



EC COMPETITION  
POLICY NEWSLETTER

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# COMPETITION POLICY NEWSLETTER

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- State aid rules and public funding of broadband
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- Recent cartel cases
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- Antitrust — Merger control — State aid control — Enlargement



EUROPEAN COMMISSION

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## Neelie Kroes, Commissioner responsible for Competition

*Welcome to the spring 2005 edition of the Competition Policy Newsletter!*



This is the first edition of the Newsletter since I took over as European Commissioner for Competition. I would like to take this opportunity to give you a picture of how I see competition policy evolving over the next five years, and how that fits into the wider vision the Barroso Commission has for the European Union.

But first of all, I would like to put on record my sincere thanks to Mario Monti for the achievements which marked his term in office. His farewell speech last October (reproduced in the autumn 2004 Newsletter) gave a flavour of the vigour, enthusiasm and sheer hard work he and the Directorate General for Competition put into the job, with impressive results. It was an honour as well as a pleasure to pick up the baton from him.

Over the next five years I will be working for a European Union that is peaceful, prosperous and competitive. A Union that makes the most of a vibrant and well-functioning internal market. A Union where well-educated people, top-level knowledge, and the right business climate come together to produce innovative results. I think these aspirations — economic growth, better jobs and a secure and sustainable standard of living — are shared by the vast majority of Europeans.

That is why, under the guidance of President Barroso, the new European Commission is determined to reinvigorate the Lisbon process launched in 2000. We will do this through a partnership for more economic growth and more jobs.

More economic growth will give us the means to sustain the fabric of our European societies and guarantee social justice; protect the natural environment which is our legacy to generations to

come; promote peace, security and respect for rights within our borders; and, of course, export these principles to partners throughout the world.

Competition policy has a crucial role to play in the partnership for growth and jobs. Competition drives up innovation and drives down prices. Competition is the central driver for economic growth.

I am firmly convinced that it is markets that generate wealth — and, as a result of that, jobs — and not governments. Competition is the essential and necessary ingredient of markets. Market based competition rewards strong firms that offer better goods and services at lower prices. And it penalises those which make less efficient choices about how they organise themselves and what they produce. And my own experience has taught me that companies which face strong competition in their home markets are more likely to become successful on a global scale.

But markets will only serve us to their full potential if they operate freely and fairly. Keeping the playing field level is right at the heart of my mission. That is why I will pursue three key objectives: ever more effective enforcement of modernised competition law; promoting competition-friendly practice; and reform of the state aid regime.

### Effective enforcement

Europe now has a set of up-to-date, effective rules in the field of anti-trust and merger control. The sound application of these rules is the European Commission's ongoing priority. But we also need to look at complementary steps to strengthen enforcement.

I want to push harder in the fight against cartels. Cartels represent the worst of competition breaches by robbing businesses and consumers of their fair share of the benefits of efficient integrated markets. As well as creating a dedicated cartel directorate within the Directorate General for Competition, we are working on ways of improving the leniency system within Europe. This is also one of several areas where our cooperation with other competition authorities worldwide is fundamental.

Furthermore, it is time to empower consumer groups and other private parties to press their own cases for breaches of European competition law. We could make more use of the national courts. I therefore plan to present a Green Paper on this issue. Private enforcement of the competition rules is important in providing compensation to parties injured by competition law infringements, acting as an incentive for compliance, and strengthening the decentralisation of the enforcement of the anti-trust rules. All of which should have a positive knock-on effect in terms of deterrence.

And thirdly, I think we can do more to promote coherence and simplicity in our policy approach. All areas of the competition rules need to share common economic principles and common concepts of harm. We are working hard on a review of our action under Article 82 in tackling abuses of market power. We will be consulting widely on a series of working papers in this field with a view to providing better guidance to business by extending the same economic analysis present in Article 81 and the Merger Regulation to questions of abuse of dominance.

### **Promoting competition-friendly practice**

I think that there is a lot more the Commission can do to promote competitive practice. We will launch sector inquiries in areas where competition does not appear to be functioning as well as it might. We intend to make a start this year with the financial services and energy sectors, both markets being crucial to the Union's overall competitiveness. We will go into these investigations with an open mind and constructive approach. Where we identify obstacles to competition — whether those barriers are created by private actors or by poor or over-complicated regulation — we will propose solutions, working closely with national administrations, regulatory bodies and competition authorities.

Moreover, we will introduce systematic examination of the impact of proposed new EU legislation on competitiveness. The aim is to screen proposals, identify those which may have an unnecessarily harmful impact on competition and consumers, and then take the steps needed to make

sure this is appropriately dealt with before the proposal leaves the Commission. And as well as building competitiveness testing into European impact assessment, I also intend to encourage Member States to review national regulation that stands in the way of competition.

### **Reforming the state aid regime**

My third objective is perhaps the most important. We have to improve the state aid system. The European Council has set a clear objective: a more competitive Europe needs 'less and better aid'. The Commission will shortly launch a consultation process on an Action Plan for delivering this through a comprehensive reform of the current state aid regime. The reform has to deliver 'less aid' since it is simply unacceptable that while most businesses fight hard to survive and succeed, others are granted artificial advantage through public support. In the long run this aid prevents market forces from rewarding the most competitive firms, and overall competitiveness suffers. And the reform has to deliver 'better aid' since intelligently-targeted support can fill the gaps left by genuine market failures and hence empower more undertakings to become active competitors.

