apparent ability to repay a short or long term loan. The rating is one of the criteria used by banks to determine the price and other conditions (in particular length of operations and the overall credit line) which is attributed to a counterparty. The top rating in S&P's scale is referred to as Triple A.

is driven by retail and corporate banking markets, CDC IXIS (with a total balance sheet of over €250 billion and a pre-tax profit of €506 million for 2002), is an investment bank. It is present in International financial markets, in Asset Management as well as in Banking and Securities services. CDC IXIS also manages the intragroup treasury operations. In addition to the operations registered in the balance sheet, like most financial institutions but more so in investment banks than retail banks, a very large part of its activity is reflected in operations which are not registered in the balance sheet but in the 'off-balance sheet items'. This refers to transactions which have not materialised during the accounting period but for which there is a probability that the transaction may or will do so at a certain point in the future. Examples include Interest Rate SWAPS where one bank may wish to swap a floating interest rate for a fixed interest rate over a given period which will end at some time in the future. Such transactions are evaluated in respect of the amount of risk they contain for the future. Netting, which offsets debts and credits can reduce the apparent risk.

Why is the guarantee to CDC IXIS not compatible with state aid rules?

A commercial bank may not benefit from a state guarantee if it constitutes state aid unless the conditions of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees are met ([1]). This was clearly not the case for CDC IXIS.

It was established that the guarantee to CDC IXIS is qualified under state aid rules as a state guarantee. The guarantor, CDC, is a public bank sui generis operating and funded through state resources. Important strategic and business actions of CDC are under the control of the state whose representatives make up the highest management body. For these reasons amongst others, it was beyond reasonable doubt that CDC could not give a guarantee to CDC IXIS without taking account of the requirements of the public authorities and it was extremely unlikely that such a decision could be taken without its knowledge and therefore imputation to the state was confirmed.

Concerning the advantages procured by the guarantee, they are both general and specific to they market in which CDC IXIS is active. For example, Rating agencies quote the existence of the guarantee as one of the criteria, though not the only one, contributing to their decisions to award CDC IXIS the top AAA rating. Operating on international financial markets where the attribution of a 'triple A' rating gives rise to quantitative (more favourable rates) and qualitative (longer maturities, larger envelopes, greater willingness to trade…) advantages, the distortion of competition was unquestionable as was the effect on cross-border trade. The conditions were therefore met for this measure to be qualified as state aid.

The Commission of course looked to see whether the guarantee could nevertheless be exempted on the basis of the Commission Notice on guarantees. Four aspects in particular were examined. If the first two, concerning the financial viability of the company, did not raise doubts, the remaining two conditions did. These require that a guarantee should be limited and that a market price should be paid.

The CDC guarantee could not be considered as limited in scope or in duration. By definition, a financial institution trading on capital markets will have a portfolio which will vary in value from day to day. Furthermore it includes actual and potential risks which in the case of CDC IXIS are particularly important due to its very strong involvement in derivatives and other off balance sheet operations.

A guarantee for a continuously fluctuating amount and value of operations, and therefore potential outlay by the guarantor, cannot be considered as limited. Indeed, this constitutes a open envelope where the value of the guarantee cannot be calculated by the guarantor or a third party independently of the guaranteed entity. Open envelopes are not authorised under state aid rules.

Furthermore, it is impossible to calculate the market price of the premium for an open envelope, even if such a formula were to exist. In fact in this case, there is no product on financial markets which takes account of both the quantitative and qualitative advantages procured by a state guarantee of this type. The conclusion of the Commission was therefore that this guarantee constituted state aid which could not qualify either for an exemption under the provisions of Article 86.2 in the scope of a public service activity, nor did the exemptions of Articles 87.2 or 87.3 apply.

Appropriate measures proposed that the guarantee should be abolished

A proposal for appropriate measures was adopted by the Commission in January 2003 ([2]) which

([1]) OJ C 71, 11.3.2000, p. 14-18.

([2]) This proposal is revised by a proposal adopted on 30 April 2003 and which takes account of a memorandum of understanding of 27 March 2003.

proposed that the guarantee should be abolished. This outlined the new conditions for CDC IXIS operations.

These include the fact that there will be a normal commercial relationship between CDC and CDC IXIS just like those governing any other company with a private shareholder. CDC will have no obligation to grant economic support to CDC IXIS and will take no unlimited liability for CDC IXIS. Creditors of CDC IXIS will be in the same situation as those of private credit institutions.

The French Authorities have agreed on the conditions proposed by the Commission for the phasing out of the guarantee.

The transition period

Such phasing out in this case involves a transition period where a certain part of the activity can still be conducted under the auspices of the guarantee for a limited period of time. A transition period is the shortest time necessary to allow an institution to adapt its organisation, activities and legal environment to the new market conditions under which it will operate without the guarantee. Several factors were taken into account to determine whether or not a transition period was necessary in the case of CDC IXIS and if so, what the characteristics of this period should be. This approach is consistent with that taken for the removal of guarantees to German public banks.

Firstly, the Commission considered not only CDC IXIS but also the counterparties with which CDC IXIS transacts. Uncertainty and instability are factors of risk in international financial markets therefore, it was considered reasonable for there to be a transition period to avoid unnecessarily abrupt and possibly inappropriate adjustments in financial markets. Although this sometimes happens when rating agencies adjust their ratings of a financial institution downwards, it was considered preferable to announce clearly the timetable over which the guarantee will be abolished. The Commission also took into consideration the fact that CDC IXIS is a recently created institution as a separate entity from the mother company CDC.

Consequently the Commission proposed that the guarantee should be phased out progressively. Transactions covered by the guarantee and entered into before 01.04.2003 will remain covered by the guarantee until their maturity. New transactions appearing on the balance sheet which have a maturity extending beyond 23.01.2017 are no longer eligible for the guarantee since 01.04.2003.

All other new on and off balance sheet operations included in the guarantee which will be repaid by CDC IXIS before 23.01.2017 can continue to be issued with the backing of the guarantee until 23.01.2007. This is 4 years after the proposal for appropriate measure was made. There is an exception for a category of operations in which CDC IXIS is specialised. These are off balance sheet transactions which mature after 23.01.2017. CDC IXIS may continue to benefit from the guarantee for these transactions until 23.01.2004. During the few months between the agreement on the conditions for the transitional period and January 2004, CDC IXIS intends to create a special purpose vehicle (SPV) which will be dedicated to this activity and will not benefit from the guarantee. CDC IXIS hopes that the SPV will be attributed the AAA rating. This is quite a common practice in the financial sector. After 23.01.2007 the guarantee will be fully abolished. Creditors making transactions with CDC IXIS will be informed in advance when new operations are issued without the guarantee.

Conclusion

The guarantee to CDC IXIS was not compatible with state aid rules and is already partly abolished. The transition period will allow CDC IXIS to adjust its operational and legal environment to operate at the same level as its competitors. It will also allow counterparties to know clearly when they are transacting with CDC IXIS under the auspices of the guarantee and when not. The market will then be able to operate in full transparency, with banks dealing with CDC IXIS on the basis of its intrinsic credit risk and not partly on its own merits and partly on those of a state guarantee.

Consistent policy will continue to be applied to examine state guarantees to banking activities and where appropriate, require that such guarantees are abolished. This is reflected in a similar situation where the Commission decided recently that state guarantees given to certain public banks in Austria will also be phased out (*cf 'Phase out of State guarantees in favour of the Austrian public banks' in this issue of the newsletter*).

Recent consolidation in the European pay-TV sector

Miguel MENDES PEREIRA, Directorate-General Competition, unit C-2

The past twelve months have witnessed profound structural changes which altered the competitive landscape of pay-TV in Europe. The situation where pay-TV was offered to consumers by many different players through different technical platforms such as satellite, cable and digital terrestrial has changed significantly.

The projects of Quiero Television in Spain and Ondigital/ITV Digital in the UK through digital terrestrial television (DTT) have proven unsuccessful. As a consequence, pay-TV through DTT as an alternative competitive pole vis-à-vis satellite and cable has disappeared in both countries for the time being. In Germany, the pay-TV service offered by Premiere was unavoidably affected by the bankruptcy proceedings involving the controlling Kirch Group. In parallel, and as regards satellite broadcasting, the pay-TV markets in Italy and Spain have evolved from structures characterised by two fierce competitors into single-player structures as a result of the merger between the competing platforms. In both cases, the merging parties were already the dominant players in the national pay-TV markets.

This article intends to give an overview of the mergers between Telepiù and Stream in Italy and CanalSatélite Digital and Vía Digital in Spain by highlighting the main competition issues raised in both cases. First, a separate description of each of the operations and the respective proceedings will be given. Then, the common features to both concentrations will be discussed and, subsequently, the distinctive elements will be addressed. Finally, the article will conclude by placing the decisions in both cases within the wider framework of competition policy in the media sector.

I. The concentrations

1. Sogecable/Canalsatélite Digital/ Vía Digital

On 3 July 2002, Sogecable S.A., the owner of the dominant Spanish pay-TV satellite platform 'CanalSatélite Digital', notified to the Commission the proposed acquisition of 'Vía Digital', the second pay-TV satellite platform in Spain. Upon request by the Spanish Government, on 14 August 2002 the Commission referred the notified concentration to the Spanish competition authorities ([1]). The Spanish Council of Ministers approved the operation on 29 November 2002 ([2]), subject to the submission by the merging parties of an Action Plan concerning the implementation of a number of conditions imposed on them. On 3 April 2003 the Dirección General de Defensa de Competencia approved the Action Plan.

Sogecable is a Spanish company which operates an analogue pay-TV channel (Canal+) and a digital satellite pay-TV platform (Canalsatélite Digital) in Spain. It also provides pay-TV related technical services and is involved in the production and sale of thematic channels, in the production, distribution and exhibition of films and in the acquisition of broadcasting rights for sports events. Sogecable is jointly controlled by Prisa (a Spanish media group with interests in the press, publishing and radio) and Groupe Canal+, the European film and TV division of the international media conglomerate Vivendi/Universal.

Via Digital, besides operating the second digital (satellite) pay-TV platform in Spain, is also active in the production and distribution of audio-visual products. It is controlled by Telefonica Contenidos ([3]), the audio-visual services division of the telecom incumbent in Spain.

It should be underlined that the decision taken by the Commission in this case is a referral decision under Article 9 of the Merger Regulation ([4]), pursuant to which, as a condition for the referral, the Commission merely assesses whether the markets in question present all the characteristics of distinct markets and whether the operation threatens to create or strengthen a dominant position as a result of which effective competition

([1]) Case COMP/M. 2845 *Sogecable/Canalsatélite/Vía Digital*, decision of 14.8.2002, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2845_es.pdf. See also press release IP/02/1216 of 16.8.2002.

([2]) Decisión del Consejo de Ministros de 29 de noviembre de 2002, see http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N-280_1_ACM.htm and http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N-280_2_ACM.htm.

([3]) The company was called Admira Media at the time of notification.

([4]) Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 40, 13.2.1998, p. 17.

would be significantly impeded. The final decision in this case was taken by the Spanish authorities, as were the conditions imposed upon the parties.

2. Newscorp/Telepiù

The history of this merger goes back to two operations notified to the Italian authorities. On 25 July 2001, Groupe Canal+, the owner of 'Telepiù', the dominant pay-TV satellite platform in Italy, notified to the Italian competition authority the proposed acquisition of 'Stream' ([1]). However, the notification was withdrawn on 12 December 2001 ([2]). On 14 February 2002, Groupe Canal+ notified the concentration for a second time ([3]) and on 13 May 2002 the Italian authority cleared the operation, subject to a number of conditions ([4]). Shortly thereafter, however, Vivendi Universal, the mother-company of Groupe Canal+, announced that the operation would not be implemented ([5]).

Subsequently, on 16 October 2002, The News Corporation Ltd., co-owner with Telecom Italia of the second satellite pay-TV platform in Italy 'Stream', notified to the Commission the proposed acquisition of control of the whole of 'Stream' and of 'Telepiù' ([6]). The Commission cleared the operation on 2 April 2003, upon the acceptance of a significant number of commitments by the parties ([7]).

Newscorp, the acquiring firm, is a global media company, which is active in the film and TV industries, publishing (newspapers and books) and in a number of other areas. Telepiù, the acquired firm, was controlled by Groupe Canal+, the European film and TV division of the international conglomerate Vivendi/Universal. Telepiù was the dominant pay-TV operator in Italy, having started to operate via analogue-terrestrial means in 1991 and on satellite in 1996.

II. Common features

The two cases present some common features. The first concerns the definition and assessment of the relevant markets carried out by the Commission. The parties in *Newscorp/Telepiù* postulated the abolition of the distinction between pay-TV and free-to-air TV as a matter of market definition. Nevertheless, in both cases the investigation showed that there were no reasons (yet) to change the approach taken in previous cases, and market definitions used in earlier decisions were upheld. However, particularly in the Italian case, the interaction between pay- and free-TV is clearly acknowledged and the possible future blurring of the distinction due to technological convergence is admitted.

The second common element is the relevance attributed by the parties to the financial problems incurred by the merging companies. This has lead the Commission to assess, and to reject, the 'failing firm defence' in both cases.

Thirdly, both operations were characterised by the presence of the incumbent telecommunications operator in each of the countries, giving rise to specific concerns linked to the presence of the incumbent in a number of markets related to pay-TV.

Fourthly, the remedies designed in both cases address to a great extent the same issues and therefore present significant similarities. The conditions imposed by the Spanish authorities and the undertakings accepted by the Commission are aimed at preventing the foreclosure of the affected markets which could result from the creation and strengthening of dominant positions.

1. Definition of the relevant markets

1.1. Pay-TV

The Commission has consistently held over time that the market for pay-TV is distinct from the market for free-to-air TV ([8]). Lately, however, the Commission had been confronted with opinions proposing the abolition of the distinction and suggesting the definition of an overall TV broadcasting market.

([1]) Provvedimento n. 9927 del 12.9.2001, Avvio istruttoria, Bollettino n. 35-36/2001.

([2]) Provvedimento n. 10210 del 13.12.2001, Chiusura istruttoria, Bollettino n. 50/2001.

([3]) Provvedimento n. 10462 del 28.2.2002, Avvio istruttoria, Bollettino n. 7/2002.

([4]) Provvedimento n. 10716 del 13.5.2002, Chiusura istruttoria, Bollettino n. 19/2002.

([5]) See press release of 15.5.2002 at http://www.canalplusgroup.com/infos/index_infos.asp.

([6]) Case COMP/M.2876 *Newscorp/Telepiù*. Prior notification notice in OJ C255, 23.10.2002, p. 20.

([7]) Text of the decision available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2876_en.pdf. See also press release IP/03/478 of 2.4.2003.

([8]) Cases COMP/JV 37 *BSkyB/Kirch Pay TV,* decision of 21.3.2000, OJ C 110, 15.4.2000, p. 45; IV/M.993 *Bertelsmann/Kirch/Première,* decision of 27.5.1998, OJ L 53, 27.2.1999, p. 1; COMP/M.2211 *Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd.,*decision of 20.12.2000, OJ C 363, 19.12.2001, p. 31.; COMP/JV 57 *TPS,* decision of 30.4.2002, OJ C 137, 8.6.2001, p. 23.

The opinions sustaining the abolition of the distinction are based on two grounds. First, the fact that the Commission has previously acknowledged a certain interaction between pay-TV and free-TV ([1]). Secondly, the fact that in some countries the offer by free-TV is so strong and diversified that free-to-air broadcasters constitute an effective competitive constraint for pay-TV broadcasters. This would namely be the case of Italy.

The market investigation in both operations has shown, however, that there is no case (yet) to change the approach taken so far. Particularly in the Italian case, a vast group of market players (TV broadcasters, channel suppliers, football clubs and consumer associations) agreed on the clear differences still existing between the two TV segments.

The subsistence of the distinction between pay-TV and free-TV relies on a number of factors concerning the business model, type of contents, programme scheduling, hardware, functionalities and supply-side substitutability.

As it is well known from previous cases, the most obvious difference between pay-TV and free-TV concerns the underlying business model. The reliance in one case on subscription fees and in the other on advertising revenues ([2]) implies that in the case of pay-TV there is a direct economic relationship between the pay-TV broadcaster and its viewers, whilst in the case of free-TV the economic role of the viewer is merely the one of contributing towards the audience share that forms the basis for the commercial relationship between the broadcaster and the advertisers.

A second clear difference concerns the type of contents. So called 'premium contents' (mostly, but not limited to, recent successful films and football) is in most cases shown exclusively on pay-TV. Furthermore, consumers driven by a strong interest for specific themes (sports, movies, music, travelling, science, cartoons, etc) will find their interests satisfied through pay-TV thematic channels, something that generic free-TV is not capable of offering. The tailoring of pay-TV to consumer preferences also translates into multiple programming schedules, allowing for various replays of the same programme throughout a given period of time or, for example, for the broadcasting of several football matches at the same time. This flexibility results from the coexistence of several channels within the same 'bouquet' offered by a pay-TV platform, a multiplicity which is further enhanced by digital technology.

The differences in hardware required for the consumption of pay-TV as opposed to free-TV also play a role in this respect. A pay-TV customer requires a decoder (so called set-top box, or STB) in order to decrypt the broadcasting signal. The STB must be bought or leased, in addition to the customary TV set. A free-TV consumer, on the other hand, does not require a STB (for terrestrial analogue broadcasting). The difference in hardware requirements is particularly relevant in Italy given that at present no digital terrestrial TV (DTT) is commercially available and current Government plans don't foresee the introduction of DTT before 2007. It is, however, possible that in the future this particular difference between pay-TV and free-TV becomes less relevant as from the introduction of DTT, given that analogue TV sets will also require a decoder to receive the digital signals.

Another distinctive feature of pay-TV as opposed to free-TV results from the digital technology which in some countries such as Italy is used only by pay-TV broadcasters. Apart from the multiplicity of channels, digital technology offers a number of additional functionalities such as Electronic Program Guides (EPG) and inter-activity. Viewers of sports events may format their viewing at their convenience, adjusting one of several available cameras during, for example, a Formula 1 Grand Prix or during a football match.

Lastly, as regards supply-side substitutability, and given their radically different revenue model, free-TV broadcasters are not able to switch to pay-TV broadcasting in the short term and vice-versa without incurring significant additional costs or risks ([3]).

In spite of all the elements above which uphold the distinction between pay-TV and free-TV, the Commission has nevertheless acknowledged the fact that free-TV represents a certain competitive constraint to pay-TV ([4]), particularly in those countries where free-TV offers a wide choice of channels containing commercially attractive contents. The crucial question to be answered in this respect was therefore whether such constraint was sufficiently strong as to render free-TV a substitute for pay-TV.

([1]) See cases IV/M.110 *ABC/Générale des Eaux/Canal+/W.H.Smith TV*, decision of 10.9.1991, OJ C 244, 19.9.1999, para. 11; IV/M.553 *RTL/Veronica/Endemol*, decision of 20.9.1995, OJ L 134, 5.6.1996, para. 20.

([2]) And/or, in the case of public broadcasters, public funds.

([3]) See Commission Notice on the definition of relevant market for the purpose of Community competition law, 97/C 372/03, para. 20.

([4]) Case COMP/M.2876 *Newscorp/Telepiù*, para. 37 and 38.

The attractiveness of a free-TV broadcaster's offer depends by definition on the content supplied to viewers. For the moment, premium content (in particular, successful recent movies and sports, mainly football) are available in Spain and Italy almost exclusively to and via pay-TV broadcasters. On the one hand, football clubs show a strong inclination to sell their broadcasting rights only to pay-TV operators. On the other hand, the most prominent film producers sell their broadcasting rights for a certain film under a 'windowing' scheme that provides for a pay-TV 'window' preceding the free-TV 'window'. To date, content providers have been unwilling to waive the pay-TV window scheme as it would mean foregoing an additional revenue source. For as long as this business model is in place, free-TV will not be able to compete with pay-TV in broadcasting successful recent movies immediately after the Home Video 'windows', even if it wished to do so. Therefore, at present there is a clear difference in Italy and Spain in terms of the 'premium' content that free-TV and pay-TV can offer and, most importantly, in terms of the timing at which such content is broadcast.

The current situation does not, however, exclude that the distinction between the two markets may become increasingly blurred in the future, for reasons linked *inter alia* to the evolution of technology in general and the progress of TV digitisation. In this respect, the general convergence trend between different audio-visual media, on the one hand, and convergence between media and telecommunications, on the other, is likely to bring about an increasing proximity between the different ways in which entertainment and information are brought to consumers, and the ways in which consumers enjoy them.

As regards other services related to pay-TV, the Commission has previously identified two other possible markets: pay per view services ([1]) and digital interactive TV services ([2]), the latter having been considered as linked and complementary to pay-TV. As concerns in particular services such as 'pay-per-view' (PPV), 'near-video-on demand' (nVoD) and 'video-on-demand' (VoD), the market investigation carried out in both cases has shown that, for the time being, they could be considered as mere segments within the wider pay-TV market.

As regards the geographic scope of pay-TV markets, it should be underlined that despite the fact that in certain niche markets channels are broadcast throughout Europe (for example, the Eurosport channel), television broadcasting is still generally organised on a national basis. As the Commission already stated in a number of decisions ([3]), the markets for organisation of television are national in nature or relate to linguistically homogeneous areas. This is primarily due to differences in regulatory regimes, language barriers, cultural factors and other different conditions of competition prevailing in individual Member States. The national scope of the relevant market was confirmed in both cases, being therefore limited to Spain and Italy respectively.

1.2. Acquisition of audio-visual content

As any other broadcaster, both Telepiù and Stream, in Italy, as well as CanalSatélite Digital and Via Digital, in Spain, were active in the purchase of television broadcasting rights on a heterogeneous number of entertainment products such as films, sports events ([4]), TV series, thematic channels, etc. The Commission's findings show that these different types of content are not substitutable from a demand side perspective. This is basically due to the fact that from a broadcaster's point of view, the different products do not have the same value in terms of their appeal to viewers. On the other hand, from the supply side, rights are sold under different pricing structures and do not have the same economic value. Moreover, content producers are not able to switch production between all types of content.

In line with previous decisions ([5]), the Commission defined a number of markets concerning the acquisition of audio-visual contents upstream from the pay-TV market, namely: a) premium films; b) football events that take place every year where national teams participate (essentially national League, national Cup, UEFA Cup and UEFA Champion's League); c) other sport events; d) thematic channels.

It should be underlined that some of this content is generally considered to be crucial for the success of any pay-TV operation. This is particularly the case of premium films and football.

([1]) Case COMP/M. 2211 *Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd.*

([2]) Case COMP/JV 37 *BSkyB/Kirch Pay TV.*

([3]) Cases COMP/JV 37 *BSkyB/Kirch Pay TV*; IV/M.993 *Bertelsmann/Kirch/Première*.

([4]) As regards the acquisition of broadcasting rights on sports, mainly football, the parties in Spain were also active indirectly through the joint-venture Audiovisual Sports between their mother-companies.

([5]) See in particular cases COMP/M.553 *RTL/Veronica/Endemol*; COMP/M.2050 *Vivendi/Canal+/Seagram,* decision of 13.10.2000, OJ C 311, 31.10.2000, p. 3*;* COMP/37.576 *UEFA's Broadcasting Regulations,* decision of 19.4.2001, *OJ L 171, 26.6.2001, p. 12*; COMP/M.2211 *Universal Studio Networks/De facto (NTL) Studio Channel Ltd*; COMP/JV 57 *TPS*.

As regards their geographic scope, all the markets for the acquisition of audio-visual content were considered to have a national dimension. In fact, although nothing prevents broadcasters from acquiring rights for more than one territory at a time, broadcasting rights are mostly sold on a national basis or, at the most, by homogeneous linguistic areas, and the price varies according to the territory for which the rights are acquired. The pattern for the acquisition of some products (for example, thematic channels) also appears to be strongly influenced by cultural and sociological factors. Accordingly, the geographic scope of the markets was considered to be national or limited to a linguistic area.

2. *Assessment of the affected markets*

Both the Spanish and the Italian operations were considered to lead to substantial horizontal overlaps and to entail the risk of reinforcing dominant positions in related markets.

2.1. Dominant position in the pay-TV market

The change in the competitive structure of the Spanish and Italian pay-TV markets brought about by the two operations is quite similar, in that both involve the merger of the first two players in each of the markets. Furthermore, the market position held by the parties in the pay-TV market already before the concentration was incomparably higher than the next competitor in Spain, whilst in Italy there was actually no other competitor. The combination of the market position of the merging parties therefore necessarily lead to extremely high market shares.

