



EC COMPETITION  
POLICY NEWSLETTER

Editors:

Kevin Coates  
Thomas Deisenhofer  
Jean Huby

Address:

European Commission,  
J-70, 04/136  
Brussel B-1049 Bruxelles

E-mail:

infocomp@ec.europa.eu

World Wide Web:

[http://ec.europa.eu/  
competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

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- Public service broadcasting in Spain and Germany
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## **MAIN DEVELOPMENTS ON**

- Antitrust — Cartels — Merger control — State aid control



EUROPEAN COMMISSION

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## Community rules on State aid — a practical handbook <sup>(1)</sup>

Eliška KUTENIČOVÁ

State aid control on the European level comprises a rather articulated web of rules in different areas. The basic Treaty rules have been amplified over the years by secondary legislation and court rulings. While the *ex ante* State aid control is performed at the centralized Commission level, the affected or involved entities (both the public administrators as well as the beneficiaries) are situated at the national, regional or local level.

As a follow-up of the State Aid Action Plan, we have witnessed a series of amendments and overhauls of the applicable State aid rules over the recent years. Appreciating the difficulties of finding one's way through the new rules, DG Competition carried out a complete revision of the Vademecum Community rules on State aid, a paper which aims to be a useful handbook for all involved in State aid. Amendments were done to reflect all changes which occurred in the area of State aid since 2003.

The Vademecum summarizes, in a simple, reader-friendly and consistent way, the main rules applicable to State aid control. Its role is, however, not to provide an exhaustive description of all detailed rules, but rather to be a first point of reference, which then points the user in the relevant direction for finding the full detailed rules as needed.

The document is divided into two parts. The first, general part, provides a basic description of the notion of State aid, State aid control, affected areas and applicable procedures.

The second part of the Vademecum consists of annexes- fiches- each of which is devoted to a particular type of aid instrument and a description of the relevant main terms and governing rules. The changes in the fiches largely followed the relevant changes in the underlying legislation. Apart from the fiche on environmental aid, employment aid, training aid and aid elements in the sale of land and buildings by public authorities (which have not changed since 2003), all other fiches were substantially revised in line with the applicable law. Furthermore, in the view of the latest developments, we have added a separate fiche on the treatment of services of general economic interest.

The structure and layout of the Vademecum is designed to provide an easy starting reference point for the end-user in the respective State aid field and subsequently, to highlight the most relevant rules which then may be further checked as needed.

The Vademecum Community rules on State aid is currently available online at multiple sections of the DG Competition web page in 22 languages <sup>(2)</sup>. DG Competition plans to manage the document and carry out updates of the relevant fiches, as soon as practically possible, to reflect all future changes in the State aid rules.

<sup>(1)</sup> 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 author.

<sup>(2)</sup> [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html).

## Co-operation between competition agencies in cartel investigations <sup>(1)</sup>

*Stephen RYAN*

The International Competition Network barely needs introduction by now. Created in 2001, this worldwide network of competition agencies, with no concrete headquarters or permanent secretariat, works on substantial and procedural issues of competition law and enforcement, in several working groups, including one on cartels, which is co-chaired by DG Competition and the Hungarian Office of Economic Competition.

Over the last two years, DG Competition has been working on a report in the cartels Working Group on co-operation between competition agencies in cartel investigations, the final version of which was presented to the 2007 ICN Annual Conference, which took place in Moscow, Russia, from 30 May to 1 June <sup>(2)</sup>. Based on questionnaires sent to ICN member agencies, the report aims to present a snapshot of the state of co-operation in cartel investigations, the different instruments of co-operation and their characteristics, and the impediments to greater co-operation which exist.

### Background

Given the increasingly international nature of cartels, crossing the boundaries of jurisdictions, co-operation in cartel cases is growing in importance. Co-operation can involve for instance, coordination of simultaneous inspections, exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency. Co-operation can take place at the pre-evidence-gathering, evidence-gathering or post-evidence gathering phases. Not only actual evidence may be exchanged but also “agency information” (information other than evidence, which is not necessarily in the public domain, but which is generated within the agency itself, rather than provided by parties to the investigation). However, there is a widespread feeling in many competition agencies that such co-operation is still sub-optimal.

Against this background, the ICN cartels Working Group chose in 2005 to carry out a two-year project on co-operation between competition agencies in cartel investigations, and DG Competition of the European Commission volunteered to take the lead in carrying out the project. During the first year, a questionnaire was sent by DG Competition to the agencies which are members of the Cartels Working Group, seeking information about their experiences of co-operation with other agencies in cartel investigations over the previous three years (2002-2005). Twenty agencies responded to the questionnaire <sup>(3)</sup>. In the second year, brief questionnaires were sent to private legal practitioners on the interaction between leniency and co-operation, particularly with regard to the granting of waivers of confidentiality by immunity applicants. Nine responses were received.

### Instruments and means of co-operation analysed

In the report, co-operation is treated in a number of categories, depending on the type of co-operation and the instrument used. Each type of co-operation is analysed in terms of its characteristics, its prevalence, the kind of information which can be exchanged, and its advantages and disadvantages. The categories of co-operation used in the report are the following:

- Informal co-operation based on the 1995 OECD Recommendation on co-operation <sup>(4)</sup>, other similar “soft law” instruments, or with no particular legal basis;
- Co-operation based on waivers of confidentiality from undertakings which have applied for immunity/amnesty in different jurisdictions, thus allowing the competition agencies of those jurisdictions to exchange and compare the contents of the different applications;

<sup>(1)</sup> 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 author.

<sup>(2)</sup> ISBN 978-92-79-05128-9. [http://ec.europa.eu/competition/international/multilateral/cartels\\_cooperation.pdf](http://ec.europa.eu/competition/international/multilateral/cartels_cooperation.pdf).

<sup>(3)</sup> The competition agencies of Australia, Belgium, Brazil (SDE), Canada, the European Union, France, Germany, Hungary, Israel, Jamaica, Japan, Mexico, the Netherlands, New Zealand, Portugal, Romania, Serbia, South Africa, Switzerland and the United States (DoJ). Only statistical information was provided, not details of investigations.

<sup>(4)</sup> OECD Council Recommendation Concerning Co-operation between Member States on Anticompetitive Practices Affecting International Trade, 1995.

- Co-operation based on provisions in national law. The national laws of Canada, Germany, the USA, Romania, the UK and Australia are discussed. Some national laws provide a direct legal basis to co-operation, while others only provide a mandate to enter into co-operation agreements.
- Co-operation based on non-competition-specific agreements and instruments. This category covers essentially Mutual Legal Assistance Treaties (MLATs); although the competition provisions of Free Trade Agreements would also fall into this category, it seems that FTAs are very rarely a basis for specific co-operation in cartel cases.
- Co-operation based on competition-specific agreements between jurisdictions. Such agreements have proliferated in recent years, although only one example of a “second generation agreement” (permitting the exchange of confidential information) exists, between the USA and Australia.
- Regional co-operation instruments. This category only covers co-operation between EU member States within the European Competition Network under Regulation 1/2003.

## Experiences of DG Competition

In its reply to the questionnaire, DG Competition placed emphasis on the importance of the far-reaching co-operation provisions made available to member agencies of the European Competition Network by Regulation 1/2003. This includes the right of an agency to request another member agency to carry out an inspection on its behalf, and to transmit to it all the material found. All inspections carried out by DG Competition involve assistance from one or more ECN member agencies, under the terms of Regulation 1/2003. Regarding co-operation in cartel cases with competition agencies outside the EU (non-ECN members), DG Competition reported co-operation falling into all the categories mentioned above, except MLATs, letters rogatory, and Free Trade Agreements. Over a three-year period (2002-5), the number of instances of such co-operation was: four (informal co-operation), fifteen (dedicated competition agreements), seven (co-operation based on waivers from immunity applicants). One further case involved co-operation with the EFTA Surveillance Authority under the terms of the European Economic Area Agreement.

## Findings on co-operation

Leaving aside regional co-operation within the European Competition Network <sup>(5)</sup>, the most frequent type of co-operation reported was co-operation in the context of bilateral competition agreements (8 agencies), then waivers of confidentiality from immunity/amnesty applicants and informal co-operation (6 agencies for each of these types of co-operation), then non-competition-specific agreements such as MLATs (5 agencies); two agencies reported co-operation based on letters rogatory, and one reported co-operation based on a free trade agreement.

Where MLATs exist, they normally permit a deeper level of co-operation, such as only a second-generation dedicated competition agreement can achieve, but this advantage is constrained by the more complex procedures and the fact that this instrument is not available to all jurisdictions. Provisions in national law can facilitate co-operation, but in many cases such national law provisions must be used in conjunction with some kind of agreement, and do not directly permit co-operation (although in other cases national laws do directly authorise co-operation).

The introduction of leniency programmes in more jurisdictions should be singled out as an increasingly important driver of co-operation between agencies, via waivers of confidentiality from immunity/amnesty applicants. Overall, however, it must be said that there is a complex patchwork of different types of co-operation and co-operation instruments, which is not conducive to efficiency or rapidity. Existing co-operation instruments are all useful up to a point, but all have disadvantages and none is of general usage (for all types of information, all phases of an investigation, between all types of agencies).

## Impediments to greater co-operation.

The report identifies a number of issues which contribute to a sub-optimal level of co-operation:

- *Complexity and duration of certain co-operation procedures.*

Some types of co-operation instrument are procedurally complex, and time-consuming, sometimes requiring court warrants. For example, letters rogatory and MLATs require detailed formal requests to be transmitted via the judicial authorities of both jurisdictions, and/or diplomatic channels. In many cases, a

<sup>(5)</sup> Reported by all 7 EU agencies in the sample, of which 4 reported no other types of co-operation.



period of well over a year can elapse between the sending of a co-operation request and receipt of the requested information.

- *Absence of waivers of confidentiality*

The granting of waivers of confidentiality by immunity/amnesty applicants is within the discretion of the applicant in question, and cannot be required by a competition agency. Generally, an immunity/amnesty applicant is not required to disclose in which other jurisdictions it has made an application. If a waiver is not granted rapidly, time may be lost in trying to persuade the applicant to grant a waiver, and the waiver may be granted at a later stage in the investigation, when the information in the application is already less useful to other agencies.

- *The use of some types of co-operation instrument is not open to every agency*

The only category of co-operation which is universally available for use between any two competition agencies is informal co-operation. Bilateral competition-specific agreements are becoming more and more common, including between long-established competition jurisdictions and younger ones, but they are by no means universal, and their negotiation may be too human-resource intensive for some agencies. Only a limited number of agencies have access to MLATs for use in cartel cases, as these are usually instruments of judicial co-operation and thus not available for use in jurisdictions in which cartels are administrative offences only.

- *Barriers related to “confidential information”*

Agencies are often prevented by their own national laws from sharing certain types of information regarding undertakings in their possession with other jurisdictions. These types of information are conveniently categorised as “confidential information”, although definitions of such information in national laws vary, and some national laws do not define them in a precise way.

- *Limitations on admissibility as evidence of information exchanged*

Some types of information may be exchanged between certain agencies, pursuant to co-operation agreements or other provisions, but not used in evidence. This can essentially be for one of two reasons. Firstly, a court in the jurisdiction receiving the information might not accept it, or a court in the sending jurisdiction might not approve of its exchange, essentially because the conditions in which it was gathered in the sending jurisdiction do not meet the require-

ments applied in the jurisdiction where the legal proceedings are taking place. Secondly, the agreement or legal provision on which the co-operation is based might itself limit the uses to which the exchanged information is put.

- *Risk to the integrity of the investigation(s) of the receiving jurisdiction*

It is possible that a request for co-operation will lead to the sending of information of a type which would not only be inadmissible in evidence in the receiving jurisdiction, but which would be privileged in the receiving jurisdiction, for example if the receiving jurisdiction recognises legal professional privilege while the sending jurisdiction does not. While this risk can be fairly simply be averted via the use of a “taint team” <sup>(6)</sup> to sift and filter the information received before it is transmitted to the case team (such as the case in the USA), this is very human-resource intensive, and may not be an option for smaller agencies.

- *Hindrances to exchange of “agency information”*

Exchange of “agency information” is a significant aspect of co-operation in cartel cases, but this can be hampered by a lack of understanding on both sides of how such information can and can not be used. Different agencies may take different approaches to the exchange of “agency information”, imposing different conditions on how it can be used in the other agency, creating confusion among agencies which are potential beneficiaries of the information.

## Ideas for further stimulating co-operation

Finally, the report produces some relatively modest suggestions as to possible future ways to stimulate further co-operation. These ideas focus on:

- Taking steps to promote multiple immunity/amnesty applications, information from applicants on the other jurisdictions where they have made applications, and the seeking of waivers from applicants permitting agencies to compare the contents of their applications.
- Within the bounds of what is legally possible, exploring what categories and types of evidence

<sup>(6)</sup> A “taint team” is a team of officials other than the case team, who sift documents and information received from another jurisdiction and only pass on to the case team those which they have the right to see without compromising the integrity of the proceedings.

might possibly be considered as “non-confidential” for the purposes of co-operation between agencies.

- In cases where information is exchanged between agencies, in application of the OECD Best Practices on exchange of information <sup>(7)</sup>, a procedure is suggested to check whether the rights of defendants have been respected .
- Agencies could make a clear statement on what kind of information other than evidence they can exchange with other agencies about their investigations (that is, the scope and bounda-

ries of general case discussions with other agencies) without the need for a bilateral agreement. They could also include in such a statement how they would handle material received from other agencies.

DG Competition is taking the findings of the report into account, both in its regular ongoing cartel investigations, and in its discussions with other jurisdictions about various types of agreements concerning competition (Free Trade Agreements, dedicated competition agreements and so on).

\* \* \*

<sup>(7)</sup> OECD best practices for the formal exchange of information between competition authorities in hard core cartel investigations, DAF/COMP(2005)25/FINAL, 16 November 2005.

# Revision of the Notice on merger remedies <sup>(1)</sup>

Johannes LUEBKING

## I. Introduction

On 24 April 2007, the Commission launched a public consultation on the draft revised Commission Notice under the Merger Regulation ("Revised Remedies Notice") and a proposal for amendments of the Implementing Regulation in relation to remedies ("Amendments to the Implementing Regulation") <sup>(2)</sup>. "Remedies" are modifications to a merger proposed by the parties to a concentration with a view to eliminating competition concerns identified by the Commission in the framework of the merger investigation. In order to give guidance on the interpretation of the Merger Regulation as regards to remedies, the Commission adopted in 2001 a first Remedies Notice <sup>(3)</sup> under the Merger Regulation and the Implementing Regulation in force at the time <sup>(4)</sup>. The Revised Remedies Notice will update and replace the current Notice while the Amendments to the Implementing Regulation <sup>(5)</sup> will complement the new Notice.

The revision of current Remedies Notice reflects, first, the conclusions from the Commission's "Merger Remedies Study", published in 2005 <sup>(6)</sup>. In this Study the Commission undertook a comprehensive review of past merger cases where remedies were accepted and analysed the implementation and effectiveness of these remedies. Second, the draft revised Remedies Notice incorporates recent jurisprudence, such as the judgments in the

EDP <sup>(7)</sup>, General Electric <sup>(8)</sup>, and Cementbouw <sup>(9)</sup> cases. These decisions by the European Courts gave useful guidance on the legal framework for accepting or rejecting remedies as well as on more specific issues concerning the design of remedies. Third, the experience gained in the Commission's practice in the past years in the design and implementation of remedies is also reflected in the draft revised Remedies Notice. Important recent examples in the field of remedies include the cases GDF/Suez <sup>(10)</sup> and Inco/Falconbridge <sup>(11)</sup>. Finally, the revised Notice also incorporates the changes brought about by the recast Merger Regulation of 2004 insofar as they are relevant in the field of remedies.

## II. Overview of the draft Revised Remedies Notice and the draft Amendments to the Implementing Regulation

The Draft Revised Remedies Notice does not represent a radical shift in policy, but adapts and further refines the current Notice in a number of areas and attempts to reduce the uncertainties related to the design and implementation of remedies and, therefore, to guarantee that commitments proposed by the parties will end up actually restoring the competitive situation existing before the merger. The following provides a summary of the main changes introduced compared to the current Notice.

### General Principles

In the section on "General Principles", the Draft Revised Remedies Notice clarifies, following recent jurisprudence, in particular the allocation of responsibilities for the submission of remedies and the basic conditions for accepting remedies. Under the structure of the Merger Regulation, it is the responsibility of the Commission to show that a concentration would significantly impede competition whereas it is for the notifying parties

<sup>(1)</sup> 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 author

<sup>(2)</sup> The texts of the (i) draft Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 and (ii) on a Proposal for a Commission Regulation (EC) amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on DG COMP's web-site under [http://ec.europa.eu/competition/mergers/legislation/merger\\_remedies.html](http://ec.europa.eu/competition/mergers/legislation/merger_remedies.html).

<sup>(3)</sup> Commission Notice on Remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3.

<sup>(4)</sup> Council Regulation (EEC) No 4064/89 and Commission Regulation EC No 447/89.

<sup>(5)</sup> Commission Regulation (EC) No 802/2004, OJ L 133, 30.4.2004, p. 1.

<sup>(6)</sup> DG Competition, Merger Remedies Study, October 2005.

<sup>(7)</sup> Judgment of the CFI in Case T-87/05 EDP v Commission [2005].

<sup>(8)</sup> Judgment of the CFI in Case T-210/01 General Electric v Commission [2005].

<sup>(9)</sup> Judgment of the CFI in Case T-282/02 Cementbouw v Commission [2006].

<sup>(10)</sup> Case COMP/M.4180 — GdF/Suez of 14 November 2006.

<sup>(11)</sup> Case COMP/M.4000 — Inco/Falconbridge of 4 July 2006.



to put forward commitments. The Commission is therefore not in a position to impose unilaterally any conditions to an authorisation decision, but only to clear an operation on the basis of commitments submitted by the parties.

As to the standard for accepting remedies, the revised Notice clarifies that the commitments have to “eliminate the competition concern entirely and have to be comprehensive and effective from all points of view”. Structural remedies, in particular divestitures, will only meet this condition in so far as the Commission can conclude with a sufficient degree of *certainty* that it will be possible to implement them and that it will be *likely* that the significant impediment to effective competition will not materialise. General requirements for meeting the standard are that there has to be effective implementation and the possibility of monitoring the commitments. Whereas divestitures, once implemented, do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or eliminated by the parties. Otherwise, such commitments would have to be considered as mere declarations of intentions by the parties and would not amount to binding obligations.

### *Sufficient information to assess remedy proposal*

One of the major problems identified by the Merger Remedies Study was the lack of an appropriate scope of the divested business in divestiture remedies submitted by the parties, leading to a lack of effectiveness. In order to solve this problem, the revised Remedies Notice and the amended Implementing Regulation provide for an obligation for the notifying parties to submit detailed information on the scope of the divested business at the time when the remedy is submitted. Such detailed information on the remedy proposed is also necessary to enable the Commission to comply with the case-law of the Courts which requires the Commission to decide whether the remedies, as proposed by the parties, will eliminate the competition concerns identified.

In the reform package, the obligation to submit more detailed information on the remedy proposed is incorporated in the Amendments to the Implementing Regulation. For all kinds of remedies, the Amendments to the Implementing Regulation foresee that this information must be provided in a new Form RM, requiring the parties to describe the content of the commitments offered, the conditions for their implementation and to show their suitability to remove any significant impediment to effective competition. Specifi-

cally for divestiture commitments, the Form RM obliges the notifying parties to submit detailed information on the pre-merger organisation and functioning of the divested business and its links with the parties’ remaining businesses.

This information, to be provided with the submission of the remedies, is of particular importance for divestiture remedies. It will allow the Commission to assess the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments, thereby showing which additional assets, employees or arrangements are needed in order to be able to operate the business as an effective competitor. In the absence of a general information requirement, the Commission would normally request this information via its investigative powers as it is only the parties that have all the relevant information necessary for such an assessment. The Form RM, therefore, does not require new information to be provided, but rather systematises the requirements that the Commission has already developed in its recent practice and tries to make the information available at the time when remedies are submitted. As with the Form CO, the Commission will be able to waive certain information requirements if they are not necessary for the assessment of the individual case.

### *Divestiture of a viable and competitive business*

The reform further clarifies the requirements for a sufficient scope of the divested business. The general principle is that the business has to include all the assets and employees contributing to its current operation or necessary to ensure its viability and competitiveness. The business to be divested has to be viable as such (except in case of a “fix-it-first” solution), without taking into account the resources of a possible, or even presumed, future purchaser.

Whereas the Commission has a clear preference for an existing stand-alone business, the Draft Revised Notice explains that the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which are partially integrated with businesses retained by the parties and therefore need to be “carved out”. However, the Remedies Study showed that carve-outs generally involve high risks of deterioration of the divested business pending divestiture in the interim period. The draft revised Notice therefore requires guarantees from the parties that ultimately a viable, stand-alone business will be transferred to the purchaser. This can be done either by way of a reverse carve-out or by ensuring that the

necessary carve-out is undertaken in the interim period and supervised by the monitoring trustee, enjoying strengthened powers in this respect.

### *Identification of a Suitable Purchaser*

The Draft Revised Notice stresses the link between the divested business and the purchaser: the effectiveness of a divestiture remedy is to a large extent determined by the suitability of the purchaser of the divested business. It explains in detail the ways in which it is ensured that the business is transferred to a suitable purchaser and explains, following the Commission's decisional practice, in particular under which conditions up-front buyer provisions and fix-it-first solutions may be required in order to allow the Commission to conclude with the requisite degree of certainty that the commitments will be effectively implemented with the sale to a suitable purchaser.

Up-front buyer solutions may be suitable in cases where there are considerable obstacles for a divestiture. These may include cases involving third party rights, uncertainty as to whether a suitable purchaser can be found, and cases where the preservation of the competitiveness and saleability of the divestment business in the interim period until divestiture would be problematic. The Commission may welcome fix-it-first remedies in particular in cases where the identity of the purchaser is crucial for the effectiveness of the proposed remedy.

### *Non-divestiture remedies*

The revised Remedies Notice provides extended guidance on the suitability of the various types of remedies. It clearly sets out that divestiture commitments are the preferred remedies, as they are the most effective way to restore competition. Nevertheless, the revised Notice explains that non-divestiture remedies may be acceptable in certain circumstances when their effects will be equivalent to those of a divestiture. Remedies foreseeing the granting of access to competitors (to infrastructure, networks, key technology or essential inputs), for instance, could be accepted to lower entry barriers in certain markets or to eliminate concerns of foreclosure of competitors. However, such commitments will only be acceptable if they will have a likely effect on competition, i.e. if they will actually make the entry of sufficient new competitors timely and likely (in case of lowering barriers to entry) or if competitors are likely to use them in practice so that foreclosure concerns will be eliminated.

Apart from such access remedies, the revised Notice maintains the Commission's existing scepticism towards behavioural remedies, i.e. commit-

ments merely to refrain from certain commercial behaviour. The Notice points out that such type of commitments will generally not be considered sufficient to eliminate concerns stemming from horizontal overlaps. Furthermore, due to the absence of effective monitoring of the implementation of such a remedy, it may be very difficult to achieve the required degree for its effectiveness. Therefore, the Commission may examine other types of non-divestiture remedies, apart from access commitments, such as behavioural promises, only exceptionally in specific circumstances, such as in relation to competition concerns arising in conglomerate structures.

### *Alignment with the recast Merger Regulation*

The revised Notice reflects the relevant changes introduced in 2004 in the Merger Regulation, in particular with regards to the possibilities for extension of deadlines to discuss and assess remedies.

### *Remedies Implementation Issues*

The Remedies Study showed that a proper implementation of the remedies in the interim period is of decisive importance for their overall effectiveness. Therefore, the Notice attaches a lot of importance to the requirements for the implementation of commitments. In particular, it strengthens the tasks of the Monitoring Trustee who has to oversee the implementation of divestiture remedies and clarifies the role of the Hold Separate Manager, responsible for the management of the divested business.

## **III. Further procedure and Conclusion**

Following an initial consultation among the EU Member States, the Draft Revised Remedies Notice and the Draft Amendments to the Implementing Regulation Guidelines were adopted by the Commission for public consultation. The two-month consultation period, lasting until 29 June 2007, gave an opportunity to the general public to participate in the debate and to provide their input. The revised documents are due to be adopted definitively by the Commission later in 2007, taking into account the results of the consultations just launched.

In the light of the changes developed in both documents, the Commission also intends to update its Model Texts on divestiture commitments and trustee mandates broadly in parallel with the review of the notice. There are currently no plans to introduce new texts for other type of remedies.

However, the texts will most likely be complemented by a model arbitration clause that can serve in various remedy scenarios.

Through the adoption of a Revised Remedies Notice and of the Amendments to the Implementing Regulation, the Commission aims to set out an updated framework for the design and implementation of effective merger remedies. For the

notifying parties, the revised Notice will provide clear guidance as to whether remedies proposed will be acceptable to the Commission, and the draft Amendments to the Implementing Regulation, as a step for the general implementation of the remedies policy, indicate to the notifying parties from the outset which kind of information will be required to allow the Commission a proper assessment of the remedies proposed.



## A closer look at vertical mergers <sup>(1)</sup>

*Pierre LAHBABI and Sophie MOONEN*

### I. Introduction

Last February, the European Commission launched a public consultation on draft guidelines setting out the principles that it intends to apply in its assessment of mergers between companies in a vertical or conglomerate relationship (so-called “non-horizontal mergers”). Four recent cases shed further light on how the Commission’s current approach to vertical mergers works in practice, and in particular on its assessment of whether there is a risk of input foreclosure post-merger and of what would constitute a suitable clear-cut remedy to eliminate such concerns in Phase I. These cases are Philips/Intermagnetics <sup>(2)</sup>, Johnson & Johnson/Pfizer Consumer Healthcare <sup>(3)</sup> (Thales/Finmeccanica/Alcatel Alenia Space and Telespazio (Thales) <sup>(4)</sup> and Evraz/Highveld <sup>(5)</sup>).

These cases cover a wide variety of sectors: medical systems, over-the-counter pharmaceutical products, metals and mining and telecommunications satellites. In all these cases, the merger gave rise to a risk of input foreclosure by the merged entity controlling a key component or raw material for its competitors on the downstream markets.

All these cases were concluded with a Commission clearance decision, either because the Commission concluded that it was not likely that the merger would significantly impede effective competition (Philips/Intermagnetics and Thales), or because the companies concerned submitted divestiture remedies which the Commission considered satisfactory to eliminate its serious doubts (Johnson & Johnson/Pfizer Consumer Healthcare and Evraz/Highveld). It is worth noting that three decisions were adopted in first phase, but that an in-depth investigation proved necessary in the Thales case, as the Commission’s first phase investigation had identified serious concerns that the merger would give rise to a risk of input foreclos-

ure, which the remedies proposed by the parties could not remove in a sufficiently clear-cut manner.

Below we examine each of these cases in turn, starting with the cases decided in first phase, before trying to draw some conclusions of more general application <sup>(6)</sup>.

### II. Philips/Intermagnetics

This case concerned the acquisition by Philips of Intermagnetics, its main supplier for two key components, magnets and radio frequency (“RF”) coils, for the magnetic resonance imaging (“MRI”) systems developed and produced by Philips’ healthcare systems division. The Commission examined whether Intermagnetics, once integrated in the Philips group, would have the ability and incentive to foreclose Philips’ competitors on the downstream market for MRI systems, such as General Electric and Siemens.

As regards magnets, the Commission did not identify concerns. Pre-merger Intermagnetics had already been supplying 99% of its production of magnets to Philips for several years. In fact, it was found that an input foreclosure scenario was highly unlikely. According to the parties, one rationale of the transaction was the need for a very close partnership between the magnet supplier and the MRI system producer when it comes to development of new MRI systems. Vertical integration between Intermagnetics a supplier of magnets for MRI and Philips as a supplier of MRI systems would thus facilitate such cooperation, and provide Philips with the security of sourcing of its own magnets in the future. Vertical integration was found to be a widespread business model in the relevant field of activity and is used by Philips’ rivals General Electric and Siemens.

However, as regards RF coils, Intermagnetics was a supplier of this key input to several third party MRI system suppliers. Following a more detailed investigation, the Commission found that, despite Intermagnetics’ high market shares on the open market, the ability of the new entity to foreclose RF coils customers would be limited.

In the short term, the merged entity would be bound by existing RF coil supply contracts

<sup>(1)</sup> 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.

<sup>(2)</sup> M.4300 -Philips/Intermagnetics, Commission decision of 7 November 2006.

<sup>(3)</sup> M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, Commission decision of 11 December 2006,

<sup>(4)</sup> M.4403 — Thales/Finmeccanica/Alcatel Alenia Space and Telespazio, Commission decision of 4 April 2007.

<sup>(5)</sup> M.4494 — Evraz/Highveld, Commission decision of 20 February 2007.

<sup>(6)</sup> The reader is invited to refer to the full text of the decisions for an exhaustive discussion of the relevant markets in each case.



between Intermagnetics and its customers. These were long-term contracts with severe penalty clauses for any disruption of supply, and a close analysis of these contracts showed that they would have made a scenario of voluntary disruption post merger counterproductive.

In the longer term, any attempt by the merged entity to disrupt supply to existing customers of Intermagnetics could be countered by these customers. The market investigation showed that customers could turn to at least one other RF coil manufacturer that was deemed able to step up its production of RF coils. Furthermore, the customers in question have strong research capabilities and the expertise necessary to develop and manufacture RF coils and would be able to produce a new model of RF coils within two years. As a matter of fact, there had been several instances in the past of such customers switching from Intermagnetics to internal production of RF coils in less than two years. Alternatively, Intermagnetics' customers would be able to sponsor entry upstream.

Thus, the market investigation showed that Intermagnetics' existing supply contracts would have little room for manoeuvre to foreclose in the short term, and that Philips' rivals would have the ability to adapt to restricted access of RF coils for MRI in the medium term by developing their internal capabilities or resorting to an alternative supplier.

In addition to this very limited ability to foreclose, the Commission found that the incentives for the new entity to engage in any form of input foreclosure after the expiry of the supply contracts would be minimal. It appeared that the new entity could not expect to make profits *by stopping the supply of RF coils* <sup>(7)</sup>. Philips made low gross margins on the market for MRI systems. However, relative to Philips' MRI activity, the RF coil activity of Intermagnetics was very profitable. Thus, stopping the supply of RF coils would require substantial expected extra sales of MRI systems to offset the loss of RF coils sales. However, since customers of Intermagnetics could circumvent any expected disruption of supply <sup>(8)</sup> by resorting to internal production or an alternative supplier, there would be no guarantee that these extra sales of MRI systems could be made, and therefore this strategy did not appear to be profitable for the new entity. Neither did input foreclosure *by price increases*

seem to be profitable <sup>(9)</sup>. Price increases would have an impact on less than [5-15%] of General Electric and Siemens' production costs for MRI systems and would therefore be unlikely to force them to increase their selling prices on a sustainable basis in view of their ability to switch. Furthermore, any short-term additional profits resulting from price increases on RF coils would be likely to be offset by profit losses in the longer term. Accordingly, the Commission concluded that, post-merger, Philips/Intermagnetics would not have the incentive to reduce its sales of RF coils to its rivals.