The Action Plan will launch a wide debate on how we can ensure that future aid is concentrated where it adds greatest value. The new rules must ensure that the Commission can continue to block those subsidies that hold back essential structural change. At the same time they should make it easier for Member States to use public funds for measures which will boost innovation, improve access to risk capital, and promote research and development.

Competitiveness is about people making a difference to their lives, and about businesses producing innovative high-quality products and services as efficiently as possible. As Competition Commissioner, I intend to pursue a tough, rigorous enforcement of all aspects of the competition rules — Article 81, Article 82, mergers and state aids. All of which will help strengthen the European economy. The concrete actions I have described represent an ambitious but attainable response to this challenge. I look forward to reporting on our progress in future editions of this Newsletter.

## A new perspective for Spanish shipyards — reducing distortions in shipbuilding

*Hans BERGMAN, Directorate-General Competition, unit H-1, and Kai STRUCKMANN, formerly Directorate-General Competition*

### Introduction

On 12 May 2004 the European Commission took a negative decision concerning aid worth 500 million euro which the Spanish State holding company Sociedad Estatal de Participaciones Industriales (SEPI), granted in 1999 and 2000 to the publicly owned civilian shipyards, owned at the time by IZAR. The Commission concluded that this amount constituted state aid which could not be approved under the EU rules on aid to shipbuilding. As loans amounting to 192 million euro had been paid back to SEPI, the sum to be recovered from IZAR amounted to 308 million euro, plus interests.

On 20 October 2004, the European Commission took another decision (case C 38/03) with regard to the same company. The Commission in this decision established that SEPI during 2000 had granted an additional 556 million euro to the publicly owned civilian shipyards. This aid granted in favour of IZAR's civil activities was not in line with EC State aid rules and the Commission therefore concluded that also this amount had to be recovered from IZAR.

These two decisions followed after several years of complaints from competitors on the business behaviour of the Spanish public shipyards and forced the Spanish authorities to undertake a major restructuring of these shipyards.

### Decision May 2004 (Case C 40/00)

The Commission decision taken in May 2004 covers a number of transactions that took place between 1999 and 2000 involving SEPI, its subsidiary Astilleros Españoles (AESA), the former holding company of the publicly owned civilian shipyards and AESA's producing subsidiaries. Since the Commission suspected that these transactions contained state aid, it opened a formal investigation <sup>(1)</sup> on 12 July 2000, which was

extended <sup>(2)</sup> on 28 November 2001 and further extended <sup>(3)</sup> on 27 May 2003.

Based on the facts that were established during the formal investigation procedure the Commission concluded that the state holding company SEPI undertook the following transactions, which entailed state aid to the public Spanish shipyards:

- An excess purchase price paid by SEPI when AESA sold three shipyards to SEPI in 1999. According to the Commission's calculation the purchase price paid by SEPI contained an aid element of 56 million euro. The aid benefited the remaining civil shipyards still owned by AESA;
- Loans amounting to 192.1 million euro provided by SEPI to three of AESA's shipbuilding companies;
- A capital injection by SEPI of 252.4 million euro to AESA in 2000, benefiting three of AESA's civil shipyards.

### October 2004 decision (case C 38/03)

The Commission decision of October 2004 concerns three capital injections, made in 2000, 2001 and 2002 by SEPI, to IZAR. When the Commission found out about these transactions it suspected that they contained state aid and therefore opened a formal investigation <sup>(4)</sup> on 27 May 2003.

The total amount of capital injected into IZAR was as follows: 1,322 million euro provided in July 2000, 105 million euro provided in 2001 and 50 million euro in 2002.

The Commission concluded that IZAR's civilian activities benefited from the capital injection in the year 2000, by receiving loss coverage of 364 million euro during the period 2000–2003. Furthermore, the Commission concluded that IZAR's repayment of a 192.1 million euro loan to

<sup>(1)</sup> OJ C 328, 18.11.2000, p. 16. Press release IP/00/760, 12.7.2000.

<sup>(2)</sup> OJ C 21, 24.1.2002, p. 17. Press release IP/01/1672, 28.11.2001.

<sup>(3)</sup> OJ C 199, 23.8.2003, p. 9. Press release IP/03/754, 27.5.2003.

<sup>(4)</sup> OJ C 201, 26.8.2003, p. 3. Press release IP/03/754, 27.5.2003.



SEPI on behalf of three of the shipyards, as outlined above, constituted also a direct aid to these civil shipyards. The total aid amount for the civil shipyards was thus 556.1 million euro.

The additional capital injections in 2001 and 2002 from SEPI to IZAR were used to cover unexpected increased costs for pre-pensions in IZAR's former military shipyards and did not constitute aid.

### Why is the aid incompatible?

The above mentioned aid measures, amounting to 500 million euro, respectively 556 million euro, were declared incompatible by Commission decisions of 12 May 2004 and 20 October 2004 for the following reasons.

#### *Legal base*

In 1997 pursuant to Council Regulation 1013/97, the Commission exceptionally approved a package of restructuring aids to the public Spanish shipyards amounting to 1.4 billion <sup>(1)</sup> euro subject to the condition that no further such aid could be provided. The total restructuring package amounted to 1.9 billion euro including aid approved in 1995. The restructuring period lasted from 1994 to 1998, after which the shipyards should have become profitable. In giving its agreement, the Council stressed the 'one time, last time' nature of the aid package.

Any further public measures that did not form part of the aid package approved in 1997 therefore needed to be assessed according to the general state aid rules, i.e. Article 87 of the EC Treaty. On 29 June 1998 the Council adopted the Shipbuilding Regulation, which was in force from 1 January 1999 to 31 December 2003 <sup>(2)</sup>, i.e. the period when the concerned measures took place.