In Italy, the pay-TV market has been substantially limited to delivery via direct-to-home satellite (DTH). Cable is only marginally developed and digital terrestrial television (DTT) is still in its experimental phase, with Government plans pointing towards 2007 to digital switch-over but with the market generally foreseeing an even later date. On the other hand, analogue terrestrial transmission is commonly considered to offer insufficient technical capabilities in order to allow for proper pay-TV services. These circumstances made the satellite platforms Telepiù (the dominant operator) and Stream (the second operator) the two sole pay-TV players. In accordance, the Commission concluded that the combination of their operations would lead to the creation of a near-monopoly in the Italian pay-TV market.

In Spain, pay-TV was offered to consumers via satellite, cable and DTT. The disappearance of Quiero TV (the DTT operator) from the market in 2002 has left only the satellite platforms and the cable operators on the competitive arena. To this it must be added, however, that the combined market shares of Canalsatélite Digital (the dominant satellite player) and Via Digital (the second platform) would jointly reach 70-90%. Moreover, the licences of the individual cable operators are territorially limited to the respective circumscriptions. In this context, the Commission considered that the combination of the satellite platforms' operations would lead to a strengthening of a dominant position in the Spanish pay-TV market.

2.2. Dominant position in the markets for the acquisition of content

It is a well-known fact that some audio-visual contents are crucial for the success of a pay-TV operation, triggering the willingness of the consumer to pay a certain amount for a differentiated service which is otherwise provided at no cost by free-to-air broadcasters. However, 'subscription drivers' such as premium films and football are not the only products required by a pay-TV operator, given the need to put together a comprehensive programme grid not only capable of satisfying a diversified range of interests but one which also fulfils the more basic need of filling in airtime, while at the same time strengthening the brand of the operator. Therefore, access to different types of content such as thematic channels or sports other than football is an important condition for the setting-up of a pay-TV operation.

Logically then, the creation or strengthening of a dominant position in the markets for the acquisition of such content arises as a natural competition concern, all the more so in highly concentrated markets. The Commission concluded in both cases that the notified operations would lead to the creation or strengthening of a dominant position in the markets for the acquisition of pay-TV broadcasting rights on: premium films; b) regular football events where national teams participate; and c) other sports. As regards the market for thematic channels, whilst in the Spanish case the problem lay on the supply side, in the Italian case the concern was on the demand side.

The competition concern related to the possible foreclosure effects resulting from the undue exercise of market power by the dominant player as a result of which access by actual or potential competitors to crucial input markets would be barred. The foreclosure effects could result from two main factors.

First, access to premium content was already difficult pre-merger due to the exclusivity attached to the licensing agreements entered into by the plat-

forms with content providers. The long duration of such exclusivity, in addition to numerous hold-back and pre-emption rights provided for in the agreements, not only rendered actual competition bleak but, more importantly, virtually eliminated potential competition. The same should be said in respect of the scope of the exclusivity because in some cases it not only covered the satellite means of transmission but also applied to other technical platforms.

Secondly, the dominant (in some circumstances even monopsonistic) position gained by the merged entities would naturally increase their bargaining power vis-à-vis the content providers. This would allow each of the new entities to tailor its contractual conditions with content providers to its precise needs, including the prevention of potential competition by new entrants. The increase in bargaining power would be particularly felt by smaller, independent producers due to the absence of alternatives for the sale of their products. This situation could, in addition, indirectly harm consumer welfare. Where the merged entity stopped purchasing the products of smaller providers, or where these exited the market due to unsustainable commercial terms, consumers would enjoy a reduced variety of products and a restricted freedom of choice.

3. The presence of the telecom incumbent

Both concentrations provided for the participation of the incumbent telecommunications operator in each country, Telefónica in Spain and Telecom Italia in Italy. Both operators were previously shareholders of one of the merging companies, and further to the notified operations, both would keep a minority shareholding in the new entity as well as a presence in the respective Board of Directors. These arrangements gave rise to two main competition concerns.

The first concern related to a possible further reinforcement of each of the new merged entities' dominant position in the pay-TV market. This could result from the weakening of possible competition by the telecom incumbent vis-à-vis the merged pay-TV platform. The second concern regarded a possible further strengthening of each of the telecom operators' dominant position in the markets for Internet access (mainly broadband) and for fixed telephony. This could result essentially from privileged access by the telecom operators to multimedia contents held by the pay-TV platforms.

As regards the first concern, the starting point for the analysis was the ability of telecom operators to provide audio-visual content via xDSL broadband technologies ([1]) and their interest in providing such services, including pay-TV. In this context, both Telefónica and Telecom Italia had the potential to act as one of the main competitive constraints on the pay-TV platforms. However, the link between the telecom operators and the pay-TV platforms could lead them to develop mutually reinforcing strategies. The most obvious strategy could materialise by means of the platforms making their contents available to their telecom partners at more favourable terms than to other operators, favouring them namely in the Internet broadband market. In return for this positive discrimination, the telecom partners would have a lesser incentive to compete with the pay-TV platforms on a full scale basis and could concentrate only on certain segments of the pay-TV market (for example, pay-per-view or video-on-demand), apart from possibly withdrawing from the markets for the acquisition of contents. In Italy, the reinforcement of the pay-TV platform's dominant position would work to the detriment of potential competition, further raising barriers to entry. In Spain, the same effect would harm actual competition represented by cable operators.

As regards the second concern, the starting point for the assessment was the dominant position already held by the telecom operators in the markets for Internet access and fixed telephony. The link underlying the operations would allow not only for the positive discrimination of the telecom operators in terms of access to contents but also for the bundling of multimedia content with telecom services. This common strategy would work to the great detriment of cable operators, the main advantage of which is the ability to provide consumers with a combination of services, the so called 'triple play' (pay-TV, Internet access and fixed telephony). A strategy which materialised in joint commercial offers of media and telecom services would weaken the competitive position of cable operators and further reinforce the position of the telecom operators in the markets for Internet access and fixed telephony. This would harm potential competition in Italy and actual competition in Spain.

([1]) There are a number of variants of DSL technology such as ADSL (Asymmetric Digital Subscriber Line), HDSL (High data rate Digital Subscriber Line) and VDSL (Very high rate data Digital Subscriber Line). They are collectively referred to as 'xDSL' technologies. Broadband services can be offered over the existing copper line if it is hooked up to so-called 'enabling' technologies such as one of the 'xDSL' (Digital Subscriber Line) technologies. The xDSL technologies are capable of effectively converting a copper pair into a high speed digital line, and so overcome the technical limitations of the traditional copper local loop.

In spite of the concerns raised during the proceedings, in the *Newscorp/Telepiù* case the Commission concluded that it had not been able to gather sufficient factual evidence allowing it to establish that the highlighted risks would materialise in the foreseeable future. On the contrary, in the *Sogecable/Canalsatelite Digital/Via Digital* case, the Spanish authorities imposed a number of conditions in respect of the link with Telefonica.

4. The failing firm defence

As a justification for the concentrations, the parties in both cases have insisted on the critical financial situation of the pay-TV platforms due to significant losses incurred since their launch. The parties argued that the unavoidable consequence of such situation would be the closing of at least one of the platforms present in each market.

The Commission had in the past assessed other cases in the light of the 'failing firm defence' ([1]). Three cumulative conditions have been considered as required for the acceptance of this justification: (a) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking; (b) there is no less anti-competitive alternative purchaser; and (c) the assets to be purchased would inevitably exit the market in the absence of the merger and/or the market share of the failing company would in any event be absorbed by the acquirer. The bottom line of this framework, as clearly laid down by the Court of Justice, is that '(…) the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed.' ([2])

As regards the first condition, in both cases the Commission considered that it was not met. This conclusion was based essentially on the fact that the financial difficulties invoked by the parties were felt not by independent, stand-alone companies but rather by mere divisions of larger corporations. There was no risk of Sogecable and Telefonica, in Spain, or Newscorp and Telecom Italia, in Italy, the mother-companies of the pay-TV platforms, being forced out of the market. Accordingly, the Commission considered to be in the presence of no more than a mere 'failing division defence', similar to arguments rejected in other cases ([3]).

Secondly, the Commission considered that the information at its disposal was not sufficient in order to find that the two other conditions were met, and the parties did not provide additional elements allowing the Commission to conclude otherwise.

5. The remedies

The remedies devised in both cases can be divided in two major groups, seeking to ensure as many objectives, namely:

a) access to content, through limitations to the scope and duration of exclusivity agreements with premium content providers and the establishment of sub-licensing schemes;

b) access to infra-structure, i.e. access to the satellite platforms for pay-TV distribution as well as to the technical services associated with pay-TV.

5.1. Access to content

As regards access to content, the duration of the exclusivity attached to future agreements entered into by the pay-TV platforms with premium content providers (film producers and football clubs) was limited in both cases. In the Spanish case, such limit was set by the Spanish authorities at 3 years while in the Italian case the limit was defined by the Commission also at 3 years for films and 2 years for football, a difference justified by the greater complexity of the licensing agreements for films. Additionally, as regards *ongoing* exclusive contracts, a unilateral termination right was granted by the parties in the *Newscorp/Telepiù* case to film producers and football clubs.

The exclusivity attached to premium content was also limited in its scope, restricting the range of technical platforms on which the new merged entities will be able to enjoy it. In *Newscorp/Telepiù*, the new entity will waive exclusive rights, as well as any other protection rights, with respect to all platforms other than DTH (terrestrial, cable, UMTS, Internet etc.). In the Spanish case, the new entity shall not acquire or exploit exclusive UMTS and Internet rights on the Spanish League and Cup events and, as regards films, it shall not acquire exclusive pay-per-view rights for platforms not operated by the merging parties at the time of the merger.

With respect to sub-licensing schemes, the merged entity in *Newscorp/Telepiù* shall offer third parties, on an unbundled and non-exclusive basis, the right to distribute on platforms other than DTH its premium contents. The price for this 'wholesale offer' will be determined on the basis of the

([1]) Case IV/M.308 *Kali und Salz/MKD/Treuhand,* decision of 9.7.1998, OJ C 275, 3.9.1998, p. 3; case COMP/M. 2314 *BASF/ Eurodiol/ Pantochim,* decision of 11.7.2001, OJ L 132, 17.5.2002, p. 45.

([2]) Joined cases C-68/94 and C-30/95, *France v Commission*, ECR [1988] I-1375, para. 155.

([3]) Case IV/M.1221 *Rewe/Meinl,* decision of 03.2.1999, OJ L 274, 23.10.1999, p. 1; case IV/M. 993 *Bertelsmann/Kirch/Première.*

'retail minus' principle and its implementation will imply an account separation and cost allocation between wholesale and retail operations of the platform. On its turn, the merged entity in the Spanish case shall provide third parties with at least one channel including premium films as well as its own in-house produced thematic channels. Additionally, it will be obliged to maintain the sublicensing scheme for football events that existed at the time of the merger.

5.2. Access to infra-structure

As regards access to the infra-structure, the merged entities shall grant third parties access to their satellite platforms under equitable, non-discriminatory and cost-oriented terms, such as to allow for intra-platform competition. The obligation extends to the supply of technical services that are necessary and instrumental to offering pay-TV channels.

As an additional safeguard in respect of pricing, the parties will implement separate accounts for all the activities arising from the services related to the access to platform. Above all, a clear separation between the parties' activities at wholesale and retail level in this respect will be introduced.

III. The distinctive features

As one would expect, not all elements in the two cases are identical. The differences mainly relate to market structure, market assessment and remedies.

1. Market structure

The main difference between Spain and Italy in the structure of the pay-TV market concerns the existence of cable networks in Spain and, consequently, the provision of pay-TV services via cable. This translates into the existence of actual competition to the satellite platforms in Spain at retail level, in spite of the fact that cable operators, with 15-25% of the total pay-TV subscribers, hold much lower market shares than the satellite platforms. Besides, until 2002 pay-TV services were also offered by DTT operator Quiero TV.

In Italy, on the contrary, there is no significant pay-TV distribution via cable. Only e.Biscom is marginally present in the market, providing video-on-demand and interactive services to a reduced number of subscribers. Still rolling out its projected optical fibre network, the company is mainly dedicated to voice and data transmission. Although it distributes Telepiù and Stream products, customer management in that respect remain with the satellite platforms. As regards DTT, no commercial project has seen the light of the day so far.

Accordingly, whilst in Spain the merger of the two satellite platforms would lead to a significant strengthening of a dominant position in the pay-TV market, the equivalent operation in Italy would lead to a near-monopoly.

2. Market assessment

The first distinctive trait in the Spanish case concerns the acquisition of rights on football events. The mother-companies of the merging satellite platforms, Sogecable and Telefonica, held a majority stake in the joint-venture Audiovisual Sport, a company which is active in the acquisition and sublicensing of football broadcasting rights ([1]) and which holds a significant market share of 75%-90%. The particular configuration of the Spanish market lead the Commission to define a separate market for the resale at wholesale level of football rights on events in which Spanish teams participate ([2]). Moreover, given the dominant position of Audiovisual Sport in the wholesale market and the majority stake to be held by Sogecable, the Commission also considered that the operation would lead to a strengthening of the dominant position of Sogecable in the downstream pay-TV market.

A second element worth mentioning concerns market definition. The geographic scope of the markets for the acquisition of audio-visual content were defined as national because, among other reasons, the pattern for the acquisition of some products appears to be strongly influenced by cultural and sociological factors. The Spanish case offers eloquent evidence in this respect, in that bullfights assume a particular importance within the market for the acquisition of rights on sports other than football and other events ([3]).

As regards the Italian case, the main difference concerns the vertical effects resulting from the operation.

The operation of pay-TV requires a special technical infrastructure to encrypt the television signals and to decrypt them for the authorised viewer. This infrastructure is constituted by a conditional access system ('CAS'), and by a

([1]) Further to the notified concentration, Sogecable would also acquire the indirect participation of Telefonica in Audiovisual Sport.

([2]) Case COMP/M. 2845 *Sogecable/Canalsatélite/Vía Digital*, para. 52-55.

([3]) Case COMP/M. 2845 *Sogecable/Canalsatélite/Vía Digital*, para. 58-62.

decoder ('set-top-box') ([1]). Newscorp is present on the supply-side of the CAS sector through a controlling stake in NDS, a CAS supplier. The merged entity would therefore be vertically integrated with NDS, possessing in-house a proprietary CAS technology ('Videoguard'), already in use by the platform Stream before the merger.

In the pre-merger situation there were two systems in the Italian market because the other platform (Telepiù) used its own proprietary system. Post-merger, however, the combined platform would have a strong incentive to adopt a single CAS, that is to say, Newscorp's own proprietary system. Due to the absence of actual competition in the Italian pay-TV market, this change would render Newscorp's CAS the *de facto* standard used in Italy and would turn the merged entity into the gate-keeper for this technology.

The merger of the two pay-TV platforms therefore gave rise to the concern that access by potential new entrants to NDS technology could be refused or granted only under unfair conditions. Furthermore, should new entrants decide to use a CAS different from the one licensed by NDS, then co-operation by the merged platform would be required in order to set up a simulcrypt system such as to render both technologies compatible with the use of a single decoder by subscribers. The historical difficulties in implementing a simulcrypt system together with the dependence from the merged platform's good will made such prospect look problematic.

The vertical integration of the undertaking controlling the merged platform therefore appeared to significantly raise the already high barriers to entry in the Italian pay-TV market by granting the new entity additional possibilities to foreclose the market and, consequently, to further strengthen its dominant position.

3. Remedies

The specificity of the Italian case as to remedies basically concerns access to pay-TV technical services and the divestiture from terrestrial broadcasting activities.

As regards the first, the merged entity shall grant third parties access to the application program interface (API) and conditional access system (CAS), according to a fair non-discriminatory pricing formula. The new platform will also have the obligation of entering into simulcrypt agreements as soon as reasonably possible and in any event within 9 months from the written request from an interested third party.

As regards the withdrawal from terrestrial activities, the merged entity shall divest of Telepiù's digital and analogue terrestrial broadcasting assets and commits not to enter into any further DTT activities, neither as network nor as retail operator.

The most distinctive elements in *Sogecable/Canalsatélite/Vía Digital* are the conditions imposed by the Spanish authorities on the merged platform as regards its future relationship with the telecom incumbent. The new entity shall not bundle pay-TV services with Internet access provided by Telefonica within a single offer to its customers, nor will it be allowed to enter into any further agreements or strategic alliances. It will also be prevented from favouring Telefonica in the access to any of its audiovisual contents and must guarantee the possibility of Telefonica's competitors providing the return path for any inter-active services developed by the platform. Differently, in *Newscorp/Telepiù*, the Commission simply took note of two commitments submitted by Newscorp in respect of the relationship with Telecom Italia, without such commitments being a condition for the approval of the operation.

Additionally, the Spanish authorities also imposed conditions in respect of pricing. The new platform is consequently prevented from reflecting any costs arising from the concentration on its customers (including the prohibition of raising prices in 2003) and shall not raise prices in the future above an inflation-related ratio.

IV. Competition policy in the media sector

The decisions in *Newscorp/Telepiù* and *Sogecable/Canalsatélite Digital/Vía Digital* should not be regarded as isolated cases but rather as part of a consistent line of competition policy in respect of the media sector. It frequently happens that merger control is taken for a mechanical control of dominant positions. This approach, however, forgets that in fact Article 2(3) of the Merger Regulation provides for the incompatibility of only those concentrations which create or strengthen a dominant position 'as a result of which effective competition would be significantly impeded in the common market.' The cases discussed above expressively illustrate some of the most frequent

([1]) See cases IV/M.993 *Bertelsmann /Kirch/ Premiere*, and IV/36.539 *British Interactive Broadcasting /Open,* decision of 15.9.1999, OJ L 312, 6.12.1999, p. 1, where the Commission has examined the possible existence of a product market for the wholesale provision of the technical services necessary for pay-TV

'impediments' to competition which have come under the scrutiny of the Commission during these past years, in merger as well as in antitrust media cases.

One recurrent issue is foreclosure of input markets such as, for example, content markets. Already back in 2001 Commissioner Monti stated: 'Competition law scrutiny of exclusive rights contracts also helps to keep media markets open. We have expressed concern in the past about the duration of sports broadcasting contracts. (…) Similar concerns would arise in relation to long term exclusive film contracts, and it is likely that these will require enhanced scrutiny in the future. In all of these cases, the Commission is ready to intervene where it appears that the scope of the arrangements is such that competition and market developments will be restricted in the future. By this, I mean scope of the rights licensed, territory concerned and duration. Such intervention will ensure that markets remain open, and that existing powerful operators do not strengthen their position simply by tying up the best content for years to come.' ([1])

The limitations to the scope of exclusivity imposed in respect of the agreements between the newly merged pay-TV platforms and premium content providers, materialised by means of preventing exclusivity from extending to all possible technical platforms, therefore appears as a natural remedy. This approach presents a parallel to the segmentation of rights favoured by the Commission in the *UEFA Champions League* case ([2]), where the Commission accepted the 'unbundling' of football rights in smaller packages according to different platforms and where UMTS was clearly singled out as a separate category, next to Internet rights. The same should be said in respect of limitations to the duration of exclusivity. Also in the *UEFA Champions League* case, the Commission accepted a maximum duration of three years for licensing agreements while, as regards film rights, in *Film purchases by German television stations* ([3]) a significant reduction in the duration of the agreements was introduced by the parties further to the notification of the agreements, allowing the Commission to grant an exemption under Article 81(3).

Other cases have addressed the need to ensure access to crucial contents, be it (as in the cases discussed above) film rights for pay-TV ([4]) or music rights for online distribution ([5]). Rights sublicensing schemes such as the ones imposed in the two cases discussed in this article also find a parallel in, for example, the sublicensing rules imposed by the Commission as a condition for the exemption of the agreements notified in the *EBU* ([6]) case, which provided for extensive access by third party broadcasters to EBU sports rights and to Eurosport programmes.

Content, however, is only one of several crucial inputs for the functioning of the media world. Technology, for example, is another one. The foreclosure of pay-TV markets by means of proprietary CAS technology has been previously addressed by the Commission in quite a detailed manner in *BIB/Open* ([7]), but this is not the only case where the importance of proprietary technology for the provision of media services was highlighted. In *AOL/Time Warner* ([8]), for example, the likelihood of the new merged entity being able to dictate the technical standards for streaming and downloading of music from the Internet, due to the possession of a proprietary 'music player' technology, was a crucial factor leading to the conclusion that AOL/TW could end up holding a dominant position on the emerging market for on-line music delivery.

Last but not least, access to infra-structure should not be forgotten. Not all media producers are vertically integrated, and for those who aren't, access to distribution networks is crucial in order to be able to reach the consumer. Thus the undertakings and conditions in the pay-TV mergers discussed above as regards access to satellite platforms.

Similarly, in the *Vizzavi* ([9]) case, further to the concern expressed in respect of the ability of Vodafone and Canal+ to migrate their customer basis from the mobile telephony and pay-TV

([1]) Mario Monti, 'Does EC competition policy help or hinder the European audiovisual industry?', British Screen Advisory Council, The Cavendish Conference Centre, London 26.11.2001, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/01/578|0|AGED&lg=EN&type=PDF..

([2]) Case COMP/C2/37.398 *UEFA Champions' League*, Notice published pursuant to Article 19(3) of Regulation 17, OJ C 196/3, 17.8.2002. See also Press Release IP/02/806 of 3.6.2002.

([3]) Case IV/31.743, *Film purchases by German television stations,* decision of 15.9.1989, OJ L 284, 3.10.1989, p. 36.

([4]) Case COMP/M. 2050 *Vivendi/Canal+/Seagram.*

([5]) Case COMP/M. 1845 *AOL/Time Warner*, decision of 11.10.2000, OJ L 268, 9.10.2001, p. 28; and Case COMP/M. 1852 *Time Warner/EMI*, see Press Release IP/00/617 of 14.6.2000.

([6]) Case IV/32.150 *Eurovision*, decision of 10.5. 2000, OJ L 151, 24.4.2000, p. 18.

([7]) Case IV/36.539 *British Interactive Broadcasting /Open*.

([8]) Case COMP/M. 1845 *AOL/Time Warner*

markets to the Internet access markets, the parties committed to allowing competing telecom operators to access customers' devices (pay-TV set-top boxes and mobiles phones) so as to offer their services. Additionally, the parties undertook to allow customers to change the default portal on their devices from Vizzavi's to others offered by competing operators. The commitments prevented the parties from bundling their offers on a fully exclusive basis and prevented them consequently from leveraging their market power in a way such as to gain dominant positions in the markets for Internet access and Internet portals.

In conclusion, one might say that access is one of the keywords in competition policy for the media sector. No matter how far media companies co-operate or integrate, access is crucial. Access to inputs, access to content and access to infra-structure remain fundamental in order to ensure the freedom of choice by the ultimate addressee of competition policy: the consumer.

([9]) Case COMP/JV.48 *Vodafone/Vivendi/Canal Plus*. Text of the decision available at http://europa.eu.int/comm/competition/mergers/cases/decisions/jv48_en.pdf.

The judgement of the Court of First Instance concerning the transfer of capital to *Westdeutsche Landesbank Girozentrale* (WestLB)

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On 6 March 2003 the Court of First Instance (CFI) issued the long-awaited judgement in the WestLB case concerning the transfer of the Wohnungsbauförderungsanstalt (Wfa) to WestLB and the involvement of State aid in this transaction. Though the Court annulled the Commission's decision on grounds of insufficient reasoning concerning the calculation of the aid amount of roughly € 808 million, the judgement confirmed and thereby clarified major policy issues as applied by the Commission in the field of State aid control.

WestLB is the largest German Landesbank (public law credit institution) and owned by the Land Nordrhein-Westfalen (roughly 43%) as well as two other public bodies and two savings banks' associations. In December 1991 the Land transferred to WestLB as own capital the WfA, a public development credit institution granting aid for the construction of housing and wholly owned by the Land. While the liquidity contained in the funds remained reserved for Wfa's public tasks, the funds increased WestLB's equity base allowing the bank to increase its commercial activities. This was particularly important in view of the stricter own capital requirements imposed by European legislation (Solvency Ratio and Own Funds Directives) as of 30 June 1993. The transfer was not accompanied by a corresponding increase in the Land's shareholding in WestLB. However, with effect from January 1992, the Land NRW received for its capital contribution a cash remuneration at an annual rate of 0.6% after tax.

The Bundesverband deutscher Banken, an association of German private banks, lodged a complaint alleging that the transfer involved unlawful State aid due to an inadequate remuneration for the capital provided by the Land. Following an in-depth investigation of the matter the Commission decided on 8 July 1999 that the remuneration the Land received was not in line with the so-called market investor principle and that WestLB therefore benefited from unlawful State aid incompatible with the common market. The Commission took the view that, in respect of part of the assets transferred to WestLB, a return at a market value ought to have been 9.3% per annum after tax. This figure was calculated by the Commission on the basis of a 12% basic rate of return (average return on cash core capital investments in the banking sector at the time of the investment) plus a 1.5% top-up for the specific features of the transaction minus 4.2% for the lacking liquidity of the capital injected.

