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Preserving and Promoting Competition: A European Response [1]

Philip LOWE, Director-General, Directorate-General for Competition

Competition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare. At the same time, competition policy can contribute to other objectives: in the EU context, for example, it can work towards the success of the strategy for growth and jobs, and form part of the public debate about the role of state intervention and regulation in industry. Only competition, and not economic nationalism of whatever overt or covert form, allows the emergence of firms capable of succeeding in global markets. If preserving competition is the letter of competition law enforcement, making markets work better is the leitmotiv of an active competition policy.

Competition Policy and the EU Economy

The Commission proposed a Partnership for Growth and Jobs [2] as the core of the renewed Lisbon Strategy. The renewed strategy [3] is much more focused. The tools are reduced and sharpened: there are 25 national reform programmes [4] plus the Community Lisbon programme [5]. There is only one programme per Member State and only one programme at EU level. The division of responsibilities is thus much clearer than before. Everybody can be held accountable for the goals achieved — or not achieved — under their own programme.

Competition policy has a substantial role to play in that process. Effective competition is an important driver of the growth and jobs strategy, both statically by removing restrictions and excessive market power and dynamically by fostering innovation. In fact, a recent study realised for the Commission [6] shows that competition plays an even greater role in harnessing benefits of globalisation than the well-known effects of increased international division of labour and comparative advantage. Globalisation enhances the level of competition; the increase in competition in turn lowers prices and increases demand for labour and capital. This has particularly beneficial effects for the real income of workers both directly and indirectly via higher investment, with the additional income gains estimated at around 8% over the next half century. In absolute terms this would translate into over € 2 000 annually in 2004 prices for every EU citizen, over € 5 000 for every EU household.

Competition policy must therefore use its whole potential for the benefits of growth and jobs. To do so, we need to go beyond preserving competition through our traditional enforcement action. We must also actively promote competition. This is an extension of the traditional work of a competition agency, but I believe an increasingly important one.

The Developing Role of Competition Policy

It is therefore important to enforce a rigorous competition policy through anti-trust, merger control and the state aid rules. That is the core business of an effective enforcement agency, and requires focus, resources and determination. But it is not in itself sufficient.

Aside from merger control and some parts of State aid control, enforcement intervenes *ex post*. It sets important precedents, but it sometimes comes too late; harm has been done, and remedying that harm can be quite difficult. Establishing the liability for harm is laborious, and once that is done, designing an effective remedy for the future based on the precedent of EU decisions is even more challenging; if companies have exited the market it may be impossible. The economy may be better off if we sometimes intervene much earlier in the process. We need more advocacy of competition approaches and market-based solutions.

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(1) This article is based on a speech delivered at the St Gallen Competition Law Forum on 11 May 2006.

(2) Working together for growth and jobs — A new start for the Lisbon Strategy Communication to the Spring European Council — COM (2005) 24, Brussels, 2 February 2005 http://ec.europa.eu/growthandjobs/pdf/COM2005_024_en.pdf

(3) Conclusions of the Spring European Council 22-23 March 2005 http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/84335.pdf

(4) Published at http://ec.europa.eu/growthandjobs/key/index_en.htm

(5) Common Actions for Growth and Employment: The Community Lisbon Programme — COM(2005) 330 final http://ec.europa.eu/growthandjobs/pdf/COM2005_330_en.pdf

(6) THE EU ECONOMY 2005 REVIEW, Rising International Economic Integration, Opportunities and Challenges: http://ec.europa.eu/economy_finance/publications/european_economy/2005/ee605/ee605en.pdf

Better Regulation

At the same time, we have to be aware that in our enthusiasm to find ex-ante solutions, we do not stifle competition through overregulation. The concern to deal with potential excessive market power by sector-specific regulation may be appropriate (for example in telecoms or energy), but has a cost in the medium to long term. What is described as transitory tends to be provisionally forever. Once regulations are in place, will they or the incumbents they are looking after ever be parted from each other?

We have said that we will undertake a more systematic competition screening of EC legislation ([7]), and we are doing so. Competition concerns must be, and are, part of the balancing exercise when looking at new legislation: other legitimate policy objectives may well require solutions which restrict or limit competition, but the aim is that these are proportionate and the overall balance is weighed.

For example, we are currently providing input into the Commission's potential clearing and settlement directive, to help identify a market-based, demand-driven solution. We are also working very closely with our colleagues of DG Information Society on the proposal to regulate roaming prices, so that any distortive effects of the proposed price regulation are minimised. We are sharing our market knowledge to provide the best empirical basis for the upcoming regulation, regulation which raises an interesting question: is the threat of regulation, rather than regulation, the more effective instrument for market correction?

Last, but not least, we are helping in the Commission's review of the Electricity and Gas Directives. We have detailed knowledge of the energy markets through previous case work in state aid control, antitrust and merger control, but also through our ongoing sector inquiry, the preliminary results of which were presented to the public on 16 February ([8]). Two issues of particular importance for the legislative process emerged from our investigation. First, joint ownership of supply and network businesses as well as gas storage facilities results in chronic competition problems. Imposing full structural unbundling in the next legislative package is one of the solutions proposed to get the incentives right once and for all. Second, the inquiry identified the lack of transparency as one of the main barriers to competition in the sector. This is also an important input for the ongoing review process. At least partly in response to DG Competition's interest in the question, the Florence Forum ([9]) has discussed the issue and Eurelectric (the electricity suppliers association), the transmission system operators and the regulators have produced detailed proposals to strengthen the transparency obligations. Furthermore from April 2006 the four largest generators in Germany have voluntarily started to publish aggregated generation figures. In relation to concerns about investment in interconnection, some operators have also mentioned plans to extend interconnection capacity.

Competition advocacy is perhaps even more important at the national level, as national regulation may also introduce or maintain barriers to competition. DG Competition thus tries to encourage a more systematic competition-input into national legislation. This input can be either hard or soft. The area of professional services is probably the best known example of the latter. As you know, we published a report in February 2004 as part of a long running programme of advocacy and reform. The discussions with Member States and professional bodies in order to modernise the applicable rules are ongoing.

Beyond Advocacy

The Commission has also more stringent powers at its disposal if discussions do not seem to be the right way forward.

First, the Commission has powers under Article 86 in conjunction with Article 81, 82 or the state aid rules in previous state monopoly areas, such as postal services and telecoms. In October 2004, the Commission challenged the German Postal Law which induced the German incumbent Deutsche Post to bar private postal operators from discounts for downstream network access. Good cooperation with the Bundeskartellamt helped us to achieve an almost immediate impact on the market: very shortly after the Commission's Article 86 decision ([10]), the Bundeskartellamt adopted a decision on the basis of Article 82 ([11]), obliging Deutsche Post to apply the discounts in a non-discriminatory manner.

([7]) See section 9 of the Revised Impact Assessment Guidelines adopted by the Commission in June 2005: http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines-main.pdf

([8]) Preliminary report and executive summary available at: http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/. See also European Energy Sector — Quo Vadis? First results of the Sector Inquiry, Competition Policy Newsletter, Spring 2005, p.12: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_1.pdf

([9]) http://ec.europa.eu/energy/electricity/florence/index_en.htm

([10]) Commission decision of 20.10.2004, COMP/38.745 BdKEP/Deutsche Post AG + Federal Republic of Germany: http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_77.html#i38_745.

([11]) Bundeskartellamt decision of 11.2.2005 in case B 9 — 55/03, Deutsche Post AG/DID Deniz Intelligente Dienstleistungen et al.

Secondly, Article 10 in conjunction with Article 81 and/or 82 is quite a powerful tool. Under the *CIF* ([12]) case law, national competition authorities are entitled and even obliged to set aside the application of national law which infringes the EC competition rules. Within the European Competition Network ECN, the Commission encourages national authorities not to shy away from using this power proactively.

International Co-operation

Finally, EC competition policy also has a role to play on the international scene. Competition law enforcement is increasingly — and rightly — perceived as one of the major instruments of global governance, ensuring free and fair competition by combating both private structures and behaviours (international cartels, market power) which harm consumers; and public subsidies. The Commission is the leading competition law enforcer in the largest trading bloc in the world and the only authority with direct powers to control State aid. We can and should help emerging countries to introduce or improve competition rules, and we can and should be ready to learn from the best practices of other authorities around the world. We need to promote multilateral discussions in the ECN, ICN and OECD, and we need to promote a shift of emphasis from trade regulation to competition within the WTO. We need to be more proactive in the area of global enforcement and advocacy and we should strengthen bilateral ties to ensure that global enforcement has teeth.

All of these elements, rigorous enforcement, greater advocacy and international co-operation will help us grow into a role of intellectual leadership. There are many aspects to that leadership, not least that if we are to have credibility abroad, we must have clarity at home.

The Failure of Protectionism

An important message to be conveyed both by competition advocacy and enforcement is that protectionism is not the right answer to economic reform challenges. Nor is it a way to create more jobs and growth.

The national champion logic of artificially sheltering European undertakings from competition is, and always has been, flawed. Domestic monopoly power has never helped firms become successful internationally. The often-quoted success of Asian countries essentially relates to catch-up strategies by developing economies and the same logic simply does not apply to an economy that operates at the technology frontier (or aims to do so).

Furthermore, the EU countries trade first and foremost among themselves. The EU-15 in 2003 exported (and imported) only 17% of its goods and services ([13]). If we are to have a set of national champions, then 83% of the time, it's the EU consumer that will pay the price of inefficient resource allocation.

We must therefore combat any interference in the process of cross-border restructuring by national governments which is not justified by a legitimate interest foreseen in the Treaties. The Commission has two principal legal instruments at its disposal, the single market rules and Article 21 of the EC Merger Regulation. The recent months have demonstrated that the Commission is ready and willing to use both of these, and will continue to use them.

In the E.ON/Endesa case, for example, the Commission first sent a letter to the Spanish authorities under the internal market rules requesting information on the newly adopted measures designed to make the take-over by E.ON more burdensome. On 4 April, it decided to refer Spain to the Court of Justice for restrictions on investment in energy companies ([14]). The Commission has just given its approval to the transaction under the merger control rules. The Commission will also take the necessary steps if specific national authorities seek to block mergers in this field in contravention of the legitimate exceptions — public security, prudential rules, and media plurality — contained in Article 21 of the Merger Regulation.

What is clear, is that any attempt by a national government to create an additional barrier for a transaction cleared by the Commission will not be accepted.

At the same time, EC merger control does not stop the creation of national or European champions if this enhances competition rather than undermines it. In some cases, size may even lead to efficiencies which are positively factored into the assessment. There are numerous examples of mergers approved

([12]) Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato, 2003 ECR I-08055: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0198:EN:HTML

([13]) «EU competitiveness and industrial location», European Commission, Bureau of European Policy Advisers, page 20: http://ec.europa.eu/dgs/policy_advisers/publications/docs/eu_competitiveness_industrial_location_2006_en.pdf

([14]) See Commission Press Release IP/06/437, Free movement of capital: Commission refers Spain to the Court of Justice for restrictions on investment in energy companies http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/437

under the Merger Regulation which resulted in the creation or strengthening of leading European multi-nationals. To name just a few: in 2000, we approved the creation of the nuclear giant AREVA via the merger of Framatome and the nuclear activities of Siemens ([15]). In 2000, the Commission also approved the creation of the world's largest pharmaceutical company Glaxo-Smithkline from a merger between two UK drugs companies ([16]). And indeed in 2004 the Commission cleared the merger of Sanofi and Aventis to create yet another pharmaceutical giant ([17]). Finally the European consortium EADS was created from a merger of several smaller European businesses. These are all examples of European champions which are leading global players in their respective markets: not only was their growth by merger/acquisitions approved by the Commission, but the companies benefited greatly from the one stop shop for control of mergers of European dimension instituted by the Merger Regulation.

Despite these clearances, the argument is sometimes made that "narrow market definitions" applied by the Commission mean that larger companies in smaller Member States are unable to reach the critical mass required to face competition world-wide. This contention is simply not supported by the facts.

First, the Commission takes markets as it finds them. So if markets are genuinely global in scope, the Commission will define them as such (the market for civil aircrafts for example). If they are local, because consumers do not have other alternatives to the merging companies than other local suppliers, (as is often the case for retailing), the Commission will conduct an analysis at a local level.

Secondly, to allow mergers leading to significant market power in some small or local markets would lead to discrimination against consumers in smaller Member States. These consumers deserve the same level of protection from dominant suppliers as do those in larger economies. It is disappointing, of course, to find national governments complaining that the Commission is discriminating against 'their' industry, when they should be happy that we are not discriminating against 'their' citizens.

Thirdly, remedies for local markets are usually easy to devise if there is sufficient forethought, and sufficient will.

Finally, a merger with the closest competitor in a domestic market is not the only way to reach the necessary scale to compete globally. Cross-border mergers are another, often less restrictive way. Take the mergers between Volvo and Renault ([18]) (instead of Volvo / Scania) or Abbey Bank / BSCH: ([19]) these examples show that cross-border consolidation is a real alternative for European companies that want to reach the scale needed to compete more effectively abroad.

The Right Way Forward

It is not enough, of course, to simply say that protectionism is misguided, without giving some indication of the right way forward. In addressing the challenges of globalisation, we must start with the recognition that innovation, economic growth and jobs are created mainly by companies, whereas governments (and the Commission) should concentrate on creating the right conditions for this to happen.

This means that where we intervene, we need a balanced approach, one which takes into account the positive as well as the negative effects of a behaviour or a merger, and one which is underpinned by sound economic analysis. The Horizontal Merger Guidelines ([20]) recognise the positive role of efficiencies. Through the Article 82 review ([21]), we allow for the possibility of efficiency arguments also being taken into account under Article 82.

([15]) 2001/769/EC: Commission Decision of 6 December 2000 on the compatibility of a concentration with the common market and with the EEA Agreement (Case COMP/M.1940 — Framatome/Siemens/Cogéma/JV), OJ L 289, 06/11/2001, p. 8: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0769:EN:HTML

([16]) COMMISSION DECISION of 08/05/2000 declaring a concentration to be compatible with the common market (Case No IV/M.1846 — *** GLAXO WELLCOME/SMITHKLINE BEECHAM) according to Council Regulation (EEC) No 4064/89, OJ C 170, 20/6/2000, p. 6 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000M1846:EN:HTML

([17]) Commission Decision of 26/04/2004 declaring a concentration to be compatible with the common market (Case No COMP/M.3354 — Sanofi-Synthelabo / Aventis) according to Council Regulation (EEC) No 4064/89

([18]) COMMISSION DECISION of 01/09/2000 declaring a concentration to be compatible with the common market (Case No IV/M.1980 — 3* VOLVO/RENAULT V.I.) according to Council Regulation (EEC) No 4064/89, OJ C 301 , 21/10/2000, p. 23 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000M1980:EN:HTML

([19]) Commission Decision of 15/09/2004 declaring a concentration to be compatible with the common market (Case No IV/M.3547 — BANCO SANTANDER / ABBEY NATIONAL) according to Council Regulation (EEC) No 4064/89, OJ 255 , 15/10/2004 p. 7 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004M3547:EN:HTML

([20]) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, pages 5-18: http://ec.europa.eu/comm/competition/mergers/legislation/guidelines.htm

([21]) http://ec.europa.eu/comm/competition/antitrust/others/article_82_review.html

Some practices under Article 82 are of a contractual nature and can thus under certain conditions be exempted under Article 81(3) — why should they not be exempted under Article 82 if the same or similar conditions are fulfilled? In short, most behaviours or mergers have both pro-competitive and anti-competitive aspects and it is our work to assess on balance which prevail.

We should concentrate our competition action on the most urgent market failures. This means that we must recognise that sector inquiries are a very valuable tool where a flood of complaints or other elements indicate that markets are not functioning properly. The outcome may in some cases lead to immediate enforcement, in others to more medium-term and strategy orientation.

We cannot accept artificial barriers to cross-border mergers and acquisitions created by national governments, and we will use both the competition and the single market rules in order to achieve the best possible outcome in each case.

We must focus State aid control on ensuring that less and better aid is used to tackle real market failures. We want to concentrate the Commission's in-depth scrutiny on the most distortive aid to provide more flexibility to the Member States. In December the Commission therefore adopted the new Regional Aid Guidelines ([22]) for the period 2007 to 2013 that are both fair and flexible([23]). Following our Communication on Innovation ([24]), we are now designing rules on innovation to be included in the new common Framework on state aid for research and development and innovation. We are also revising the Communication on state aid to risk capital. And we will soon launch our first proposal to adapt the *de minimis* threshold, which dates from 1996, to the economic development of the Union ([25]).

We need to play our part in reinforcing global cooperation in enforcement, and in promoting effective competition policies in jurisdictions around the world.

In conclusion, competition and competition policy are key drivers for competitiveness, and competitiveness is key to strengthening the EU economy. We need to expand the role of a competition agency both practically and culturally — beyond pure enforcement towards a wider role combining advocacy and enforcement. We need to push for greater awareness of the market and competition implications of European and national policies. We need a European response to preserve and promote competition: focused, balanced and resistant to national egoisms.

([22]) OJ C 54, 4.3.2006, p. 13.

([23]) See also New guidelines on national regional aid for 2007 – 2013, Competition Policy Newsletter, Spring 2006, p. 18:
http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_1.pdf

([24]) See http://ec.europa.eu/comm/competition/state_aid/others/action_plan/cdsai_en.pdf

([25]) Copies of these documents, and information on ongoing public consultations, are available at http://ec.europa.eu/comm/competition/state_aid/others/action_plan/

OECD peer review gives positive assessment on competition policy and enforcement in the European Union ([1])

Sari SUURNÄKKI, Directorate-General for Competition, unit F-4

The Organisation for Economic Co-operation and Development (OECD) has published a report reviewing competition law and policy in the European Union. The European Commission DG Competition requested this review as it considered it important to discuss EU competition policy at this unique forum where 30 developed countries advance ideas and review progress in various policy areas, including competition policy. The review report was prepared by the Secretariat of the OECD, following extensive co-operation with DG Competition, and formed the basis for a peer review examination of the European Commission in the OECD Competition Committee in October 2005. The report gives a very positive assessment of EU competition policy. It finds as particularly positive features that this policy is increasingly based on market-centred economic considerations and that economic underpinnings of competition analysis have become more explicit. The report also puts forward policy options to further develop the leniency system, cartel sanctions and the policy in the field of unilateral conduct as well as to increase the capacity for economic analysis.

Objectives of an OECD peer review exercise

The OECD is well known for its individual country surveys and reviews. Dialogue, consensus and peer review are at the very heart of the OECD work. OECD peer review is a systematic examination and assessment of the performance of the policy of an OECD member country in a given field. There is no other international organisation in which the practice of peer review has been so extensively developed as the OECD, where it has been facilitated by the homogeneous membership and the high degree of trust shared among the member countries.

The ultimate goal of an OECD peer review is to help the reviewed jurisdiction to improve its policy making. The OECD Secretariat prepares a draft review report on the country (a sort of a country study) and this report forms the basis for a peer review examination in the relevant OECD Committee by the OECD Member countries. In the competition policy field the review examination takes place at the OECD Competition Committee. The examination of the EU competition policy took place in the October 2005 meeting of the Competition Committee. Following that examination the OECD Secretariat adapted the report to take into account the comments made on it during the examination. The OECD Secretariat's report on EU competition policy is available at the OECD web-site ([2]).

EU review and ongoing EU competition policy development projects

The dialogue and debate at the OECD and in other international fora, such as the International Competition Network (ICN), is essential for developed competition agencies to benchmark performance, test ideas and develop best practices. It brings together around one table the major competition jurisdictions around the world. This was the first time that EU competition law and policy has been reviewed at the OECD Competition Committee. The EU competition regime has some 40 years history and during this time we have seen substantial developments.

The EU has been continuously refining its thinking on policy issues and improving enforcement processes and techniques. But in the past few years projects have developed that by far exceed in scale and depth any previous policy projects. These include most notably the modernisation of antitrust enforcement, the merger review, the ongoing Article 82 review and the State aid action plan. In view of these recent, and the still ongoing, initiatives to develop the EU competition policy and law enforcement, the OECD review of the EU competition was very timely exercise.

In the antitrust field the EU has undergone a major reform of the enforcement system that has created a new basis for tackling private barriers to competition within the EU's network of 25 national competition authorities and the European Commission, all applying the same EU antitrust law together. The European Competition Network (ECN) provides a basis for more effective enforcement and more efficient use of the collective resources. The strengths of each authority within the ECN are derived from the institutional capacity and enforcement record of the individual agencies in it. However, by work-

([1]) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

([2]) See http://www.oecd.org/dataoecd/7/41/35908641.pdf

ing together, all agencies can benefit from pooling of market knowledge, efficient allocation of cases and eventually reinforcing enforcement priorities. The new system has also opened the way for focusing resources on fighting practices that are most harmful to competition and consumers. Instead of dealing with notifications, we can now set new proactive priorities.

The challenge of the recent reform in the merger field was to ensure the continuing effectiveness of the EU merger control system in the face of increasingly complex cases and a necessary close scrutiny by the EC Courts. To meet this challenge the regulation was improved by most notably clarifying the substantive test and increasing the flexibility of the referrals system between the Commission and national authorities. In addition, the European Commission's economic expertise was enhanced to make sure that investigations are firmly grounded in sound economic reasoning. As a result, the European Commission has now in place a mature merger control system, based on sound economics and broadly the same legal standards as all major jurisdictions in the world.

One of the particular strengths of the EU competition policy is that, in addition to antitrust enforcement and merger control, it can also effectively tackle State barriers to competition. In this area the Commission has taken a two-pronged approach comprising both competition advocacy or soft law measures and enforcement action. One important advocacy measure that the Commission has launched is so called 'competition screening'. This involves a systematic assessment of the impact of proposed new EU legislation on competition.

In addition to this kind of softer measures that seek to bring about regulatory reform on a consensual basis, the Commission has also various enforcement tools at its disposal. One prominent tool is the control of State aid which may distort competition among Member States. In this area the Commission has launched a comprehensive and far-reaching reform. The purpose is to strengthen the economic analysis underpinning state aid control and ensure a consistent approach across all policy areas. The State aid reform is essentially a continuation of the work that has been under way for some time in increasing the role of sound, effects-based economic analysis in EU competition law enforcement. This approach is perhaps most fully developed in the analysis of anti-competitive agreements (under Article 81) and mergers. With the ongoing reviews into State aid and unilateral conduct (under Article 82), the economic underpinning of EU competition law enforcement action is being developed across the field. It is important to understand that in the State aid area economic approach is an instrument to better focus on 'good' aid — which targets market failure and helps to strengthen the structure of the EU economy — as well as to identify 'bad' aid — aid that is a waste of taxpayers' money and seriously distorts the market competition.

In support of its policy, the Commission has also a practice of issuing comprehensive up front guidance to the legal and business community on the way it applies the EU competition rules. Guidelines, notices and other forms of guidance issued by the Commission are of course binding only itself and not on the courts. But they do have three positive effects:

- they help prevent anti-competitive practices and structures;
- they help businesses to plan compliance better;
- they help promote convergence in the thinking and practice of competition agencies both within and outside the EU. In itself this has advantages for businesses that operate globally and are faced with compliance in a large number of jurisdictions.

The Commission has issued guidelines for instance on assessment of vertical and horizontal restraints of competition, technology licensing agreements, and horizontal mergers and on a number of State aid issues. At present the Commission is developing guidance both in the field of unilateral conduct and with respect to vertical and conglomerate mergers.

Main conclusions and policy options raised in the OECD Secretariat report

The OECD Secretariat report gives overall a favourable assessment on the EU competition law and policy. It notes in particular the reshaping of EU competition policy in terms of the increased role of effects-based economic analysis and concludes that 'competition law in the European Union is in transition, as policies about antitrust, mergers and State aids are increasingly based on market-centred economic considerations. Modernisation of concepts sets out basic analysis in an administrable format while making its economic underpinnings more explicit.'

The report provides a concise overview of the EU competition law and policy. It starts by recalling the history and origins of the EU competition policy moving then to reviewing the content of the competition law in the main policy fields, with the emphasis on vertical and horizontal restraints, abuse of dominance and merger control. Thereafter the report turns on analysing the institutional structure, enforcement processes and powers of

the Commission as well as the system of judicial review. While reviewing the substance of the law and the enforcement processes and powers, the report pays particular attention to the recent and ongoing initiatives to develop EU competition policy and enforcement, as far as those initiatives were on public domain at the moment of the review. Finally the report analyses also the limits of EU competition policy and competition advocacy initiatives of DG Competition.

The report concludes with the following four policy options for consideration:

1. clarify the relationship among the leniency programmes of the Community and the national enforcement agencies;
2. in adopting an economic approach to dominance, make liability depend upon effects that harm competition; in appropriate cases, assessing the scope for recoupment should be an integral part of such an approach;
3. increase further DG Competition's capacity for economic analysis;
4. consider means for extending sanctions to individuals as well as firms, such as co-ordination with application of Member State laws that provide for individual sanctions.

Policy options 1 and 4 both concern the EU cartel policy. The report notes as positive developments both the increase in DG Competition resources dedicated to the cartel enforcement and the increase in enforcement activity. But concerning sanctions, it considers that 'enforcement against cartels would be strengthened further if sanctions applied to individuals as well as firms'. The OECD Secretariat considers that the EC Treaty could support administrative fines against individuals, but that this might not be sufficient. Therefore, the report concludes that, if it is not feasible under the Community law to implement sanctions against individuals, it suggests as an alternative to promote and support the imposition of individual sanctions under the national laws of Member States.

The report also reflects the issue that there are currently multiple leniency programmes in operation in the EU. Due to this companies may need to file leniency applications for several authorities in the EU (there is no single point of contact). Differences in the leniency programmes complicate the matter further. While no case of serious disagreement has been reported yet, the OECD Secretariat recommends clarifying the relationship among the various leniency programmes of the Community and the national enforcement agencies. The report notes that this does not need to result in a single integrated system (at least not yet), but administrative complications and unnecessary variations need to be reduced.

Policy option 2 relates to the discussion that is ongoing in the EU on principles for the Commission's policy against abuse of dominance. The report notes that 'this area of law is due for modernisation to adapt it to the Commission's more economics-centred approach, to focus on likely or actual market foreclosure effects more than on formally defined prohibited behaviours'. Due to the fact that the report was prepared before the Commission discussion paper on Article 82 was issued, it does not reflect the content of that paper. However, the key principles of the Article 82 review were already discussed in public at that moment and therefore those ideas are behind the reflections in this report too. In particular, the recommendation that in Article 82 cases liability should depend upon effects that harm competition is in line with the effects-based approach taken in the Article 82 discussion paper. The OECD Secretariat also calls for making, in appropriate cases, assessment on the scope of recoupment ([3]) an integral part of the effects based approach.

Concerning the EU merger control, the report finds as positive features the inclusive legal standard, which can deal with all kinds of competitive effects, and the horizontal merger guidelines that 'imply strong harmonisation in approach across the Atlantic, at least for horizontal combinations'. But in this context the report also calls for a further increase in DG Competition's capacity for economic analysis, particularly by increasing the staffing of the Chief Competition Economist's team. The report welcomes nonetheless the measures that the Commission has taken to increase its capacity for economic analysis and to strengthen internal quality controls (in particular the peer review panels and the expansion of the hearing officers' role) ([4]). But it considers that DG Competition's caseload may in the future consist of more complex and controversial cases (particularly following the antitrust modernisation and the case

([3]) Possibility of recoupment is relevant in predation cases and the test is to determine whether a company's alleged predatory strategy would be likely to eliminate and deter competition and whether it is likely that the predator would then be able to collect at least enough profit to recover the losses it sustained during its predatory attack. See for reference the OECD policy brief on the OECD Competition Committee roundtable on predatory foreclosure published in OECD web-site www.OECD.org.

([4]) While these measures are discussed in the report in the context of merger control, it needs to be kept in mind that these improvements apply across the field in the EU competition law enforcement.

allocation within the ECN), and that these internal steps might become more a rule than something to be used selectively.

As for the administrative process in general, the report underlines as positive features the changes in the law that strengthen investigative powers as well as the better incorporation of economic evidence in decision-making. The report also welcomes the modernisation of the enforcement process, by eliminating notification and prior approval of exemptions while sharing enforcement responsibility with national agencies, and considers that this is designed, among other things, to redirect resources so that DG Competition can concentrate on complex, Community-wide issues and investigations. A continuing challenge will be to convince the courts and to maintain policy consistency in a system of decentralised enforcement where the Member State competition agencies and courts can fully apply Community substantive law. The informal network of the enforcement authorities, ECN has in this context an important task to facilitate inter-agency co-ordination. The report notes that the ECN has got a promising start, but that experience will show whether it is necessary or prudent to make it more formal.