The Commission also assessed whether the transaction could lead to a risk of customer foreclosure for Intermagnetics' rivals for the supply of RF coils for MRI. This scenario was not regarded as likely by the Commission since Philips already purchased a significant share of its RF coils from Intermagnetics before the Transaction.

### III. Johnson & Johnson/Pfizer Consumer Healthcare

This case concerned the acquisition by Johnson & Johnson ("J&J") of Pfizer's entire consumer healthcare division, Pfizer Consumer Healthcare ("PCH"). Apart from a number of horizontal overlaps for over-the-counter pharmaceutical products and personal care products (some of which required the divestiture of J&J's daily-use mouthwash in the EEA and of PCH's antifungals in Italy), the merger gave rise to a problematic vertical relationship in the area of nicotine replacement therapy (NRT) products, more particularly as regards nicotine patches.

A company acquired by J&J in 2001, ALZA, is active in the development and manufacturing of innovative drug-delivery systems, among which transdermal drug-delivery patches. ALZA is however not marketing directly transdermal nicotine patches to consumers, but has concluded exclusive supply agreements with regional "distributors": PCH in Canada, Sanofi-Aventis in the United States and South Korea, and GlaxoSmithKline ("GSK") in the rest of the world. Under its exclusive supply agreement with GSK, ALZA supplied all GSK's needs for nicotine patches and cooperated with GSK in the development of nicotine patch products. GSK is the holder of the marketing authorisations in the various countries in which it sells nicotine patches supplied by ALZA under

<sup>(7)</sup> Or engaging in a disruption of supply that would compel customers to stop purchasing RF coils from Intermagnetics.

<sup>(8)</sup> This disruption of supply is expected when negotiations to renew contracts for the supply of RF coils starting two or more years from now collapse.

<sup>(9)</sup> As put forward in para 40 of the draft non-horizontal guidelines, the lower the margins upstream, the lower the loss from restricting input sales. In this case, conversely, upstream margins were relatively high.

its brand NiQuitin. The success of the partnership between ALZA and GSK was based on a division of responsibilities between the two companies.

Among PCH's activities acquired by J&J was the Nicorette business, which produces a broad range of NRT products, including nicotine patches. Following the merger, GSK would therefore find itself in a situation where it would be supplied by its main competitor on the downstream markets for nicotine patches and NRT products in general, the new entity J&J/PCH.

There are three main competitors on the market for nicotine patches, GSK, PCH (which is vertically-integrated) and Novartis (which sources nicotine patches from Lohman Therapy System, in which Novartis holds a shareholding). The Commission's investigation showed that nicotine patches are relatively complex to develop and manufacture. In addition, as nicotine patches are pharmaceutical products, any change in the manufacturing process requires the approval from the relevant health authorities. They are also branded consumer products for which demand fluctuates and for which quality and security of supply are essential. These factors explain why the accepted business models involve vertical integration or long-term exclusive supply agreement between nicotine patch producers upstream and the companies marketing nicotine patches downstream.

The market investigation led to the conclusion that there was a risk that post-merger, the new entity would have the ability and incentive to foreclose GSK, its competitor on the downstream markets. As regards ability, it is worth noting that there was no risk that ALZA would refuse to supply GSK (in light of the existing ALZA-GSK supply agreement), but rather a risk that the new entity would seek to reduce the competitiveness of GSK's NiQuitin patches by, for example, limiting or reducing supply, degrading quality, increasing costs of goods, or disrupting R&D. The provisions of the existing contract were not sufficient to prevent such a strategy. For example, in order to launch NiQuitin in a new country, GSK would be dependent on the new entity to increase the volumes supplied. The market investigation further showed that GSK would not be in a position to source nicotine patches with the required design and quality from other patch suppliers in the short term. As regards incentive, the new entity would stand to increase its own downstream sales of Nicorette nicotine patches to the detriment of GSK's NiQuitin as the Commission's market investigation showed that a significant share of customers would switch to Nicorette if they no longer had access to NiQuitin. Finally, such an input foreclosure strategy would have a direct impact on competition on the down-

stream markets for nicotine patches, by reducing the competitive constraints NiQuitin exerts on Nicorette, leading to reduced choice and increased prices for consumers.

The Commission took the view that behavioural commitments to amend the supply agreement to prevent price increases or other anti-competitive behaviours would not be sufficient to exclude the risk of input foreclosure. Therefore J&J committed to divest ALZA's nicotine patch manufacturing business (either ALZA's international nicotine patch business i.e. the manufacture for exclusive supply to GSK, or, if no suitable purchaser was found within the first divestiture period, ALZA's global nicotine patch business). In March 2007, the Commission approved the sale of ALZA's international nicotine patch business to GSK. This remedy will, after a transition period allowing GSK to set up its own nicotine patch manufacturing facilities and obtain all necessary regulatory approvals, eliminate the vertical relationship and turn GSK into a vertically-integrated operation.

#### IV. Evraz/Highveld

In *Evraz/Highveld*, Evraz, a large Russian integrated steel producer acquired Highveld, a South African steel and vanadium producer. The transaction gave rise to several horizontal and vertical relationships at various levels of the vanadium supply chain, deriving in particular from the leading position of the new entity at the feedstock level. The case is interesting as it combines horizontal factors (strong position in the supply of vanadium feedstock) and vertical factors (presence on the downstream markets). The Commission cleared the transaction conditional upon the divestment of the whole of Highveld's integrated vanadium operations.

The vanadium production chain may be divided into three vertically-related stages: vanadium feedstock, vanadium oxides and finished vanadium products (90% of which is ferrovanadium used for steel applications). The vertical competition concern arose from the parties' leading positions as suppliers of vanadium feedstock. The issue was both of a horizontal and of a vertical nature since it resulted from the combination of the parties' vanadium feedstock resources (horizontal overlap) and the vertical relationship between the parties at the three levels of the production chain (vertical relationship).

The vertical issue examined by the Commission was whether the transaction would give the merged entity the ability and incentive to reduce the global production of vanadium feedstock so

as to increase global vanadium prices and to foreclose the downstream rivals it supplies with vanadium feedstock.

The analysis of the vanadium industry's structure showed that the parties would have an economic interest to reduce their own production of the most costly vanadium feedstock (vanadium bearing ore), to restrict access to the most economical vanadium feedstock (vanadium steel slag) to third parties and to redirect this feedstock to their own downstream production facilities. This strategy would at the same time reduce the global production of vanadium feedstock, leading to an increase in global vanadium prices, and increase Evraz/Highveld's downstream rivals' costs. The Commission investigated both the merged entity's ability (acquisition of downstream assets to process vanadium steel slag) and its incentive (large production base to benefit from higher vanadium prices) to adopt this strategy — which would have resulted in higher vanadium prices overall. The Commission estimated that such risks were sufficiently serious to justify the opening of an in-depth investigation in the absence of remedies.

It is important to note that the Commission explicitly focused its assessment on the impact of the merger on customers of finished vanadium products. The issue was whether the merger could lead to price increases in these downstream markets. In line with an effects-based approach, certain changes in the industry structure, such as the degree of vertical integration or the potential marginalization of companies active at the intermediate level of the supply chain, are negative only if they have eventually an impact downstream.

The competitive assessment therefore focused on the likely price variations for finished vanadium products as a result of a change on the supply side (capacity withdrawal). The supply of vanadium feedstock is relatively inelastic in the medium term given that two thirds of it is a by-product of other industrial processes (mainly steel making and petro-chemicals) and one third comes from vanadium/iron ore mines with long development times for new capacity. Very few greenfield vanadium mines are foreseen to come on stream before 2010, except for one large project in Australia. In addition, after a period of high vanadium prices, stocks of products are at a low level. On the demand side, vanadium use grows in line with the consumption of high strength low alloy steels and other end applications. In most of these end applications, substitution of vanadium by other materials is limited for technical reasons.

After extensive discussions with the merging parties and a leading mining and metals consultancy

firm, the Commission considered that these different factors on the supply and demand side point toward low price elasticity of demand and support the economic incentive of production withdrawal by the parties.

The parties proposed structural remedies consisting in the divestment of the entire vanadium assets of Highveld, in order to obtain a clearance of the case in first phase. The scope of the assets to be divested was significantly extended during the procedure, in order to ensure the divested entity's independence and viability. The Commission considered that the competition problem created by the combination of the parties' vanadium feedstock resources could not be solved by a divestment limited to downstream assets. Access to its own feedstock and to end customers was essential for the divested business to compete effectively on the market. The final remedy package thus includes assets at all level of the supply chain, in particular at the upstream level of vanadium feedstock. Evraz committed to divest a significant share of an iron/vanadium ore mine located in South Africa or, at the option of the buyer, an equivalent share of the reserves to be operated by the purchaser as a mine. The package also included a commitment to supply vanadium slag at the current rate.

## V. Thales/Finmeccanica/Alcatel Alenia Space and Telespazio

In Thales/Finmeccanica/AAS and Telespazio, Thales acquired Alcatel's shareholding in AAS and Telespazio, two joint ventures jointly controlled by Alcatel and Finmeccanica, respectively active in space systems and space services. The evidence collected during the first phase investigation pointed to serious risks on competition, which the package of behavioural commitments offered by the parties were, in the Commission's view, insufficient to remove in a clear-cut manner. The in-depth investigation however removed the Commission's serious doubts, and the transaction was cleared without conditions.

The acquisition of joint control of AAS by Thales resulted both in the combination of AAS' activities as a commercial telecommunications satellite prime contractor, Thales' activities as a producer of Travelling Wave Tubes (TWTs), a key component of commercial telecommunications satellites, and AAS' activities in the field of Electronic Power Conditioner ("EPC"), another essential satellite component. Combined with TWTs, EPCs constitute the Travelling Wave Tube Amplifiers ("TWTAs") that are used to amplify the satellite's electro-magnetic signals before they are sent back to Earth. The relevant markets investigated by the Commission were therefore TWTs and EPCs at



the upstream level, TWTAs at the intermediate level and commercial telecommunications satellites at the downstream level.

The Commission assessed the likelihood and potential effect of input foreclosure at two levels, at the TWT level and at the satellite prime contracting level. As Thales has a very strong, almost dominant, position at the TWT level, the Commission's investigation focused on non-price discrimination at the pre-award stage (during the quotation process and before the TWT contract is signed) which could not be detected by other market players — or by antitrust enforcers.

At the end of its first phase investigation, the Commission considered that there was a serious risk that competition would be significantly impeded through various vertical foreclosure scenarios. The Commission also noted that, before such concerns could be alleviated, a number of complex technical and economic issues needed further investigation. During its in-depth investigation, the Commission collected additional information from market players, visited Thales and AAS production sites and analysed internal documents of Thales and AAS.

Given the specificities of the space industry, there is a very small number of market players at each level of the value chain. In particular, Thales is the leading player at the TWT level, L3, an American company, is its only competitor and Tesat (a subsidiary of EADS) and L3 are the two leading players at the EPC and TWT level. The market for commercial telecommunications satellites is more competitive with two European players, AAS and Astrium (a subsidiary of EADS), four American suppliers (Boeing, Lockheed Martin, Loral and Orbital) and Russian, Chinese and Indian players. The Commission analysed in depth each market player's product range and production capacities for TWTs, EPCs and TWTAs.

In its second phase investigation, the Commission focused its assessment on two main issues: the competitive constraint exercised by L3 on Thales for TWTs and AAS' EPC production range and production capabilities. Evaluating L3's competitive strength turned out to be essential to understand whether Thales' TWT customers would switch to L3 if they were foreclosed. This issue was key to the assessment of Thales' economic incentives to foreclose its TWT and satellite rivals. AAS' EPC capabilities also proved crucial to the analysis of whether it would be feasible for the merged entity to combine AAS' EPCs with Thales' TWTs to foreclose its rivals. In its in-depth investigation the Commission collected solid evidence

showing that both L3's competitive TWT product offering and AAS' restricted EPC capabilities seriously limited the risk of input foreclosure.

The in-depth investigation demonstrated that L3 is a credible competitor to Thales for most TWT frequency bands and that the majority of TWT customers considered that L3's TWTs were competitive as compared to Thales'. L3 has also the major competitive advantage in that it is completely vertically-integrated and produces its EPCs internally. Due to this presence of L3, the Commission considered that the merged entity would incur a significant commercial risk if it were to foreclose its downstream rivals as it would lose TWT sales without being certain to gain a decisive advantage at the TWT or satellite levels.

As regards EPCs, the market investigation established that Tesat and L3 were the two leading players in terms of product range and production capacities and that AAS was not considered a credible supplier of EPCs by most market players so far. In particular, AAS does not have dual EPCs (EPCs that provide power to two TWTs), which now account for half of the EPC demand. This is a growing market segment. The development, qualification and the acquisition of flight heritage of AAS' dual EPCs will require several years. AAS also has a limited EPC production capacity and would be unable to increase this capacity rapidly. These factors restrict the merged entity's ability to integrate AAS' EPCs with Thales' TWTs and foreclose its competitors, since it will remain dependent on third-party suppliers for at least half of its EPC needs.

As in *Philips / Intermagnetics*, the Commission evaluated Thales' and AAS' margins at each level of the supply chain. It turned out that, due to more intense competition, margins are lower at the satellite level, than at the component level. The different margins available at the different production levels do not give Thales incentives to forego sales of profitable satellite components for uncertain benefits at the subsystems or satellite level. It is not guaranteed that a TWT foreclosure strategy would increase significantly AAS' chances to win satellite bids since L3 offers competitive TWTs. In addition, the overall competitiveness of satellite prime contractors offers depends not only on the TWTs but also on a broad range of parameters (satellite architecture, satellite subsystems, schedule and price, etc.). The benefits of any foreclosure are therefore very uncertain.

One of the other interesting points of the Thales case is that the Commission carried out a very detailed assessment, by market segment, of the risk

of foreclosure. The overall picture above is valid for the most common TWTs and EPCs, but L3 and AAS' capabilities depend on the type of TWT and EPC. Furthermore, customer preferences in terms of components and satellite supplier are important factors influencing the parties' incentives to foreclose. For the two scenarios mentioned above, the Commission thus identified a number of market segments based on TWT, EPC and customer preferences and assessed separately the new entity's ability and incentives to foreclose in each market segment. The relative importance of these market segments was estimated on the basis of all telecommunications satellites contracts awarded between 2001 and 2006. In this way, the Commission quantified the share of the TWT/EPC market on which the foreclosure was likely, possible (without being likely) or unlikely.

This analysis showed that foreclosure was likely only in less than 10% of TWTA and satellite bids. In addition, foreclosure at the satellite level was unlikely as long as competition exists at the TWTA intermediate level. Satellite prime contractors generally purchase integrated TWTAs (instead of TWTs) and competition to supply prime contractors usually takes place at this level. This means that an impediment to competition at the TWTA level is required to see an effect at the satellite level and that the two issues are interdependent.

Thus, at the TWTA level, the transaction would not have a major effect given the very limited market segments where the new entity would be able to foreclose its rivals. The transaction could possibly be beneficial to competition if the new entity were to enter those narrow market segments, where it is currently not operating, in competition with Tesat and L3. The new entity would emerge as a third player on certain segments of a market where there are only two players at present. This means that the merger may provide incentives to the merging parties to compete on the downstream market and this would increase competition. Even if an extreme scenario is envisaged, where Tesat would be forced to exit the market, Thales would effectively replace Tesat and the current duopoly situation would remain unchanged. There is no reason to believe that this would impede competition, since both Tesat and Thales are part of space groups also active as prime contractors of commercial telecommunications satellites.

At the prime contracting level, the Commission assessed whether a foreclosure strategy limited to very narrow market segments would negatively affect the competitiveness of the merged entity's rival satellite prime contractors. This is clearly not the case since satellite prime contractors are generally active in several market segments and

achieve a significant part of their business in the institutional markets (with national and international space agencies), which are not affected by the proposed transaction. In addition, there are several credible prime contractors, which makes the market for commercial telecom satellites very competitive. This limits the risk of a significant impediment to competition.

As a result of this detailed analysis, the Commission cleared the merger without conditions.

## VI. Conclusions

This brief overview of four recent cases involving vertical effects shows that the Commission has now developed a consistent practice and methodology to vertical mergers. This methodology, which is now being consolidated in Non-horizontal Merger Guidelines <sup>(10)</sup>, includes a three-step analysis in which the Commission assesses (i) the merging parties' ability and (ii) their incentives to pursue a foreclosure strategy, followed by (iii) an analysis of the impact that such foreclosure would have on consumers in the downstream markets in terms of prices, quality and similar competitive parameters. These various examples of merger investigations carried out by the Commission also demonstrate a clear focus on consumer welfare as the principal aim of EC merger control. In Philips/Intermagetics, in spite of high market shares upstream in the "open" market, vertical concerns were excluded because no harm to downstream customers could be shown. Similarly, in Thales/AAS, a detailed analysis of the competitive constraints on the merging parties allowed the Commission to dispel serious doubts that arose from the presence of a high level of concentration at various stages of the value chain. By contrast, in Evraz/Highveld and Johnson & Johnson/Pfizer Consumer Healthcare, likely consumer harm could be expected and remedies were necessary.

The methodology and case practice now developed by the Commission provide a good illustration of how a consumer welfare analysis can be made workable, through an appropriate use of proxies and a detailed analysis of competitive constraints — in spite of the challenge of doing so in a prospective manner and in a short time frame, a constraint inherent in merger control.

Finally, as regards remedies, while the examples of Evraz/Highveld and Johnson & Johnson/Pfizer Consumer Healthcare make clear that it is possi-

<sup>(10)</sup> The text of the draft Guidelines, as well as the comments received in response to a public consultation, are available on DG Competition's website: [http://ec.europa.eu/comm/competition/mergers/legislation/non\\_horizontal\\_consultation.html](http://ec.europa.eu/comm/competition/mergers/legislation/non_horizontal_consultation.html).



ble to find appropriate structural remedies even in Phase I, a word of caution is warranted as regards behavioural remedies such as commitments to supply inputs to rivals. Such remedies indeed will usually fail to remove the incentives for the merged entity to engage in vertical foreclosure. In many cases, the commitments will not be suf-

ficiently constraining to remove the merging parties' ability to foreclose. In *Thales* behavioural commitments could not be accepted in Phase I and, more generally, it can be expected that vertical mergers raising competitive issues will be difficult to resolve through behavioural commitments alone.

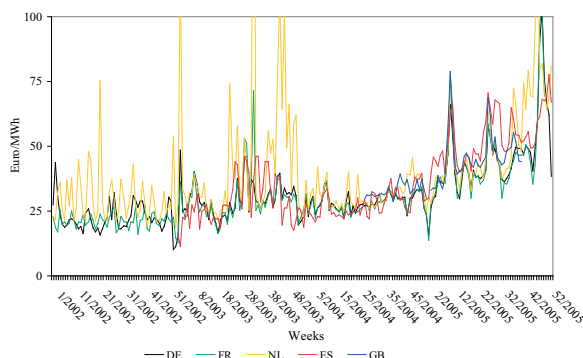
# Modelling competitive electricity markets: are consumers paying for a lack of competition? <sup>(1)</sup>

*Philippe CHAUVÉ and Martin GODFRIED*

## Introduction

When, at the beginning of 2005, the European Commission decided to carry out the energy sector inquiry <sup>(2)</sup>, one of its reasons for doing so was the numerous complaints it was receiving about increases in electricity prices, which many felt were due to a lack of competition, and could not be justified by increasing fuel costs (see figure 1).

**Figure 1 — Weekly average power exchange prices 2002-2005**



In February 2006, when DG Competition released its preliminary report on the sector inquiry, the data gathered clearly pointed to several competition problems in electricity markets, in particular high levels of concentration and a lack of confidence in the prevailing price formation mechanisms. Given these results, it was decided to commission an in-depth study <sup>(3)</sup> to determine whether there is a systematic difference (mark-up) between price levels recorded on electricity wholesale markets and what they would have been, had the markets been fully competitive.

Given that electricity markets operate on an hourly basis and involve hundreds of production units, such a study requires large amounts of detailed

data <sup>(4)</sup>. It was thus necessary to focus the study on specific Member States and a relatively limited time frame. DG Competition chose to “drill down” on the three-year period of 2003 to 2005, for the six Member States for which it had received most complaints early in the sector inquiry, namely <sup>(5)</sup>: Belgium, France, Germany, United Kingdom (in fact, only Great Britain, that is to say, the United Kingdom less Northern Ireland, was included in the sample), the Netherlands, and Spain. With this limited focus, an in-depth investigation was possible.

This article gives a broad overview of the study and its findings. A detailed report is available on the Commission’s thematic Web site on competition policy <sup>(6)</sup>. First we explain the methodology applied. Secondly, we explain some of the practical issues and data assumptions. Thirdly we report on the essential tests that were carried out to verify the robustness of the model. Fourthly we present the main results as regards mark-ups, the relation between concentration and mark-ups and production.

## The methodology

As shown in the Final Report of the energy sector inquiry <sup>(7)</sup>, most developed electricity wholesale markets operate in the short-term for the day-ahead trade on an hourly basis <sup>(8)</sup> in order to be able to follow the changing patterns of demand. In practice, in all markets studied (except Belgium), there is a “power exchange” <sup>(9)</sup> which matches demand and supply bids in corresponding national territories on an hourly basis on the

<sup>(1)</sup> 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.

<sup>(2)</sup> See Competition policy newsletters number 1 of 2006 and number 1 of 2007 for a detailed presentation of the sector inquiry. All documents of the sector inquiry and the report of the study are available on the website of DG Competition at: <http://ec.europa.eu/competition/sectors/energy/inquiry/index.html>.

<sup>(3)</sup> The full report of the study is available on the website of DG Competition; see footnote 2 for the address.

<sup>(4)</sup> The study in the end relied on more than a billion data points.

<sup>(5)</sup> In fact, there were complaints also as regards the Italian wholesale market, but these were already being addressed by the National Competition Authority.

<sup>(6)</sup> The report of the study is available on the website of DG Competition at: <http://ec.europa.eu/competition/sectors/energy/inquiry/index.html>.

<sup>(7)</sup> Final Report on the energy sector inquiry, paragraph 353 and following.

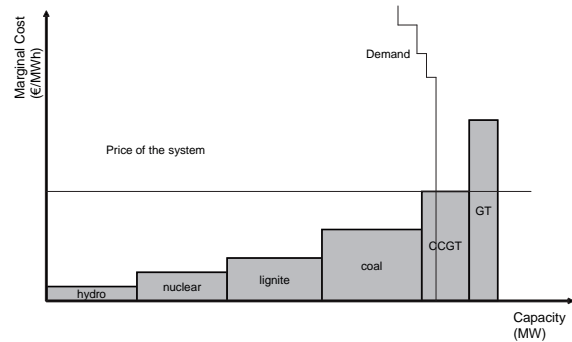
<sup>(8)</sup> The only exception is the UK, which operates on a half-hourly-basis.

<sup>(9)</sup> Referring to the Final Report of the sector inquiry it is known that the level of liquidity and volumes of electricity traded differs per power exchanges and further there are additional trade places such as over the counter markets. These have been taken into account in the study.

day before delivery <sup>(10)</sup>. The exchanges report thus prices of electricity delivered in their territories (in €/MWh) for each hour of each day <sup>(11)</sup>. In a nutshell, the aim of the study was thus to calculate the difference (“mark-up”) between these hourly prices and what prices would have been if markets had been competitive <sup>(12)</sup>. In the case of Belgium, where there were no market prices during the period studied, such comparison is less meaningful but it was still considered useful to carry out the simulation to assess the impact of external constraints on electricity prices <sup>(13)</sup>.

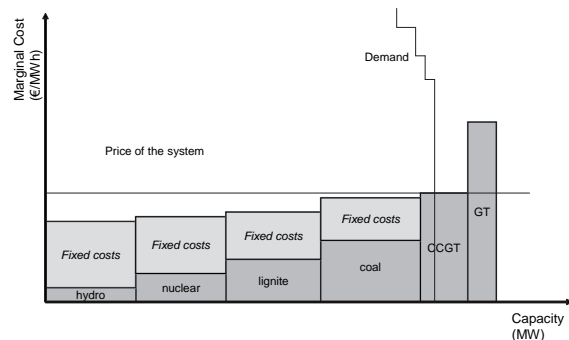
Economic theory and practice by electricity operators suggests that the price on short-term perfectly competitive markets is set by the short run marginal cost of the last unit required to meet demand <sup>(14)</sup>. This is illustrated by the following figure showing the supply curve of a theoretical market (where technologies are ranked in the merit order of their variable costs) and the demand curve (load), which is usually close to a vertical line illustrating that the level of demand is usually rather insensitive to prices. The price (and quantity) of the market is decided by the crossing point between the two curves. This theory is also standard practice in the sector: in their answers to DG Competition questionnaires in the sector inquiry operators confirmed that they use this approach in their operations and in their analysis of markets.

**Figure 2 — Schema of the supply and demand curve in short-term electricity markets**



There are of course some theoretical assumptions behind this model. One of them deserves special attention, i.e. the issue of fixed (investment) costs. The generation technologies with the lowest variable costs (e.g. nuclear or lignite-fuelled plants) are usually the ones with the largest fixed (investment) costs, while the generation technologies with the largest variable costs (e.g. oil and gas-fired plants) are usually the technologies with the lowest fixed costs. Thus, the first ones are considered (by academics and operators) to rely on the price set by the higher variable costs of the second ones to amortise their fixed costs. This is shown in the same theoretical example in the figure below <sup>(15)</sup>.

**Figure 3 — Schema of contributions to amortization of fixed costs in short-term electricity markets**



<sup>(10)</sup> In the case of UKPX, demand and offer can be matched until a few hours before delivery.

<sup>(11)</sup> In France, Germany, the Netherlands and Spain, power exchanges determined hourly prices through a single auction mechanism. In Great Britain, the half-hourly price is reported by UKPX based on continuous trade that is carried out on its platform for half-hourly products.

<sup>(12)</sup> The study also compares the results of the simulation with average day-ahead prices.

<sup>(13)</sup> Until Belpex, the Belgium power exchange, was launched at the end of 2006, there were no hourly prices in Belgium; there was also little public trade and the main publicly available price was a daily price index (the Belgium Price Index) published by the incumbent (Electabel) on weekdays.

<sup>(14)</sup> See for instance, S. Stoft (2002), *Power System Economics*, IEEE Press / Wiley-Interscience, page 222. See also Final Report on the energy sector inquiry, paragraphs 368-370.

<sup>(15)</sup> In reality, in a given market there are both new and old plants and the latter do not need contributions to fixed costs if they are fully amortised. Further, the merit curve contains many plants and the steps on the curve are many, which means, given the variation of demand between peak and off-peak, that virtually all plants (except the ones on the far right of the curve), enjoy a price which is set during some hours by a more expensive plant and thus get contributions to fixed costs. Finally, the plants on the far right side of the merit curve called at peak are usually old plants whose fixed costs are fully amortised.

This is an important theoretical concept that, as far as we know, has never been checked against economic reality. One can still simulate the perfectly competitive market as described above but one would need to check that the contributions to fixed costs created by the price of the theoretically competitive market are sufficient. At the request of DG Competition, this study is a first of its kind, which carried out such an analysis.

### Simulating competitive markets in practice

In order to apply the theory and simulate the competitive outcome (hourly price and volume) one needs to take into account all information about availability of each plant (i.e. information about outages and maintenance) hour by hour during the period as well as information about variable costs of operation of each plant hour by hour during the period. Then the market can be simulated by dispatching all available plants in order to serve the load (consumption) registered in that hour while minimizing generation costs. In the simplest way, it means drawing up a chart equivalent to that in Figure 2: ranking up in each hour all available plants in the order of their costs and selecting the cheapest ones to meet the load.

However, the practical simulation is very complex since there are many (economic, technical and regulatory) constraints on plants affecting the extent to which a plant can be dispatched to serve demand.

For instance, as regards economic constraints, plants have *inter alia* start-up costs, which can be very high <sup>(16)</sup>, as well as technical constraints (so-called minimum-up-times and minimum-down-times) which prevent the plants from being turned on and off repeatedly. Some plants also must produce electricity (they are so called “must-run” plants) during certain periods because of obligations to supply electricity to the Transmission System Operator to solve congestions in the network or because they also have to produce heat (CHP-Combined Heat and Power plants) for other purposes (industrial process, district heating). Also hydro plants can store their “fuel” and thus can arbitrage in time.

Given these and other specificities of electricity production and that supply and demand are matched on an hourly basis (meaning 26,304 hours for the period covered), the simulation required a state-of-the-art software to simulate

dynamically electricity markets. This and the need to be advised on the specific conditions of electricity markets led DG Competition to commission the study from an external consultant while asking this consultant to carry out the work on DG Competition premises to protect the full confidentiality of the data. The consultant selected through an open tender process was London Economics, in association with the data and software provider Global Energy Decisions.

DG Competition then proceeded to collect all relevant data from generators: technical characteristics of plants, prices of fuels, efficiency of the plants, effective output for all hours etc. This data <sup>(17)</sup> was checked for consistency and to the extent necessary generators were asked to correct the data provided. The simulation was to be based on all generators with more than 250MW of installed generation capacity <sup>(18)</sup> in the six markets. This meant that data was collected from more than a hundred companies relating to more than a thousand power plants.

Once data from generators was collected and checked a number of issues raised by the practical simulation were addressed. The most important are:

First, what value should be used for the load? Previous studies <sup>(19)</sup> usually rely on measurements of consumption made by Transmission System Operators on their networks. DG Competition had indeed separately collected data about the total consumption recorded by the operators of the transmission networks on their networks on an hourly basis during the period. However, this consumption was smaller (and in some cases very much so) than the sum of the generation reported by all generators which had provided data. This was due to the fact that some power plants are connected to lower-voltage distribution networks. It was thus necessary to take as a load for the simu-

<sup>(16)</sup> Start-up costs can be more than ten times more expensive than the price of fuel for production during a whole day.

<sup>(17)</sup> All data from the generators was processed and analysed in the premises of DG Competition in a locked data room on designated laptops without internet or outside access to the room or data. Company names were anonymised as appropriate during the exercise and for the report.

<sup>(18)</sup> The threshold of 250MW was decided to cover in practice almost all power plants which contribute to the determination of electricity prices, since the plants of smaller operators are usually not selling their output on public markets.

<sup>(19)</sup> See for instance, Musgens, F. 2004. Market Power in the German Wholesale Electricity Market, EWI Working Paper Nr. 04.03; Borenstein, S., Bushnell, J. and Wolak, F., 2002. Measuring Market Inefficiencies in California's Restructured Wholesale Electricity Market, American Economic Review, 92, 1376-1405.

lation the sum of generation of all plants included in the study to obtain a more complete picture of the market.

The second question that arose was how to model the interconnections between markets? It was difficult to model all of them, since data included only a selection of the European markets. However, because the load used for the simulation is equal to total generation in each market, this load takes into account the imports and exports that actually occurred during the period <sup>(20)</sup>. Simulating on that basis thus takes into account the current importing and exporting nature of the market (and the downward or upward consequences on prices).