On that basis the Commission assessed the difference between the market price return and the remuneration actually received by the Land for the period 1992 to 1998, at a total of roughly DEM 1.58 billion (€ 808 million) to be recovered by Germany from WestLB. The Land Nordrhein-Westfalen and WestLB each sought annulment of that decision before the CFI. The parallel proceedings brought by Germany to the Court of Justice were subsequently suspended, and Germany intervened in support of WestLB and Land NRW in the cases pending before the Court of First Instance.

The Court backed the Commission on the major legal issues and endorsed its interpretation of important principles of State aid law, in particular the application of the market economy investor principle to companies not being in difficulty. The CFI rejected the applicants' contention in this respect that the Commission had unlawfully extended the concept of State aid. It confirmed that state aid is given where the return demanded by the State for such an investment is less than that which a private investor operating in a market economy would have demanded for a similar investment. The CFI also considered that the Commission was entitled to take account of the average return on investments in the relevant sector in order to determine the appropriate return.

However, the CFI found that the 9.3% rate of return which the Commission stated to be the appropriate return was is not sufficiently reasoned in two respects. First, regarding the value of the basic rate of return, the Court considered that the Commission did not enough substantiate the considerations leading to the benchmark of 12%. Secondly, the Court found that the decision did also not sufficiently reason the 1.5% increase

applied to that rate in order to take account of the specific features of the transaction. Due to the importance of those two elements for the Commission's decision, the CFI annulled the decision. ([1])

The issues raised by the Court will have to be addressed in an appropriate way by a new decision on the case. The complexity and rather technical aspects of the issues mentioned by the CFI will require a careful analysis, before being able to reach a conclusion. However, in the other respects, the CFI ruling confirmed the correctness of the Commission's analysis. This is particularly encouraging as the issues at stake concerned some of the key principles of state aid control.

The ruling endorsed the Commission's policy that fair competition requires a capital injection undertaken by the State to be remunerated at market rates. The Court stated that the Commission did not infringe Art. 87 (1) of the Treaty or Article 295 of the Treaty and that it correctly interpreted the market economy investor principle which according to the Court is applicable also to undertakings not being in difficulty. The Court also clarified that Article 295 of the Treaty does not limit the scope of Article 87 (1) of the Treaty and does not justify in itself non-market behaviour by the State. If Article 87 (1) of the Treaty obstructs the fulfilment of public service tasks, Art. 86 (2) EC remains the only exemption clause. But its criteria were not fulfilled here. Overall, the CFI ruling reinforced the Commission's determination to ensure a level playing field in the European banking sector.

The new WestLB decision will have to be closely coordinated with the ongoing investigations in six other cases of capital transfer to Landesbanken where the proceedings were initiated in July and November 2002. In that context it should, however, be noted that the individual cases show certain differences and naturally need to be analysed on their own merits.

([1]) An appeal may be brought before the Court of Justice to contest the judgement of the CFI within two months from the date of its notification. At the time of editing this article, this period has not elapsed.

Canada's merger control system: a perspective from the inside ([1])

Geraldine EMBERGER, Directorate-General Competition, unit B-1

I. Background and scope of the exchange

The exchange of officers between Canada's Competition Bureau (CB) and the European Commission's Directorate-General Competition (Comp), which took place between July and December 2002, can be seen as an example of 'live co-operation' between the two jurisdictions. ([2]) The exchange project was implemented by way of an exchange of letters between Canada's Commissioner of Competition Konrad von Finckenstein and then-Director-General of Competition Alexander Schaub. ([3])

The decision to exchange mergers personnel in particular for this initial exchange of competition officers was based on several factors, including the international scope of merger control and the need for greater coordination in international mergers cases. The duration of the exchange was six months, which was initially considered to be sufficient time for the officers involved to gain a good appreciation of their host agencies' enforcement regimes.

The purpose of the exchange was to expand and enhance cooperation between the two respective agencies, to promote a shared understanding of Canadian and European merger control regimes, and to facilitate the sharing of experiences and best practices in furtherance of the objectives of the 1999 Canada-EC Agreement. In order to achieve these purposes, each exchange officer took on the responsibilities of a normal officer in the host jurisdiction involving the investigation and analysis of merger cases. In addition to undertaking usual merger review duties, each participant contributed to policy issues and meeting with antitrust and other branches involved in competition policy enforcement, and took part in training programs including giving presentations about their own merger review systems.

The following article briefly summarises the author's observations on the Canadian merger control regime and how it works in practice compared to the European system. The article concludes with some reflections on the results of the exchange and the possibility of future programs.

II. The Canadian merger control system

1. Organisation of the CB

The Competition Bureau (CB) consists of 7 branches ([4]), one of which is Mergers. The Mergers Branch has 58 staff all together and is divided into three units: the Merger and Notification Unit (MNU) and the operative units A and B. The CB is headed by the Commissioner for Competition ('Commissioner'), presently Konrad von Finckenstein, whose five year term was renewed in 2002. In terms of administrative framework, the CB forms part of Industry Canada although the Minister of Industry may not interfere with the Commissioner's inquiries or proceedings before the Tribunal. The Commissioner is assisted by a group of legal experts within the Department of Justice (around 20 lawyers and paralegals, some of them from private practice). In merger cases, Justice assumes the task of presenting the Commissioner's position before the Competition Tribunal. In addition, the Commissioner may also use external counsel and has done so in very complex cases.

The Commissioner has the exclusive right to challenge merger cases, but it is the Competition Tribunal ([5]) ('Tribunal'), who decides. Canadian

([1]) The present article reflects the personal opinion of the author and does not constitute the official position of the Commission or DG Competition.

([2]) Bilateral cooperation was formamised in 1999 with the signing of the Canada-EC Agreement on the Application of their Competition Laws.

([3]) Taking part in the exchange were Geraldine Emberger for the Merger Task Force of DG Competition (MTF) and Paul Feuer for the Mergers Branch of the Competition Bureau.

([4]) Civil matters (corresponds to Article 82 cases), criminal matters (cartels), competition policy (including international affairs), mergers, fair business practices, compliance and operations and justice (compares to the Legal Service).

([5]) The Tribunal is an adjudicative body that operates independently of the Commissioner and other government departments.

merger control, contrary to that of the Commission, is thus based on a judicial system, where both parties defend their case before an independent specialised court.

2. *SPLC test and the Merger Enforcement Guidelines (MEGs)*

The Canadian merger control system is based on the Substantial Prevention or Lessening of Competition or SPLC test (section 92/1). This test verifies whether the merger will lead, or is likely to lead, to a substantial prevention or lessening of competition. This can only be the case if the parties are, or will likely be, able to exercise a greater degree of market power, unilaterally or interdependently with others, following the transaction than if the merger did not proceed (Part II section 2.1 of the Merger Enforcement Guidelines, 'MEGs'). Market power is understood as the ability of firms to profitably influence output and price (or quality), variety, service, advertising, innovation or other dimensions of competition. The word 'substantially' was intentionally left undefined to allow for enough flexibility on a case-by-case basis. ([1]) The Canadian test is substantively similar to the one proposed under the new Merger Regulation (draft Article 2(2)), according to which undertakings shall be deemed to be dominant if they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition.

Similar to the Commission's notices on merger-related topics such as market definition, concept of a concentration or remedies policy, the MEGs ([2]) provide guidance for case handlers and practitioners on the application of the merger rules. The Guidelines are a non-binding instrument describing the enforcement policy of the Bureau in merger cases. The consolidated document covers numerous aspects, which may be relevant in the course of the investigation (anti-competitive thresholds, market definition, evaluative criteria, efficiencies and also process matters). With respect to combined market shares, the MEGs provide for a 'safe harbour' below 35% (for unilateral effects) and below 65% of the four main operators (for coordinated effects). A similar presumption of compatibility can be found in the ECMR (see recital 15) if combined market shares are below 25%; under par. 16 of the Draft Horizontal Guidelines the Commission is unlikely to investigate cases where the HHI post merger remains below 1000.

During the investigation the case team concentrates on elements similar to the ones used in EC Merger control, taking into account market shares, substitutes, entry barriers, the removal of a vigorous and effective competitor, the effective remaining competition and foreign competition (section 93). The team has to focus on two possible scenarios. The first is a potential *lessening* of competition, which occurs where a merger enables the undertakings concerned to unilaterally raise prices (N.B., price is the most direct means of assessment but the Merger Branch also looks at other potential competitive effects including quality, variety, service, advertising, innovation or other dimensions of competition); second, a merger could also bring about a price increase through increased scope for interdependent behaviour in the market. Interdependent behaviour may arise following an explicit arrangement but also by other means (implicit coordination, e.g. through facilitating practices, the interplay of market signals or conscious parallelism). Finally, competition may even be *prevented* by either unilateral or interdependent conduct post merger (for example by the acquisition of a potential competitor or a potential entrant). Competition may be prevented where a merger will inhibit the development of greater rivalry in a market, which is already characterised by interdependent behaviour.

3. *Efficiency doctrine*

Efficiencies under the Canadian Competition Act

Canada is unique in having adopted a formal efficiency gains defence in its competition legislation. Under Section 96 of the Competition Act an anti-competitive transaction is permissible if the efficiency gains are greater than and off-set the anti-competitive effects. Section 96 stipulates: *'The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of*

([1]) There are no absolute figures and the percentage will differ from industry to industry; a SLC or prevention of the latter will probably not occur if the price differential will arguably be eliminated within two years by new or increased competition from foreign or domestic sources.

([2]) Info Bulletin No. 5, Supply and Services Canada; March 1991; see also Bank Merger Guidelines of 1998.

competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.'

Efficiency gains that are assessed pursuant to section 96 fall into two broad classes: production efficiencies and dynamic efficiencies. Production efficiencies result from real long run savings in resources which permit firms to produce more output or better quality output from the same amount of input. These efficiencies are generally the focus of the evaluation, because they can be quantifiably measured, objectively ascertained, and supported by engineering, accounting or other data. Nevertheless, it is a well-known fact that merger-related claimed efficiencies are often debatable and realised efficiencies post-merger are often less than predicted. Dynamic efficiencies, include gains attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. It is recognised that the attainment of dynamic efficiencies is crucial to both the general evolution of competition and the international competitiveness of Canadian industries. However, claims that a merger will lead to dynamic efficiencies are ordinarily extremely difficult to measure. Accordingly, the weight given to claims regarding such efficiencies will generally be qualitative in nature.

The saga of Superior Propane

The Canadian approach to efficiencies has recently been subject to a lengthy dispute between the Commissioner and the Canadian competition courts. In order to better understand their individual positions, it is useful to give a brief summary of the case.

In 1998 Superior Propane and ICG, Canada's leading suppliers of propane gas, saw their merger challenged by the Commissioner. The Tribunal, while agreeing on the existence of an SLPC, decided that the merger should be saved due to efficiencies created by the transaction. The Tribunal used what economists refer to as the «total surplus standard» to weigh the efficiency gains against the effects of the SPLC. Those effects are limited to the so-called 'dead weight' loss ([1]) of wealth to the economy resulting from the merger. Under the total surplus standard, an anti-competitive merger could be allowed to proceed when efficiency gains are greater than and offset this dead weight loss to the economy. ([2])

On appeal, the Federal Court held that the Tribunal erred in law when adopting the total surplus standard since it failed to ensure that *all* the objectives of the Competition Act were considered in the balancing exercise mandated by Section 96, including the supply of consumers with competitive prices and product choices. The case was remitted to the Tribunal for re-determination.

In its 2002 judgement, the Tribunal rejected the consumer surplus standard and refused to include as an effect of the anti-competitive merger the entire amount of the wealth transfer from consumers to producers. The Tribunal held that only the socially adverse portion of the wealth transfer, estimated at approximately 2.6 million Can$ per year, should be weighed against the efficiency gains. The court concluded that under any reasonable weighting scheme ([3]) the efficiency gains (an estimated 29.2 million Can $) would be greater than and would offset all of the effects of SPLC attributable to the merger. The Commissioner appealed again to the Federal Court arguing that the Tribunal had not followed the instructions of the Federal Court.

In its judgement of January 2003 the Federal Court of Appeal confirmed the decision of the Tribunal ruling that the Tribunal had respected the Court's instructions by choosing the balancing weights standard. Subsequently, the Competition Bureau announced that it has concluded that further litigation will not sufficiently clarify the efficiency defence and so it will not appeal the decision.

Consequences of the Superior Propane case

The judgement of the Tribunal upheld by the Federal Court does not set out the exact method which should be used in determining efficiencies. However, it definitely rejected the inclusion of the entire wealth transfer arguing that it would not provide the discretion necessary to deal with the impact of a merger on different socio-economic statuses of consumers and shareholders of a merged entity. While the Court did not expressly reject the consumer surplus standard, it opined that the wealth transfer might have positive or neutral social effects and concluded that it was only the

([1]) Dead weight loss results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute.

([2]) The initial dead weight loss of an estimated 3 million Can $ per year over ten years was considered to be outweighed by efficiencies of approximately 29 million Can $.

([3]) The Tribunal found that even if the adverse portion of the wealth transfer was doubled, the total anti-competitive effects would not exceed $11.2 million (adverse portion of wealth transfer of $5.2 million (2 x $2.6 million) + deadweight loss of $6 million).

socially adverse portion of the wealth transfer that should count against the efficiency gains (the 'socially adverse effects approach').

One consequence of this judgement would be that even a merger to monopoly (like the one between Superior and ICG) could be saved by relatively limited efficiencies, offsetting little more than the dead weight loss. The Court did not accept the Commissioner's argument that monopoly *per se* is an (additional) anti-competitive effect to be weighed against efficiency gains under section 96. In addition, applying the balancing weight standard requires a very difficult and complex socio-economic welfare analysis, which is probably beyond the capacities and expertise of any competition watchdog, including the Canadian Competition authorities. What is more, such analysis cannot take sufficient account of qualitative effects a merger may generate (such a reduction in service level or innovation), which are not quantifiable like a price increase.

Proposed amendment to Section 96

In response to the debate on the appropriate role of efficiencies vis-à-vis the remaining objectives of the Competition Act, there is currently a private member's bill before Parliament proposing an amendment to section 96 (1), which is now in second reading. The proposed amendment (C-249), which is supported by the Commissioner, reads as follows: *'In determining for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal* ***shall together with the factors that may be considered by the Tribunal*** *under section 93, have regard to whether the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers, including competitive prices or product choices, that would not likely be attained in the absence of the merger or proposed merger.'*

Provided that the proposed bill receives sufficient government support, it could be adopted before the end of 2003. The amendment would bring Canada's efficiency doctrine more in line with the European and US approach, which examines efficiencies as one factor to be considered together with and in the context of a number of other determining factors when deciding about the compatibility of a merger instead of providing a complete defense to an otherwise anticompetitive merger.

What is more, the merger enforcement guidelines MEGs, the efficiencies portion of which have been suspended by the Commissioner following the ongoing proceedings in Superior Propane, are currently subject to a review. The revised guidelines will clarify how the Commissioner intends to deal with efficiency claims in practice and which may be the standard(s) applied.

4. Procedure in merger cases

A separate unit for pre-merger notification/ consultation: MNU (since 2000)

Unlike the European merger control system, the Canadian Competition Act of 1986 ([1]) enables the Commissioner to investigate any concentration ([2]) which has an impact on Canadian territory (sect. 91-107), although mandatory notification only applies to transactions of a certain magnitude ([3]), which have to be notified (sect. 108-124). In pre-merger notification the parties are dealing with a specialised unit, the Merger Notification Unit or MNU, which assists in clarifying whether a certain transaction has to be notified and in which form (short or long form notification ([4])). MNU also administers the application of filing fees (which have recently been raised from 25.000 to 50.000 Can $ ([5])) and for binding advisory opinions (4000 Can$ ([6])), and classifies each case as either non-complex, complex or very complex. The classification as 'very complex' is reserved for cases which are highly likely to cause competition concerns (comparable to phase II cases). 60-70% of non-complex (simplified) cases ([7]) are dealt with by MNU, the rest are passed on to the case teams of the operative units.

Voluntary deadlines/limited suspension

Contrary to the EC's merger regime, the Canadian system does not provide for legal deadlines by which

([1]) Competition Act (formerly Combines Investigation Act), R.S.C. 1985, c. C-34, as amended; before 1986 anti-competitive mergers were subject to criminal legislation.

([2]) Exemptions exist for banking mergers, which have been certified by the Finance Minister as 'desirable in the interest of the financial system'.

([3]) Combined turnover of 400.000 Can.$; transaction size 35.000 Can$.

([4]) The long form is usually required for more complex transactions; it requires the submission of sales for individual products but is less comprehensive than the Form Co.

([5]) Approximately 36.000 euro.

([6]) Approximately 2800 euro.

date a Commission decision must be rendered, but by non-binding 'service standards'. The service standard is the period within which the Bureau should provide a response to the parties with respect to whether the Bureau has no issues or believes the transaction raises serious competition concerns which, if left unresolved, may cause the Commissioner to file an application with the Competition Tribunal. They were introduced in November 1997 following the unprecedented increase in merger activity since 1994, with the main objective to improve the service provided to stakeholders. The above-mentioned filing fees were introduced in parallel, in order to help the CB to live up to the new standards. The service standard period is 5 months for complex cases as opposed to 10 weeks and 2 weeks for complex and non-complex cases respectively. ([1]) The service standards, however, only apply to the Commissioner's investigation period. In litigated mergers, which are challenged before the Court, the proceedings can take several years (especially in case of an appeal). Discussions are currently under way to introduce a time limit of 6 months between the application by the Commissioner and the order made by the Tribunal. Finally, another notable difference between the two systems is that the Canadian system allows prior implementation of the deal after a certain 'waiting period' (2 weeks; 42 days for very complex cases) which may end before the review is completed. However, it can be observed that most parties await the outcome of the investigation. The Commissioner may also apply to the Tribunal for interim measures (such as hold-separate obligations, or even a prohibition to implement).

Conduct of investigations by the Commissioner

Each investigation in complex or very complex cases starts by an initial screening phase during which the case team gathers information from interested third parties on a voluntary basis, mainly be telephone interviews but also written requests. If the case does not raise any competition concerns, it may be concluded by an advanced ruling certificate (ARC) or a 'no action letter', which are brief notices to the parties that their deal may go ahead as planned. Most cases notified to the CB ([2]) do not raise competition issues. Only 2% are subject to commitments, prohibition or abandoned by the parties.

Should the preliminary screening indicate the possibility of a SPLC ([3]), the Commissioner usually initiates a formal inquiry, asking the Court to issue legally binding information requests under Section 11 of the Competition Act. These information requests are an important element of the CB's enforcement powers and comparable to Article 11 requests under the ECMR.

But there are also other important investigative tools at the disposal of the Commissioner. One of them is the possibility to hire professional economists ([4]) as well as external industry experts on a short term (that is, case-by-case) basis. In complex cases, the Commissioner has so far made wide use of this possibility ([5]).

Experts may be asked to complete sector studies or develop new models for market definition. They are of great value when it comes to bringing the case team (who are not usually specialising in certain industry sectors) up to speed and to help them understand the main drivers of competition in a particular industry. The expert for example may be a university professor or scientist or member of a consulting firm. Ideally he or she has previous professional experience in the industry concerned. ([6]) If this is the case, the expert may be of great help to establish contact to competitors and customers and convey insider information. This aspect is particularly valuable in complex or highly technical industries (like for example avionics) or in differentiated product markets (where product market definition may be an issue) or markets in transition where the evaluation of a merger requires a prospective analysis, or in the liberalised sectors (like for instance the electricity sector). The expert may also participate in oral

([7]) Most non-complex cases are concluded by issuing an 'Advanced Ruling Certificate' (ARC), which is a brief letter to the Parties declaring that the transaction does not raise any competition concerns.

([1]) The Bureau has become increasingly successful in implementing the service standards: in 200-2001 the standards were met in 100% of the very complex cases and in 92%/95% of the complex/non-complex cases.

([2]) In 2001/2002 a total of 328 transactions were notified to the CB.

([3]) Substantial prevention or lessening of competition.

([4]) The case teams are also assisted by a pool of internal economists working for the CB ('Economic Policy and Enforcement' unit, consisting of 11 junior and 4 senior economists).

([5]) In the Superior/Propane case, for instance, 10 expert witnesses appeared in court over 8 days on economic and industry related topics; several industry experts were also retained in the recent litigated cases United Grain Growers Ltd/Agricore and Canadian Waste Services/Browning Ferries Ind. Ltd.

([6]) *However, the expert has to certify that he/she has not worked on a permanent basis for the merging parties in the past four years.*

hearings before the Tribunal or be asked to issue written statements under oath (affidavits).

The role of the Competition Tribunal

The role of the Competition Tribunal ('Tribunal') is determined by the Competition Tribunal Act. ([1]) The Tribunal hears all applications brought before it by the Commissioner in merger and other competition cases involving reviewable matters set out in Part VIII of the Competition Act. It has rights similar to a superior court when hearing and examining witnesses under oath and it may also penalise legal and natural persons if it finds that they have breached an order of the Tribunal. If a corporation is found to be in contempt the Tribunal orders it to refrain from the illegal conduct and may also impose a fine. ([2]) The Tribunal is authorised to adjudicate questions of fact and law. The latter are only determined by the judicial members, while the former or mixed questions of fact and law are determined by all members sitting in the proceedings.

The Canadian merger control system is based on the 'one-stop-shop' principle: Only the Commissioner (no other federal or regional agency) may initiate merger proceedings before the Tribunal. ([3]) Therefore, if the Commissioner decides not to oppose a transaction, third parties have no right to challenge this decision. However, the Competition Act allows the Commissioner the ability to make an application on any case in which an ARC has not been issued if competition problems occur within three years of the original decision. ([4])

Possible outcome of court proceedings

If the Commissioner comes to the conclusion that a transaction gives rise to a SPLC and that there are no efficiencies which counterbalance these negative effects, he may consider accepting suitable remedies offered by the parties, if these remedies completely remove the competition concerns and can be implemented in a timely manner (section 105). If a deal is struck between the Commissioner and the parties on the contents of the remedy, the Commissioner will then submit the 'Consent Agreement' to the Tribunal for registration. Remedies may obviously also be negotiated to end ongoing litigation between the parties and the Commissioner. Most cases involving competition problems are solved by negotiated settlement. ([5]) Upon registration the commitments are legally binding ([6]) upon the parties: if they fail to comply, they risk facing penalties or they could even face a decision to have their deal dissolved.

If no suitable solution can be found to remedy the competition problem, the Commissioner will submit an application to the Competition Tribunal asking it to prohibit the deal or to order divestitures or (any) other appropriate measures.

Judicial review by the Federal Court and Supreme Court

The parties and affected third parties may appeal to the Federal Court of Appeal against a judgement of the Tribunal with respect to questions of law or questions of mixed fact and law, or on a question of fact with leave. The Federal Court (similar to the CFI) may annul the Tribunal's order and send the case back to it for re-determination. The Tribunal's decision may then again be challenged before the Supreme Court, who may again send the matter down to the Federal Court. These proceedings may take several years to complete (see Superior Propane/ICG; 1999/2003).

III. Conclusions on the exchange program and perspectives for the future

The results of the exchange definitely support the view that the best way to understand the procedures, substantive law and considerations that affect competition law enforcement in each other's jurisdiction is firsthand experience. The exchange has offered a unique opportunity to the case handlers concerned to work in each others' agencies as fully integrated team members. The experience gathered from this exercise and the personal

([1]) R.S.C. 1985, c. 19; énd Supp.; as amended S.C. 1995, c. &, s.62 (1)(e); 19999, c.2, ss.41-43; 2000.

([2]) If a corporation is found to be in contempt, the responsible officers that aided and abetted the breach may also found to be in contempt and may ultimately face imprisonment. However, this has never before happened in practice.

([3]) By contrast, the most recent amendment of the Competition Act, Bill 23, which entered into force in June 2002 authorizes any person to make an application for leave to the Tribunal if faced with refusal to deal, exclusive dealing or tied selling (section 103.1).

([4]) In order to reserve this possibility and signal it to the parties, the Commissioner issues a 'no action letter' instead of an ARC.

([5]) See recently UGG/Agricore, Astral/Media, Chapters, etc.

([6]) On rare occasions, the Commissioner may also decide to go for non-binding commitments (comparable to 'take-note' commitments accepted in rare cases by the Commission), which are of pure declaratory nature (see for example Cendant/Budget in 2002).

contacts established during the period of the exchange enhances mutual confidence and contributes to a smoother handling of case-related issues in transatlantic mergers.

In addition, a better understanding of each other's enforcement activities but also of the different challenges faced by the other authority provides opportunities to cooperate more closely on policy issues and horizontal aspects, such as for example the current merger review process. Close contacts at working level have been established between the Canadian team drafting the revised MEGs and members of the MTF Merger Review team. These informal discussions have proven to be very productive.