As for the coverage of the Community competition law, the report finds that it is 'broad and generally consistent, with no sectoral exclusions and few provisions for special enforcement processes'. Even though a specific treatment applies to aspects of agriculture and transport, particularly ocean shipping, the report recalls that these sectors commonly get specific treatment also elsewhere. The report calls for careful attention to ensure consistency in sector-specific application of state aid rules, where the enforcement is under the responsibility of the sector specific Directorates General, and other general competition rules. It is worth noting that after this review exercise the Commission has launched a proposal for the Council to repeal the block exemption for liner shipping companies ([5]). The preparatory works on this proposal started well before the peer review exercise ([6]). When this proposal is adopted, one important sector is removed from the list of areas which get some sort of specific treatment.

([5]) Commission proposal of 14.12.2005 for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services.

([6]) First consultation paper on this matter was published in March 2003. Public consultation documents in this review process are available at DG Competition web-site: http://europa.eu.int/comm/competition/antitrust/legislation/maritime/

Finally, concerning the State measures that restrict competition, the report notes that the Treaty provisions that prohibit Member State measures contrary to Treaty rules about public undertakings and undertakings with special or exclusive rights have been the foundation for the long-term liberalisation program to reform traditional infrastructure monopolies. As for the State aid control, the report notes that the subject is too technical and wide-ranging for detailed treatment in this report. The report also notes the fact that the Commission's impact analysis of EU legislative proposals is turning attention to avoiding that EU legislation restricts competition. It reminds that 'the extent to which other parts of the Commission are committed to pro-competitive reform of their regulatory programmes remains to be seen'.

What the peer review gives for the future development of EU competition policy?

The Directorate-General for Competition has already during and before the peer review exercise been working on certain of the policy issues displayed in the peer review for consideration. Particularly concerning leniency policy, the European Commission is already working in the ECN together with the EU Member States' national competition authorities to ensure that discrepancies between the various programmes and the flexible enforcement system opted for in the EU do not dissuade applicants from coming forward. Leniency policy has proven to be a powerful and central instrument in the fight against cartels. It is therefore in the Commission's and other ECN members' interests to ensure that our respective leniency programmes continue to be attractive for the business community. The next step is necessarily to design and implement a one-stop-shop system, but it is still too early to describe how that system would look and when it could be put in place.

The Commission is also reviewing its policy in abuse of dominance cases. On 19 December 2005 the European Commission published for third party comments a Staff Discussion Paper on the application of EC Treaty competition rules on the abuse of a dominant market position (Article 82) ([7]). The Discussion Paper is designed to promote a debate as to how EU markets are best protected from dominant companies' exclusionary conduct, conduct which risks weakening competition on a market. The paper suggests a framework for the continued rigorous enforcement of Article 82, building on the economic analysis carried out

([7]) The discussion paper is available at DG Competition web-site: http://europa.eu.int/comm/competition/antitrust/others/article_82_review.html

in recent cases, and setting out one possible methodology for the assessment of some of the most common abusive practices, such as tying, and rebates and discounts.

The rest of the policy options put forward by the OECD Secretariat merit also a careful examination. The recommendation to increase DG Competition's capacity for economic analysis has probably overlooked that in the past few years DG Competition has put particular emphasis on increasing its capacity for economic analysis throughout the house. As a result there are currently a relatively large number of economists around the house working in case-teams along with lawyers. The Chief Economist's team provides further support to the individual case-teams like the Policy Directorate (Directorate A), which also has within it a number of highly qualified economists. The Chief Economist's team is also involved in various policy development projects.

The policy option raised in the report on extending sanctions to individuals is not a novel one, but it raises complex legal and policy issues. That policy option needs to be analysed in the EU legal framework and taking into account potential implications for the whole EU anti-cartel enforcement system. The system of cartel sanctions in the EU is based on effective application of a combination of corporate and individual sanctions at Community and national level. There would seem to be some scope for examining how to best use the options available in this system.

Finally it should be noted that one area which clearly would have merited more attention at the OECD Secretariat's report is the EU State aid policy. As mentioned above, one of the major strengths of the EU competition policy is that it allows the Commission to effectively tackle also State barriers to competition, be it through bringing reform on a consensus basis or via application of various enforcement tools, most notably the State aid control tools. Commission has launched a comprehensive and far-reaching reform in the field of State aid control ([8]). It would have been highly beneficial to receive views of the OECD experts in this area too, both because of the importance of this policy area for the EU and because the review coincided with the beginning of the reform project, when envisaged orientations of the reform were published.

([8]) See Press Release — IP/05/680 of 7.6.2005 on State Aid: Commission outlines comprehensive five year reform of state aid policy to promote growth, jobs and cohesion.

Preliminary results of Commission sector inquiry in payment cards industry raise competition concerns (1)

Magdalena BRENNING-LOUKO, Tatyana PANOVA, Lukas REPA and Antonio Carlos TEIXEIRA, Directorate-General for Competition, unit D-1

1. Introduction

The payment cards industry is of growing economic importance in Europe. Cards increasingly replace cash and cheques as payment means for over the counter purchases. In 2004 a total of 23 bn. card payments were made in the EU with an overall value of € 1.350 bn. Retailers paid an estimated € 25 bn. in fees to banks for accepting cards. Consumers pay fees for card usage, interest for the use of credit facilities and money exchange fees which can add up to considerable sums.

In its Communication of 2 February 2005 to the Spring European Council on a new start for the Lisbon strategy, the Commission endorsed a more pro-active application of competition policy, in particular, by means of sector investigations. The Commission launched three sector inquiries (energy, retail banking and business insurance) on 13 June 2005 (2). The first part of the inquiry into retail banking focussed on the payment cards business. On 4 April 2006 the Commission published an interim report on preliminary findings on the payment cards industry (3), available on the internet (4). It raises a series of substantive competition concerns. Commissioner Kroes has invited the industry to address the problems identified in the report.

The interim findings of the payment cards inquiry are divided into two categories: financial findings and potential barriers to competition.

2. Financial findings

2.1. High profitability of the payment cards business

An important preliminary finding of the sector inquiry is that the profitability of payment card issuing is high and sustained over time. The credit card business appears particularly profitable, with a weighted profit-to-cost ratio average of 65% for issuing. The average profit-to-cost ratio for debit card issuing is also high at 47%. High profitability is often correlated with high fees charged to merchants and cardholders. A key preliminary finding of the inquiry is that, even in the absence of interchange fees, other revenues alone would generate profits for issuers. The evidence suggests that card issuing would generate positive profits in 20 out of 25 countries, even without interchange fee income.

The profitability of payment card acquiring seems to vary, though is fairly high overall. Credit card acquirers across the EU have a 15% profit-to-cost ratio on a weighted average, while debit card acquirers averaged around 5% profitability. As a result, issuing of debit and credit cards is significantly more profitable than acquiring in the EU. These results cast doubts upon a longstanding claim of industry participants that interchange fees are necessary to render the business of card issuing sufficiently profitable.

2.2. High variation of fees across Europe

2.2.1. Merchant fees

Merchant fees are the price per transaction that a business (or 'merchant') pays to the acquirer for accepting cards as a method of payment. The preliminary results of the inquiry indicate that there is a high variation of merchant fees across the European Union. The market for card payment services may therefore not be working effectively in some Member States, to the detriment of businesses and consumers.

There is evidence of price dispersion at five levels:

- Businesses in some countries pay a far higher merchant fee on average than others. Merchants in Hungary, Czech Republic and Portugal have to pay an average fee of between 2.5 and 3.1% of total transaction value to accept a Master/Visa credit card. This level is 3 to 4 times higher than in Sweden, Finland and Italy.
- Businesses pay a far higher merchant fee on average to accept credit than debit cards. For example, a merchant in the UK pays almost five times as high a fee on average for accepting a MasterCard credit card as compared to a Master Card debit card.

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

(2) See Press Release **IP/05/719.**

(3) See Press release **IP/06/496.**

(4) http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/interim_report_1.pdf

- Businesses pay a far higher merchant fee on average to accept cards issued in the international networks than cards issued in the domestic networks. Typically, businesses pay 30-40% lower fees on average for domestic debit card usage than Visa/MasterCard (Maestro) debit.
- Smaller businesses pay premium rates for accepting MasterCard and Visa. They pay typically between 60 and 70% higher fees on average for Visa and MasterCard credit and debit card transactions than larger ones. This does not seem justified solely based on transaction volumes as in domestic card payment systems the price difference between smaller and larger merchants is only 7% on average.
- Businesses in some sectors pay much higher merchant fees on average than in others: For instance, florists, restaurants and car rental firms pay a merchant fee twice the level of fuel companies and wholesale trade firms.

The investigation has also shown that inter-system competition between MasterCard and Visa is hampered by pricing practices. Acquiring banks often charge businesses the same level of merchant fees for accepting cards issued by different networks. This practice is known as 'blending'. Acquirers apply blending to competing products, such as MasterCard and Visa, both in domestic and international card payment systems. The inquiry has found that blending of prices may weaken inter-network price competition, which in turn may lead to businesses paying higher acquirers fees. Blending appears to be widespread across the EU25.

2.2.2. Cardholder fees

Cardholder fees are the fees a cardholder pays to the issuing bank for a payment card. The results of the inquiry show that there is no significant negative relationship between the levels of fee per card and credit card interchange fee at the country- and network-level. The evidence challenges hypotheses advanced by some industry participants and the economic literature of an inverse relationship between card fees and interchange fees. Accordingly, high interchange fees do not appear to result in low fees per card, or vice versa.

2.2.3. Fees paid between banks

Acquiring banks in the MasterCard and Visa systems and in some national systems pay issuing banks "interchange fees" for every transaction with a payment card. The level and structure of these fees are typically decided upon by a system's member banks in a collective manner. The interchange fee operates as a transfer of revenues from the acquiring bank to the card issuing bank and determines to a large extent the fees paid by merchants. The results of the inquiry show that there is high variation of interchange fees across the EU. The level of interchange fee dispersion is similar to those of the merchant fees. Acquirers in some Member States pay far higher interchange fees on average than in others. This is true for international credit, international debit and domestic debit card transactions.

3. Potential barriers to competition

The investigation has identified a number of potential barriers to competition in the markets for card payment services. These barriers are of a structural, technical or behavioural nature:

3.1. Structural barriers

The high vertical integration of some card payment systems may impede new entrants, in particular non-banks (processors), from competing with the incumbent in one segment of the market. In systems where the network is co-owned by the very banks that are the customers of the network operator, banks have little incentive to sign up with a processor other than 'their' network operator. This may lead to a lack of competition which inhibits innovation and inflates processing costs.

Joint ventures between banks for acquiring merchants may remove the competitive pressure on merchant fees, because merchants only face one offer for the network concerned instead of offers from many competing banks. Such joint ventures exist in Belgium and Denmark for domestic payment card transactions and in eight Member States for acquiring MasterCard and Visa. Informal complaints have highlighted that foreign banks incur particular difficulties in entering national markets where local issuing banks co-own such acquiring joint ventures. Only about 9% of the acquiring banks surveyed ever attempted a cross-border entry into a new market and few of them have been successful.

Banks may also find it difficult to enter payment card systems without a central clearing house. In systems where clearing occurs bilaterally between pairs of banks, the foreign bank is forced to find a local bank as 'sponsor' to access the clearing infrastructure. This makes new market access dependent on the goodwill of incumbent banks.

3.2. Technical barriers

Diverging technical standards across the European Union may hinder acquirers, processors and terminal vendors from operating efficiently on a pan-

European scale. There appears to be significant scope for efficient convergence of technical standards in the payment cards industry.

3.3. *Behavioural barriers*

Agreements on interchange fees may raise the costs of foreign banks to enter a new market. This seems to be at least the situation in Austria, Portugal, Spain and France. Moreover, interchange fees account for 40 % to 70% of the average merchant fee. They appear to inflate retail prices and may inhibit price competition between acquiring banks.

Some governance arrangements within card payment systems risk distorting the competitive conditions between the members, in particular between new entrants and the incumbent banks. For instance, in some networks, associate members have to communicate business sensitive information to the principal members without reciprocal information sharing. In other systems, decision making on issues affecting intra-system competition, such as fees, membership rules and technical specifications, is reserved to the principal members.

Some payment system membership requirements may hinder non-banks from domestic acquiring and new entrants from cross-border acquiring. Rules which may constitute barriers include requirements to be a financial institution and to have a local establishment. About half of the domestic card payment systems in the EU require issuers and acquirers to be financial institutions. Some systems also require banks to establish a local presence before joining a domestic payment system.

High joining fees of card payment systems and their structure may discourage new entry and expanded card issuing. High variation of joining fees across the EU for similar card payment systems may also indicate that the level of fees is not objectively justified.

Other network rules may also prevent or make entry more difficult. Prohibition on co-operative agreements with competing networks or non-banks, co-branding, may hinder domestic debit card payment systems from entering into competition with Visa and MasterCard, or, retailers or other operators from entering into competition with issuing banks. Similarly, the prohibition for merchants to charge customers for paying by card, surcharging, may hinder the development of alternative non-cash payment instruments as the true costs are hidden to the consumers via cross-subsidisation.

4. Follow up

The preliminary findings of the interim report on payment cards were subject to public consultation until 21 June 2006. A public hearing was held on 17 July 2006 giving industry, academia, businesses and consumers the possibility to comment on the preliminary findings. The final report on card payments is to be published together with findings on the competitive market situation in other areas of retail banking at the end of 2006. This report will contain concrete recommendations to industry, regulators and the legislator to improve the competitive situation in the payment cards industry.

The European Competition Day in Vienna on 19 June 2006: 'Competition law and its surroundings — links and new trends' (1)

The event, traditionally organised by each EU presidency, was this time co-staged by the two 2006 Presidencies of the Council of the European Union countries Austria and Finland.

We would like to bring to your attention a few quotations in order to give a better vision of the main themes treated by the programme sessions: I) Do mergers keep what they promise? II) Links and trends in antitrust policy III) Europe's quest for competitiveness — role of antitrust.

From left to right: Jonathan Evans, MEP; Neelie Kroes, Commissioner in charge of competition; Martin Bartenstein, Austrian Federal Minister for Economics and Labour; Dr Paul Rübig, MEP

Mrs Neelie Kroes, Member of the European Commission in charge of Competition.

Opening session remarks: 'I am firmly of the view that private enforcement of competition law is an essential component of a truly effective and comprehensive anti-trust system. If we can encourage an increase in effective private enforcement, this will not only secure compensation for injured businesses and consumers — which they already have a right to after all! But it will also play an important part in encouraging overall compliance with the rules as a complement to the actions of competition authorities.'

'We must protect competition, not competitors; and the ultimate aim is to avoid harm to consumers. The Article 82 review Discussion Paper therefore suggests ways of analysing this type of conduct which are firmly rooted in sound economic analysis. This should enable us to identify those practices which are most harmful to competition and consumers. By focusing our enforcement priorities on these abuses we hope to optimise our use of resources and improve the quality of our decisions.'

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

Mr. Raimo Luoma, Director General, Finnish Ministry of Trade and Industry.

Delivering his opening address, Mr. Luoma said: 'The effectiveness and focus of EU competition policy should also be assessed at the political level. The debate on competition policy should not solely remain the concern of officials implementing competition rules'.

Mr Emil Paulis, Director of Policy and strategic support of the Directorate General for Competition of the European Commission.

Presenting the Interaction between public and private enforcement and the role of leniency he said: 'It can't be right that the victims of competition violations are left to stand out in the rain with no effective means to redress that situation.'…. 'If we do not have an effective type of collective action, only individual actions, will that be sufficient to ensure that the harm is undone? That is very doubtful.'

'The Commission has not yet decided if actions — legislative or otherwise — are necessary. Also, no conclusions have been reached whether any possible action is best taken at the Community level or at the level of the Member States. The Commission will take on board all comments received on the Green Paper and assess at that point what further action, if any, is needed.'

During the discussion about Europe's quest for competitiveness he said: 'The purpose of EU competition policy, to the extent that markets in Europe are already open to competition, is to ensure that competition is not undermined. To the extent that markets in Europe are not already open to competition, its purpose is to ensure that competition is introduced to the extent possible.'…..'A consumer welfare standard is at the root of our approach to competition policy: this is the most reliable benchmark for ensuring that markets are productive and that society as a whole will benefit from this productivity.'

'There is no necessary incompatibility between embracing open and competitive markets in Europe and worldwide (economic globalisation) and the provision by governments of mechanisms aimed at ensuring that its citizens are equipped to survive and prosper in a market-driven economy, including the alleviation of some of the undesirable consequences of a market-driven economy.'

RA Dr. Hanno Wollmann, Lawyer from Schoenherr & Partners
speaking on counteracting anticompetitive practices — the impact of other Laws, said:

…' there is an apparent conflict of interests between competition policy and other state policies (conflicts which need to be solved in mutual respect); there are many instances where competition rules and other national laws serve the same or at least a similar purpose. The most notorious example is the law against unfair competition. This is particularly obvious in the area of Article 82 EC-Treaty. More often than not, the abuse of a dominant market position is hardly anything else than unfair competition conducted by a dominant firm.'

…' the stakeholders in neighbouring laws (e.g. the regulators in the area of liberalized industries, or the consumer protection organisations in the field of unfair competition) should have adequate access to the instruments of antitrust policy. Austria is a jurisdiction where "crossing borders" in this sense usually works well.'

Mr. Rainer Geiger, OECD, Deputy Director Financial and Enterprise Affairs,
presenting the convergence & international cooperation in Competition Law explain the role of the OECD:

'1 — Competition Committee has for many years promoted best practices in competition law enforcement & cooperation.

2 — Recommendations and Best Practice documents provide framework for cooperation.

3 — Roundtable discussions contribute to substantive convergence.

4 — Cooperation traditionally an instrument to reduce conflicts and tensions (at times of fundamental differences over competition policy goals).

5 — Today much greater emphasis on cooperation as an instrument to make enforcement more effective.

6 — Effective cooperation depends on convergence of substantive and procedural rules.'

With some conclusions:

'1 — Cooperation depends on substantive and procedural harmonization; differences interfere with cooperation. E.g., ECN has highest level of cooperation: enforcement of the same legal norms; similar legal culture.

2 — Concurrent developments on many fronts: important roles for OECD, ICN, bilateral and regional cooperation models.

3 — Formal instruments and informal contacts: the role of the Competition Committee.

4 — International cooperation on competition: an important step toward managing globalization'

Professor Tomi Laamanen of Strategic Management at the Helsinki University of Technology

presenting mergers and business strategy give 'key insights of Managing Acquisitive Growth: Acquisitions programs can be used to engineer growth strategies that contribute to shareholder value creation, and programs for managing acquisitive growth should be tightly embedded to the organic growth strategy.'

Jonathan Evans MEP, member of the European Parliament, Chairman of the Transatlantic Legislators Dialogue, and European Parliament Rapporteur on the modernisation of EU Competition Policy,

highlighted the links between the EU Competition Day and the EU-US summit between President Bush, Chancellor Schussel and Commission President Barroso being held in Vienna the same week. Both meetings faced the major challenge of confronting economic nationalism and protectionism. Mr Evans anticipated much closer coordination between the Commission DGs dealing with Competition and the Internal Market, and within their equivalent committees in Parliament in identifying further areas for sectoral inquiries in following years.

The day concluded that competition and well-performing markets constitute a background for all key competitiveness themes. During Finland's EU Presidency, the competition perspective will also be reflected in the innovation policy and the energy policy debate.

http://www.bmwa.gv.at/BMWA/Presse/Aktuelle+Meldungen/20060619_01.htm

http://www.competition06.com/competition06/speeches.htm

Future Competition Days

The Bulgarian Commission on Protection of Competition is organising a Competition Day the 9th November 2006 in Sophia under the theme 'Competition Policy before and after Bulgaria's Accession to the EU'. http://www.cpc.bg/public/index.php

In 2007 the Competition Day will be held under the Germany Presidency of the Council of the European Union during the first half of 2007 in Munich.

Prokent/Tomra, a textbook case? Abuse of dominance under perfect information [1]

Frank MAIER-RIGAUD, Directorate-General for Competition, unit A-3 and Dovile VAIGAUSKAITE, Directorate-General for Competition, unit E-1 [2]

Introduction:

On 29 March 2006 the Commission adopted the Prokent/Tomra decision imposing a fine of € 24 million on the Norwegian group Tomra, a supplier of so-called reverse-vending machines that are used by retail outlets to collect empty drink containers. The Commission found that Tomra abused its dominant position and therefore infringed Article 82 of the EC Treaty and Article 54 of the EEA Agreement in five different EEA markets: Austria, Germany, the Netherlands, Norway and Sweden.

The infringement committed by Tomra Systems ASA, Tomra Europe AS and its five national subsidiaries in the relevant EEA markets (together 'Tomra') consisted of the operation of a system of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, restricting or at least delaying the market entry of other machine manufacturers. This in turn led to the foreclosure of the market for Tomra's competitors, in some instances even to their elimination from the market to the detriment of consumers.

The Commission's investigation was triggered in 2001 by a complaint from a German supplier of reverse vending machines, Prokent, asking the Commission to investigate whether Tomra was abusing its dominant position, in particular through agreements concluded with several large retail companies that allegedly denied Prokent access to the market. Following the inspections carried out in Tomra's premises, and several years of further investigation, the Commission found that Tomra in fact abused its dominance in the time span of five years from 1998 to 2002. The infringement was found to be serious, and a corresponding fine was imposed.

The product:

'Reverse Vending Machines' (RVMs) are installed in shops and supermarkets to facilitate the collection of empty drink containers, such as glass, plastic bottles or cans. In essence, the machine allows the customer to return empty bottles, thereby recouping the deposit, in an automated way. Upon insertion of the bottle, the machine identifies it based on parameters such as shape or bar code, and calculates the deposit that is to be reimbursed to the customer. Typically, the machine then prints a receipt that is credited back at the shop's cashier.

There exist different types of such machines, depending on the type of drink containers they can accept and their storage capacity. The basic machine model can accept one type of container, for example, either only glass bottles or cans. More complex machines can accept several types of containers and corresponding crates. Furthermore, certain types of machines can be connected to backroom equipment, that is, equipment installed in a room separated from the shop, allowing empty containers to be mechanically sorted and stored. Connection to backroom equipment increases significantly the storage capacity of a machine. While this type of machine is usually referred to as 'high-end' RVM, the single standing ones are referred to as 'low-end' RVMs.

The relevant market:

Although there were indications that high-end machines may constitute a separate market distinct from the market for low-end RVMs [3], the Commission left this question open, since the competitive assessment would substantially be the same under both market definitions. In any event, such a more encompassing market definition was more favourable to Tomra.

The development of the market for RVMs is highly dependent on the enactment of national legislation subjecting the sale of drink containers to a mandatory deposit. The types and the volumes of certain drink containers in any given country, together with consumer preferences, determine the demand for reverse vending machines and the models that are marketed in the country in

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

(2) The authors would like to thank Stefan Bechtold, Celine Gauer, Jean Huby, Luc Peeperkorn and Joos Stragier for comments on an earlier version of this article.

(3) For example, the difference between the storage capacities of high-end and low-end machines usually meant that big supermarkets would not opt for a low-end machine, as the amount of containers handled by a big shop would require big storage capacity, offered only by a backroom equipment-capable machine. There are significant price differences between high-end machines and lower priced low-end machines.

question. Each country requires specific software applications, for example, concerning the deposit amount or the language. Finally, despite recent cross-border consolidations in the retail industry, the procurement process of reverse vending solutions was predominantly organized on a national basis, at least at the time when the investigation took place. Tomra's national subsidiaries were supplying the retail companies based in the territories serviced by them. All this led to the conclusion that the relevant geographical market in this case was national in scope.

Tomra — a dominant undertaking:

Tomra had a very strong market position in the EEA in general and in particular in each national market under investigation. Tomra's competitors were a few small companies. Overall, Tomra did not face strong competition from any rivals on any of the national markets concerned.

The Commission concluded that Tomra was in a dominant position at least from 1998 to 2002, the time period under investigation. In this context, the Commission took into account the high market shares of Tomra, and other factors such as, among other aspects, the weak market position of its rivals and lacking buyer power in the market. Tomra was found to be a dominant undertaking in the national markets under investigation and in the EEA in general ([4]).

Abuse:

Tomra's strategy:

The infringement consisted of agreements and arrangements, systematically aiming at and restricting, or at least delaying the market entry of Tomra's rivals. The strategy of limiting market entry or restricting the growth of competitors was expressly mentioned in the internal documents of Tomra collected by the Commission during inspections. The means used by Tomra to implement its strategy included (i) exclusivity or preferred supplier agreements with customers, (ii) individualised high-volume orders, and (iii) individualised retroactive rebate schemes, both of which were adapted to expected customer demand.

Exclusivity agreements:

During 1998-2002 Tomra concluded a number of single branding agreements with its customers, according to which it became the sole or preferred supplier of machines for the collection of used drink containers to the retail outlets belonging to those customers. In some agreements Tomra was not foreseen as 'exclusive' or 'sole' RVM supplier, although customers were expected to exclusively purchase from Tomra and this was generally understood and accepted by all parties. By agreeing to Tomra's exclusivity or to its preferred supplier status, customers' would receive discounts on their purchases or other rewards, such as, for instance, free machines or free upgrades for the installed machines. If the customer were to purchase competing machines, he would be reminded that the discounts granted in the agreement would have to be paid back.([5])

Quantity commitments:

The second category of agreements employed by Tomra imposed purchase targets upon its customers, which usually corresponded to total or almost total demand of a customer during a specific time frame. Similarly to exclusivity agreements, customers were offered better prices if they agreed to Tomra's quantity requirements. The quantity targets were individualised for every client, resulting, in some cases, in higher unit prices for larger volumes purchased compared to the unit prices for much smaller quantities of machines bought by other customers. The volumes were based either on demand estimations or on the customers past purchases.

Retroactive rebate schemes:

The third category of agreements used by Tomra were agreements containing rebate schemes that entitled the customers to retroactive discounts or bonuses depending on them reaching a specific individualised purchasing target (threshold) by the end of a given reference period. Just as the quantity targets, the rebate scheme thresholds were individualised, and adapted to the estimated demand of each customer. The bonuses were paid at the end of the reference period and took the form of a cash refund, or bonuses in kind, such as, for example, free machines.

In order to describe the effects of such schemes on average unit prices, the following three-dimensional Figure (Figure 1) is introduced. It depicts what is typically referred to as suction effect for a range of different rebate percentages. Such a presentation is useful when considering rebate schemes and was also used by the Commission in *Prokent/Tomra.* Figure 1 depicts the unit price that a competitor

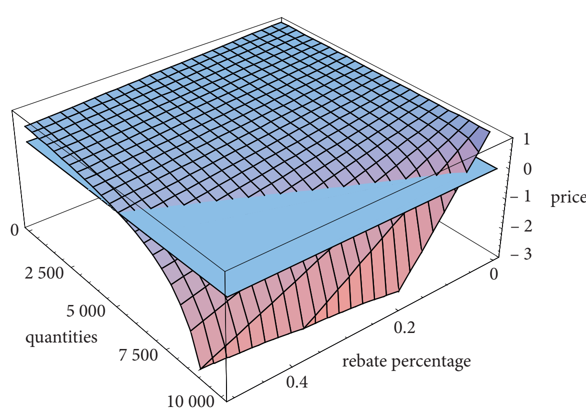
([4]) Tomra was not in a dominant position in two national markets under investigation during a few years. This stands in contrast to the general development of Tomra's market shares in the EEA. With respect to overall market shares in the EEA, Tomra was dominant during the entire period under investigation.

([5]) Some agreements contained clauses that went as far as explicitly forbidding the installation of free test machines by competing manufacturers.

would need to offer for the remaining quantity up to the threshold in order to render the buyer indifferent between buying from the dominant firm and the competitor. Alternatively the curve can be interpreted as the average unit price that the dominant firm offers for the remaining quantity up to the threshold. The threshold in a rebate scheme is the quantity that triggers the retroactive rebate on all previous units purchased once reached. By assessing the strength of the suction effect, i.e. the unit price that a competitor would at least have to offer to compete, it is possible to establish whether any particular rebate scheme has the capability of effectively foreclosing competitors.

For instance, under homogenous products such an analysis allows to gauge the likely effects of rebate schemes if the minimum quantity that unavoidably will need to be purchased from the dominant firm can be determined ([6]). In other words, the dominant firm has to be an unavoidable trading partner for rebate schemes to be capable of developing their full anti-competitive effects. This could, among other factors, be due to the necessity to offer products from the dominant firm (must stock brand), or, as for instance in this case, to capacity constraints of competitors, or to the competitors' reputation, depriving them from competing *ex ante* on high volumes before their machines have been tested by the buyer on a smaller scale.