Thirdly, electricity markets require some reserves to balance supply and demand at all times <sup>(21)</sup>. The simulation thus ensured that such reserves would be met <sup>(22)</sup>, the simulation also addressed the specifics of certain power plants, such as minimum and maximum up-time, must-run nature, etc. <sup>(23)</sup>.

Fourthly, there is always an issue with simulations done ex-post: they are inevitably distorted by the fact that they are made with the benefit of hindsight — and thus simulate a market without uncertainty about future availability of production assets and future demand. However, this distortion has been minimised to the extent that it does not affect the reliability of the results. This is first of all due to the fact that the level of the load in electricity markets is in fact very much predictable in the *short-term*: the hypothesis of perfect foresight on the part of the generators is thus not far from reality. In the simulation, decisions depending on the load have thus been made with information equivalent to what was available to

generators in reality<sup>24</sup>. Further, the simulation was designed so as to avoid exaggerating the impact of arbitrage in time on the operation of hydro-power facilities. In the electricity sector, arbitrage in time is very much limited by the fact that electricity cannot be stored; however, there is one exception: hydro power. In order to take a conservative approach, the simulation therefore never ran the hydro power plants more than they did in reality each week. In other words, the simulation did not try to create more arbitrage on the long-run, it only maximised arbitrage between peak and off-peak periods within each week.

Finally, there was one specific issue for the year 2005, when the European Trading Scheme (ETS) for CO<sub>2</sub> allowances came into force. Modelling this issue is not straightforward because the generators have been given a large part (e.g. in Spain and in the UK) or all (e.g. in Germany) of the CO<sub>2</sub> allowances they need in the first period for free. Nobody doubts that allowances purchased by generators are a cost that they factor into the price of electricity. In principle, the opportunity cost of not selling valuable allowances, even if they were obtained for free, would be factored in as well by operators in a competitive market. However, there may be constraints on the opportunity to sell the allowances: for instance, in an ongoing antitrust procedure<sup>25</sup>, the Bundeskartellamt finds that certain German operators could not pass the full CO<sub>2</sub> opportunity costs onto their customers if they were in a competitive market. Thus, it is not clear whether the modelling of a competitive market, should be based on the factoring of the full value of CO<sub>2</sub> allowances into the price of the electricity they offer when they obtained these allowances for free <sup>(26)</sup>. Therefore, for 2005 two scenarios were calculated. First a simulation was executed on where the cost of CO<sub>2</sub> allowances was fully factored in as a cost even if enough allowances were allocated for free (scenario “with carbon”). Then a second simulation was carried out based on the assumption that the CO<sub>2</sub> Emission Trading Scheme had

<sup>(20)</sup> The equation of an electricity market is: consumption + exports = generation + imports.

<sup>(21)</sup> Day-ahead markets cannot foresee perfectly demand, thus it is necessary for network operators to contract in advance capacity to be made available to them and that they can call upon to generate electricity (or diminish electricity production) to meet last minute imbalances between offer and demand.

<sup>(22)</sup> In practice, in order to simplify the data input, the simulation adopted a requirement of 5% of total demand, which was larger than what occurred in reality. In markets where there were larger requirements in reality (Germany), the simulation was also done with a 10% requirement: this did not change substantially price outcomes.

<sup>(23)</sup> As explained above, the simulation took into account the technical regulatory and other constraints on plants. The simulation also defined the profile of production of storage and pump-storage hydro plant as peak-shaving: they sold in the simulation at peak time within the limits of their reported weekly production; in addition, pump storage plants stored water during off-peak hours.

<sup>(24)</sup> In particular, all decisions about whether to turn on or off a plant, with due regards to its start-up costs, have been made essentially on the basis of the shape of the actual load the day after: this is in most cases the shape that could be predicted by the operator.

<sup>(25)</sup> Cf. press release of 20 December 2006: Bundeskartellamt issues warning to electricity provider on account of excessive electricity prices within the context of CO<sub>2</sub> emission allowance trading.

<sup>(26)</sup> In its procedure against one German generator, the German competition authority (the Bundeskartellamt) finds that there are constraints on the opportunity to sell and thus that the pricing-in of CO<sub>2</sub> allowances is not fully justified. The purpose of the study was not to analyse whether or not generators are allowed to factor in CO<sub>2</sub> certificates.



not been introduced (scenario “without carbon”). In the scenario “with carbon”, the cost of a given plant thus includes the value of CO<sub>2</sub> allowances for that plant <sup>(27)</sup> whereas in the scenario “without carbon”, the cost of the plant does not include the value of CO<sub>2</sub> allowances. Each scenario (“with carbon” and “without carbon”) led to a marginal cost of the system in each hour where a different unit may set the price in each scenario. It follows that the impact of ETS is equal to the difference between the two marginal costs estimated <sup>(28)</sup>.

## Checking fixed costs

As explained in the section on methodology, there could be a concern that the contributions to fixed costs generated in the model applied are not sufficient to amortize fixed costs. The simulation showed however that, for all markets but one, the contributions to fixed costs are sufficiently large for each operator to invest in new plants. In practice, the study estimated that the contribution to fixed costs necessary for a generic 400MW gas-fired CCGT plant would be about 68,000€/MW/year and for a generic 1000MW coal-fired CCGT plant would be about 61,900€/MW/year. In Germany, the UK and the Netherlands, the contributions to fixed costs per MW of installed capacity for all operators in the market were above these references. In Spain, the average contribution was lower (about 50,000€/MW/year), but given that this calculation is based on the assumption that all plants in the market would be new whereas some of them are already amortised, it was concluded that the contribution to fixed costs would be sufficient there as well.

There is one country where this verification could not be carried out, namely France. The merit curve of that market is very flat: it essentially consists of some hydro and many nuclear power plants. The

prices of competitive markets under the simulation are thus — during many hours — set by nuclear plants given that there are enough such plants to meet both domestic demand and existing exports in most hours. In such circumstances, operators in the theoretically competitive market could not recover their fixed costs by simply offering their power at marginal costs (no more expensive plant is setting the price for most hours). The applied theoretical model does not yield reliable results and the data on France is thus not included in this article <sup>(29)</sup>.

## The results

### *Significant mark-ups in all markets*

Table 1 presents for each market and for every year the price <sup>(30)</sup> that could have been expected in a perfectly competitive market (in the table referred to as “cost”), the actual price of the power exchange in that market and the difference between the two (the “mark-up”). In 2005, there is also a “Carbon” value, which is the maximum potential impact of the ETS as defined above, and, for that year, the mark-up is presented as the difference between the actual price of the exchange and the sum of the “cost” and “carbon” components. For a proper interpretation of this table one should keep in mind that an increase of one €/MWh of the wholesale electricity price will mean an increase of one €/MWh plus taxes for all customers. An average industrial user consumes 24,000MWh per year <sup>(31)</sup>.

<sup>(27)</sup> The value of CO<sub>2</sub> allowances for a given plant (per MWh) is estimated by multiplying the emissions of that plant (tonne/MWh) by the value of a tonne of carbon (€/t), as provided by the market for CO<sub>2</sub> allowances. In its procedure, the Bundeskartellamt finds that the generator involved could not have factored the value of CO<sub>2</sub> allowances into the price of electricity for more than 25% of the allowances.

<sup>(28)</sup> In this respect it is important to note that this estimation is the maximum possible impact of ETS as the scenario «with carbon» relies on the assumption that all companies fully price in the value of all CO<sub>2</sub> allowances that they use.

<sup>(29)</sup> In practice, operators of nuclear plants in the competitive French market would include some add-on to the price at which they offer to cover their fixed costs. This depends on the age of the plants in the portfolio. In addition, given the lower price obtained in the French market compared to other markets, there would be more exports than what occurred in reality and prices would be driven up further. A test case was done in that latter respect.

<sup>(30)</sup> More precisely, all prices in the table are weighted averages of the prices registered for all hours: the price of each hour in the period is weighted by the load experienced in that hour. The same applies for the «Carbon» value.

<sup>(31)</sup> The wholesale price of electricity is the «energy component» of the end-user's bill; the end-user's bill also includes the fees for networks as well as taxes; these latter two elements together represent at a minimum a bit less than the energy component in the case of the large industrial users, and at a maximum twice as much as the «energy component» of the end-user's bill in the case of households. The end-user's bill also includes a much smaller component (which is equal to a few percentage points of the total price at maximum): the margin of the retailer.

**Table 1 — Contribution to Power Price (€/MWh)**

Country	2003	2004	2005
<b>BE Belgium</b>			
Cost	29.75	31.70	50.40
Carbon	0.00	0.00	10.11
<b>DE Germany</b>			
Cost	19.46	24.27	28.17
Carbon	0.00	0.00	13.86
Mark-Up	11.42	5.36	6.39
<i>Total</i>	30.88	29.63	48.42
<i>EEX Price</i>	30.88	29.63	48.42
<b>ES Spain</b>			
Cost	23.95	27.51	33.65
Carbon	0.00	0.00	10.12
Mark-Up	6.29	1.39	12.20
<i>Total</i>	30.24	28.89	55.97
<i>OMEL Price</i>	30.24	28.89	55.97
<b>NL Netherlands</b>			
Cost	36.26	34.64	50.50
Carbon	0.00	0.00	9.52
Mark-Up	11.99	- 0.63	- 3.09
<i>Total</i>	48.24	34.01	56.93
<i>APX Price</i>	48.24	34.01	56.93
<b>GB/Great Britain <sup>(32)</sup></b>			
Cost	—	33.33	39.06
Carbon	—	0.00	10.00
Mark-Up	—	1.25	6.35
<i>Total</i>	—	34.58	55.41
<i>UKPX Price</i>	—	34.58	55.41

*Note: all values in this table are load weighted average values.*

*“Cost” is the price of the simulated competitive market.*

The table shows first that prices of competitive markets should have remained rather stable at around 30€/MWh between 2003 and 2004 (cf. rows on costs) in most markets reflecting the moderate growth in demand and the stable fuel prices. However in 2005 a substantial increase of electricity prices in 2005 can be observed, which can at least partly be explained by higher fuel costs in certain markets. Indeed, in Belgium and the Netherlands fuel price increased significantly explaining the 50% increase of the competitive price. These two markets rely substantially on gas

to meet electricity demand <sup>(33)</sup>. The contribution from rising fuel prices to electricity price increases in Spain and UK is lower: about 20% of the competitive price of 2004. In Spain and the UK gas is only indispensable to meet demand at peak hours whereas coal-fired plants are sufficient to meet demand at many off-peak hours. The impact of fuel price rises is even lower in Germany (more or less 16% of the competitive price of the year before), where coal-fired capacity is even larger. The difference (in €/MWh) is more than fourfold between the extreme cases and underlines the impact of the different fuel strategies pursued by the member states.

As regards CO<sub>2</sub>, the maximum ETS impact depends on the emitting nature of the plants: coal-fired plants emit more than gas-fired plants and nuclear and hydropower plants do not emit CO<sub>2</sub> at all. The results show thus that the maximum effect of the ETS is largest (roughly 14€/MWh) in Germany, which has the largest fleet of coal-fired plants. The effect is roughly equal to 10€/MWh in most other markets <sup>(34)</sup>. Again, the national choice of fuel mixes has different impacts for users.

The table reveals further that electricity prices have been roughly 10€/MWh above the competitive price in 2003 for all markets where the comparison can be made: this meant for that year roughly 240,000€ were paid too much by an average industrial user for its electricity. The mark-up has narrowed down significantly for all markets in 2004 but increased again for Germany, Spain and the UK <sup>(35)</sup> in 2005. If one adds the carbon effects, 2005 was a very profitable year for the electricity generators.

In terms of percentages, the actual price of the market has been on average over the period 27% (51% if one excludes CO<sub>2</sub> from the cost basis) over the competitive benchmark in Germany, 21% (35% if one excludes CO<sub>2</sub> from the cost basis) in Spain, and much less in the Netherlands and the UK,

<sup>(33)</sup> Gas-fired plants represent about 60 percent of the installed generation in the Netherlands and 40% in Belgium. In both cases, gas «sets the price» in many hours.

<sup>(34)</sup> As explained above, the model could also compute the carbon effect in France: as expected it is much lower (4€/MWh) due to the large proportion of nuclear generation.

<sup>(35)</sup> In the case of the UK, the price of the competitive market is underestimated in 2005 due to the fact that the simulation could not take into account the impact of exceptionally high gas prices in that market in the second half of 2005 and the unique liquidity of the UK gas market, which gave the opportunity to generators to sell back their gas instead of generating electricity.

<sup>(32)</sup> Hourly price data from the UKPX is only available from July 2004 onwards. Therefore, there is no result for 2003 under this approach and the result for 2004 should be viewed in the light of the data availability issue.

although one must note for the Netherlands <sup>(36)</sup> that the price cost margin reached a high level of 33% in 2003. This is shown in the table below:

**Table 2 — The mark-up as a percentage of the “cost”**

	2003	2004	2005 (CO <sub>2</sub> added to the “cost”)	2005 (CO <sub>2</sub> excluded from the “cost”)	2003/2005 (CO <sub>2</sub> added to the “cost”)	2003/2005 (CO <sub>2</sub> excluded from the “cost”)
Germany	59%	22%	15%	72%	27%	51%
Spain	26%	5%	28%	66%	21%	35%
Netherlands	33%	–2%	–5%	13%	6%	14%
Great Britain	—	4%	13%	42%	11%	31%

Of course, given the sensitivity of such an exercise, it is not possible to reason that the mark-up in the market was exactly equal to the values presented above. However, the magnitude of the mark-ups allows us to conclude that electricity prices have been too high.

### *Correlation between mark-ups and concentration established*

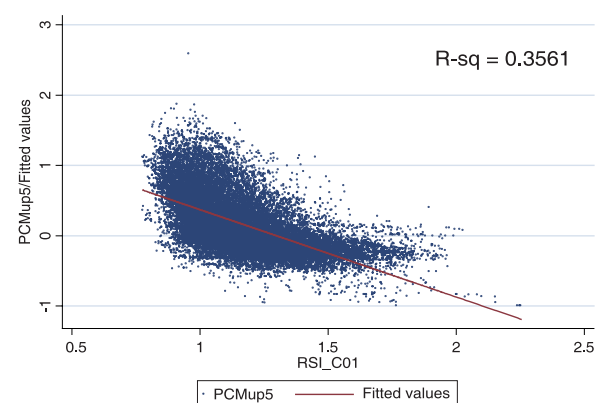
Given these results, it is interesting to find out an explanation for them. The study first tried to establish a statistical explanation. Indeed, the sector inquiry report and many experts in the sector argue that concentration is the main reason why prices are too high in the sector. The study has thus measured concentration in the six markets. It did so with traditional indices (CR<sub>n</sub>, HHI) as well as with electricity specific indices. One of the specific indices is the so called “Residual Supply Index” (RSI): it measures how much indispensable an operator is to meet demand. The RSI of an operator in a given hour is equal to the sum of available capacity of all other operators (taking

into account outages) divided by demand in that hour: if RSI is below 1, the operator is indispensable to meet demand.

The study calculated the RSI for the main operators in each market in each hour and, through

regression analysis, tried to establish if there is a linear relationship between the mark-ups and the RSI of one or several of the main operators as single or multiple explanatory variables. The following graph shows the results for the Spanish market and one of the main operators. It shows that the more indispensable this operator was during the period, the higher the mark-ups were.

**Figure 4 — Price cost mark-up (PCM) on Residual Supply Index (RSI)**



The regression analysis showed in fact that, in all markets, there is a statistically relevant correlation between the RSI of the main generators and the mark-ups in each hour. In other words, the more the main generators are needed to supply demand, the higher the mark-ups in the market become. The regression analysis corrected for other possible factors that could contribute to explaining high(er) mark-ups, such as the lack of electricity generating capacity of the whole market (scarcity), peak moments and seasonal variations in demand. However, the correlation between mark-ups and the indispensability of certain operators was significantly in all these tests and hence for the first time empirically tested and confirmed in this study. It can thus be concluded that concentration contributes to explaining the level of mark-ups.

<sup>(36)</sup> It is also necessary to explain the negative mark-ups in the Netherlands. They are a result of the conservative approach taken by the study to calculate mark-ups. In order to simulate the competitive market, the study used data on all generation plants. Some plants have special characteristics and the study tried to model these to the extent possible. In the case of Combined Heat and Power (CHP) plants which have been designed generally to produce heat and generate electricity as a by-product, it was not possible to model exactly how much electricity is produced by those plants as a by-product of their heat supply activities. More information would have been needed. It is not unusual that electricity produced by CHP plants is «dumped» at very low prices on power exchanges because the CHP operators are happy to accept any payment for their electricity. In the absence of adequate data, the model systematically underestimated the amounts of electricity available «at low prices» from CHP plants. In doing so, the study overestimated the price of a competitive market. The problem is particularly acute in the Netherlands which is characterised by a high proportion of CHP plants.

*The issue of “withholding”*

The study further compared what operators produced in reality to what they would have produced in the perfectly competitive market. This is important to explain if prices have been too high simply because operators sold at higher prices or because operators have actually practised a strategy called “withholding”. Withholding takes place when an operator does not produce (or produces less) with a power plant that would be economic to run with a view to forcing recourse (along the merit curve) to more expensive plants to meet demand. This is possible due to the specifics of the sector: the lack of storability of the product, a steep merit curve, little flexibility on the demand side, demand predictability, the single auction price mechanism of short-term markets, etc. It will be profitable if the revenues foregone from not producing are compensated by the higher revenues earned with the other plants through the higher market price. Large operators with sufficiently large portfolios of base-load plants (e.g. nuclear plants) are deemed to have adequate portfolios to carry out such strategies.

The results of the study show that differences between operators are significant, and that some operators seem to have not made full use of their generation capacity. This is one of the allegations

made in 2006 by some users in the German market and was one of the subject of inspections carried out at the premises of German generators in December 2006 <sup>(37)</sup>.

**Conclusion**

The scope and detail of the study make it the first of its kind with substantial new insights into the performance of electricity markets, including a reliable estimation of what wholesale electricity prices would have been if the markets had been competitive. The results show that prices are significantly above relevant (fuel) generation costs in most markets in 2003 and in some of them in 2005, indicating significant mark-ups due to a lack of competition in almost all markets studied. The results also show that the mark-ups are systematically greater when concentration on the supply side of generation rises in each market. In addition, the results show that a number of operators have apparently not fully used their relatively cheap available capacity: they may have thus withdrawn capacity to raise prices. These results confirm the findings of the sector inquiry and the need to further promote competition in the sector both by reinforcing the regulatory framework and by carrying out competition investigations in specific cases.

<sup>(37)</sup> See MEMO/06/483 of 12.12.2006 available at <http://europa.eu/rapid>





## New EU-US cooperation agreement in air transport <sup>(1)</sup>

Michael GREMMINGER

### 1. Introduction

On 30 April 2007, the long awaited EU-US air transport agreement was signed at the EU-US summit in Washington after its approval at the EU Transport Council on 22 March 2007. This so-called first stage agreement will be applied on a provisional basis as of 30 March 2008 <sup>(2)</sup>. Shortly thereafter, negotiations on a second stage agreement aiming for full transatlantic air transport liberalization will begin. The agreement that has already been signed will open up the most important international air transport market in the world in terms of revenues generated and passengers carried. It authorizes all US and EU airlines to fly between any city in the European Union and any city in the United States; to operate without restrictions on the number of flights, the aircraft used, or the routes chosen; to set fares freely in accordance with market demand; and to enter into cooperative arrangements with other airlines, including code-sharing and leasing. The agreement will lead to more competition on the transatlantic markets by removing unnecessary regulation. This should lead to new services being provided to European businesses and consumers, lower prices and better flight schedules. Moreover, the agreement creates a cooperation framework between the Commission and the U.S. Department of Transportation (DoT) in the areas of competition law and policy in the field of air transport.

### Policy context

The current EU-US co-operation agreement <sup>(3)</sup> in the field of competition applies only to the Department of Justice (DoJ) and Federal Trade Commission (FTC) and does not apply to the DoT, which is the competent authority for the examination of

international airline cooperation agreements <sup>(4)</sup>, such as those concluded between the members of the SkyTeam, Star or Oneworld global airline alliances. Transatlantic airline cooperation cases typically have competitive effects on both sides of the Atlantic and thus these transactions can be reviewed by the Commission (or the competent National Competition Authority) and the DoT in accordance with their respective competition regimes <sup>(5)</sup>. In such cases of parallel competence, experience has shown in this and other areas that cooperation between the relevant competition authorities can help promote compatible regulatory results and minimize differences in enforcement and policy approach. However, in the absence of a formal competition policy cooperation framework between the Commission and the DoT all cooperation in the past has been on an *ad hoc* and informal basis. One of the Commission's principal negotiation objectives for the EU-US air transport agreement was therefore to establish an effective framework for competition policy cooperation in the area of international airline cooperation agreements between the Commission and the DoT.

### Promoting compatible regulatory results

The Commission's starting point has been that it is not desirable — even if it were realistic — to harmonise EU and US competition laws and that an air transport competition policy cooperation agreement should focus on ensuring effective

<sup>(1)</sup> 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 author.

<sup>(2)</sup> Since the agreement is a mixed agreement concluded by the Commission and the Member States it will have to be ratified by all Member States. This usually takes some time and therefore the provisional application of the agreement has been agreed.

<sup>(3)</sup> The EC and the US concluded an agreement in 1991 which provides a framework for cooperation between the EC and US competition authorities when dealing with cases that affect each other's important interests. However, this agreement only applies to the Department of Justice (DoJ) and the Federal Trade Commission (FTC) which are the main US antitrust law enforcers.

<sup>(4)</sup> In relation to enforcement, the Antitrust Division of the DoJ has primary responsibility for enforcing competition laws in the airline industry. The DoJ reviews airline mergers and takes enforcement action with respect to antitrust violations such as price fixing and predatory pricing. However, the DoT has authority to review agreements relating to international services and may grant antitrust immunity to such agreements. The DoT also has authority to take action against unfair or deceptive practices and unfair methods of competition by airlines.

<sup>(5)</sup> For the EC, this includes Articles 81, 82, and 85 of the Treaty and their implementing Regulations. For the DoT, this includes in particular sections 41308, 41309, and 41720 of Title 49 of the United States Code, and its implementing Regulations and legal precedents pursuant thereto. A detailed discussion is provided in: Gremminger, Michael: Competition assessment of airline alliances and mergers in the light of an EU-US Open Aviation Area — Comparative analysis of the US-EU enforcement practice and convergence policy recommendations. George Mason University, School of Public Policy Working Paper, June 2004.

tive enforcement of the existing rules and not the creation of new ones. This position was broadly shared by US counterparts and reflects experience in other sectors, where a great deal of competition policy convergence was achieved despite differences in substantive laws. The aim of the competition chapter of the EU-US air transport agreement was therefore the promotion of compatible regulatory results in the application of the respective competition rules by avoiding major differences in approach to transatlantic airline competition policy issues. Compatible regulatory approaches can be promoted in particular through a better understanding of the methodologies, analytical techniques, including the definition of the relevant market(s) and analysis of competitive effects, and remedies that both sides use in their respective independent competition reviews. It is in the interest of both EU and US airlines that the regulatory environment should be as predictable and consistent as possible and that any difficulties caused by the fact that cooperation arrangements are subject to two different legal systems and different competition enforcement authorities are minimised. The agreement therefore envisages that the competent competition authorities on both sides strive to avoid taking decisions on competition matters that are in conflict or incompatible with one another.

### Competition policy related provisions of the EU-US air transport agreement

The institutional framework for competition policy co-operation in the EU-US air transport agreement is laid out in three different texts. In Article 20, the competition article of the main agreement, the principles underlying the application of competition rules to the transatlantic air transport market, in particular the principle of non-discrimination, are established. This article commits the parties to apply their competition rules in order to favour competition and not individual airlines. Moreover, the article lays down the principle of cooperation to minimise differences in the application of the law and refers to the Annex Concerning Cooperation with Respect to Competition Issues in the Air Transportation Market which establishes the areas and rules of cooperation between the DoT and the Commission <sup>(6)</sup>. This annex provides mainly for three

areas of cooperation: regular meetings to discuss general substantive competition issues; consultation on individual proceedings or cases and notification of individual proceedings. It further governs the rules relating to the disclosure of confidential information between the authorities. Finally a Memorandum of Consultations explains how the parties envisage dealing with two important issues of practical relevance for their cooperation. The first concerns the limitations the DoT has in exchanging case specific information during active investigations <sup>(7)</sup>. The second concerns the use by the DoT of the public interest criteria. The DoT explains that this decision criterion is not an exception to the competition analysis but rather an additional requirement for the carriers to fulfil in order to obtain the requested antitrust immunity.

### Conclusion

The new competition policy cooperation framework between the Commission and the DoT establishes an effective communication and cooperation channel. It has the potential to lead to the same kind of close and effective transatlantic cooperation as is already best practice between the Commission and the DoJ and the FTC. In particular, the new cooperation framework will facilitate the assessment of alliances between EU and US carriers with a view of achieving compatible regulatory results. An important role in this regard will be played by the envisaged bi-annual meetings of DoT and EU competition experts. These meetings will facilitate the exchange of best practices and promote a common understanding of the competition impact of key industry developments.

However it should be clear that the full benefits of transatlantic airline competition and effective competition policy cooperation can only materialize once a fully liberalized EU-US aviation area without any substantial ownership and control or traffic rights restrictions is established. This is the overall objective of the second stage agreement, negotiations for which will start within 60 days

<sup>(6)</sup> While the EU-US air transport agreement will be a mixed agreement concluded on behalf of the EC and the Member States, the Annex concerning cooperation is — in line with previous EC/Third countries cooperation agreements in the field of competition policy — limited to the Commission only.

<sup>(7)</sup> The DoT face two basic procedural constraints on discussion of ongoing cases. The first applies largely to communications from the Commission to DoT: the latter's decision cannot be based on any substantive information or argument unavailable to all parties for comment on the record before final decision. Should such information be received, it cannot be considered in the decision unless it is made available. The second constraint involves communications from rather than to DoT: the agency cannot demonstrate or appear to demonstrate "prejudgment" of the issues — that is, articulating a conclusion before the record in the case is ripe and a final decision has been publicly released.

of the date of provisional application. Should no such agreement be concluded, each party reserves the possibility to suspend the rights granted to carriers by the existing agreement <sup>(8)</sup>.

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<sup>(8)</sup> The first stage agreement confers diverse and wide spread rights to air carriers from both sides. For example, air carriers enjoy the right to operate certain air services; they are entitled to establish offices in the territory of the other Party with a view to the promotion and sale of their services.



## Broadband competition in Malta: are two access providers enough? <sup>(1)</sup>

*Olivier BRINGER and Stefan KRAMER <sup>(2)</sup>*

The current Regulatory Framework <sup>(3)</sup> promotes the establishment of competitive markets for electronic communication networks and services. The market conduct and performance we see today are, however, often based on service competition rather than infrastructure competition. Service providers are granted access — through ex-ante regulation — to facilities of the incumbent telcoms operator and offer their services, at regulated wholesale conditions, on the networks of the incumbent. In an ideal scenario, new market entrants thus start generating revenue and climb up the so-called “ladder of investment” <sup>(4)</sup> and in the process roll out their own competing infrastructures.

The ladder of investment regulatory approach works well in those Member States that have properly applied the Regulatory Framework. In the field of broadband services for example, there has been a very significant move up the ladder across Europe in recent years, with the proportion of new entrants offering broadband through simple resale of the incumbent’s offer decreasing, while the proportion of entrants offering broadband services through Bitstream or Local

Loop Unbundling (LLU) <sup>(5)</sup> has been continuously increasing. In the most advanced Member States, alternative access infrastructures, such as fibre or fixed wireless networks, are currently rolled out by both new entrants and incumbents <sup>(6)</sup>, while cable TV networks are upgraded to allow for the provision of telephony and broadband services. Once alternative and competing infrastructure are sufficiently well developed, transitional access obligations may be relaxed and only general competition rules apply, which is the ultimate objective of the current Regulatory Framework.

Yet the roll-out of competing infrastructures requires significant investments from the new entrants and may, absent access regulation and service competition, limit the number of competitors in the market. Mobile telephony markets, for example, have experienced infrastructure competition from the start, resulting in a limited number of mobile operators and a level of competition that proved to be occasionally insufficient at wholesale level, as attested by the enforcement in several Member States of mobile access regulation on the basis of a finding of dominance <sup>(7)</sup>.

The emergence of vertically integrated operators in electronic communications markets, providing retail services on the basis of their own infrastructure, thus raises the issue of competition in oligopolistic market structures. Whether or not the emergence of oligopolies in electronic

<sup>(1)</sup> 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.

<sup>(2)</sup> The authors wish to thank their colleagues of the Directorate-General for Information Society involved in assessing the issues discussed in this article and in particular Vesa Terava, Gabor Gal and Axel Bierer.

<sup>(3)</sup> The Regulatory Framework for Electronic Communications which came into force in the year 2003 (the «Regulatory Framework») consists of the Framework Directive 2002/21/EC and four specific Directives: the Authorisation Directive 2002/20/EC, the Access Directive 2002/19/EC, the Universal Service Directive 2002/22/EC and the Data Protection Directive 2002/58/EC. Unlike previous frameworks, it provides for an ex-ante regulatory approach based on concepts and principles of Competition Law.

<sup>(4)</sup> The “ladder of investment” regulatory approach lays down that by allowing access at different levels of an existing access network infrastructure, new entrants will stagger their infrastructure investment as they acquire customers and revenues and progressively increase the level of competition throughout the access value chain.

<sup>(5)</sup> Bitstream and LLU are wholesale products providing entrants with access to different levels of an existing access infrastructure. Bitstream gives access at the highest network level, while LLU gives access deeper in the network to the local loop, the final metallic circuit connecting the subscriber.

<sup>(6)</sup> Fibre is being rolled-out at different levels in the access network (fibre to the street, to the building, to the home). It allows for the delivery of bandwidths significantly in excess of those currently available using existing copper-based infrastructures. Fibre access networks allow for the development of innovative broadband services by the operators.

Depending on spectrum availability, terrestrial fixed wireless technologies such as WiMax are notably being rolled out in low populated areas where investment in wireline infrastructure appears unattractive.

<sup>(7)</sup> See for example the Spanish notification, registered under case number ES/2005/03330, available at <http://forum.europa.eu.int/Public/irc/infos/home/main>.



communications markets warrants ex ante regulatory intervention is also an issue currently debated by national regulatory authorities (“NRAs”).

A very good example for such a regulatory dilemma is the wholesale broadband access market in Malta which was recently analysed by the Maltese Regulatory Authority (“the MCA”) and notified to the Commission under the Article 7 Framework Directive consultation mechanism<sup>8</sup>. The MCA has found that the wholesale broadband access market comprised two competing infrastructures — telephony and cable — and that the vertically integrated operators on these infrastructures held a position of collective dominance. In its preliminary assessment the Commission had indicated it had serious doubts as to the compatibility of the notified measure with Community law. After the Commission launched a second phase investigation following its serious doubts letter, the MCA eventually withdrew the measure.