What is more, certain features of Canadian merger control could also fit into the framework of the European system. One example is the short-term recruitment of external industry experts and professional economists in order to give the case teams access to specific industry knowledge required for the handling of highly complex cases. In order to secure the confidential treatment of all information accessed by the experts in the course of his/her contacts with the CB, they sign a confidentiality agreement. Another example is the systematic conduct of teleconferences with particularly interested third parties early in the review, in order get a better feeling if the case creates any competition concerns. Finally, the introduction of filing and consultation fees helped the CB to strengthen its resources; the possibility to introduce filing fees also forms part of the Commission's proposal for a revised merger regulation.

In view of the above, it is worthwhile to think about a continuation of these exchange programs with Canada and other non-European competition authorities. Due to the increasing need of a coherent approach to transatlantic consolidation, merger control remains the focus of such projects. In addition, one could also consider exchanges in other areas of competition enforcement, in particular antitrust. An exchange in antitrust would be of particular interest against the background of the modernisation starting in 2004, when the focus will be on hard core cartel cases, many of which require inter-agency cooperation. ([1]) The length of such an exchange should probably be more than six months, with a view to the average duration of larger antitrust cases. The possibility for exchange officers to participate in searches (dawn raids) organised by the host agency is another issue which should be further explored.

([1]) The CB has a proven expertise in the handling of large national and international cartels, including the conduct of large-scale computer searches under section 16 of the Competition Act.

The new insurance block exemption Regulation: a modernised framework for insurance industry and consumers, following extensive consultation

Stephen RYAN, Directorate-General Competition, unit D-1

Introduction

On 27 February 2003 the European Commission adopted a new block exemption Regulation for the insurance sector ([1]), which replaced the previous insurance block exemption Regulation ([2]) on its expiry at the end of March 2003. The new Regulation grants an exemption under the European competition rules, on conditions, to certain types of agreements in the insurance sector, namely agreements on:

— the establishment of common risk premium tariffs;

— the establishment of common standard policy conditions;

— the joint coverage of certain types of risks;

— the testing and acceptance of safety devices.

The new Regulation will be valid for seven years, and thus will expire on 31 March 2010. One year before that, at the latest, the Commission will publish a report on the functioning of the Regulation, with an indication of its intentions as to the future of the insurance block exemption after its expiry.

The adoption of a new Regulation was the end of a long process, beginning with the publication in May 1999 of a report on the application of Regulation 3932/92 ([3]), and including the publication on 9 July 2002 of a draft new Regulation for comments of interested parties ([4]). Following this, twenty-two contributions were received from insurance sector organisations, consumer bodies, and public sector bodies. The new Regulation contains some amendments, made in the light of the comments received on the text of July 2002, but still covers the same four categories of agreements. The main features of the new Regulation in these four areas, with a focus on the differences between the present draft, and the Regulation currently in force, are described below.

Joint calculations and studies of risks (chapter II of the Regulation)

It is important for insurers to have accurate information about the risks which they insure, including possible future developments. This is not always possible with the information available to them internally, based on their own customers. For this reason, some exchange of statistical information and joint calculation of risks are authorised by the block exemption. The scope of the exemption is unchanged in this area; however, there are certain additional conditions for exemption and clarifications.

Non-binding standard policy conditions (chapter III of the Regulation)

Standard insurance policy conditions for many types of insurance policy are produced by national associations of insurance undertakings. The basic scope of the block exemption in this area is unchanged in the new Regulation, as compared with Regulation 3932/92, although some additional conditions for exemption have been added. The draft published in July 2002 had narrowed somewhat the scope of the exemption in this area; however, in re-widening the scope of the exemption in the final Regulation, the Commission has taken into consideration the comments of the insurance sector and consumer organisations. The insurance sector provided a number of substantial arguments, with supporting concrete examples, to the effect that non-binding standard policy conditions meet all the criteria for exemption under Article 81(3) of the Treaty; in particular, standard policy conditions procure efficiencies for insurance undertakings, and can have benefits for consumer organisations and brokers. Consumer organisations had mixed views, with some supporting and others opposing standard conditions.

([1]) Commision Regulation 358/2003 of 27.2.2003. OJ L 53, 28.2.2003, p. 8.

([2]) Commision Regulation 3932/1992 of 21.12.1992. OJ L 398, 31.12.1992, p. 7.

([3]) COM(1999) 192 final of 12.5.1999.

([4]) OJ C 163, 9.7.2002, p. 7. Accompanying press release: IP/02/1028. See article in the Competition policy newsletter for October 2002.

Insurance pools (chapter IV of the Regulation)

Insurance pools involving a number of insurers are frequent for the coverage of large or exceptional risks, such as aviation, nuclear and environmental risks, for which individual insurance companies are reluctant to insure the entire risk alone. In this area, the scope of the block exemption has been extended as compared with the previous Regulation. Firstly, the market share thresholds for pools to be exempted have been slightly increased (from 10% to 20% in the case of co-insurance pools, and from 15% to 25% in the case of co-reinsurance pools). Secondly, for pools which are newly-created in order to cover a «new risk», a new three-year exemption has been introduced, with no market share threshold. The rationale is that co-operation resulting in the creation of entirely new commercial products can be exempted without a market share threshold for a limited start-up period, and in the case of a new insurance product it is not possible to determine in advance what capacity is necessary to cover the risk. For this reason, the definition of new risks is such as to ensure that only risks genuinely requiring the creation of a new insurance product are covered (the definition has been made more rigorous compared with that in the draft of July 2002).

However, as a counterbalance to this extended scope of the exemption, and as a result of comments received in the public consultation, certain additional conditions for exemption are introduced (in article 8), in particular, a condition removing the block exemption in cases where an undertaking is a member of, or exercises a determining influence on the commercial policy of, two pools active on the same market. This means that insurers that join, or control via subsidiaries, many different pools, do not benefit from the exemption.

Security devices (chapter V of the Regulation)

In most Member States, there are agreements between insurers on technical specifications for safety equipment (for example, alarms, anti-theft and anti-fire devices); on this basis, devices are tested, and lists of «approved» devices drawn up. The scope of Commission Regulation 3932/92 covered all such agreements. However, following comments received on the first draft, the scope of the new Regulation has been narrowed, to place it in line with the harmonised single market rules that apply to security devices. This is because where there is Community harmonisation legislation in force, agreements between insurers which effectively impose on security devices higher requirements than those imposed by legislation have a major impact on the market for such devices, as a device which insurers are reluctant to insure will have great difficulty gaining access to the market. Given this, the view has been taken that agreements between insurers going beyond harmonising legislation cannot be exempted by Regulation. Concretely, the scope of the block exemption on this point has been redrafted so as to exempt such agreements only in areas where no Community-level harmonisation has taken place (for example, for the installation and maintenance of security devices). As a consequence of the above changes, articles 9(m), 9(n) and 10 of the draft published on 9 July 2002 are no longer necessary and have been deleted.

The duration of the exemption

The duration of the exemption has been set at seven years in the new Regulation, as it is felt that this is appropriate in view of possible developments in the market. However, there is a transitional period of one year, in which agreements already in force before the entry into force of the new Regulation, which met the criteria for block exemption in the previous Regulation but not the new one, will remain exempted.

Conclusion

The new Regulation, which is the product of extensive consultation, provides legal certainty to the insurance sector on those types of agreement which are clearly exemptable. However, wherever there is doubt as to whether a category of agreements meets all the criteria for exemption, including efficiency gains and consumer benefit, the Regulation errs on the side of caution and does not grant a block exemption.

The first case of application of the new motor vehicle block exemption regulation: AUDI's authorised repairers

Hubert GAMBS, Directorate-General Competition, unit F-2

Introduction

The new motor vehicle block exemption regulation ([1]) (BER) entered into force on 1 October 2002. A one-year transitional period until 30 September 2003 is foreseen in the BER in order to give all interested parties time to adapt their distribution agreements to the new legal framework. The first case of application of the new regulation offered the Commission the possibility to clarify two important aspects: the authorisation of repairers in the networks of vehicle manufacturers and the application of the BER during the transitional period.

During the Autumn of 2002, the Commission received a great number of informal and formal complaints concerning the question of authorisation of repairers. The informal complaints concerned several brands of vehicle manufacturers. The formal complaints were directed against four vehicle manufacturers. Most of the formal complaints concerned AUDI AG, the German car manufacturer which is part of the Volkswagen group. In the meantime, the Commission had also opened an own-initiative case concerning the question of authorisation of repairers by this manufacturer, as a 'leading' case. AUDI had terminated many agreements with dealers and repairers which were part of its network. Some of these agreements finished before the transitional period, others during it. Former dealers and repairers complained to the Commission about the refusal by AUDI to conclude agreements, before the end of the transitional period, with repairers who wanted to become authorised AUDI repairers and fulfilled the qualitative criteria for authorised AUDI repairers.

The authorisation of repairers

The new BER has the objective of increasing competition for both the sale of new motor vehicles and the provision of repair and maintenance services. With regard to the latter area, one of the measures enshrined in the new BER is the reorganisation of the link between the sale of new vehicles and the provision of after-sales service.

The old BER ([2]) declared in Article 1 that 'subject to the conditions laid down in this Regulation, Article [81(1) of the Treaty] shall not apply to agreements … in which one contracting party agrees to supply, within a defined territory of the common market

— only to the other party, or

— only to the other party and to a specified number of other undertakings within the distribution system, for the purpose of resale, certain new motor vehicles …, together with spare parts therefor'. Its Article 5(1)(1) also made the application of the old BER dependent on there being an obligation on the part of dealers to honour guarantees, to perform free servicing and vehicle-recall work and to carry out repair and maintenance work. These provisions established an obligatory link between the two, in principle, separate economic activities of selling new vehicles, on the one hand, and repairing and maintaining vehicles, on the other hand.

The new BER offers a distributor of new vehicles the possibility to provide after-sales service itself or to subcontract it to authorised repairers of the brand (see Article 4(1)(g) of the new BER). In many cases the distributor will continue to exercise both activities, i.e. it will at the same time sell new vehicles as distributor and repair and maintain vehicles as authorised repairer. However, under the BER it is also possible for an operator to be a member of the distribution network of a vehicle manufacturer and only repair and maintain motor vehicles as well as distribute spare parts, if the supplier combines the two activities. (See Article 4(1)(h) of the new BER.) The BER introduces the authorised repairer as a new type of operator meaning a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor

([1]) Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, p. 30.

([2]) Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L 145, 29.6.1995, p. 25.

vehicles (see Article 1(1)(l) of the BER). The supplier is in general the vehicle manufacturer or its importers.

In order to ensure the provision of repair and maintenance services for the cars of the respective brand, some vehicle manufacturers like AUDI have in the past, already before the new BER, concluded agreements with authorised repairers who only provide after-sales service. This network of authorised repairers exists beside the network of authorised dealers of the respective brand, who sell new cars and at the same time provide the after-sales service.

As far as market definition in such a case is concerned, the relevant product market is likely to be the market for repair and maintenance services for the vehicles of a specific brand. As the supply of the network with spare parts, supply-chain logistics, software and IPR-protected items is organised on a national basis and network members can and do purchase at similar trading conditions on such a basis, the national market is held to be the geographic market affected by the agreements concerning after-sales service ([1]). In the case of AUDI, the services in question are currently provided, as mentioned, by authorised AUDI repairers who are either at the same time also AUDI dealers, i.e. distributing new AUDI cars and offering after-sales service, or pure authorised AUDI repairers who are not distributing new vehicles but only offer after-sales service. In addition, independent repairers also supply these services. Under these circumstances and based on the information available on the market shares of authorised repairers and of AUDI, on the one hand, and the independent repairers, on the other, it turns out that the market share of the AUDI network on the market for after-sales service for AUDI cars is above the 30% threshold specified in Article 3(1) of the BER ([2]).

Consequently, a supplier has to establish a qualitative selective distribution system in order to be covered by the BER. In such a system, the supplier uses criteria for the selection of distributors or repairers which are only qualitative in nature, are required by the nature of the contract goods or services, are laid down uniformly for all distributors or repairers applying to join the distribution system, are not applied in a discriminatory manner, and do not directly limit the number of distributors or repairers (see Article 1(1)(h) of the BER). It results from the non-discriminatory application of such a distribution system that undertakings which fulfil the qualitative criteria must be able to enter the network of the manufacturer.

The transitional period

In the AUDI case, it had to be examined whether the manufacturer had to establish such a qualitative distribution system already before the end of the transitional period.

Article 10 of the BER states that the prohibition laid down in Article 81(1) of the EC Treaty shall not apply during the period from 1 October 2002 to 30 September 2003 in respect of agreements already in force on 30 September 2002 which do not satisfy the conditions for exemption provided for in the new BER but which satisfy the conditions for exemption provided for in the old BER.

In order to take advantage of the transitional period, the agreements of a manufacurer have to satisfy two conditions: first, they must already have been in force on 30 September 2002 and second, they must satisfy the conditions for exemption provided for in the old BER.

The agreements between AUDI and its authorised repairers which relate purely to after-sales service could not benefit from the transitional period. Such agreements were not covered by the old BER as they do not provide for the obligatory link between the sale of new vehicles and the servicing of vehicles, the existence of which was one of the conditions for the application of the old block exemption.

In this respect, four further comments are justified: First, a right of an authorised repairer to sell vehicles, beside its repair and maintenance activity, is not sufficient to establish the obligatory link between sales of new vehicles and after-sales service ([3]).

Second, if the authorised repairers of a brand are also obliged to sell new vehicles, but do so only as genuine agents of the manufacturer (or one of its distributors), this would not be covered by the transitional period. The conclusion of vertical agreements for the distribution of repair and maintenance services and parts, allied to a genuine agency relationship for vehicle sales, does not

([1]) See also section 6.2 of the Explanatory Brochure on Regulation No 1400/2002 published by the Directorate-General for Competition.

([2]) See Andersen, Study on the impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned, p. 254, appendix 8.

([3]) See also Commission Press Release IP/97/740 of 4 August 1997.

come within the terms of Article 1 of the old BER as the relationship does not involve the supply of cars for resale.

Third, the old BER was based on a combination of selective and exclusive distribution. Territorial exclusivity had to be attributed to one or a specified number of undertakings (see its Article 1 described above). If the authorised repairer does not have a veto power with regard to the appointment of additional authorised repairers or, indeed, other dealers, in the defined territory, the agreement does not attribute exclusivity with regard to neither the sale of new vehicles nor the provision of after-sales services. The manufacturer could not be hindered by the authorised repairer to conclude an agreement with another undertaking within the same territory. Consequently, such agreements do not fulfil the criteria of exclusivity contained in Article 1 of the old BER, fall outside its scope and are for this reason not eligible for the application of the transitional period pursuant to Article 10 of the new BER.

Finally, a manufacturer that has to establish a system of qualitative selective distribution with regard to its after-sales service cannot argue that the authorisation of a repairer would infringe the territorial exclusivity of a dealer whose distribution agreement benefits from the transitional period. This 'civil law defence' is not acceptable to justify an infringement of the EC competition rules. It is a question of national contract law whether the manufacturer might have to adapt the dealer agreement as a consequence of the establishment of the qualitative selective distribution system for after-sales service ([1]).

In the case at question, AUDI agreed to apply a system of qualitative selective distribution with regard to its after-sales service in order to benefit from the new block exemption. This means that AUDI will only use qualitative criteria for the selection of authorised repairers, and will conclude servicing agreements with repairers that satisfy the criteria set by AUDI already before the end of the transitional period. Moreover, AUDI must not apply these criteria in a discriminatory manner.

This solution permits former AUDI dealers or repairers that meet the relevant criteria to be reinstated and remain active in the market as members of AUDI's network. In addition, Volkswagen AG committed itself to ensure that the same policy would be followed also by all the other brands of the Volkswagen group.

Conclusion

One of the main objective of the AUDI case was to provide guidance for other motor vehicle manufacturers in similar circumstances with regard to their after-sales servicing networks ([2]).

Any vehicle manufacturer which operates a network of service outlets and which has a market share of over 30% for the relevant repair and maintenance services will thus not be able to benefit from the transitional period provided for by the new BER with regard to its servicing agreements. Consequently, such a manufacturer must already now establish a qualitative selective distribution system for its network of authorised repairers.

In contrast, in order to benefit from the block exemption, a manufacturer with a market share of over 30% on the relevant market for after-sales service which does not operate a network of service outlets outside of its dealer network and whose dealer network complies in all respects with the old motor vehicle BER will have to apply qualitative selection in respect of after-sales service after the end of the transitional period on 30 September 2003 at the latest.

The AUDI case shows the determination of the Commission to react quickly and decisively, not least during the transitional period, in order to ensure a correct implementation of the new competition rules in the motor vehicle sector.

([1]) See also the answer to question 22 in the Explanatory Brochure on Regulation No 1400/2002. This question asks whether the rights of a dealer over a certain territory may call into question the appointment of a candidate authorised repairer for the same brand during the transitional period. It addresses a scenario where all distribution agreements of a manufacturer are covered by the transitional period and where no parallel 'repair-only' network exists. The candidate repairer cannot argue that such a stipulation of territorial exclusivity infringes Article 81 until the end of the transitional period on 1 October 2003. For general commentary (situation before the AUDI case), see also Roniger/Hemetsberger, KFZ-Vertrieb neu (Wien 2003), p. 209.

([2]) To this end, the Commission issued Press Release IP/03/80 of 20 January 2003. In the other cases, a similar settlement could be reached in one of them and the procedure for rejecting the complaint was launched in another. A third case is still open. See also Mario Monti, The new legal framework for car distribution, speech at the Ninth Annual European Automotive Conference: Car retailing at a crossroads, Brussels, 6 February 2003.

La Commission impose une amende à six fédérations françaises pour une entente dans le secteur de la viande bovine

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Le 2 avril 2003, la Commission a infligé des amendes d'un montant total de 16,68 millions d'euros à six fédérations professionnelles françaises du secteur de la viande bovine, quatre représentant les éleveurs (dont la Fédération Nationale des Syndicats d'Exploitants Agricoles, principale fédération agricole française) et deux représentant les abatteurs. Ces amendes viennent sanctionner la conclusion d'un accord écrit le 24 octobre 2001, qui s'est poursuivi oralement à partir de fin novembre – début décembre 2001.

Procédure

Informée de la signature de l'accord du 24 octobre 2001, la Commission a adressé, début novembre 2001, des demandes de renseignement aux 5 des 6 fédérations dont elle avait alors connaissance. Le 25 novembre 2001, elle a adressé des lettres d'avertissement aux six parties. Toutes y ont répondu en soulignant que, d'une part, l'accord avait déjà été dénoncé par une des parties à la suite des demandes de renseignement, d'autre part, que l'accord ne serait pas prorogé. Compte tenu d'informations indiquant que, en fait, l'accord se poursuivait en secret, des inspections ont eu lieu, à la mi-décembre 2001, au siège de trois des fédérations qui apparaissaient les plus impliquées. Elles ont confirmé les soupçons de la Commission.

Contenu de l'accord

L'accord écrit du 24 octobre 2001 est intervenu après plusieurs semaines de manifestations d'éleveurs ayant entraîné un blocage des abattoirs sur une grande partie du territoire français. Il prévoit que, en contrepartie du déblocage des abattoirs, les abatteurs s'engagent vis-à-vis des éleveurs, du 29 octobre 2001 au 30 novembre 2001, à:

— suspendre provisoirement l'importation de viandes bovines. Par un accord supplémentaire du 31 octobre 2001, cet engagement a été atténué; il n'est plus fait référence qu'à la «solidarité» des «importateurs et exportateurs», ce qui se comprend, dans le contexte, comme un engagement de limitation des importations;

— appliquer aux vaches dites «de réforme» (vaches laitières ou allaitantes destinées à l'abattage) les prix d'achat minima fixés dans un tableau faisant partie intégrante de l'accord.

À la lumière, notamment, des pièces trouvées lors des inspections, il apparaît que les parties à l'accord ont décidé de le renouveler verbalement et en secret fin novembre et début décembre 2001, contrairement aux garanties écrites données à la Commission. Ces pièces montrent également que les parties connaissaient parfaitement le caractère illégal de l'accord qu'elles concluaient.

Appréciation juridique

Article 81

Les fédérations d'éleveurs et d'abatteurs sont des associations d'entreprises (ou des associations d'associations d'entreprises, dans le cas des fédérations agricoles). Ces fédérations syndicales sortent des limites de leur mission légitime lorsqu'elles prêtent leur concours à la conclusion et à la mise en œuvre d'accords méconnaissant les règles d'ordre public, telles que les règles de concurrence.

L'engagement écrit du 24 octobre 2001 constitue un accord. En outre, les discussions entre les fédérations qui ont eu lieu les 29 novembre et 5 décembre 2001 attestent de l'existence d'un accord oral semblable à l'accord écrit initial. Le fait que les abatteurs ont accepté l'engagement sous la contrainte de la violence physique des éleveurs n'exclut pas la qualification d'accord au sens de l'article 81 mais constitue une circonstance atténuante dans le calcul des amendes. Par ailleurs, même si le ministre français a publiquement encouragé la conclusion de l'accord écrit du 24 octobre 2001 et s'est publiquement félicité de sa signature, ceci ne suffit pas à écarter l'application de l'article 81 aux comportements des six fédérations. En effet, le rôle du ministre a été celui de l'incitation, et non du cadre juridique contraignant ne laissant aucune marge de manœuvre aux parties.

La fixation en commun de prix minimum, d'une part, la suspension ou la limitation des importations, d'autre part, sont des restrictions de concur-

rence par objet, énumérées à l'article 81 du traité. Le dossier comporte de nombreuses preuves de la mise en œuvre de ces deux infractions. Par ailleurs, l'accord est susceptible d'affecter sensiblement le commerce entre États membres. Les échanges intracommunautaires, de France et vers la France en particulier, sont en effet significatifs.

Règlement 26/62 du Conseil

L'article 2 de ce règlement prévoit trois exceptions aux règles de la concurrence au bénéfice du secteur agricole. En l'espèce, est seule en cause l'exception au profit des accords «nécessaires à la réalisation des objectifs de la Politique agricole commune» (PAC) énumérés à l'article 33 du traité. Toutefois, elle ne s'applique pas en l'espèce, pour les raisons suivantes: (i) une exception doit être d'interprétation restrictive; (ii) l'accord litigieux est manifestement étranger à la réalisation de 4 des 5 objectifs de la PAC; or, l'exception ne peut s'appliquer que si l'accord remplit tous ces objectifs cumulativement ou, si ces objectifs s'avèrent divergents, que si la Commission est en mesure de les concilier. En l'espèce, la mise en balance des objectifs amène à écarter l'application de la dérogation; (iii) l'organisation commune des marchés (OCM) de la viande bovine est précisément destinée à assurer la réalisation des objectifs de la PAC. Or, l'accord ne fait pas partie des instruments prévus par l'OCM; (iv) en toute hypothèse, les objectifs de la PAC pourraient être atteints par des accords moins restrictifs de concurrence. L'accord litigieux apparaît ainsi disproportionné.

Amendes

L'infraction est qualifiée de très grave, compte tenu de sa nature (entente de prix et suspension ou limitation des importations) et de son étendue géographique (la France est un des principaux marchés de viande bovine et l'accord dépasse ce seul marché du fait de son volet relatif aux importations). La durée est en revanche très brève (24 octobre 2001/11 janvier 2002).

Sont considérés comme circonstances aggravantes les trois éléments suivants, pour toutes ou certaines des fédérations selon le cas: (i) les actes de violence physique des agriculteurs en vue d'obtenir la conclusion de l'accord et de vérifier son application; (ii) la poursuite de l'accord en secret fin novembre et début décembre 2001, alors que les parties avaient reçu une lettre d'avertissement de la Commission et assuré que l'accord ne serait pas prorogé; (iii) enfin, une des fédérations agricoles, propre au secteur bovin, a été l'initiatrice de l'infraction.

Sont considérés comme circonstances atténuantes les trois éléments suivants, pour toutes ou certaines des fédérations selon le cas: (i) l'intervention publique du ministre de l'agriculture en faveur de la conclusion de l'accord du 24 octobre 2001, même si cette intervention est le résultat de plusieurs semaines de manifestations violentes d'agriculteurs; (ii) la contrainte physique dont les fédérations d'abatteurs ont été victimes de la part des agriculteurs; (iii) le rôle passif d'une des fédérations agricoles.

Enfin, au titre du point 5, sous b), des lignes directrices pour le calcul des amendes, le montant des amendes ainsi calculé est substantiellement réduit afin de tenir compte du contexte économique spécifique lié à la crise de la «vache folle», qui a secoué le monde agricole et affecté les comportements des consommateurs.