Figure 1: 3D Suction effect ([7])



([6]) Once that quantity is determined, the price a competitor would need to offer can directly be read off the figure graphing the suction effect.

([7]) The Figure depicts a three dimensional suction effect in a rebate scheme with a threshold of 10,000 units, a normalized base price of 1 and rebates ranging from 0 to 50%. The 'suction-wave' in the Figure indicates the price a competitor would need to offer to make the customer indifferent. This price decreases with an increase in quantity bought from the dominant firm and may fall below 0, as indicated by the light blue plane.

Assessment of Tomra's practices:

The Commission found that Tomra's policy and its practices were designed to, were clearly capable of, and were likely to restrict market access for competitors, to foreclose the RVM market and to affect the competition structure on it.

Although the agreements, arrangements and conditions found in this case contained different features such as explicit or *de facto* exclusivity clauses, undertakings to purchase volume targets or retroactive rebate schemes, or a combination of them, they were all seen by the Commission in the context of Tomra's general strategy directed at preventing market entry, market access and growth opportunities for existing and potential competitors and eventually driving them out of the market so as to create a situation of quasi-monopoly. Where the customer would refuse to accept exclusivity, Tomra did achieve the same result by offering the customer attractive high-volume quantity targets, which corresponded to the customer's forecasted demand. By using different types of arrangements and tailoring them to the specific conditions, Tomra did achieve overall foreclosure of the market.

In accordance with the case-law of the Community Courts, the Commission concluded that Tomra's practices were exclusionary because they were designed to block access to customers and thereby to hinder existing competition or the development of new competition, and therefore should be qualified as an abuse of dominant position and an infringement of Article 82 EC Treaty. Following the *Hoffman-La Roche* and *Michelin I* judgments, the Commission stated that Tomra abused its dominant position by tying its customers by an obligation or promise on their part to obtain all or most of their requirements exclusively from Tomra ([8]). This was also considered to be true in cases where purchase targets, expressed in absolute figures, represented all or a large proportion of the customer's requirements in the contract period in question.

Impact of Tomra's practices:

According to Michelin II, '*it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of hav-*

([8]) Case 85/76, *Hoffmann-La Roche,* [1979] ECR-461, and Case T-203/01, *Manufacture française des pneumatiques Michelin* v. *Commission (Michelin II),* judgment of 30 September 2003.

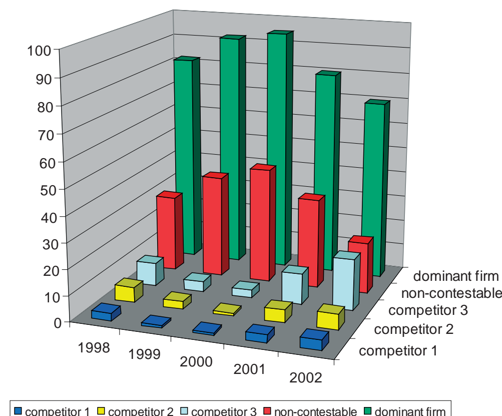
ing that effect' ([9]). The Commission, however, also investigated the likely effects of Tomra's practices on the market as well.

That Tomra's exclusionary strategy did have the intended effects was demonstrated by several developments on the market as, for instance, the evolution of Tomra's market position. The market shares of Tomra have remained rather stable, compared to the weak market position of its rivals. Its market share always remained very high in all individual markets and in the EEA in general, especially considering the characteristics of the RVM market where demand is essentially non-recurring ([10]) and generally does not remain stable over the course of several years.

Second, compared to Tomra's strong position, the position of its few competitors continued to be weak over the time of investigation, notwithstanding periodic positive demand shocks on most of the markets that occurred due to the introduction of mandatory deposit systems and that could have attracted entry. There was, actually, no successful entry into any of the relevant national markets during the time frame covered by the decision. On the contrary, some of the competitors left the market due to either insolvency or acquisition.

Finally, the Commission also observed that Tomra would sell a higher number of machines during the years where more of the total market demand was covered by its exclusionary agreements. On the contrary, when less demand on the market was covered by Tomra's anti-competitive arrangements, Tomra's market share would decrease. In other instances, the Commission noted that customers began purchasing larger numbers of competing machines when they were no longer restrained by the exclusionary agreements concluded with Tomra. In general, Tomra's rivals were observed to be able to sell more machines, the smaller the portion of total market demand covered by exclusionary arrangements was. This relationship between non-contestable market share (i.e. the market share covered by exclusive practices and no longer accessible to Tomra's competitors), competitor market share and Tomra's market share is depicted in Figure 2 for one country. The Figure shows the development of market shares of 3 competitors and Tomra for the years between 1998 and 2002. In addition, the Figure shows the portion of Tomra's market share that the Commission considered as foreclosed to competitors. Overall, non-contestable market shares went as high as 93% in individual years and countries while amounting to 32% averaged over all years and countries considered.

Figure 2: Development of Tomra's and its competitors' market shares ([11])



Considering all the above, and the fact that notwithstanding occasional surges in demand, several unsuccessful entries into the market, while entry is neither technically particularly difficult, nor exceedingly costly, the RVM market remained quasi-monopolistic throughout the time under investigation, the Commission concluded that Tomra's practices in fact were likely to foreclose the market to its competitors.

Tomra's defence:

To rebut the Commission's allegations, Tomra invoked several arguments in its defence, for instance, that the agreements identified by the Commission were not enforced and did not carry any sanctions for the customers not reaching the stipulated target, or that the quantity commitments or rebate schemes did not have any loyalty inducing effect. To support its arguments, Tomra submitted an economic assessment mainly focussing on rebate schemes.

This economic assessment was essentially based on a static model of suction effects in rebate schemes under perfect information. This model was produced by the parties in response to the analysis of potential suction effects by the Commission (see Figure 1). Given the individualized nature of the rebate schemes employed, the main aim of the report produced by Tomra was to reduce the amount of schemes deemed problematic from the Commis-

([9]) *Michelin II,* par 239, and Case T-219/99, *British Airways,* judgment of 17 December 2003, par. 250.

([10]) That is, initial big volume orders, and not periodic orders evenly distributed over time. Initial orders are, however, replaced one by one according to the life-span of the machine.

([11]) Similar Figures have been used in the decision. The Figure demonstrates the relationship between the market shares of a dominant company, the size of the non-contestable market demand (i.e. the units sold under the anti-competitive agreements), and the evolution of competitors' market shares. For reasons of confidentiality, the values in the Figure presented are purely fictional.

sion's perspective by demonstrating that a substantial amount of schemes had no foreclosure impact and that the remaining schemes did not result in sufficient coverage to have such an impact either.

The case can be considered a textbook case for rebates in the sense that neither asymmetric information nor uncertainty nor resale of the product, were present and therefore a simplified analysis was possible ([12]). This is an essential factual element of the case because uncertainty would typically require a dynamic analysis of rebate schemes that is more complicated than the analysis conducted in this case. Indeed, from the evidence in the file, demand was fairly accurately and easily known to all market participants, as supermarket size typically determines the need for RVMs and the number of existing and planned supermarkets is also easily known. It is also clear that supermarkets do not resell RVMs. This is also reflected in the model proposed in the economic report by the parties, where uncertainty and asymmetric information were neither discussed nor considered relevant to the case.

Nevertheless, the main line of argument followed in the economic submission by Tomra relied on the fact that in some cases, *ex post* demand deviated positively from the fixed threshold level, i.e. $D > x^T$, where D denotes demand and x^T the threshold quantity. Although in itself inconclusive, this evidence (interpreted by the Commission as implying foreclosure only up to the quantity x^T but not D) was used by the authors of the economic report to argue that this *ex post* deviation effectively rendered the complete scheme, including quantities up to x^T innocuous.

Upon a detailed analysis of the model submitted by Tomra, three problematic aspects underlying the reasoning could be identified, allowing a rejection of the argument and maintaining the number of schemes deemed problematic ([13]).

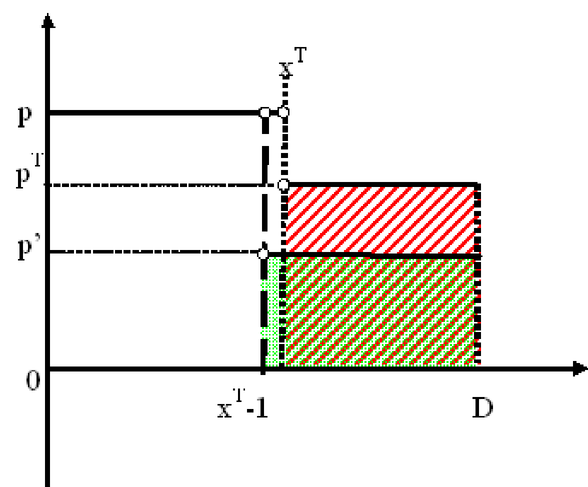
([12]) Note that if products are not sold for final consumption, the analysis of suction effects becomes more demanding because the relevant parameter is no longer the difference in prices of rival suppliers but the difference in the margin obtained by selling the various (branded) products by the retailer. Under uncertainty one would also have to weigh the costs of deviations from expected demand to determine the optimal threshold because under such circumstances the optimal threshold is typically no longer equal to expected demand.

([13]) The main argument put forth in the economic report has been replicated in Federico, G. (2005) When are Rebates Exclusionary? *European Competition Law Review* 26(9), 477-480. See Maier-Rigaud, F. (2006) Article 82 Rebates: Four Common Fallacies, forthcoming in the special issue on Article 82 of the *European Competition Journal, 2 (2), 67-82 (special issue on Article 82)* for a critique of that paper and more details on the theoretical analysis presented only shortly here.

The first two arguments relate to the use of *ex post* data in assessing foreclosure and the behaviour of Tomra in setting the rebate threshold. Under perfect information of individual customers demand it is difficult to see why Tomra would want to set the rebate threshold systematically below demand. If, however, Tomra sets the threshold at expected demand and this demand corresponds to the quantity the customer expects to buy, it is difficult to see why the scheme would not potentially develop a suction effect, thereby foreclosing the market, even if demand *ex post* deviates, i.e. the threshold was not reached or actual demand was above the predicted level.

The third argument hinges critically on $D > x^T$. In a mathematically correct way the economic report presented by Tomra establishes that the price a competitor would need to offer to make the customer indifferent between Tomra and a rival supplier within the rebate scheme increases with an increase in demand above the threshold. Indeed, the authors of the study claim that this price approaches p^T, that is the price granted from the threshold on ([14]), as demand goes to infinity ([15]). If found to be true, this could have a substantial impact on the amount of schemes considered problematic because prices calculated in that fashion may no longer foreclose competitors. As the Commission demonstrated in the decision, such an argument can, however, not be considered economically meaningful.

Figure 3: Price schedule and revenues



For simplicity imagine a situation where demand is indeed above the threshold, i.e. demand is 120 and the threshold is 100. The base price p is assumed

([14]) I.e. p — α p, where α denotes the percentage rebate, i.e. .05, that is 5% for example and p the base price.

([15]) Formally, $\lim_{D\to\infty} \frac{p^T D - p(x^T - 1)}{(D - (x^T - 1))} = p^T$.

to be 1 and the rebate is 10%. Tomra now considers the worst case scenario, where a customer has bought 99 units from Tomra at a price of 1 and thus requires 21 more units by definition. Tomra now claims that the unit price a competitor would need to offer to make the customer indifferent between that competitor and Tomra is (21×.9-99×.1)/21 = 3/7 = 0.43 ([16]), a price that may well be above cost and feasible for any competitor. Unfortunately, it is far from clear why a competitor would want to do so to begin with. Assuming profit maximizing behaviour on the part of the competitor, it would make much more sense to forego the last unit and sell only 20 units at a price of .9 for total revenues of 18. Clearly revenues of 18 are to be preferred to revenues of 9, especially since with revenues of 18, Tomra has revenues of 90 (5 times higher), whereas under revenues of 9, Tomra has revenues of 99 (10 times higher) ([17]). For better understanding, this is also depicted in Figure 3, where the bigger, striped area is the revenue corresponding to the scenario where the competitor foregoes the last unit and the smaller shaded area corresponds to the revenues when the competitor decides to also sell within the rebate threshold.

The argument advanced violates individual rationality (profit maximizing principle), that is, the constraint typically imposed on actors in economic models. The question of whether foreclosure is likely within the rebate scheme has to be distinguished from the uncontroversial fact that competition on any quantity above the threshold will typically be possible. Demonstrating that averaging prices between units above and below the threshold, as described above, is not a rational option, allowed to refocus the discussion on the question whether foreclosure is likely to occur within the rebate schemes or not ([18]). As a result, the Commission was able to maintain its findings concerning likely foreclosure effects in the schemes where such likely effects were contested.

Conclusion:

In summary, the Commission found that Tomra group abused its dominant position in five national markets of the EEA (Austria, Germany, the Netherlands, Sweden and Norway) by employing a system of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate systems, thresholds of which were usually adapted to the customers' requirements. This in turn led to the foreclosure of the market for Tomra's competitors, in some instances even to their elimination from the market to the detriment of consumers.

The decision demonstrates how a general system of several types of abusive conduct can achieve a strong cumulative effect on the market. This effect, likely and actual effect of foreclosing the market, was analysed following the previous case law of the European Court of Justice, in addition to being based and supported by economic analysis in the spirit of the recently publicised DG Competition Discussion paper on the application of Article 82 to exclusionary abuses. The case can be considered an important step towards the envisaged reform of the application of Article 82 EC Treaty.

(16) The price is calculated by multiplying the rebated unit price of .9 with the sold quantity of 21 units and subtracting the foregone rebate of .1 on all 99 units purchased from the dominant firm.

(17) Revenues of 9 are calculated in the following way: 21×.9 − 99×.1 = 9. Note that revenues do not take costs, which will be higher for 21 than for 20 units, into account.

(18) In fact, averaging is unproblematic (but also meaningless to the question of interest here) if there is no likely foreclosure within the rebate scheme, i.e. if it is possible and rational to induce buyers to switch, begging in turn the question under what conditions that is the case.

REPSOL: Opening up the fuel distribution system in Spain [1]

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Introduction

On 12 April 2006, the Commission adopted a decision based on Article 9 of Regulation (EC) 1/2003 addressed to the largest petrol supplier in Spain, REPSOL Commercial de Productos Petroliferos ('REPSOL'), making commitments entered into by REPSOL legally binding. This commitment decision concerns the supply of fuel to service stations in Spain and results from the concern that the supply contracts of REPSOL foreclose the market. The decision remedies this concern by changing the market conduct of REPSOL and brings an end to the investigation initiated under Article 81 of the EC Treaty. The decision in particular gives an opportunity for service stations in which REPSOL had made investments to terminate the long term agreements they signed with REPSOL and terminate the corresponding 'right in rem' that REPSOL held in those stations subject to compensation. Due to market specifics the decision adopts a solution for compensation differing from that adopted in previous cases where there was an investment from the supplier in the retailer's premises (e.g. in the beer sector).

Background

In 2005, 40 million tons of motor fuel were sold through service stations, mainly diesel (33 million tons, or more than 80% of total sales). This represented a value before tax of € 18 billion (up from € 14 billion in 2004).

Liberalisation of the Spanish service station market occurred only rather recently and gradually after the accession of Spain to the EU in 1986. First the exclusive supplier CAMPSA was split-up [2]. In parallel, from 1988 onwards, importers could create separate distribution networks with new service stations but remained subject to quantitative restrictions for total imports. This created a two-tier system, which was ended in 1993 when remaining exclusive and special rights at the refining and logistic level and quantitative import restrictions were removed. Further, in 1995, restrictions on distance between service stations were removed, and in 1996, the legal obligation to have exclusive supplies for a given station was removed. Thus the market was fully liberalised only ten years ago.

This gradual liberalisation occurred in a market which was still in its infancy. In 1990, there were in Spain around four times fewer stations per inhabitants than in other large Member States of the EU. Thus liberalisation led to construction of many new service stations. By the end of the 1990s, the number of stations per inhabitants had come close to that of the other large Member States of the EU. New stations were often financed by the wholesale suppliers owning stations or by individual service stations owners through bank loans. However, in a significant number of cases (around 500 stations in the case of REPSOL, i.e. around 15% of stations in REPSOL's current portfolio), individual station owners obtained financing for a new station or refurbishing of an existing building directly from the suppliers. In exchange, the suppliers obtained a 'right in rem' in the station either in the form of 'tenancy' (where the land was bare), respectively 'usufruct' (when there was already a building in some shape or form). These rights basically allowed the supplier to build, respectively refurbish, the building and own it for a specified number of years (which was usually between 25 to 40 years, but could even be longer). The supplier then leased back the station to the bare owner for the operation of the station and became the exclusive supplier of the station for the duration of the 'right *in rem*'.

The various types of service stations on the Spanish market today are thus, according to the jargon of the sector: the COCO stations (Company Owned and Company Operated), the CODO stations (Company Owned and Distributor Operated), the DODO stations (Distributor Owned and Distributor Operated), and the Usufruct/Tenancy (U/T) stations. In the case of REPSOL, which is the largest operator representing around two fifth of the total number of stations in the market, there are around 1000 COCO stations, 1400 CODO stations, 750 DODO stations and 500 U/T stations.

That being said, since the end of the 1990s, the U/T stations have been trying in national courts to obtain the cancellation of their contracts with the various suppliers involved (REPSOL and others),

[1] The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

[2] CAMPSA had to transfer the service stations it owned as well as the contracts with service stations that it did not own to the refiners which were shareholders of CAMPSA, in proportion of their shares, and CAMPSA under its new name CLH remained in charge of wholesale logistics. These transfers of assets were subject to a Commission decision IV/M.138 dated 19.12.2001.

on the grounds that these contracts infringe Spanish competition rules, which mirror EC rules [3]. More precisely, the station operators often argued before national courts that the durations of the contract were contrary to competition rules and that REPSOL was fixing retail prices although the operators were not agents of REPSOL. In the face of widespread litigation and contradictory rulings by the different National Courts involved, in December 2001 REPSOL notified pursuant to Regulation 17 [4] all its supply agreements to the Commission, with a view to obtaining a negative clearance or, failing this, an individual exemption under Article 81(3) EC.

The procedure

REPSOL's notification covered the agreements and/or model contracts laying down the conditions under which it carried on or intended to carry on its business of distributing fuel for motor vehicles through service stations in Spain. The Commission subsequently carried out a market investigation, inter alia by publishing in the Official Journal a notice inviting interested third parties to submit their comments on the notification [5]. With the entry into force of Regulation (EC) No 1/2003 [6] on 1 May 2004, the notification made by REPSOL lapsed [7].

However, in June 2004, given the concerns it had with regard to the notified contracts, the Commission opened proceedings under Chapter III of Regulation (EC) No 1/2003, and subsequently addressed to REPSOL a preliminary assessment [8] outlining the competition concerns (about market foreclosure) and giving REPSOL the opportunity to remedy these concerns by submitting commitments. REPSOL submitted commitment proposals to the Commission in response to the preliminary assessment and in October 2004, the Commission market tested them, inviting interested third parties to submit observations [9].

The Commission received 25 submissions from associations of service stations, groups of stations as well as some individual stations. The observations generally agreed with the analysis of market foreclosure but disagreed that the remedies were sufficient, in particular because they found that the possibility to exit long-term contracts might be ineffective (they argued that the price to be paid would render exit economically uninteresting). Some submissions further argued that the Commission had not understood that REPSOL was de facto fixing the retail price in its network and that the Commission had thus failed to address the problem.

In March 2005, REPSOL was informed of the observations received from interested third parties and subsequently submitted several amended proposals. The last amended proposals, submitted in early March 2006, were considered satisfactory by the Commission, which, on 12 April 2006, adopted a commitment decision. That decision had received on 27 March 2006 a unanimously favourable opinion of the Advisory Committee on Restrictive Practices and Dominant Positions.

The relevant market

Fuel sold in Spain includes two main categories: diesel and petrol, diesel outselling petrol as explained above. Fuel sold in Spain comes mainly from Spanish refineries. The balance is imported/exported by tanker: Spain is a net importer of diesel and a net exporter of petrol. Fuel, whether produced by a refinery or imported, is either fed into the retail sales network of the producer or importer (composed of company-owned or affiliated service stations) or sold wholesale (off-network) to: (i) independent retailers who are not integrated upstream (unbranded service stations or supermarkets), (ii) traders (including large oil companies not vertically integrated in Spain), or (iii) large final customers (industrial and commercial users such as hospitals, car-rental companies, transport undertakings, factories, etc.). Products may, moreover, be exchanged between refiners or operators at all levels of the chain.

In earlier decisions [10], the Commission considered that the off-network (or wholesale) selling of fuel and the retail selling of fuel through service stations could constitute different product markets. In the case of off-network selling, it considered that there was a separate product market for each type of fuel. Given that the competition concern identified in the preliminary assessment would also relate to a market comprising all fuel types and both off-network and on-network sales,

(3) The Spanish Competition law includes basically the same provisions as Articles 81 and 82 of the EC Treaty, and, as regards vertical agreements, has incorporated the EC block exemption Regulation 2790/1999.
(4) First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204/62, regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).
(5) OJ C 70, 19.3.2002, p. 29. In response to the invitation, 69 comments were received from interested third parties, some on behalf of several service stations.
(6) OJ L 1, 4.1.2003.
(7) Article 34(1) of Regulation (EC) No 1/2003.
(8) Article 9(1) of Regulation (EC) No 1/2003.
(9) OJ C 258, 20.10.2004, p. 7.
(10) Commission Decisions in Case No COMP/M.1383 — Exxon/Mobil and Case No COMP/M.1628 TotalFina/Elf.

the question of whether the market should be narrowed down to the different channels and fuel types was left open for the purpose of the decision.

As regards the geographic market, in the same earlier decisions, the Commission considered that markets could be local or national. Given that the competition concern identified in the preliminary assessment would also exist if the market were national, the question of whether the market should be narrowed down to local areas was left open.

Practices raising concerns

The distribution agreements (whether of CODO, DODO, or U/T type) between REPSOL and service station operators contained non-compete clauses covering fuel intended for sale through service stations (but not products other than fuel sold through service stations). The duration of these clauses varied. In agreements of the CODO or DODO type, it was as a rule 5 years. In agreements of the U/T type, it ranged from 25 to 40 years depending on the type of agreement.

Such agreements may, depending on the circumstances, give rise to a competition problem, notably where, by virtue of such clauses, other suppliers in the market cannot sell to the buyers concerned, which may foreclose the market and weaken inter-brand competition. In order to check whether such foreclosure effects exist, two conditions need to be fulfilled ([11]): access to the market should be difficult and the contracts concerned should significantly contribute to the foreclosure of the market. Indeed, in its preliminary assessment, the Commission found that the market is accessible only with difficulty by competitors wishing to enter or expand. This is due notably to the significant vertical integration of operators, the cumulative effect of the parallel networks of vertical restraints, difficulties in setting up an alternative network and other competitive conditions (principally the saturation of the market and the nature of the product). Further, in its preliminary assessment, the Commission took the view that the agreements in question might contribute significantly to the foreclosure of the market . This was a result of the following factors: the extent of the non-compete obligations imposed by REPSOL (the market share tied by REPSOL's sales under the CODO and U/T contracts was deemed considerable, at around [25-35%]); the non-compete commitments entered into were of substantial duration, especially in the case of agreements of the U/T type, which are long-term agreements (between 25 and 40 years); and service station operators and final customers were deemed to be in a weak, fragmented position compared with suppliers, in particular REPSOL, which has a total market share of around 40%.

The commitments offered (March 2006)

First, REPSOL proposed to offer to U/T service station operators the possibility of 'buying back' the right in rem before the scheduled expiry of the agreement. This option could in principle have been exercised at any time after the date when the agreement had only 12 years left to run. The exercise of the option would have involved paying REPSOL compensation equal to the value of the right in rem in question. The value was to be calculated on the basis of REPSOL's annual cash flow and the contract period still to run and as a result would not correspond to the residual value of the investment. However, in the event of disagreement about the compensation, the valuation criteria laid down in the Spanish law on expropriation would have applied.

Second, REPSOL proposed not to conclude any new supply contracts exceeding 5 years with service stations that it does not own. Also, REPSOL proposed not to purchase any independent station that is not supplied by REPSOL, until the end of the second year following the Commission decision. Finally, REPSOL proposed to ensure that all service stations within its network are able to provide discounts on the price recommended by REPSOL: discounts should be possible also for stations which only act as agents of REPSOL (in such cases the station will be able to share its commission with the client in order to reduce the price for the client).

The issues of retail price maintenance and agency

In its preliminary assessment, the Commission had noted that the provisions of the contracts signed by REPSOL did not prevent service stations from granting discounts on the price recommended by REPSOL. However, during the market test, some market participants claimed that service stations are not in practice able to make discounts on the recommended price. It was also argued that the Commission should decide whether the stations are 'real agents or not'. The submissions referred also to a national competition procedure, where the 'Tribunal de Defensa de la Competencia', concluded in 2001 that so-called 'agency contracts' entered into between some service stations and REPSOL were in fact not real 'agency contracts'

([11]) Ruling of the ECJ of 28.02.1991 in case C-234/89, Stergios Delimitis vs. Henninger Bräu AG, Rec. 1991, page I-935, paragraphs 13 *et seq.* See as well paragraphs 138 to 160 of the Communication of the Commission — Guidelines on vertical restrictions, OJ C 291 of 13.10.2000, p. 1 *et seq.*

and that REPSOL was fixing resale price contrary to competition rules. REPSOL was ordered to stop fixing the price in all contracts with similar characteristics and the implementation is being monitored by the 'Servicio de Defensa de la Competencia'.

Given that these issues are being addressed by the national competition authorities and that the issue of whether the service stations are 'agents' or not is irrelevant for the market foreclosure concerns raised by the Commission, the Decision does not take any position in this regard. The commitments proposed by REPSOL ensure, in any event, that all service stations within the network of REPSOL will be able to provide discounts on the basis of the price recommended by REPSOL.

The compensation for investments

As mentioned above, in the market test, some market participants expressed the view that the possibility to exit long-term U/T contracts might be ineffective, because the price to be paid would render exit economically uninteresting. In effect, making the station pay for the cash-flow that REPSOL would have enjoyed if it had maintained the agreement till its end would have most likely prevented a profitable operation of the station after termination of the U/T contract. The alternative offered to use arbitration under the terms of the Spanish expropriation law would not have led to effective results either as REPSOL and the service stations strongly disagree about the size of the investments made by both parties in the station and about the duration in which they should be amortised and either party would have appealed in courts any result of a first arbitration, substantially postponing any effect of the commitments.

Accordingly, a new compensation mechanism was designed, which does not take into account investments made by the parties, but rather attempts to give a concrete financial incentive for the U/T stations to terminate their contracts while allowing REPSOL to receive a reasonable amount in compensation.

The principles of the new mechanisms are the following: first of all, DODO contracts provide much larger margins (in €/l) than U/T contracts do and stations which exit U/T contract will become 'independent operators' and sign DODO contracts with REPSOL or any other supplier ([12]). Assuming that the station pays every year to REPSOL 60% of the difference between the higher DODO margin (€/l) and the lower U/T margin (€/l) to REPSOL multiplied by its yearly volume of sales, the station will roughly increase its revenues by 40% of the difference between the higher DODO margin and the lower U/T margin multiplied by its yearly volume of sales. Simulations on the portfolio of U/T stations of REPSOL showed that this would be equivalent to an increase of [15-25]% of the existing U/T margins (€/l), thus representing a concrete financial incentive to exit, and that the difference of margins between the two categories had remained rather stable in the past ([13]). Accordingly, these principles were retained for the calculation of the compensation ([14]).

These general principles had of course to be fine-tuned in order to ensure that a real incentive exists for practically all types of stations. For instance, the formula is based on six categories of stations (depending on volumes of sales) and in each of them the payment is capped. It was further important to make up for any possible external factor affecting the incentive after exit: in cases of a severe drop (-10% or more) in volumes of fuel sold after exit, the volume used for the computation of the compensation is adjusted to the lower level of sales ([15]). In addition, it was necessary to minimise any cost associated with the mechanism: for that purpose, payments by the stations can be done on a quarterly basis to limit financing costs for the station.