Article 5(1) of the Shipbuilding Regulation explicitly states that no rescue or restructuring aid may be granted to an undertaking that has been granted such aid pursuant to Regulation 1013/97 (i.e. within the 1997 shipbuilding aid package mentioned above). Consequently, rescue or restructuring aid to the public Spanish yards in excess of the aid, that was authorised by the initial Commission decision in 1997, would be considered incompatible with the common market.

The measures under investigation did not fall under any of the other derogations provided for by the Shipbuilding Regulation. Hence the crucial question in the investigation procedure was whether the measures granted by SEPI constituted aid, as the qualification of the measures as aid consequently would imply their incompatibility with the common market.

#### *The role of SEPI*

In the opening and extensions of the formal investigation procedure the Commission presumed that SEPI acted on behalf of the state, i.e. that its behaviour in the different transactions was imputable to the state. Spain contested this, and claimed that SEPI functions independently from the state and that therefore its actions are not imputable to the state. Furthermore, in Spain's view, SEPI acted as a market investor and therefore the funds provided from SEPI in this case could not be considered as state aid.

The Commission, however, noted that SEPI is a public holding company which depends directly on the Ministry of Finance. As such it is considered a public undertaking in the sense of Commission Directive 80/723/CEE of 25 June 1980 <sup>(3)</sup> as amended by Commission Directive 2000/52/EC of 26 July 2000 <sup>(4)</sup>, since, due to its ownership or its financial participation, the public authorities can directly or indirectly exercise a dominant influence on SEPI.

With reference to the jurisprudence of the Court (Case C-83/98 *France v Ladbroke Racing and Commission* <sup>(5)</sup>; C-482/99, *Stardust marine* <sup>(6)</sup>) the Commission concluded that the funds provided by SEPI were to be considered state resources as they remained under public control. Furthermore, the actions of SEPI were considered imputable to the state, by the level of supervision exercised by government representatives over the company and the public nature of its activities.

The general principle that applies for financial transactions between the state and public companies is the so called market economy investor principle. Given that SEPI's funds were considered state resources, it was essential that SEPI, in its economic transactions with its shipbuilding subsidiaries acted fully in line with the market

<sup>(1)</sup> OJ C 354, 21.11.97, p. 2. Press release IP/97/646, 15.7.1997.

<sup>(2)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(3)</sup> OJ L 195, 29.7.1980.

<sup>(4)</sup> OJ L 193, 29.7.2000, p. 75.

<sup>(5)</sup> [2000] ECR I-03271, paragraph 50.

<sup>(6)</sup> [2002] ECR I-04397, paragraphs 55-56.

economy investor principle in order to be able to conclude that the funds provided were free of state aid.

The market economy investor principle is explained in the Commission communication to the Member States on the Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector <sup>(1)</sup>. The case law further establishes (e.g. in Case C 40/85 Boch <sup>(2)</sup>) that the appropriate way of determining whether a measure constitutes state aid is to ask to what extent the undertaking would be able to obtain the sums in question on the private capital markets at the same conditions.

Therefore, the Commission had to apply the criteria of the market economy investor principle to each of the transactions undertaken by SEPI as it had to assess individually whether each transaction was free of aid.

### *Aid via the purchase of assets by SEPI*

SEPI on 28 December 1999 bought the three companies Juliana, Cadiz, and Manises from AESA for 15 million euro which according to Spain corresponded to the book value of the companies at some point in 1999.

The Commission based its assessment on the information obtained within the investigation and concluded that SEPI on 28 December 1999 paid 15 million euro for three companies which had a book value of minus 41 million euro and which furthermore contained additional liabilities of substantial amounts. It therefore concluded that SEPI paid more than the market price for the companies (which on the basis of the available information was estimated at minus 41 million euro). The amount exceeding the market price, i.e. 56 million euro, consequently was to be considered as incompatible state aid to the seller, AESA.

### *Aid via loans provided by SEPI to three shipyards in December 1999*

The three shipbuilding companies owned by AESA (Juliana, Cadiz and Manises) had accumulated a debt to AESA of 192 million euro. When SEPI took them over in 1999 it also provided them with 192.1 million euro 'advance' payment which was used to repay the loans to AESA. SEPI in turn took over the claim of 192.1 million euro from AESA. The assessment focused on SEPI's loan of

192.1 million euro to the three companies Juliana, Cadiz and Manises.

The Commission again needed to assess whether an investor could, under normal market economy conditions, expect an acceptable rate of profitability on the capital invested and to what extent the undertaking would be able to obtain the sums in question on the private capital markets.

It was clear from the annual reports that the three companies receiving the loans were in difficulties. There were no signs that the difficult financial situation of the companies would improve. For these reasons, it was obvious that the three companies would not have been able to obtain the loans on the private capital markets and that SEPI, consequently, could not have expected a reasonable rate of return. Thus, the Commission considered the loans from SEPI to the shipbuilding companies amounting to 192.1 million euro as state aid, which was incompatible with the common market.

These loans were repaid with interest to SEPI on 12 September 2000 by IZAR which at that time had taken over and dissolved the companies Juliana, Cadiz and Manises. The Commission therefore declared that the aid had been recovered. However, this information was used in the second decision on IZAR (see further below).