## **THE CASE OF THE BROADBAND ACCESS MARKET IN MALTA**

The notification from the MCA was registered in December 2006 and covered the market for wholesale broadband access. The wholesale broadband access market corresponds to one of the markets listed in the Commission Recommendation on relevant markets susceptible to ex-ante regulation<sup>9</sup>. NRAs are required to analyse these markets and impose remedies if one or more undertakings hold a position of dominance.

### **Specific feature of the Maltese wholesale broadband access market: ubiquitous coverage of cable and service competition on the public telephony network**

The size of Malta and its high population density has allowed for the roll-out of two ubiquitous network infrastructures: the traditional public telephony network operated by Maltacom, the telecommunications incumbent, and the cable network operated by Melita Cable, the “cable incumbent”. Both networks cover more than 95% of households and provide broadband internet access at retail level in addition to their respective legacy services (telephony over copper network and television over cable).

<sup>(8)</sup> This case was registered under case number MT/2007/563.

<sup>(9)</sup> Commission Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (the “Recommendation”).

Both cable and telecommunications markets were liberalised prior to the accession of Malta to the European Union and regulation of broadband access was imposed on the two platforms. Maltacom has complied with the regulatory obligation and opened its network to third-party Internet Service Providers (“ISPs”), while Melita Cable has so far denied access to its network and only supplies its in-house ISP.

## **The draft measure: inclusion of cable in the wholesale broadband access market and finding of collective dominance**

### *Market Definition*

On the basis of a substitutability analysis from the demand- and the supply-side, both at retail and wholesale level, the MCA established that the wholesale market for broadband access in Malta includes products provided over the existing broadband platforms and predominantly cable and DSL.

With regard to cable modem and DSL substitutability at wholesale level, the MCA put forward the following arguments:

- Although the technologies differ, notably at access level<sup>(10)</sup>, both services present similar network architectures resulting in similar possible points of interconnection for the provision of broadband access and similar cost structures. For this reason the MCA considered that the two wholesale products are equivalent<sup>(11)</sup>.
- On the demand-side, both platforms provide equivalent products; they have ubiquitous coverage of the national territory; the interconnection for ISPs as well as for any of the wholesale providers is considered simple and cost-effective.
- On the supply-side, although entry barriers for the roll-out of a new fixed network are high, the MCA considered that both DSL and cable modem wholesale providers would be in the position to counteract any price increase of their competitor by providing a similar product through their own access network.

<sup>(10)</sup> While DSL is provided over a copper pair dedicated to each end-user, cable modem is provided over a hybrid fibre-coax support, shared between several users.

<sup>(11)</sup> The MCA additionally provided evidence of the existence of vendors solutions for the provision of products equivalent to Bitstream over cable, as well as examples of existing commercially viable cable wholesale broadband access solutions (whether resulting from regulation, like in the USA and Canada, or from self development, like in Israel, Finland, UK or Singapore).

This statement was supported by the outlined broadband products equivalence at both wholesale and retail level.

The Commission did not challenge the MCA's finding that the Maltese market is specific and most notably there is ubiquitous coverage of the cable network over the national territory. The Commission expressed however concerns with regards to the evidence provided by the MCA concerning (i) the capacity of cable wholesale broadband access providers to offer critical product characteristics comparable to DSL, notably in terms of service management, and (ii) product characteristics (notably in terms of customer premise equipments) that may render it difficult for an ISP to switch from a DSL wholesale broadband access provider to a cable provider, independent of the technical substitutability.

### *Finding of Significant Market Power*

The MCA demonstrated that, on the basis of a market comprising both cable and DSL, no single dominance could be found, since both wholesale broadband access providers have stable and symmetric market shares (in terms of volume and revenues) and enjoy the same economies of scale and scope, as well as the same barriers to entry, absence of countervailing buyer power and vertical integration.

When assessing the existence of collective dominance on the wholesale market, the MCA investigated the following criteria: (i) characteristics of the market that make it conducive to tacit coordination, (ii) sustainability of tacit coordination and (iii) potential market constraints on tacit coordination.

With regard to the first criterion, the MCA identified the following relevant characteristics: the homogeneity of cable and DSL products (in terms of functionality and prices at both retail and wholesale level), the similarity in market shares between the two platforms, the similarity of cost structures, the high market concentration, the lack of technical innovation and maturity of technology, the lack or reduced scope for price competition (owing notably to the ability to replicate products and the availability of price information).

According to the MCA these various conditions were conducive to tacit market coordination, with a focal point consisting in the denial of access to third parties. The MCA hence stated that absent the current access regulation, Maltacom would have a strong incentive to discontinue its wholesale offer and take over the DSL broadband lines

currently provided by third party ISPs<sup>(12)</sup>. This would lead to a market of only two vertically integrated network operators jointly holding a dominant position on the wholesale market and controlling competition in the retail market to ensure supernormal profits in the long-run.

The MCA stated that such an outcome was sustainable over time thanks to the transparency of the market and the disincentive to grant access to the respective networks, as this would lead to losing retail market shares and related revenues. The MCA considered also that at retail level an effective retaliatory mechanism exists and is sufficient to support a coordinated strategy: if one firm deviates by granting access to its infrastructure, the second firm would respond with lower retail prices, such that the deviating firm, besides not gaining any market share, will be worse off in the long run due to an overall lower price level.

Moreover the MCA stated that market constraints on the duopoly are low: the market is mature<sup>(13)</sup>, there are high barriers to entry and potential competition with broadband wireless access ("BWA") networks operators, who represent the most serious competitive threat to Melita Cable and Maltacom, is not being expected to have a significant impact on the market during the timeframe of the review<sup>(14)</sup>, there is low elasticity of the wholesale demand and lack of countervailing buying power.

Based on the above assessment, the MCA concluded that both Maltacom and Melita Cable were jointly dominant on the wholesale broadband access market in Malta. In consequence, the MCA intended to impose obligations of access, non-discrimination, transparency, price control and

<sup>(12)</sup> The MCA mentioned a number of strategies to be used by Maltacom to drive third-party ISPs out of the market absent regulation, including notably delays in the provision and repairs of DSL access or tightening of financial terms and conditions offered to ISPs.

<sup>(13)</sup> The overall number of internet connections (broadband and narrowband included) has been stable over the last years in Malta and according to the MCA's user perception survey a small minority of non-internet users envisage purchasing internet access in the future. Growth in the broadband market is therefore mainly linked to upgrade from narrowband users which, according to the survey, is reaching a limit, owing to insufficient need from the end-users or too high prices.

<sup>(14)</sup> In 2005 the MCA assigned three licences for the deployment of a BWA network to the two mobile operators present in Malta, Vodafone and MobIsle, and to Cellcom, a consortium of alternative ISPs. According to their respective licences all three operators should have had a significant national coverage by April 2007 (50% for Cellcom and Vodafone, 39% for MobIsle). Yet, at the date of the notification, none of the operators had started the rollout of their network and two of these networks, Cellcom and MobIsle, had required a postponement of the obligation.

accounting separation on the two operators. However the Commission expressed serious doubts as to whether the two incumbents effectively hold a position of collective dominance and decided to open a second phase investigation on the notified draft measure before the MCA eventually withdrew it.

### Assessment of the collective dominance finding

When assessing the case the Commission services had to ascertain whether, as stated by the MCA, the removal of national regulation would lead to a situation in which effective competition in the relevant market would be significantly impeded by one or more other undertakings which together are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers<sup>(15)</sup>. The MCA assessed that were the existing access regulation on the Maltese market for wholesale broadband access to be withdrawn, Maltacom and Melita Cable may consider it possible, economically rational, and hence preferable to adopt on a sustainable basis a course of action aimed at selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 of the Treaty<sup>(16)</sup>.

From the case-law it follows that when assessing *ex-ante* the likelihood of tacit coordination, it is necessary to analyse whether (i) the characteristics of the market makes it conducive to tacit coordination and (ii) whether such form of coordination is sustainable. Three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination<sup>(17)</sup>.

In the view of the Commission, the MCA did not provide a conclusive assessment of any of the two previous conditions:

<sup>(15)</sup> Joined Cases C-68/94 and C-30/95 France and Others v Commission (known as 'Kali und Salz') [1998] ECR I-1375, paragraph 221.

<sup>(16)</sup> Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 277; Case T-342/99, Airtours v Commission, [2002] ECR II-2585, paragraph 61.

<sup>(17)</sup> Case T-342/99, Airtours v Commission, [2002] ECR II-2585, paragraph 62.

### *No conclusive assessment of the characteristics of the market that make it conducive to tacit coordination*

Coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work. Coordinating firms should have similar views regarding which actions would be considered to be in accordance with the aligned behaviour and which actions would not.

On principle, the less complex and the more stable the economic environment, the easier it is for the firms to reach a common understanding on the terms of coordination.

The Commission services have during the second phase investigation recognized that the market for wholesale broadband access in Malta displays characteristics of concentration, symmetry, transparency and homogeneity, that makes it easier for the firms to reach a common understanding on the terms of coordination. The MCA did, however, not convincingly establish that the market is sufficiently mature to make it conducive to tacit coordination. Neither did the MCA demonstrate that the market is characterised by stagnant or moderate growth and/or a reduced scope for price competition.

The MCA's analysis drew significantly on transactions occurring at the retail level of the market, partly because a large proportion of supply on the relevant market is captive, i.e. provided internally by vertically integrated wholesale broadband access providers Maltacom and Melita Cable. In such a case the structure of supply at the wholesale level — at least market shares of the undertakings active on the relevant market — might need to be derived from supply at the retail level. Other characteristics of the market and competitive conditions at retail level can also be relevant to assess whether the corresponding wholesale market is conducive to tacit collusion.

In this respect the Commission services came to the conclusion that the arguments brought forward by the MCA to support a finding of only limited competition at the retail level are not convincing and are rather contradicted by, among others, the following factors:

- (1) The penetration rate of broadband services in Malta is not low and shows an upward trend<sup>(18)</sup>. Moreover, companies operating on

<sup>(18)</sup> According to the MCA's most recent information, the broadband penetration in Malta rose from 10.4% in Q3 2005 to 14.7% in Q3 2006. The broadband penetration in October 2006 was slightly below the EU25 average (15.7%) but significantly above the EU10 average (6.7%).



the retail market have based their business planning on further significant growth of the market <sup>(19)</sup>.

- (2) The level of retail broadband prices in Malta does not appear to be particularly high, notably when compared to other EU countries <sup>(20)</sup> and specially when taking into account the high cost of international IP connectivity in Malta; additionally there is evidence of price competition (and related price decrease) in recent times. This apparently moderate price level is all the more remarkable as — contrary to most other EU countries — competitors have so far not based their retail offers on the unbundled local loop.
- (3) The variety of retail broadband offers in Malta does not seem unusually restricted, at least not when compared to other EU countries <sup>(21)</sup>; further, services and technology innovation is taking place in Malta, with the advent of multiple play offers <sup>(22)</sup> as well as the planned development of nomadic and mobile broadband services, through the rollout of BWA infrastructures.

Given the above mentioned growth of broadband penetration as well as ongoing innovation, the MCA's finding of market maturity appears questionable, all the more so as the alternative

ISPs, which are currently losing market shares, may have an increased incentive to develop BWA infrastructures and services.

Further, the Commission services have noted, that the MCA speaks of a prospective collusive equilibrium which will only be established once current access regulation is withdrawn. Given the current structural characteristics of the market the establishment of a collusive equilibrium appears economically irrational and hence implausible also on a forward looking basis. While it is not excluded that Maltacom embarks on discriminatory practices and attempts to drive alternative ISPs off its DSL infrastructure and out of the broadband market, the MCA did not sufficiently demonstrate that Maltacom would then retain a critical number of the ISP's subscribers. In order to render credible the finding of a prospective collusive equilibrium the MCA would need to demonstrate that Maltacom would not incur significant churn to cable operators or emerging platforms such as BWA. The MCA has not provided an economic rationale why Maltacom may voluntarily carry the risk of losing a large part of its wholesale market share and the corresponding revenues to alternative platforms, all the more so as these companies, which are small, flexible, service-oriented organisations may be a source of efficiencies and value for the incumbent.

Hence, the MCA did not provide sufficient evidence that the retail market for broadband access in Malta is stagnant and mature, i.e. that there is limited or no competition between Maltacom and Melita Cable for the end customer. Given that competitive conditions at the retail level determine to a large extent the competitive conditions at the wholesale level, especially in a market dominated by vertically integrated undertakings operating at both levels, the Commission services have concluded that the MCA did not establish the stability and absence of competition on the wholesale market for broadband access in Malta which would make it conducive to tacit coordination. Neither did the MCA demonstrate that it is economically rational and preferable for Maltacom to establish at the wholesale level a collusive equilibrium with Melita Cable on a forward looking basis.

### *No conclusive assessment of the sustainability of coordination*

The Commission services have also noted that for coordination to be successfully established on the market for wholesale broadband access in Malta, the actions of non-coordinating firms and potential competitors, as well as customers, should not be able to jeopardise the outcome expected from coordination.

<sup>(19)</sup> The popularity of always-on 128Kbps products, offered by both Melita Cable and Maltacom at prices significantly below broadband prices, shall notably stimulate, in the view of these operators, the upgrade from narrowband to broadband, thus eventually increasing broadband usage and penetration in Malta.

<sup>(20)</sup> 4Mbps or above ADSL products, with download limit at around 10GB, are offered at a price of around €30 in other EU countries (for example by Tele2 in Belgium or Free in France). Maltacom was offering an entry package at the speed of 2Mbps with 8GB download limit for €29 per month, while it now offers 4Mbps with 1GB download limit for €23.

<sup>(21)</sup> Maltese packages are currently based on two download bandwidths (4M and 2M) and are mainly differentiated by their download limits. This does not appear to be different from other EU countries, where ISPs usually propose offers based on a single download bandwidth, which has grown over time from few hundreds Kbps to several Mbps at no additional cost for the end-user.

<sup>(22)</sup> Melita Cable signed in October 2006 the first voice interconnection agreement with Maltacom, thus allowing the cable operator to provide complete fixed voice services in addition to broadband and television services. It also recently launched together with Vodafone (one of the two mobile operators in Malta) a temporary bundled offer including mobile voice, broadband and television. Thanks to its recently acquired digital television network and to its mobile network, Maltacom could also provide several bundled offers such as telephony and television or mobile voice and broadband access.

It must also be stressed that for a competitor to be able to disrupt tacit coordination, it is not necessary to be a strong competitor of the tacitly colluding parties<sup>23</sup>. It is sufficient if customers can foster the emergence of other leading players by contracting with the existing smaller competitors.

In the course of its investigation, it has been confirmed that Vodafone, one of the three BWA licence holders, will enter the market for retail broadband services in 2007. It has further been confirmed that Vodafone intends to abide by its licence obligations to cover half of Malta's territory by 2007 and reach ubiquitous coverage by April 2008. Vodafone's roll-out is based on the fixed WiMax standard rather than the mobile standard. This indicates that the focus for the launch of Vodafone's home broadband services will be on an infrastructure capable of providing voice and broadband data services.

It appears therefore that the new entrant will have a significant impact on the retail broadband market in Malta and would be able to disrupt the alleged tacit coordination between Maltacom and Melita Cable claimed by the MCA. Given Vodafone's imminent market entry it appears unlikely that the two vertically integrated broadband providers Maltacom and Melita Cable would find it economically rational and preferable to agree now or in the future on a collective refusal to grant access to their networks as well as super-competitive price level. It appears that this market entry constrains the behaviour of the two incumbents at present and over the period of the review. Hence, the MCA's finding of a prospective collusive equilibrium between Maltacom and Melita Cable is not sufficiently motivated with regard to market entry of new competitors.

Further market entry of BWA license holders could be expected although is yet uncertain when such entry may occur. The two other license holders have requested an extension of the deadline for fulfilling their license obligations. Vodafone has, however, formally appealed the request for another extension of the BWA rollout and coverage obligations made by the two other licence holders, because such an extension would allow the two licensees to deploy enhanced mobile WiMax infrastructures, whereas Vodafone is currently deploying fixed WiMax infrastructures. The MCA may therefore decide to enforce the initial rollout and coverage obligations and foster further market entry. This will impact further on the retail broadband market and the alleged collusive equilibrium in the wholesale market for

broadband access in Malta. All the more so as one of the licence holder is a consortium of alternative ISPs, which, as stated above, are currently losing market shares and may therefore have an incentive to develop BWA services, and migrate existing customers onto their own BWA infrastructure.

It follows from the above that the MCA, via the enforcement of existing BWA roll-out obligations, can promote infrastructure-based competition in the market for retail broadband access and can consequently exert a constraint on any possible collusive equilibrium in the market for broadband access.

## CONCLUSION

The underlying principle of the Regulatory Framework (established in the legislation) is that regulation becomes redundant if and where single or joint dominance can no longer be demonstrated. At this point access regulation can be withdrawn and ex post competition law be applied.

In Malta an alternative cable infrastructure has significantly developed and as long as it is concluded that the two infrastructures are in the same relevant wholesale market, single dominance of the traditional telephony operator can no longer be established. The framework is based on existing competition law principles and dominance is the threshold for intervention in competition law against unilateral conduct of firms. Hence, the only possibility to intervene according to the Regulatory Framework is to prove the existence of joint dominance through tacit collusion between operators.

The standard of proof for a finding of joint dominance is established by the European case law. It requires the competition authority or in this case the NRA to establish characteristics of the market that make it conducive to tacit coordination as well as a demonstration of the sustainability of such coordination. This is by no means an easy task. As highlighted in the Maltese case, duopolists may in principal benefit from collectively refusing access to their networks and thereby preventing market entry. In practise they are often disciplined by potential entry and the normal play of competition in a dynamic market place. This is all the more likely in a sector like telecommunications where market conditions are potentially destabilized by access network innovations (e.g. the entry of BWA operators that may have an impact on fixed broadband and telephony markets, but also on mobile telephony markets) as well as product/marketing innovations (e.g. multiple play and convergent offers). In the case of the broadband

(<sup>23</sup>) Case T-342/99, *Airtours v Commission*, [2002] ECR II-2585, paragraph 213.



market, the still limited retail penetration rate and growth perspectives give operators further incentive to compete and to deviate from possible tacit coordination.

In any event, over-regulation shall be avoided as it may prevent operators from investing and passing on efficiencies and innovations to consumers. Although in many instances newly liberalised markets will display narrow oligopolistic market structures, regulation should be aimed at fostering competition and not at protecting competitors. A threshold for ex-ante regulatory interven-

tion lower than dominance under Article 82 of the EC Treaty as interpreted by the European courts is not foreseen in the Regulatory Framework. A higher level of intervention could have negative consequences for the firms' incentives to compete on price, investment in infrastructure and innovation — if for example there was an expectation of a higher likelihood of access regulation. Further to that such lowering would make the transition of the electronic communication markets to ex post competition law application difficult if not impossible. Any such regime which would perpetuate regulation is not acceptable.



## Cartel fined in the elevators and escalators sector <sup>(1)</sup>

*Andrés FONT GALARZA, Gyula CSEREY, René PLANK and Eline POST*

On 21 February 2007 the Commission adopted a prohibition decision and imposed fines totalling €992 million on the Otis, KONE, Schindler and ThyssenKrupp groups for operating cartels for the sale, installation, maintenance and modernisation of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. The decision was addressed to 17 national subsidiaries of the above undertakings, as well as their controlling parents, and to Mitsubishi Elevator Europe B.V. which participated in the Dutch cartel. KONE subsidiaries received full immunity from fines under the Commission's leniency programme in respect of the cartels in Belgium and Luxembourg, for being first to provide information about these cartels. Similarly, Otis received full immunity in respect of the cartel in the Netherlands. The ThyssenKrupp group had its fine increased as it is a repeat offender. The addressees of the Decision participated in four single and continuous infringements of Article 81 of the EC Treaty between 1995 and 2004.

### The products and services

The conducts found illegal in the decision related to **elevators** and **escalators**, as well as the provision of **maintenance** and **modernisation services** for these products.

There are three main types of elevators: *i*) hydraulic elevators, which are elevator systems which lift an elevator car using a hydraulic ram; *ii*) roped elevators which are geared; the elevator car is raised and lowered by traction steel ropes; and *iii*) roped elevators which are gearless; in gearless elevators the machine room is either much smaller or there is no need for a separate machine room at all ("machine-room-less" elevators). There are various and commonly known applications for elevators such as, for example, low-rise, mid-rise and high-rise buildings, residential or office, hospitals or services, transport or freight. There are different applications for escalators, either for commercial (shopping malls, office buildings, hotels)

or transport purposes (airports, railway stations, subway systems). Elevators and escalators have a relatively long life span of 20 to 50 years.

Maintenance services are provided with varying content. Generally, undertakings provide monitoring and prevention services (for example, active information to elevator and escalator owners and building managers about upcoming maintenance requirements), as well as repair services and replacements of spare parts. Modernization services require more intervention and replacement of parts than maintenance, but substantially less than the installation of an entirely new product. While elevators are typically modernized, escalators are generally not. Services generate the majority of profits in the elevator and escalator sector. The vast majority of elevators and escalators installed in the Member States affected by the infringement are serviced by the undertaking responsible for the installation.

The market value was ca. € 250 million in Belgium, ca. € 580 million in Germany (*excluding* the services market), ca. € 32 million in Luxembourg and ca. € 410 million in the Netherlands in 2003.

### The infringements

The Commission initiated the investigation on its own initiative ("*ex-officio*") in early 2004 using information brought to its attention. Three rounds of inspections (Belgium, and Germany: January 2004; Belgium, Germany and Luxembourg: March 2004 and the Netherlands: April 2004) and a large number of leniency applications under the 2002 Notice on immunity from fines and reduction of fines in cartel cases (the "Leniency Notice")<sup>2</sup> confirmed that cartels operated in Belgium, Germany, Luxembourg and the Netherlands. The infringements covered both new installations and services, except in Germany where the evidence would suggest that only new installations were covered.

It is worth noting, from a perspective of efficient administration, that the Commission addressed its objections relating to the four cartels in one

<sup>(1)</sup> 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.

<sup>(2)</sup> OJ C 45, 19.2.2002, p. 3.

single Statement of Objections, considering that all four cartels displayed **common elements** such as:

- KONE, Otis, Schindler and ThyssenKrupp were all involved in the infringements in each of the four Member States;
- The cartels covered the same products and services in each Member State at issue, with the exception of Germany where — to the knowledge of the Commission — services were not part of the cartel agreements;
- The managers responsible for the subsidiaries involved (and participants in the cartels) were sometimes simultaneously or successively responsible for several Member States;
- The periods of infringement largely overlapped;
- The method for the allocation of projects concerning the sale and installation of elevators and escalators was similar, sometimes identical (regarding, for example, the principles governing market and customer sharing, the maintenance of “status quo” in market shares, the structure of the meetings, compensation schemes, use of project lists);
- The method for the allocation of projects concerning maintenance and modernization was similar, sometimes identical, in Belgium, Luxembourg and the Netherlands (for example, the principles governing customer sharing, establishment and maintenance of contacts, communication methods and compensation schemes).

The Statement of Objections was notified to the parties in October 2005.

The periods of infringement are:

- from 9 May 1996 to 29 January 2004 in Belgium (over seven years);
- from 1 August 1995 to 5 December 2003 in Germany (over eight years);
- from 7 December 1995 to 9 March 2004 in Luxembourg (over eight years); and
- from 15 April 1998 to 5 March 2004 in the Netherlands (over five years).

In particular, the following infringements were committed in one, several or all of the Member States concerned:

- agreement(s) to share elevator and escalator sales and installations;
- agreement(s) on the allocation of public and private tenders and other contracts for the sale and installation of elevators and escalators in accordance with each undertaking’s pre-agreed shares of sales;

- agreement(s) on the allocation of projects for the sale and installation of new elevators and/or escalators in accordance with the principle that existing customer relationships should be respected;
- agreement(s) not to compete with each other for maintenance contracts for elevators and escalators already in operation and agreement(s) on bidding patterns for those contracts;
- agreement(s) not to compete with each other for maintenance contracts for new elevators and escalators and agreements on bidding patterns for those contracts; and
- agreement(s) not to compete with each other for modernization contracts.

The infringements’ main features also included exchange of commercially important and confidential market and company (internal) information including bidding patterns and prices. The participants met regularly to agree to the above restrictions and they monitored their implementation. There is evidence that the companies were aware that their behaviour was illegal and they took care to avoid detection: their employees usually met in bars and restaurants, travelled to the countryside or even abroad and used pre-paid mobile phone cards to avoid tracking.

Considering the above, the Commission concluded that the addressees of the decision participated in four separate single and continuous infringements of Article 81 of the Treaty in Belgium, Germany, Luxembourg and the Netherlands. Each of the four infringements covered the whole territory of a Member State.

### Calculation of the fines

In assessing the gravity of the infringement, the Commission took account of its nature, its actual impact on the market, where this could be measured, and the size of the relevant geographic market. The infringements were all considered to be very serious in nature, in accordance with the Guidelines on the method of setting the fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty <sup>(3)</sup>.

In setting the starting amount of the fine for each undertaking, the Commission took into account their respective turnover in Belgium, Germany, Luxembourg and the Netherlands in 2003, being the last full year of the infringements (2000 for Schindler in Germany, the year it exited that cartel). In this way four separate starting amounts were set and four separate calculations were carried out.

<sup>(3)</sup> OJ C 9, 14.1.1998, p. 4

As there was considerable disparity between each undertaking's turnovers for the products and services concerned in Belgium, Germany, Luxembourg and the Netherlands, the undertakings were divided into different groups for each Member State. In this manner, the Commission took into account the effective economic capacity of the undertakings to cause significant damage to competition in the cartelised industry.

Several undertakings claimed some or all of the following attenuating circumstances: early termination of the infringement, a minor/passive role, the absence of an effective implementation of the practices, the implementation of compliance programmes and absence of benefit. These claims were all rejected as being unfounded.

### Sufficient deterrence

In order to set the amount of the fine at a level which ensures that it has sufficient deterrent effect, the Commission considered it appropriate to apply a multiplication factor to the fines imposed. Accordingly and in line with previous decisions, the Commission decided to multiply the fines for ThyssenKrupp and Otis. The fines were further increased as a function of the duration of the infringement committed by each legal entity, by 10% for each full year of duration and by 5% for each 6 month-period.

### Repeated infringement

ThyssenKrupp was considered to have committed a repeated infringement, since two entities controlled by Krupp and/or Thyssen (before these two undertakings merged in 1999) had already been addressees of a previous Commission decision concerning cartel activities in Alloy Surcharge<sup>(4)</sup>. The fact that the undertaking has repeated the same type of conduct shows that the first penalties did not prevent it from committing new infringements. The basic amount of the fine to be imposed on ThyssenKrupp was thus increased by 50%.

#### Application of the 2002 Leniency Notice

KONE, Otis, ThyssenKrupp and Schindler all submitted applications under the Leniency Notice. They co-operated with the Commission at different stages of the investigation with a view to receiving favourable treatment under the Leniency Notice.

<sup>(4)</sup> See Joined Cases T-45/98 and T-47/98 *ThyssenKrupp Stainless and ThyssenKrupp Acciai speciali Terni v Commission* ("Alloy Surcharge") [2001] ECR II-3757, and Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp Stainless and ThyssenKrupp Acciai speciali Terni v Commission*, judgment of July 14 2005.

### Point 8(a) — Immunity

Otis was granted full immunity under point 8(a) of the Leniency Notice concerning the cartel in the Netherlands since it enabled the Commission to carry out inspections in the Netherlands.

### Point 8(b) — Immunity

In respect of the infringements in Belgium and Luxembourg, KONE's submission enabled the Commission to find an infringement of Article 81 of the Treaty. Hence, KONE qualified for full immunity from the fine in respect of these infringements.

### Point 23 (b), first indent (reduction of 30-50%)

The evidence submitted by Otis relating to the cartels in Belgium and Luxembourg represented significant added value with respect to the evidence already in the Commission's possession, strengthening the Commission's ability to prove the infringement. In addition, Otis has terminated its involvement in the infringements and therefore was granted a 40% reduction of the fine for both infringements. Similarly, KONE's submission in relation to the cartel in Germany, as well as ThyssenKrupp's submission in relation to the cartel in the Netherlands, represented significant added value within the meaning of the Leniency Notice. Therefore, the Commission granted KONE a 50% reduction of the fine in respect of the infringement in Germany and ThyssenKrupp a 40% reduction of the fine in respect of the infringement in the Netherlands.

### Point 23 (b), second indent (reduction of 20-30%)

The evidence submitted by Otis relating to the cartel in Germany represented significant added value with respect to the evidence already in the Commission's possession, strengthening the Commission's ability to prove the infringement. Otis was granted a 25% reduction of the fine for the infringement in Germany. Similarly, in respect of the infringement in Belgium, ThyssenKrupp's submission represented a significant added value for which it was granted a 20% reduction of the fine.

### Point 23 (b), third indent (reduction of up to 20%)

The evidence submitted by Schindler relating to the cartel in Germany represented significant added value with respect to the evidence already in the Commission's possession, strengthening the



Commission's ability to prove the infringement in Germany. Under these circumstances, Schindler was granted a 15% reduction of the fine in respect of the infringement in Germany.

## Conclusion

The aggregate fine imposed in this case is the largest ever fine imposed by the Commission for cartel violations. A strong warning was again issued against a repeat offender. Competition Commissioner Neelie Kroes commented on this case by stating: *"It is outrageous that the construction and maintenance costs of buildings, including hospitals, have been artificially bloated by these cartels. The*

*national management of these companies knew what they were doing was wrong, but they tried to conceal their action and went ahead anyway. The damage caused by this cartel will last for many years because it covered not only the initial supply but also the subsequent maintenance of lifts and escalators — for these companies the memory of this fine should last just as long."* At the same time, by granting full immunity from fines to KONE (in respect of the cartel in Belgium and Luxembourg) and Otis (in respect of the cartel in the Netherlands) and substantial reductions of fines, the Commission is offering an incentive to future leniency applicants to come forward and actively cooperate.

## Cartel fined in the gas insulated switchgear sector <sup>(1)</sup>

*Marisa TIERNO CENTELLA, Maurits PINO and Jindrich KLOUB*

On 24 January the Commission adopted a prohibition Decision against members of the Gas Insulated Switchgear cartel with fines totalling some €750 million. The cartel from 1989 until the Commission's inspections in May 2004, and was nearly global in coverage. The anticompetitive practices consisted principally of market allocation, customer allocation and bid rigging for public tenders.

### The product

Gas Insulated Switchgear (GIS) is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power substations. GIS is sold both as a stand-alone product and as part of GIS based turnkey power substations. The product is specialised and, therefore, custom made. Clients normally specify their needs and ask potential suppliers to make a bid. The annual market value of GIS projects was in 2003 approximately €2200 million world-wide and some €320 million in the EEA.

### Procedure

The case was opened on the basis of an immunity application, lodged by the Swiss undertaking ABB in 2004 in accordance with the 2002 Leniency Notice <sup>(2)</sup>. Subsequently, inspections took place at the EU premises of ABB's competitors Siemens, AREVA, VA Tech, JAEPS and Hitachi.