European Commission opens up Interbrew's Belgian horeca outlets to competing beer brands ([1])

Karin ATSMA, Directorate-General Competition, unit F-3

On 15 April 2003, the European Commission approved the amended supply agreements between Interbrew, the largest brewer in Belgium, and pubs, restaurants or hotels (horeca-outlets) located on the Belgian market. The Commission had required Interbrew to amend these agreements in order to offer some real possibilities for its competitors to enter its horeca outlets.

I. Competition policy context

Interbrew is the largest Belgian brewer and holds an overall market share of roughly 56% of the Belgian horeca sector. Due to this market share, it is the only Belgian brewer whose exclusivity agreements are clearly not covered by the Block Exemption Regulation on Vertical Agreements. ([2]) This Block Exemption Regulation allows a brewer with a market share not exceeding 30% to oblige horeca outlets to buy all their beer from it in exchange for a five year loan or for as long as they would lease or sub-lease the premises from it.

In the past, Interbrew had the right – like any other brewer – to tie horeca outlets without much legal constraint. Indeed the previous Block Exemption Regulation provided in practice a safe haven even for brewers with very substantial market shares. ([3]) In view of the changed situation, Interbrew notified its brewery contracts and offered some amendments. The Commission found these amendments insufficient and it therefore required additional concessions from Interbrew. Following the publication on 20 November 2002 of a 19(3) notice ([4]), in which the amendments by Interbrew until that moment were described at length, the Commission received comments from several stakeholders. These comments led to other lengthy discussions and one additional concession by Interbrew on lease and sublease ties, which will be described below. With this last concession the Commission is now satisfied that the amended brewery contracts no longer restrict competition in an appreciable manner.

II. Amended agreements

In Belgium, there are close to 50,000 horeca outlets. Over 10,000 of these outlets have concluded a supply contract directly with Interbrew. All these contracts initially contained a clause forcing them to serve exclusively Interbrew's beers. Interbrew has now agreed to give these outlets – what the Commission considers to be – a real opportunity to serve also beers from its competitors. The amendments to the contracts will give the horeca outlets the following possibilities.

a) Loan agreements

Under the so-called *loan agreements*, most of which have a maximum duration of five years, Interbrew provides independent horeca-outlets with a loan, a bank guarantee or valuable material (e.g. cooling installations). The more than 7000 outlets which have so far been entirely tied to Interbrew under a loan agreement will now be able to buy from Interbrew's competitors a) *any draught beer other than pils* and b) *any beer (including pils) in bottles or cans*.

In other words, the Commission accepts that in return for a loan, the horeca-outlets commit themselves to purchasing from Interbrew *draught pils* on an exclusive basis. This exclusivity covers the Stella, Jupiler and Safir lager brands which are served from 30 liter or 50 liter kegs. In the unlikely event that Interbrew's draught pils would account for less than 50% of the outlet's total beer throughput, the outlet has to ensure that it purchases the shortfall also from Interbrew's portfolio of brands.

This leaves the horeca outlets the freedom to buy draught beer other than pils as well as bottled or canned beer, including pils, from Interbrew's competitors.

Moreover, the outlets can now also terminate their exclusivity contract more easily. They can do so at

([1]) See also press release of 15 April 2003, IP/03/545.

([2]) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

([3]) Title II of Regulation No 1984/83.

([4]) Notice published pursuant to Article 19(3) of Regulation No 17 concerning notification COMP/A37.904/F3 – Interbrew, OJ C 283, 20.11.2002, p. 14.

any time prior to normal termination after five years, provided they give Interbrew a three months' notice. If the outlets do so, they (or the competing brewer from whom they intend to buy in future) must of course repay the outstanding capital of the loan or the remaining value of the material (or return this material in kind). However, in case they have to repay the outstanding capital of the loan, they do not have to pay the penalty which the lender is normally entitled to claim from them for early repayment. The possibility to terminate the contract and the conditions applicable are set out in the 'General terms and conditions of sale' which are printed on the back of every invoice.

b) Lease or sublease agreements

Under the so-called *lease or sublease agreements*, which last for at least nine years, Interbrew owns the outlet and lets it to an independent operator or it is the principal lessee of this outlet and sublets it to such an operator. The more than 3000 other outlets which are Interbrew's property or for which Interbrew is the principal lessee and which have sofar also been entirely tied to Interbrew also gain the freedom to supply some competing beer brands.

Firstly, they will be able to serve *any beer in bottles or cans* brewed by Interbrew competitors since the exclusivity in future only covers *draught beer*. Secondly, the outlet operator has the right to sell one brand of draught beer other than pils brewed by a competitor, i.e. a 'guest beer'. The Commission accepts that this 'guest beer' will be supplied by Interbrew or a wholesaler appointed by it. In order to verify whether the 'guest beer' clause has given competing brewers a real entry into Interbrew's lease and sublease outlets, the Commission will review the impact of the clause after one year of operation.

The 'guest beer' clause was introduced as a result of the comments received from stakeholders. The amended agreement as described in the 19(3) notice contained a exclusivity clause applicable to *all types of beer* brewed by Interbrew under its own brand or under a licence agreement. The Commission realised after several comments concerning this issue, that the implementation of this exclusivity clause for *all types of beer* would lead to indistinctness. Brewers who wanted access to an Interbrew horeca outlet, would every time have to offer convincing proof that their draught beer is of another type than the one brewed by Interbrew. This would create a constant battle because the term 'type' is open to interpretation.

The 'guest beer' clause resolves this situation as it gives clarity for all parties concerned and it offers real opportunities for competing brewers to enter Interbrew's outlets. It is important to note that with this final amendment Interbrew is not able to invoke its exclusivity for draught beer against this 'guest beer' on the ground that the latter is a type of beer (e.g. white beer, amber beer, etc.) already brewed by itself.

III. Commission's approval

The Commission has informed Interbrew (by means of a negative clearance comfort letter) that its amended agreements no longer lead to an appreciable restriction of competition. Interbrew has committed itself to implement the amended agreements within two months after the Commission's approval.

IV. Contacts with National Competition Authorities

It is worth mentioning that in the course of the proceedings of this case, the Commission has worked closely with two national authorities. First, the Netherlands competition authority (NMa) has sought guidance from the Commission in the context of its handling of brewery contracts notified by Heineken, the leading Dutch brewer with a market share also exceeding 30%. The NMa approved Heineken's amended brewery contracts on 29 May 2002 broadly following the line applied by the Commission in the underlying case. Second, the Belgian authority has participated in meetings between the Commission and Interbrew.

This is an example of the fruits borne by intensified contacts with NCAs, a phenomenon that should be even more frequent in the future through the European Competition Network (ECN).

Vertical and horizontal restraints in the European gas sector – lessons learnt from the DONG/DUC case

Dominik SCHNICHELS and Fabien VALLI, Directorate-General Competition, unit E-4

1. Introduction

On 23 April 2003 the Commission services closed their investigation into the DONG/DUC case relating to the Danish gas market ([1]). This case as well as some other cases recently concluded ([2]) demonstrate the way in which the European Commission applies its competition policy in the European gas sector. All cases complement the liberalisation process in the energy sector promoted by the European Commission ([3]).

This article provides an overview over the essential findings of the Commission services in the DONG/DUC case, which relates to joint marketing activities of gas producers as well as certain restrictive provisions contained in the gas supply contracts concluded between these gas producers and the Danish incumbent company DONG.

This article also summarises the experiences gained in the other recent cases relating to the European gas sector ([4]). In this respect it appears appropriate to distinguish between vertical and horizontal restraints. Vertical restraints are those found in vertical supply relationships, e.g. between gas producers and European wholesalers. Horizontal restraints on the other hand relate to the relationship between companies acting on the same level of trade, e.g. gas producers.

2. The facts of the DONG/DUC case

In the year 2000, gas produced for sale at the Danish continental shelf amounted to approximately 7 BCM. The DUC partners (Shell, AP Møller/Maersk and ChevronTexaco) accounted for 90 % of this production. The gas produced by the DUC partners is sold under three large Gas Supply Agreements (GSA 1979, GSA 1990 and GSA 1993) to the Danish incumbent gas supplier DONG. The gas consumption in Denmark was approximately 4 BCM in 2000, the remaining volumes were exported by DONG to Sweden and Germany.

The Gas Supply Agreements between the DUC partners and DONG were negotiated jointly by the DUC partners and DONG, but subsequently entered into separately by each of the DUC partners and DONG. The contracts contain provisions, by means of which the DUC partners grant DONG certain priority rights when it comes to the sale of 'additional' (newly discovered) gas volumes. The contracts also introduced price formulas depending on the customer to whom DONG resells the gas. Finally the contracts contain a mechanism, which was interpreted as providing a right to ask inter alia for adjustments to the gas volumes purchased from the DUC partners, if the DUC partners start selling into Denmark.

3. Horizontal restraints

The first aspect addressed in the DONG/DUC case was that of joint marketing by the gas producers. The DUC partners had negotiated their Gas Supply Agreements with DONG jointly and only when it came to the conclusion of the contracts had entered into separate contracts. In this respect the Commission services took the view that the joint marketing activities reduce the possibilities of customers to choose between suppliers/producers and thus appreciably restrict competition contrary to Article 81 (1) EC. The Commission services also argued that joint marketing does not improve the production or distribution of goods within the

([1]) IP/03/566.

([2]) IP/02/1084 of 17 July 2002 – GFU; IP/02/1293 of 12 September 2003 – EdF Trading/WINGAS and IP/02/1869 of 12 December 2002 – Nigeria LNG.

([3]) Cf *Proposal for a Directive amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal markets in electricity and natural gas* of 13 March 2001 (http://europa.eu.int/comm/energy/en/internal-market/int-market.html) and *Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC* of 29 January 2003 (http://register.consilium.eu.int).

([4]) This article does not cover cases relating to access to pipelines etc. In this respect reference is however made to the recent settlement of the Marathon case with the Dutch company Gasunie, IP/03/547 of 16 April 2003.

meaning of Article 81 (3) EC and can therefore not be exempted.

The DUC partners claimed however, inter alia, that their joint marketing activities were covered by 'Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of specialisation agreements' ([1]) (Specialisation Block Exemption). Article 3 (b) of this Regulation does allow – under certain circumstances – for 'joint distribution' of goods produced jointly.

The Commission services did not agree with this reasoning. The joint marketing of the DUC parties provided for 'joint co-ordination of sales' between independent operators as opposed to 'joint distribution' under the Specialisation Block Exemption. In addition the Commission services drew the attention of the parties to the 8th recital of the Specialisation Block Exemption, which sets out that one of the effects of specialisation should be that 'the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply'. According to the Commission services this will hardly ever be the case for the forms of joint production of gas as known today.

Whilst reserving their legal position the DUC partners agreed to discontinue joint marketing activities for un-contracted gas produced on the Danish continental shelf. They agreed in particular to market all new gas individually in future. They also undertook to individually carry out negotiations concerning existing contracts when prices are renegotiated. Finally they promised to offer for sale 7 billion cubic meters of gas to interested third parties. Taking into account that DONG promised not to buy these volumes, the Commission services agreed to close their investigation relating to the joint marketing of gas in the past.

The DONG/DUC case follows the example set in the GFU case of last year ([2]). In this case the Norwegian gas producers had committed to discontinue their joint marketing activities relating to all gas produced in Norway. The DONG/DUC case confirms the Commission's reasoning in the GFU case (i.e. the need for individual marketing) and develops it further as the Danish case no longer relates to all gas produced in one country, but only to gas produced in one or more gas fields ([3]). The case thus shows that joint marketing activities of gas producers will – under normal circumstances – not be accepted by the Commission as these joint activities limit the consumers' choice to negotiate with different supplier.

4. Vertical restraints

Apart from the horizontal aspects, the DONG/DUC case also raised a number of issues relating to the supply relationship between the DUC partners and DONG (vertical restraints) ([4]). In this respect it appears possible to distinguish between a) restraints imposed on the DUC partners in their function as suppliers (here in form of a 'reduction clause') and b) restraints imposed on DONG in its function as buyer/customer (here in form of a use restriction) ([5]). Taking into account that the Commission recently concluded some other cases relating to similar issues, the subsequent chapters also make reference to these cases.

a) Reduction clauses

The gas supply agreement between the DUC partners and DONG of 1993 contained a so called 'necessary adjustment mechanism'. This clause was interpreted as providing that the DUC partners and DONG have to agree on adjustments to the gas supply agreements, e.g. the take-or-pay obligations of DONG, if the DUC partners start selling gas into Denmark. The mechanism is seen by the Commission services to have the same effect as the so called 'reduction clause', identified in an earlier case as potentially anti-competitive ([6]).

In the course of the settlement discussions it was argued that the adjustment mechanism (i.e. the reduction clause) is necessary to counterbalance

([1]) OJ L 304, 5.12.2000, p. 3. It should be noted that the predecessors of Regulation 2658/2000 (Regulation 417/85 as amended by Regulation 151/93 on specialisation agreements) did not apply due to the turnover threshold mentioned in Article 3 (1) (b) of the Regulation.

([2]) IP/02/1084 of 17 July 2002 – GFU, cf. also Lindroos/Schnichels/Svane, Liberalisation of European Gas Markets – Commission settles GFU case with Norwegian gas producers; Competition Policy Newsletter 2000, 3rd edition, p. 50 et subseq.

([3]) CF. in this sense also IP/01/578 of 20 April 2001 – Corrib, Report on Competition Policy 2001, p. 206.

([4]) In this respect it should be noted that the DUC partners and DONG are potential competitors for certain gas customers leading to the conclusion that their vertical supply relationship also had horizontal effects.

([5]) The investigation also confirmed that DONG enjoyed certain priority rights when the DUC partners had additional gas to offer. For the purpose of this article is was deemed appropriate not to deal with this issue in detail. For further information reference is made to the press release.

([6]) IP/02/1293 of 12 September 2002 – EdF Trading/WINGAS, cf. also forthcoming Report on Competition Policy 2002.

the 'take-or-pay' ([1]) obligations imposed on the buyer. Otherwise, the producer/seller could sell its gas twice, once to the buyer (even if not taken) and once again to former customers of the buyer. It was argued that the elimination of the adjustment mechanism would undermine the commercial equilibrium of the contracts, even after new gas pipelines to neighbouring countries are commissioned providing for new – however commercially less attractive – marketing outlets.

The Commission services did not agree with this reasoning. They argued that reduction clauses have similar effects as exclusivity clauses – from which they usually derive –, namely to prevent the supplier (here the DUC partners) from entering the downstream markets or at least rendering the supplier's direct sales on that market less attractive. This could not be accepted as the buyer (here DONG) holds a dominant position on the Danish markets concerned. The Commission services maintained in particular that in the post liberalisation period a protection of the home markets is no longer warranted when new pipelines linking Denmark with other continental European markets are commissioned.

The solution agreed upon between the Commission services and DONG consists in the elimination of the adjustment mechanism. DONG – whilst maintaining its legal position – clarified in the first place that it will not invoke the adjustment mechanism for gas originating from sources other than the DUC gas fields. Thus gas imports from Germany are allowed without the possibility to invoke the clause. DONG also committed to waive the adjustment mechanism once a new pipeline is commissioned linking the gas fields on the Danish continental shelf with other continental European countries ([2]). In this respect the Commission services accepted a six months transitional period. Thus the DUC partners will be free to sell DUC gas into the Danish market six months after the commissioning of this new pipeline without the possibility that the adjustment mechanism can be invoked.

The solution found in the DONG/DUC case confirms the earlier case EdF Trading/WINGAS and develops the Commission's practice further. The German gas company WINGAS had agreed not to invoke the reduction clause in its supply contracts with EdF Trading in so far as this company sells gas to other wholesalers in Germany ([3]). The elimination of the adjustment mechanism in the DONG/DUC case also concerns sales to customers other than wholesalers, i.e. most prominently industrial users.

b) Use restrictions

Another important aspect of the DONG/DUC case relates to a specific form of a use restriction identified in the gas supply agreements between the DUC partners and DONG. The contracts provided that DONG had to report to the DUC partners the volumes sold to certain customer groups in order to benefit from special price formulas for these customers.

The Commission services argued that these reporting obligations amount to a 'use restriction', as DONG is not free to sell the gas to whichever customer without losing the benefit of the specific price formula. In this respect the Commission services explained that use restrictions are hard-core restrictions in as far as they relate to the territory into which, or the customers to whom the buyer may sell the contractual goods or services ([4]). Applied to gas sales, they lead to market partitioning, which is incompatible with EC competition law and the creation of a common gas market.

Reserving their legal position, the DUC partners and DONG agreed to amend their supply contracts also in this regard. The Commission services welcomed this decision as it will allow DONG to sell the gas wherever and to whomever it deems appropriate, and in particular without informing the DUC partners about any of these sales.

The solution agreed upon in the DONG/DUC case presents some similarities with the solution found in the case relating to the Nigerian gas company NLNG ([5]). In this case the Commission services had established that NLNG had entered into a gas supply contract with a European customer containing a territorial restriction clause. Thus the customer was prevented from reselling the gas outside a certain territory (here a Member State).

([1]) Take-or-pay obligation means that DONG has to pay for a defined quantity of gas even if not taken. Generally the take-or-pay obligation do not relate to the full annual gas quantity that could be delivered, but only to a large part thereof.

([2]) The construction of such a new pipeline is planned. It is envisaged that the pipeline is commissioned not later than 1 January 2005.

([3]) IP/02/1293 of 12 September 2002 – EdF Trading/WINGAS, cf. also forthcoming Report on Competition Policy 2002.

([4]) Cf. also Commission notice 'Guidelines on Vertical Restraints', OJ C 291, 13.10.2000, p. 1 (recital 49).

([5]) IP/02/1869 of 12 December 2002 – Nigeria LNG.

This case could be closed after NLNG had deleted the contested clause from the supply contract and had committed not to introduce territorial sales restrictions and use restrictions into its future gas supply agreements relating to the European Community. NLNG also confirmed that it will not introduce so called 'profit-splitting mechanisms' into its future gas supply contracts. Such clauses foresee that the customer has to pass over a certain part of its profit to the supplier, if it sells the goods outside an agreed territory or to customers using the gas for other purposes. In this respect the Commission services take the view that profit-splitting mechanism are incompatible with European competition law as they have similar effects as territorial sales restrictions and use restrictions ([1]).

5. Conclusion

The settlement reached in the DONG/DUC case contains important clarifications for the application of EC competition law in the European gas sector. It confirms again that joint marketing of gas by gas producers is under normal circumstances no longer acceptable in the liberalised gas markets.

It also develops the Commission's practice as regards vertical restraints in the gas sector and clarifies that reduction clauses and use restrictions (here in form of reporting obligations) are no longer tolerable in a liberalised gas environment.

The case is thus a good example of how competition cases can contribute to the liberalisation process of the European energy markets.

([1]) Cf. also Commission notice 'Guidelines on Vertical Restraints', OJ C 291, 13.10.2000, p. 1 (recital 49).

Aviation sector

Commission approves partnership between British Airways and SN Brussels Airlines

Christine TOMBOY, Directorate-General Competition, unit D-2

Procedure

On 25 July 2002, British Airways (BA) and SN Brussels Airlines (SN) notified to the Commission a number of co-operation agreements requesting an exemption under Article 81 (3) of the Treaty.

These agreements were notified under Regulation 3975/87, which provides that if the Commission does not object within 90 days of publication of a summary of the agreement in the Official Journal, the deal is automatically exempted for a maximum period of six years. The summary was published on 10 December 2002 ([1]) and the 90-day period expired on 10 March 2003 without the Commission having raised serious doubts.

A summary of the Commission assessment is available on the DG Competition website, together with the undertakings submitted by the parties.

Substance

The alliance agreements aim at enabling the parties to co-operate across their respective networks in terms of pricing, scheduling and capacity.

The Commission's analysis has shown that their networks are largely complementary and that their co-operation will bring benefits for consumers. In particular, the agreement will allow SN's passengers to have access to a long-haul network, while BA's passengers will benefit from an easier access to SN's African destinations.

The Commission however had to ensure that the alliance would not result in the elimination of competition on certain routes. The Commission concerns were focused on two of the routes where both parties operated direct services before the alliance, i.e. Brussels-London and Brussels-Manchester.

- The Commission came to the conclusion that the alliance will have an appreciable impact on Brussels-London but that it will not eliminate competition on the route as BA and SN will continue facing bmi and Eurostar, two powerful competitors. bmi operates seven daily frequencies from London Heathrow and is member of the STAR alliance. Eurostar operates eight daily frequencies between Brussels and London Waterloo and is a competitive alternative for both business and leisure passengers. The Commission also considered that the five daily frequencies on weekdays operated by VLM – in codeshare with Virgin Express as from 30 March 2003 – between Brussels-National and London-City are also likely to exercise a competitive constraint on the parties.

- Brussels-Manchester is the route where the alliance has the most restrictive effect as the parties' cumulated market share is close to 100%. Furthermore, there are capacity constraints at Brussels National airport at peak-time periods, which could prejudice a new entrant's ability to enter this market.

In order to remedy the concerns raised by the Commission during the initial review, the parties undertook to release enough landing and take-off slots at Brussels National for a new entrant to operate three daily services to Manchester, in case these slots would not be available through the normal slot allocation procedure. The set of commitments submitted by the parties is available on the DG Competition website.

([1]) OJ C 306, 10.12.2002.

Commission closes probe into major EU airlines' incentive schemes for travel agents

Christine TOMBOY and Oliver STEHMANN, Directorate-General Competition, unit D-2

The Commission has recently closed its investigations into the incentive schemes for travel agents operated by several EU airlines. It had to ascertain that these incentive schemes were not used by dominant carriers to remunerate travel agents for their loyalty, thereby creating illegal barriers to entry for their competitors. In several cases the Commission's investigation has triggered an in-depth reform or even a complete replacement of existing incentive schemes with a view to bringing them into conformity with EU competition rules.

The first case the Commission had to deal with arose from a complaint from Virgin against British Airways' system of commissions for UK travel agents. Acting upon this complaint, the Commission investigated BA's incentive schemes. This investigation resulted in the adoption, on 14 July 1999, of a decision with fines finding that the incentive schemes BA had operated for UK travel agents were in breach of Article 82 of the Treaty. ([1]) Subsequently, BA adopted a new scheme consisting of two main elements, a flat rate booking fee and sales and marketing agreements that reward travel agents for meeting certain quality targets. Nevertheless, BA appealed against the decision before the Court of First Instance and the case is still pending.

Following the Virgin-BA decision, the Commission took the necessary measures to ensure that the principles set out in the decision be applied to other EU airlines in equivalent situations.

1. The Virgin-BA decision (14 July 1999)

In its decision, the Commission found that BA was a dominant purchaser of air travel agency services in the UK. It considered that BA had abused its dominant position on this market by applying loyalty discounts and by discriminating between travel agents:

- it is well established Community law ([2]) that loyalty discounts, i.e. discounts based not on cost savings but on loyalty, constitute an exclusionary abuse of a dominant position. The extra-commissions paid by BA to travel agents were of that type as they were dependent upon the travel agents meeting or exceeding their previous year's sales of BA's tickets. In order to qualify for the payment of an extra-commission, travel agents were forced to increase their sales of BA's tickets year after year.
- under Article 82 of the Treaty, applying dissimilar conditions to equivalent transactions with other trading parties constitutes an abuse of a dominant position. Under BA's incentive schemes, two travel agents handling the same number of BA tickets and providing the same level of service to BA received a different commission rate if their sales of BA tickets were different in the previous year. BA was consequently found to have abused its dominant position by discriminating between travel agents.

In order to provide guidance for any other airline in a similar situation, the Commission set out, on the occasion of the Virgin-BA decision, a number of principles concerning travel agency commissions. ([3]) The Commission also took the necessary measures to ensure that the above-mentioned principles be applied to other EU airlines in equivalent situations.

2. Investigations into other EU carriers' incentive schemes for travel agents

Complaints

In the context of the Commission investigation into its incentive schemes for UK travel agents, BA lodged complaints against eight other EU carriers ([4]), claiming that their incentive agreements included features to which the Commission objected in BA's case. In addition to its investigations into the complaints lodged by BA, the

([1]) Commission decision 2000/74/EC of 14 July 1999, Virgin/British Airways, OJ L 30, 4.2.2000, p. 1-24.

([2]) See e.g. case 322/81 Michelin [1983] ECR 3461; case 85/76 Hoffmann-La Roche [1979], ECR 541.

([3]) See Annex to Press Release IP IP/99/504 of 14 July 1999.

Commission opened three ex-officio procedures. ([1]) The Commission investigated all of the various incentive schemes operated by these carriers.

In some instances, it was not necessary for the Commission to undertake an in-depth investigation because

- the airline concerned put an end to all its incentive schemes (Sabena before its bankruptcy);
- the national competition authority was dealing with the case (the Italian Competition Authority ruled that the incentive schemes operated by Alitalia were contrary to Article 82, applying the same principles as the Commission in the Virgin-BA decision);
- the airline concerned was clearly not dominant on the relevant market (Olympic Airways in Greece).