### *Aid via a capital injection from SEPI to AESA*

AESA on 20 July 2000 sold to Bazán (later renamed IZAR) its remaining three shipyard companies, Puerto Real, Sestao and Sevilla for one Peseta each. On 18 July 2000, two days before, SEPI decided to provide AESA with a 252 million euro capital injection. This capital was then paid out in September 2000. Spain claimed that since this capital was only provided in September 2000, when AESA already had sold its shipyards, it could not distort competition for shipbuilding.

The Commission in this respect concluded first, that the capital injection, in view of the financial situation of AESA, could not be expected to generate a reasonable rate of return and consequently constituted incompatible aid that needed to be recovered.

Secondly, the Commission noted that AESA cancelled debts to its shipyards for 309 million euro before the yards were transferred to Bazán for a symbolic price. This improved their financial

<sup>(1)</sup> OJ C 307, 13.11.1993, p. 3.

<sup>(2)</sup> [1986] ECR 2321.

situation by the same amount. It was also concluded that since AESA's debt cancellation did not involve any cash payment, already SEPI's decision on 18 July 2000 to inject 252 million euro to AESA enabled AESA to cancel the concerned debts without having to declare immediate bankruptcy, although the money was only provided in September 2000.

From a state aid perspective the aid was therefore granted by SEPI's decision on 18 July 2000 to provide the capital injection, since this decision was the precondition to enable AESA to relieve the shipyards of its debts. The ultimate beneficiaries of this aid were the shipyards, since the effect of the operation was that the shipyards were relieved of their debts to AESA.

AESA's debt cancellation improved the financial situation of the concerned shipyards by 309 million euro. However, the Commission only assessed the provision of funds from SEPI, which in this transaction amounted to 252 million euro. This state aid was not compatible with the common market, since it could not be authorised under the rules for restructuring aid or any other type of aid.

### *Aid through the capital injection to IZAR*

The Commission established that out of the 1322 million euro injected by SEPI into IZAR (at the time called Bazán) in July 2000, 364 million euro had benefited the civilian activities of the shipyards since it was used to cover losses of these companies for the years 2000 to 2003.

From the information provided by Spain it is clear that the civilian companies bought by Bazán in July 2000 were in economic difficulties. There were furthermore no signs that the difficult financial situation for their activities would improve. It can therefore be excluded that the civilian activities, under the ownership of Bazán/IZAR would generate an acceptable rate of return.

For these reasons, it can be established that IZAR would not have been able to obtain loans or capital on the private capital markets to cover the losses of its civilian activities. Therefore, the provision of capital to these activities did not comply with the market economy investor test. For the same reasons SEPI could not have expected a return on this capital. Therefore the provision of these resources from SEPI to IZAR did not comply with the market economy investor principle. Therefore the capital injected for the use by the civilian activities constitutes state aid to IZAR. This state aid

was illegal, since it had not been notified to the Commission.

It can furthermore be concluded that this aid was not compatible with the Common market as it could not be authorised as restructuring aid. The aid could neither be approved under any other provision of the shipbuilding Regulation or under any other of the derogations laid down in Article 87(2) and (3) of the EC Treaty.

### *Loans repaid by IZAR on behalf of three activities*

As noted above, in the state aid decision on case C 40/00, IZAR had repaid loans amounting to 192.1 million euro with interest to SEPI. The funds had been provided in 1999 to the companies Juliana, Cadiz and Manises, which subsequently were taken over by IZAR in July 2000.

According to information received from Spain, the reported losses for the civilian activities for the year 2000 did not include the repayment of the above mentioned loans.

It is evident that funds provided by SEPI in 1999 benefited the civilian companies Juliana, Cadiz and Manises. However, since the repayment of these loans was made from the general accounts of IZAR, the effect is that the three companies, later dissolved into business units, benefited from not having to repay the concerned loans. It is thus clear that it was IZAR, which through the payment from its own resources, alleviated Juliana, Cadiz and Manises from the financial burden to repay the loans.

The Commission has assessed whether the loans repaid by IZAR could have been financed with funds received through a new loan taken by IZAR under market conditions. Concerning this aspect the Commission considers that without the capital injection in the year 2000, which — as has been shown above — has been used to support the civilian activities of IZAR, the latter's financial situation would have been much worse than it was. For this reason it can be excluded that IZAR could have received a loan on market conditions if it had not received the illegal and incompatible aid in the form of 364 million of the capital injection.

The repayment of 192.1 million euro by IZAR to SEPI should therefore be considered as a further use of the capital injection under investigation to the benefit of IZAR's civilian activities. For the same reasons as outlined above for the loss coverage, this use of funds for the civilian activities did not comply with the market economy



investor principle and the corresponding amount used from the capital injected to IZAR constitutes incompatible state aid to IZAR.

### *Aid recovery following change of ownership*

The shipyard companies that ultimately benefited from the illegal aid established in the first decision were, at the time of the decision, owned by IZAR. The Commission decision therefore found that this illegal aid should be recovered from IZAR. The Commission took the view that after the change of ownership of the yards, from AESA or SEPI to IZAR, the recovery of the aid should not remain with the previous owner of the concerned companies as they were not transferred to IZAR on market terms in open and transparent tendering procedures, but in the form of a reorganisation within the SEPI group, with the use of symbolic prices. Therefore all incompatible aid is to be recovered from the owner of the ultimate beneficiaries of the aid, i.e. IZAR.

### **Future**

Following the Commission decisions, Spain has taken several steps in order to reorganise its public shipbuilding sector. The reason is that IZAR had to declare bankruptcy once the recovery claim for the illegal and incompatible aid would be introduced in the balance sheet of the company. This was done in January 2005.