### The cartel

The cartel had a complex structure. First, there was a 'common understanding' between the participants that the Japanese undertakings would not sell in defined European countries (generally Western Europe) and the European undertakings would not sell in Japan. Secondly, projects outside defined European countries and Japan were divided on the basis of global quotas. A number of countries were excluded altogether from the agreement, notably the USA and Canada. Thirdly, based upon the protection provided by the established 'common understanding', the European undertakings discussed among themselves projects in defined European countries

and these projects were accounted for under their global quotas that had been agreed upon with the Japanese companies. Fourthly, certain European countries in which the European producers had their manufacturing capacities were designated as 'home countries'. These 'home countries' were reserved for home-producers and sales in them were not accounted for under the global quotas reserved for the European companies.

The parties regularly met

- to allocate GIS projects in accordance with the set quotas;
- to agree upon the prices that the allotted undertaking could charge;
- to agree upon the prices that members of the cartel that were not to win the tender would bid in order to leave the impression of genuine competition; and
- to agree upon the pricing parameters to respect when the parties could not agree amongst themselves to whom the project would be allocated.

The participants took elaborate measures to conceal their cartel activities. Not only did they prepare spurious bids in order to leave an impression of genuine competition, but they also used code names and sophisticated means of communication (e-mail from private accounts with encrypted messages; mobile telephones with encryption) to avoid detection.

### Liability of parent companies

An interesting feature of this case is that the Commission held the parent companies of a joint venture with legal personality fully liable for the infringement, together with the joint-venture. Specifically, liability was imputed to Hitachi and Fuji, who held respectively 50% and 30% in their common joint-venture JAEPS and to Mitsubishi Electric Corporation and Toshiba whole held 50% each in their joint-venture TM T&D.

The parent companies had been directly involved in the cartel themselves before placing their GIS activities in the JVs for the last years of the cartel and hence for this preceding period they are held liable on account of their own, direct involvement.

<sup>(1)</sup> 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.

<sup>(2)</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, 19.2.2002.

For the period that the joint-ventures existed, the Commission established that the parent companies actually exercised a decisive influence on the market behaviour of the joint-venture and in fact used the joint venture as a vehicle to continue their long-standing involvement in the cartel of GIS producers. In this case, in view of the level of shareholding, the Commission did not rely on a presumption of the exercise of decisive influence based on ownership of the (near) totality of the shares, but it relied on other factors.

Specifically, the imputation of liability to the parent companies was based principally on the following factors: the supervisory and management role of the parent companies on the JVs' activities, the previous involvement of all parents in the cartel activities before the creation of the JVs, the fact that the parent companies' subsidiaries formerly involved in GIS activities withdrew from them in order for the JVs to succeed them with their subsequent assistance and kept their interest in the products as distributors thereof, the presence in cartel meetings of individuals representing JVs, and the fact that many individuals holding senior positions in the JVs also held simultaneously or consecutively senior positions in the parent companies.

## Fines

As the Statement of Objection had been issued in April 2006, the 1998 Guidelines on fines <sup>(3)</sup> applied.

The cartel was classified as a 'very serious infringement', and the starting amount for the cartel members with the largest market shares, Siemens and ABB, was set at € 45 million. The starting amounts for the other parties were set at a proportionately lower level based on their own position in the market.

In order to ensure sufficient deterrence, the Commission applied to the largest undertakings

the following multiplying factors: Siemens 2.5, Hitachi 2.5, Toshiba 2, Mitsubishi Electric Corporation 1.5, ABB 1.25.

The cartel lasted more than 16 years, which resulted in an increase of up to 10% per year, therefore 160% in total of the starting amount increased, by the multiplier where applicable. For several of the undertakings concerned, the increase was less because of their shorter participation in the cartel. It is worth noting that had the Statement of Objections in this cartel been sent after the publication of the 2006 Fines Notice, the potential increase would have been 100% per year, in place of the above 10%.

In the case of Siemens, Alstom and Areva the Commission concluded that their role of a secretary of the cartel should be evaluated as an aggravating circumstance, justifying a 50% increase of their fine.

As ABB was the first to inform the Commission of the existence of the cartel and it met all the further conditions set by the Leniency Notice it was granted full immunity from fines. Also AREVA, Siemens, VA TECH, Hitachi and JAEPS, Melco and Fuji made applications under the Leniency Notice, which were examined by the Commission in the chronological order in which they were made in order to evaluate whether any of them constitutes significant added value within the meaning of point 21 of the Leniency Notice. The Commission concluded that none of these submissions contained information which would be of significant added value within the meaning of the Leniency Notice in comparison to the information already in its possession at that time from ABB, from the inspections previously carried out, and from the investigation carried out until the respective applications were made.

The fines imposed for the cartel were at the time of the adoption of the Decision the highest the Commission ever imposed for a single infringement.

<sup>(3)</sup> Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9 of 14.01.1998.

## Overview of the fines imposed:

Name and location of company	Reduction (%)	Reduction (euros)	Fine * (euros)
ABB, Switzerland	100%	215 156 250	0
Alstom, France	—	—	65 025 000
Areva, France**	—	—	53 550 000
Fuji Electric, Japan	—	—	3 750 000
Hitachi, Japan	—	—	51 750 000
Japan AE Power Systems, Japan***	—	—	1 350 000
Mitsubishi Electric Corporation, Japan	—	—	118 575 000
Schneider, France	—	—	8 100 000
Siemens, Germany	—	—	396 562 500
Siemens, Austria****	—	—	22 050 000
Toshiba, Japan	—	—	90 900 000
<b>Total</b>			<b>750 712 500</b>

(\*) Fine imposed on the undertaking — some entities concerned are held jointly and severally liable for the whole or part of the fine imposed on other entities.

(\*\*) The amount of €65 025 000 attributed to Alstom, France is built up as follows: €11 475 000 for which Alstom is solely liable, covering the period before the existence of the Alstom subsidiary into which the business was incorporated in 1992, and €53 550 000, for which Alstom is jointly and severally liable with that subsidiary for the period of ownership of Alstom. This subsidiary was acquired by the Areva group towards the end of the infringement, in January 2004. The parent entities of the Areva group share a joint liability with that subsidiary for the period after its acquisition.

(\*\*\*) Joint-venture of Fuji Electric, Hitachi and Meidensha, Japan.

(\*\*\*\*) Fine for the infringement committed by VA Tech, acquired by Siemens after the infringement.





## Merger control: Main developments between 1 January and 30 April 2007 <sup>(1)</sup>

Mary LOUGHRAN and John GATTI

### Introduction

The level of notifications continued at record levels with a total of 122 transactions being notified to the Commission in the period 1 January — 30 April 2007. A commensurate number of decisions were adopted — 112 — during the trimester. Some 107 transactions were approved without conditions pursuant to Article 6 (1) (b) (of which 64 decisions were adopted via the simplified procedure) and 3 proposed acquisitions were approved subject to conditions and obligations pursuant to Article 6(2). The Commission also cleared one case unconditionally after a second Phase investigation and a further case was withdrawn during the Phase II investigation. There were no prohibition decisions and no decisions taken pursuant to Art. 8 (2). The Commission opened 2 Phase II investigations (Article 6(1) (c)) during the period.

The Commission received 2 requests for referral from Member States pursuant to Articles 9 during this period. These cases are described in more detail below. There were no Art. 22 decisions adopted during the period.

As regards pre-notification referrals 17 new requests were received pursuant to Art. 4 (5) and 18 such requests were accepted. One case was transferred by the Commission under Art. 4 (4) during the period. No new Art. 4 (4) requests were submitted during the period.

### A — Decisions taken under Article 6 (2)

#### Schneider Electric /APC

On 8 February the Commission approved the proposed acquisition of American Power Conversion Corporation (APC) by the French group Schneider Electric. Both parties to the transaction were major suppliers of a broad range of uninterruptible power supply (UPS) devices which clean power signals and provide back-up power in case of power cuts. Schneider is active in the manufacturing and sale of products in the sectors of electrical distribution, industrial control and automation. Amongst other products, it supplies UPS

devices through its subsidiary MGE UPS Systems S.A. APC is active in the design, manufacturing and sale of power protection equipment and software and accessories for computers, communications and related equipment, in particular UPS devices.

The Commission examined the competitive effects of the proposed merger in the UPS devices markets, where both companies were active as suppliers. The Commission's investigation revealed that the proposed transaction could significantly reduce competition as regards the market for small UPS devices (i.e. those with a power range below 10 kilo Volt-Ampere (kVA)) which are used mainly to protect individual computers and devices for small businesses. APC and MGE are respectively the number one and number two in this market at European level. The next largest competitor had a very limited market position. Thus, the Commission considered that the proposed transaction as initially notified was likely to weaken competition and therefore raised serious doubts as to its compatibility with the Single Market.

To address the Commission's serious doubts, Schneider Electric undertook to divest the MGE activities related to its small UPS business. After further investigation the Commission concluded that the proposed sale would adequately address its competition concerns. The Commission therefore gave its approval to the acquisition subject to completion of the divestiture of Schneider Electric's business related to small UPS devices.

#### Evrz/Highveld

On 20 February the Commission cleared, subject to conditions, the proposed acquisition of the South African steel and vanadium producer Highveld by the steel company Evraz, incorporated in Luxembourg and primarily active in Russia. Vanadium is a metal primarily used in the production of alloys (e.g. steel alloys used in axles, crankshafts, gears, and other critical components; mixed with aluminium in titanium alloys used in jet engines and high-speed airframes) plus rust resistant and high speed tool steels and in specialty stainless steel for use in surgical instruments and tools. Evraz is an international vertically integrated steel and mining company. It also has joint control of Strategic Minerals Corporation, which produces a number

<sup>(1)</sup> 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.

of vanadium products. Highveld is a steel producer also active in the production of various vanadium products.

The Commission's investigation revealed that the proposed transaction would not significantly modify the structure of steel markets in the EEA, in particular due to Highveld's very limited presence. However, the Commission found that there were serious concerns that the proposed transaction would significantly impede effective competition worldwide for vanadium products, such as vanadium chemicals, specialty vanadium alloys for the titanium industry and ferrovanadium used for steel applications. The combination of the vanadium feedstock activities of Evraz and Highveld (ore, slag and residues), added to their combined presence in the downstream markets of vanadium oxides and finished products, would have given the merged entity the ability and incentive to reduce the global production of vanadium feedstock (in particular vanadium-bearing ore) so as to increase global vanadium prices and to foreclose the downstream rivals it supplies with vanadium feedstock. In addition, the merged entity would have gained a very strong market position for the supply of high-purity vanadium oxides.

To resolve these competition concerns, Evraz proposed to divest its vertically integrated vanadium operations, consisting of an equity interest or a portion of Highveld's large Mapoch iron and vanadium ore mine; Highveld's vanadium extraction, vanadium oxides and vanadium chemicals plants (also referred to as the Vanchem operations); a ferrovanadium smelter located on the site of Highveld steel facility; and Highveld's 50% shareholding in SAJV, a joint venture between Highveld and two Japanese partners active in the production and marketing of ferrovanadium. The divested business comprises all Highveld's vanadium businesses with the exception of the production of vanadium steel slag as a by-product of its steel operation. The Commission's investigation showed that it constitutes an independent and economically viable entity, able to compete effectively on the markets for vanadium oxides and vanadium finished products.

The proposed remedies would remove the competition concerns deriving from the new entity's strong market position at the vanadium feedstock level. The production shares of the merged entity in vanadium feedstock would indeed decrease to under 30% with the partial sale of the Mapoch mine. The sale of the entire vanadium oxides and ferrovanadium business of Highveld would eliminate the merged entity's ability and its incentive to reduce output.

Finally Evraz undertook to maintain and strengthen the existing feedstock supply relationships with Tula, Chussovskoy and Treibacher. These companies are the major consumers of the feedstock sold by Evraz and Highveld. These undertakings contributed further to eliminating the risk of feedstock supply problems to the vanadium-processing industry.

### APW/Capio

On 16 March the Commission approved the proposed acquisition of joint control of Capio AB, a Swedish provider of healthcare services, by the private equity funds Apax Partners Worldwide LLP ("APW") of the UK, Apax Partners SA ("APSA") of France and Nordic Capital of the Channel Islands. The Commission's decision was conditional upon the divestiture by Capio AB of most of its UK subsidiaries.

Capio is a Swedish provider of healthcare services for both public and private customers via its private "acute general hospitals" (privately funded hospitals which admit patients for surgical operations and other medical treatments), diagnostic centres and private psychiatric hospitals. It is active in Sweden, Norway, Finland, Denmark, France, Spain, Germany and the UK.

The acquiring private equity companies control several undertakings that are active in the same markets as Capio or in upstream markets. APW controls General Healthcare Group Limited ("GHG"), a provider of private healthcare services throughout the UK and Mölnlycke Healthcare, a supplier of surgical and wound care products. The French hospital chain Vedici is controlled by APSA and Nordic Capital has an interest in Nycomed and Altana, both suppliers of pharmaceutical products, as well as Unomedical and Atos Medical, both suppliers of medical devices.

The proposed transaction would have resulted in horizontal overlaps for private acute general hospital services and the provision of outsourced health care services to the National Health Service (NHS) in the UK, both at national and local level.

The combination of the activities of GHG and Capio thus led to a decrease in the number of nationally operating private acute general hospital chains in the UK from four to three. This would have strengthened the market position of GHG and Capio and could have given rise to increases in the prices paid by the private medical insurance companies that are clients of these hospitals. At a local level, the proposed transaction gave the parties a significant share of a large number of markets in the UK. This could have resulted in less effective

tive competition on the local markets concerned. The Commission's concerns were confirmed by its market investigation.

Although the proposed transaction resulted in the creation of a substantial number of vertical relationships between the parties in Sweden, Norway, France, Spain, Germany and the UK these relationships did not raise competition concerns.

To address the Commission's concerns with regard to the horizontal overlaps the parties offered to divest all of Capiro's UK private acute general hospitals, its Independent Sector Treatment Centres' outsourcing business and its specialist eye hospital. The Commission's market investigation confirmed that the proposed divestitures would remove the horizontal overlap in the UK and eliminate the serious doubts as to the compatibility of the transaction with the Single Market. The proposed acquisition was therefore approved subject to fulfilment of the commitments.

## *B — Decisions taken under Article 8*

### **Thales /Meccanica**

Following an in-depth investigation the Commission decided on 4 April to grant an unconditional clearance to the proposed acquisition by Thales of France of Alcatel's shareholdings in the Alcatel Alenia Space (AAS) of France and Telespazio of Italy, companies jointly controlled by Alcatel and Finmeccanica.

Thales is active in the development and integration of critical information systems for the defence, aeronautics and transport industries and for civil security. Thales is jointly-controlled by the French State and Alcatel. Finmeccanica is a diversified engineering group active in aerospace, defence systems, energy, communications, transportation and automation. AAS is active in the manufacture of ground and space systems, including satellites and subsystems and equipment for satellites. Telespazio provides services and end-user applications using or related to satellite-based solutions and products.

The transaction as notified involved the acquisition by Thales of Alcatel's 67% shareholding in AAS and its 33% shareholding in Telespazio. Thales is not active in satellite manufacturing but its subsidiary Thales Electron Devices (TED) is the leading producer of TWTs, a component used to amplify microwave signals received by satellites before being retransmitted to earth. The electronic component that supplies power to the TWT (Electronic Power Conditioner or EPC) together

with the TWT itself form the integrated Traveling Wave Tube Amplifier (or TWTA), an amplifier on telecommunications satellites.

TWTs and TWTAs are crucial components of telecommunications satellites, as they determine the performance of the satellite. There are only two suppliers of TWTs worldwide, TED and the U.S. company L3-ETI. The two leading suppliers of TWTAs worldwide are L3-ETI and Tesat, a subsidiary of Astrium (EADS group). All of these products — telecommunications satellites, TWTs and TWTAs — are purchased in open competitions. All these markets are considered to have a worldwide dimension.

The Commission's initial investigation had indicated that the combination of Thales' activities in TWTs and AAS' activities as a satellite manufacturer could give rise to competition concerns. The Commission opened an in-depth investigation to examine whether the new entity would have the ability and the incentive to discriminate against its downstream competitors in the supply of TWTs so as to favour its own TWTA and satellite prime contracting activities.

As regards the TWTA market, the Commission found that the new entity would have a limited position as a supplier of EPCs, the other component of TWTAs. AAS produces EPCs but its range is very limited. In particular, AAS does not produce dual EPCs able to power two TWTs, which offer significant advantages in terms of cost and mass, and it would take several years before AAS would be regarded as an established dual EPC supplier. The demand for dual EPCs currently represents 50% and is expected to increase further. The Commission also found that L3-ETI, a leading TWTA supplier, is a credible competitor for the TWT frequencies that represent the bulk of the demand. In addition, if the new entity were to establish itself on the market for TWTAs, this would increase competition from two to three suppliers.

As regards the market for commercial telecommunications satellites, the Commission found that, for the vast majority of recent satellite orders, satellite manufacturers buy TWTAs from Tesat or L3, rather than purchasing TWTs and EPCs separately. This suggested that a foreclosure strategy based on direct supply of TWTs would not be effective at the satellite level. In addition, the Commission conducted a detailed analysis of the types of TWTs and EPCs currently used and of satellite operators' preferences, which showed that the new entity would not have the capacity to foreclose the satellite market.

*C – Decisions taken under Article 9***Cronimet Remondis Alfa/TSR**

In February the Commission acceded to the request of the German competition authority to refer certain aspects of the proposed acquisition of TSR by Cronimet, Remondis and Alfa Acciai to it for examination under German national competition law. The transaction involved the acquisition by German companies Remondis and Cronimet as well as the Italian company Alfa Acciai of the German company TSR. Alfa Acciai produces 'rebars' (steel reinforcement bars for the construction industry) and reinforcing steels. Cronimet is a trader of ferrous scrap for use in steel production. Remondis is active worldwide in water and recycling management. The target company TSR trades and processes scrap for the steel industry.

A first examination of the case showed that the acquisition could affect competition significantly on the regional markets for the collection of carbon steel scrap in the Ruhr area and in the market for the collection of alloyed steel scrap around Stuttgart. In both these markets there were considerable overlaps between the parties. In addition certain structural links between the parties would have been created on these markets. Also TSR's participation in the Recool joint venture, along with Abfallentsorgungsgesellschaft Ruhrgebiet mbH (AGR) could have strengthened Remondis' position on the German market for the recycling of cooling systems.

The German authorities took the view in their referral request that the transaction threatened to significantly affect competition in certain relevant markets located in Germany. It therefore requested the Commission pursuant to Art. 9 (2) (a) of the Merger Regulation, to refer this aspect of the case to them.

The Commission's own assessment of the case showed that the relevant markets for the collection of ferrous scrap and alloyed steel scrap could be regional in scope and that the proposed transaction would create structural links between the parties and other important players. In addition the Commission found that, by acquiring TSR's participation in the Recool JV, Remondis would further strengthen its leading position on the German market for the recycling of cooling systems.

The Commission therefore agreed that the German competition authority was best placed to assess the competitive impact of the case on these markets and accepted that the German competition authority should assess this aspect of the proposed transaction. The Commission's investigation revealed that apart from these aspects the proposed operation would not give rise to any competition concerns. The remaining parts of the transaction were therefore approved unconditionally.

**Carrefour /Ahold Polska**

On 10 April 2007, and following the request of the Polish Competition Authority, the Commission referred the assessment of the acquisition of Ahold Polska of Poland by Carrefour of France to the Polish Competition Authority.

Carrefour is an international group active in food and non-food retailing. Ahold is part of the Ahold group, active in food and non-food retailing in Poland. Both Carrefour and Ahold are involved in various types of retail businesses in Poland (mainly consumer goods through supermarkets, hypermarkets and discount stores). Following notification of the transaction to the Commission the Polish Competition Authority asked the Commission to refer the transaction to it on the grounds that it would affect competition in a number of markets within Poland, which presented all the characteristics of distinct markets and which do not constitute a substantial part of the Single Market. The request was based on Art. 9 (2) (b).

The Commission found that the conditions for referral were met in this case. When these conditions are met, according to Article 9(3), the Commission has no discretion to refuse to refer the part of the case relating to the affected distinct markets concerned.

For efficiency reasons and in order not to split the proposed transaction, the Commission decided to refer the case in its entirety to Poland. This includes those markets which do not seem to raise competition concerns because the combined market shares of the parties did not exceed 15% (e.g. procurement markets for daily consumer goods and local retail markets for motor fuel).



## Schneider/APC: a textbook first-phase case with creation of dominant position and structural remedies <sup>(1)</sup>

*Antoni Vassileff* <sup>(2)</sup>

On December 12, 2006, the French company Schneider notified its proposed acquisition of the US-based company American Power Conversion (APC) to the Commission. The main overlap in the parties' activities concerned the sales of uninterruptible power supply (UPS) devices. The Commission considered that the proposed transaction was likely to lead to the creation of a dominant position and raised serious doubts as to its compatibility with the common market. The notifying party filed remedies that were accepted by the Commission.

This article discusses some of the interesting points raised by the case.

### Short description of the products concerned

Both Schneider, through its affiliate MGE, and APC marketed UPS devices. UPS devices have two basic functions: first, they provide a back-up power in the event of power cuts, and second, they clean the power signal. They are used to protect electrical devices for which the interruption or disruption of power supply would have harmful consequences — such as desktop computers, or systems for larger structures such as hospitals, security systems, airports, etc. The larger the system to be supported, the larger the capacity (measured in kVA <sup>(3)</sup>) of the UPS device needed.

While the basic functions of all UPS devices remain the same regardless of the end-application, the wide array of prices and capacities meant that defining product markets required some sort of segmentation.

### Product market definition

Schneider proposed to make a first segmentation of the market by considering a cut-off limit at 10kVA. Then, it expressed the view that, within the 0-10kVA capacity range, devices with a capacity of 3kVA or less could be distinguished from

those with a capacity of more than 3kVA or above. No further distinction within the above 10kVA segment was proposed by Schneider.

The decision discusses in detail the relevance of these cut-off points and it is not the purpose of this article to repeat that discussion. However, one point of interest related to the possible difficulty of defining markets when a continuum of products is considered, especially when this continuum is characterized by power/capacity figures. On one hand, there was an obvious difference between a €100 UPS device destined for use with a desktop computer and a €50,000 UPS system capable of supporting hospital facilities. On the other hand, differentiating between a 9kVA UPS and an 11kVA may sound arbitrary <sup>(4)</sup>.

In this case, however, the 9kVA and 11kVA UPS device were actually quite distinguishable. The reason for it is that the 10kVA corresponds to a technical cut-off point between “one-phase” devices (below 10kVA) and “three-phase” devices (above 10kVA). These technological differences correspond to a difference in terms of target customers. The 0-10kVA UPS devices are generally purchased by information technology (IT) wholesalers that typically resell these devices to retailers such as Fnac. The above 10kVA devices are bought by electrical technology (ET) wholesalers <sup>(5)</sup> or contractors that integrate UPS devices into electrical infrastructures of buildings.

On the other hand, the relevance of the 3kVA limit turned out to be slightly less obvious to specify and the question of whether there should be a segmentation of the above 10kVA segment proved difficult. Many possible cut-off points (e.g. 50kVA, 80kVA, 200kVA, etc.) were suggested, but neither the market investigation nor third party studies provided a clear picture either. However, in this specific case, these difficulties did not have any bearing on the competitive assessment.

<sup>(1)</sup> 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 author.

<sup>(2)</sup> The author wishes to thank Maria Rehbinder and Viktor Porubsky for their comments on the article.

<sup>(3)</sup> For kilo volt-ampere. Volt is the unit of electric tension, whereas ampere measures the electric current.

<sup>(4)</sup> For a recent illustration of the difficulty of defining product markets according to the power capacity, see e.g. M4271 Daikin/OYL. In this case, no clear-cut consensus emerged from the market investigation and an alternative segmentation—based on technology—was also examined.

<sup>(5)</sup> ET wholesalers sell electrical devices such as sockets, switches, plugs, etc. to professionals.



## Geographic market definition

Schneider explained to the Commission that market for UPS devices had at least a European span on the grounds that Asia-based plants cater for the demand all over Europe, and that prices and standards were homogeneous across Europe.

However, the fact that production sites serving Europe are located in remote locations is in itself not a sufficient condition to define markets as wider than national in scope. In this case, it turned out that a national presence was essential to be an effective competitor in particular in larger Member States, while utilizing the services of a distributor seemed to be a second best solution mostly better suited to smaller Member States.

The Commission ultimately left the exact geographic scope of the markets open as competition concerns were raised on a European-wide basis and at the level of specific Member States.

## Competitive Assessment <sup>(6)</sup>

The deal commanded particular attention from the Commission in relation to the changes that would arise on the market for below 10kVA UPS devices: while APC led competition with [20-30]% of the EEA-wide market, Schneider's MGE was the second most important market player with [10-20]%. The proposed merger would create a market player with nearly half of the market <sup>(7)</sup>. In contrast to this high share, the next largest competitors (Riello, Eaton, Chloride, etc.) were rather weak as they had market shares of less than 10%. In addition, [20-30]% of the market was made up of a myriad of smaller players.

As these market shares are indicative of the creation of a dominant position, the Commission investigated the effects of the removal of APC's largest competitor and the significance of the role played by smaller players.

It found that competition essentially rested on two criteria, price and quality, and that APC and Schneider were the best performing companies in these respects. In particular, the two companies had continuously introduced new products with a favourable price/quality rating from the customers' perspective. In this context, the Commission found that brands play an important role and stand for the reputation for quality, and reliability

of the products and services. MGE and, to an even greater extent, APC had built strong and recognized brands on the market.

Conversely, it appeared that competitors did not have the same advantages: a basic low capacity UPS device is relatively easy to produce and production of such devices is made on a significant scale in Asia. As a result, many smaller market players import "no-name" products to Europe, that are lower-priced but also less trusted, if not of poorer quality. Other larger market players such as Chloride, focus on the above 10kVA UPS segment.

The Commission's investigation showed therefore that APC and Schneider's MGE were close or even the closest competitors on the under 10kVA market and that they were perceived as head-to-head competitors by customers.

Furthermore, there appeared to be high barriers to entry and expansion which made it difficult for competitors to obtain a market position similar to Schneider's MGE. For one thing, competitors need to be capable of matching the merged entity's rhythm in introducing new products, and to develop a sufficiently efficient logistics and distribution in Europe for Asian-made products. Second, the entrant would have to establish a satisfactory track record to build a good reputation and a well-recognized brand. Third, it would have to obtain access to IT wholesalers, the distribution channel for UPS devices with a capacity below 10kVA. IT wholesalers and suppliers of UPS devices have close and long-term relationships and it is difficult to build such customer intimacy <sup>(8)</sup>.

The Commission concluded therefore that the proposed transaction was raising serious competitive concerns on the market for 10kVA.

## Structural Remedies

To remove the Commission's serious competition concerns Schneider proposed structural remedies that consisted in the divestiture of its 0-10kVA UPS business. The discussion on the viability of the divested package focused on its access to distributors (that is, to IT wholesalers) and the optional transfer of the brand to ensure that the new business had solid foundations. In view of MGE's particular history — it had previously been the subject of a successful leveraged buy out operation — the Commission had to ensure that the business would be attractive and able to effectively compete, irrespective of the nature of the

<sup>(6)</sup> For convenience of reading, only the assessment on the 0-10KVA market at the European level is given in this text. Defining the market for 0-3kVA and/or examining the situation at the national level did not change the conclusions.

<sup>(7)</sup> [40-50]%

<sup>(8)</sup> However, the Commission found that a market player does not need to sell other products to be an efficient supplier of below 10 kVA devices.

purchaser (industrial or financial). The divested package, in particular, included a management structure, the transfer of the customers and of the existing sales-force, the transfer of the shareholding in joint venture agreement for the manufacturing of UPS devices, supply agreements, and R&D resources.

The market test underscored that the fate of the MGE brand was a particularly important issue. Schneider originally proposed a temporary license of the MGE brand to allow some time for the acquirer to re-brand the products. However, according to respondents, the viability of the divested package would be seriously jeopardized if it was acquired by a company — such as an investor — without its own brand for UPS devices and therefore unable to replace the MGE brand with its own recognized brand. The licensing for a limited period of the MGE brand for the 0-10kVA activity would have therefore not been sufficient

for such an acquirer. Schneider agreed to address this concern by offering as an option the divestiture of the brand MGE for the 0-10kVA segment, should the divested business be acquired by a new or minor actor in the industry.

## Conclusion

The final remedies package submitted by the merging parties was sufficient to remove the Commission's competitive concerns. The Commission thus cleared the operation in first phase with conditions. While this case may in certain respect seem a classic example –risk of creation of a dominant position that was resolved by the submission of structural remedies –, the above analysis shows that such “classic” merger cases often raise significant technical, legal or policy issues: identifying these issues early on and proactively seeking for solutions then is necessary if the merger is to be cleared in Phase I.



## Groupements d'intérêt économique fiscaux: Le régime fiscal français de financement de certains biens d'équipement constitue une aide d'État <sup>(1)</sup>

Barbara JANKOVEC

En France, de nombreux navires, avions et certains autres biens d'équipement lourds étaient depuis 1998 financés grâce à un régime fiscal avantageux.

Par sa décision du 20 décembre 2006 <sup>(2)</sup>, la Commission a estimé que ce régime des opérations de financement de biens mobiliers amortissables sur une durée de plus huit ans mis en location par des groupements d'intérêt économique (GIE) constituait une aide d'État. Cette décision vient confirmer les doutes qui avaient conduit la Commission, à la fin de l'année 2004, à ouvrir la procédure formelle d'examen du dispositif en cause <sup>(3)</sup>.

Preuve de l'intérêt suscité par la mise en cause de ce régime fiscal, 16 parties intéressées appartenant tant au secteur du transport qu'au secteur bancaire, ont fait valoir leur point de vue lors de la procédure d'examen. L'ouverture de cette procédure et ses éventuelles implications avaient incité la France à suspendre l'application de ce régime dans l'attente de la décision de la Commission.

### 1. En cause: le régime fiscal des opérations de financement de biens mobiliers loués par des GIE

Les GIE sont des entités dotées de la personnalité morale et constitués de deux ou plusieurs personnes physiques ou morales. Leur mission est de favoriser le développement économique de leurs membres afin d'en accroître les résultats. Le GIE n'exerce ainsi pas d'activité autonome et n'est, par conséquent, pas assujéti à l'impôt sur les sociétés. Chacun des membres du groupement est toutefois personnellement redevable de l'impôt sur le revenu ou de l'impôt sur les sociétés pour la part des bénéfices du groupement correspondant à ses droits.

Compte tenu de la structure fiscalement transparente des GIE, le législateur français a introduit en 1998, dans le code général des impôts (CGI), deux

dispositions censées permettre de lutter contre l'évasion fiscale dans les opérations de financement de biens mobiliers loués par des GIE.

Aux termes de l'article 39 C, deuxième alinéa, du CGI, l'amortissement fiscalement déductible d'un bien mis en location par un GIE ne peut excéder le montant du loyer perçu diminué des autres charges afférentes audit bien. Les résultats du GIE étant généralement fortement déficitaires les premières années d'utilisation du bien et ces déficits venant en déduction des résultats imposables déclarés par ses membres, le plafonnement de l'amortissement vise à empêcher un recours abusif à ce type de financement à des fins d'optimisation fiscale. Cette disposition est d'ailleurs conforme au plafonnement de principe de l'amortissement des biens loués prévu à l'article 39 C, premier alinéa, du CGI.