In addition to these technical issues, it was crucial to make sure that the formula would not affect competition between REPSOL and the other fuel suppliers. With that aim, the DODO offer used for calculating the 60/40 ratio is the first offer to be made by REPSOL at the time of exit. Accordingly, the compensation remains the same whatever the supplier chosen by the station when it exits its U/T contract and REPSOL cannot increase its compensation when trying to match offers by competitors. In addition, as indicated above, the formula depends on six categories of stations and in each of them the payment is capped: thus Repsol's compensation is capped for the better performing stations in each category; accordingly, Repsol will

([12]) Indeed, many observations made in the market test insisted on the wish of service stations to obtain DODO like wholesale supply contracts with a price formula based on a Platts' index.

([13]) One must note in that respect that U/T stations receive margins similar to those of the CODO stations and that the difference of margin between these stations and DODO stations is bound to stay given the different situation of the station operator in those categories.

([14]) In order to avoid that transparency be maintained over time between competing suppliers for these stations and given the stability of the difference between the two categories, the formula uses the values of these margins and volumes at the time of exit of a U/T contract.

([15]) This element of transparency is inevitable as stations can face sudden drops of activity due to external factors such as the creation of an alternative road.

not be able to use the compensation to anticipate competition and make a 'better than normal' first offer.

This mechanism was designed by taking into account the detailed comments and explanations of the market participants that participated in the market test launched in 2004, and that were further informally consulted on the revised formula at the end of 2005.

In addition, given that some observations in the market test argued that there are not enough stations that would come on the market every year, REPSOL proposed that all U/T stations be allowed to terminate their contracts at the end of the duration of the commitments. In that context, given that some contracts will have much longer remaining duration than 12 years at that point in time, it was decided that stations will not pay for more than 16 years (cap on duration).

Conclusion

The commitment decision adopted in this case will free hundreds of service stations linked to REPSOL from very long-term contracts bringing competition to a significant segment of the Spanish service station market [16]. This may be followed by similar mechanisms for the few other fuel suppliers who still maintain similar contracts [17]. It signals the end of a special treatment of a sector which until the end of the transition period for the implementation of the Block exemption under Regulation 2790/1999 has been characterised by the existence of exclusive supply contracts of a duration longer than five years. It also shows that commitment procedures under Article 9 of Regulation (EC) 1/2003 can provide concrete solutions to rather complex contractual relationships and pave the way for competition on the merits.

[16] For more details, see:
http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38348/decision_es.pdf
and
http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38348/commitments.pdf

[17] The National Competion Authority has opened two cases against the number 2 (CEPSA-TOTAL) and number 3 (BP) in the market.

De Beers: commitments to phase out diamond purchases from the most important competitor ([1])

Harald MISCHE and Blaž VIŠNAR, Directorate-General for Competition, unit B-2

1. Overview

On 22 February 2006 the Commission adopted a decision pursuant to Article 9 of Regulation (EC) No 1/2003 (hereafter: *'Reg. 1/2003'*) which rendered binding the commitments offered by De Beers in order to address the Commission's competition concerns under Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

The competition concerns related to a purchase relationship between De Beers group of companies (hereafter: 'De Beers'), the largest producer of rough diamonds in the world, and the Russian company ALROSA Company Ltd (hereafter: *'ALROSA'*), the second biggest rough diamond producer. Notably, this purchase relationship led De Beers to conclude the Trade Agreement, which, according to De Beers, had never been implemented. However, pending the Commission's proceedings concerning the Trade Agreement, De Beers had agreed to purchase substantial amounts of rough gem diamonds from ALROSA under a 'willing–buyer-willing-seller' arrangement.

The commitments prohibit all De Beers' rough diamond purchases from ALROSA following a transitional period until the end of 2008, allowing the establishment of an efficient distribution system independent of De Beers. This will allow for more competition between producers of rough diamonds, enabling customers, such as diamond polishers and traders, to have access to additional supplies outside De Beers, thus also favouring competition downstream.

2. Procedure

The existence of trade agreements between De Beers and ALROSA (and formerly the Russian State) for the sale of rough diamonds was revealed by the Commission in 2001. Following further investigation by the Commission, City West and East limited (hereafter: *'CWEL'*), De Beers Centenary Aktiengesellschaft (hereafter: *'DBCAG'*), both members of De Beers, and ALROSA, notified their Trade Agreement on 5 March 2002 in accordance with Regulation No 17.

On 14 January 2003 the Commission opened proceedings by issuing a Statement of Objections under Article 82 of the Treaty addressed to De Beers SA, the holding company of De Beers, CEWL and DBCAG in respect to the Trade Agreement, followed by a supplementary Statement of Objections on 1 July 2003 which added Article 54 of the EEA Agreement as an additional legal basis. A complaint against the purchase relationship was also lodged with the Commission.

On 14 December 2004, CWEL and DBCAG submitted a commitment proposal ([2]) in response to the Commission's Statements of Objections ([3]) which were deemed to constitute a preliminary assessment within the meaning of Article 9(1) of Reg. 1/2003. In June 2005, a Notice was published in the Official Journal inviting interested third parties to submit their observations ([4]) on the proposed commitments.

In response to the Notice, the Commission received 21 observations from interested third parties, of which 2 were submitted by industry associations, 5 by diamond bourses and 14 by market operators active downstream of De Beers, notably diamond manufacturers (cutters / polishers) and traders. A large majority of the observations echoed the Commission's competition concerns, as expressed in its preliminary assessment, but indicated that they would be insufficiently addressed by the proposed commitments. In view of these observations which the Commission found relevant, De Beers SA submitted an amended commitment proposal on 25 January 2006.

On 10 February 2006 the Advisory Committee on Restrictive Practices and Dominant Positions unanimously adopted a favourable opinion

([1]) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

([2]) http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38381/commitments_de_beer_en.pdf

([3]) ALROSA submitted reciprocal commitments in response to the Commission's Statements of Objections under Article 81 of the EC Treaty and Article 53 of the EEA Agreement of 14 January 2003 and 1 July 2003 which were also addressed to De Beers SA, CWEL and DBCAG. Commitments by CWEL and DBCAG also aimed at addressing the concerns raised under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. These separate proceedings would be closed simultaneously with the adoption of the attached draft decision.

([4]) OJ C 136, 3.6.2005, p. 32 — 33.

on the draft decision. The commitment decision was adopted by the Commission on 22 February 2006 ([5]).

3. Competitive analysis

The Commission's competition analysis of the purchase relationship was set out in its preliminary assessment (Article 9(1) of Reg. 1/2003) on which the commitment decision is based. Following Recital 13 of Reg. 1/2003, the commitment decision concludes that *'there are no longer grounds for action by the Commission'* and does not state *'whether or not there has been or still is an infringement'*.

3.1. Relevant market

In the Commission's preliminary assessment, the relevant product market was identified as production and supply of 'rough diamonds' suitable for the cutting and polishing industry and, ultimately, the jewellery industry. The product market of rough diamonds comprises the full range of diamonds (in relation to caratage, colour, clarity and (potential) cut). Rough diamonds are distinct from other precious stones due to product characteristics, such as hardness, clarity and reflection of light. Diamonds are generally traded in a grouped form (boxes) comprising a large range of diamonds of different sizes and qualities.

In the Commission's preliminary assessment, the relevant geographic market was identified as being worldwide, based on the fact that rough diamonds are priced and traded worldwide.

3.2. Dominance

In its preliminary assessment, the Commission took the view that De Beers is dominant within the meaning of Article 82 of the EC Treaty and Article 54 of the EEA Agreement on the worldwide rough diamond market and therefore in the EEA.

For much of the 20th century, De Beers controlled over 80% of the worldwide supply of rough diamonds. Throughout this period, De Beers exercised the role of 'custodian' of the market by managing production quotas, keeping large stocks, and by purchasing diamonds from its competitors or on the open market.

The rough diamond market remains highly concentrated (HHI index above 2600). With diamonds from its own production and its joint ventures, De Beers accounts for roughly a half of the rough diamond output. ALROSA, its nearest competitor, holds around a quarter of global diamond sales. Other competitors are much smaller.

De Beers is still considered the price leader in the diamond industry. Its vertical integration and an advanced distribution system provide it with a unique knowledge of the diamond pipeline. De Beers operates the world's most efficient mines and has the widest access to diamond sources. As a market maker, by aggregating the output of numerous mines and its other sources of rough diamonds, De Beers is able to smooth out fluctuations in the composition of its production and provide a more consistent product range to its customers than any of its competitors. The Commission took the preliminary view that the ability to offer a consistent product range of diamonds is key in the rough diamond market.

In its preliminary assessment the Commission considered that for the foreseeable future the strong position of De Beers will be protected from competition by high barriers to entry. Natural resources are limited, and risky, high-cost investments are required for exploration and start-up of mines, thus preventing any significant market entry that would lead to a significant change in the market structure.

3.3. The competition concerns

The Commission investigated the purchase relationship between De Beers and its most important competitor ALROSA against its historic background. Their long-lasting trade relationship had in the past been instrumental to jointly regulate volume, assortment and prices for rough diamonds sold on the world market, and constituted one of the main elements for De Beers' market maker role. The Trade Agreement and the 'willing-buyer-willing-seller' arrangement appeared to be a continuation of their past trade relationship.

In its preliminary assessment, the Commission took the view that De Beers' continuous purchase relationship with ALROSA constituted recourse to methods different from those consistent with normal competition with the effect of hindering the maintenance of the degree of existing competition or the growth of that competition, and of maintaining De Beers' control over the rough diamonds market.

By the terms of the Trade Agreement De Beers would, in the Commission's preliminary view, purchase amounts that corresponded in practice to the quantities of ALROSA diamonds sold outside the Commonwealth of Independent States (hereafter:

([5]) Available at: http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_76.html#i38_381

'*CIS*'). As a consequence, De Beers would eliminate an alternative and independent source of supply for potential customers on the world market.

In the same vein, the Commission took the preliminary view that through its purchases under the 'willing-buyer-willing-seller' arrangement, De Beers hindered ALROSA from competing fully with it and from acting as an alternative and independent supplier on the rough diamond market outside the CIS states.

4. Commitment decision

The Commission decision rendered De Beers' commitments binding on the company and found that there are no longer grounds for action. The Commission considered that the commitments were sufficient to address its competition concerns as identified in the preliminary assessment and backed up by market observations.

The commitments contain provisions on De Beers' rough diamonds purchases from ALROSA, as well as rules on implementation and monitoring.

At the core of the commitments lies De Beers' obligation to discontinue all purchases from ALROSA. This prohibition also relates to indirect sales, where, for example, De Beers would knowingly buy ALROSA diamonds through third parties. However, complete termination will be preceded by a transitional period, during which De Beers can purchase no more than USD 600 m of rough diamonds from ALROSA in 2006, USD 500 m in 2007 and USD 400 m in the last year, 2008. The Commission viewed this transitional period necessary to allow sufficient time for distribution channels for sales of ALROSA produced rough diamonds previously controlled by De Beers to be put in place. As to the implementation of the commitments, De Beers undertook that any contract for the supply of rough diamonds, including a modified Trade Agreement, it concludes with ALROSA would comply with the commitments which are to be interpreted in the general framework of Community law, and in particular in the light of Articles 81 and 82 of the EC Treaty and Reg. 1/2003.

The task of monitoring compliance with the commitments will be assigned to a monitoring trustee whose appointment is subject to Commission approval.

Multi-brand distribution and access to repairer networks under Motor Vehicle Block Exemption Regulation 1400/2002: the experience of the BMW and General Motors cases (1)

Rainer BECKER, Directorate-General for Competition, unit E-2, and Iona HAMILTON, Directorate-General for Competition, unit E-1 (2)

1. Introduction

The new Commission Regulation 1400/2002 block exempting distribution and servicing agreements in the motor vehicle sector (the 'Regulation') (3) has given rise to a number of novel questions. In recently concluded cases concerning BMW and General Motors ('GM'), the European Commission clarified several important aspects of the two most frequently debated issues under the new Regulation, namely (i) the conditions for selling and servicing cars of more than one brand, and (ii) the conditions for repairers to become members of the authorised networks.

The BMW and GM cases originated in complaints by dealers' associations in a number of Member States. Following the entry into force of Regulation 1400/2002, most car manufacturers had concluded new contracts containing a large number of increasingly detailed and investment-intensive rules and standards on the set-up of dealer and repairer outlets including equipment, corporate identity and operational infrastructure. The complainants alleged that the new BMW and Opel (4) dealer and repairer agreements did not comply with the new rules for block exemption by Regulation 1400/2002, and raised competition concerns within the meaning of Article 81(1). They argued, inter alia, that aspects of the selective distribution systems set up by these agreements were unduly restrictive with regard to multi-brand distribution and servicing, and that they created artificial barriers to entry to the authorised repairer networks of BMW and GM.

Faced with a risk of Article 81 being applied against them, both BMW and GM expressed their will to remain within the safe harbour offered by Regulation 1400/2002. With respect to multi-branding, the Regulation provides that dealers and repairers may not be unduly restricted in their choice to sell and / or service cars of other brands (5). With regard to repair and maintenance and the distribution of spare parts, the Regulation makes the block exemption of servicing agreements *inter alia* conditional upon the manufacturer (a) allowing its authorised repairers to provide after-sales services only (without having to also distribute new cars) (6), and (b) only imposing selection criteria which are necessary with a view to providing high quality after-sales services (this assumes the likely scenario that the market share of the relevant authorised repairer network exceeds 30%) (7). After comprehensive discussions held by the Commission with all parties, BMW and GM implemented a range of clarifications and adjustments to their distribution and servicing agreements so as to ensure compliance with Regulation 1400/2002. Whilst the remedies also address a variety of other issues, the present article focuses on those aspects which concern the interpretation and the application of Regulation 1400/2002 to restraints affecting multi-brand distribution and servicing, and access to authorised repairer networks. It should also be mentioned that a number of arguments raised by the complainants were not considered to be founded under EC competition law (8). The respective dealer associations ultimately decided to withdraw their complaints in light of the remedies offered by the car manufacturers concerned, which enabled the Competition DG to close its proceedings in March 2006.

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

(2) The authors would very much like to thank Paolo Cesarini, Head of Unit E2, for his valuable guidance throughout.

(3) 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. The Regulation entered into force on 1 October 2002, with a transition period for existing contracts until 30 September 2003 (see Articles 12(1) and 10). Regulation 1400/2002 replaced the previous block exemption Regulation 1475/95 for the car sector, which in turn had replaced the sector specific block exemption Regulation 123/85.

(4) Owned by GM.

(5) Articles 5(1)(a) and 1(1)(b) as well as Article 5(1)(b) of Regulation 1400/2002, see in more detail section 2 below.

(6) Cf. Article 4(1)(g) of Regulation 1400/2002.

(7) Article 3(1) of Regulation 1400/2002 (in connection with Article 1(1)(h)); see also e.g. Competition DG, Explanatory brochure on Regulation 1400/2002, p. 14, and section 3 below.

(8) Cf. Commission press releases IP/06/302 and IP/06/303 *in fine.* See also section 4 below.

2. Multi-brand distribution of new cars under Regulation 1400/2002

In the context of multi-brand distribution of new cars, Regulation 1400/2002 sought to address a two-fold competition concern. In fact, Article 81(1) could apply in connection with two main effects resulting from the 'traditional' mono-brand distribution systems put in place by virtually all vehicle manufacturers before the entry into force of the Regulation. The first potential issue relates to obstacles for manufacturers to access or to expand in markets ([9]). It is true that, in the context of the wide-ranging network reorganisations between 2001 and 2003 across most of the EU, the exit of many dealers from their previous networks may have made it easier in many countries for car manufacturers to find distribution partners. However, it would be wrong to altogether discard considerations of access to, and expansion in, markets as a potential concern ([10]): issues may still arise, for instance, with respect to less densely populated areas where it can be particularly difficult for non-domestic brands to expand in the market, or with respect to specific market segments where competition is less intense ([11]).

In any event, aside from such considerations, the competition rationale of Regulation 1400/2002 as regards multi-brand distribution has a second element, namely 'to give distributors opportunities to sell vehicles of brands from two or more manufacturers' ([12]). This not only refers to dealers being able to adopt a second supplier strategy ([13]) and to offer consumers a better opportunity to compare a range of different cars (in-store competition). It also refers to dealers being able to opt for a potentially more cost-effective distribution format as an alternative to the traditional mono-brand model. In this context it is worth recalling that the Court of First Instance emphasised that rigid selective distribution systems which a priori exclude alternative and innovative forms of distribution that are otherwise suitable for the sale of the products in question, can raise competition concerns under Article 81(1) ([14]). Such concerns about the exclusion of potentially more competitive distribution formats can become particularly relevant in a context where many competing suppliers operate similar types of distribution systems (possible cumulative effects), as is the case in the car sector. The vast majority of manufacturers in the EU apply similarly structured systems of quantitative selection for the distribution of new cars, and similar systems of qualitative selection for the provision of authorised after-sales services and the distribution of spare parts. In such scenarios, the members of each selective distribution system operate with a similar distribution cost structure and are not faced with competition from distributors who have a different retail and cost structure. Indeed, multi-brand distribution of cars is often seen by dealers as one way of achieving a more cost-effective use of their existing investments by enabling them to spread their fixed costs over greater sales volumes. This can increase the scope for competition on retail prices with no detriment to the quality of sales services, as dealers remain subject to the same quality standards set by the respective suppliers.

Regulation 1400/2002 deals with multi-brand distribution of cars as a 'special condition' in Article 5, as opposed to the hard-core restrictions listed in Article 4, and thereby leaves wider scope for a case-by-case assessment. Article 5(1)(a) excludes non-compete obligations of dealers as defined in Article 1(1)(b) from block exemption. Both Articles 5(1)(a) and 1(1)(b) are clear that indirect restrictions, i.e. measures which have *equivalent* effects to those of a direct non-compete obligation, are not exempted either. Under the new Regulation, authorised dealers shall not be unduly restricted in exercising their choice to use their *existing* facilities for selling cars of another brand so as to avoid inefficient duplication of investments ([15]). In contrast to Regulation 1475/1995 (the previous block exemption Regulation for the sector), the new rules no longer exempt the obligation of dealers to have, for their business activities with other brands, separate sales premises, a separate management, and a distinct legal entity ([16]). The definition of non-compete obligation in Article 1(1)(b) of Regulation 1400/2002 now makes it clear that manufacturers can legitimately require

([9]) See Recital 27 (1st half of 1st sentence) of Regulation 1400/2002.

([10]) See, however, Klevstrand, Multi-Branding of Cars: a Paper Tiger?, [2005] E.C.L.R., 538.

([11]) It should also be noted that the dealerships that have become 'vacant' in recent restructurings of networks may not always be those which are well located.

([12]) See Recital 27 (2nd half of 1st sentence) of Regulation 1400/2002.

([13]) In this context, the opinion of AG Tesauro should be noted in case C-230/96, *Cabour et al.,* ECR [1998] p. I-2058, at para. 38, emphasising that non-compete obligations of car dealers (e.g. not to sell cars of a competing brand even from separate premises) can constitute a restriction of competition within the meaning of Article 81(1) because they limit the 'dealers' commercial independence'.

([14]) See CFI, case T-19/92, *Groupement d'achat Edouard Leclerc (Galec) / Commission,* ECR [1996] p. II-1851, in particular at para. 122, 166. Cf. also ECJ, case 75/84, *Metro II,* ECR [1986] p. 3021, at para. 40.

([15]) Cf. the reference in Recital 27 and Article 1(1)(b) to the use of the same showroom and the same personnel for several brands.

([16]) See Article 3(3) of Regulation 1475/1995.

their dealers to display their car models in brand-specific areas of the showroom in order to avoid confusion between the brands and potentially negative consequences for their respective brand images. Recital 27 points out that full-range forcing, i.e. the obligation of a dealer to distribute and promote the car maker's entire model range, is, in principle, block exempted, provided that it does not render the sale or display of competing vehicles impossible or unreasonably difficult.

The BMW and the GM cases provided the Commission with the opportunity to clarify the interpretation of Regulation 1400/2002 in relation to a number of frequently occurring contract provisions which were regarded by the complainants as capable of hindering dealers' ability to sell brands of competing car manufacturers.

(a) Non-exclusive use of premises and compliance with corporate identity requirements of competing manufacturers

The BMW and GM dealer agreements contained a number of requirements which limited the dealers' ability to develop an activity with competing brands within their existing premises. The complainants were concerned, in particular, about the extent to which manufacturers would allow the co-existence of competing brand signage and corporate identity elements within and outside the premises of the dealer. Following the Competition DG's investigation, BMW and GM confirmed to their respective networks that they accept the use by dealers of their *existing* premises and facilities for the purpose of selling cars of a competing brand. In this context, the manufacturers explicitly accepted that all facilities can be used on a non-exclusive basis, with the exception of the part of the showroom dedicated to the sale of their brand. Therefore, the entrance, reception counter, customer area and back office, for instance, can be set up in a brand-neutral manner, if the dealer so wishes. In addition, both carmakers explicitly recognisesd the principle of co-existence of competing brands as regards the display of their respective trademarks, distinctive signs or other corporate identity elements in and outside the dealership premises.

Uncertainties and ambiguities concerning brand signage and corporate identity obligations in the texts of agreements *de facto* often have considerable deterrent effects on dealers. It is therefore important to note that BMW and GM communicated all their respective contractual clarifications and adjustments in the form of clear and explicit guidelines for authorised dealers explaining to them the criteria applicable when they decide to sell cars of competing brands.

(b) Measuring dealer performance

A major concern of the complainants in the GM case related to the method of setting sales targets and evaluating dealer performance. Dealer sales performance was measured by Opel both in terms of numbers of cars sold and number of cars registered in the dealer's area of responsibility, the latter indicating the dealer's local market share. In both cases the measurement was of relative performance. The mechanism used was as follows: to measure sales effectiveness, GM looked at the number of vehicles sold by a dealer in relation to his or her sales target, as a percentage. This percentage was then compared to the average degree of achievement of sales targets by all dealers in the Opel network in that country. If the relative performance of the dealer was less than 75% of the average national performance, GM could initiate a process of sanctions, which could culminate in termination of contract. The same procedure was used for measuring registration effectiveness, where the dealer's local market share was compared with the national market share.

There were two aspects of the performance measuring process which were of concern to the complainants: first, that the dealers felt that the sales targets were imposed rather than agreed and that this could be construed as an indirect non-compete obligation, and second, that the application of the registration effectiveness performance measure could act as a potential deterrent on dealers considering becoming multi-brand, as the 75% relative performance threshold, were it not adjusted, would give little room for manoeuvre in the case of a dealer who started to sell an additional, competing brand. Although one could assume that a dealer would choose to become multi-brand in the hope of increasing overall sales, there is the risk that sales of a new competing brand would 'cannibalise' the sales of the original brand. GM decided to adopt a solution that avoids any doubts as to the compatibility with Regulation 1400/2002, by altogether removing the sanction linked to the registration effectiveness measure. Moreover, GM provided that the sales targets will be mutually agreed with dealers and will be set taking account not only of possible changes in local market conditions but also of changes to the individual business circumstances of the dealer, such as the decision to sell competing brands. GM clarified that these targets are subject to arbitration in the case of dispute.

(c) Operational standards

As regards operational standards and with a view to avoiding unnecessary duplication of dealers' investments in this respect, BMW has allowed the use of a brand-neutral accounting methodol-

ogy and accounting frame, provided that these fulfil certain basic requirements. BMW would, for example, accept that a multi-brand dealer uses the generic accounting framework DATEV SKR 03 which is marketed by an independent company. Similarly, both BMW and GM clarified that their dealers can use generic (i.e. multi-brand compatible) IT software (e.g. dealer management systems) provided that such software has equivalent functionality and quality to the solutions recommended by BMW and GM, and provided that the interfaces allow communication with the central IT systems of the respective manufacturer. In this context, it should be noted that all contractual adjustments and clarifications implemented by BMW and GM became an effective part of the existing contracts and thus subject to the dispute resolution mechanisms contained in these contracts. Therefore, in the event of disagreement between the parties, for instance, on the equivalence of the functionality and quality of alternative IT software, arbitration can be used to settle the matter.

GM also clarified that its dealers can set up multi-brand internet sites and link them to their Opel specific web pages. Furthermore, GM made it clear that Opel trained sales personnel can also be used for selling cars of other brands while no GM-specific training is required in respect of staff entrusted solely with the sale of competing brands.

(d) Commercially sensitive information on competing brands

Dealer agreements in the sector often impose detailed and wide-ranging reporting and auditing obligations on dealers. In this context, potentially significant obstacles to multi-branding can arise where such obligations extend to data which include commercially sensitive information on the business activities of dealers regarding products of competing suppliers. Both BMW and GM have clarified that the reporting obligations on dealers to provide their respective manufacturers with regular information on sales and other business data will not require the disclosure of such commercially sensitive information relating to other brands. In particular, GM has confirmed that the software used by GM to communicate with its dealer network will not enable the company to obtain such information. The same principles apply to the disclosure of data to the manufacturers in the course of commercial audits. Where the manufacturer may have a legitimate interest in verifying the financial health of a dealer's entire business operations, this will be conducted – as BMW has made clear – through a neutral third party (e.g. an accounting firm) who will make available to the manufacturer only the necessary abstract summary information.

In response to another concern regarding the communication of data on potential customers, GM clarified in its circulars that dealers are only required to provide information to GM on current Opel customers and not on existing customers of competing brands. Insofar as the reporting obligation also concerned *prospective* customers of GM, it was also clarified that information on them should only be provided to GM where such a customer has specifically requested information on a GM vehicle, or has approached the dealer following a GM-specific advertising campaign.

(e) Minimum number of display vehicles

The Competition DG also investigated whether the BMW requirements as to the minimum number of cars a dealer must have on display could produce effects amounting to an appreciable indirect non-compete obligation within the meaning of Regulation 1400/2002. Market data, however, revealed that, for the large majority of authorised BMW dealers in the countries investigated ([17]), the BMW contracts left significant free capacity for dealers to be able to use their existing showroom to display cars of another brand. Those BMW dealers that have insufficient showroom space available for other brands are mainly smaller dealers, representing clearly less than half of the current network of BMW dealers in these Member States. For these smaller dealers, the contractual minimum standard requires the display of 3-4 cars only. As the block exemption covers, in principle, obligations designed to ensure an even and effective representation of a range of the carmaker's models ([18]), the Competition DG did not consider this requirement to be an indirect non-compete obligation within the meaning of Regulation 1400/2002. Showrooms below a certain size may in certain cases simply not be suitable for displaying a representative range of cars by more than one brand, without additional investment.

It is sometimes argued that minimum requirements in relation to demonstration cars and cars held in stock tie up so much capital that it becomes economically difficult for a dealer to become an authorised distributor of another brand. The requirement for a dealer to have a variety of demonstration cars or cars in stock is a normal consequence of its obligation to promote a range of

([17]) The investigation focussed on a representative group of EU Member States, namely those where BMW achieves more than three quarter of its total car sales related wholesale turnover (in terms of value and volume) and where therefore the impact on consumers can be expected to be strongest. These countries are Germany, France, Italy, Sweden and the UK.

([18]) See Recital 27 of Regulation 1400/2002 on full-range forcing.

models of each brand which is covered by the block exemption. Secondly, it must be considered that the financial burden resulting from the distribution of one brand does not as such amount to an indirect non-compete obligation. Selling cars of an additional brand usually generates greater turnover and earnings. It can be assumed that it would only be economically rational for a dealer to become authorised for another brand if the additional earnings derived from selling cars of the new brand were sufficient to offset the costs of becoming authorised for this brand. Costs for fulfilling the standards of one brand do therefore not per se constitute an indirect non-compete obligation.

3. Access to authorised repairer networks and multi-brand servicing

With respect to car servicing and repair, one of the policy objectives of Regulation 1400/2002 was to enable authorised repairers to concentrate on after-sales services only ([19]) and to exempt only qualitative selective distribution where the authorised network accounts for a market share in excess of 30% ([20]). Qualitative selective distribution means that the manufacturer appoints the distribution partners on the basis of selection criteria which are objectively necessary with a view to the nature of the product and the service in question ([21]). It also means that such purely qualitative criteria must be set out and applied in a uniform and non-discriminatory manner ([22]). From this it follows that manufacturers who wish to operate a qualitative selective system that meets the conditions for block exemption under Article 3(1), must admit all candidates who fulfil the required qualitative criteria to their networks of authorised repairers. The rationale behind this approach of the Regulation is to enable market forces to determine the density of the authorised repair networks and the location of repair outlets in accordance with local demand, so that consumers can benefit from certified after-sales services in their proximity and effective competition between authorised repairers ([23]).