In other instances, the Commission closely analysed the incentive schemes in force and urged the airlines concerned to make changes that were sometimes substantial.

- In the case of KLM and SAS ([2]), the Commission took the view that the new schemes implemented in 2000 and which remunerated specific service-elements rendered to these airlines did not raise concerns under Article 82.
- Air France undertook a gradual reform of its incentive schemes to travel agents in 1999. In 2002, only a minority of travel agents still received extra-commission payments presenting 'loyalty' features, as were prohibited in the Virgin-BA decision. In June 2002, Air France reached an agreement with the travel agents' representatives (the SNAV). It results from this agreement that extra-commissions payments are made exclusively on the basis of quality-only targets since January 2003.
- At the end of 2001, Lufthansa abolished in its entirety its previous remuneration scheme, in particular the 'Partner Plus' program under which travel agents received a basic commission supplemented by an additional incentive payment 'Partner Plus'. This was then replaced by a new remuneration scheme based on a uniform system of a standard commission on Lufthansa sales. This basic remuneration scheme, which applies to all travel agencies, is based on a flat rate for flights within Europe and another rate for international flights. Lufthansa provides additional remuneration to agents with large sales volumes ("special agents"). The actual commission offered is based on the cost savings which arise for Lufthansa when dealing with the agent and on the value of specific services provided by the agent. The special value of such services arises from an agent's dealings with corporate customers, specific promotional efforts, and the geographic scope of activities. Such agents have to meet certain volume thresholds and make certain commitments to marketing co-operation with Lufthansa.

  The Commission analysed in detail the additional commission paid to special agents and requested Lufthansa to make a number of changes to ensure that the system be in conformity with Article 82. Adaptations were made, for instance, to ensure that past sales and growth in revenue with regards to the previous year's turnover do not play a role. The reference period for commission targets was reduced from an annual basis to a 6-month period. Safeguards have been built into the system to ensure that there is no discrimination between special agents. Thirdly, to avoid any fidelity element, any review of the thresholds will be done in a non-individualised and objective manner based on generally applicable criteria.
- As a result of the Commission's investigation, Austrian Airlines (AuA) also replaced completely its incentive scheme. Under the new system, as introduced on 1 January 2001, AuA pays travel agencies a flat fee (base commission) which applies to all travel agencies and a Bonus provision offered for all fare types with a 6-month contract period. The Bonus provision is subject to the same terms and conditions for all contracts and all agencies which sell above a single specific threshold qualify for this higher fee. The Bonus is only available to agencies which sell a large quantity of tickets and is not related to growth performance in relation to previous sales. As a consequence, the Commission considered that this new scheme was in conformity with Article 82.

As a result, between June and December 2002, the Commission could inform BA ([3]) that it considers

([4]) Sabena, Alitalia, Olympic Airways, Lufthansa, Air France, Austrian Airlines, KLM and SAS.

([1]) Against Iberia, Aer Lingus and TAP

([2]) Since 1 January 2003 SAS has implemented a new incentive scheme that has not yet been reviewed by the Commission.

([3]) By letters pursuant to Article 6 of Regulation 2842/98 (OJ L 354, 30.12.1998, p. 18-21).

the individual incentive schemes operated by the airlines referred to above to be compatible with Article 82. As BA did not submit further observations, the Commission subsequently closed these investigations.

Ex-officio investigations

The Commission closed its investigation into Iberia's incentive schemes following a decision taken by the Spanish Competition Authority in 2002. The Spanish Competition Authority found that Iberia applied the same type of incentive that was deemed illegal in Virgin/BA. It imposed a fine on the airline and ordered it to cease applying the system.

By contrast, the incentive schemes operated by Aer Lingus were found to be compatible with Article 82 and the Commission consequently closed the case. The procedure against TAP is still ongoing but the Commission expects to come to a conclusion shortly.

Study of past merger remedies

Alexander KOPKE, Directorate-General Competition, unit B-5

In the 12 years from 1991 to 2002, some 159 merger cases were cleared following commitments by the notifying parties to modify the transactions and thus remove the competition concerns identified by the Commission (so-called remedies). In spring 2002, the Directorate General for Competition started an assessment of its past remedies in merger cases with the objective of systematically analysing the effectiveness of its policy and practices. A similar exercise was carried out by the US Federal Trade Commission (US FTC) leading to its 1999 publication of the: 'Study of the Commission's Divestiture Process'. ([1])

DG Competition's Study of Past Merger Remedies started with an overview analysis of all remedy cases and is currently at the stage where case handlers of the Merger Task Force are carrying out interviews in some 40 cases where the remedies have been implemented. The case handlers are talking to the people and companies directly involved in the transaction at the time, i.e. the buyers of assets or businesses, the sellers, the monitoring trustees and also, where appropriate, third parties such as competitors, customers, and suppliers.

In these interviews, the Remedy Study team collects the experience of the involved practitioners on all matters relevant to the remedy, including the market context at the time, the process of negotiations between buyers and sellers, the transfer of the business and the operation of the assets after the transfer, the role of particular elements in the text of the commitment ([2]), and the developments of markets after the concentration. Ultimately, and beyond merely the implementation of the commitments, these interviews should help enhance the Commission's understanding of the effectiveness of a commitment to remedy the competition concerns identified by the Commission's services. The term effectiveness of a remedy thus relates also to its competitive outcome. The cases and remedies studied will comprise divestments of stand-alone businesses and other structural remedies and also issues of granting of licenses or access rights and other types of commitments.

Interviews have been carried out in cases completed in the years 1998, 1999 and 2000. Companies co-operate on an entirely voluntary basis. So far they have been very forthcoming in sharing their experience with the Commission. The study team aims to develop a comprehensive view of the cases and remedies and thus welcomes the views of all those involved.

Commissioner Monti has underlined in his speeches to the business and legal community that this study presents a unique opportunity to make their views known outside of the formal merger procedures and thus contribute to the development of the Commission's policy and practice. Interviews are scheduled for the remainder of this year. It is envisaged to publish a report on the general findings of the study in the course of 2004. Companies will of course remain anonymous in the report.

The planning for further stages of the study foresees statistical evaluations of the information collected in the interviews and in-depth analyses of economic sectors involved.

([1]) http://www.ftc.gov/os/1999/9908/divestiture.pdf.

([2]) Typical elements of commitment texts are known under the terms: monitoring trustees, hold-separate clauses, the length of the periods granted, fire-sale provisions, the review clauses, up-front buyer provisions, crown-jewel provisions, provisions on the transfers of personnel, etc.

Merger Control: Main developments between 1st January 2003 and 30th April 2003

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Recent cases – Introductory remarks

Between 1 January and 30 April 2003, 67 new cases were notified to the Commission. This is less than in the previous four-month period (102) and also represents a slight decrease compared to the same period in 2002 (79). In this quarter the Commission took 74 final decisions. In total during this period the Commission cleared 71 cases in Phase 1. Of these 2 were conditional clearances pursuant to Art. 6 (2) and 33 were decisions adopted in accordance with the simplified procedure. As regards Phase II investigations three conditional clearances were also granted during this period but there were no outright prohibition decisions (pursuant to Art. 8 (3)) and no unconditional clearances (pursuant to Art. 8 (2)). In addition the Commission took six referral decisions pursuant to Article 9 of the Merger Regulation. Finally four new in-depth investigations pursuant to Art. 6(1)(c) were opened.

A – Summaries of decisions taken under Article 8 of Council Regulation (EEC) No 4064/89

Summaries of cases declared compatible with the common market under Article 8(3) of the ECMR with commitments

Siemens/Drägerwerk/JV ([1])

On 30 April 2003, the Commission approved, subject to conditions, the merger of the medical ventilators, anaesthesia delivery systems and patient monitoring businesses of Siemens AG and Drägerwerk AG, two German companies. The Commission was concerned that Siemens and Drägerwerk through their Dräger Medical joint venture would hold too high a share of the markets concerned which would have been detrimental for hospitals. But Siemens solved these concerns by offering to sell its ventilator and anaesthesia delivery business and by providing rivals with the information necessary to enable them to connect their patient monitors and clinical information systems to its equipment.

The joint venture brings together the two leading players in Europe in ventilators and it also leads to high market shares in anaesthesia delivery systems, where Dräger Medical already has a strong position in a number of EU countries. Apart from leading to high market shares, the transaction also removes a particularly close competitor, especially for ventilators, therefore significantly increasing Siemens/Dräger's market power vis à vis its customers, the hospitals.

The transaction did not present any overlaps with regard to patient monitors, because only Siemens, but not Dräger, makes them. However, monitors are closely linked to ventilators and anaesthesia equipment in hospital operating theatres and intensive care units.

The Commission's investigation, therefore, focused on the joint venture's impact in the markets for anaesthesia delivery systems, ventilators and patient monitoring devices.

The markets concerned have undergone a significant consolidation in recent years, as the main players became bigger through the acquisition of the smaller manufacturers to the extent that they can nowadays offer a wide range of medical equipment to hospitals. Whilst many hospitals welcome the increased efficiency of a "one-stop-shop" on the supply side, there are also increasing concerns that their bargaining power is declining more than is in the public's interest.

The investigation revealed serious concerns among both customers and competitors about the joint venture's strong position in ventilators and anaesthesia equipment. It also raised fears that the joint venture would give preference to Siemens' patient monitors by withholding the interface information necessary to enable competitors' monitors to be connected with the ventilators and other relevant equipment sold by the venture. This would not be in the interest of hospitals as it would reduce their choice of suppliers and lead to potentially higher prices.

([1]) Case No COMP/M.2861.

In response to the competition concerns raised by the Commission, the parties undertook to divest Siemens's Life Support Systems unit, which includes the company's world-wide anaesthesia delivery and ventilation business. This removes the horizontal overlap between the activities of Siemens and Dräger in this field and will see the emergence of a strong new competitor. Although Siemens is a smaller player in anaesthesia delivery systems than market leaders Dräger and Instrumentarium, its ventilation business is the largest or second largest competitor in most Member States.

Furthermore, Dräger Medical will provide details of the electrical and mechanical interfaces to rivals to enable their patient monitors to be interconnected with its own equipment used in operating theatres and intensive care units.

Siemens is active globally in several business areas including information and communication, automation and control, energy supply and medical equipment. Siemens' Medical Solutions division markets a wide range of devices including diagnostic imaging equipment (e.g. x-ray, ultrasound), electromedical systems (e.g. patient monitors, ventilators and anaesthetic delivery) and IT solutions for hospitals.

Drägerwerk, has three principal subsidiaries: medical technology, safety technology and aerospace. All three areas exploit Drägerwerk's know how in ventilation and oxygen delivery. Dräger Medical manufactures anaesthetic delivery systems and ventilators and distributes patient monitors sourced from third-party suppliers.

The Commission co-operated closely with the US Federal Trade Commission in this case. Siemens/Dräger have significantly lower market shares in North America than in Europe and, consequently, the US competition authorities did not challenge the transaction.

DaimlerChrysler/Deutsche Telekom/JV

On 30 April 2003 the European Commission authorised the acquisition of joint control by DaimlerChrysler AG and Deutsche Telekom AG of the newly created joint venture Toll Collect GmbH. Toll Collect will establish and operate a system for the collection of road tolls from heavy trucks in Germany which can also be used as a platform to provide telematics services. An in-depth investigation showed that the transaction would lead to a dominant position of Daimler Chrysler on the emerging market for telematics systems in Germany. DaimlerChrysler and Deutsche Telekom successfully addressed the Commission's concerns by offering a set of commitments providing for a level playing field for all competitors on the telematics market.

Beginning from the summer 2003, Germany will charge all heavy trucks a distance-based road toll the use of its motorways. The tender for the establishment and operation of a system for collecting the toll was awarded to a consortium formed by DaimlerChrysler Services, Deutsche Telekom, and the French motorway operator Cofiroute S.A. The parties set up Toll Collect GmbH to install and operate the toll collection system.

After carrying out an in-depth investigation, the Commission found that the formation of the joint venture would lead to a dominant position of DaimlerChrysler on the emerging market for telematics systems for transport and logistics businesses in Germany. Rapid growth is expected for this market. According to a recent study, the turnover in the segment for telematics systems for transport and logistics companies in Europe will increase from € 160 million in 2001 to around € 4.7 billion in 2009.

The Toll Collect onboard units, which will be installed in the trucks for the purpose of the toll collection, can also be used to offer value-added services for telematics applications. The onboard units, which incorporate a GPS ([1]) receiver and a GSM communication module, will be able to offer, without further technical adaptations, positioning and messaging services.

The Toll Collect onboard units will be available free of charge to truck owners. The Commission concluded that this makes it highly likely that truck fleet owners would not want to install a second, costly telematics unit for other services in each truck. As several hundred thousand Toll Collect onboard units will be installed, the Commission found that the Toll Collect infrastructure would become the predominant platform for telematics services in Germany.

Through its joint control of Toll Collect, DaimlerChrysler, the biggest German truck manufacturer and one of the main players in the market for transport and logistics telematics systems, would control the access of third party services providers to the Toll Collect onboard units. Toll Collect would be the gatekeeper for the provision of telematics services on this platform and DaimlerChrysler be able to control the conditions

([1]) Global Positioning System.

of competition in this market. At the same time, the emergence of a predominant standard for onboard units would cause the disappearance of suppliers of telematics systems currently on the market.

In response to the Commission's competition concerns, the parties offered the following commitments:

(1) Formation of an independent Telematics Gateway company, not controlled by the parties and operating a central interface through which telematics services can be fed into the Toll Collect system and can be provided to all trucks equipped with a Toll Collect onboard unit;

(2) Development of a GPS interface for the Toll Collect onboard unit in order to connect it with third party peripherals;

(3) The development of a toll collection module to be integrated into third party telematics devices.

The three elements of the commitments package are linked among each other. The provision of telematics services on the on-board units via the Telematics Gateway is subject to the Commission's approval. This will lead to a moratorium for the provision of these services: The Commission's approval will only be granted once the interface for third party peripherals and the toll collection module for third party telematics devices have been developed. The moratorium guarantees that Daimler Chrysler will not provide telematics services using the Toll Collect infrastructure until other providers can do so on the same basis.

The toll module for third party equipment will be developed by the parties in close co-operation with interested third parties and will enable them to manufacture their own telematics equipment with a toll function. Truck producers will be able to linefit telematics devices including a toll collection function. This will, together with the open interface for GPS that will be developed, largely limit the chances of Toll Collect becoming the dominant platform for the provision of telematics services.

Telematics services on the Toll Collect onboard units themselves can, once the other solutions are in place, be offered via a central telematics gateway operated by an independent Telematics Gateway company. This Telematics Gateway company will be neutral as it will be open to other shareholders and not be controlled by the parties. All providers of telematics services will obtain non-discriminatory access to the telematics gateway irrespective of whether or not they are shareholders of the gateway company.

The Commission believed that the commitments package would, while removing its competition concerns and creating a level playing field for all competitors, form a basis for the development of the emerging market for telematics systems and will, in particular, be in line with the interests of consumers.

B – Summaries of decisions taken under Article 6

Summaries of decisions taken under Article 6(1)(b) and 6(2) where undertakings have been given by the firms involved

Pfizer/Pharmacia

The European Commission authorised, subject to conditions, the acquisition of Pharmacia Corporation (Pharmacia) by Pfizer Inc. (Pfizer) in a deal creating the largest pharmaceutical company in the world in terms of sales and R&D spending. The two companies' activities were considered to be largely complementary. However the operation gave rise to a number of horizontal overlaps in human pharmaceuticals (including existing and pipeline products) and animal healthcare.

The approval followed an investigation into a number of treatment areas both in human pharmaceuticals and in animal healthcare, where the transaction raised serious doubts as to the compatibility with the common market. In reaction to the serious doubts raised by the Commission, the parties offered commitments to alleviate competition concerns. In the absence of such remedies, the merged entity would have been in a position to exploit its dominant positions in a number of product markets to the detriment of consumers.

The operation, as initially notified to the Commission, raised serious competition concerns in the field of human pharmaceuticals, specifically, in G4B4 Urinary Incontinence, G4B3 Erectile Dysfunction and C2A Antihypertensives (of Non-Herbal Origin) Plain, and in animal health in the market for Oral Penicillin for Companion Animals, cats and dogs. In examining pharmaceutical markets, the Commission uses the Anatomical Therapeutic Chemical classification (ATC) system, which subdivides medicines into different therapeutic classes. The ATC system is hierarchical and has 16 categories (A, B, C, D, etc.) each with up to four levels. The first level (ATC 1) is the most general and the fourth level (ATC 4) the most detailed.

In the market for G4B3 Erectile Dysfunction, Pfizer markets the blockbuster drug Viagra and commands a very strong market position – up to almost 100% – across the EEA. While no competition concerns were identified at the level of the parties' existing products, the Commission was concerned that the adding of Pharmacia's two pipeline products would have further strengthened Pfizer's existing strong market position. The Commission's concerns were further amplified by the fact that Pfizer had commenced patent litigation proceedings in the United States against a number of competitors, who are developing similar drugs to Viagra. Although Pfizer's European patent has been held invalid by the European Patent Office, Pfizer has appealed this decision. The Commission considered that broad patent coverage in the United States and the pending patent issue in Europe would create uncertainty among the competitors and could have adversely affected the development and future launch of the competing products.

On the market of G4B4 Urinary Incontinence, Pharmacia had an existing product, Detrusitol, for the treatment of over-active bladders. Detrusitol has high market shares – ranging from 40% to almost 100% – in most EU Member States. Pfizer is not active on the market but has a compound, Darifenacin, in Phase III development. In the absence of effective actual or potential competition, adding Pfizer's pipeline product to Pharmacia's existing strong market position would have lead to serious doubts in this product market.

In the market for C2A Antihypertensives (of non-herbal origin) Plain in The Netherlands, the new entity would have attained a very strong market position with a significant increment of market share. The operation would have brought the number one and two market operators together, while the remaining competitors would have been very small. The Commission considered that the transaction would give rise to serious doubts, because Pfizer had recently introduced a new patent protected version of its leading product and because it would face very limited competition from the remaining competitors.

As regards Oral Penicillin Antibiotics for Companion Animals in Germany, the parties would have achieved a very high combined market share and the transaction would have removed Pfizer's second largest competitor from the German market.

In order to remove the competition concerns, the parties proposed a set of undertakings which effectively removed these concerns: with regard to Erectile Dysfunction, the parties proposed to transfer Pharmacia's two products being developed with Nastech Pharmaceutical Company: the dopamine D2 receptor (PNU-142774E) and Apomorphine hydrochloride nasal spray, to Nastech Pharmaceutical Company Inc.. As regards the market for Urinary Incontinence, the parties proposed to divest Pfizer's Phase III compound Darifenacin world-wide. With regard to Antihypertensives (of Non-Herbal Origin Plain) in the Netherlands, the parties proposed to discontinue selling Ketensin and transfer the rights or assets to the original licensor or to third parties. Finally, with respect to animal health, the parties proposed to divest Pharmacia's product Parkemoxin in Germany.

The Commission considered that these commitments were appropriate to remedy the competition concerns. Therefore, subject to the full compliance with these commitments, the concentration was declared compatible with the common market.

Pursuant to the bilateral agreement of 1991 on antitrust co-operation between the European Commission and the United States of America, the European Commission closely co-operated with the Federal Trade Commission (FTC) in the analysis of a number of issues, notably in remedies in the areas of urinary incontinence and erectile dysfunction, where the parties committed to divestments on a world-wide basis.

Tetra Laval/Sidel II ([1])

On 13 January 2003, the Commission decided not to oppose the acquisition by Tetra Laval B.V., which belongs to the Swiss-based Tetra Laval Group, the owner of the Tetra Pak packaging businesses, of the French packaging company Sidel S.A., subject to compliance with a commitment and other obligations.

Following the annulment on 25 October 2002, by the Court of First Instance (CFI) of the Commission's decision dated 30 October 2001 prohibiting the transaction, the Commission re-commenced its examination of the proposed operation. Tetra holds a dominant position for carton packaging with an overall market share in Europe of approximately 80 percent. Sidel is the leading manufacturer of plastic PET packaging equipment and in particular stretch blow moulding (SBM) machines.

([1]) COMP/M.2416 Tetra Laval/Sidel, 13.01.2003.

The operation concerned the market for the packaging of liquid food products. There are four main packaging materials for such liquids: carton and plastic (including PET and HDPE high-density polyethylene) are two of these, the other two being cans and glass.

The Commission's investigation of the notified operation focused on addressing the various points raised in the CFI's Judgment, which required further investigation. On the basis of the CFI's ruling, the Commission had to examine the impact of the transaction on the wider SBM machines markets rather than the narrower markets for SBM machines by end-use.

However, the Commission acquired evidence about a new SBM technology called «Tetra Fast», which Tetra has been developing and of which the Commission was not aware in the previous proceedings and which was hence not analysed in the previous decision. Conventional (compressed air) stretch blow moulding involves using a compressor generating approximately 40 bar of pressure for blowing the bottle from the heated pre-form. The Tetra Fast technology, however, is based on the concept of using a hydrogen oxygen (explosive) chemical reaction to form PET bottles, instead of using compressed air, whereby the explosive process has a sterilising effect. It does not require the use of an expensive compressor and performs the high-pressure stage of the blow moulding by igniting an oxygen/hydrogen mixture causing an explosion inside the pre-form. Although the Tetra Fast technology is still being developed it has reached field-testing stage and, therefore, gave rise to serious doubts as to the creation of a dominant position on wider SBM markets. This is because, in combination with Sidel's clear technological and other advantages, it would seem to have been capable of having a decisive impact on the merged entity's future positions on the SBM markets.

However, this concern was removed by Tetra's commitment to licence its Tetra Fast technology. The Commission took note of further commitments regarding Tetra's assignment of proprietary SBM technology unrelated to 'Tetra Fast' and regarding the PET pre-forms market which Tetra undertook not to re-enter for the next five years. Evaluating the information available after the new investigation within the terms of the CFI's Judgment, the Commission could no longer conclude that the operation would create a dominant position, other than as related to the 'Tetra Fast' technology.

On 8 January 2003, the Commission lodged an appeal against the CFI's annulment of its prohibition decision of 30 October 2001 and subsequent separation decision of 30 January 2002 (IP/02/1952). The clearance decision in this case, which takes account of the Judgment of the CFI could be affected by the outcome of the Commission's appeal and an eventual re-examination of the Commission's earlier decision by the Court of Justice or the CFI, in the event that the matter would be referred back to it by the Court of Justice.

C – Summaries of referral decisions taken under Article 9 of the ECMR

Article 9 of the Merger Regulation is intended to fine-tune the effects of the turnover- based system of thresholds for establishing jurisdiction. This instrument allows the Commission, if certain conditions are fulfilled, to refer the transaction to the competent competition authority of the Member State in question. If for instance the transaction threatens to create a dominant position restricting competition in distinct markets within a specific Member State the Merger Regulation allows the Commission to refer cases to national authorities in such circumstances if they request a referral. This arrangement allows the best placed authority to deal with the case in line with the subsidiarity principle.

Electrabel/Intercommunales

At the beginning of 2003, Electrabel notified a series of transactions with community dimension whereby it proposed to acquire the electricity and gas supply activities of the regional co-operative utility companies (Intercommunales).

In order to implement the liberalisation of the Belgian electricity and gas markets, the intercommunales need to separate their gas- and electricity supply activities to eligible customers from their distribution activities. Electrabel Customer Solutions ('ECS'), an affiliate of Suez's energy division Tractebel, proposed to acquire the supply contracts with eligible customers that have not selected a supplier, thereby becoming their default supplier. In return, the Intercommunales would acquire a participation in ECS. In Flanders, the proposed operations covered both gas and electricity, whilst the agreements for the Wallonian part of Belgium are restricted to electricity.

As all contracts with the different intercommunales were notified as separate transactions, a number of these operations fell directly within the competence of the Belgian competition authorities, which concluded for three of them that they would strengthen Electrabel's dominant position on the market. As a result, these transactions were prohibited.

In order to ensure the consistency with its previous decisions, the Belgian competition authorities requested the referral of the cases notified to the Commission. For all cases with a Community dimension, the Commission concluded that the operation could strengthen Electrabel's already dominant position on the market of the supply of electricity (and for 6 out of the 7 transactions also for gas) to eligible customers, markets which are national in scope. The Commission also concluded that these transactions would significantly increase the already high barriers that competitors to Electrabel encounter on the Belgian electricity and gas markets. Furthermore, these transactions would eliminate the possibility for competitors to become default suppliers, a qualification which in itself significantly enhances the credibility of suppliers in the market. The Commission therefore decided to refer these cases to the competent Belgian authorities.