Cependant, le législateur a prévu, à l'article 39 CA du CGI, une dérogation à cette limitation de principe concernant les biens mobiliers amortissables selon le mode dégressif sur une période de plus de 8 ans, le bénéfice de cette dérogation étant soumis à la délivrance préalable d'un agrément ministériel.

Interrogées sur les demandes d'agrément ayant été introduites en application de l'article 39 CA, les autorités françaises ont transmis des informations qui ont permis à la Commission de constater que près de 80% des agréments délivrés l'avaient été pour le financement de navires et près de 13% aux fins de la réalisation d'investissement aéronautiques <sup>(4)</sup>.

### 2. La nature d'aide d'État du régime fiscal en cause: un avantage sélectif

En dépit des observations formulées par l'État membre et des bénéficiaires du régime fiscal en cause, la Commission a considéré que ce régime constituait une aide d'État au sens de l'article 87, paragraphe 1, du traité.

#### *Un avantage fiscal...*

L'une des deux questions centrales posées par cette affaire était de savoir si un avantage résultant

<sup>(1)</sup> Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leurs auteurs.

<sup>(2)</sup> Décision de la Commission du 20 décembre 2006 concernant le régime d'aide mis à exécution par la France au titre de l'article 39 CA du code général des impôts — Aide d'État C 46/04 (JO L 112 du 30 avril 2004, p. 41).

<sup>(3)</sup> JO C 89 du 13 avril 2005, p. 15.

<sup>(4)</sup> Le reste des agréments délivrés concernaient les investissements ferroviaires et industriels.

de l'application de ce régime pouvait être identifié. En effet, l'article 87, paragraphe 1, du traité interdit toute mesure de nature à favoriser certaines entreprises ou certaines productions par rapport à d'autres. Cette analyse exige ainsi que soit déterminée la règle de référence ou le régime commun applicable, dans le cadre d'un régime juridique donné, à l'aune duquel la mesure litigieuse sera comparée <sup>(5)</sup>.

Contrairement à ce que soutenait la France, la Commission a considéré que la règle de référence, c'est-à-dire l'imposition normale à laquelle devait être comparé le régime de l'article 39 CA du CGI, était la limitation de principe de l'amortissement pour les biens financés par des GIE (article 39 C, deuxième alinéa, du CGI). Il ne pouvait en effet s'agir de l'article 39 C, premier alinéa, qui prévoit certes un dé plafonnement de l'amortissement applicable, mais n'est pas applicable à des opérations de financement de biens par des GIE. La Commission a ainsi logiquement considéré que ne pouvaient être comparées que des situations factuelles et juridiques identiques.

L'avantage résultant de l'application du régime de l'article 39 CA du CGI au lieu du régime de droit commun était le dé plafonnement de l'amortissement. En effet, en raison des amortissements dégressifs et des frais financiers qui, par définition, sont concentrés sur les premières années d'utilisation du bien, les résultats du GIE sont fortement déficitaires au cours de ces années et deviennent bénéficiaires au cours d'une seconde période, lorsque le montant des loyers perçus excède le total des charges constatées (amortissements et frais financiers compris). Le GIE relevant du régime des sociétés de personnes, les déficits qu'il constate au cours de ses premières années d'activité viennent en déduction des bénéfices imposables réalisés par ses membres à raison de leurs activités courantes. Selon les autorités françaises, les économies d'impôt ainsi obtenues par les établissements financiers durant les premières années de l'opération sont compensées par les suppléments d'impôt apparaissant ensuite lorsque le GIE réalise des bénéfices. La Commission a toutefois logiquement estimé que ce décalage dans le temps permettait aux membres du GIE de dégager un gain de trésorerie.

L'avantage fiscal constaté résultait également d'une majoration d'un point du coefficient d'amortissement dégressif applicable habituellement au bien

considéré et, dans l'hypothèse d'une cession anticipée du bien à l'utilisateur et lorsque notamment les deux tiers de la durée normale d'utilisation du bien sont écoulés, d'une exonération de la plus value.

### *...en faveur des transporteurs et des banques*

Les bénéficiaires de ces avantages fiscaux étaient d'une part les membres du GIE, constitués en principe d'établissements bancaires, et, d'autre part, les utilisateurs finals des biens loués, à savoir pour l'essentiel des entreprises de transport. Le régime en cause prévoyant la rétrocession aux utilisateurs du bien des deux tiers au moins de l'avantage fiscal retiré par le GIE de l'agrément, ces derniers étaient aussi bénéficiaires de cet avantage fiscal. Cette rétrocession se concrétisait sous forme d'une diminution du montant du loyer ou encore d'une minoration du montant de l'option d'achat. Quant aux GIE en tant que tels, ils ne pouvaient être considérés comme bénéficiaires du régime en cause, puisqu'ils ne sont pas redevables de l'impôt, compte tenu de leur transparence d'un point de vue fiscal.

La Commission ayant identifié un avantage conféré aux bénéficiaires du régime, l'autre question à laquelle la Commission devait répondre était celle de savoir si la mesure revêtait un caractère sélectif. Selon la jurisprudence, une mesure conférant un avantage économique constitue en effet une aide d'Etat lorsqu'elle revêt un caractère sélectif, c'est-à-dire si les entreprises bénéficiaires de la mesure appartiennent à une catégorie bien déterminée par l'application, en droit ou en fait, du critère établi par ladite mesure <sup>(6)</sup>.

En l'espèce, en limitant le bénéfice du dé plafonnement (et donc de l'avantage fiscal) au financement de biens mobiliers amortissables sur une durée de plus de 8 ans, la France a, *de jure*, favorisé les entreprises ayant recours à ce type de biens. Pour rappel, l'analyse des données transmises par les autorités françaises a clairement mis en évidence que le régime fiscal en cause bénéficiait essentiellement aux utilisateurs de biens lourds relevant du secteur du transport, tels que les navires et les avions. L'appréciation de la Commission a d'ailleurs été confortée par l'analyse des travaux législatifs préparatoires à l'adoption de l'article 39 CA du CGI, qui ne font pas mystère de la volonté du législateur de favoriser l'investissement dans le secteur maritime.

En outre, le caractère sélectif de la mesure était ici renforcé, s'il en était besoin, par la nature des

<sup>(5)</sup> Voir l'arrêt du Tribunal du 1<sup>er</sup> juillet 2004, Salzgitter/Commission (T-308/00, Rec. p. II-1933, point 81) et la communication de la Commission sur l'application des règles relatives aux aides d'Etat aux mesures relevant de la fiscalité directe des entreprises (JO C 384 du 10 décembre 1998, p. 3, point 16).

<sup>(6)</sup> Voir, en ce sens, l'arrêt Salzgitter/Commission (cf. référence en bas de page n° 5).



conditions présidant à la délivrance des agréments ministériels. En effet, l'administration fiscale disposait, dans ce contexte, d'une large marge d'appréciation de nature à lui permettre de favoriser certains demandeurs. Ainsi, l'une des conditions d'octroi était que l'investissement présente un « intérêt économique et social significatif, particulièrement en matière d'emploi ».

À cet égard, l'un des aspects intéressants de la décision de la Commission réside précisément dans le rejet de l'argument de la France selon lequel le régime en cause était justifié par la nature et l'économie du système fiscal en cause, en ce qu'il visait à empêcher le recours à ce type de financement à des fins d'optimisation fiscale.

La notion d'aide au sens de l'article 87, paragraphe 1, CE ne vise pas à empêcher que des entreprises soient soumises à des traitements fiscaux différents, dès lors que cette différence de traitement, fondée sur la nature et l'économie du système, est logique et cohérente au regard du système fiscal analysé. Toutefois, tant la pratique de la Commission que la jurisprudence ont déterminé les limites de cette exception en rejetant systématiquement l'invocation par les États d'objectifs généraux certes légitimes mais auxquels il était fait référence afin de justifier l'octroi d'avantages à des entreprises exerçant certaines activités spécifiques. Il a ainsi été considéré que la volonté de favoriser l'emploi, la protection de l'environnement ou la sécurité routière ne pouvait pas être invoquée afin de justifier une différence de traitement fiscal, et que l'invocation de tels objectifs ne pouvait faire obstacle à la qualification d'une telle mesure comme aide au sens du traité <sup>(7)</sup>. Il transparaît clairement de cette approche que le contrôle des aides vise à protéger la concurrence et, partant, que la Commission doit, lorsqu'elle doit déterminer si une mesure étatique constitue ou non une aide, s'intéresser à ses effets sur le marché commun et non pas à l'objectif poursuivi.

Durant la procédure, la France a certes fait valoir que la finalité poursuivie en l'espèce ne constituait pas un objectif général sans lien avec la nature et l'économie du système fiscal considéré. Les autorités française prétendaient en effet que les dispositions combinées des articles 39 C, deuxième alinéa, et 39 CA du CGI constituaient un moyen de contrôle a priori dont disposait l'administration fiscale afin de lutter contre l'évasion fiscale résultant d'un usage abusif des opérations de

financement par des structures fiscalement transparentes telles que les GIE. La Commission a toutefois considéré que bien que cet objectif puisse être nécessaire et rationnel afin de garantir l'efficacité du système fiscal des amortissements de biens loués et, dès lors, qu'il puisse être inhérent à celui-ci, les conditions d'application du dé plafonnement de l'amortissement prévues à l'article 39 CA du CGI n'étaient cependant pas susceptibles de satisfaire cet objectif. En effet, tant la limitation du bénéfice du dé plafonnement à des biens lourds que les conditions à satisfaire aux fins de la délivrance de l'agrément ministériel n'étaient pas justifiées aux fins de la réalisation de l'objectif poursuivi.

Au terme de son analyse — les critères additionnels de l'existence d'une aide (existence d'un transfert de ressources étatiques, affectation des échanges entre États membres et existence d'une distorsion de concurrence) étant clairement satisfaits — la Commission a considéré que le régime de l'article 39 CA du CGI constituait une aide d'État.

### 3. Compatibilité et récupération de l'aide illégale

L'examen de la compatibilité de l'aide avec le marché commun a requis de la Commission une analyse secteur par secteur. Les aides au secteur du transport aérien ont été considérées comme compatibles, mais uniquement dans les limites de l'application des lignes directrices concernant les aides d'État à finalité régionales de 1998, modifiées en 2000 <sup>(8)</sup> et des lignes directrices communautaires sur le financement des aéroports et les aides d'État au démarrage pour les compagnies aériennes au départ d'aéroport régionaux <sup>(9)</sup>. Quant aux aides au transport maritime — qui constitue sans aucun doute le secteur le plus favorisé — la Commission les a déclarées compatibles avec le marché commun uniquement dans la limite du niveau maximal autorisé dans les orientations communautaires sur les aides d'État au transport maritimes de 1997, puis de 2004 <sup>(10)</sup>. S'agissant du transport ferroviaire, la Commission a considéré, conformément à sa pratique, que les aides octroyées à ce secteur étaient compatibles en application de l'article 87, paragraphe 3, sous c), du traité, le remplacement du matériel roulant devant être facilité, afin de compenser la perte de la part de marché

<sup>(7)</sup> Voir arrêt du Tribunal du 29 septembre 2000, CETM/Commission (T-55/99, Rec. p. II-3207, point 39) et la communication de la Commission sur l'application des règles relatives aux aides d'État aux mesures relevant de la fiscalité directe des entreprises (JOCE C 384 du 10 décembre 1998, p. 3).

<sup>(8)</sup> JO C 74 du 10 mars 1998, p. 9 et JO C 258 du 9 septembre 2000, p. 5.

<sup>(9)</sup> JO C 312 du 9 décembre 2005, p. 1.

<sup>(10)</sup> Orientations communautaires sur les aides d'État au transport maritime (JO C205 du 5 juillet 1997, p. 5) et communication C (2004) 43 de la Commission — Orientations communautaires sur les aides d'État au transport maritime (JO C 13 du 17 janvier 2004, p. 3).

de ce mode de transport moins nocif à l'environnement que les autres. Quant aux aides octroyées au secteur industriel — bénéficiaire résiduel des mesures en cause — la Commission a estimé qu'elles sont compatibles avec le marché commun dans les limites des conditions prescrites par les lignes directrices à finalité régionale précitées.

L'examen sectoriel des bénéficiaires finals des aides octroyées en application de l'article 39 CA du CGI ne dispensait toutefois pas la Commission de s'interroger sur la compatibilité des aides octroyées au secteur financier en tant que bénéficiaire direct de l'aide. Rappelons en effet que les membres des GIE — principalement des institutions financières — étaient bénéficiaires d'une partie de l'avantage fiscal global. À l'égard de ce secteur, la Commission a constaté que l'ensemble des dérogations sectorielles précédemment invoquées étaient dépourvues de pertinence. Elle a en revanche considéré que les mesures jugées compatibles en application des encadrements sectoriels ou régionaux le seraient non seulement à l'égard des bénéficiaires finals — utilisateurs des biens concernés — mais également à l'égard des membres des GIE concernés. En effet, en l'espèce, le bon sens commandait de considérer l'opération de financement dans sa globalité — l'intermédiation du GIE étant inhérente à l'opération — et, ce faisant, de ne pas traiter différemment les utilisateurs des biens et les établissements bancaires impliqués.

S'agissant enfin de la récupération des aides octroyées illégalement et incompatibles avec le marché commun, la Commission a estimé que seules celles octroyées en vertu d'un acte juridiquement contraignant des autorités françaises pris postérieurement à la publication de la décision d'ouverture de la procédure formelle d'examen devaient faire l'objet d'une récupération.

Il convient de relever le caractère tout à fait exceptionnel de cette limitation dans le temps de la récupération des aides. Rappelons, à cet égard, qu'il incombe en principe à la Commission de récupérer toute aide illégale et incompatible avec le marché commun. Hormis les cas d'application du délai de prescription de 10 ans prévu par le règlement de procédure, seule la violation par la Commission d'un principe général de droit communautaire peut justifier qu'il soit dérogé à la récupération<sup>(11)</sup>. Cette exception au principe de récupération devant être interprétée strictement, seules des circonstances exceptionnelles peuvent justifier un tel renoncement.

<sup>(11)</sup> Article 14, paragraphe 1, du règlement (CE) n° 659/1999, du Conseil du 22 mars 1999, portant modalités d'application de l'article 93 du traité [devenu article 88 du traité] (JO L 83 du 27 mars 1999, p. 1).

Dans la présente affaire, une combinaison de circonstances dont le caractère exceptionnel ne saurait être contesté a toutefois conduit la Commission à reconnaître que le principe de sécurité juridique faisait obstacle à la récupération intégrale des aides illégales et incompatibles<sup>(12)</sup>. Premièrement, la Commission a relevé que la France l'avait informé, en 1998, de l'existence du mécanisme fiscal en cause. Deuxièmement, dans le cadre de l'instruction de deux plaintes, la Commission avait interrogé les autorités françaises sur le mode de financement de certains navires. Or, dans le cadre de leurs réponses, les autorités françaises avait exposé de manière précise le régime fiscal en cause sans que la Commission ne décide d'approfondir son instruction. Enfin, dans une précédente décision, la Commission avait considéré que le régime fiscal antérieur à celui en cause dans la présente affaire — lequel était toutefois substantiellement différent — ne constituait pas une aide d'État au sens de l'article 87, paragraphe 1, CE. Or, il ne pouvait être exclu que le manque de clarté de la Commission concernant certains aspects de cette décision ait pu induire en erreur les bénéficiaires du régime sous examen.

Il importe de souligner qu'aucune des circonstances susmentionnées, prise isolément, n'aurait permis de caractériser une méconnaissance par la Commission du principe de sécurité juridique. Tel est particulièrement le cas s'agissant de la première de ces circonstances. En effet, il ne saurait être considéré qu'une simple lettre d'information d'un État membre à la Commission permette à celui-ci de contourner l'obligation de notification lui incombant dès lors qu'il nourrit des doutes quant à la qualification d'une mesure comme aide. Un tel procédé reviendrait en effet à priver le mécanisme de contrôle des aides d'État — dont l'obligation de notification constitue la pierre angulaire — de tout effet utile, ainsi qu'à méconnaître l'obligation générale de coopération vis-à-vis de l'action de la Commission qui incombe aux États membres en vertu de l'article 10 du traité.

<sup>(12)</sup> Selon la jurisprudence, l'exigence fondamentale de sécurité juridique vise à garantir la prévisibilité des situations et des relations juridiques relevant du droit communautaire et, partant, s'oppose à ce que la Commission puisse retarder indéfiniment l'exercice de ses pouvoirs (voir arrêt de la Cour du 24 septembre 2002, Falck et Acciaierie di Bolzano/Commission, C-74/00 P et C-75/00 P, Rec. 2002, p. I-7869, point 140). Ce principe se distingue du principe de confiance légitime qui suppose que la Commission ait fourni des assurances précises, inconditionnelles et concordantes de nature à faire naître des espérances fondées de l'État membre et/ou des bénéficiaires du régime en cause quant à sa régularité.

Cette limitation dans le temps de la récupération des aides illégales et incompatibles avec le marché commun n'exonère toutefois pas la France de son obligation de modifier le régime fiscal de financement des biens loués par des GIE afin de le rendre compatible avec les règles du traité en matière d'aide d'État.

## Premier cas d'application du nouvel encadrement communautaire des aides d'Etat à la recherche, au développement et à l'innovation: l'aide de l'Agence française de l'innovation industrielle au programme NeoVal <sup>(1)</sup>

*Isabelle NEALE-BESSON et Jean-Charles DJELALIAN*

La Commission européenne a adopté le 22 novembre 2006 un nouvel encadrement communautaire des aides d'Etat à la recherche, au développement et à l'innovation (l'encadrement R&D&I) <sup>(2)</sup>. Cet encadrement est entré en vigueur le 1<sup>er</sup> janvier 2007 et il est applicable à tous les projets d'aide notifiés sur lesquels la Commission est appelée à statuer après cette date.

Les autorités françaises ont notifié le projet d'aide de l'Agence de l'innovation industrielle au programme mobilisateur pour l'innovation industrielle « NeoVal » le 11 octobre 2006. L'aide est attribuée dans le cadre du régime de soutien de l'Agence de l'innovation industrielle, approuvé par la Commission par décision du 19 juillet 2006 <sup>(3)</sup>. Le programme de R&D NeoVal vise le développement d'une nouvelle génération de métro, transposant la technologie routière au monde ferroviaire et combinant plusieurs autres fonctions innovantes telles que la modularité de la composition de la rame, jusqu'à une configuration d'un véhicule à une seule voiture, et l'alimentation électrique du véhicule avec stockage de l'énergie à bord et autonomie en énergie entre stations. Il associe la filiale de Siemens nommée Siemens Transportation Systems (STS) et l'entreprise LOHR Industrie. Le coût global du programme s'élève à 61 millions d'EUR sur six ans. Le soutien proposé par l'Agence française de l'innovation industrielle prend la forme de 11 millions d'EUR de subventions et de 15 millions d'EUR d'avances remboursables.

L'encadrement R&D&I distingue deux niveaux d'analyse de la compatibilité pour les projets de R&D. Les sections 5.1, 6 et 8 décrivent les conditions formelles de compatibilité des projets de R&D. Ils correspondent au premier niveau d'analyse. La section 7.1 indique que les aides aux projets de R&D, d'un montant supérieur à un certain seuil

qui dépend de la nature des activités menées <sup>(4)</sup>, doivent faire l'objet d'un examen approfondi par la Commission suivant les éléments positifs et négatifs décrits respectivement aux sections 7.3 et 7.4 de l'encadrement R&D&I. Ceux-ci correspondent au second niveau d'analyse. Dans le cadre de cet examen approfondi, la Commission doit s'assurer que les effets positifs de l'aide dépassent les distorsions de concurrence que l'aide génère. Si cet exercice de mise en balance n'est pas à proprement parler nouveau dans la pratique de la Commission, la méthode employée diffère radicalement. D'un côté, la Commission doit examiner si l'aide remédie à une défaillance du marché clairement délimitée, si elle est un moyen d'action adapté et si elle est nécessaire et proportionnée. De l'autre, elle doit analyser les distorsions de concurrence et des échanges sur les marchés de produits concernés par l'aide.

Dans le cas d'espèce, la Commission a vérifié que l'aide remplissait les conditions formelles définies dans les sections 5.1, 6 et 8 de l'encadrement R&D&I notamment en termes de catégories de recherche, de coûts éligibles et d'intensité d'aide (premier niveau d'analyse). De plus, la Commission s'est livrée à un examen approfondi de l'aide attribuée à STS dans la mesure où elle vise principalement des activités de développement expérimental et dépasse le seuil de 7,5 millions d'EUR défini par le nouvel encadrement. L'aide à LOHR étant inférieure à 7,5 millions d'EUR, celle-ci n'était soumise qu'au premier niveau d'analyse. A l'issue de l'examen approfondi de l'aide à STS, la Commission a estimé que les effets positifs l'emportaient sur les effets négatifs et donc que le projet d'aide pouvait bénéficier des dispositions de l'article 87, paragraphe 3, sous c) du traité CE, en application des dispositions de l'encadrement R&D&I.

<sup>(1)</sup> Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leurs auteurs.

<sup>(2)</sup> JO C 323 du 30/12/2006, p. 1.

<sup>(3)</sup> Lettre SG(2006)D/204076 du 20/07/2006 ; JO C 218 du 09/09/2006, p. 9.

<sup>(4)</sup> Si le projet consiste à titre principal en de la recherche fondamentale, le seuil s'élève à de 20 millions d'euros par entreprise et par projet; si le projet consiste à titre principal en de la recherche industrielle, le seuil s'élève à 10 millions d'euros par entreprise et par projet; pour tous les autres projets, le seuil s'élève à 7,5 millions d'euros par entreprise et par projet.



Les questions méthodologiques soulevées dans le cadre de cette première application de l'encadrement R&D&I ont porté principalement sur l'appréciation de l'effet incitatif et du caractère proportionné de l'aide ainsi que sur l'analyse des distorsions de concurrence. L'approche suivie par la Commission pour l'examen de ces questions est développée ci-après.

## 1. Effet incitatif de l'aide

Les aides d'Etat à la R&D doivent avoir un effet d'incitation, c'est-à-dire déclencher chez les bénéficiaires un changement de comportement les amenant à intensifier leurs activités de R&D. C'est la condition la plus importante prise en considération dans l'examen des aides d'Etat à la R&D&I.

### Premier niveau d'analyse

La date de démarrage des activités est le premier élément à considérer. La Commission considère à cet égard que l'aide est dépourvue d'effet d'incitation lorsque l'activité de R&D&I a déjà démarré avant que le bénéficiaire n'ait demandé l'aide aux autorités nationales.

De plus, l'Etat membre est tenu de fournir une évaluation *ex ante* de l'augmentation de l'activité de R&D&I du bénéficiaire, sur la base d'une analyse reposant sur une comparaison de la situation avec et sans octroi d'aide. Différents indicateurs peuvent illustrer l'effet d'incitation: l'augmentation de la taille, de la portée ou du rythme du projet mais également l'augmentation des dépenses totales affectées à la R&D&I par le bénéficiaire. Si un effet significatif peut être démontré sur au moins un de ces éléments, la Commission considère, *prima facie*, que l'aide a un effet d'incitation.

Dans le cas d'espèce, outre la date de démarrage du programme, les autorités françaises font valoir qu'en l'absence d'aide, du fait de l'important niveau d'investissements et des nombreuses incertitudes technologiques liés au programme, dans un secteur caractérisé par une durée de retour sur investissement très longue et privilégiant le développement des innovations au gré des opportunités de marché, les bénéficiaires conduiraient un projet de R&D alternatif intitulé APM03, de portée plus réduite et étalé sur une période de temps plus longue. Ce projet n'inclut pas les travaux nécessaires pour le développement de plusieurs caractéristiques du NeoVal, notamment les fonctions de stockage de l'énergie par batteries et super-condensateurs. De plus, STS augmentera, de manière significative, ses effectifs et ses dépenses totales de R&D.

## Second niveau d'analyse

Dans le cadre de l'examen approfondi d'une mesure individuelle, la Commission peut considérer que les indicateurs précédents sont insuffisants et demander les renseignements supplémentaires détaillés dans la section 7.3.3 du nouvel encadrement. La question posée par la Commission, dans ce cadre, est de savoir si l'existence d'un effet incitatif de l'aide, telle qu'attestée, *prima facie*, par les indicateurs précédents est confirmée par l'analyse des déterminants de l'investissement de R&D. Cet examen se fonde sur une analyse contradictoire de la situation avec et sans aide. En d'autres termes, la Commission doit vérifier si STS n'aurait pas entrepris le projet NeoVal même en l'absence d'aide.

A cet égard, trois éléments ont été essentiels dans l'appréciation de la Commission: le calendrier de trésorerie, la rentabilité et le niveau de risque convergent pour démontrer l'existence d'un effet incitatif de l'aide.

En premier lieu, l'examen du montant des investissements et le calendrier des flux de trésorerie indique que l'effort financier requis par le programme NeoVal est significativement plus élevé par rapport au projet APM03 et aussi plus concentré dans le temps. De plus, l'analyse du processus de décision interne à STS révèle l'existence d'une contrainte budgétaire de court terme pesant sur ses choix de R&D <sup>(5)</sup>. Ainsi, STS est amené à sélectionner les projets de R&D qui conjuguent rentabilité à moyen terme et impact acceptable sur les indicateurs financiers de court terme. La Commission a tenu compte de cet élément dans son appréciation dans la mesure où l'existence de cette contrainte est avérée par des documents internes et des déclarations publiques de l'entreprise. Différents compte-rendu de réunions du directoire supervisant les travaux de STS attestent en effet que STS aurait choisi de mener le projet APM03 de portée plus réduite en absence d'aide.

En deuxième lieu, la Commission a calculé la rentabilité du programme NeoVal sans aide et l'a comparée avec celle du projet APM03, dans des scénarios raisonnables de succès commercial. Ces calculs indiquent que le programme NeoVal, même sans aide, bénéficie de meilleures perspectives de rentabilité que le projet APM03. En effet, la valeur nette actualisée ainsi que le taux de rentabilité interne du programme NeoVal, même sans aide, sont supérieurs aux indicateurs du projet APM03. Toutefois, ces calculs de rentabilité doivent être considérés avec précaution. En effet, si,

<sup>(5)</sup> La marge opérationnelle de la division dont STS dépend devait augmenter à hauteur de 5% du chiffre d'affaires avant le 31 mars 2007 alors qu'au 30 septembre 2006, celle-ci s'élevait à 1,8% du chiffre d'affaires.



dans ses plans d'affaires, STS a tenu compte de la meilleure pénétration commerciale du projet NeoVal par rapport au projet APM03, STS n'a pas intégré les différences de niveaux de risques technologiques du programme NeoVal et du projet APM03. Le taux d'actualisation utilisé pour les calculs de rentabilité est identique pour les deux projets de R&D et n'inclut pas de prime de risque pour le programme de recherche le plus innovant. Par conséquent, NeoVal pourrait se révéler moins attractif que l'APM03 si, en dépit de perspectives de rentabilité supérieures, sa probabilité de succès technologique est nettement inférieure à celle de l'APM03.

En troisième lieu, en l'absence d'une mesure des risques associés à chacun des projets fournie par l'Etat membre ou le bénéficiaire, la Commission a estimé, à partir des plans d'affaires de STS, l'écart critique entre les probabilités de succès technologique au-delà duquel NeoVal devient moins attractif que l'APM03. En effet, au vu de la meilleure rentabilité du programme NeoVal par rapport au projet APM03, il était essentiel que la Commission apprécie si les risques supplémentaires du programme NeoVal par rapport aux risques du projet APM03 étaient de proportion à inverser l'écart de rentabilité entre les deux projets de R&D. La Commission a utilisé les éléments qualitatifs à sa disposition concernant les risques spécifiques encourus par le programme NeoVal par rapport au projet APM03 et elle a conclu que ceux-ci étaient de proportion à ce que NeoVal apparaisse *ex ante* moins attractif que l'APM03.

Tout d'abord, les experts indépendants mandatés par l'Agence de l'innovation industrielle ont identifié l'existence d'importantes incertitudes technologiques sur les fonctions spécifiques du programme NeoVal, en particulier en ce qui concerne la gestion et le stockage de l'énergie embarquée. Ces avis ont été confirmés par l'expertise interne de la Commission.

Les autorités françaises ont également fait valoir que les risques liés à des grands programmes de R&D comme NeoVal sont d'autant plus substantiels que le volume des travaux est important. En outre, plus le produit visé par le programme de R&D comprend de fonctionnalités, plus ces risques s'intensifient et les probabilités d'échec se multiplient.

Enfin, la Commission a apprécié la différence de probabilité de succès entre le programme NeoVal et le projet alternatif APM03 en tenant compte des solutions de repli en cas d'échec technologique. Dans l'hypothèse où le projet APM03 constituerait un scénario de repli pour STS en cas d'échec technologique de NeoVal, le taux de risque encouru par

l'entreprise serait diminué. A cet égard, la Commission a retenu que les objectifs du programme NeoVal étaient beaucoup plus ambitieux que ceux du projet APM03. Le produit NeoVal étant conçu comme un système intégré, ses objectifs initiaux régissent les principes de conception du système complet et de ses sous-ensembles et ont, par conséquent, un impact sur la structure et la complexité de l'ensemble du programme. Du fait de l'intégration des différentes fonctions au sein d'un même système, l'échec d'une fonctionnalité avancée a des répercussions sur l'ensemble des fonctionnalités. Des travaux lourds de re-conception sur la quasi-totalité du système seraient nécessaires pour que STS puisse se replier sur le projet APM03. La Commission en a conclu que l'APM03 ne constituait pas une solution de repli et que, de ce fait, les risques technologiques du programme NeoVal n'étaient pas atténués.

## 2. Proportionnalité de l'aide

Conformément au point 7.3.4 de l'encadrement R&D&I, l'analyse de la proportionnalité de l'aide fait partie de l'examen approfondi d'une aide individuelle. Indépendamment des intensités maximales précisées par la section 5.1 de l'encadrement R&D&I, il s'agit d'apprécier si l'aide est limitée au montant minimum. En l'absence d'indications précises du nouvel encadrement en la matière, la Commission a examiné trois éléments et a conclu que l'aide était proportionnée: l'assiette des coûts éligibles à prendre en compte, les instruments d'aide utilisés et la question d'un éventuel effet d'aubaine pour le bénéficiaire.

Tout d'abord, dans la mesure où comme il a été démontré plus haut que STS mènerait un projet de R&D de portée réduite en l'absence d'aide, la Commission s'est interrogée sur la pertinence de considérer l'ensemble des coûts de R&D du programme NeoVal, plutôt que seuls les coûts additionnels de NeoVal par rapport au projet alternatif. A cet égard, la Commission a retenu que le programme NeoVal n'est pas simplement conçu comme le projet APM03 auquel sont ajoutés des options supplémentaires. Dans la mesure où le produit NeoVal constitue un système intégré, l'introduction d'une nouvelle fonction ou le développement d'une fonction à un stade plus avancé a des répercussions profondes sur les principes de conception du système complet et de ses sous-ensembles. Ainsi, l'ensemble des lots du programme de R&D sont affectés et la Commission a estimé que l'ensemble des coûts éligibles du programme devaient être considérés.