In addition to these rules, Regulation 1400/2002 also contains provisions for multi-branding in the after-market: on the one hand, the rule of Article 5(1)(a) (in conjunction with Article 1(1)(b)) on non-compete obligations encompasses also the sale of repair and maintenance services and the distribution of spare parts ([24]). On the other hand, Article 5(1)(b) contains a specific rule on restrictions of the 'ability of an authorised repairer to provide repair and maintenance services for vehicles from competing suppliers'. It is submitted that the rule in letter (b) does not intend to establish a different regime than letter (a) of Article 5. Rather, the reason for a separate provision in Article 5(1)(b) is simply to allow for multi-brand after-sales activities also in the likely event that the relevant product markets in this regard are to be defined as being brand-specific ([25]).

In view to complying with the above rules of Regulation 1400/2002, BMW and GM both adopted a number of contractual clarifications and adjustments to their respective servicing agreements with their authorised repairers.

With respect to authorised repairers using their facilities and equipment for the purpose of servicing cars of other brands, both carmakers have implemented the same principles as set out above in the context of multi-brand car distribution. As BMW and GM, in view of the strong position of their authorised networks on the aftermarket, wished to apply a system of qualitative selective distribution in relation to their repairer networks in order to benefit from block exemption, they also eliminated various non-qualitative requirements that appreciably restricted outsiders in entering the authorised networks. Some of these requirements also had the effect of unduly hindering authorised repairers in their capacity to service cars of other brands. In the following, we will look at a selection of these issues.

(a) Quantitative criteria

Where manufacturers have opted for qualitative selective distribution because the market share of their networks exceeds 30%, agreements containing *quantitative* selection criteria are not exempted by Regulation 1400/2002 as stipulated in Article 3(1). Quantitative selection criteria, which are defined in Article 1(1)(g) of the Regulation, are criteria that directly limit the potential number

([19]) Without being obliged to also sell new cars of the respective brand, see Article 4(1)(h) and Recital 22 of the Regulation.

([20]) Where the market share of the car maker and its authorised repair network exceeds 30%, the Regulation only exempts the use of such selection criteria that are of purely qualitative nature (cf. Articles 3(1) and 1(1)(h) of the Regulation).

([21]) See Article 1(1)(h) of the Regulation.

([22]) *Ibid.*

([23]) In this context, it should be noted that the catchment areas of repair-shops tend to be rather small. It appears that a driving time of up to 15 to 30 minutes is usually the distance that the average consumer is prepared to travel to have his car serviced and repaired.

([24]) See the wide definition in Article 1(1)(b) of the Regulation.

([25]) A non-*compete* obligation presupposes that one and the same relevant market is concerned, cf. Article 1(1)(b) of the Regulation ('… of the contract goods, corresponding goods or services and their substitutes on the relevant market …').

of members of the network ([26]). Examples, aside from directly fixing the number of dealers, include minimum turnover or minimum purchase obligations or minimum capacity requirements ([27]). Such criteria determine, *de facto*, the maximum number of distributors that can commercially exist in the relevant geographic area.

In order to ensure block exemption of their service agreements, BMW and GM removed all quantitative criteria from these contracts. In particular the BMW contracts had contained an incremental scale of minimum capacity requirements in terms of work bays, equipment, stock and warehouse capacity, that depended on the local BMW car park. These requirements, which were based on the total potential local demand in the catchment area rather than on the actual demand of each repairer, implied that any new entrant was required to set up service capacities duplicating those already operated by existing authorised repairers. This mechanism entailed such investments in redundant capacities as would deter the entry of new competitors into the authorised repairers' network. The requirement for new entrants to build up capacity, regardless of the actual demand of the individual repairer, artificially increased entry costs and protected the incumbent authorised repairer from competition. BMW now merely requires that each authorised repairer has a minimum of three mechanical work bays (and corresponding equipment) which can be deemed necessary to ensure high quality service.

(b) Introduction of an 'opening clause' for equivalent equipment

BMW and GM also introduced an 'opening clause' to their servicing contracts to enable their authorised repairers to source equipment, including tools and IT hardware and software, from suppliers other than those designated by BMW and GM, provided that the competing products are of equivalent functionality and quality (the contractual arbitration mechanism being available in the event of dispute). This not only helps authorised repairers to keep their investment costs within the limits of what is objectively necessary to provide high quality service (cf. Articles 3(1) and 1(1)(h)). It also allows authorised repairers to purchase – where available – generic tools, equipment and informatics infrastructure that can be used for servicing cars of different brands (cf. Article 5(1)(a/b)), thus avoiding inefficient duplication of investments for multi-brand repairers. In this context, GM in particular removed doubts as to the possibility to use any workshop facilities or equipment for servicing cars of competing brands. Moreover, GM reduced the number of special tools that authorised repairers must constantly hold on their premises, thereby enlarging the possibilities for dealers to pursue alternative solutions to ensure the availability of particularly rarely used special tools (e.g. renting or sharing between repairers in geographic proximity, provided of course that the alternative solution is not to the detriment of the quality of the repair and maintenance service).

(c) Joint purchasing and warehousing

Finally, BMW and GM have clarified that authorised repairers do not have to have their own complete individual warehouses on site. BMW in particular informed its authorised repairers that they are only required to keep stocks of those so-called 'over-the-counter-parts' at their premises which are frequently purchased by customers. Other spare parts can be stocked elsewhere, provided that quality of service is not negatively affected, e.g. in shared warehousing capacities which ensure 'just in time' supplies. These clarifications and adjustments open the way for potentially more efficient forms of cooperation between authorised repairers in purchasing and warehousing of spare parts. Joint purchasing and joint warehousing can contribute to freeing up both physical and financial resources to organise the sourcing of competing spare parts from a range of different suppliers, thus enhancing consumer choice.

4. Conclusion

The solutions designed in the BMW and GM cases were publicised by the Commission ([28]) with a view to providing guidance on the interpretation and application of Regulation 1400/2002, so as to assist all interested parties in the sector and their legal advisors in assessing similar matters under Regulation 1400/2002. Although the cases provide a number of useful indications on the relevant considerations under competition rules, they do not preclude in any way the outcome of an individual assessment under Article 81(1) and (3) of the EC Treaty, which would require, on a case-by-case basis, a comprehensive factual analysis of the agreements and their effects in their full economic and legal context ([29]).

([26]) See also Vertical Guidelines, Official Journal C-291/1, 13.10.2000, para. 185 *in fine*.

([27]) Cf. Vertical Guidelines, Official Journal C-291/1, 13.10.2000, para. 185, 189.

([28]) See Commission press releases IP/06/302 and IP/06/303 of 13th March 2006 as well as the accompanying Commission background memorandum MEMO/06/120. See also the forthcoming annual Report on Competition Policy 2005.

([29]) See for more details Guidelines on the application of Article 81(3) of the Treaty, Official Journal C-101/97, 27.04.2004.

It should also be noted that the complainants in the BMW and GM cases had raised several arguments which the Commission did not consider to be founded under EC competition rules. Some of these arguments related to concerns about the imbalance of contractual powers and a resulting perceived unfairness of the dealer and servicing agreements. Whilst concerns of this nature are, as such, not likely to amount to a restriction of competition within the meaning of Article 81, they may raise issues under applicable rules of national law, in particular those on the protection of weaker contract parties. National courts not only can apply such rules of national law, but will also usually be in a position to combine this with the application and enforcement of EC competition rules, for which they are fully competent. Indeed, this fact may constitute an incentive for dealers and repairers to lodge their claims before national courts, including in cases where the agreements concerned are not in line with the principles summarised in the present article.

Merger Control: Main Developments between 1 January and 30 April 2006 ([1])

Mary LOUGHRAN, Directorate General for Competition, unit C-4 and John GATTI, Directorate General for Competition, unit B-3

Recent cases — Introductory remarks

The Commission received 111 notifications and adopted 101 final decisions in this trimester. These two figures represent a marked increase compared to the same period in 2005. Of the 101 final decisions, 92 were transactions pursuant to Article 6 (1) (b) ECMR (clearance without conditions) and 5 were clearances with conditions and obligations pursuant to Article 6(2) ECMR. Of the 92 unconditional clearance decisions there were 60 decisions taken in accordance with the simplified procedure. The Commission also adopted during the reference period 3 decisions after a second phase investigation. Of these 3 decisions, 1 decision was adopted without conditions pursuant to Article 8 (1) ECMR while 2 were adopted conditionally subject to commitments pursuant to Article 8 (2) ECMR. The Commission also took 4 decisions to open Phase II investigations (Article 6(1) (c) ECMR) during the period.

As regards referrals the Commission received a total of 3 requests for referral from Member States pursuant to Articles 9 and 22 (post-notification referrals) during this period. Out of these 3 requests, there were 2 requests that the Commission refer the case to the national authorities of a Member State (Article 9 ECMR) and 1 request that the Commission accept to deal with a case, pursuant to Article 22 ECMR. During the same period, the Commission adopted 3 referral decisions: 1 decision to refer a case to a Member State (Article 9 (3) ECMR, full referral), 1 decision to accept a referral request (Article 22 ECMR) and 1 decision to refuse an Article 22 ECMR request.

During the period, there were also 15 'pre-notification' requests for referral pursuant to Article 4 ECMR, made by parties prior to notification. Of these requests, 2 were pre-notification requests pursuant to Article 4 (4) ECMR for a case with a Community dimension to be referred from the Commission to a Member State(s) and 13 were pre-notification requests pursuant to Art. 4 (5) for a case without a Community dimension to be referred from the Member State(s) to the Commission. During the same period, the Commission took 18 decisions pursuant to Article 4 ECMR accepting referral requests, 16 under Article 4 (5) ECMR and 2 under Article 4 (4) ECMR.

A — Decisions taken under Article 6 (2)

Telefonica /O2

On 10 January the Commission cleared the proposed acquisition of UK telecommunications company O2 by the Spanish telecommunications company Telefónica. Telefónica and O2 are both telecommunication network operators. While Telefónica's activities include both fixed and mobile telephony, O2 is only active in the mobile telephony sector. Telefónica provides its services in Spain and in the Czech Republic. O2 is active in the UK, Germany and in Ireland. Apart from retail telephony for end-customers, both companies offer call termination and international roaming services to other telecommunication companies.

The Commission's market investigation identified concerns closely related to the functioning of the alliances of network operators created to improve international roaming services. 'International roaming' is a term which refers to the ability of mobile phone subscribers to use their phones whilst travelling abroad. Users can make and receive calls using the same number as they do at home.

Telefónica is currently a member of the so-called FreeMove alliance, where it co-operates with the other three largest incumbent network operators in the EEA (France Télécom, France; Telecom Italia, Italy; and Deutsche Telekom, Germany). O2 participates in the Starmap alliance, where a range of smaller telecommunication companies co-operate under a similar, albeit more loosely structured, framework.

The Commission found that the merger would give rise to competition concerns on the market for international roaming services. At the wholesale level, telecommunication companies buy international roaming from each other in order to allow their mobile telephony subscribers to make and receive calls while travelling abroad. In particu-

([1]) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

lar, the FreeMove alliance was founded in order to concentrate the exchange of international roaming business among its members.

The Commission's market investigation showed that following the proposed transaction, O2 would in the normal course of events be expected to move from the Starmap alliance to the FreeMove alliance, or align its behaviour with that of the latter, as a consequence of its dependency on Telefónica. As a result, O2 would in all probability be less ready to exchange international roaming traffic with non-FreeMove members. This would imply significant cost increases for those companies, in particular in the UK where no international roaming provider independent of FreeMove would remain after the transaction (except for the fully integrated Vodafone group).

Telefónica undertook to leave the FreeMove alliance as soon as possible and not to re-enter that alliance without the Commission's prior consent in the coming years. With the termination of its alliance membership the serious doubts outlined above were removed and the Commission was then able to approve the proposed acquisition.

Solvay/Renolit

On 23 February the European Commission cleared the proposed acquisition of the industrial foil business of the Belgian company Solvay by the German company Renolit. Effective competition in the foil sector is important because of the wide range of applications of these products by a large number of customers. A sufficient number of competing suppliers must remain on the market to supply high quality industrial foil at a competitive price.

The operation as initially notified to the Commission raised serious competition concerns in the European Economic Area (EEA) market for flexible technical films made of PVC. The proposed concentration would have brought together the two leading players, resulting in a very high share in that market, which is characterised by high entry barriers and limited imports from outside Europe.

In order to remove the competition concerns, Renolit offered to divest Solvay's two main production plants for flexible technical PVC films, namely the Liancourt plant in France and the relevant part of the Enkhuizen plant in the Netherlands. As a result of the commitments the combined market share of the parties on the EEA market for flexible technical PVC films would be substantially reduced, and thus the opportunity for other players to enter or expand in the market would be enhanced.

CVC/SLEC

On 31 January 2006 CVC notified its proposal to acquire sole control of SLEC. SLEC is a holding company owning all the rights in the Formula One Group. CVC is already active in the field of motor sports through its subsidiary Dorna, the promoter of the Moto GP motorcycle Championship, the FIM Supercross World Championship, the Spanish Road Racing Championship and the British Superbike Championship. The Commission's extensive market investigation showed that the proposed acquisition by CVC of SLEC could significantly reduce competition as regards the selling of the TV rights to these events in Italy and Spain, which are the countries within the EU where these events are most popular. In addition, concerns were raised that in Member States where Moto GP is less popular than Formula One, CVC might bundle the TV rights for both events.

To address the Commission's concerns, CVC agreed to divest its subsidiary Dorna in its entirety. This divestment removed the only overlap in the parties' activities, as well as possible concerns regarding the bundling of broadcasting rights. In light of this commitment the Commission concluded that the transaction would not significantly impede effective competition in the EEA or any substantial part of it.

Talanx/Gerling

On 5 April the proposed acquisition of the German insurance group Gerling by the insurer Talanx was approved. Talanx Aktiengesellschaft ('Talanx') is a German holding company. Its subsidiaries offer life and non-life insurances to end customers and are active in the provision of re-insurance. HDI Industrieversicherung AG (HDI), a subsidiary of Talanx, offers industrial insurance. Gerling Versicherungsgruppe ('Gerling') is mainly active in the provision of life and non-life insurance to end-customers.

In most segments of life and non-life insurance, the proposed transaction does not raise competition concerns because the merged entity would face competition from several strong insurance companies. However, the Commission's extensive market investigation revealed that the proposed acquisition could significantly reduce competition as regards liability insurance for pharmaceutical companies in Germany. Both HDI and Gerling have a very strong position in providing working cover and in acting as a leading insurer in liability programs of German pharmaceutical companies.

Liability insurance in the pharmaceutical sector is different from liability insurance in other industry sectors because it means long term exposure with

a high risk potential. Some important insurers are engaged in this segment but only to a limited extent. HDI and Gerling were the closest competitors. The proposed transaction would have eliminated competition between them and would have substantially reduced the choice of the pharmaceutical companies.

Liability insurance programmes of pharmaceutical companies are organised in layers. Each layer represents a certain insured sum and is insured independently. An insurer of a higher layer only has to cover losses if the layers below are exhausted. As the frequency of losses is much higher in lower layers, they are also called working cover. In Germany, the working cover is provided mainly in the form of co-insurance by one leading insurer and several non-leading insurers. The leading insurer has an important role, because it offers a high capacity share, assesses the risk, determines the insurance conditions and is in charge of the coordination and the administration in case damages occur.

To address the Commission's concerns, Talanx undertook to divest the pharmaceutical liability business of its subsidiary HDI as far as it concerns insurance for German companies outside the obligatory product liability insurance. This would allow other competitors to establish themselves in the market for liability insurance for pharmaceutical companies in Germany.

Boston/Guidant

On 11 April the Commission approved the planned acquisition by US healthcare group Boston Scientific Corporation ('Boston Scientific') of its competitor Guidant Corporation (Boston), a US company specialised in cardiovascular medical products, subject to conditions.

Boston Scientific proposed to acquire Guidant with the exception of Guidant's interventional cardiology and endovascular devices businesses, which was to be acquired by healthcare group Abbott. Boston Scientific was also to enter into an agreement with Abbott regarding the sharing of Guidant's drug-eluting stent intellectual property portfolio. Drug eluting stents ('DES') are expandable wire tubes coated with a drug which are placed in an occluded artery in order to remove the plaque and support the walls of the vessel.

The Commission's market investigation identified some competition concerns closely related to the implementation of the agreement between Boston Scientific and Abbott. In order to remove these concerns, Boston Scientific and Abbott proposed some modifications to the agreement, in particular pertaining to the sharing of Guidant's DES intellectual property, the limitation of the duration of the supply agreement of DES from Abbott to Boston Scientific and the remuneration mechanism of this supply agreement. The two companies also gave undertakings regarding the minority stake of Abbott in Boston Scientific. As a result of these commitments, the Commission concluded that the parties' incentives to compete in the markets for vascular devices would not be diminished.

B — Decisions taken under Article 8

Cargill / Degussa

On 21 October 2005, the Commission received a notification of Cargill's planned acquisition of sole control of Degussa's Food Ingredients branch ('DFI'). Both Cargill and DFI produce a number of food ingredients and hold a relatively strong position in the markets for different types of lecithin. Lecithin is mainly extracted from soybeans and used as an emulsifier by companies in the food industry such as chocolate manufacturers and bakeries, and to a lesser extent in other industries such as animal feed. As lecithin has a wide functionality beyond its emulsifying properties and carries a unique 'good-for-you' image, the Commission had found that most buyers of lecithin could not switch to another product. The investigation also showed that European food producers only use non-genetically modified ('non-GM') lecithin. Commission Regulations 1829/2003 and 1830/2003 (see IP/03/1056) requires producers to acknowledge on the label that they may contain genetically modified (GM) food or food ingredients.

Since Cargill had recently entered the markets for lecithin, on which DFI was already a major actor, the Commission was concerned that the merger would remove effective competition on these markets and decided to open a detailed investigation. In this examination, the Commission found that, although barriers to entry were rather high, several producers from Brazil and India had been able to enter the markets due to their easy access to the raw material (non-GM soybeans) and their partnership with distributors established in Europe. Some of them were in the process of establishing their own distribution networks in Europe. Since these new competitors were often also the suppliers of Cargill and DFI, the Commission concluded that the merged companies would not have power to increase prices. Finally, the Commission found that Cargill's position in the non-GM lecithin market was not, on its own, as competitive as initially thought at the beginning of the investigation.

The Commission was therefore able to approve the transaction unconditionally, pursuant to Article 8 (1) ECMR, towards the end of March.

T-Mobile Austria /tele.ring (2)

On 26 April the Commission cleared the proposed acquisition of the Austrian mobile phone operator tele.ring by T-Mobile Austria, subject to conditions and obligations.

The Commission had found that the proposed acquisition of tele.ring by T-Mobile, in its original form, would have removed from the Austrian mobile telephony market the operator which had offered consumers the most advantageous prices in recent years. On the basis of price comparisons and an analysis of the switching behaviour of customers, the Commission concluded that tele.ring exerted considerable competitive pressure, in particular on the two largest operators, namely Mobilkom and T-Mobile Austria. Following the proposed transaction, in its original form the concentration would thus have significantly impeded effective competition on the Austrian market for the provision of mobile telephony services to final consumers, even though T-Mobile would not have become the market leader in Austria.

With a view to removing the Commission's competition concerns, the merging parties undertook to divest UMTS frequencies and mobile telephony sites of tele.ring to operators with lower market shares than T-Mobile Austria. In particular, T-Mobile will sell two 5 MHz 3G/UMTS frequency blocks, which are currently licensed to tele.ring, to competitors with smaller market shares, subject to approval by the Austrian telecommunications regulator and the Commission. At least one frequency package will go to Hutchison 3G (who has signed a framework agreement with T-Mobile). It was considered that these undertakings would enable Hutchison 3G, which recently entered the market as a UMTS operator, to expand its network all over Austria and thereby to compete without being dependent on its current national roaming agreement with Mobilkom. The Commission found that Hutchison 3G had sufficient incentives to continuously offer low tariffs in order to gain additional customers and thereby increase its network utilisation and realise economies of scale.

(2) See also the article "T-Mobile Austria/tele.ring: Remedying the loss of a maverick" by Johannes Luebking on page 48 in this issue.

Dong/ Elsam/Energi E2 ('E2')/ Københavns Energi Holding A/S ('KE') / Frederiksberg Elnet A/S ('FE') (3)

On 14 March 2006 the Commission approved the acquisition of sole control of Elsam and Energi E2 ('E2'), regional electricity generation incumbents in Denmark, and of Københavns Energi Holding A/S ('KE') and Frederiksberg Elnet A/S ('FE'), Danish electricity suppliers, by DONG A/S ('DONG'), the Danish state-owned gas incumbent, subject to conditions and obligations.

DONG is active in exploration, production, offshore transport and sale of oil and natural gas, as well as storage and distribution of natural gas. It also has some activities related to wind electricity generation and supply of electricity and heat. Elsam and E2 are the Danish electricity generation incumbent operators in West Denmark and East Denmark respectively. They are both active in production and trading of electricity on the wholesale market. Elsam also has activities in electricity retailing via its subsidiary NESA.

KE and FE supply customers with electricity in the Copenhagen area.

The Commission analysed the impact of the proposed operation on gas and electricity markets in Denmark and concluded that the transaction, as notified, would have significantly impeded effective competition on several natural gas markets. In particular, the Commission found that the transaction would have resulted in the removal of actual and potential competition on the gas wholesale and retail markets, raised entry barriers on these markets, foreclosed an important segment of the Danish demand for natural gas, and that it would have strengthened DONG's ability to raise its rivals' costs for storage and flexibility.

The Commission's decision to approve this concentration took full account of the pre-existing level of liberalisation in Denmark, where the transmission activities have already been fully unbundled from DONG, and of the significant commitments DONG had offered.

To address the concerns identified by the Commission, DONG offered a comprehensive remedies package. As a structural remedy, DONG, the owner of both Danish gas storage facilities, would fully divest the larger of the two (at Lille Torup in Jutland).

(3) See also the article "DONG/Elsam/E2: Remedying competition problems in an energy merger through infrastructure unbundling and gas release" by Claes BENGTSSON, Peter EBERL, Kristóf KOVÁCS, Søren Bo RASMUSSEN and Walter TRETTON on page 55 in this issue.

Furthermore, DONG will implement a programme releasing significant volumes of gas, equivalent to 10% of Danish demand in 2005. The gas release programme will include 6 yearly auctions of 400 million cubic meters for a total duration of 7 years. The auction will have two stages, whereby the primary auction will involve swapping the auctioned lots between the Danish hub (GTF) and any of four northern European hubs in the UK (NBP), the Netherlands (TTF), Belgium (ZBT) and Germany (BEB-VP). If all lots are not disposed of in the course of the primary auction, any remaining volumes will be sold against cash settlement in a secondary auction.

On the basis of past experience in carrying out such remedies, as well as detailed comments by energy market operators, the Commission concluded that the divestiture will establish a second, independent player on the Danish storage market. In addition, the gas release will spur new entry onto the Danish natural gas market and increase the flexible liquidity of the wholesale market as well as free up contractually locked-in customers.

In parallel with the acquisitions by DONG, the Swedish state-owned electricity incumbent Vattenfall will acquire parts of Elsam and E2's assets, which contributes to boosting competition into both West and East Denmark.

C — Decisions taken under Article 9

M. 4174 — TCCC/CCHBC/TRAFICANTE

On 9 March the Commission received a notification of Coca-Cola's planned acquisition of the Italian mineral water producer Fonti del Vulture. The Coca-Cola Company ('TCCC') owns trademarks and supplies soft drink concentrates, which it sells to bottling and canning companies. Coca-Cola Hellenic Bottling Company ('CCHBC') is a licensed bottler jointly controlled by TCCC that produces and sells TCCC-branded soft drinks within the EEA, Eurasia and Africa. Fonti del Vulture ('Traficante') is an Italian family-owned company located in Rionero in Vulture that extracts, bottles and markets packaged waters principally in southern Italy. TCCC and CCHB proposed to acquire joint control over Traficante.

During its Phase I investigation of the transaction the Commission received some complaints from wholesale distributors of soft drinks and other producers of mineral water in Italy. A few days later the Autorità Garante della Concorrenza e del Mercato ('the Autorità') requested the Commission to refer to it the examination of the case.

In its referral request the Autorità explained that it intended to investigate whether, as a result of the merger, TCCC could broaden its portfolio of soft drinks in some regional markets in Italy and significantly strengthen its market position in the *on-premise* distribution channel (hotels, restaurants, bars). It also argued that the case is an adequate candidate for referral given that the effects of the proposed transaction in the markets of carbonated soft drinks and that of mineral water are limited to Italy with possible local implications; that the Autorità has already carried out investigations in the relevant markets and is better placed to handle the complaints.

The Commission concluded that the request was well-founded. In referring the case to Italy, the Commission recognised the inherently Italian character of the transaction and entrusted the national authorities to deal with the specificities of the case.

T-Mobile Austria/tele.ring: Remedying the loss of a maverick [1]

Johannes LUEBKING, Directorate-General for Competition, unit A-2

On 26 April 2006, the Commission authorised the acquisition of sole control by T-Mobile, a subsidiary of Deutsche Telekom, of the Austrian mobile phone operator tele.ring, leading to a combination of two Austrian mobile network providers. The Commission reached this decision after an in-depth investigation, including a Statement of Objections, on the basis of the commitments submitted by the notifying party. The decision is relevant in particular for two aspects: First, for the application of the new test, introduced by the recast Merger Regulation [2], to an undertaking which would not become the market leader after the transaction and, second, for the remedies accepted by the Commission.

1. Relevant market

Both T-Mobile and tele.ring have operated mobile telephony networks in Austria and have been active on the respective retail and wholesale markets. The merger caused specific problems only in the Austrian retail market for the provision of mobile telephony services to end customers. The discussion in this article will focus on this market.

The Commission did not further delineate the retail market between business and residential or post-paid and pre-paid customers, mainly for reason of supply-side substitutability. The Commission also concluded that there is a single product market for 2G and 3G mobile telephony services for the basic services (such as voice telephony and basic data services) which can be provided on both technologies. However, the Commission left open whether there was a distinct market for additional services, such as value-added and multimedia services, which can only be provided on 3G networks, as the concentration did not raise any competition concerns in this respect.

2. Market Structure

Before the transaction, on the Austrian retail market for mobile telephony services, four undertakings have operated 2G (GSM) mobile telephone networks with an Austrian-wide coverage: Mobilkom (a subsidiary of Telekom Austria), T-Mobile, ONE and tele.ring. Each of them has also operated a 3G network in parallel.

In addition to these four established operators, H3G (a subsidiary of Hutchison) entered the market in 2003 and provides mobile telephony services purely on the basis of a 3G network. However, this network covered only 50% of the Austrian population at the end of 2005 (this was also the regulatory minimum requirement for the coverage at this date) and less than 10% of Austria in geographic terms. In order to be able to offer its customers mobile telephony services throughout Austria, H3G has entered into a national roaming agreement with Mobilkom for the areas not covered by H3G's own network.

The market shares of the operators developed as follows in recent years on the basis of the number of customers [3]:

Operator	First half 2005	2004	2003	2002
Mobilkom	[35-45] %	[35-45]*%	[40-50]*%	[40-50]*%
T-Mobile	[20-30] %	[20-30]*%	[20-30]*%	[25-35]*%
tele.ring	[10-20] %	[10-20]*%	[5-15]*%	[<5]*%
T-Mobile/ tele.ring combined	*[30-40]%*	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*
ONE	[15-25]%	[15-25]*%	[15-25]*%	[15-25]*%
H3G	[<5]*%	[<5]*%	[<5]*%	0%

The Commission further analysed the position of service providers. Their role is quite limited in the Austrian market, with an aggregate market share of around 5%. The most relevant service provider is YESSS!, the discount brand of the network operator ONE, which entered the market in April 2005. It only has a pre-paid offer, is distributed via a grocery discounter and the Internet, and its services are limited to voice telephony (including a voice mailbox) and SMS. No other services, such as other data services or international roaming, are offered.

[1] The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

[3] The development of the market shares on the basis of turnover generated by the operators and on the basis of originating minutes was similar to the shares on the basis of customers.

3. Non-coordinated effects

For the competitive assessment, the Commission focused on the analysis of non-coordinated effects. It concluded that, despite the fact that T-Mobile would not be the biggest operator in terms of market shares after the operation, the elimination of tele.ring as independent operator would lead to non-coordinated effects and to a significant effect on prices. The Commission could leave open whether the concentration would in addition lead to coordinated effects as the commitments proposed by the notifying party would also rule out any coordinated effects the transaction might create.

Analysis of tele.ring's past competitive behaviour

Concerning tele.ring's past competitive impact in the market, the Commission based its analysis on three elements: (1) market shares, (2) switching rates and (3) pricing behaviour.