D – Summaries of judgements of Court of First Instance in competition cases and re-examination of cases

Le 3 avril 2003 le Tribunal de Première Instance ('TPI') a prononcé ses arrêts sur les recours de Philips et Babyliss contre les décisions d'approbation et de renvoi de la Commission dans l'affaire SEB/Moulinex, datées du 08.01.2002.

Par ces arrêts le Tribunal confirme l'essentiel des deux décisions et invalide la décision d'autorisation pour ce qui concerne cinq pays où des remèdes n'avaient pas été soumis (l'Espagne, la Finlande, l'Irlande, l'Italie et le Royaume Uni).

Dans l'affaire **T-119/02** Philips demandait l'annulation de la décision d'approbation conditionnelle ainsi que de la décision de renvoi aux autorités françaises de la partie française de l'opération. Le recours de Philips est rejeté.

Dans l'affaire **T-114/02**, Babyliss ne demande que l'annulation de la décision d'approbation conditionnelle. Le recours de Babyliss est partiellement accueilli pour autant qu'il concerne l'Espagne, la Finlande, l'Irlande, l'Italie et le Royaume Uni.

La décision d'approbation

Le traitement des modifications tardives d'engagements

Philips et Babyliss faisaient grief à la Commission d'avoir accepté des engagements tardifs. En effet, selon les requérantes, la Commission n'aurait pas dû accepter les modifications apportées par SEB aux engagements initiaux au delà du délai initial de trois semaines prévu à la Communication sur les mesures correctives. Selon le Tribunal, si la Commission estime avoir le temps nécessaire pour examiner des engagements tardifs et procéder aux consultations nécessaires, elle doit être en mesure d'autoriser la concentration au vu des dits engagements, même si ces modifications interviennent au-delà du délai de trois semaines. En revanche, la Commission est liée par sa Communication sur les mesures correctives en s'assurant que les modifications entre les différentes versions des engagements sont limitées et constituent une réponse immédiate aux résultats de consultations, ce qu'elle a fait en l'espèce.

Sur les marchés géographiques où des engagements ont été proposés, ceux-ci sont suffisants.

Philips et Babyliss faisaient grief à la Commission d'avoir accepté la soumission d'engagements insuffisants par SEB de par leur nature (licence de marque) et leur durée. Le Tribunal a estimé en réponse que rien ne permet d'exclure a priori qu'un engagement de type comportemental tel qu'un engagement de licence de marque soit de nature à résoudre les problèmes de concurrence posés par une concentration. En l'espèce, au vu de l'importance de la marque dans les marchés en cause, le Tribunal a confirmé l'analyse de la Commission. De même, la durée de 5 ans pour la licence de marque et les 3 années supplémentaires d'interdiction de réintroduction de la marque Moulinex est apparue justifiée au Tribunal. Le Tribunal souligne également que la Commission était justifiée à étendre l'engagement de licence la marque Moulinex à l'ensemble des catégories de produits qui portent cette marque même si les doutes sérieux ne portaient que sur certaines voire même une seule catégorie de produits dans un pays donné.

Le TPI a donc considéré que les engagements de licence de marque offerts par SEB étaient susceptibles de résoudre les problèmes de concurrence induits par l'opération de concentration en cause.

Sur les marchés géographiques où des engagements n'ont pas été proposés, la Commission ne pouvait écarter l'existence de doutes sérieux

Selon Babyliss, la Commission n'a imposé aucun engagement sur des marchés présentant pourtant des problèmes sérieux de concurrence. C'est le cas pour l'Italie, la Norvège, l'Espagne, la Finlande ainsi que le Royaume-Uni et l'Irlande.

La décision avait procédé à un raisonnement en quatre étapes. Elle examinait tout d'abord si la nouvelle entité avait des parts de marché combinées supérieures à 40 % sur un marché de produits en concluant qu'il y avait alors un indice de dominance sur ce marché. Dans un seconde étape, elle excluait les doutes sérieux lorsqu'il n'y avait pas de chevauchement significatif ou (troisième étape) lorsque des concurrents avaient une présence significative ou enfin (quatrième étape) lorsque le marché de produits en cause était de faible importance par rapport à l'ensemble des ventes d'appareils de petits électroménager de l'entité combinée et corrélativement, que les acheteurs disposaient d'un contre-pouvoir suffisant (effet de gamme inversé).

Le TPI a admis la cohérence du raisonnement de la Commission pour ce qui concerne le *seuil de 40%* et la possibilité de prise en compte de l'absence de chevauchement *significatif* pour l'analyse concurrentielle sur un marché de produit donné.

En revanche, le TPI a considéré comme incohérent le traitement fait par la Commission des *concurrents* sur les marchés où des doutes sérieux avaient été constatés et les marchés examinés dans le cadre de ce moyen.

Le TPI confirme ensuite le bien fondé de la prise en compte par la Commission des *effets de portefeuille et de gamme* sur les marchés en cause où la marque est le facteur de concurrence le plus important et où la notoriété d'une marque profite à tous les produits. Il estime en revanche que l'absence de *chevauchement significatif* n'est pas un critère à appliquer pour écarter les doutes sérieux sur un marché où des effets de gamme peuvent opérer.

Le TPI affirme enfin que la Commission n'a pas démontré le bien-fondé de sa théorie selon laquelle les clients pourraient punir un comportement anticoncurrentiel sur un marché par des achats moindres sur d'autres marchés (effet de gamme inversé). Selon le Tribunal, comme les deux parties à la concentration jouissaient chacune de positions fortes sur de nombreux marchés et disposaient de plusieurs marques renommées, l'effet de gamme aurait dû avoir un effet aggravant, plutôt que salvateur. Or, la Commission s'est abstenue d'analyser cet effet pour les quatre marchés en cause. De plus, le Tribunal ajoute que dans la mesure où la théorie de la Commission *'consiste à envisager que les revendeurs pourront punir tout comportement anticoncurrentiel de la nouvelle entité, revient davantage à constater que les revendeurs seront en mesure d'empêcher SEB-Moulinex de commettre un abus qu'à démontrer que l'entité combinée ne disposera pas d'une position dominante. Or, le règlement n° 4064/89 vise à interdire non l'abus de position dominante mais la création ou le renforcement d'une telle position'. (§ 362 de T - 114/02)*

Le TPI conclut donc que, en dehors de la Norvège où des engagements ont effectivement été proposés par les parties, les éléments retenus dans la décision attaquée ne permettaient pas à la Commission d'écarter l'existence de doutes sérieux sur au moins un marché individuel en Finlande, Espagne, Italie et, Royaume-Uni et l'Irlande. Pour l'Italie, le Tribunal conclut en plus que le moyen est fondé.

Le caractère dérisoire du prix payé par SEB et le concours financier apporté par la République française n'avaient pas à être pris en considération par la Commission.

Selon *Babyliss*, la Commission aurait dû examiner si le caractère dérisoire du prix payé par SEB pour la reprise de Moulinex et le concours financier apporté par l'État français n'étaient pas de nature à renforcer la position de SEB sur les marchés concernés au détriment de ses concurrents. Le Tribunal exclut que le prix de reprise constitue une aide d'Etat. S'agissant de la prise en charge des indemnités de licenciement par la République française, le TPI précise qu'*«Il ne saurait être considéré que la Commission soit tenue de mener à bien une procédure en matière d'aide d'État dans le cadre de chaque procédure de concentration, qu'elle doit conclure dans des délais stricts.»*

La décision de renvoi

Philips était recevable à contester la décision de renvoi

Le TPI a estimé que la décision de renvoi est susceptible de produire des effets juridiques directs et automatiques pour la requérante. En effet, la décision de renvoi affecte la situation juridique de la requérante en la privant de la possibilité de voir examiner cette partie de l'opération par la Commission et des droits procéduraux découlant de l'article 18(4) du Règlement Concentration dont elle aurait pu user si la Commission avait ouvert la phase d'examen approfondi. Une telle décision de renvoi prive également les tiers de la protection juridictionnelle conférée par le Traité, puisque les tiers ne pourront contester devant le TPI la décision des autorités nationales.

Le Tribunal estime également que Philips était *individuellement* concernée par cette décision de renvoi, puisqu'en l'absence de renvoi, Philips aurait été recevable à contester les appréciations formulées par la Commission pour le marché français.

La Commission a valablement renvoyé les aspects français de l'opération aux autorités françaises

Sur le fond, Philips faisait grief à la Commission de la violation des principes de l'article 9 du Règlement concentration et d'être en contradiction déraisonnable avec la pratique établie en la matière.

Le Tribunal a tout d'abord confirmé que les deux conditions prévues à l'Article 9(2)a étaient bien réunies dans le cas d'espèce : les parts de marché plus élevées, les barrières à l'entrée significatives et la prédominance de la grande distribution suffisent à établir que le marché français est structurellement différent et donc distinct des autres marchés ; quant au risque de création ou de renforcement de position dominante en France, il n'était pas contesté par la requérante. A titre liminaire, le TPI a précisé que les conditions de renvoi prévues par l'article 9(2)a du règlement «concentration» présentent un caractère juridique et doivent être interprétées sur la base d'éléments objectifs. Pour cette raison, le juge communautaire exerce un entier *contrôle* pour déterminer si une concentration entre dans le champ d'application de cet article.

Le TPI devait ensuite vérifier si la Commission a à juste titre décidé de renvoyer partiellement le dossier aux autorités françaises. A ce titre, le TPI souligne que si l'article 9(3)a du règlement «concentration» «*confère à la Commission un large pouvoir d'appréciation quant à la décision de renvoyer ou non une concentration, elle ne saurait décider d'effectuer le renvoi si, au moment de l'examen de la demande de renvoi communiquée par l'État membre concerné, il apparaît, sur la base d'un ensemble d'indices précis et concordants, que ledit renvoi n'est pas de nature à permettre de préserver ou rétablir une concurrence effective sur les marchés concernés*.»(§ 343 de T – 119/02). En l'espèce, le Tribunal a estimé que la Commission a pu raisonnablement considérer que les autorités françaises adopteraient des mesures permettant de préserver ou rétablir une concurrence effective et donc a agi conformément aux dispositions de l'Article 9(3).

Schneider/Legrand
Réexamen de l'opération suite à l'arrêt d'annulation du TPI

Le 22 octobre 2002, le Tribunal de première instance a annulé la décision de la Commission du 10 octobre 2001 déclarant incompatible avec le marché commun la concentration entre les fabricants de matériels électriques français Schneider Electric et Legrand (voire Competition Policy Newsletter 1/2003, p. 84 et ss.). A la lumière de l'arrêt du TPI, la Commission a procédé au réexamen de l'opération et, après avoir précisé les griefs reprochés à Schneider et examiné les propositions d'engagements qui lui étaient soumises, a décidé le 4 décembre 2002 d'ouvrir la seconde phase en raison des doutes sérieux qui subsistaient quant à la compatibilité de l'opération avec le marché commun. Toutefois, aucune décision finale n'a été adoptée en raison de la décision de Schneider de vendre Legrand au consortium formé de Wendel Investissements (Wendel) et Kohlberg Kravis Roberts & Co. (KKR), qui a rendu sans objet la procédure de contrôle de concentration menée par la Commission.

Rappel de la procédure

La transaction qui faisait l'objet de l'examen de la Commission consistait en une offre publique d'échange, annoncée le 15 janvier 2001 et réalisée le 25 juillet 2001. Depuis cette date Schneider Electric détenait 98,1% du capital de Legrand. Par une décision en date du 10 octobre 2001 (la décision d'incompatibilité), la Commission avait interdit cette opération en raison de ses effets sur la concurrence sur un certain nombre de marchés nationaux en Europe et de l'insuffisance des remèdes alors proposés par Schneider. Le 30 janvier 2002, la Commission avait également adopter une décision sur la base de l'article 8 paragraphe 4 du Règlement concentrations, ordonnant à Schneider de se séparer de Legrand (la décision de séparation). Par la suite, Schneider avait signé un contrat de vente de sa participation dans Legrand à un consortium formé de Wendel et KKR. Ce contrat contenait une clause de résiliation, invocable jusqu'au 10 décembre 2002, qui permettait à Schneider de conserver Legrand au cas où la décision d'incompatibilité de la Commission soit annulée par le TPI.

Les deux décisions de la Commission ont été annulées par le Tribunal de première instance le 22 octobre 2002 et en conséquence la Commission a repris son examen de cette transaction.

Analyse concurrentielle de la Commission

L'arrêt du Tribunal de première instance confirme l'analyse concurrentielle de la Commission pour les marchés sectoriels français mais annule les conclusions de la Commission pour les autres marchés nationaux sur lesquels la décision du 10 octobre 2001 concluait à des problèmes de concurrence. La Commission a donc concentré son analyse dans cette nouvelle phase d'examen sur les marchés français où la concurrence était jusqu'à

présent animée par la rivalité entre Schneider et Legrand sur l'ensemble des marchés des équipements électriques de basse tension. Schneider et Legrand disposent à cet égard chacun d'un certain nombre de positions dominantes en France. En particulier, Schneider est en position dominante sur les marchés des tableaux électriques, tandis que Legrand se trouve dans une position prépondérante notamment sur le marché des prises et interrupteurs.

Engagements soumis par Schneider

Schneider a soumis des engagements en vue d'éliminer les problèmes de concurrence identifiés par la Commission. Ces propositions d'engagements n'étaient pourtant pas suffisantes pour résoudre d'une manière claire et immédiate les problèmes de concurrence posés par l'opération sur les marchés français concernés, en vue de permettre à la Commission d'autoriser l'opération de concentration à l'issue d'un examen de phase I.

Tout d'abord, un certain nombre des propositions de Schneider visaient des actifs appartenant au groupe Legrand. La Commission a tenu compte dans son évaluation de l'arrêt de la Cour d'appel de Versailles du 29 novembre 2002 qui a imposé à Schneider de retirer ses engagements concernant des actifs de Legrand. Elle a considéré que les conséquences de cette décision d'une juridiction nationale rendaient la réalisation de la proposition d'engagement de Schneider très incertaine.

En tout état de cause, les propositions de Schneider étaient affectées de problèmes en ce qui concerne l'autonomie et la viabilité des entités cédées.

Pour l'ensemble de ces raisons, la Commission a conclu que les engagements de première phase proposés par Schneider ne permettaient pas d'éliminer les doutes sérieux quant aux problèmes de concurrence possibles sur les marchés en question, et que l'ouverture d'une procédure de phase II était donc nécessaire.

Abandon de l'opération et clôture de la procédure

Le 10 décembre 2002, Schneider a informé la Commission qu'elle avait renoncé à exercer la clause de résiliation contenue dans le contrat de vente à Wendel KKR et transféré ses actions Legrand à ce consortium. Par ce fait, la procédure de contrôle de concentrations concernant la prise de contrôle de Legrand par Schneider est devenue sans objet. Par conséquent, la Commission a clôturé le dossier.

La décision de la Commission d'ouverture de procédure du 5 décembre 2002 ainsi que le fait que la Commission a par la suite clôturé le dossier font à présent l'objet d'un recours en annulation de la part de Schneider Electric devant le TPI.

The market investor principle in privatisations – European Court of Justice upholds the Commission's decision on Gröditzer Stahlwerke GmbH

Steffen SUEHNEL, Directorate-General Competition, unit H-1

Introduction

On 28 January 2003, ([1]) the European Court of Justice ('the Court' or 'the ECJ') upheld ('the judgement') the Commission's partially negative decision on State aid granted by Germany to Gröditzer Stahlwerke GmbH ('GSW') and its subsidiary Walzwerk Burg GmbH ('the decision') ([2]). With this judgement the Court provides an important clarification on the interpretation of the private investor principle in cases involving privatisations at a negative sales price.

Background

The judgement relates to the decision in which the Commission declared incompatible part of the State aid implemented by Germany for the restructuring and privatisation of GSW.

GSW is an undertaking in the steel industry, established in Saxony, one of the new German Länder. In 1990, following the reunification of Germany, the shares representing GSW's capital were taken over by the Treuhandanstalt ('THA'), a German body governed by public law responsible for restructuring and privatising undertakings in the new German Länder.

During the period 1992-1996 GSW received aid of about EUR 155 m in connection with investment, social and operating measures in form of shareholder loans and bank loans guaranteed by THA and its successor Bundesanstalt für vereinigungsbedingte Sonderaufgaben ('BvS').

On 1 January 1997 GSW was sold to Georgsmariënhütte GmbH ('GMH'), following a bidding procedure conducted by investment banks. The privatisation of GSW involved costs for the public shareholder of about EUR 170 m, arising principally from the waiver of shareholder loans and of bank loans.

After having assessed the aid more closely, and in particular the privatisation procedure, the Commission found that investment and operating aid of around EUR 124 m was incompatible with the common market and asked Germany to recover the unlawfully granted aid from the aid recipient.

For its assessment of the aid the Commission had to take into account that GSW is a steel company to which the strict State aid rules of the ECSC Treaty applied. Under the ECSC rules operating aid and investment aid were not allowed. Only for some activities of GSW, which were clearly separated from the undertaking's ECSC activity, the State aid rules of the EC Treaty could be applied.

As to the question, whether the measures in context of the privatisation also involve aid, the Commission noted in the decision that the sale to GMH involved a cost in form of a negative sales price. It noted further that the cost of liquidation would have comprised the liquidation value of the assets only (about EUR 48 m). Even if the shareholder loans were to be included in the cost of liquidation at full value, the total would still be EUR 150 m. As the privatisation involved costs of about EUR 170 m, the Commission concluded that liquidation would have been cheaper so that a private investor would have decided to wind up the company. Consequently, and in line with its established practise, the Commission concluded that, as the sale was made on terms unacceptable to a private investor, the negative sales price constitutes aid.

The Commission's decision was subsequently appealed on six grounds by the German Government to the ECJ. Of particular interest is the sixth plea of the German Government by which it challenged the validity of the Commissions assessment of GSW privatisation procedure. The German Government took the view that the Commission decision was vitiated by an error in so far as it was based on the finding that the privatisation for a negative purchase prices was not, from the point of view of the owner of the capital, a more advantageous solution in terms of costs than winding-up GSW.

On 24 January 2002, Advocate General Dámaso Ruiz-Jarabo Colomer ('the Advocate General') delivered his opinion ('the opinion') on the case

([1]) Judgement of 28 January 2003. Case C-334/99 Germany v. Commission, not yet published.

([2]) Commission Decision 1999/720/EC, ECSC, OJ L 292, 13.11.1999, p. 27.

and proposed to reject the appeal from the German authorities against the decision. ([1])

The judgement

The Court followed the Advocate General's opinion and has upheld the Commission's findings in all material and procedural respects.

As regards the sixth plea from Germany, the judgement provides some important material clarifications as to the application of State aid rules in privatisation procedures at a negative sales price.

The Court follows the Commission's approach taken in the decision and assesses, whether the privatisation of GSW at a negative selling price involves elements of State aid. According to the judgement, for that purpose *'…it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the sale of that undertaking or whether it would instead have chosen to wind it up.'* ([2])

The Court stresses that in that respect, as the case law makes clear, a distinction must be drawn between the obligation which the State must assume as owner of the share capital and its obligation as a public authority. ([3])

For the calculation of the normal cost of winding up GSW the Court does not take into account obligations which arise from the granting of aid. The ECJ explicitly states that *'…the loss of a claim as the result of the grant of aid, that is to say, arising from a measure taken by the Member State as a public authority, which could not have been taken by a private investor and could not, accordingly, be taken into account in calculating the cost of the winding up.'* ([4])

The Court concludes that the Commission was correct to find that it would have been less costly to wind up GSW and that, therefore, a private investor would have chosen that solution.

Furthermore, the Court clarifies that, regardless whether the privatisation took place on basis of an open, transparent and unconditional sales procedure, the finding that the option of privatising GSW at a negative sales price did not satisfy the private investor test, is enough to conclude that the negative sales price contains State aid.

Conclusion

With this judgement the Court confirms the Commission practise to consider that, when a sale is made on terms unacceptable to a private investor, as it would be the case when the cost of liquidation are lower than the cost of privatisation, the negative sales price contains State aid. The ECJ also clarifies that this assessment is independent from the analysis, whether the sale took place on basis of an open bid.

For the assessment, whether the terms would have been acceptable to a private investor, a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligation as a public authority. Consequently, any loss of a claim as the result of the grant of aid cannot be taken into account.

([1]) Opinion of the Advocate General Dámaso Ruiz-Jarabo Colomer of 24 January 2002, Case C-334/99 Germany v. Commission, not yet translated into English, not yet published.

([2]) Paragraph 133 of the judgement. See also Case C-482/99 France v. Commission [2002] ECR-I-4397, paragraph 80.

([3]) See also joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECR I-4103, paragraph 22.

([4]) See paragraph 140 of the judgement.

EU — rules on State aid do not allow for export aid

Dagmar HEINISCH, Directorate-General Competition, unit G-1

On 5 March 2003 the Commission took a partly negative decision concerning an export-promotion scheme of the *Land* of Mecklenburg-Vorpommern and clarified again that even low amounts of export subsidies are not compatible with the Common Market.

Factual description

The trade and export promotion scheme of the *Land* of Mecklenburg-Vorpommern provided for four different measures: (1) 'Market-launch activities' including external consultancy services and workshops, (2) 'fairs and participation in exhibitions in Germany and abroad, (3) promotion of 'offices shared abroad', which consisted of expenditure directly necessary for the establishment and operation of shared offices, and (4) support for 'foreign trade assistants', meaning the gross salary of one foreign sales assistant for a period of one year.

As only small amounts of aid were awarded under the scheme, the *Land* of Mecklenburg-Vorpommern intended to run the scheme as a *de minimis* aid scheme.

Assessment

The Commission examined the scheme under its Commission Regulation (EC) No 69/2001 of 12 January 2001 ([1]) (hereinafter referred to as '*de minimis*-Regulation'). Article 1(b) of this regulation sets a definition of 'export-aid' and states explicitly that such export aid is excluded from the benefit of the *de minimis* rules. Corresponding 'export-aid' comprises:

— aid directly linked to the quantities exported,

— aid to the establishment and operation of a distribution network, or

— aid to other current expenditure linked to the export activity.

The Commission investigated whether the four measures under the scheme constitute 'export-aid' in the meaning of Article 1(b) of the *de minimis*-Regulation and came to the conclusion that the **first measure** 'market launch activities' did not fall under the definition of export-aid pursuant to Article 1(b) of the *de minimis*-Regulation. In fact, according to recital (4) of said regulation ([2]), such measures do normally not constitute export aid. The word 'normally' should make clear that aid for consultancy services is not an absolute safe harbour clause. However, at this point the Commission took the view that external consultancy services under the scheme did not constitute 'export-aid' as defined in the *de minimis*-Regulation.

The Commission decided that the **second measure** 'fairs and exhibitions in Germany and abroad' was also covered by recital (4) of the *de minimis*-Regulation and thus did not constitute 'export-aid' in the meaning of Article 1(b) of this regulation.

The **third measure** 'grants for offices shared abroad' aimed at the establishment of joint-offices in the European Union, the EEA and countries with the official status of a candidate for accession to the EU. Eligible costs were necessary expenditures for the establishment and the operation of shared offices, such as non-fixed office equipment and machines, expenditure on current business necessities and expenditure on foreign staff. The joint-offices had the objective to provide SMEs with information about the foreign market and to set up an initial contact point for SMEs interested in entering this market. The Commission took the view that this kind of aid could be used to set up and to run a commercial trade representation, which might be the start-up for a distribution network abroad. Therefore the measure could be linked to the 'establishment and operation of a distribution network abroad', or could constitute 'aid to other current expenditure linked to the export activity', both being excluded from the scope of the *de minimis*-Regulation as representing export-aid.

([1]) OJ L 10, 13.1.2001, p. 30.

([2]) Recital (4) of the Commission Regulation (EC) No 69/2001 reads as follows: 'In the light of the World Trade Organisation (WTO) Agreement on Subsidies and Countervailing Measures (OJ L 336, 23.12.1994, p. 156), this Regulation should not exempt export aid or aid favouring domestic over imported products. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market does normally not constitute export aid.'

The **fourth measure** 'foreign trade assistants' provided subsidies for the gross salary of one foreign trade assistant. It had the objective to encourage SMEs to hire staff with necessary language skills and knowledge of international trade in order to support the firms in entering a foreign market. The Commission decided that this measure was per definition a measure, which had to be considered as current expenditure linked to export activities in the meaning of Article 1(b) of the *de minimis*-Regulation.