De plus, la Commission a pris note du choix des autorités françaises de privilégier l'instrument des avances remboursables, plutôt que des subven-

tions, pour les activités de R&D les plus proches du marché. A cet égard, elle estime que les avances remboursables se révèlent, par construction, proportionnées à la distorsion de concurrence induite. En effet, dans un scénario de succès commercial raisonnable, examiné par ailleurs par la Commission, le bénéficiaire rembourse la totalité de l'avance, y compris les intérêts d'actualisation et conserve *in fine* une subvention uniquement pour ses travaux de recherche industrielle, pour lesquels la diffusion des résultats du programme est la plus importante. Si le succès commercial du produit issu du programme de R&D dépasse l'issue favorable définie sur base d'une hypothèse prudente et raisonnable, le bénéficiaire verse à l'Etat membre un intéressement en complément. En revanche, si le programme de R&D ne débouche pas sur un succès commercial, soit en raison d'un échec technologique, soit pour des raisons commerciales, le bénéficiaire ne rembourse qu'une partie de l'avance, proportionnée au succès partiel. Dans ce cas, les distorsions de concurrence sont aussi plus limitées.

Enfin, la Commission a constaté que l'aide ne génère pas d'effet d'aubaine pour STS. NeoVal implique des coûts nets additionnels pour le bénéficiaire en comparaison avec le projet alternatif. En outre, l'effort financier requis par le programme NeoVal sur les trois premières années est considérablement plus élevé que l'effort qui aurait été consenti pour le projet alternatif APM03.

### 3. Distorsion de la concurrence et des échanges

Dans son examen approfondi, la Commission analyse également les effets négatifs de l'aide, à savoir si celle-ci peut provoquer d'importantes distorsions de concurrence.

La première étape de l'analyse de la Commission a visé l'identification des marchés affectés par le programme.

En premier lieu, la Commission a déterminé quels étaient les produits du programme de R&D. A cet égard, elle a conclu que, dans l'analyse concurrentielle, il y a lieu de considérer le système NeoVal comme un produit unique global. En effet, elle a estimé que la réutilisation par STS des résultats des travaux dans d'autres produits et/ou pour d'autres secteurs industriels ne pourrait être envisagée que pour deux sous-systèmes. Le premier sous-système n'est actuellement pas commercialisé par STS en lots séparés. La base de ce sous-système a en outre été développée sur les fonds propres de STS. Le second sous-système nécessiterait des modifica-

tions très importantes et coûteuses pour pouvoir être ré-utilisé dans un contexte autre (automobile ou routier au sens large) que celui du NeoVal.

En deuxième lieu, la Commission a délimité les marchés de produits affectés par l'aide. Partant du marché des systèmes de transport urbain en site propre, elle n'a retenu, pour des questions de capacités, que le segment de marché des métros légers à mi-lourds. Elle a exclu de ce segment les tramways et les bus en site propre pour des questions de différences de capacités et de coûts de réalisation. De plus, suivant en cela sa décision précédente concernant l'acquisition partielle par Siemens des activités transport du groupe Lagardère <sup>(6)</sup>, la Commission a estimé que le marché des systèmes de métro automatiques (AGT) constituait un segment spécifique dans la mesure où ces systèmes nécessitent de nombreux équipements supplémentaires et, de ce fait, présentent un coût d'acquisition plus élevé que les systèmes manuels. En outre, la Commission a estimé que NeoVal, pour des questions d'interopérabilité et du fait de son concept global, était exclu du segment de marché s'inscrivant dans le cadre d'une modernisation, transformation ou extension de réseau existant ou encore des marchés attribués par lots distincts.

S'agissant de la distinction entre les systèmes automatiques de métro sur «pneu» et les systèmes automatiques de métro sur «fer», la Commission s'est intéressée aux caractéristiques techniques des deux produits. Une analyse avantages et inconvénients des deux types de systèmes indique qu'il existe une zone de chevauchement entre les segments de marché uniquement «fer» ou «pneu» dans laquelle les deux systèmes sont en concurrence directe. Si certaines caractéristiques techniques imposent de fait les systèmes «pneu» au détriment des systèmes «fer» sur des espaces géographiques particuliers (faible substituabilité des systèmes «pneu» par les systèmes «fer»), la Commission est d'avis que peu d'obstacles techniques semblent véritablement s'opposer à une plus large pénétration du «pneu» sur l'ensemble du segment des marchés clés en main (substituabilité plus importante des systèmes «fer» par les systèmes «pneu»). Cette conclusion rejoint la position de la Commission dans plusieurs décisions relatives à des opérations de concentration dans le secteur <sup>(7)</sup> dans lesquelles la distinction «fer» / «pneu» n'a jamais été considérée comme pertinente.

<sup>(6)</sup> Décision du 08/02/1996 sur le cas M.685 Siemens/Lagardère.

<sup>(7)</sup> Décision du 08/02/1996 concernant le cas M.685 (Siemens/Lagardère), décision du 18/09/2000 concernant le cas M.2069 (Alstom/FIAT Ferroviaria) et décision du 03/04/2001 concernant le cas M. 2139 (Bombardier/ADtranz).

En dernier lieu, la Commission s'est attachée à déterminer la dimension géographique du marché affecté et a conclu qu'il s'agissait d'un marché mondial. Tout d'abord, le marché des transports automatiques «pneu» et «fer» est actuellement marqué par le développement de grands contrats à l'échelle mondiale et l'apparition de nouveaux acteurs mondiaux à bas coût. En outre, l'analyse des mises en service réalisées sur la période 2001-2005 et prévues sur la période 2006-2010 montre la présence des constructeurs européens et de leur concurrent canadien Bombardier au niveau européen et mondial. De plus, si les systèmes de transport public urbain guidés sont soumis aux réglementations nationales ou locales des Etats membres de l'Union européenne, les normes du domaine sont unifiées au niveau européen, voire mondial, malgré quelques exceptions notables (comportement au feu). En outre, le NeoVal est développé suivant un cadre multi-référentiel.

La seconde étape de l'analyse de la Commission a porté sur les effets négatifs éventuels de l'aide sur les segments de marché identifiés. Conformément au point 7.4 de l'encadrement R&D&I, les aides à la R&D&I peuvent fausser la concurrence sur les marchés de produit de trois manières distinctes:

1. elles peuvent fausser les incitants dynamiques des opérateurs à investir ;
2. elles peuvent créer ou maintenir des positions de pouvoir de marché ;
3. elles peuvent perpétuer une structure de marché inefficace.

La Commission a considéré que l'aide au programme de R&D NeoVal n'était pas de nature à perturber le fonctionnement concurrentiel des marchés visés dans une proportion contraire à l'intérêt commun pour les raisons suivantes:

- L'aide à STS, malgré un montant élevé (23 MEUR sur six ans), doit être relativisée au regard du budget annuel de R&D de Siemens et au volume des dépenses de R&D pour l'ensemble du secteur estimé entre 81 et 142 millions d'EUR.
- Les activités de développement expérimental qui sont les plus proches du marché, sont soutenues avec des avances remboursables avec intérêt en cas de succès et donnent lieu à un intéressement en cas de succès supérieur.
- Le programme de R&D a été sélectionné selon une procédure ouverte, suivant l'examen du dossier et l'audition des partenaires du programme par trois experts indépendants.
- Les concurrents de STS sont enfermés dans une trajectoire de R&D particulière liées à leurs

investissements passés, une part importante du marché global étant liée aux bases installées du fait des extensions de lignes existantes et les systèmes développés ayant des durées de vie très longues (trentaine d'année). Ceci rend moins vraisemblable que ces concurrents arrêteront leurs efforts de R&D sur les segments de marché qu'ils ont investis.

- L'aide accordée vise un marché en forte croissance, les hypothèses de croissance variant entre [10-20%] par an <sup>(8)</sup> et 4,4% par an <sup>(9)</sup>. Dans ce marché en forte croissance, il est raisonnable de considérer que les autres acteurs n'arrêteront ou ne diminueront pas leurs efforts de R&D. En particulier, on peut observer que des concurrents de STS sont très actifs en matière de R&D: deux entreprises ont encore récemment introduit des nouveaux systèmes de métro automatisé sur pneu.
- Si l'on considère l'ensemble du segment des métros automatiques («pneu» et «fer», exprimé en km), sur la période 2001-2005, STS enregistre une part de marché de [0-10%]. Sur la période 2006-2010, sous réserve des systèmes en cours de sélection, cette part augmente à [5-25%]. STS vise, à l'issue du programme, une part de marché de [5-25%].
- Le marché global des systèmes de transports collectifs comporte de nombreux segments et variantes. Les segments de marché autres que les systèmes de métro clés en main «pneu» seront moins affectés. Sur le segment des métros clés en main «pneu», STS fait face à des concurrents forts.
- L'arrivée de nouveaux entrants (conglomérats coréens et entreprises chinoises) est avérée et ce, malgré l'existence d'importantes barrières à l'entrée.
- Le marché fonctionne largement sur base d'appels d'offres, ce qui tend à limiter le pouvoir de marché que chacun des opérateurs peut détenir. Le développement de grands contrats et l'augmentation des exigences des clients limitent le pouvoir de marché éventuel que pourrait acquérir une entreprise du secteur.

<sup>(8)</sup> Taux de croissance des mises en services en volume observé entre 2001-2005 et 2006-2010.

<sup>(9)</sup> Taux de croissance annuel moyen du PIB mondial estimé pour la période 2006-2010.

## Du nouveau dans le dossier des centres de coordination belges <sup>(1)</sup>

Jean-Marc HUEZ

Les centres de coordination établis en Belgique bénéficient depuis 1983 d'un régime fiscal dérogatoire au droit commun. Ces entreprises, qui appartiennent à des groupes multinationaux, fournissent un certain nombre de services dits accessoires <sup>(2)</sup> au bénéfice exclusif d'autres entreprises du groupe. Les activités les plus répandues sont la réalisation d'opérations de financement et la gestion de la trésorerie; certains centres sont d'ailleurs considérés comme «la banque» au sein du groupe. Pour bénéficier du régime dérogatoire, les centres doivent en outre être titulaires d'un agrément de 10 ans délivré par l'État belge. Le régime fiscal favorable dont bénéficient ces centres agréés est constitué de diverses exonérations (précompte immobilier, droit d'apport en cas d'augmentation de capital, précompte mobilier sur les revenus distribués). Leur bénéfice imposable à l'impôt des sociétés est également fortement réduit par l'utilisation d'une méthode de calcul alternative de type cost plus très favorable. Ce régime avait été autorisé par la Commission en 1984 et en 1987.

En décembre 1997, dans le cadre de l'adoption du *Code de conduite dans le domaine de la fiscalité des entreprises* visant à combattre la concurrence fiscale dommageable <sup>(3)</sup>, le Conseil et les États membres ont demandé à la Commission d'examiner — ou réexaminer — certains régimes fiscaux à la lumière des règles aides d'État. Le régime des centres de coordination figure au nombre de ces régimes.

Entamée en 1999, l'enquête aboutit le 17 février 2003 à une décision finale négative de la Commission. S'agissant d'une aide existante, la Commission ne requiert pas la récupération des aides accordées par le passé et autorise les bénéficiaires à profiter des avantages du régime jusqu'à la fin de leur agrément en cours. Elle interdit par contre, avec effet immédiat, l'octroi du bénéfice du régime de faveur à de nouveaux bénéficiaires ainsi que le

renouvellement pour les centres dont l'agrément de 10 ans viendrait à échéance après la date de la décision.

Forum 187, l'association regroupant les centres de coordination d'une part, les autorités belges d'autre part, introduisent contre cette décision des recours en annulation auprès de la Cour de Justice européenne. Les uns et les autres estiment que l'arrêt immédiat du régime causerait un dommage irréparable à certaines entreprises dont l'agrément échoit dans les mois qui suivent. Les centres estiment en outre que le régime n'est pas constitutif d'aides d'État <sup>(4)</sup>. Suite à ces recours, la Cour délivrera, le 26 juin 2003, une Ordonnance de suspension rendant inopérante — jusqu'à l'arrêt sur le fond — l'interdiction de renouveler les agréments venant à échéance. Notons encore que, parallèlement à ces recours, les autorités belges obtiennent, le 16 juillet 2003, une décision du Conseil à l'unanimité les autorisant à prolonger les effets du régime jusque fin 2005 pour toutes les entreprises dont l'agrément viendrait à échéance avant. Cette décision du Conseil fait, à son tour, l'objet d'un recours introduit par la Commission devant la Cour, qui l'annulera le 22 juin 2006 (Aff. C-399/03).

Dans un autre arrêt du 22 juin 2006 également, la Cour s'est prononcée sur les recours introduits par les centres de coordination et par les autorités belges (Affaires jointes C-182/03 et C-217/03).

Dans la suite de cet article, nous analyserons l'arrêt de la Cour et les raisons qui ont amené la Commission à étendre, le 21 avril 2007, la procédure formelle d'investigation entamée dans ce dossier des centres de coordination en février 2002.

### L'arrêt de la Cour du 22 février 2006

Quant au fond, la Cour confirme l'analyse de la Commission: le régime des centres de coordination est bien un régime d'aides et ces aides sont incompatibles avec le marché commun.

En revanche, elle annule la décision de la Commission du 17 février 2003 «*en ce qu'elle ne prévoit pas de mesures transitoires en ce qui concerne les centres de coordination dont la demande de renouvellement d'agrément était pendante à la date de notification de la décision attaquée ou dont*

<sup>(1)</sup> Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que l'auteur.

<sup>(2)</sup> Financement d'investissements, gestion de trésorerie, gestion informatique, gestion du personnel, recherche, etc.

<sup>(3)</sup> Il s'agit de mesures susceptibles d'influencer la localisation des investissements ou des revenus imposables des entreprises dans un état membre au détriment des recettes fiscales d'autres états membres.

<sup>(4)</sup> Voir Competition Policy Newsletter 2005, n° 1, p. 91.



*l'agrément expirait concomitamment ou à brève échéance après la notification de ladite décision.»* Elle précise: «[...]. À cet égard, l'expression «à brève échéance» est à comprendre en ce sens qu'elle vise une date tellement rapprochée de celle de la notification de la décision attaquée que les centres de coordination concernés ne disposaient pas du temps nécessaire pour s'adapter au changement de régime en cause.» La Cour reproche en fait à la Commission de ne pas avoir laissé à certains centres une période transitoire suffisante pour s'adapter au changement de régime. Ce faisant, la Commission a porté atteinte à la confiance légitime des centres concernés ainsi qu'au principe d'égalité. Une identification plus précise des centres concernés implique donc la détermination préalable de la période transitoire que la Commission aurait dû accorder à compter du 17 février 2003 pour que tous les centres disposent du temps nécessaire pour s'adapter au changement de régime. Selon la Commission, la Cour limite en tout cas la portée de l'annulation par rapport à ce qui avait été requis, c'est-à-dire l'annulation pure et simple de l'interdiction de renouveler les agréments.

### Quelle période transitoire?

Une partie de sa décision ayant été annulée, la Commission devait déterminer quelles suites elle devait donner à l'arrêt, si une nouvelle décision était nécessaire et, le cas échéant, quel devait être son contenu.

Un faisceau d'éléments concordants émanant des autorités belges ou de centres de coordination semblait indiquer qu'une période transitoire prenant fin le 31 décembre 2005 serait raisonnable aux yeux des uns et des autres. On notera notamment les engagements de démantèlement du régime des centres pris par la Belgique au sein du Conseil dans le cadre du Code de conduite (2003), la décision obtenue auprès du Conseil d'autoriser la prolongation du régime (2003), les estimations présentées à la Cour de la période nécessaire pour le démantèlement d'un centre (2003).

À la demande de la Commission, la Belgique a d'ailleurs confirmé qu'elle avait prolongé jusqu'au 31 décembre 2005 tous les centres dont l'agrément

était arrivé à échéance depuis le 17 février 2003. Le 22 juin 2006, date de l'arrêt, ces centres ne bénéficiaient donc plus, en principe, du régime interdit par la Commission et avaient pleinement profité de la prolongation accordée par la Belgique sous couvert de la suspension ordonnée le 26 juin 2003 par le Président de la Cour.

La Belgique fait toutefois une tout autre lecture de l'arrêt rendu par la Cour. Elle estime ainsi que le principe d'égalité qui fonde partiellement l'arrêt implique que tous les centres auraient dû recevoir la même période transitoire. Elle en conclut que la période transitoire adéquate doit être prolongée bien au-delà de 2005 jusqu'en 2010, et qu'elle doit s'appliquer non pas à certains centres mais à tous ceux dont l'agrément vient à échéance avant 2010.

### Une consultation plus large

Cette lecture de l'arrêt a amené la Belgique à adopter — en décembre 2006 — une loi qui permettrait le renouvellement jusque fin 2010 de tous les centres qui le demanderaient. Cette loi s'appliquerait notamment, avec effet rétroactif, aux centres dont l'agrément a déjà expiré. Elle n'a pas été notifiée à la Commission mais son entrée en vigueur est suspendue à une autorisation préalable par la Commission.

Devant ce constat, la Commission a estimé utile d'étendre la procédure formelle d'examen ouverte en février 2002. La décision a été adoptée le 21 mars 2007 <sup>(5)</sup>. La Commission y expose sa lecture actuelle de l'arrêt et les éléments connus dont elle estime devoir tenir compte pour définir la durée de la période raisonnable qu'elle aurait dû prévoir, à compter du 17 février 2003, pour que les centres dont l'agrément prenait fin peu après, puissent s'adapter au changement de régime. Elle exprime également ses doutes quant au caractère raisonnable d'une prolongation jusque fin 2010 et appelle l'État membre et les tiers intéressés à lui indiquer les éléments qui plaident, selon eux, en faveur d'une prolongation jusque fin 2010.

Sur la base des informations ainsi collectées, la Commission fixera probablement la durée de cette période adéquate, dans une nouvelle décision finale partielle.

<sup>(5)</sup> Voir IP/07/370 sur <http://europa.eu/rapid/setLanguage.do?language=fr>



## Increased transparency and efficiency in public service broadcasting. Recent cases in Spain and Germany <sup>(1)</sup>

*Pedro Dias and Alexandra Antoniadis*

### Introduction

Since the adoption of the Broadcasting Communication in 2001, the Commission followed a structured and consistent approach in dealing with numerous complaints lodged against the financing of public service broadcasters in Europe. It reviewed in particular the existing financing regimes and discussed with Member States measures to ensure full compliance with the EU State aid rules. The experience has been positive: Several Member States have either already changed or committed themselves to changing the financing rules for public service broadcasters to implement fundamental principles of transparency and proportionality <sup>(2)</sup>.

The present article reviews the two most recent decisions in this field which are examples of increased efficiency and transparency in public service broadcasting.

### Financing of workforce reduction measures of RTVE

In the context of the review of the previous financing regime in favour of RTVE, the Spanish Government had given a series of commitments, including the adoption of safeguards against overcompensation and possible non-market conform behaviour of RTVE <sup>(3)</sup>. In particular, in the future RTVE was to be financed through annual contributions limited to the net public service costs as determined based on separate accounts. The Spanish Government also announced the establishment of a new corporation under private law. Due to its new legal status, RTVE would no longer benefit from the unlimited State guarantee and the tax exemption which were regarded by the Commission as incompatible aid.

<sup>(1)</sup> 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.

<sup>(2)</sup> See in particular the Commission decisions concerning the financing of the Italian, French and Spanish public service broadcasters in April 2005 (see IP/05/458) as well as the Commission decision regarding the financing of the Portuguese public service broadcaster in March 2006 (see IP/06/349).

<sup>(3)</sup> See State aid case E 8/2005, Commission decision of 20 April 2005, published in the original language on: [http://ec.europa.eu/competition/state\\_aid/register/index.html](http://ec.europa.eu/competition/state_aid/register/index.html)

The annual contribution granted to RTVE was made dependent upon the adoption of measures to increase efficiency. The Spanish authorities commissioned a study on the financial situation of RTVE which revealed that the — at the time — existing workforce exceeded what was necessary for the fulfilment of the public service tasks. Agreement could be reached between the Spanish authorities, RTVE and trade unions on a significant reduction of the workforce through early retirement measures. The Spanish State decided to finance these measures, thus alleviating RTVE of costs it would normally have to bear. The savings in terms of labour costs and consequently public service costs of RTVE exceeded the financial burden of the Spanish State due to the financing of the workforce reduction measures. The Commission approved the aid under Article 86 (2) EC Treaty, also considering the overall reduction of State aid to the public service broadcaster <sup>(4)</sup>.

The reform of the financing regime for RTVE is a good example of the positive impact of State aid investigations into the financing of public service broadcasters. The Commission's investigation led to an overhaul of the previous financing system and triggered a system of transparent financing based on annual contributions to cover the estimated public service needs of RTVE. At the same time, RTVE adopted measures to limit the costs (here labour-related costs) to what is really necessary for the fulfilment of its tasks.

### General financing regime of ARD and ZDF

The investigation concerning the financing of ARD and ZDF was triggered by several complaints bringing forward a series of allegations, ranging from the lack of a clearly defined public service remit, the lack of transparency (i.e. non compliance with the requirement laid down in the Transparency Directive) to alleged overcompensation and cross-subsidisation into what were regarded as purely commercial activities.

In March 2005, DG COMP informed the German Government of its preliminary view that

<sup>(4)</sup> State aid No NN 8/2007; the Commission decision of 7<sup>th</sup> March 2007 can be found on the Internet at: [http://ec.europa.eu/competition/state\\_aid/register/index.html](http://ec.europa.eu/competition/state_aid/register/index.html), see also IP/07/291.

the financing regime was no longer compatible with the EU State aid rules. This so-called Article 17 letter was followed by a further exchange of information and then in 2006 by concrete and constructive discussions between the Commission services and the German authorities. In the end, Germany submitted proposals for measures to be implemented within the next two years. The Commission closed the investigation after having assessed these commitments and concluded that they ensured a financing of public service broadcasters in full respect of the EU State aid rules <sup>(5)</sup>.

The commitments concern first of all safeguards that have already been implemented in a number of other Member States, such as a clear separation of accounts for public service and other (purely commercial) activities, a limitation of the available public funding to the net public service costs of public service broadcasters subject to regular *ex post* control and the respect of market principles for purely commercial activities. The cost separation will be achieved by the fact that commercial activities will be carried out by commercial subsidiaries of public service broadcasters. The relationship between the public service broadcasters and these subsidiaries must be at arm's length. Also, all investments of public service broadcasters into other undertakings must respect the MEIP. These principles will be subject to adequate *ex post* control. It is thus ensured that purely commercial activities do not unduly benefit from public funding and that the public funding will not be unnecessarily increased by non market conform behaviour.

Apart from issues similar to those in other cases, the German case also raised new issues in particular as regards the financing of new media activities and sports rights.

More particularly as regards the financing of new media activities, the Commission considered that a mere authorisation given to public service broadcasters to offer new media services without the exact scope of these activities being sufficiently clear would neither satisfy the requirement for a clear definition of the public service mission nor the requirement for a proper entrustment. The Commission considered that the current definition of programme-related and programme-accompanying new media services could not be regarded as sufficient in order to demonstrate to what extent these new media activities would serve

the same democratic, social and cultural needs of society. In its commitments, Germany proposed to further clarify the public service remit for new media activities through the establishment of additional criteria, the enumeration of functions that public service broadcasters need to fulfil as well as an illustrative list of activities which do (not) normally fall within the scope of the remit. In particular the criterion requiring new media offers to make a contribution to editorial competition would require an analysis of the contribution of new offers to opinion shaping while also taking into account already existing offers on the market. Also, private operators will have the opportunity to give their comments on the expected market impact of the envisaged new offers. In the end, the Länder endorse proposals by the public service broadcasters for new media activities and formally entrust public service broadcasters with these tasks.

The acceptance of these commitments by the Commission was based on the following general considerations.

The Commission confirmed that the public service remit can encompass more than traditional television broadcasting and can also include new media activities. Also, the Commission recognised that the mere distribution of the same content over new platforms does not affect the public service character of these programmes. On the other hand, the Commission pointed out that the principle of technological neutrality does not mean that any service offered over new platforms would automatically constitute a service of general economic interest. Therefore, it was necessary that new services were subject to a prior evaluation of the particular public service character — or in the wording of the Broadcasting Communication: that they addressed the same democratic, social and cultural needs of society. The findings of that evaluation would then need to be reflected in a formal act of entrustment. In this respect, it was stressed that it cannot be left to the public service broadcasters alone (including their internal control bodies) to determine the scope of their activities. Proposals elaborated and developed by the public service broadcaster would need to be endorsed by public authorities. On the other hand, the Commission also clarified that the need for a clearly defined and a properly entrusted public service remit did not put into question fundamental principles of independence from the State and the resulting programme autonomy of public service broadcasters.

These considerations are also valid for similar cases in other Member States. It should neverthe-

<sup>(5)</sup> State aid No E 3/2005; the Commission decision of 24<sup>th</sup> April 2007 published on the internet: [http://ec.europa.eu/competition/state\\_aid/register/ii/by\\_case\\_nr\\_e2005\\_000.html#3](http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_e2005_000.html#3); see also IP/07/543 and MEMO/07/150.

less be stressed that the Commission will continue to assess the financing regime in each Member State on its own merit.

The complaints also raised questions about the permissible scope of sports rights acquired with public money. The Commission came to the conclusion that in the present case, there were no indications that public service broadcasters showed “too much sports” on public TV channels or that they emptied the market for, in particular, premium sports rights. Even though public service broadcasters had acquired a significant proportion of sports rights of particular appeal to the German audience, this did not prevent other operators from acquiring rights for equally attractive sports events. Also, the Commission considered that public service broadcasters were not precluded from acquiring exclusive rights. Even though they were — due to the State funding — less dependent upon exclusivity for financial reasons, exclusivity could still be regarded as necessary for the fulfilment of their remit. On the other hand, the Commission considered that the financing of sports rights which remained unused by public

service broadcasters would not be permissible under Article 86 (2) EC Treaty. Consequently, such unused rights would normally have to be offered to third parties for sub-licensing. According to the commitments given by Germany, public service broadcasters will have to make the scope and rules for sublicensing transparent so as to allow other operators to plan their activities.

The requirements as specified in this decision are essentially about introducing rules of good governance: transparency in the definition, proportionality in the funding and accountability of public service broadcasters, both as regards the fulfilment of their public service tasks and the use of public money. Within the agreed parameters and the overall requirement for transparency, the decisions about media policy and its implementation are left to the stakeholders at national level. They have now the opportunity to design a system which reconciles the requirements for public service broadcasting with fair competition between public and private operators in the new media landscape.

## Commission approves aid to an innovative regional equity platform for SMEs in the UK's West Midlands to overcome market failure in risk capital <sup>(1)</sup>

*Radoš HORÁČEK and Zsuzsanna LANTOS*

### Background

On 18 August 2006 the Commission adopted new Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises <sup>(2)</sup> (hereinafter “the Risk Capital Guidelines” or “RCG”), which provide for a lighter assessment of risk capital measures if the qualitative criteria of its section 4 are fulfilled, and for a detailed economic assessment under section 5.

On 20 December 2006, the Commission approved the aid to Investbx, an innovative regional platform for raising capital for SMEs in the UK's West Midlands. In this decision the Commission conducted for the first time an in-depth assessment of a risk capital case, following the section 5 of the Risk Capital Guidelines. It is also among the first decisions where the Commission appreciates in detail the existence of market failure that is targeted by the measure.

### Description

Investbx is going to be set up as a regional platform matching investors and West Midlands-based SMEs in their expansion stage. It will primarily assist SMEs by raising equity funding between €0.7 and €2.9 million (£0.5 and £2 million). It will bring together SMEs, investment related service providers and investors to make it easier for companies to raise money by creating a forum for issuing and exchanging new shares. Investbx will firstly raise funds for SMEs. Secondly, it will intermediate marketing and other services as well as in-depth research analysis, which will be then freely available to all investors on the Investbx Web page. This type of research analysis is usually prepared only for larger stocks of shares and available only to institutional investors. Finally, it will provide an on-line auction based trading platform for SMEs shares, where the shares will be traded at a single price — without the market maker spread.

Investbx will receive a €4.4 (£3 million) grant to offset its initial losses during a period of up to five

years. If the project is successful at the end of the trial period, Investbx will be sold to private investors; otherwise it will be closed.

### Assessment

The Commission found State aid at the level of Investbx, which receives financing at conditions that were not acceptable to any private investor. Furthermore, the target SMEs using Investbx also benefit from aid, as only due to the grant to Investbx they are able to receive the services that were otherwise unavailable to them on the market at the same conditions. On the other hand, there is no state aid to the investors, as the measure is not selective at this level; any investors, independent of their origin and amount they wish to invest, can use Investbx.

The measure does not constitute an investment fund but rather an investment vehicle (p. 5.1(f) RCG), therefore its compatibility with the common market was assessed on the basis of section 5 of the Risk Capital Guidelines. Accordingly, the Commission weighted the positive effects of the aid — the targeted market failure, the appropriateness, incentive effect, necessity and proportionality of the aid — against its negative effects — the risk of crowding out of private risk capital and other distortions of competition. The balancing test means that the Commission takes into account a number of positive and negative elements of which no single element is determinant, nor can any set of elements be regarded as sufficient on its own to ensure compatibility, while their applicability and weighting may depend on the form of the measure.

### *Existence and evidence of market failure*

In line with the Risk Capital Guidelines, at the compatibility analysis the Commission first had to assess the market failure targeted by the measure (p. 5.2.1 RCG). The primary objective of the aid to Investbx is to address a market failure in the financing of SMEs due to imperfect or asymmetric information. In general, for investments in young, innovative, small and medium-sized enterprises developing new technologies, investors face relatively more uncertainty than in the case of large established quoted companies. It is partly due to the fact that the flow of information about

<sup>(1)</sup> 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.

<sup>(2)</sup> OJ C 194, 18.8.2006, p. 2.



unquoted smaller companies seeking equity funding is much more limited and potential investors face more difficulties and relatively higher related costs in gathering reliable information on their business prospects and monitoring them. In the Risk Capital Guidelines the Commission acknowledges that asymmetric information may result in high transaction and agency costs of raising funds for SMEs as well as in risk aversion regarding such investments. In such circumstances, an equity gap arises when, due to the inefficient matching of supply and demand of risk capital, the level of risk capital becomes too restricted and enterprises do not obtain funding despite having a valuable business model and growth prospects.

The notified measure targets equity funding in the West Midlands region in the area of £ 0.5 million to £ 2 million. The UK submitted that this range of investment size is too high for most informal investors such as business angels, which have access to limited financial resources <sup>(3)</sup>, and too low for most formal venture capital investors, which find the cost of evaluating potential investments prohibitive when a business is seeking only a modest amount of equity finance.