One aim of the reorganisation has been to avoid that IZAR's military production would be harmed, which is a legitimate objective in accordance with Article 296 of the EC Treaty. This goal is reached by transferring the military production to a new public company ('Navantia'). Since the new company, for viability reasons, will need to have certain civilian activities, safeguards have to be put in place in agreement with the Commission.

Another aim has been to, if possible, rescue employment in the civil shipyards, while still respecting Community legislation. The objective is to privatise the civil shipyards, through open and transparent market operations. In this way, the Commission may accept that the recovery claim on IZAR does not follow to the privatised shipyards.

A third aim has been to alleviate the social problems, by granting pre-pensions to all IZAR

employees at the age of 52 or above. In this way it is hoped that direct lay-offs can be avoided.

### **Conclusion**

The Commission, when it took the decisions, was aware that the consequences of the decisions may be serious for the Spanish public shipyards and their employees. However, the Commission also had received numerous complaints from shipyards in other EU Member States, and even from Spanish competitors. It therefore had to act to ensure that competition in the EU shipbuilding market was not distorted.

The state aid history of the Spanish shipyards may be seen as an illustration of how repeated state aid in order to cover losses creates problems not only for competitors, but in the end also is harmful for the employees. Competitors suffer, since a company that runs with permanent deficits supported by state aid tends to undercut prices and thus create serious distortions in the market. Employees also suffer, at least in the long run, since such companies feel less pressure to innovate and improve productivity, which is necessary in order to ensure long-term job security.

The effects of the recent restructuring will be on the one hand a viable military shipbuilding company, with a limited civilian activity which is strictly obliged to respect EC Competition rules. On the other hand, the civilian yards, significantly downsized, may find new buyers.

The Commission has also underlined the European Community's coherent policy in support of EU shipyards, facing unfair competition from Korean shipyards, which consists of three main elements:

- A WTO panel against Korea, challenging restructuring aid and export aid and the price depression these measures have caused. This procedure was terminated by adoption of the final report by the Dispute Settlement Body on 11 April 2005.
- The temporary defensive mechanism <sup>(1)</sup>, which allows for the granting of state aid to EU-yards constructing ship-types particularly harmed by unfair competition.
- 'LeaderSHIP <sup>(2)</sup> 2015'. A Commission initiative aiming at strengthening the competitiveness of EC shipyards.

<sup>(1)</sup> OJ L 172, 2.7.2002, p.1, Press release IP/02/945, 27.6.2002.

<sup>(2)</sup> COM(2003) 717 final of 21.11.2003.

## State aid rules and public funding of broadband

*Monika HENCSEY, Olivia REYMOND, Alexander RIEDL, Sandro SANTAMATO and Jan Gerrit WESTERHOF, Directorate-General Competition, unit H-3 <sup>(1)</sup>*

### Introduction

The development of the information society and of the 'e-economy' is commonly seen as a necessary step for giving new impetus to the modernisation of society and the growth of the economy. It is a crucial aspect of the Lisbon agenda, which sets out the European Union's policy priorities for the next decade.

A pre-requisite for transition to the e-economy is widespread access to *broadband*. 'Broadband' refers to always-on Internet connection providing high-speed data transmission, allowing the delivery of innovative content and services.

By means of its eEurope strategy, the Commission is actively encouraging national governments to set up national broadband strategies <sup>(2)</sup>. In this context, many public initiatives are taking place at national or local level to advance the development of those services and the establishment of the infrastructure that is necessary to provide them.

Inevitably, public intervention raises the issue of State aid: under what conditions are these projects compatible with the EU rules on competition and, more specifically, on State aid?

In the recent months, the Commission had the opportunity to assess several projects involving public support to broadband development. The considerations developed in this article reflect the Commission's conclusions in the ensuing decisions and aim at providing guidance on how to design forms of intervention that do not raise competition concerns. A word of caution is, however, necessary. These are the first decisions on State aid relating to broadband projects: the

present views might evolve in the light of further experience and in view of the quick pace of economic development and technological evolution in the sector.

### I. WHAT IS BROADBAND AND WHY SUPPORT IT

#### Some introductory elements

Connectivity to the Internet and the possibility to receive and transmit data is an electronic communication service. A basic service of this type is ubiquitously available throughout the Community <sup>(3)</sup>. This is the 'dial-up' *narrowband* connection, which has limited capability. The more advanced *broadband* services offer 'always-on' access allowing transmission of large volumes of data, reducing waiting time and improving efficiency.

Broadband networks are typically made up of a national backbone, a regional and a local backhaul and an access network or local loop. The highest bandwidth can be provided over technologies using optical fibre which is the mainstream medium deployed for national and regional networks. The connection to the final user (*last mile*) can then be provided by upgraded two-way TV cable networks, wireless solutions, bespoke fibre access solutions or through the existing copper telephone lines by upgrading some parts of the switching and transmission equipment (for instance, xDSL).

Broadband penetration in Europe is still modest <sup>(4)</sup>, but the growth rate of broadband subscriptions has been very large, with the number

<sup>(1)</sup> All authors work for the European Commission, Directorate-General for Competition. The present document only reflects their personal opinions and should not be held to represent the views of the European Commission or of the Directorate-General for Competition. The authors wish to thank Guido Acchioni, Adrian Cox, Christian Hocepiet, Dag Johansson, Laura Pontiggia and Lucilla Sioi for their valuable comments and opinions. The final responsibility for the content of the paper rests solely on the authors.