Finally, the Commission assessed whether the **third and fourth measure**, which both did not comply with the conditions of a *de minimis* aid pursuant to the *de minimis*-Regulation, could be compatible with the Common Market under other State aid rules. The Commission negated this question and concluded that, as a general principle of State aid policy, export-aid cannot be considered as compatible with the Common Market. The Commission is particularly concerned when aid is given for intra-Community exports, since those have the most direct impact on the market of another Member State. Distorting competition by financing an increased presence on the market of another Member State within the EU breaches not only state aid rules, but also Article 10 EC Treaty. It is contrary to the overall economic goal of the Community, which is to set up a homogenous market free from obstacles, restrictions, distortion, and devoted to the principle of an open market economy with free competition. With regard to the case law of the Court of Justice ([1]) and to the specific situation of the relevant territories, the same applies to aid measures involving exports from a Member State to the EEA, but also to the candidate countries ([2]), because the economic interconnection between the Community and the future Member States has permanently increased since the enforcement of the Europe Agreements.

([1]) Notably Case C-142/87 Belgium v Commission *('Tubemeuse')*, ECR 1990, p. I-00959, paras 31 to 44.

([2]) At present the following 13 countries are considered as 'candidate countries' since their application to join the European Union has been accepted by the European Council: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey – as recognised by the relevant European Councils.

La Commission examine un nouveau cas de coûts échoués

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La Commission européenne a autorisé le 16 octobre 2002 une mesure visant à compenser l'impact de la libéralisation du marché de l'électricité sur la société *Public Power Corporation of Greece* (PPC).

Cette mesure comprend trois volets.

Le **premier volet** vise à compenser les coûts liés à l'exploitation par PPC de centrales économiquement non rentables dans le cadre d'un marché libéralisé. Ces centrales, pour la plupart hydroélectriques, ont été construites à une époque où l'inflation en Grèce était très importante. Leur construction a donné lieu à d'importants coûts financiers qui étaient récupérables dans un système où les tarifs étaient fixés de manière ad hoc par l'Etat, mais qui ne le sont plus dans sur un marché libéralisé.

Les compensations au titre de ce volet seront versées jusqu'à l'année 2015, et adaptées annuellement au montant réel de la charge encourue par PPC lors de l'exploitation de ces centrales. Elle ne pourront en tout état de cause dépasser un total de 929 M€.

Le **deuxième volet** vise à compenser le coût pour PPC des travaux de gestion des ressources hydrauliques et d'irrigation qui lui ont été imposés par l'Etat grec conjointement à la construction de ses centrales.

Ce volet donnera lieu au versement de compensations d'un montant de 324 M€.

La Commission a considéré que ces deux premiers volets de la mesure se rattachaient au concept de coûts échoués.

Les coûts échoués sont des coûts relatifs à des investissements ou engagements à long terme pris par les entreprises du secteur électrique à l'époque ou le marché de l'électricité était clos, et qui ont été rendus non économiques par la libéralisation du secteur.

Etant donné que plusieurs Etats membres ont envisagé de compenser les sociétés du secteur électrique pour ces coûts, et que ce type de compensation pouvait, dans certains cas, revêtir le caractère d'une aide, la Commission a adopté, le 25 juillet 2001, une méthodologie d'analyse fixant les critères à la lumière desquels elle analyserait les aides d'Etat pour compensations de coûts échoués. Ces critères visent à assurer que les aides compensent des coûts réellement encourus par les entreprises bénéficiaires et directement liés à la libéralisation du secteur. Les aides doivent être limitées dans le temps et tenir compte de l'évolution réelle du marché de l'électricité, et tout particulièrement des prix de marché. Elles doivent favoriser la transition des entreprises du secteur vers un marché concurrentiel.

La Commission a considéré que les sommes versées par l'Etat grec dans le cadre des deux premiers volets de la mesure, dans l'hypothèse où elles constitueraient des aides d'Etat au sens du Traité CE, seraient compatibles avec les critères de la méthodologie, et bénéficieraient donc d'une dérogation au principe selon lequel les aides d'Etat sont incompatibles avec le marché commun.

Le **troisième volet** de la mesure vise la compensation des coûts liés à un contrat à long terme liant PPC à une usine de production d'aluminium appartenant à la société *Aluminium of Greece*. Ce contrat, signé en 1960 et expirant en 2006, prévoit la vente par PPC d'une quantité importante d'électricité à des prix pouvant être inférieurs au prix de marché de l'électricité pour les gros consommateurs, provoquant ainsi des pertes pour PPC.

Il est prévu que la charge liée à ces pertes soit compensée par l'Etat. Les compensations seront adaptées annuellement à la valeur réelle des pertes en fonction des conditions économiques de l'année concernée. Elles ne pourront en tout état de cause dépasser un total de 178 M€.

La Commission a noté que ce volet de la mesure ne procurait pas d'avantage concurrentiel à PPC, les sommes versées par l'Etat ne faisant que transiter par cette société pour bénéficier en fin de compte à Aluminium of Greece.

La Commission a donc considéré que ce volet ne constituait pas une aide d'Etat à PPC au sens de l'article 87(1) du Traité.

Pour ce qui concerne l'éventuelle aide d'Etat à Aluminium of Greece, la Commission a noté que, le contrat datant de 1960 et n'ayant pas été modifié de manière substantielle depuis l'entrée de la Grèce dans le marché commun, une telle aide serait en tout état de cause une aide existante.

Phase out of State guarantees in favour of the Austrian public banks

Renate SCHOHAJ, Directorate-General Competition, unit H-3

History

The Commission has been considering State guarantees in different Member States in favour of certain credit institutions under the Treaty rules for several years. The situation in Germany (Anstaltslast and Gewährträgerhaftung) as well as in France (guarantee by CDC in favour of CDC IXIS) led to the conclusion that the guarantees had to be abolished after a certain transitional period. In order to put all Member States, providing public bank guarantees, which are unlimited in time and amount and for which therefore no market premium can be established, on an equal footing, the Commission also started to assess the public bank guarantees in Austria.

Description of the guarantees

In Austria, 7 Landeshypothekenbanks (regional public banks) and about 27 savings banks currently benefit from a public guarantee, which is called Ausfallshaftung. This public guarantee can be translated as a 'guarantee obligation' and it creates the obligation for the guarantor (Federal State, Land or municipalities) to step in in the case of insolvency or liquidation of the credit institutions. It creates direct claims of the creditors of the banks against the guarantor, who can, however, only be called upon if the assets of the banks are not sufficient to satisfy the creditors. The guarantees are neither limited in duration nor to a certain amount. All Landeshypothekenbanks pay a premium for their guarantee, while the savings banks do not pay any remuneration.

Assessment of the guarantees made by the Commission

The public bank guarantees provide a very effective protection for creditors and business partners, because they reduce or even eliminate the risk of entering into business with the credit institutions and providing capital to them. This has consequences for the terms at which business partners are willing to deal with these credit institutions or creditors are willing to provide them with financial means and make these terms more favourable for the credit institutions. Because of this effect the public bank guarantees have a significant effect on the competitive position of the credit institutions.

The advantages arise, in particular, but not only, for activities on the international capital markets (e.g. issuing bonds or raising subordinated equity), in the business activities involving large institutional investors, in the derivative and over the counter ('OTC') business and, to a lesser degree, in the interbank business. The advantages in particular take the form of lower interest rates asked by creditors, in the form of lower (or no) security asked or they can also decide whether a business partner on the market enters into a business relationship at all. These advantages on the funding side can be translated into advantages when the credit institutions offer their services to potential customers. As the guarantees are unlimited in time and amount, the Commission considered that the value of these guarantees cannot be quantified and therefore a correct premium cannot be calculated. The aid has therefore to be seen in the foregoing of a market premium. The fact that the Landeshypothekenbanks paid certain premiums might reduce the aid element, but does not eliminate it.

The more favourable conditions and the better market access both improve the competitive situation of the public credit institutions. Within the sector of financial services there is strong competition between financial institutions of different Member States. Distortion of competition also effects trade between Member States. Taking all these factors into account, the Commission concluded that the State guarantees in favour of the Austrian public banks constitute State aid. Since the guarantees are all established in regional laws and/or the statutes of the credit institutions and all these measures dating back to before Austria's accession to the Community the Commission took the view that the State aid constitutes existing aid within the meaning of Article 88(1) EC.

Proposal for appropriate measures and transitional period

The Commission adopted a proposal for appropriate measures in January 2003 proposing the abolition of the guarantees. This was followed by discussions with the Austrian authorities

concerning the transitional period, which is necessary to allow the banks to adopt to the changed environment. According to the agreement reached between the Commission and the Austrian authorities on the 1 April 2003, the guarantees in favour of the Austrian public banks will be phased out progressively. The guarantees will be 'grandfathered' for all liabilities existing on 2 April 2003 until they mature. The transitional period will last until 1 April 2007, 4 years after the day of the agreement. During this period, Ausfallshaftung may remain in place only for operations maturing before 30 September 2017. New liabilities entered in after 1 April 2007 will not be covered by Ausfallshaftung any more.

Conclusion

The State guarantees in favour of the Austrian public banks are not compatible with the State aid rules and therefore have to be abolished. Eliminating this source of distortion of competition between commercial banks and public banks will lead to better service for all customers and make the EU banking sector more transparent and efficient.

La Commission ouvre deux investigations sur les mesures de soutien public octroyées en faveur de Mobilcom et France Télécom

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1. Introduction

L'année 2003 s'est ouverte avec une intense activité de la DG Concurrence sur les aides d'Etat dans le secteur de la téléphonie. Le résultat de cette activité est visible dans deux décisions de la Commission adoptées en janvier 2003, l'une concernant un opérateur privé allemand et l'autre l'opérateur historique français. Dans les deux cas, la Commission a dû opter pour l'ouverture d'une procédure formelle d'examen car les informations fournies par les autorités des ces deux pays n'ont pas permis à la Commission d'écarter tout doute quant à la compatibilité des mesures adoptées avec le marché intérieur.

2. MobilCom

La Commission européenne a décidé le 21 janvier 2003 d'autoriser une aide au sauvetage de 50 millions d'euros en faveur de MobilCom AG, et a lancé parallèlement une procédure formelle d'examen sur la garantie accordée par les autorités allemandes sur un prêt supplémentaire de 112 millions d'euros.

Le 19 septembre 2002, l'Etat allemand s'est porté garant d'un prêt de 50 millions d'euros accordé à MobilCom (la «première mesure d'aide»). Le prêt proprement dit a été accordé par la banque publique de développement KfW. Le 20 novembre 2002, l'Etat allemand s'est porté garant pour un nouveau prêt de 112 millions d'euros (la «seconde mesure d'aide»). Celui-ci a été octroyé par un consortium de banques publiques et privées.

Il est ressorti de l'examen préliminaire de la Commission qu'à l'époque où le prêt de 50 millions d'euros a été accordé, MobilCom était effectivement confrontée à un recul de sa marge brute d'autofinancement dû à la fin du soutien financier dont elle bénéficiait de la part de son actionnaire principal, France Télécom (FT). Le retrait de FT a plongé MobilCom dans une grave crise de liquidité. Au vu de la situation de MobilCom, susceptible d'être qualifiée d'entreprise en difficulté, la Commission a estimé que la première mesure d'aide pouvait être considérée comme une aide au sauvetage relevant des lignes directrices communautaires pour les aides au sauvetage et à la restructuration d'entreprises en difficulté ([1]) (les «lignes directrices»). Conformément à ces lignes directrices, des aides de trésorerie prenant la forme de prêts à court terme ou de garanties de prêts peuvent être approuvées en tant qu'aides au sauvetage en faveur d'une entreprise en difficulté, si l'aide est limitée au montant nécessaire pour maintenir l'entreprise en activité jusqu'à ce qu'un plan de restructuration puisse être élaboré. Les autorités allemandes ont apporté la preuve que le prêt de 50 millions d'euros était effectivement nécessaire pour couvrir les dépenses de fonctionnement courantes de MobilCom, et elles se sont engagées à présenter un plan de restructuration dans un délai de six mois à compter de l'autorisation du prêt de sauvetage par la Commission.

En ce qui concerne l'autre garantie d'Etat couvrant le prêt de 112 millions d'euros, la Commission avait des doutes sérieux quant à la possibilité de qualifier cette mesure d'aide au sauvetage. Sur la base des informations fournies par les autorités allemandes, il apparaît que le second prêt a été utilisé non seulement pour couvrir les dépenses courantes, mais également pour financer une série de mesures de restructuration. Cependant, aucun plan de restructuration n'ayant été présenté à la Commission, celle-ci ne disposait pas des informations nécessaires pour déterminer si la seconde mesure d'aide peut être considérée comme une aide à la restructuration au sens des lignes directrices communautaires.

La Commission, bien que les autorités allemandes affirment que les deux mesures d'aide doivent être considérées comme un seul train d'aides au sauvetage, a donc examiné les mesures séparément, parce qu'elles sont soumises à des conditions distinctes et qu'il apparaît qu'elles ont des destinations différentes. Un examen plus approfondi de la seconde mesure d'aide au regard des lignes direc-

([1]) JO C 288, 9.10.1999, p. 2.

trices communautaires rend nécessaire l'ouverture d'une procédure formelle d'examen.

Au cours de la procédure formelle, la Commission devra examiner l'éventuelle compatibilité des ces mesures avec le bon fonctionnement du marché intérieur, et notamment aux termes des lignes directrices précitées.

3. France Télécom

La Commission européenne a décidé le 30 janvier 2003 d'ouvrir la procédure formelle d'examen prévue à l'article 88 paragraphe 2 du traité CE à l'égard d'un projet de soutien financier du gouvernement français notifié le 3 décembre 2002 en faveur de France Télécom. La procédure concerne également le régime de taxe professionnelle applicable à FT, lequel fait l'objet d'une plainte.

3.1. Notification du gouvernement français

Le projet vise à permettre à France Télécom de faire face au remboursement de ses dettes à courte échéance en procédant à la recapitalisation de France Télécom, laquelle serait souscrite proportionnellement à leur participation respective actuelle par l'Etat et l'actionnariat privé. Estimant qu'il n'était pas possible de procéder à la recapitalisation de France Télécom dans un bref délai, le gouvernement français avait déjà anticipé sa participation à la recapitalisation en annonçant la mise en place d'une avance d'actionnaire sous la forme d'une ligne de crédit d'un montant maximum de 9 milliards d'euros par l'intermédiaire d'un établissement public, l'ERAP. Le gouvernement français a précisé que cette avance d'actionnaire serait rémunérée aux conditions du marché.

La Commission a des doutes à l'égard de ce projet en ce qu'il serait susceptible d'accorder à FT un avantage en dehors des conditions de marché, et en ce que le comportement du gouvernement français soit conforme à celui d'un investisseur avisé.

Ainsi, il semble être admis par le gouvernement français que France Télécom était dans une situation financière telle que, préalablement à l'annonce de l'avance d'actionnaire, elle ne pouvait obtenir de capitaux sur le marché à des conditions appropriées. En même temps, comme le gouvernement français n'a laissé aucun doute quant au fait que la ligne de crédit était une anticipation de la participation de l'Etat au renforcement des fonds propres de France Télécom, il parait difficile d'admettre dans ces circonstances que la participation des autorité françaises à la recapitalisation de France Télécom puisse être considérée comme concomitante à la participation des investisseurs privés. Dans ces conditions la Commission doit établir si le comportement de l'Etat a été basé sur un plan de restructuration capable d'assurer une rémunération des capitaux investis acceptable pour un investisseur privé. La procédure d'examen doit donc apprécier si la ligne de crédit a permis à France Télécom d'anticiper le recours au marché obligataire lui donnant également la possibilité de réaliser sa recapitalisation dans des conditions qui ne seraient pas possibles pour toute autre entreprise soumise aux règles du libre marché.

3.2. Régime de la taxe professionnelle

La loi n°90-568 du 2 juillet 1990 prévoit un régime dérogatoire au bénéfice de France Télécom par rapport au régime de droit commun prévu au Code général des impôts. Deux régimes se sont succédés: un régime «transitoire» tout d'abord, applicable du 1er janvier 1991 au 1er janvier 1994, lequel prévoit que FT n'est pas soumise à la taxe professionnelle en tant que telle, puis un régime «définitif» lequel prévoit, à partir de 1994, le recouvrement de la taxe professionnelle selon des règles exorbitantes du droit commun. Ainsi, la base d'imposition utilisée est celle du lieu du principal établissement, la base de la taxe professionnelle applicable à France Télécom est réduite par rapport à celle applicable aux autres entreprises, et le taux d'imposition auquel est soumise France Télécom est différent des taux applicables aux autres entreprises.

Le régime de la taxe professionnelle applicable à France Télécom semble remplir les critères relatifs à la qualification d'une mesure comme aide d'Etat au sens des règles du Traité. Il semble en effet que ce régime ait procuré un avantage à France Télécom dans la mesure où cette dernière a acquitté un montant de taxe professionnelle inférieur à celui qu'elle aurait normalement dû acquitter selon les règles du droit commun.

Suite à un examen préliminaire qui ne lui a pas permis de lever ses doutes, la Commission a décidé conformément au Traité d'ouvrir la procédure formelle d'examen sur les deux volets en question. Si au cours de la procédure formelle, la Commission arrivait à la conclusion que les mesures en questions constituent en effet des aides d'Etat, elle devra examiner l'éventuelle compatibilité des ces mesures avec le bon fonctionnement du marché intérieur, et notamment aux termes des lignes directrices précitées.

Garantie illimitée de l'État en faveur d'EDF: ouverture de la procédure formelle

Eric PAROCHE et Maria Jesús SEGURA CATALÁN, Direction générale de la concurrence, unité H-3

Le 2 avril 2003, la Commission a décidé d'ouvrir la procédure formelle d'examen, prévue à l'article 88, paragraphe 2, du Traité CE, à l'égard de la garantie illimitée de l'Etat dont Electricité de France (EDF) bénéficie en raison de son statut. Cette décision s'inscrit dans le cadre de l'action entreprise depuis plusieurs années par la Commission contre différents types de garanties étatiques, qui avantagent certaines entreprises par rapport à leurs concurrents.

Depuis sa création en 1946, EDF est dotée du statut d'Etablissement public industriel et commercial (EPIC). En tant que personnes morales de droit public, les EPIC ne sont pas soumis à la loi française du 25 janvier 1985 sur le redressement et la liquidation judiciaires des entreprises. Par conséquent, EDF ne peut pas être placée en liquidation judiciaire par un Tribunal de commerce et ses créditeurs se voient ainsi assurés d'obtenir le remboursement de leurs créances. Cela permet donc à EDF de lever des fonds sur les marchés de capitaux à des taux privilégiés. Ce statut d'EPIC, en ce qu'il permet à EDF d'échapper à toute faillite, équivaut à une garantie illimitée de l'Etat.

Cette garantie illimitée de l'Etat liée au statut d'EPIC constitue une aide d'Etat au sens de l'article 87 du Traité CE. Comme le rappelle la Communication de la Commission sur l'application des articles 87 et 88 du Traité CE aux aides d'Etat sous forme de garanties ([1]), les conditions de crédit plus favorables obtenues par EDF sur les marchés de capitaux grâce à son statut qui exclut toute possibilité de procédure de faillite ou d'insolvabilité, constituent un avantage financier de nature à fausser la concurrence.

A ce stade de l'analyse de la Commission, il ne semble pas que cette garantie illimitée de l'Etat puisse être justifiée au titre de la compensation des coûts supplémentaires engendrés par des obligations de service public qui pèseraient sur EDF. En effet, la garantie illimitée de l'Etat bénéficie à l'ensemble des activités du groupe EDF, ce qui inclut des activités dépassant clairement ses obligations de service public, notamment dans les autres Etats membres. En outre, un Etat membre, qui décide d'attribuer une compensation financière à une entreprise à laquelle il a confié la gestion d'un service d'intérêt économique général, ne peut compenser celle-ci au-delà des coûts supplémentaires générés par cette mission. Cela suppose non seulement que l'Etat membre soit en mesure de déterminer les coûts supplémentaires liés à ce service, mais également que la compensation puisse être mesurable. Or, il est difficile, si ce n'est impossible, de mesurer la valeur d'une garantie générale telle que celle dont bénéficie EDF, car elle est indéterminable dans son montant et illimitée dans le temps.

Le statut d'EDF datant de 1946, la garantie illimitée de l'Etat qui en découle constitue une aide existante. En octobre 2002, conformément à l'article 88 du Traité CE, la Commission avait proposé aux autorités françaises la suppression de la garantie illimitée de l'Etat liée au statut d'EPIC au titre de mesure utile. Les autorités françaises n'ayant pas donné une suite favorable à cette proposition, la Commission a décidé d'ouvrir la procédure formelle d'examen, comme le prévoit l'article 19 du règlement de procédure n° 659/1999, dès lors qu'un Etat membre refuse de mettre en œuvre une mesure utile qu'elle a proposée.

([1]) JO C 71, 11.3.2000, p. 14.

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New documentation

European Commission Directorate General Competition

This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: http://europa.eu.int/comm/competition/speeches/index_2003.html

Speeches by the Commissioner, 1 Januray – 30 April 2003

European Competition Policy: Quo Vadis ? – Mario MONTI – XX. International Forum on European Competition Policy – Brussels, Belgium – 10.04.2003

Competition enforcement reforms in the EU: some comments by the Reformer – Mario MONTI – Georgetown University Washington – Washington, USA - 04.04.2003

Competition in Professional Services: New Light and New Challenges – Mario MONTI – Bundesanwaltskammer – Berlin, Germany – 21.03.2003

Competition enforcement and the interests of consumers – a stable link in times of change – Mario MONTI – European Competition Day in Athens – Athens, Greece – 14.02.2003

The new legal framework for car distribution – Mario MONTI – Ninth Annual European Automotive Conference: Car retailing at a crossroads – Brussels, Belgium – 06.02.2003

Speeches and articles, Directorate-General Competition staff, 1 January – 30 April 2003

Competition Policy in the Financial Services Sector – Magdalena BRENNING – Law Society, European Group – Brussels, Belgium – 10.04.2003

Vertical and horizontal integration in the media sector and EU competition law – Miguel MENDES PEREIRA – The ICT and Media Sectors within the EU Policy Framework, U.L.B.-SMIT (Studies on Media, Information and Telecommunications), CEAS-Norwegian School of Management, Oslo Telenor Broadcast – Brussels, Belgium – 07.04.2003

Zugangsentgelte in der Telekommunikation: Die Erfahrung mit dem entbündelten Zugang zur Teilnehmeranschlussleitung in der EU – Robert KLOTZ, Juan DELGADO, Jérôme FEHRENBACH – Published in : Wirtschaft und Wettbewerb, 4/2003, S. 346 – Germany – 01.04.2003

Current and future competition policy issues in the maritime sector – Fabrizia BENINI – Seminar on EU competition Law and Maritime Transport – London, England – 01.04.2003

Alternative Regulierungsformen zwischen Staat und Markt – Herbert UNGERER – Brussels, Belgium – 18.02.2003

Competition – A better deal for consumers? – Sven NORBERG – The Hellenic Competition Commission – Athens, Greece – 14.02.2003

La politique de la Commission en matière d'amendes antitrust : récents développements, perspectives d'avenir – Gianfranco ROCCA – Université Libre de Bruxelles, Institut d'Études Européennes – Brussels, Belgium – 04.02.2003

What are the results of 15 years deregulation in telecommunications, what are the challenges and opportunities for telecommunications and media operators and policy makers in the coming years? – Herbert UNGERER – Annual Conference, Dutch Telecom Society – The Hague, the Netherlands – 23.01.2003

TV Rights of Sports Events – Torben TOFT – Vision in Business Broadcasting Competition Law – Hilton Hotel, Brussels, Belgium – 15.01.2003

Competition policy and the issue of access in broadcasting markets – Herbert UNGERER – Vision in Business Broadcasting Competition Law – Hilton Hotel, Brussels, Belgium – 14.01.2003

Community Publications on Competition

New publications and publications coming up shortly

- ***XXXI report on Competition policy — 2002***
- ***Competition policy newsletter, 2003, Number 3 — Autumn 2003***

Information about our other publications can be found on the on the DG Competition web site: http://europa.eu.int/comm/competition/publications

The annual report is available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Most publications, including this newsletter, are available in PDF format on the web site.

Press releases
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All texts are available from the Commission's press release database RAPID at: http://europa.eu.int/rapid/start/ Enter the reference (e.g. IP/03/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.

ANTITRUST

IP/03/589 – 30/04/2003 – Commission approves 3rd Generation mobile network sharing in the United Kingdom

IP/03/566 – 24/04/2003 – Commission and Danish competition authorities jointly open up Danish gas market

IP/03/557 – 23/04/2003 – Commission intends to exempt REIMS II from the antitrust rules but requires third party access

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IP/03/520 – 09/04/2003 – Commission calls for equal treatment for cable networks in the provision of telecommunications services in France

IP/03/515 – 08/04/2003 – France must comply fully with the Court judgment on financing of universal service in telecommunications

IP/03/462 – 31/03/2003 – Commission raises competition concerns about behaviour of Clearstream Banking AG

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IP/03/598 – 30/04/2003 – Commission investigates French aid to Sernam, SNCF's road haulage subsidiary

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