The Commission took into account several research papers and surveys analysing the equity gap submitted by the UK authorities. Among them, the HM Treasury budget consultation document "Bridging the Finance Gap" <sup>(4)</sup> estimated the gap in the area of £ 0.25 million to £ 2 million. The report concluded that high transaction costs and the proportionally higher costs of obtaining information about smaller firms make investors shift their focus on larger investments. Research undertaken by ECOTEC <sup>(5)</sup> estimated the equity gap between £ 0.5 million to £ 5 million, with the most severe constraints being businesses seeking up to £ 2 million of growth capital. The Commission took into account the findings of the report, namely that the existence of the equity gap in the West Midlands is due to the following factors: private equity finance companies cannot achieve the level of returns they require on investments below £ 2 million; venture capital moved on to larger deals; very few private equity investments are being made in the region in the range £ 250 000 to £ 2 million; while there is a significant demand for funding from SMEs in this equity gap range.

Other research pointed out that in the UK few smaller quoted companies are followed by analysts as there is insufficient volume of trading to justify the cost of the investment analysis being produced. It was further reported that smaller quoted companies are competing for a small and decreasing proportion of institutional equity investment in the UK. The Commission also accepted a survey, which indicated that there was a clear awareness among issuers and investors that current mechanisms for providing financial services to SMEs could be improved, particularly with respect to bringing issuers and investors together. Another paper found relevant by the Commission stated that listing and regulatory requirements of traditional exchanges are so expensive compared to the size of companies involved and the sums of money being raised that they impose a floor on the size of company that can effectively access the main markets in the UK, the London Stock Exchange and its second tier market, AIM.

As regards the regional aspects of the equity gap, the Commission also took into account the study of Robert Huggins Associates <sup>(6)</sup> stating that compared to other UK regions the Midlands region has one of the lowest levels of market capitalisation relative to economic performance.

As no statistical evidence exists on unsatisfied demand of companies with viable business plans for finance, the Commission accepted the methodology of conducting surveys among professional advisers. Accordingly, firms of professional advisers were asked to estimate how many of their clients they would expect to propose as suitable for joining the new equity marketplace. Based on their indications, a conservative estimate of demand for the equity financing of at least ten SMEs per annum at Investbx was concluded. The Commission accepted the argument by the UK authorities, who believe that the existing marketplaces have not resolved the equity gap and none of them has a regional focus on West Midlands-based SMEs.

Based on the various arguments put forward in several reports, surveys and comments provided by the UK authorities and third parties, the Commission concluded on the existence of the equity gap in the West Midlands in the range of £ 0.5 to 2 million.

<sup>(3)</sup> HM Treasury: Bridging the Finance Gap: next steps in improving access to growth capital for small businesses (December 2003).

<sup>(4)</sup> Ibid.

<sup>(5)</sup> ECOTEC Research and Consulting Limited: "Advantage Enterprise & Innovation Fund: Analysis of Market Demand" (2004).

<sup>(6)</sup> Robert Huggins, Robert Huggins Associates: "Regional Stock Exchanges — A Viable Option for Wales and Other UK Regions?" (2003).



### *Targeting, appropriateness, incentive effect, necessity and proportionality*

Investbx, by making available detailed independent reports on SMEs to all potential investors, improves the information and transaction efficiency, thus addresses directly the cause of the market failure. It intends to raise equity for at least 47 enterprises during its first 5 years. Moreover, it lowers certain costs related to the fund raising by using templates and procedures adjusted specifically to SMEs. In addition, it eliminates the often very high market maker spread at secondary trading. For these reasons the Commission found that Investbx is expected to have a positive impact on the alleviation of market failure and that the measure is appropriate. (p. 5.2.2 RCG)

The Commission noted that, as the investment decisions are entirely made by private investors, the requirement for commercial management of the vehicle (p. 5.2.3.1 RCG) and the presence of an investment committee (p. 5.2.3.2 RCG) is of lesser relevance. It was regarded positively that according to the financial plan of Investbx, the aid amount is expected to be sufficient to enable Investbx to reach within five years the critical size to become profitable (p. 5.2.3.3 RCG). As Investbx does not operate at the seed-stage, the involvement of business angels is not required (p. 5.2.3.4 RCG); nevertheless, Investbx is open to them. The Commission considered the aid as necessary, as no private investor was willing to provide capital to Investbx. As compared to the current situation, Investbx aims at stimulating significant increase of risk capital investments into SMEs, much higher than the aid amount is, and thus provides for incentive effect. (p. 5.2.3 RCG)

The Commission considered positively that the aid is limited to what is according to the financial plan the minimum to reach profitability in five years. In any case, if the measure becomes profitable before the entire grant is used, the rest will be returned. Comparing Investbx with the creation of risk capital funds with similar amounts of invested equity, significantly lower aid amount is used. All investors will be publicly invited to

participate and Investbx will remain open to new investors. Consequently, the Commission regards the measure as proportional. (p. 5.2.4 RCG)

### *Negative effects*

In order to examine crowding out and other distortions of competition (p. 5.3 RCG), the Commission considered various groups of potential competitors (such as business angels, private venture capital funds, brokers and stock exchanges) as well as private investors that could be crowded-out, including the undertakings that voiced critical comments during the investigation procedure, in particular the alternative trading system Ofex/PLUS.

As concerns the effect on competition with the latter, the Commission noted that only five per cent of the companies traded by Ofex were based in the West Midlands. Ofex operates in the whole UK and also internationally, without limitations as to the region, size of the investments or SME character of the companies. The Commission also noted the relatively small amount of fund raising in the West Midlands, which at Ofex amounted to £ 3.5 million in five companies during a period of 5 years.

The Commission concluded that the possible distortion of competition vis-à-vis Ofex and other potential competitors is limited in several aspects: Firstly, geographically, as the target SMEs of Investbx must be located in the West Midlands region, secondly, in time, as the aid will be granted for at most five years and, thirdly, in scope, as Investbx can raise at most £ 2 million per SME.

### **Conclusion**

The Commission, on the basis of the evidence provided, recognised the market failure related to risk capital financing of SMEs. It further considered that the measure serves a common interest in that it is aimed at mitigating a well-defined market failure and increasing the provision of risk capital to SMEs. It is proportional and its negative effects on competition are limited. Therefore the Commission considered that the measure is compatible with the common market under the Risk Capital Guidelines.

## Information Section

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## Notices and news in brief

### **14<sup>th</sup> European Competition Day and 13<sup>th</sup> International Conference on Competition (25-27 March 2007, Munich, Germany) <sup>(1)</sup>**

The 14<sup>th</sup> Competition Day and the International Conference on Competition were hosted jointly by the Bundeskartellamt (the German national competition authority) from 25 to 27 March 2007.

The International Conference on Competition has been held every other year for the last 25 years and the European Competition Day has taken place biannually since 2000 and is traditionally hosted by the respective Council Presidency.

This year's theme was "Competition as a Cornerstone of a Free Economic and Social Order". The conference was attended by 400 participants including 70 competition authorities from the EU and its Member States, USA, Japan, Korea, Russia, countries from Africa, Latin and South America and, for the first time, the People's Republic of China.

In his opening address, Mr Dr Ulf Böge, President of the Bundeskartellamt, stated that *"The question about the guiding principle of competition policy is not a new one. Its discussion has been revived by the fervent debate about the much quoted "more economic approach" and the question whether increasing consumer welfare is the appropriate guiding principle of a modern competition policy. Counter to this is the argument that an efficient competition policy should rather aim at guaranteeing a competitive structure of the market. Or is there a middle course?"*



From left to right: Dr. Ulf Böge <sup>(2)</sup>, Mr. Ewin Huber <sup>(3)</sup>, Mrs. Pervenche Bères <sup>(4)</sup>, Mrs. Neelie Kroes <sup>(5)</sup>, Mr. Michael Glos <sup>(6)</sup>.

The welcoming address by Mr Christian Ude, Lord Mayor of Munich, was followed by speeches by the Bavarian State Minister of Economic Affairs, Erwin Huber, the Federal Minister of Economics and Technology, Michael Glos, the Chairwoman of the Committee on Economic and Monetary Affairs of the European Parliament, Ms Pervenche Berès and Dr. Klaus Kleinfeld, CEO of Siemens AG.

<sup>(1)</sup> Text based on the contribution from Michael Jungk (Bundeskartellamt) and the conference website <http://www.ecd-ikk-2007.de/index.html>.

<sup>(2)</sup> President of the Bundeskartellamt.

<sup>(3)</sup> Bavarian State Minister of Economic Affairs.

<sup>(4)</sup> Chairwoman of the Committee on Economic and Monetary Affairs of the European Parliament.

<sup>(5)</sup> European Commissioner for Competition.

<sup>(6)</sup> Federal Minister of Economics and Technology.

European Commissioner Neelie Kroes spoke about the contribution of sector inquiries to better regulation, priority setting and detection in antitrust cases. She stated that *“although a sector inquiry gathers evidence that may be relevant for antitrust enforcement, [...], this must not be the end of the story. The knowledge gained can fruitfully be used to guide our thinking in merger and state-aid cases. But just as importantly, it can inform and guide proposals for legislation, embedding competition principles and sectoral knowledge in the wider policy work of the Commission.”*

The two-day conference included panel discussions by competition experts on two main themes: consumer welfare and efficiency as new guiding principles of competition policy, and national champions.

The programme and conference materials can be found on the conference website in both English and German: [http://www.ecd-ikk-2007.de/seiten/index\\_d.html](http://www.ecd-ikk-2007.de/seiten/index_d.html)

**Announcement:**  
**15<sup>th</sup> European Competition Day and**  
**2<sup>nd</sup> Lisbon Conference on Competition Law and Economics**  
**(15 and 16 November 2007. Lisbon, Portugal)**

These two events will be organised by the Portuguese Competition Authority in the framework of the Portuguese Presidency of the EU, and will take place on 15 and 16 November 2007.

Five sessions will discuss the following topics:

- more efficient approach to State Aid;
- judicial control of administrative decisions and private enforcement;
- merger control in regulated markets with network economies;
- stock taking on major debates in the EU and USA about abuses of dominant positions and attempts at monopolization;
- the challenge of globalization to national and EU industrial policies.

Further information on the conference and registration is available on the website of the Autoridade de Concorrência: <http://www.autoridadedaconcorrenca.pt/en/pca2007/default.asp>



## Directorate-General for Competition — Organigramme (1 September 2007)

<b>Director-General</b>	<b>Philip LOWE</b>	02 29 65040/02 29 54562
<b>Deputy Director-General Operations</b>	<b>Lowri EVANS</b>	02 29 65029
<b>Deputy Director-General Mergers and Antitrust Adviser</b>	<b>Nadia CALVIÑO</b> <b>Claude RAKOVSKY</b>	02 29 55067 02 29 55389
<b>Deputy Director-General State Aids</b>	<b>Herbert UNGERER acting</b>	02 29 68623
Chief Economist	<b>Damien NEVEN</b>	02 29 87312
Adviser: Consumer Liaison Officer	<b>Juan RIVIERE Y MARTI</b>	02 29 51146
Audit adviser	<b>Rosalind BUFTON</b>	02 29 64116
Assistants to the Director-General	<b>Inge BERNAERTS</b>	02 29 51888
	<b>Tomas DEISENHOFER</b>	02 29 85081
Task Force "Ethics, security and procedures"	<b>Jean-Louis COLSON</b>	02 29 60995
01. Communications policy and institutional relations	<b>Kevin COATES acting</b>	02 29 59758
02. Antitrust and merger case support	<b>Carles ESTEVA MOSSO</b>	02 29 69721
03. State aid case support	<b>Nicola PESARESI</b>	02 29 92906
<b>DIRECTORATE A Policy and Strategy</b>	<b>Emil PAULIS</b>	02 29 65033
1. Strategy and delivery	<b>Anna COLUCCI acting</b>	02 29 68319
2. Antitrust and mergers policy and scrutiny	<b>Joos STRAGIER</b>	02 29 52482
3. State aids policy and scrutiny	<b>Alain ALEXIS</b>	02 29 55303
4. Evaluation	<b>Dietrich KLEEMANN</b>	02 29 65301
5. European Competition Network	<b>Kris DEKEYSER</b>	02 29 54206
6. International Relations	<b>Blanca RODRIGUEZ GALINDO</b>	02 29 52920
<b>DIRECTORATE B Markets and cases I – Energy and environment</b>	<b>Herbert UNGERER</b>	02 29 68623
1. Antitrust — energy, environment	<b>Lars KJOLBYE</b>	02 29 69417
2. State aids	<b>Jorma PIHLATIE</b>	02 29 53607/02 29 69193
3. Mergers	<b>Dan SJOBLÖM</b>	02 29 67964
<b>DIRECTORATE C Markets and cases II – Information, communication and media</b>	<b>Cecilio MADERO VILLAREJO</b>	02 29 60949
1. Antitrust — telecoms	<b>Michael ALBERS</b>	02 29 61874
2. Antitrust — media	<b>Arianna VANNINI</b>	02 29 64209
3. Antitrust — IT, internet and consumer electronics	<b>Per HELLSTROEM</b>	02 29 66935
4. State aids	<b>Eric VAN GINDERACHTER</b>	02 29 54427
5. Mergers	<b>Johannes LUEBKING acting</b>	02 29 59851
<b>DIRECTORATE D Markets and cases III – Financial services and health-related markets</b>	<b>Irmfried SCHWIMANN acting</b>	02 29 67002
1. Antitrust – Financial services	<b>Irmfried SCHWIMANN</b>	02 29 67002
2. Antitrust – Pharmaceuticals and other health-related markets	<b>Georg DE BRONETT</b>	02 29 59268
3. State aids	<b>Adinda SINNAEVE</b>	02 29 95077
4. Mergers	<b>Joachim LUECKING</b>	02 29 66545

**DIRECTORATE E****Markets and cases IV – Basic industries, manufacturing and agriculture**

1. Antitrust — Consumer goods, agriculture and goods
2. Antitrust – Basic industries, chemicals and other manufacturing
3. State aids – Industrial restructuring
4. Mergers

**Paul CSISZAR**

02 29 84669

*Yves DEVELLENES*

02 29 51590/02 29 52814

*Paolo CESARINI*

02 29 51286/02 29 66495

*Karl SOUKUP*

02 29 67442

*Maria REHBINDER*

02 29 90007

**DIRECTORATE F****Markets and cases V — Transport, post and other services**

1. Antitrust — Transport and post
2. Antitrust — Other services
3. State aids
4. Mergers

**Olivier GUERSENT acting**

02 29 65414

*Linsey Mc CALLUM*

02 29 90122

*Zsuzsanna JAMBOR*

02 29 87436

*Joaquin FERNANDEZ MARTIN*

02 29 51041

*Olivier GUERSENT*

02 29 65414

**DIRECTORATE G****Cartels**

1. Cartels I
2. Cartels II
3. Cartels III
3. Cartels IV
4. Cartels V

**Kirtikumar MEHTA**

02 29 57389

*Paul MALRIC-SMITH*

02 29 59675

*Dirk VAN ERPS*

02 29 66080

*Jarek POREJSKI*

02 29 87440

*Ewoud SAKKERS*

02 29 66352

*Flavio LAINA acting*

02 29 69669

**DIRECTORATE H****State aid – Cohesion, R&D&I and enforcement**

1. Regional aid
2. R&D, innovation and risk capital
3. State aid network and transparency
4. Enforcement and procedural reform

**Humbert DRABBE**

02 29 50060/02 29 52701

*Robert HANKIN*

02 29 59773/02 29 68315

*Wouter PIEKE*

02 29 59824/02 29 67267

*Wolfgang MEDERER*

02 29 53584/02 29 65424

*Dominique VAN DER WEE*

02 29 60216

**DIRECTORATE R****Registry and Resources**

1. Document management
2. Resources
3. Information technology

**Michel MAGNIER acting**

02 29 56199/02 29 57107

*Corinne DUSSART-LEFRET*

02 29 61223/02 29 90797

*Michel MAGNIER*

02 29 56199/02 29 57107

*Manuel PEREZ ESPIN*

02 29 61691

**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/competition/speeches/>*

#### Speeches by the Commissioner, 1 January 2007 — 30 April 2007

**27 April: State aid and globalisation — the competition perspective** — Neelie Kroes — Würzburg (Informal Competitiveness Council)

**18 April: Commission decision to fine members of beer cartel in the Netherlands** — Neelie Kroes — Brussels (European Commission)

**30 March: More competition and greater energy security in the Single European Market for electricity and gas** — Neelie Kroes — Berlin (Germany High-Level Workshop on Energy Organised By German Presidency)

**26 March: Fact-based competition policy — the contribution of sector inquiries to better regulation, priority setting and detection** — Neelie Kroes — Munich Germany (13th International Conference on Competition and the 14th European Competition Day)

**23 March: Improving Europe's energy markets through more competition** — Neelie Kroes — Düsseldorf, Germany (Industrie-Club e.V. Düsseldorf)

**20 March: Developments in competition policy since October 2006 — and a look forward into 2007** — Neelie Kroes — Brussels (European Parliament)

**08 March: Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe** — Neelie Kroes — Brussels (Commission/IBA Joint Conference on EC Competition Policy)

**19 February: Getting more from financial services markets: greater competition for a better deal for consumers** — Neelie Kroes — London (London School of Economics)

**09 February: Preliminary Findings of the Business Insurance Sector Inquiry** — Neelie Kroes — Brussels (European Commission Public Hearing)

**05 February: A new European Energy Policy; reaping the benefits of open and competitive markets** — Neelie Kroes — Essen (Energy conference: E-world energy & water)

**31 January: Introductory Remarks on Final Report of Retail Banking Sector Inquiry** — Neelie Kroes — Brussels (European Commission)

**10 January: Final Report of Energy Sector Competition Inquiry — Press Conference** — Neelie Kroes — Brussels (European Commission)

**08 January: Key developments in European competition policy over the past two years** — Neelie Kroes — Paris, France (European American Press Club)

#### Speeches and articles, Directorate-General Competition staff, 1 January 2007 — 30 April 2007

**27 March: Consumer Welfare and Efficiency — New Guiding Principles of Competition Policy?** — Philip Lowe — Munich, Germany (13th International Conference on Competition and 14th European Competition Day)

**23 February: Staatliches Handeln in der EU-Wettbewerbspolitik** — Philip Lowe — Innsbruck (FIW Symposium 2007)

### Community Publications on Competition

#### New publications

- **Report on competition policy 2006 — available in electronic version**

The report adopted by the Commission (25 pages) is available in 20 languages: Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Italian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Portuguese, Slovak, Slovene, Spanish and Swedish.

The Commission Staff working document (105 pages) is currently available in English. The French and German versions will follow.

- ***Report on competition policy 2005 — now available in print version***

The report adopted by the Commission is available in 20 languages and is distributed free of charge.

The supplement to the report contains detailed information on the application of competition rules in the European Union and Member States, including statistics. Available in English only. Price: 25 EUR.

All publications can be ordered or downloaded from the EU bookshop:

<http://bookshop.europa.eu/>

Publications for sale are also available the sales agents of the Office for Official Publications of the European Communities. Requests for free publications can also be addressed to the representations of the European Commission in the

Member States, to the delegations of the European Commission in other countries, or to the Europe Direct network.

Links to your nearest contact point for free and priced publications can be found at:

[http://publications.europa.eu/howto/index\\_en.htm](http://publications.europa.eu/howto/index_en.htm)

Further information about our publications as well as PDF versions of them can be found on the DG Competition web site:

<http://ec.europa.eu/comm/competition/publications/index.html>

**Upcoming publications (autumn 2007)**

- ***Competition policy newsletter, 2007, Number 3***
- ***International cooperation instruments of EU Competition policy***

## Press releases

1 January 2007 — 30 April 2007

*All texts are available from the Commission's press release database RAPID at: <http://europa.eu/rapid/>. Enter the reference (e.g. IP/06/14) in the 'reference' input box on the 'search' screen to retrieve the text of a press release. Note: Languages available vary for different press releases.*

### Antitrust

**MEMO/07/155 — 26/04/2007** — Commission welcomes Court of First Instance judgment in carbonless paper cartel case

**MEMO/07/148 — 23/04/2007** — Commission receives reply from Microsoft to statement of objections on unreasonable pricing of interoperability information

**MEMO/07/147 — 23/04/2007** — European Commission sends Statement of Objections to alleged participants in cartel for car glass

**IP/07/522 — 20/04/2007** — Competition: study on electricity markets supports the results of the Commission's Sector Inquiry

**IP/07/509 — 18/04/2007** — Competition: Commission fines members of beer cartel in The Netherlands over €273 million

**MEMO/07/136 — 18/04/2007** — Commission action against cartels — Questions and answers

**IP/07/490 — 11/04/2007** — Commission market tests commitments proposed by Distrigas concerning its long-term gas sales contracts in Belgium

**MEMO/07/131 — 11/04/2007** — Commission confirms sending Statement of Objections to alleged participants in cartel for transport of bulk liquids by sea

**MEMO/07/126 — 03/04/2007** — European Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple

**MEMO/07/125 — 30/03/2007** — Commission confirms sending Statement of Objections in alleged cartel in bathrooms fittings and fixtures sector

**IP/07/409 — 23/03/2007** — Competition: Commission invites comments on four car-makers' commitments to give adequate access to technical information

**IP/07/400 — 23/03/2007** — Competition: Commission requests Czech Republic to bring Czech Competition Act into conformity with EU law

**IP/07/397 — 22/03/2007** — Competition: Commission refers Greece back to Court for failure to adopt new framework for broadcasting services

**MEMO/07/109 — 20/03/2007** — European Commission confirms sending a Statement of Objections against alleged participants in a cartel for professional videotape

**MEMO/07/103 — 15/03/2007** — Commission welcomes European Court of Justice judgment in the Virgin/British Airways case

**MEMO/07/102 — 14/03/2007** — European Commission confirms sending a Statement of Objections to alleged participants in a cartel for flat glass

**IP/07/269 — 01/03/2007** — Competition: Commission warns Microsoft of further penalties over unreasonable pricing as interoperability information lacks significant innovation

**MEMO/07/90 — 01/03/2007** — Statement of Objections to Microsoft for non-compliance with March 2004 decision — frequently asked questions

**IP/07/209 — 21/02/2007** — Competition: Commission fines members of lifts and escalators cartels over €990 million

**MEMO/07/70 — 21/02/2007** — Commission action against cartels — Questions and answers

**MEMO/07/61 — 15/02/2007** — Commissioner Kroes presents results of energy sector inquiry to Energy Council

**MEMO/07/53 — 13/02/2007** — Commission has carried out inspections in the power transformers sector

**MEMO/07/49 — 08/02/2007** — Commission welcomes Court of Justice ruling in Danone case, confirming higher fines for repeat offenders

**IP/07/122 — 31/01/2007** — Competition: Commission closes investigation in rough diamonds sector following improvements to De Beers' distribution system



**IP/07/114 — 31/01/2007 — Competition:** Commission sector inquiry finds major competition barriers in retail banking

**MEMO/07/40 — 31/01/2007 —** Final report on retail banking inquiry — frequently asked questions

**MEMO/07/38 — 30/01/2007 —** Commission welcomes judgment of the Court of First Instance in French broadband case

**MEMO/07/31 — 25/01/2007 —** Commission welcomes judgments of the European Court of Justice in Seamless steel tubes cartel case

**IP/07/80 — 24/01/2007 — Competition:** Commission fines members of gas insulated switchgear cartel over 750 million euros

**MEMO/07/29 — 24/01/2007 —** Commission action against cartels — Questions and answers

**IP/07/74 — 24/01/2007 — Competition:** Commission publishes interim report on business insurance inquiry; public hearing in February

**MEMO/07/26 — 24/01/2007 —** interim report on business insurance inquiry — frequently asked questions

**MEMO/07/22 — 18/01/2007 —** Commission has carried out inspections in the calcium carbide sector

**IP/07/45 — 15/01/2007 — Telecommunications:** Polish regulator must carry out a new market analysis of retail access markets, says Commission

**IP/07/26 — 10/01/2007 — Competition:** Commission energy sector inquiry confirms serious competition problems

**MEMO/07/15 — 10/01/2007 —** Energy sector competition inquiry — final report — frequently asked questions and graphics

**IP/07/10 — 08/01/2007 — Competition:** Commission calls on Luxembourg to comply with Court judgment to simplify access to telecommunication markets

## Merger control

**IP/07/588 — 27/04/2007 — Mergers:** Commission clears proposed acquisition of UGS by Siemens

**IP/07/578 — 26/04/2007 — Mergers:** Commission approves proposed acquisition of Coryton Refinery by Petroplus

**IP/07/577 — 26/04/2007 — Mergers:** Commission approves proposed acquisition of Tussaud's by Merlin

**IP/07/574 — 26/04/2007 — Mergers:** Commission approves proposed acquisition of Delvita by REWE group

**IP/07/572 — 26/04/2007 — Mergers:** Commission approves proposed acquisition of Scandic by EQT

**IP/07/556 — 25/04/2007 — Mergers:** Commission approves proposed acquisition by General Electric of the in vitro diagnostics business of Abbott Laboratories

**IP/07/544 — 24/04/2007 — Mergers:** Commission launches public consultation on draft revised guidelines on remedies

**IP/07/541 — 23/04/2007 — Mergers:** Commission approves proposed acquisition of aerospace division of Smiths Group by General Electric

**IP/07/535 — 20/04/2007 — Mergers:** Commission approves proposed acquisition of APCOA by Eurazeo

**IP/07/517 — 19/04/2007 — Mergers:** Commission approves proposed creation of an aluminium extrusion joint venture by Alcoa and Orkla

**IP/07/513 — 18/04/2007 — Mergers:** Commission approves planned acquisition of 50% stake in Cebo by S&B

**IP/07/482 — 10/04/2007 — Mergers:** Commission refers proposed acquisition of Ahold Polska by Carrefour to Polish Competition Authority

**IP/07/479 — 04/04/2007 — Mergers:** Commission approves proposed acquisition of Hellas Telecommunications by Weather Investments

**IP/07/477 — 04/04/2007 — Mergers:** Commission approves acquisition by Thales and Finmeccanica of joint control of two space joint ventures Alcatel Alenia Space and Telespazio

**IP/07/470 — 04/04/2007 — Mergers:** Commission approves proposed acquisition of Van Gansewinkel by AVR

**IP/07/467 — 03/04/2007 — Mergers:** Commission approves proposed acquisition of TK Aluminium "A" by Nemak

**IP/07/461 — 03/04/2007 — Mergers:** Commission ends investigation after CVC and Ferd abort proposed acquisition of SIG and withdraw notification

**IP/07/454 — 30/03/2007 — Mergers:** Commission clears joint venture between Alstom UK and Balfour Beatty

**IP/07/427 — 28/03/2007 — Mergers:** Commission refers Spain to Court for not lifting unlawful conditions imposed on E.ON's bid for Endesa

**IP/07/426 — 28/03/2007** — Mergers: Commission approves proposed acquisition of French bearings manufacturer SNR by NTN of Japan

**IP/07/425 — 28/03/2007** — Mergers: Commission approves proposed acquisition of joint control of Mölnlycke Healthcare Group by Investor AB and Morgan Stanley Group

**IP/07/399 — 22/03/2007** — Mergers: Commission approves proposed creation of scrap metal joint venture between Scholz and voestalpine

**IP/07/384 — 21/03/2007** — Mergers: Commission approves proposed acquisition of Nera by Thrane & Thrane

**IP/07/349 — 20/03/2007** — Mergers: Commission approves Thales' participation in DCN

**IP/07/347 — 20/03/2007** — Mergers: Commission launches in-depth investigation into proposed acquisition of Télé2 France by SFR

**IP/07/342 — 16/03/2007** — Mergers: Commission approves proposed acquisition of joint control of Capio AB by Apax Partners Worldwide LLP, Apax Partners SA and Nordic Capital, subject to conditions

**IP/07/296 — 07/03/2007** — Mergers: infringement proceedings against Spain for not lifting unlawful conditions imposed on E.ON's bid for Endesa

**IP/07/287 — 07/03/2007** — Mergers: Commission approves proposed acquisition of Dana's Engine Products Group by Mahle

**IP/07/272 — 01/03/2007** — Mergers: Commission opens in-depth investigation into Sony/BMG recorded music joint-venture

**IP/07/250 — 27/02/2007** — Mergers: Commission approves proposed creation of joint venture between Umicore and Zinifex in zinc sector

**IP/07/248 — 26/02/2007** — Mergers: Commission clears acquisition of Telenet by LGI and acquisition of UPC Belgium by Telenet

**IP/07/229 — 22/02/2007** — Mergers: Commission clears proposed acquisition of ProSiebenSat.1 by KKR and Permira

**IP/07/220 — 21/02/2007** — Mergers: Commission clears proposed acquisition of six ConocoPhillips subsidiaries by Lukoil

**IP/07/219 — 21/02/2007** — Mergers: Commission approves proposed acquisition of Quest by Givaudan

**IP/07/218 — 21/02/2007** — Mergers: Commission approves proposed acquisition of Gallaher by Japan Tobacco

**IP/07/208 — 20/02/2007** — Mergers: Commission approves proposed acquisition by Freeport-McMoRan Copper & Gold Inc. of Phelps Dodge Corporation

**IP/07/207 — 20/02/2007** — Mergers: Commission approves proposed acquisition of steel and vanadium producer Highveld by steel company Evraz, subject to conditions

**IP/07/201 — 16/02/2007** — Mergers: Commission clears planned entry of Lite-On into Philips & BenQ Digital Storage Corporation Joint Venture

**IP/07/200 — 16/02/2007** — Mergers: Commission clears proposed acquisition of Philips' Automotive Playback Module business by Philips & BenQ Digital Storage Corporation

**IP/07/196 — 15/02/2007** — Mergers: Commission approves planned acquisition of Scottish Power by Iberdrola

**IP/07/178 — 13/02/2007** — Mergers: Commission launches public consultation on draft Merger Guidelines for companies in a vertical or conglomerate relationship

**IP/07/164 — 08/02/2007** — Mergers: Commission clears planned acquisition of APC by Schneider Electric, subject to conditions

**IP/07/146 — 07/02/2007** — Mergers: Commission refers part of Cronimet's, Remondis' and Alfa Acciai's proposed acquisition of TSR to German competition authority; approves the rest

**IP/07/143 — 06/02/2007** — Mergers: Commission approves proposed acquisition of OMG Nickel by Norilsk Nickel

**IP/07/127 — 01/02/2007** — Mergers: Commission approves proposed acquisition of aluminium assets of Glencore and Sual by EN+

**IP/07/121 — 31/01/2007** — Mergers: Commission approves proposed acquisition of Eurotecnica by MAN Ferrostaal

**IP/07/117 — 31/01/2007** — Mergers: Commission sends new preliminary assessment to Italy on measures blocking Abertis-Autostrade merger

**IP/07/116 — 31/01/2007** — Mergers: infringement procedure against Spain for not lifting unlawful conditions imposed on E.ON's bid for Endesa

**IP/07/106 — 29/01/2007** — Mergers: Commission clears proposed acquisition of Corus by Companhia Siderurgica Nacional

**IP/07/105 — 29/01/2007** — Mergers: Commission approves proposed acquisition of PLI by Philips

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