<sup>(2)</sup> Commission Communication COM(2004) 369 of 12 May 2004, 'Connecting Europe at High Speed – National Broadband Strategies'.

<sup>(3)</sup> Directive 2002/22/EC on universal service and user rights relating to electronic communications networks and services (Universal Service Directive), 7.3.2002.

<sup>(4)</sup> In July 2004, broadband penetration in the EU-25 was — on average — 6.5% of the population. Cf. Communication from the Commission COM(2004) 759 on European Electronic Communications Regulation and Markets 2004 (10th Implementation Report), 2.12.2004.

of broadband lines almost doubling in the past two years. Despite this rapid increase in connectivity, a large part of the European territory is underserved. For example, ADSL, the most commonly used platform in the EU, reaches not more than 85% of the population of the EU 15 and even less in the new Member States.

Lack of terrestrial broadband coverage is due among others to some of the typical economic problems associated with networks industries. Broadband networks are generally much more cost effective to roll-out, and hence available at cheaper terms, where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs, unit costs escalate dramatically as population densities drop <sup>(1)</sup>. Remoteness also plays a role, requiring to bridge longer distances in the backhaul and in the last mile. 65-70% of the costs associated with the deployment of broadband in the access network is related to civil infrastructure <sup>(2)</sup>. In addition, although equipment costs have fallen as volumes increase, they remain a significant cost and major barrier to roll-out.

In areas where demand is not very developed and coverage of cost is uncertain, private operators might find it difficult to find a source of funding for infrastructure projects, which have a long life and amortisation period.

Today, next to 'black areas' — where high demand supports a competitive supply — there can be 'grey areas' which can be characterized as a kind of natural monopoly, where the network is controlled by a single operator refusing access to its basic infrastructure. Finally, there are 'white areas' with no broadband provision at all.

The fact that an operator refuses access to its infrastructure — such as dark fibre <sup>(3)</sup> — to other providers, may seriously restrain competition. Ex-ante access regulation of wholesale broadband access <sup>(4)</sup> addresses some of these issues. It has not so far ensured effective competition in all regions and markets.

Public intervention might accelerate the establishment of the network while ensuring, by means of open access requirements, that competition is preserved in the future.

## What kind of public support?

Public intervention in broadband may take various forms with different implications in terms of impact on competition and State aid assessment. Although individual projects differ widely in the details, the projects assessed by the Commission so far can be broadly classified in two main categories: infrastructure projects and projects involving end-to-end services provision.

In a typical infrastructure project, the public authorities may want to support the creation of infrastructure (for instance ducts, masts, collocation sites, dark fibre) which is made available to all operators on non-discriminatory terms. This would generally concern to a varying extent the regional, local and access infrastructure, but not national backbone networks. Typically, the infrastructure is owned by the state but its management is tendered out to an independent company that does not offer the final service, but only access to the infrastructure or wholesale services.

In the case of projects involving end-to-end services provision, the selected bidder would normally not only have the task of providing the necessary infrastructure open to third party providers, but would also have the obligation to offer itself the retail service to end users. It is left to the selected bidder to choose between leasing or building the infrastructure necessary for the delivery of the required services. The assets would typically be owned by the selected bidder.

The next two sections summarise the elements that appeared particularly important for the Commission's assessment of both types of projects. It is worthwhile mentioning that all projects were in underserved areas, either because scarcely populated or because characterised by difficult topography.

<sup>(1)</sup> The costs per user of a satellite solution is largely unaffected by site density, however, at current overall subscriber volumes this technology remains expensive when compared to DSL or cable, mainly due to high set-up and installation costs.

<sup>(2)</sup> Broadband Stakeholders Group 'Broadband in Rural Areas', 2003. In the case of xDSL solutions, the infrastructure in the access networks already exists although sometimes investments in backhaul infrastructure are needed.

<sup>(3)</sup> A plain fibre-optic cable with no optical transmission equipment. Operators may add their own equipment and build their own network, retaining complete control over the fibre.

<sup>(4)</sup> Access Directive 2002/19/EC, 7/03/2002 and Commission Recommendation 2003/311/EC, 11.2.2003 on relevant product and service markets within the electronic communications sector require in principle the unbundling of copper lines only and not that of fibre connections in the local loop.

## II. PUBLIC INTERVENTION NOT INVOLVING STATE AID

### Investment on market terms

When public authorities intervene on the market on the same terms as private investors, there is no granting of State aid. This case, however, is quite rare, since public authorities generally take action precisely because the market fails to deliver the desired supply.

Nevertheless, it might still be the case that a public investment project in a broadband project is capable of securing revenues that are sufficient to repay its costs within a reasonable time-horizon and provide a rate of return in line with the market remuneration for projects of similar risk.

For pure infrastructure projects the appropriate repayment period might be longer, and the return on investment might be lower than those required by the market on integrated telecom projects. The Commission accepts the principle that the business model of a 'utility' company involved in pure infrastructure provision would be different from that of a telecom operator investing in a network and providing electronic communications services to end-users <sup>(1)</sup>. However, conformity with the Market Economy Investor Principle (MEIP) would have to be supported by a sound business plan, foresee a pricing policy that is justified on commercial rather than on policy grounds and possibly envisage a relevant participation of private partners to the venture on equal terms with public investors.

### General infrastructure not distorting competition

It is sometimes suggested that certain projects do not fall within the scope of Article 87(1) EC, but should rather be seen as a typical task of the public authority of providing general infrastructure.