The starting point for the Commission's analysis was the development of the market shares from 2002 to mid-2005. On the basis of customers, tele.ring's market shares more than doubled in this period whereas T-Mobile's and Mobilkom's shares decreased significantly and ONE's market share remained stable. The new entrant H3G significantly increased its market shares since 2003, but was still below 5% in 2005. The Commission concluded that the development of the market shares indicated that tele.ring played a very active role in the last years whereas Mobilkom, T-Mobile and ONE remained rather passive.

Due to the steep increase of tele.ring's market shares, already the market share data suggests that a large proportion of customers who left T-Mobile and Mobilkom have become tele.ring's customers. The data collected by the Austrian regulator for those customers that switched provider by using number portability supports this interpretation. In 2005, more than half of those switching customers went to tele.ring and roughly 60% of those customers which left T-Mobile and Mobilkom, respectively, switched to tele.ring. Second behind tele.ring was H3G, which picked up some 20% of all customers that switched provider by porting their numbers. Even though those customers do not account for all customers who changed provider, this analysis clearly indicates that tele.ring exerted the strongest competitive pressure in the market, in particular on Mobilkom and T-Mobile.

The Commission also analysed average per-minute prices on the basis of all tariffs applied by the various network operators, using data provided by the Austrian telecom regulator for 2001-2005. The data shows that, overall, prices constantly fell in this period and that tele.ring has offered its services since the third quarter of 2002 at significantly lower prices per minute than the other three 2G network operators, Mobilkom, T-Mobile and ONE, the prices of which were in the same range. H3G's average per-minute prices were quite close to those charged by tele.ring, without undercutting them.

This price analysis was confirmed by a comparison with the results obtained from the tariff calculator of the Austrian Chamber of Labour ('AK Wien'). Based on the tariff situation of October 2005, the simulation used profiles of typical mobile communications users with monthly call volumes from 30 to 480 minutes and the average user profiles of T-Mobile and tele.ring. In these simulations, tele.ring was the cheapest supplier in the majority of cases and H3G was the cheapest provider in most of the other cases (and the second cheapest provider when tele.ring had the lowest price). In addition, the Commission made a long-term price analysis by looking at the monthly tariff comparisons for all providers published by AK Wien from 2003 to the first half of 2005. The analysis showed that tele.ring was the provider offering the cheapest tariff most frequently, followed by H3G, whereas T-Mobile, Mobilkom and ONE offered the lowest prices in considerably fewer cases. Of particular significance is the analysis of post-paid subscribers, who account for the overwhelming majority of tele.ring's customers. Among this customer group, tele.ring was the cheapest supplier in considerably more than 50% of cases, whereas H3G was the cheapest provider in the remaining cases; T-Mobile, Mobilkom and ONE did not offer the lowest prices in a single case.

From the analysis of tele.ring's past competitive behaviour, the Commission concluded that, during the period 2002 to 2005, tele.ring was the most active player in the market, exerted considerable competitive pressure in particular on T-Mobile and Mobilkom and played a crucial role in restricting their pricing behaviour. The analysis therefore suggested that tele.ring performed the role of a maverick in the market.

Incentives and Network Costs

The Commission further analysed the incentives of mobile telephony operators to price aggressively, in particular in order to attract new customers. The costs of the mobile industry are determined by high investment costs for the construction of a network with a country-wide coverage, network operation costs that are to a large extent independent of its actual use, and relatively smaller variable costs.

Due to the high proportion of fixed costs, network operators generally have the incentive to use the capacity of the network as fully as possible via a large customer base. This is in particular true for small network operators that first have to build up their customer base to be able to recoup the investments and cover the network operating costs. However, the incentives for attracting new customers change with a larger customer base. Attracting new customers by adopting an aggressive pricing policy will reduce the profitability of the existing customer base, as the favourable conditions will have to be extended to the existing customers at least in the medium-term. Therefore, the larger the customer base, the less likely is an aggressive pricing strategy aimed at attracting new customers, as the reduced revenues from the existing customer base can no longer be offset by the additional income to be expected from new customers. In the past, tele.ring and H3G therefore had the incentives to adopt an aggressive pricing policy, as the new customers always more than offset any price cuts offered to existing customers. By contrast, neither Mobilkom nor T-Mobile had caused any shift in market prices in the past by making particularly aggressive offers, which can be explained by their large base of existing customers, as reflected in their market share. The Commission also analysed the composition of the customer base in terms of phone usage and calling patterns to understand the brand positioning and pricing behaviour of the different operators. The Commission considered that the merger would increase T-Mobile's number of customers further and thereby strengthen its incentive to focus on the profitability of its existing customers instead of aiming at attracting new customers.

Role of the other operators after the transaction

The Commission further concluded that, after the transaction, no other operator could take over the role that tele.ring had played in the past.

For H3G, the Commission acknowledged that it followed a strategy of aggressive pricing in the past, but considered that it could not be regarded as a fully-fledged competitor due to the lack of full network coverage and only limited frequencies. The dependence on the national roaming agreement with Mobilkom considerably increases H3G's variable costs and restricts its scope for an aggressive pricing strategy. It entails substantial variable costs for H3G per minute with a direct impact on the prices charged to the final consumer and leads to incentives which are quite different from network operators when it comes to adopting an aggressive pricing strategy and attracting new customers. The Commission considered it further likely that H3G would extend its network, but concluded that there would be significant uncertainties for the build-up of a network with a full coverage in the foreseeable future, given the increasing difficulties to find locations for additional mobile telephony sites in Austria due to heightened environmental concerns and planning requirements. In addition, H3G's limited frequency spectrum (compared to its competitors) severely limits its capacity. The Commission therefore concluded that H3G would not have the ability to act in the future as a constraining force for the other mobile operators in a similar way as tele.ring in the past.

The Commission also discarded ONE and its discount brand YESSS!, as operator which could form a similar competitive constraint on T-Mobile and Mobilkom as tele.ring. In the past, ONE had not acted as price-aggressive operator, but positioned itself as an operator with a specific focus on network quality. The Commission considered it very unlikely that ONE would find it profitable to adopt a similar strategy as tele.ring and did not find any indications that ONE would change its strategy. For the discount brand YESSS!, the Commission concluded that due to its very limited services and its focus on pre-paid customers YESSS! could not be considered to be a competitive constraint similar to tele.ring and would not be an alternative for customers of tele.ring with its very high share of post-paid customers. In any case, YESSS! only entered the market in April 2005 and fully depends on its parent company ONE for its pricing behaviour. The Commission considered it doubtful whether ONE would continue to follow the discount strategy once tele.ring had disappeared, in particular as ONE would no longer have to compensate to the same extent for the loss of customers of its quality brand ONE.

Future competitive behaviour of tele.ring

The Commission also analysed whether tele.ring would likely continue its past competitive behaviour in the future. The Commission, *inter alia,* analysed tele.ring's pre-merger business plan which showed that it aimed at growth rates far exceeding the general market growth also in the future. Therefore, it seemed likely that tele.ring would continue its aggressive pricing strategy to achieve this growth by attracting customers from other operators.

Conclusion for non-coordinated effects

The Commission concluded that, due to the elimination of the maverick in the market, it would be likely that the transaction would produce non-coordinated effects and significantly impede effec-

tive competition in a substantial part of the common market. For this conclusion, the Commission referred to the Horizontal Guidelines which state that some firms have more of an influence on the competitive process than their market shares would suggest. A merger involving such a firm could change the competitive dynamics in a significant anti-competitive way, in particular when the market is already concentrated ([4]). The present case shows that the finding of non-coordinated effects is not limited to the mostly quoted scenario for these effects, i.e. a situation where the merging parties are the closest competitors to each other.

4. Commitments

For being able to accept commitments, the Commission had to be convinced that the remedies would create a player which would likely play a similar role in the market as played by tele.ring in the past and would act as a similar competitive constraint on the other mobile telephony providers, in particular Mobilkom and T-Mobile.

The remedies submitted by T-Mobile contain two main elements. First, T-Mobile committed to divest tele.ring's two packages of UMTS-frequencies, one to H3G and the other one to a competitor with a smaller market share. Second, T-Mobile committed to divest a very large number of the mobile telephony sites currently operated by tele.ring (including all necessary technical equipment), mainly to H3G, some to ONE (if interested). In order to achieve an up-front implementation of the commitments as far as possible, T-Mobile entered into a legally binding framework agreement with H3G for the divestiture of UMTS-frequencies and a large number of mobile telephony sites already during the procedure. Only this up-front implementation of the commitments gave the Commission the necessary certainty that H3G would purchase sites and frequencies and that the competition concerns were likely removed.

In a nutshell, the commitments will enable H3G to acquire the essential parts of tele.ring's network infrastructure so that H3G will be able to build up a country-wide network and to quickly become a full network operator. According to H3G's business plan, the acquisition of the tele.ring sites will allow H3G to achieve complete network coverage of the population in the near future. The divestiture of at least one UMTS-frequency package to H3G will further enlarge its capacity and enable H3G, in particular, to reserve one 5 MHz UMTS frequency block for voice telephony. The additional frequency package will therefore increase H3G's overall network capacity, allowing it to serve a larger number of customers on its own network and giving it a stronger incentive to attract a large number of new customers.

The Commission assessed the likely effects of the commitments on H3G's role in the market, in particular on its incentive to price aggressively in the field of voice telephony. Buildings its own network will eliminate H3G's dependence on the national roaming agreement with Mobilkom, reduce its variable per minute costs considerably and allow H3G to achieve much larger economies of scale. H3G already in the past offered the most attractive prices after tele.ring. Due to its currently small customer base, H3G has strong incentives to exploit the economies of scale of an own network and to attract a large number of new customers by an aggressive pricing policy in order to 'fill' this network. This is supported by its revised business plan which takes account of the acquisition of the mobile telephony sites and the UMTS-frequencies. Therefore, H3G could be considered to be in a comparable role as tele.ring in the past and it is likely that H3G will act as a competitive constraint on the other operators in a similar way as tele.ring did.

The incentives to offer attractive prices in voice telephony are not substantially changed by the fact that H3G is an operator of a 3G network whereas tele.ring was mainly a 2G operator. While H3G offers also other services in addition to voice telephony, the Commission concluded that voice telephony services will, in the foreseeable future, still play the most important role also for 3G operators in terms of capacity used, revenues and profits. The Commission considered in addition that attractive prices for voice telephony, as the basic service, will also for H3G be the most relevant factor for attracting a large number of new customers to whom also multimedia services may be sold.

The conclusion that H3G would be suitable to play a similar role in the market as tele.ring was further supported by the similar 'communication profile' of their customers. Customers of both operators are price sensitive and the share of post-paid and frequent users of mobile phones is considerably above average for both. The fact that, in 2005, nearly half of the customers who switched away from tele.ring by porting their numbers went to H3G shows that H3G is the next best alternative for tele.ring customers.

Due to the similar incentives of H3G and tele.ring with regard to winning new customers and, in

([4]) Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, paragraph 37.

addition, a comparable communication profile of the customers of both operators, the Commission concluded that there would be strong indications that H3G would follow a similar price strategy in the future as tele.ring has done in the past and that the commitments would eliminate the risk of a significant impediment of effective competition on the retail market for mobile telephony services in Austria as regards non-coordinated as well as possible coordinated effects.

Siemens/ VA Tech: A Case of Bidding Markets and Minority Stakes [1]

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On 26 April 2006, the merger case M.3653 — Siemens/ VA Tech was closed following the successful sale, after an auction process organised by Siemens, of VA Tech's hydro power business to Andritz, an Austrian engineering group. Siemens had already earlier fulfilled another undertaking in the case, the sale of its non-controlling minority stake in SMS Demag ('SMS'), a German metal plant engineering firm.

Both Siemens and VA Tech, which is the largest Austrian-based industrial group, are active in a wide range of technology and engineering sectors. The companies supply major components for products such as power plants, trains, railway infrastructure, steel plants, electricity distribution systems, cable cars and others. The notified merger consequently led to horizontal overlaps in numerous product markets. The Phase II investigation concluded that the transaction would significantly impede effective competition in two markets, hydro power equipment and metallurgical plant building. The case was cleared subject to divestiture commitments, which eliminated the horizontal competition concerns in these markets. The market investigation in these two areas raised a number of novel issues which we summarise in the following. In structuring the undertakings, the Commission took into account the lessons from the recent study on merger remedies.

Hydro Power Equipment

Hydro power equipment includes all the mechanical and electrical components of a hydro power station, such as turbines, generators, controls, valves etc. (but not civil works, such as dams). Both Siemens and VA Tech are active in this market, Siemens through Voith Siemens, a joint venture with German engineering company Voith. Because all major suppliers of hydro power equipment cover the full range of components, supply-side substitutability led the Commission to define a single relevant product market for hydro power equipment. The geographic market was found to be EEA-wide in scope. All of the major manufacturers (Voith Siemens, VA Tech, Alstom and GE Hydro) participate successfully in tenders throughout Europe and, indeed, worldwide. However, the European market differs from other world regions in so far as Asian suppliers (mainly based in China, India and Japan) have been entirely absent and are not recognised by customers as credible bidders.

Most hydro power equipment is sold in tenders which have the characteristics of winner-takes-all bidding contests. The competitive analysis of bidding markets poses a number of challenges and opportunities for a competition authority and also for the merging parties. Parties' lawyers often use the presence of bidding markets to argue that high market shares created by a transaction are not indicative of market power. While this may or may not be true in a given situation, detailed bidding data, which is sometimes available in these markets, can enable the regulator to gain more accurate information about the competitive dynamics of a market than would be possible from market shares and other sources. Where bidding data can be collected with reasonable resource deployment and can be verified (for example, by collecting similar data from several sources), it should therefore be used.

The competitive impact of a merger in a bidding market depends crucially on the structure of the bidding contests in which the product is sold. By contrast, the formal context in which the bidding takes place, for example by public tender or through informal bids solicited by customers, is not decisive. In some settings, for example, when most sales are made in a small number of large auctions, products and suppliers' costs structures are fairly homogeneous and output is not constrained by capacity, bidding markets can generate competitive outcomes even when they are very concentrated. Market shares provide little or no guidance about market power in these situations. Some markets affected by the Siemens/ VA Tech merger, for example in the power transmission & distribution sector, were cleared on this basis.

In the market for hydro power equipment, most demand in Europe is for the replacement of parts of existing hydro power plants. By contrast, greenfield projects and full refurbishments, where the entire electrical and mechanical equipment is replaced, are comparatively rare. Consequently,

[1] The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

hydro power equipment is sold in a large number of relatively small tenders involving very different products and specifications. This observation, combined with other factors (such as product differentiation and the cost of submitting bids) led the Commission to conclude that market shares do contain significant information about market power in this bidding market. In the case, they were the result of several hundred purchasing decisions by a large number of customers. At the same time, they reflected suppliers' decisions to participate in a bidding contest with a given set of tender specifications. The parties' high combined market share of [40-60]% therefore led the Commission to presume that Voith Siemens and VA Tech were exercising an important competitive constraint on each other, which would be lost post-merger. Apart from the detailed survey of customers and competitors and their internal documents, bidding data played an important role in verifying the merging parties' competitive interaction.

The Commission collected data about tender participation from Voith Siemens and VA Tech, as well as from their main competitors, Alstom and GE Hydro. Ideally, a bidding analysis would be conducted on the basis of aggregated bidding data from all sources. However, two obstacles made such an analysis unfeasible: First, all firms considered their bidding information as highly confidential. And secondly, it proved impossible to match individual tenders from the different sources as dates and project names differed in many cases and it remained thus unclear whether a given data point related to the same tender or to separate tenders within a larger project. The competitor data nevertheless enabled the Commission to conduct important cross checks of the Siemens data.

The nature of the tender process in this case meant that important information could be derived from the identity of the bidders in a given tender. As bid submission is costly, only those companies that expect to have a reasonable chance of winning (for example, because they can meet the tender specifications) are likely to participate. Frequent interaction of certain companies over a large number of tenders would therefore indicate that they offer close substitutes and, thus, exert strong competitive pressure on each other. This type of information is a significant improvement over market shares because not the winning bid (which is represented by market shares), but the second-best bid is particularly important for the outcome of a bidding contest. Hence, if Voith Siemens and VA Tech rarely participated in the same tenders (for example, because they covered different market segments), the competitive impact of the merger would be small, despite the large market share addition.

The tender data, thus, provided important information about the competitive interaction of the four leading hydro power equipment manufacturers and of the fringe suppliers. In this case, it turned out that Voith Siemens and VA Tech were the companies that interacted most frequently with each other by various measures. Together with other sources of evidence and the market shares, the bidding data formed a robust case indicating that the elimination of VA Tech as an independent bidder would significantly impede effective competition in the hydro power equipment market by creating a dominant position of the merged entity Siemens/VA Tech.

It is in some markets possible to estimate econometrically the quantitative impact of a proposed merger on prices. However, in many cases, the extent and quality of the available bidding data is insufficient for such an approach. In hydro power equipment, like in many other engineering markets, the price of a given project depends primarily on the technical specifications rather than the number of bidders. In some markets, the winning bid may be selected not only on the basis of price, but on a combination of price, quality and other, not directly observable, factors. In Siemens/ VA Tech, the value of individual auctions ranged from thousands to millions of Euros and was not easily accounted for econometrically. This and other complexities, as well as pure incompleteness or unavailability of suitable data, can be challenging to overcome within the time limits of a merger investigation. The approach applied in Siemens/ VA Tech balances the objectives of an effects-based approach based on a variety of available evidence with the time constraints of the EU merger procedure and the need to provide clear and predictable rules for merging parties.

Metallurgical plant building

In the area of metallurgical plant building ('metal plant building') ([2]), the investigation covered two areas, namely 'electrical' and 'mechanical' metal plant building. The main competition issues arose in the context of mechanical plant building, which covers the planning and building of the hardware and process technology of metal plants (whereas electrical plant building covers their electrification and automation). The area of mechanical metal plant building had been investigated in a previous Commission decision ([3]). The findings in the present case confirmed the basic assumptions of this decision concerning the product market seg-

([2]) The terms refer to activities related to the (mostly turnkey) planning and building of industrial plants producing and processing metals.

([3]) COMP/M. 1450 — SMS/ Mannesmann Demag of 8.4.1999.

mentation for different types of metal (notably steel being distinct from aluminium, copper and other metals) and the likelihood of a further segmentation along the lines of the main relevant process steps (for iron/steel most importantly iron making, steel making, casting, hot rolling, cold rolling, further processing).

In mechanical metal plant building, Siemens itself had no direct business activities. It did, however, hold a non-controlling 28% share in SMS, who was head-to-head with VA Tech the European and world-wide market leader. In relation to all mechanical metal plant building activities as well as in certain possible submarkets, VA Tech and SMS together held high shares of sometimes well above 50%; they were also found to be the closest competitors ([4]). Mechanical metal plant building was characterised by high levels of concentration with merely three undertakings, the 'full-liners', offering most or all major process technologies. These three companies (VA Tech, SMS and Danieli) held by far largest part of the overall market and of most possible sub-markets ([5]).

Due to Siemens' participation in SMS, the concentration therefore raised competition issues under two aspects: On the one hand, the Commission found that Siemens' stake in SMS would, normally, be likely to dampen the competition between Siemens/VA Tech and SMS. In fact, Siemens' financial participation in the company value (and thus the business success) of SMS would normally reduce Siemens' incentives to compete aggressively against SMS, particularly in tenders where SMS has a realistic chance of winning the contract. However, in mid-2004, Siemens had exercised a put option to sell its 28% stake in SMS to the sole other shareholder as of 31 December 2004. In this connection, a dispute had arisen between the parties about the fair evaluation of the price for the shares. During the Commission's merger control investigation, Siemens was therefore still effective shareholder of SMS and it was not foreseeable, due to the potentially protracted dispute pending before German courts, when the divestiture of Siemens' stake in SMS would be completed and how Siemens would exercise its rights in the meantime. The Commission established that it was, by contrast, clear and undisputed between the parties, that the relevant moment in time for establishing the value of Siemens' shares in SMS was 31 December 2004. Siemens would therefore not participate in the commercial success of SMS by means of an increase of value of SMS after that date. A financial participation of Siemens in SMS' business success by means of a dividend payment could not altogether be excluded, but this prospect was – in view of the legal dispute with the majority shareholder – not sufficiently certain so as to have the likely effect of appreciably influencing Siemens' bidding behaviour after its acquisition of VA Tech ([6]).

On the other hand, the rights of Siemens under its minority shareholding included access to sensitive strategic data about the business of SMS. The Commission found that the competitive situation and the structure of the market were such that Siemens' access to strategic business information of SMS would allow Siemens/VA Tech to anticipate certain competitive behaviour of SMS, thereby reducing the competitive pressure previously exercised by SMS on VA Tech. In this context, the Commission particularly emphasized the market power of VA Tech in this highly concentrated area, the fact that SMS is a particularly close competitor of VA Tech, and that other companies are unlikely to exercise sufficient competitive pressure on Siemens/VA Tech. On this basis, the Commission could leave it open whether Siemens/VA Tech's information advantage over the closest competitor SMS and its lead in terms of market power vis-à-vis other competitors were sufficient for the concentration to create a dominant position on the possible overall market for mechanical metal plant building, because, in any event, it would lead to a significant impediment of effective competition by means of non-coordinated behaviour ([7]). For two possible submarkets, the Commission found that the concentration would lead to the creation of a dominant position.

Remedies

In order to remove the competition problems in the market for *hydro power equipment* identified in the investigation, Siemens committed to divest VA Tech's hydro power business, thereby entirely removing the competitive overlap between VA Tech and the Voith Siemens joint venture in the market for hydro power generation equipment.

When accepting this divestiture remedy, the Commission took the lessons drawn in its recent Remedies Study ([8]) into account in order ensure

([4]) Bidding scenarios were analysed for this finding and so were competitor rankings by customers and the ability to bid for larger projects.

([5]) Arguments related to countervailing buyer power were considered but rejected as insufficient.

([6]) See Commission decision, at para. 328.

([7]) See for more details Commission decision, at para. 329 – 335. It is noted that this may have been the first example of an independent application, albeit *in the alternative,* of the 'SIEC test' (substantial impediment to effective competition) of the new Merger Regulation (Reg. 139/2004) *even in the absence of dominance.*

([8]) DG Competition Merger Remedies Study, available at http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf.

that the divestment business was a viable, standalone entity comprising the whole of VA Tech's activities in hydro power generation. Therefore, the commitment provided that the divestment business include all off VA Tech's subsidiary VA Tech Hydro GmbH & Co. ('VA Tech Hydro'), even though this company was also active in combined-cycle ('CC') equipment. The CC business concerns a separate product market from hydro power, but the two areas shared certain corporate functions that ensured the economic viability of the divested business. In addition, the commitment contained a 'catch-all' clause providing that Siemens had to sell VA Tech's entire hydro power business regardless of the corporate entity to which it belonged. This clause was necessary as the exact legal structure of VA Tech's hydro power business was not known in all details before completion of the public bid. The structure of the divestiture commitment, thus, ensured that VA Tech Hydro would operate as an effective competitor under a variety of conceivable purchasers.

The commitments also provided that VA Tech SAT GmbH & Co. ('VA Tech SAT'), a company owned 50% by VA Tech Hydro and 50% by VA Tech T&D, another VA Tech subsidiary, could be retained by Siemens. VA Tech SAT provided automation technology both to the hydro power and the transmission and distribution ('T&D') businesses of VA Tech. According to Siemens, this technology could be provided to the divested business through a cooperation and licensing agreement. After the decision clearing the Siemens/VA Tech transaction was adopted, it became however clear that in order to be able to submit competitive bids for new hydro power projects, VA Tech Hydro needed to have in-house access to the essential automation technology. After discussions with the management of VA Tech Hydro, the trustee in charge of monitoring the divestiture process and the Commission, Siemens agreed to transfer the staff and assets of VA Tech SAT essential for the hydro power business to the divestment business.

Towards the end of the divestiture process, it turned out that it was not necessary for VA Tech Hydro to retain the CC business because the proposed buyer, Andritz, would be able to ensure the viability also of a separate hydro business. This assessment was based on Andritz' diversified activities in a range of engineering and technology industries and its proven ability to manage large project risks in cyclical industries. Therefore, the Commission ultimately agreed that the CC business could be retained by Siemens.

Since Andritz, an Austrian engineering company, appeared to be a viable purchaser independent of Siemens and having the financial resources, proven expertise and incentive to maintain and develop the divestment business as an active competitive force in the market, the Commission was able to approve Andritz as purchaser of VA Tech Hydro.

With respect to *metal plant building,* Siemens' committed to complete the already initiated divestiture of Siemens' minority shareholding in SMS in order to remedy the competition concerns identified by the Commission. In view of the very specific circumstances of the case, a standard type divestiture remedy was not necessary as Siemens had already exercised its option to sell the shares in SMS. There was, in particular, no need for a deadline to find an appropriate buyer because the buyer had already been found. It also appeared disproportionate to interfere with litigation under national law by insisting on a divestiture deadline, because by exercising the put-option, Siemens had already sold its minority stake in a legally binding form and, hence, fully and irrevocably remedied the competitive harm. This being said, the Commission, in view of the competition concerns identified by the investigation, had to ensure that pending the resolution of the legal dispute between the majority shareholder of SMS and Siemens the latter would not continue to have access to information about SMS' strategic behaviour. Therefore, Siemens agreed to appoint trustees approved by the Commission, who would take Siemens' seats in SMS' supervisory board and the shareholders committee. All commercially sensitive information would only be passed to the trustees, who were obliged not to disclose it to Siemens ([9]).

In fact, the trustee solution needed to be in place only for a short period of time. At the beginning of 2006, Siemens and the majority shareholder of SMS reached a compromise on the valuation of the shares, and Siemens' stake in SMS was definitely transferred to the majority shareholder of SMS, thereby dissolving any link between these two competitors in the market for metallurgy plant building.

The remedies thus enabled the Commission to resolve convincingly the competition problems raised by this complex merger of two diversified companies with horizontal overlap in a range of different markets.

([9]) Exceptions were only made regarding information needed by Siemens to comply with its legal obligation to establish its group balance sheet and – in view of the ongoing litigation – information related to the past concerning the valuation of its SMS stake as of 31 December 2004 (such historic data would not allow Siemens to draw any reliable conclusions on SMS' current or future strategic behaviour). In addition, Siemens committed to implement a ring-fencing safeguard to ensure that the information mentioned would only be accessible to certain dedicated staff.

DONG/Elsam/E2: Remedying competition problems in an energy merger through infrastructure unbundling and gas release (1)

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1. Introduction

Following an in-depth investigation, the European Commission on 14 March 2006 authorised — subject to commitments — the acquisition by Danish natural gas incumbent DONG of Elsam, Energi E2 ('E2'), Københavns Energi ('KE') and Frederiksberg Elnet ('FE'). Elsam and E2 are the Danish electricity generation incumbents in West Denmark (Elsam) and East Denmark (E2), respectively, while KE and FE are the electricity retail incumbents in the Copenhagen area.

In parallel with the acquisitions by DONG, the Swedish state-owned electricity incumbent Vattenfall acquired parts of Elsam's and E2's assets (e.g. power plants), a transaction that contributes to boosting competition in electricity generation in both West and East Denmark. The entry of Vattenfall on the Danish electricity generation and wholesale markets eliminated any potential concerns the Commission could have had on these markets while on electricity retail markets, the merged company would not have a dominant position leading to a significant impediment to competition.

The Commission however concluded that the transaction, as notified, would have significantly impeded effective competition on several natural gas markets through the removal of actual or potential competition on the gas wholesale and retail markets, raising entry barriers on these markets, foreclosing an important segment of the Danish demand for natural gas, and the strengthening DONG's ability to raise its rivals' costs for storage and flexibility.

To address these concerns, DONG offered a comprehensive remedies package including — for the first time in a Commission energy merger case — divestiture of infrastructure, namely one of the two Danish gas storages both of which was owned by DONG pre-merger. DONG will furthermore implement a gas release programme which releases 2.4 bcm (2) gas over 6 years, equalling annually 10% of Danish demand in 2005. The Commission concluded that the Commitments proposed by the parties sufficiently remedied the competition problems identified and therefore authorised the acquisition.