It could be argued that this is the case of a project that serves the interest of the general public, provides a facility that the market is not capable of supplying and is planned in a way that avoids granting of selective advantages.

These conditions, however, should be interpreted strictly. As the Commission argued in *ATLAS* <sup>(2)</sup>, infrastructures that do not serve the general public, but are rather dedicated to specific economic operators cannot be seen as a typical task of the public authority outside of the scope of Article 87(1) EC. Similarly, projects that duplicate market initiatives or provide services already available are deemed to potentially distort competition. The infrastructure argument appears therefore tenable only if limited to basic civil works and passive elements such as ducts and dark fibre in unserved areas. So far, no such case was the object of a Commission decision.

### Funding of a Service of General Economic Interest

Use of public resources might not constitute State aid also in relation to the funding of a Service of General Economic Interest (SGEI). The Court of Justice has indicated that compensation for costs that result from public service obligations are not within the scope of article 87(1) of the Treaty, providing certain conditions are fulfilled. These conditions are described in the *Altmark* judgement of 24 July 2003 <sup>(3)</sup>.

In its decision on *Pyrénées-Atlantiques* the Commission assessed whether those conditions were fulfilled for a broadband project.

#### *A preliminary question: true public service?*

Before proceeding to the four *Altmark* criteria a preliminary question has to be answered: could the service in question be actually considered a Service of General Economic Interest? <sup>(4)</sup>

The Commission acknowledged that Member States have a large power of appreciation concerning the identification of a service as SGEI, but — on the basis of the case-law of the EU courts — indicated that some general principles should nevertheless be respected:

— the definition of SGEI must not be in conflict with Community legislation in the given field <sup>(5)</sup>;

<sup>(1)</sup> Commission decision of 9 September 2004 in case N 213/03, *Project ATLAS* (Corrigendum).

<sup>(2)</sup> Cf. footnote 8.

<sup>(3)</sup> Judgement of the Court of 24 July 2003, in case C-280/00, *Altmark Trans*, ECR 2003 p. I-7747 paragraphs 89 to 93 of the judgement.

<sup>(4)</sup> This, indeed, can be considered an implicit requirement of the first *Altmark* condition.

<sup>(5)</sup> Judgment of the CFI of 27.02.1997 in case T-106/95, *FFSA*, ECR 1997 p. II-0229.



- the service in question must carry a general interest that goes beyond the generic interest associated to each economic activity <sup>(1)</sup>;
- the public intervention must be justified by the nature and needs of the public service <sup>(2)</sup>.

### *Community legislation in the given field*

In the electronic communications sector, Community legislation harmonises the principles applicable to the universal service obligation <sup>(3)</sup>, which concerns the supply of a minimum set of basic services to all end-users at affordable prices. As already indicated, the scope of universal service includes a narrowband connection capable of supporting voice and data communications at a speed sufficient to access the Internet; typically at or equal to 56kbit/s. Member States may decide to make additional services publicly available in their territory, in addition to those included in the scope of universal service. It is considered important that the characterisation of a broadband service as SGEI does not modify the scope of universal service, and as such does not imply any obligation to offer or finance broadband services imposed on telecom operators. <sup>(4)</sup> This could represent a heavy burden, especially for small operators and new entrants in the market.

In *Pyrénées-Atlantiques*, the qualification of the provision of broadband access as SGEI did not alter the scope of the universal service while being in line with Community priorities and not raising competition concerns. This allowed the conclusion that the qualification as SGEI in the areas concerned was not in contrast with Community legislation.

### *General interest*

The Commission also acknowledged that broadband services can be considered to carry a general interest that goes beyond that of generic economic activities. Broadband services are becoming a widespread support not only for the development of business initiatives, but also for responding to numerous citizens' needs and for the supply of government services. The possibility to offer, thanks to broadband, e-Health, e-Government, e-Education and tele-working render this type of initiatives more relevant to the general interest than projects for pure economic development,

which would generally be assessed under the existing State aid rules, for example on regional aid. Naturally, SGEI projects must be related to the provision of a service to the general public and not be exclusively targeted at businesses.

### *Public intervention justified by the nature of the service*

The Commission also found that the already mentioned economic peculiarities of this network industry justified public intervention in certain geographic areas. What is worthwhile emphasising is that the same conclusion would not necessarily hold for projects that, contrary to *Pyrénées-Atlantiques*, concerned areas where offers by competing operators are already present ('black areas').

It was also considered that only the investment in the network justified public support. Indeed, the market might not be able to undertake the high fixed-cost investment in the infrastructure, but once an open infrastructure is available, market operators would normally not need additional funding for the supply of the downstream services.

Finally, only if the infrastructure is fully open on transparent and non-discriminatory terms, it can provide a service of truly general interest. The funding of a network belonging to one operator that may restrict access to competitors, would risk foreclosing the market from new entrants in the medium term. On the contrary, public intervention should not create monopoly positions and should ensure open and non-discriminatory access to the financed network.

The open access requirement should concern the basic element of the infrastructure — e.g. access to dark fibre in case of an optical fibre infrastructure. If this is the case, competition can take place in the segments of the market with the highest value-added and lead to the greatest advantage for the end users.

### **The Altmark criteria**

The assessment of the fulfilment of the *Altmark* criteria is based on considerations which are not necessarily specific to broadband projects, but

<sup>(1)</sup> Judgement of the Court of 10 December 1991, in case C-179/90, *Merci convenzionali porto di Genova SpA*, ECR 1991 p. I-5889, point 27.