2. Relevant markets identified by the Commission and competitive assessment

Gas Wholesale markets

With regards to the product market definition the decision concluded that there exists a market for wholesale supplies of gas for Denmark, which comprises all sales, irrespective of whether via the GTF (3), supply contracts or other agreements by physical or contractual importers, re-importers (in case of so called turn-around gas, re-imported from Germany), producers (if applicable in the future) and traders to other traders or to central CHPs (4) (who take over at least some of the services regularly provided by a supplier for delivery at the site or intend to resell the gas), which satisfy the needs of these customers to have access to wholesale gas in Denmark. With respect to Sweden, the decision concluded that there exists a separate market for wholesale supplies of gas destined for consumption in Sweden because of the different market situations in Denmark and Sweden.

On geographic market definition the decision concluded that the market for wholesale supplies is limited to Denmark. The main reasons were that all gas consumed in Denmark is Danish offshore gas while the transactions on the main European hubs do not have a sufficient impact on wholesale prices in Denmark and Danish customers have little knowledge of non-Danish prices and consider import of gas a weak substitute. Consequently, contractual imports represent less than 12% of total Danish consumption and face significant transport costs, capacity constraints and administrative obstacles. Furthermore the market shares of the different wholesale players are very different in the respective countries.

With regard to Sweden it was concluded that gas supplies for Sweden is not part of the same geographical market as Denmark and forms a sepa-

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

(2) Billion cubic metres.

(3) The virtual gas trading point in Denmark.

(4) Central CHPs are large combined heat and power plants.

rate market which is Swedish or Danish-Swedish in scope since the wholesale supplies in Sweden do not exercise a strong competitive constraint on wholesale supplies in Denmark.

DONG argued throughout the case that all potential gas deliveries at the German side of the Danish entry/exit point at Ellund belong to the Danish wholesale gas market. The decision leaves open whether actual delivered volumes at Ellund should be included in the geographic scope of the Danish gas wholesale supply market but dismisses the claim that all potential capacity-dependent volumes should be included because gas exported from Denmark to Germany that can be potentially turned back into Denmark does not pose a significant competitive constraint on DONG.

In the competitive assessment the decision concluded that DONG is dominant on the Danish market for gas wholesale supplies, with a market share of above 80% The (potential) competitive constraints on DONG's dominant position come from the operators in the Danish offshore area, imports from Germany, turnaround of gas at Ellund, a liquid Danish wholesale market and new pipeline capacity or other import facilities. It was concluded that these competitive constraints are weak or not sufficiently certain to in the short term constitute an effective constraint on DONG's market position.

The Commission's investigation showed that DONG's dominant position would be further strengthened by the removal of E2 as an actual, and Elsam as a credible potential competitor to DONG and at the same time, Vattenfall's acquisition of a small share of E2's and Elsam's gas-fired power plants will not be sufficient to outweigh the loss of competitive pressure caused by the two generators' integration in the DONG group.

In addition to these horizontal effects, the decision concluded that the transaction will lead to customer foreclosure, and as a result to a significant impediment to effective competition, due to a vertical integration of DONG with E2 and Elsam, which account for about 25 % of total Danish consumption. It will thus be more difficult for DONG's competitors to enter Danish gas markets, both as wholesale suppliers and as suppliers of final customers, thereby raising barriers to entry to these markets.

As regards gas wholesale supplies in Sweden, DONG has a very strong position on that market as well. The decision left open whether DONG is in a position of single or joint dominance in a Swedish or Danish-Swedish wholesale market, since any harmful effects on any of these markets would be derived from a harmful effect the operation would have on the wholesale market for Denmark.

Gas storage/flexibility market

The proposed concentration as notified would have led to a substantial impediment of effective competition in the Danish market for gas flexibility/storage. The Commission's Statement of Objections expressed in that respect both horizontal and vertical competition concerns which could only be removed by DONG's commitment to divest the larger of its two gas storage facilities in Denmark.

Whereas production in gas fields is rather constant, gas demand varies, both seasonally and in the short term (intra-day and intra-week). Therefore, companies active in the gas industry have to balance their gas supply and demand and thus have a genuine need for gas flexibility services. In addition, gas transmission system operators have to cope with possible imbalances and emergency situations in order to ensure stable gas pressure in the network.

The Commission's market investigation identified physical gas storage as the most important flexibility tool. However, the investigation also showed that flexible supply contracts (upstream) as well as customers with the ability of demand modulation (downstream) are considered important flexibility tools for gas companies. This holds in particular for the flexible consumption of Elsam's and E2's gas-fired power plants (central CHPs) which are the largest gas consumers in Denmark with [20-25%] of the national consumption. They are able to generate flexibility in two ways: first, by means of output variation, and second through the switching of fuels between gas, coal, oil and bio mass. Thereby these gas-fired power plants can provide both seasonal and short-term flexibility to their suppliers, and exert thus, at least to some extent, competitive constraints on DONG's storage operations. However, for the purpose of the present case it was not necessary to determine whether or not gas storage and flexible gas consumption by central CHPs are part of the same relevant product market (see below). As to the relevant geographical market, the Commission found that it was national in scope, both on the hypothesis of a storage market and of a broader market for flexibility.

The Commission's investigation established that the proposed transaction would have led to a significant impediment of effective competition on the Danish market for flexibility/storage, irrespective of the precise market definition. The concentration as notified gave rise to both horizontal and vertical competition concerns.

As to the horizontal concern, the acquisition of Elsam's and E2's CHPs as significant flexibility tools would have strengthened DONG's dominant position on the storage/flexibility market. The Commission found that DONG was already dominant on the basis of either market definition as it had a monopoly for storage and storage constitutes the largest and most important source of flexibility in Denmark. The acquisition of the flexibility offered by Elsam's and E2's power plants would remove a significant competitive constraint on DONG's storage operations, and thereby strengthen its dominant position.

Regarding the vertical concern, the Commission found that DONG would have the ability and the incentive to raise its (wholesale) rivals' costs. It has to be borne in mind that storage/flexibility services are a necessary input for gas wholesale companies. Following the merger, DONG would be able to reduce its own storage needs as it could increasingly use the flexibility of Elsam's and E2's gas-fired power plants. The combined entity could use the central CHPs as 'virtual storages', i.e. relatively increase their gas consumption in periods of low demand by other customers and reduce their gas consumption in peak periods and in winter. The fact that following the integration of Elsam and E2 DONG would be able to reduce its own storage needs is not a competition concern in itself. However, the harm to competition arises because, due to the current Danish regulatory regime, DONG's decreasing demand would lead to an increase of storage tariffs for its competitors in the wholesale and supply markets. This is due to the fact that DONG's storage subsidiary is entitled to a fixed annual revenue to cover its costs from storage operations and that, as a consequence of DONG's reduced demand following the merger, costs per cubic metre of stored gas would increase accordingly. Therefore DONG would not only have the ability but also the incentive to increase its rivals' costs for storage.

Retail gas markets

All Danish retail gas markets have been fully open for competition since 2004. With this in mind, the Commission identified three distinct gas retail markets: (i) A market for supply of natural gas to central CHP plants (ii) Market(s) for supply of gas to decentral CHPs and to large industrial customers and (iii) Market(s) for supplies of gas to households and small businesses. These markets can be distinguished in terms of regulatory environment, gas consumption, contract types, demand patterns, flexibility needs and prices.

As to the geographic market, the decision considered that (i) the retail market for central CHP's was most likely national in scope and could at most include also Sweden (ii) the retail market for decentral CHPs and to large industrial customers was national and (iii) the retail market for households and small businesses was not wider than national and possibly still regional in scope.

The Commissions investigations showed that DONG was already pre-merger dominant on all the identified retail markets and that this dominance would have been strengthened on two of the retail markets leading to a significant impediment to effective competition on those markets.

(i) The market for supply of natural gas to central CHP plants

The decision considered that there were no concerns on this market since no customers could suffer any harm at least until 2009 and since post-2009 these customers would be protected if the well-functioning of the market is reinforced by the commitment to release gas. The decision also considered whether the concentration eliminated potential competition, but concluded that it would be unlikely that Elsam and/or E2 were potential entrants since it would seem unlikely that other central CHP's would buy gas from its direct competitors.

(ii) Market(s) for supply of gas to decentral CHPs and to large industrial customers

On these market(s), the Commissions investigation showed that, absent the merger, Elsam, E2, Nesa [5] and KE would have been likely and effective potential competitors. Elsam and E2 both had access to large gas quantities at competitive prices and they also had access to important means of flexibility. This was also confirmed by the market investigation and from internal papers. Nesa and KE both had strong energy brands and could have achieved cost synergies and customer loyalty by sales of dual fuel. They also already had access to a large customer base of industrial customers.

Moreover, the concentration would raise entry barriers since it would be more difficult for competitors to attain critical size as 20% of Danish gas consumption was removed from the market. The effects of the concentration on storage and wholesale markets described above would also raise entry barriers on the retail markets. Finally DONG will after the merger be in a privileged position to offer dual fuel products, which would be difficult for competitors to match.

(5) The electricity retail company owned by Elsam.

The Commission therefore concluded that the concentration would remove potential competition and raise entry barriers on this market thereby significantly impeding effective competition.

(iii) Market(s) for supplies of gas to households and small businesses.

For the same reasons as above, the concentration would also raise entry barriers on this market. Entry barriers would also be raised because large customers — whose flexibility could have been balanced against the flexibility of smaller customers — were removed.

The decision also found that to some extent, potential competition from NESA and KE would be eliminated through the concentration. As electricity retailers, NESA and KE already had the sales force, IT and billing systems, customer portfolios and brand strength in place and would therefore not meet the high entry barriers that other entrants would meet. However the investigation also revealed that many of KE and NESA's customers already had their energy needs satisfied by city gas and district heating and that KE and NESA — being situated in the same geographic area as DONG's gas competitor HNG — could mainly have used their customer portfolios to compete with HNG and not with DONG. It was also considered that other electricity companies could have entered this market, but it was concluded that it would be difficult for other companies to duplicate KE's and NESA's special position with regards to access to gas.

The Commission therefore concluded that the concentration would remove some potential competition and raise entry barriers on this market thereby significantly impeding effective competition.

3. Assessment of proposed remedies

In order to remedy the competitive concerns identified by the Commission, DONG submitted a package of undertakings. In particular, DONG committed to sell one of the two gas storage facilities and to release a total of 2,4 bcm of gas in a gas release programme.

The storage facility to be divested is Lille Torup in Jutland, the larger of the two Danish facilities. The divestiture will deprive DONG of the ability and incentive to raise rivals' cost of storage. The storage remedy will reinforce the effect of the unbundling of gas infrastructure assets which has already taken place in Denmark as regards the ownership of the gas transmission network. It constitutes the first structural unbundling remedy in a Commission merger case, separating the assets of the incumbent wholesale operator and infrastructure facilities ([6]).

The gas release programme remedy will include 6 yearly auctions of 400 million cubic meters for a total duration of 7 years ([7]). The quantities to be auctioned annually thus correspond to about 10% of the Danish consumption in 2005. Lot sizes will be 40 million cubic meters. The first auction is to take place before the end of August 2006.

While gas release programmes have previously been accepted as a remedy by the Commission ([8]), the design of the release programme in this case contains a novel two-stage selling procedure. In a first stage the gas will be offered in a swap auction whereby interested buyers must 'pay' for the gas delivered in Denmark (at the Danish hub GTF) with gas delivered to DONG at one of any of four northern European hubs in the UK (NBP), the Netherlands (TTF), Belgium (ZBT) and Germany (BEB-VP). The auction itself will determine a competitive level for swap-fees (either positive or negative) to reflect the relative value of gas supplied at the different locations. In order to ensure that the quantities committed to be released will actually be sold, the swap auction will, if necessary, be supplemented with a secondary auction for the same year in which the remaining volumes will be offered in a standard auction against cash settlement.

The Commission accepted DONG's proposal because the swap component had the potential of contributing to integrating European gas markets without compromising the objective of ensuring that significant quantities of gas would be released in Denmark in order to remedy competition concerns on the Danish wholesale and retail markets. Entry possibilities into the Danish markets are further enhanced by provisions on the flexibility of the daily quantities ([9]) and the freeing up of DONG's customers if approached by a successful bidder in a gas release auction with a more attractive offer. The gas release will thus increase the flexible liquidity of the wholesale market and facilitate new entry onto the Danish natural gas markets.

([6]) A prior structural unbundling remedy in *E.ON/MOL* concerns unbundling of the gas producer from the storage operator and separates links between the production incumbent and the wholesale incumbent.

([7]) The total delivery of the six auctions will stretch over 7 years due to delivery periods of 2 years per auction.

([8]) In *E.ON /MOL*.

([9]) Annual take or pay of 90% of the auctioned annual contractual quantity and daily flexibility of 50-110% of the daily contractual quantity.

Commission requests phasing out of Spain's export related tax incentives [1]

Marek HERM and Pierpaolo ROSSI, Directorate-General for Competition, unit H-2

On 22 March 2006 the Commission proposed, pursuant to Article 88(1) of the Treaty, appropriate measures to Spain with a view to abolishing the tax incentives in favour of Spanish companies investing abroad. Spain was invited to gradually eliminate the incentives by the end of 2010 at the latest. The acceptance of the proposed measures rendered the abolition of the tax incentives legally binding for Spain.

Background

In October 2000, the Commission took a final negative decision under the ECSC Treaty on Spain's corporate tax incentive on the grounds that it constituted State aid favouring outward foreign direct investments related to the export of steel products from Spain [2]. The scheme was foreseen by Article 34 (now Article 37) of the Spanish Corporate Tax Act (ISS) and the corresponding legislation of the Basque Provinces. Spain challenged the decision before the ECJ. One of Spain's claims was that the tax incentive was not to be considered State aid but a legitimate adaptation of Spain's corporate tax system to favour foreign investments related to export and they were to be considered a general tax measure favouring the export of all products and services from Spain (not just steel). On 15 July 2004 the Court eventually rejected Spain's arguments and ruled that the tax incentive at hand constituted State aid incompatible with the ECSC Treaty [3]. The grounds upon which the incentives were declared incompatible under the ECSC Treaty are essentially the same for which the Commission initiated State aid review under the EC Treaty in 2004. In fact the Commission's view was from the beginning of the ECSC procedure that the incentive would also constitute State aid under the EC Treaty [4]. Due to the uncertain qualification of the scheme as existing or new aid and following an information injunction in 2003 to clarify this qualification, the preliminary investigation by the Commission led to appropriate measures being proposed only in March 2006.

With this new procedure, the Commission took a broader approach. First, the Commission decided to investigate similar tax breaks granted by Navarra in addition to those foreseen by Article 37 ISS for Spain and the corresponding legislation of the Basque Provinces. Furthermore, the Commission decided to investigate other tax incentives, foreseen by Article 23 ISS (enacted in 2000), for the Spanish companies carrying out outward foreign direct investments outside the Community which have to be related to export from Spain. The Commission investigation accordingly concerned two separate sets of tax incentives, only in minor part constituting new aid.

Description of the tax scheme

Tax credit

Article 37 ISS provides for an annual tax credit in favour of companies subject to corporate tax in Spain. The credit corresponds to 25% of:

a) the amount invested to establish a foreign branch or to acquire at least 25% shareholding in a foreign company (including in other Member States), provided that their activity is directly linked to the export of goods or services, or the sale of Spanish tourist services. The costs cannot include financing and insurance costs;

b) the capitalised costs incurred abroad (including in other Member States) to advertise and launch products or services to be exported, penetrate new markets, conduct market research and take part in fairs, exhibitions and similar events (including those held in Spain, but having an international character).

Tax allowance

Pursuant to Article 23 ISS, Spanish companies can create a temporary tax-free reserve by means of a deduction from their taxable bases. In particular, the beneficiaries may deduct the costs incurred to acquire at least a controlling participation (more than 50% of the total voting rights) in a foreign company (excluding those of other Member States), provided that the acquired company car-

[1] The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
[2] OJ L 60, 1.3.2001, p. 57.
[3] Judgement of the Court of 15 July 2004 in Case C-501/00, Spain v Commission, [2004] ECR I-6717.
[4] Commission Communication opening the formal investigation procedure laid down in Article 6(5) of the Commission Decision 2596/96/ECSC, OJ C 329 of 31.10.1997, p. 4.

ries out an active business abroad (other than real estate, finance or insurance) and that such company does not sell services to a related company residing in Spain.

The amount corresponding to the expenses incurred to obtain control in foreign companies is temporarily deductible from the taxable income of the beneficiary, as an allowance to be included in a reserve on the equity side of its balance sheet. The allowance is not permanent as the amount included in the reserve is recaptured and included in equal instalments in the taxable income of the beneficiary during the four years following the year in which the deduction took place. This deduction comes on top of the ordinary deducted business expenses allowed under ISS. It is also a derogation from the general rule forbidding deduction of costs incurred in connection with income being exempt from corporate tax in Spain because earned abroad.

Existing vs. new aid

One has to note that the vast majority of these measures were in place when Spain joined the Community in 1986, some date back to 1965. That part of measures existing at the moment of accession, therefore, constitutes existing aid. An increase of the tax credit from 15% to 25% enacted in 1986 and the tax allowance enacted in 2000, thus after Spain's accession, constitute new aid. The Commission initiated a review of the existing aid under the cooperation procedure foreseen by the Procedural Regulation ([5]), with a view to convincing Spain to voluntarily repeal all of the incentives related to export. The Commission eventually decided to propose appropriate measures in order for Spain to accept the repeal of the comprehensive package.

Assessment

With this decision, the Commission considered that the tax advantages at hand fulfil all the relevant conditions to constitute State aid within the meaning of Article 87(1) of the EC Treaty. First, the measures afford to the beneficiaries an economic advantage consisting in the reduction of the tax burden of companies carrying out certain foreign investments related to export activities and to acquisition of control of foreign companies engaged in new active business ventures abroad. Such an advantage cannot be considered to derive from a general tax policy measure, but rather as a derogation from the ordinary scope of the Spanish corporate tax system.

Second, State resources are involved as the revenues of the Treasury are foregone.

Third, the advantage given is capable of affecting trade between Member States because the objective of the scheme is to specifically improve trading conditions of the beneficiaries in exporting goods and services from Spain to foreign markets. The scheme also distorts or threatens to distort competition because, by strengthening the Spanish undertakings carrying out active business abroad, it puts non-Spanish competitors at a relative disadvantage in carrying out comparable business activities in the relevant reference markets. The latter include all the markets where the Spanish beneficiaries export their products or services.

Lastly, the measure must be specific or selective in that it favours only certain undertakings or the production of certain goods. Spain has argued that the incentives in question constitute a tax policy measure in favour of all companies aiming to acquire an active interest in a business abroad and would therefore correspond to a general measure. For Spain, the specific character of the scheme would be justified by the need to compensate the additional risks and expenses involved in penetrating foreign markets, as opposed to companies focusing solely on the Spanish market. Such scheme would be necessary to support business innovation and internationalization initiatives as a way of making Spanish businesses more competitive and ensuring their survival in a global and rapidly changing economy.

The Commission did not accept Spain's arguments and considered that the measures in question provide selective advantages exclusively in favour of undertakings carrying out certain types of investments directly related to the export of goods and services from Spain and the acquisition of foreign active businesses not engaged in selling services to Spanish related companies. The fact that a high number of beneficiaries may avail themselves of the incentive does not make it a general measure, since its derogatory nature from the tax system and its specific nature is demonstrated. The unavailability of the scheme for the internal part of Spain's economy makes it selective.

According to the Commission the above conclusion is well established under the settled case law of the Court. The Court has found that a reduction of social contribution charges reduction targeting

([5]) Council Regulation No 659/1999 of 22.3.1999 laying down detailed rules for the application of Article 93 EC Treaty, OJ L 83 of 27.3.1999, p. 1.

all of the sectors that are exposed to international competition constitutes State aid ([6]), and the same applies for measures favoring only national products being exported ([7]). Finally, in rejecting the appeal lodged by Spain against the Commission Decision of 31 October 2000, the Court has concluded that the fact that the measures in question pursues a commercial or industrial policy objective, such as the promotion of international trade and the promotion of foreign investment, is not sufficient to take them outside the classification of State aid ([8]).

The Commission also considered that, pursuant to the relevant case law, neither the high number of benefiting undertakings nor the diversity and importance of the economic sectors to which those undertakings belong warrant the conclusion that the measures at hand constitute a general measure of economic policy ([9]).

For the Commission, the selective character of the tax advantages is not justified by the nature of the tax system. Under prior case law ([10]), the Court has held that the selectivity criterion is fulfilled where undertakings in a comparable situation are disproportionately affected by a tax measure, with no objective justification stemming from the scheme's objective. The Commission considered that it is disproportionate for the scheme to impose substantively different nominal and effective tax levels on companies being in comparable situation from a business tax standpoint just because some of them are involved in export related activities or pursue investment opportunities overseas. The advantage is also not justified by the need to award relief against foreign taxation, since the benefit is independent from foreign taxation being incurred. The Commission accordingly concluded that the scheme is selective in that it only favours certain undertakings carrying out certain investments abroad and that this specific character of the scheme is not justified by the nature of the scheme.

Compatibility

The Commission considered that the State aid in question is incompatible with the single market. The Spanish authorities did not present any arguments to indicate that any of the exceptions provided for in Articles 87(2) and (3) of the EC Treaty, under which State aid may be considered compatible with the common market, applies in the present case.

The Commission considered that tax advantages granted by the scheme are not related to specific investments eligible to receive aid under the Community rules and guidelines, to job creation or to specific projects. They constitute a reduction of charges that should normally be borne by the firms concerned in the course of their business and must therefore be considered as an operating State aid. According to the constant practice of the Commission, such aid cannot be considered compatible with the single market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, degressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

Aid to export (being directly linked with the quantities exported or favouring domestic over imported products and services) and aid to export related activities (including aid to the establishment and operation of a distribution network, aid to other current expenditures linked to export activities and aid towards the cost of participating in trade fairs or of studies or consultancy services excluding those for the launch of new or existing products on a new market) are in principle not compatible with EU engagements with WTO pursuant to the Commission Regulations NN° 69/2001 and 70/2001, on the application of State aid rules to *de minimis aid* and to SMEs ([11]), respectively. The Commission considered that the incentives at hand do not fulfil the above indicated conditions and cannot accordingly be considered compatible with the common market.

Finally, the Commission considered that the tax incentives are specifically aimed at improving the trading conditions of the beneficiaries taxable in Spain against foreign competitors, including those established in other Member States, with respect to the investments such beneficiaries make abroad being directly or indirectly related to export of products and services from Spain. The Commission accordingly stated that, as far as the aid scheme in question results in a remission of internal taxes in respect of exports to other Member States contrary to Article 92 of the EC Treaty, it is incompatible with the common market. State aid, the conditions

([6]) Case C-75/97 *Belgium v Commission* (Maribel bis/ter scheme), [1999] ECR I-3671.

([7]) Joined Cases 6 and 11/69 *Commission v France* [1969] ECR 523.

([8]) Judgement of the Court of 15 July 2004 in Case C-501/00, *Spain v Commission,* point 125, [2004] ECR I-6717.

([9]) Case C-75/97 *Belgium v Commission (Maribel bis/ter scheme)* [1999] ECR I-3671.

([10]) Case C-143/99 *Adria-Wien Pipeline,* [2001] ECR I-8365.

([11]) Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis aid,* OJ L 10/2001, p. 30 and Commission Regulation (EC) No 70/2001 on the application of Article 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ L 10/2001, p. 33.

of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market ([12]).

The Commission's request

The Spanish Government has given a commitment to the Commission that the new aid elements of the current tax scheme will be repealed by 1 January 2007 and the remaining incentives would be gradually phased-out. After the given commitment, a draft bill was presented to the Parliament on 10 March 2006 which provided for the elimination of the tax allowance and the difference between the current 25% and existing aid part of the tax credit by 1 January 2007. According to the draft the remaining tax advantages, which are considered by the Commission as existing aid, are to be phased-out by 1 January 2011.

Having taken note of the Spain's commitment and the draft legislation proposed to the Parliament the Commission proposed on 22 March 2006 to Spain to formally accept the following measures:

— reduction of the tax credit from 25% to 12% as of 1 January 2007

— further reduction of the tax credit by 3% per year until its complete elimination by 1 January 2011;

— immediate termination of any aid to export or to favour domestic over imported products within the meaning of Council Regulations 69/2001 and 70/2001 on the application of state aid rules to the *de minimis aid* and to SMEs, respectively.

Spain's acceptance of the proposed measures rendered the proposed abolition of the incentives legally binding. As a result, the most harmful effects of the aid scheme, namely those related to export aid, would be immediately eliminated, whereas the intensity of the remaining aid elements would be gradually reduced as of 1 January 2007 until its final suppression by the end of 2010.

Spain accepted in full the proposed measures by letter to the Commission. Although Spain already took the formal commitment to repeal the aid elements in question, the Commission may still consider it necessary to open proceedings in case of non-implementation of only some of the commitment taken by Spain and most notably to secure a timely elimination of the new aid elements, in line with what proposed in its appropriate measures.

([12]) Case C-156/98 *Germany v Commission,* [2000] ECR I-6857.

STATE AID

Commission finds public participation in Austrian securitisation scheme is not State aid [1]

Almorò RUBIN DE CERVIN, Directorate-General Competition, unit G-3, and Volker ZULEGER, formerly Directorate-General Competition, unit G-3

On 9 February 2006, the Commission authorised the public participation of Austria Wirtschaftsservice GmbH (aws), a public body that administers the award of grants to Austrian companies, in a bond portfolio set up by the private bank Investkreditbank AG for Austrian enterprises. The public participation will correspond to 10% of a € 300 million bond portfolio. Austria had notified the measure for reasons of legal certainty, but believed it did not involve State aid. In its decision, the Commission agreed with Austria's assessment, concluding that the public participation indeed does not constitute state aid pursuant to Article 87(1) EC as it is made on terms that would have been acceptable to a market economy investor.

Securitisation issues

The case is noteworthy because it concerns the first public interventions in favour of securitisation notified to the Commission in State aid control.

Securitisation (i.e. the conversion of assets into securities in order to raise cash) is widely seen as one of the possible answers to the potential problem for lending to small and medium-sized enterprises (SMEs) that may derive from the new capital requirements imposed by the Capital Requirements Directive (reflecting the Basel II agreement) which will be in place as of 2008. Securitisation would help reduce the risk of the lenders, who would be able to share part of it with other investors. At the same time, the development of the market for bonds linked to loans to SMEs would increase the amount of credit overall available to the SMEs.

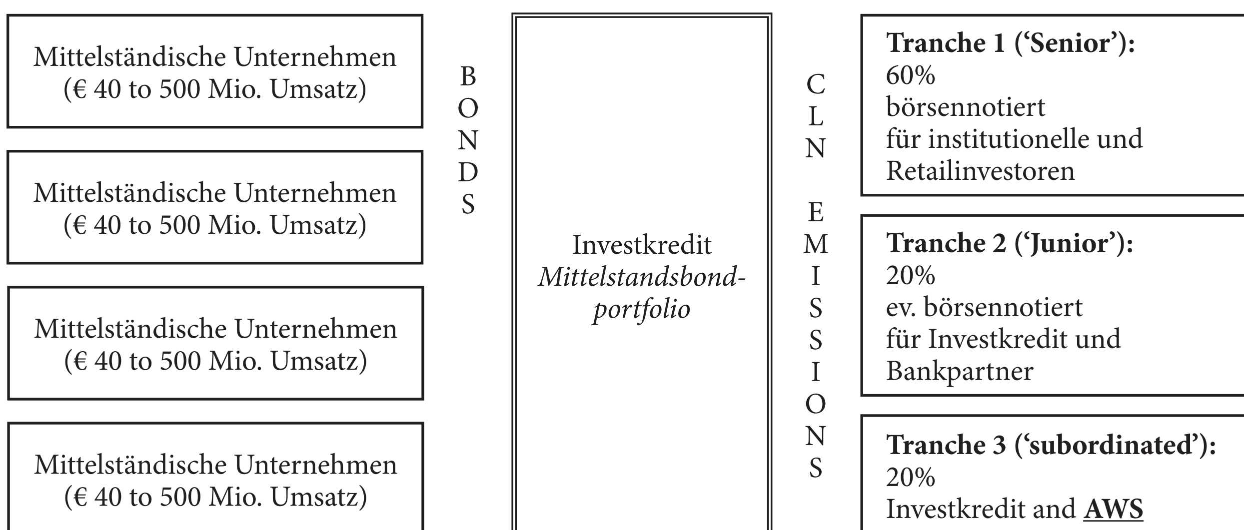
In the proposal for the Competitiveness and Innovation Programme (CIP), the Commission itself has foreseen a new financial instrument to foster securitisation, to be managed by the European Investment Fund (EIF) along with those supporting guarantees and seed capital.

The Mittelstandsbondportfolio

During the investment phase Investkredit will subscribe bonds (€5m to €45m) from a limited number of medium-to-large sized enterprises at market rates, bundle them in a so-called bond-portfolio and divide them into three tranches.

During the subsequent capital market phase, the bond-portfolio will be offered to institutional and retail investors through the emission of bonds in the form of Credit Linked Notes (CLN), depending on the three different tranches and their risk qualities.

The following picture may illustrate the factual situation:



[1] State aid No N 192/2005 — Austria (OJ C 79, 1.4.2006, p. 23). The authentic version of the decision text is published under http://ec.europa.eu/community_law/state_aids/comp-2005/n192-05.pdf
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The public participation into the Mittelstandsbondsportfolio

aws will invest up to 50% of the third tranche, whilst the remaining percentage will be covered by *Investkredit*. Accordingly, the investment of aws will cover a maximum of 10% of the entire portfolio.

However, the case is made slightly more complex by the fact that aws does not have resources itself for the purpose of investments and is not allowed by law to raise capital from the capital market. Accordingly, for the purpose of raising the finance for its participation in the third tranche, aws will issue a guarantee covering the amount of its participation to Investkredit. Investkredit will then raise an amount equivalent to the guarantee given by aws as liquidity from the capital market at market rates. The guarantee provided for by aws will be remunerated by Investkredit as if it were a loan given on market conditions.

aws will share equally with Investkredit the profit from the net interest revenues of the third tranche, following deduction of Investkredit's administration costs for the issue of the third tranche and aws's administrative fees. Furthermore, the conditions for the third tranche will be at market conditions, as the remuneration will be on the basis of a market rate for (BB-) investments. Overall, both Investkredit and aws invest on equal terms.

The Commission's assessment

In its assessment, the Commission looked first into the conditions of aws's investment and second into the different aspects of the bond portfolio which concerns three levels of economic actors on which the Commission assessed the presence of State aid pursuant to Article 87(1) EC.

The Commission found that aws's participation is made on market terms and is based on conditions a private investor would have accepted ('the market economy investor principle'). For the same reasons, the Commission concluded that there is no aid involved to Investkredit, the investors or the undertakings in the portfolio.

Conclusion

The case shows that there are ways of improving access to finance for small and medium-sized firms through public intervention without distorting competition, when the intervention is made using market-based instruments.

State aid for biofuels [1]

Anne Theo SEINEN and Johanna BERNSEL,
Directorate-General for Competition, unit G-4

Community policy encourages biofuels

The promotion of biofuels and other renewable fuels to replace diesel or petrol for transport is a well established Community priority, as biofuels are expected to contribute to objectives such as the reduction of CO2-emissions and environmentally friendly security of supply. Most concretely, Article 3 of Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport [2] (hereinafter 'the Biofuel Directive') establishes a reference value of 5.75% of all petrol and diesel for transport purposes placed on their markets by 31 December 2010. Recently, the Commission adopted two further communications concerning biofuels, namely the 'Biomass action plan' of 7 December 2005 and 'An EU strategy for biofuels' of 8 February 2006 [3]. The environmental benefits of biofuels depend to a significant extent on the use of energy and non-renewable resources in their production and the cultivation of the feedstocks.

Measures to encourage biofuels normally constitute State aid in the meaning of Article 87(1) of the Treaty, and by now the Commission has adopted a dozen of decisions not raising objections to such aid. The more recent decisions on the Czech, Dutch and Swedish measures may serve best as reference documents [4]. This article addresses some of the less obvious aspects of the State aid assessment, notably the State aid nature of general tax exemptions, the rule to avoid overcompensation, the relation with other applicable Community legislation, the alternative instrument of biofuel supply obligations and the assessment of less common biofuels.

General exemptions for biofuels constitute State aid

First, in the case of a general exemption from the fuel tax, the existence of State aid is not always clear to everyone. In the case of tax exemptions granted only to a limited number of biofuel producers, typically selected by means of a tender procedure, the selective nature is clear. But in the case of general tax exemptions for biofuels it could be argued that the direct benefit would go to the consumer and that any producer of biofuel is free to compete in the market. The Commission, however, has consistently held that such tax exemptions, despite applying generally to all biofuel sales, favour selectively the production of biofuels and distort competition vis-à-vis other fuels.

Pure vegetable oils like rape oil are included in annex I of the Treaty, and hence the Community guidelines on State aid in the Agricultural sector [5], section 5.5.3, apply. For other fuels, the compatibility criteria can be found in the Community guidelines for State aid for environmental protection [6], section E.3.3. Both sets of rules allow basically the same aid amounts. The latter text allows different options for Member States as to how to support renewable energy. Normally, option 1 (points 58-60) is applicable, which means that operating aid can be granted in order to cover the difference between the cost of biofuel production and its market price. The starting point for determining the market price is typically the price of the fossil fuel for which the biofuel substitutes. Consumers may, however, take into account the lower energy content of biofuels and therefore be prepared to buy biofuels only if their market price is correspondingly lower [7]. Biofuels are normally produced from biomass, and therefore there is no need to limit the aid to the higher investment cost only (point 60).

Avoiding overcompensation

'Allowing aid only to cover the difference between cost and market price' is equivalent to 'there should be no overcompensation for biofuel producers'. In

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
(2) OJ L 123, 17.5.2003, p. 42.
(3) COM(2005) 628 final and COM(2006) 34 final.
(4) Cases N223/05 CZ, N570/05 NL and N112/04 SE. The decisions in English can be found on http://europa.eu.int/comm/competition/state_aid/decisions/additional_docs.html.
(5) OJ C28 of 1.2.2000, p. 2.
(6) OJ C37 of 3.2.2001, p. 3.
(7) Energy content values can be found in the report 'Stationary Applications of Liquid Biofuels': http://europa.eu.int/comm/energy/res/sectors/doc/bioenergy/pta_biofuels_final_rev2_1.pdf. With low blends, however, the effect might be less noticeable to the consumer or not noticeable at all. In some cases, the Commission accepted energy content values given in studies that address the particular situation (e.g. type of cars) in the Member State concerned.

practice, this is not so easy: cost of production depends on many factors, e.g. type of fuel, type of raw material, scale of production, market price for by-products, etc. There are many cost studies, but they do not appear to cover all situations brought forward by Member States. Until now, the Commission generally was able to rely on the information provided by the Member State, though sometimes only after some critical discussion.

General tax exemptions allow aid that may just suffice to compensate for the extra costs of domestic producers, but at the same time may make it attractive to import cheaper biofuels from third countries. Under the current market conditions, this situation typically arises for ethanol produced from cane. Bioethanol can be imported under various customs codes, and some Member States exempt imported fuels from the tax only when they are imported under the code with the highest customs duty. Biofuel imports should not merely be considered as a problem, but rather as part of the solution. The European biofuel strategy cannot be based on domestic production only, and in its most recent communication, the Commission calls for a balanced trade strategy. Also from the competition point of view, the issue may not be very problematic, since an aid that is available to *any* biofuel producer does not distort competition *between different biofuel producers*. Differences in competitive strength are inevitable in any market where producers of similar products use different feedstock with different production technologies. General tax exemptions do not affect such differences, but preserve competition between biofuel producers.

Cumulation of tax exemptions and direct operating grants is no problem provided that the combined aid level does not lead to overcompensation. Cumulation of operating aid and regional investment aid may not pose a problem, as regional aid is supposed to compensate for the disadvantages from carrying out an activity in a less developed region. But in certain situations, it may well be appropriate to take the effect of investment aid into account when calculating the level of operating aid that can be granted without leading to overcompensation. This would be the case in particular when operating aid is cumulated with environmental investment aid, which is granted for the very same purposes.

There are also a number of practical issues when it comes to avoiding overcompensation: on which prices for fossil fuels, on which exchange rates and on which time series should the aid be based? The Commission has not developed rules for this, but in general simply requests that the methods used are reasonable. Monitoring and adaptation of the aid level if necessary for avoiding overcompensation, should take place at least once a year. The Czech authorities set a laudable example by having a more frequent revision for its biodiesel scheme, but this may not be possible in different administrative contexts.

Respecting other relevant Community legislation

A number of conditions for aid derive from other relevant Community legislation, notably Directive 2001/77/EC of the European Parliament and the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal market ([8]) as regards the definition of 'renewable energy' and Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([9]) (hereinafter the 'Energy Tax Directive'), in particular Article 16, as regards tax aspects. This Directive requires, among other things, that tax exemptions are limited to the biofuel part in the blended fuel and that exemptions granted to individual companies have a maximum duration of only 6 years. Of course, Community tax law prohibits discrimination between domestic and imported products. When using direct subsidies to producers, such discrimination is not a problem: it is rather inherent in the notion of State aid. What is not allowed, however, is granting aid conditional upon the use of domestic raw material. This directly breaches WTO-provisions.

Biofuel supply obligations

Some Member States (e.g. Austria, the UK, Germany and the Netherlands) have put in place or consider putting in place, biofuel supply obligations, i.e. legal obligations imposed on any fuel supplier to sell a minimum percentage of biofuels in its overall sales. In order to create flexibility, the system can be combined with tradable certificates. Supply obligations don't involve State resources and hence they don't involve State aid in the meaning of Article 87(1). In addition, as the extra costs can be expected to be reflected in fuel prices in general, such obligations shift the burden from tax payers to suppliers and consumers, which is more in line with the 'polluter pays principle'. When applying in a general way, they may have the least distortive effect on competition and therefore, from a competition point of view, they seem attractive. A supply obligation may fully replace a tax exemption, but Austria, e.g., combines the instruments. Being aware of this, the Commission approved the Aus-

([8]) OJ L 283 of 27.10.2001, p. 33.
([9]) OJ L 283 of 31.10.2003, p. 51.

trian tax exemption, as the aid was still justified by the difference between the production cost and the market price of the biofuel in the meaning of the current rules.

Less common fuels, future policy

There are some less common biofuels like biogas and hydrogen. Often, for such fuels Member States grant tax exemptions to pilot projects on the basis of Article 15(1) (a) of the Energy Tax Directive rather than a general tax exemption on the basis of Article 16. The Swedish case provides further details on the Commission's assessment of such fuels.

As a final remark, the Commission may make proposals as regards the instruments to be used for encouraging biofuels in the context of its mid-term review of the Biofuel Directive, which is planned for 2006. Of course, consequences for the Commission's assessment of State aid for biofuels can, at this stage, not be excluded.

Forfeiting financing and the construction of the waste-fuelled power station (Müllheizkraftwerk) MHKW Rothensee GmbH (1)

Jörg KÖHLI, Directorate-General for Competition, unit G-4, and
Volker ZULEGER, formerly Directorate-General for Competition, unit G-3

Overview

On 22 March 2006, the Commission decided (2) that the forfeiting financing for the construction of the waste-fuelled power station MHKW Rothensee does not constitute state aid pursuant to Article 87(1) EC. The case concerned the financing of the construction of a waste-fuelled power plant operated by the enterprise MHKW Rothensee in Germany (Saxony-Anhalt). It is the first time the Commission had to deal with a forfeiting financing model in the context of a state aid case.

Forfeiting, a commercial financing instrument, is the purchase of receivables or claims without recourse to the selling party in the case of non-payment.

Internationally, this financing tool is mainly used in the export business. An exporter holding promissory notes (receivables, claims) from the buyer as payment for the exported goods is occasionally interested in raising funds by selling these notes to a bank and transforming a credit transaction into a cash transaction. For the bank, this purchase covers a risk of non-payment of the notes.

In practice, the bank as the 'forfaiteur' buys the claims, which the exporter would acquire against the importer after the delivery of goods and provides the exporter's financing of the trade transaction. For the purchase of receivables or claims the forfeiting bank applies a discounting rate agreed with the exporter, which receives the net cash amount.

In particular in Germany, forfeiting is not only applied in the export business but also used for the financing of investments by both large banks and banks specialised on forfeiting.

The measure at stake concerned such financing of an investment project; this is the construction of the waste-fuelled power station MHKW Rothensee. Germany felt confident that the measure did not involve State aid pursuant to Article 87(1) EC, but nevertheless notified it to the Commission for reasons of legal certainty. In its assessment, the Commission concluded that taking into account all particular circumstances and conditions, no state aid was involved in this specific project.

The project outline

Based on the offers from a call for tender, the City of Magdeburg selected MHKW Rothensee as an enterprise for waste management ('Abfallwirtschaftsbetrieb') to collect and dispose the waste in the area of Magdeburg. Both sides agreed on a waste disposal contract ('Entsorgungsvertrag') including on the one hand MHKW Rothensee's obligations on waste treatment and on the other hand the city's commitment to remunerate for the waste disposal. Accordingly, MHKW Rothensee will dispose the waste in a waste-fuelled power station, which has been pre-financed by its shareholders, i.e. E.ON, which holds 51 % of the shares, and the Städtische Werke Magdeburg GmbH, which owns 49 % of MHKW. Since the City of Magdeburg owns itself 54 % of Städtische Werke Magdeburg, it is indirectly a shareholder of MHKW Rothensee.

MHKW Rothensee intends to finance a part of the investment by 'forfeiting', which in this case means the partial sale of MHKW's claims to the City of Magdeburg for the remuneration of its services — ca. 62 % of the total remuneration for the waste disposal — to a bank consortium (Helaba and Commerzbank). The City of Magdeburg waives its pleas ('Einredeverzicht') concerning these claims by means of an Additional Agreement ('Zusatzvereinbarung'). It follows from this agreement that the City cannot object paying MHKW Rothensee for this part of the remuneration as foreseen in the waste disposal contract.

According to Germany, favourable financing conditions for the project result not from the forfeiting financing but from the waiver of pleas stipulated in the Additional Agreement. Applying the model as proposed, MHKW Rothensee would receive financing for the construction of the waste fuelled power station at similar conditions as a municipality. As calculated by the bank consortium, the interest rate would decrease accordingly and result in a certain cash value, which MHKW Rothensee would, however, directly and without delay forward to the City in one lump sum.

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
(2) State aid No N 339/2005 — Germany (not yet published).

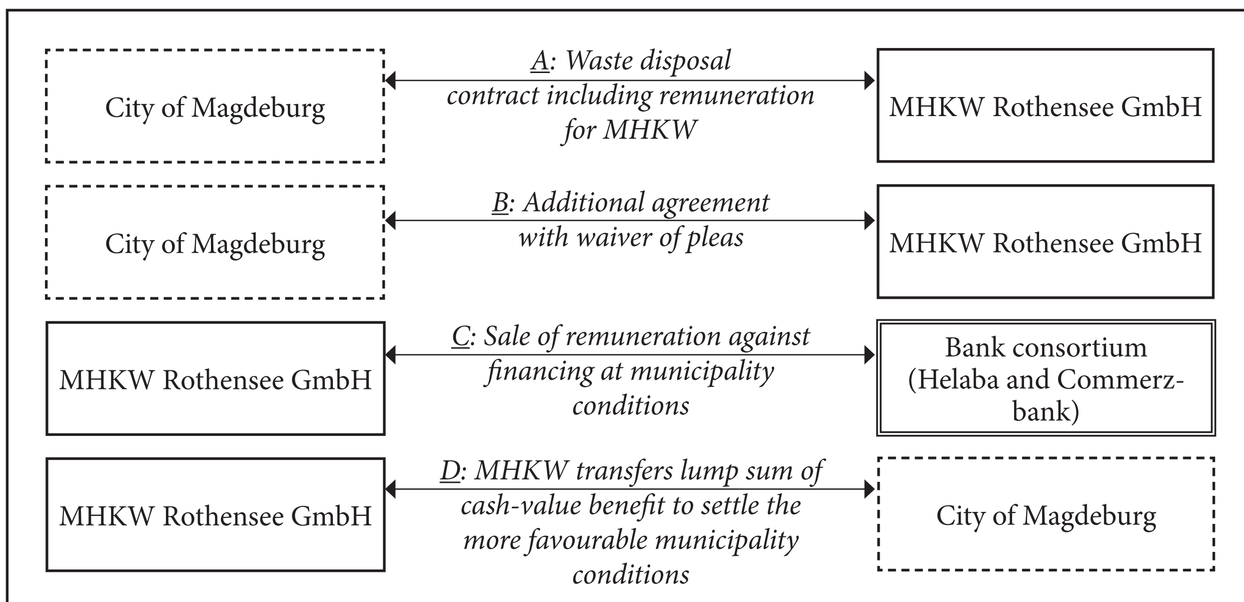
It is to be underlined, that not the forfeiting project in total but a specific aspect — the Additional Agreement ('Zusatzvereinbarung') to waive the City of Magdeburg's pleas ('Einredeverzicht') for 62 % of its claims against MHKW — required particular attention in the Commission's state aid analysis.

The financing arrangements in the context of state aid analysis

The Commission based its analysis and decision on potential state aid in favour of MHKW Rothensee in the meaning of Article 87(1) EC on the following reasoning:

1. In the framework of the forfeiting model MHKW Rothensee sells claims under the waste disposal contract, corresponding to a certain nominal value to the bank consortium. As usual and common practice for such business transactions, the sales price is calculated as the present value of the revenues to which the claims give entitlement over the duration of the contract. The discount rate used by the bank in such calculation will naturally include a risk premium reflecting the situation of the seller, MHKW Rothensee. However, the claims sold are those covered by the 'Additional Agreement' to which the City of Magdeburg cannot object and therefore the City factually guarantees that it will pay them in full. From this follows that the risk for the bank consortium is no longer that relating to MHKW Rothensee but the one relating to the City. Hence, the forfeiting model with the Additional Agreement reflects in fact the conditions of a municipal credit ('Kommunalkredit').

2. Although the bank consortium receives an irrevocable claim and therefore an advantage as compared to the situation without the Additional Agreement, it pays a purchase price to MHKW Rothensee as if such change of debtor would not have taken place. The bank consortium calculates the purchase price by taking into account the net present value method, which is a market conform calculation method where the primary factors are the maturity of the claims and the discount interest rate. However, due to the Additional Agreement of the forfeiting model and the change of debtor, the bank consortium concedes a lower and for MHKW more favourable discount interest rate. From the reduced interest rate applied, results an increased price, which the bank consortium pays for the claims to MHKW (see also the following chart). It means that MHKW Rothensee receives a higher purchase price from the bank consortium than it would have got without the Additional Agreement.



The main task of the Commission was to verify whether the calculation of the amount forwarded is in line with market terms in order to avoid any indirect advantage resulting from the involvement of a public entity (the City of Magdeburg).

First of all, Germany demonstrated that MHKW Rothensee had asked several financial institutions for offers and negotiated the final financing conditions with the bank consortium. Further, it was guaranteed that MHKW Rothensee forwarded the advantage from the higher purchase price in full to the City of Magdeburg and that no advantage remained to MHKW Rothensee under the Additional Agreement. Apparently only the City obtains the benefit of its waiver of pleas under

that Agreement. Finally, Germany confirmed that there will be no advantage in MHKW Rothensee's taxation results from the forfeiting model and the Additional Agreement.

Additional risks and an adequate compensation

The Commission had also to assess whether the banks would not unduly benefit from the forfeiting financing with Additional Agreement. Such advantage would be created, if the compensation paid to the City of Magdeburg for bearing additional risks was inadequate. In any case, such advantage would be limited to the difference between the financing conditions with and without the Additional Agreement. With the aim of allowing a full assessment of the case, the banks involved submitted information on the alternative financing proposal (without Additional Agreement).

Since it could happen that MHKW Rothensee may not always fulfil its contract on waste treatment, the Commission analysed the value of the waiver of claims and assessed the additional risks for the City of Magdeburg. The Commission considered such risk as very small:

— First, the City of Magedeburg will be able to enforce 38 % of its claims without any restriction until the total of claims will have arrived at the 62% it has waived. That level would only be reached when the service provided under the contract was totally inadequate.

— According to information submitted by Commerzbank and Helaba the banks would be prepared to finance the proposed transaction also in absence of the waiver by Magdeburg, however then subject to an increase of the interest rate requested for the financing of the project.

— When assessing the risks for Magdeburg due to the waiver of pleas it should be noticed that waste collection and treatment is a relatively stable business. MHWK Rothensee had already started operations without any delays and operated without any interruptions so far.

— Furthermore, the City of Magdeburg is also secured against the possibility of an insolvency of MHKW Rothensee. The shareholders of MHKW Rothensee have committed themselves with regard to Magdeburg to allow MHKW Rothensee an additional bank line.

— Since the City of Magdeburg is indirectly co-owner of MHKW Rothensee (via its co-ownership of Städtische Werke Magdeburg which owns 49% of MHKW Rothensee) it can intervene in the case of non-fulfilment of any contractual obligations.

— Furthermore, MHKW Rothensee is a member of the interruption network of Northern German waste-fuelled power plants (Ausfallsverbund Norddeutscher Müllverbrennungsanlange) and thus insured against breakdowns. Any additional costs caused by one of the network members would be covered by the breakdown insurance of MHKW Rothensee.

— Taking into account both the specific conditions accompanying the forfeiting financing in this case and the fact that the City of Magdeburg negotiated with several banks eventually entering into an agreement with two banks, which are not involved in other aspects of the financing of the project, the Commission considered that the remuneration for the waiver reflects a market price.

Conclusion

It follows from the above that the forfeiting financing at stake, which includes an additional agreement, involves neither an advantage to MHKW Rothensee nor to the bank consortium Commerzbank and Helaba.

The case is therefore a good example for an innovative financing mode, which involves a public entity without resulting in state aid pursuant to Article 87(1) EC.

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Notices and news in brief

Latest web developments

You may have noticed that **all the EU institutions website addresses** have changed. A list of all the new web addresses is available here: http://europa.eu/rapid/ (type IP/06/586 on the reference field and click on 'search').

The European Commission web address is now http://ec.europa.eu. All Commission E-mail addresses have also changed from @cec.eu.int to @ec.europa.eu.

The **websites managed by DG Competition** are undergoing other changes in 2006:

The European Competition Network (ECN), made up of competition authorities of the Commission and EU member states, has created a new website that describes its role and gives access to the latest news and annual reports of its members. Figures on antitrust cases dealt with by the network are also available. This site is initially in English and will soon be available in all EU official languages.

A large part of Commissioner Neelie Kroes' website has been translated. Visitors from all member states can now read about the Commissioner's mission and current work in their own language.

Finally, the Competition website of the European Commission is undergoing a major revamp. The aim is to make the site more user friendly by ensuring that both the general public and competition professionals quickly can access the information they need. The new website is foreseen to be launched this autumn.

Links

European Competition Network (ECN)
http://ec.europa.eu/comm/competition/antitrust/ecn/ecn_home.html

Neelie Kroes, European Commissioner for Competition
http://ec.europa.eu/comm/commission_barroso/kroes/index_en.html

Competition
http://ec.europa.eu/comm/competition/index_en.html

Directorate-General for Competition — Organigramme (16 May 2006)

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Deputy Director-General with special responsibility for State aid	***Lowri EVANS***	02 29 65029
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Deputy Head of Unit	*Klaus-Otto JUNGINGER-DITTEL*	02 29 60376/02 29 66845
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3. R&D, innovation and risk capital	*Wouter PIEKE*	02 29 59824/02 29 67267
4. Environment and Energy	*Jorma PIHLATIE*	02 29 53607/02 29 69193

DIRECTORATE H

State aid II: Network industries, liberalised sectors and services	***Loretta DORMAL-MARINO***	02 29 58603/02 29 53731
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2. Financial services	*Jean-Louis COLSON*	02 29 60995/02 29 62526
3. Telecommunications and Media	*Eric VAN GINDERACHTER*	02 29 54427
Deputy Head of Unit	*Sandro SANTAMATO*	02 29 93447

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2. Strategic support and decision scrutiny	*Nicola PESARESI*	02 29 92906
3. State aid network and transparency	*Wolfgang MEDERER*	02 29 53584/02 29 65424
4. Enforcement and monitoring	*Dominique VAN DER WEE*	02 29 60216

Reporting directly to the Commissioner

Hearing officer	*Serge DURANDE*	02 29 57243
Hearing officer	*Karen WILLIAMS*	02 29 65575

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://ec.europa.eu/comm/competition/speeches/

Speeches by the Commissioner, 1 January 2006 — 30 April 2006

25 April: **Competition policy as a promoter of the Single Market** — Neelie KROES — Brussels (The Kangaroo Group)

24 April: **Competition in the aviation sector: the European Commission's approach** — Neelie KROES — Leiden International Institute of Air and Space law (IIASL)

21 April: **Less and better state aid for growth and jobs — the new rules on research, development and innovation, and risk capital** — Neelie KROES — Graz Informal Competitiveness Council

15 March: **Introductory remarks on 'Mergers in the Internal Market'** — Neelie KROES — Strasbourg (European Parliament)

9 March: **More private antitrust enforcement through better access to damages: an invitation for an open debate** — Neelie KROES — Brussels (onference 'Private enforcement in EC competition law: the Green Paper on damages actions')

9 March: **Competition in the energy sector: preliminary results of the Commission's inquiry and next steps in anti-trust enforcement** — Neelie KROES — Brussels (Brussels First Annual Seminar and Conference on Energy Law and Policy)

2 March: **Strengthening the European Creative Industries in the Light of the i2010 Strategy** — Neelie KROES — Vienna (Austrian Presidency Expert Seminar)

1 March: **What's Wrong with Europe's Energy Markets?** — Neelie KROES — Vienna (Energy Sector Inquiry Conference)

16 February: **Towards an Efficient and Integrated European Energy Market — First Findings and Next Steps** — Neelie KROES — Brussels (European Commission)

31 January: **Competition Policy's Contribution to Growth and Jobs** — Neelie KROES — Brussels (EP Economic and Monetary Affairs Committee)

Speeches and articles, Directorate-General Competition staff, 1 January 2006 — 30 April 2006

28 April: **Developments in European Law** — Torben TOFT — Berlin (Congress Sports & Law)

27 April: **The future regulatory framework for liner shipping** — Lowri EVANS — London (8th Global Liner Shipping Conference)

03 April: **Article 82 — interview with M. Albers and L. Peeperkorn** — Michael ALBERS — Brussels (Section 2 Committee)

30 March: **EC Competition Law aspects: Sports Rights in a converging media technology environment** — Torben TOFT — London (Broadcasting & EC Competition Law)

22 March: **Wie entwickelt sich der europäische Binnenmarkt für Gas — EU Sektoruntersuchung und wettbewerbsrechtliche Aspekte** — Herbert UNGERER — Munich ICG (Innovation Congress GmbH)

31 January: **Sports Law and Business — Competition Law Review** — Torben TOFT —London (C5 Conference)

Community Publications on Competition

New publications and publications coming up shortly

- ***Study on the enforcement of State aid law at national level*** **(ISBN 92-79-01715-2)**
- ***The Impact of Vertical and Conglomerate Mergers on Competition*** **(ISBN 92-79-00384-4)**
- ***The Economics of Horizontal Mergers: Unilateral and Coordinated Effects*** **(ISBN 92-79-00409-3)**
- **Report on competition policy 2005**
- **Competition policy newsletter, 2006, Number 3 — Autumn 2006**

Information about our publications as well as PDF versions of them can be found on the DG Competition web site:
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Press releases
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IP/06/496 — 12/04/2006 — Competition: Commission sector inquiry highlights competition concerns in payment cards industry

IP/06/495 — 12/04/2006 — Competition: Commission increases competition in Spanish service station market

IP/06/487 — 11/04/2006 — Competition: Commission requests Hungary to abolish restrictions on cable TV services

IP/06/421 — 03/04/2006 — Competition: European Competition Network launches one-stop access website

IP/06/398 — 29/03/2006 — Competition: Commission imposes € 24 million fine on Tomra group for abuse of dominant position

IP/06/356 — 22/03/2006 — Competition: Commission makes commitments from FA Premier League legally binding

IP/06/302 — 13/03/2006 — Competition: Commission welcomes changes to BMW's distribution and servicing agreements

IP/06/298 — 10/03/2006 — Competition: Commission sends new letter to Microsoft on compliance with decision

IP/06/273 — 07/03/2006 — Clearing and settlement: Competition and Internal Market Commissioners will act unless there is further action from industry

IP/06/226 — 24/02/2006 — Energy, environment, competitiveness: Commission launches high level group

IP/06/204 — 22/02/2006 — Competition: De Beers' commitment to phase out rough diamond purchases from ALROSA made legally binding by Commission decision

IP/06/174 — 16/02/2006 — Competition: energy sector inquiry confirms serious problems and sets out way forward

IP/06/139 — 09/02/2006 — Competition: Commission closes investigation following changes to Philips CD-Recordable Disc Patent Licensing

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IP/06/78 — 25/01/2006

European Commission authorises prolongation of aid measures to improve safety in mines in Asturias

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