<sup>(2)</sup> Judgement of 13 December 1991 in case C-18/88, *GB-INNO-BM*, ECR p. I-5941, point 22.

<sup>(3)</sup> Directive of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108 of 24.4.2002.

<sup>(4)</sup> Op. Cit. Footnote 2.

apply to SGEI in general. Some of the crucial elements are worth recalling:

### *Clearly defined obligations*

Public support is not considered aid if it is possible to establish a clear correspondence between the extra costs of public service obligations and their compensation. This requires a precise identification of the services demanded. In general, the attribution of a public service mandate through an open procedure implies a detailed specification of the required services and fulfils this criterion.

### *Parameters of compensation established beforehand*

If the mechanism for compensation left some margin of discretion or the possibility to grant ex-post additional funding, the risk of overcompensation could not be excluded. Again, the criterion is normally satisfied when the service is attributed through open procedure, since the overall amount of aid, or the parameters for compensation, would be determined before the start of the contract.

### *No overcompensation*

Whatever the mechanism for the choice of the operator and the determination of compensation, the compensation must *'not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.'*

Indeed, there could be circumstances in which the attribution through an open procedure on the basis of the best available offer on the market would not be sufficient to exclude overcompensation. This might be the case if the number of potential competitors is limited — notably because of the atypical character or the complexity of the service — or if an operator has privileged access to an infrastructure necessary to provide the service.

To avoid this problem, in the case of *Pyrénées-Atlantiques* the authorities required the selected operator to set up a legally independent company whose accounts would be regularly audited. A reverse payment clause in case of revenues exceeding a certain threshold was also foreseen.

### *Choice of provider*

To ensure that the cost of public service is effectively minimised it is necessary not only to avoid

overcompensation, but also to entrust the service to the most efficient operator. For this reason the fourth *Altmark* criterion is a necessary complement to the third one.

In the case of broadband there are many variables that qualify a project: quality of service, aid amount, aid intensity, geographical coverage, chosen technical means, price to users, etc.

The case law on public service contracts indicates that when the chosen procedure is not based only on the lowest price, but on multiple awarding criteria ('the most economically advantageous tender') those criteria must be: *'linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, ... expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'* <sup>(1)</sup>.

It has been suggested, however, that the *Altmark* case-law should be interpreted in a more stringent way. If aid is to be excluded, the procedure must offer sufficient guarantees that the choice reflects the 'best value for money' for the tendering public authority.

In *Pyrénées-Atlantiques*, the Commission accepted that the fourth *Altmark* criterion was satisfied because the selection was not mainly based on qualitative criteria, but was made on quantifiable elements and the choice between the two final offers reflected the lowest amount and intensity of aid.

## III. COMPATIBLE AID

A project that does not fall within the categories described above would generally involve State aid and would need to be notified and assessed for compatibility.

This would be the case of infrastructure projects dedicated to businesses — as the Commission has indicated in *ATLAS* — or in areas where there is already competitive supply and the SGEI qualification would not be justified. It might also be the case of funding of SGEIs that does not comply with the *Altmark* criteria.

Another frequent case is that of 'service projects', involving the funding of an end-to-end service provision.

<sup>(1)</sup> Judgment of the Court of 17 September 2002 in case C-513/99, *Concordia*, ECR [2002] p. I-07213, point 64.

## Service projects

Projects involving end-to-end service provision have several pros and cons when compared to pure infrastructure projects. On the one hand:

- an end-to-end service typically involves a lower detail of specification as to the type of infrastructure and technical means required by the authorities. This has the advantage of allowing better exploitation of existing installations and greater technological neutrality;
- an end-to-end service might also be preferable in cases where there is less need for building and managing new infrastructure and focus is on the rapid availability of the service to end users. By tendering the final service, the authorities have greater certainty on the scope and timing of the final service;
- a project that includes the provision of the final services allows greater commercial opportunities to the selected bidder and is likely to attract a greater proportion of private funding. This might entail lesser use of public resources and lower aid intensities.

On the other hand:

- this type of project can be seen as more distortive than one merely consisting of provision of infrastructure, since it will intervene in a greater number of markets, including those downstream markets in which public intervention appears less needed. In most cases public support for third party infrastructure (especially civil infrastructure), sold on a non-discriminatory wholesale basis to service providers, should be sufficient to reduce overall investment costs and lower barriers to service provision for numerous providers;
- it should also be noted that in certain infrastructure projects the State retains ownership of the infrastructure and attributes its management through a concession of limited duration to an independent party that cannot act as service provider. This solution preserves the neutrality of the infrastructure manager, as opposed to a situation in which a service provider also controls the infrastructure;
- finally, an end-to-end service requirement may put at an advantage the service operations of the selected provider, who is likely to be in a position to roll-out end-user services prior to the entry of third party providers benefiting

from the open access. Under certain circumstances, this might lead to market foreclosure effects.

## *Presence of State aid*

The funding of service projects, being a selective measure, distorts competition and constitutes State aid. The selectivity is both sectoral and geographical. Public funding supports the telecom sector and allows businesses in the concerned regions to profit from broadband services at better conditions in terms of coverage, quality and prices.

The measure might also selectively favour the chosen service provider, which will be capable of establishing its business and developing its customer base, enjoying a first mover advantage over prospective competitors. It should be considered that the broadband market is rapidly evolving and that, while public authorities generally decide to intervene in view of the lack of private initiatives in the concerned areas, it cannot be excluded that those could become viable in the medium term.

The Commission has noted in several cases that the existing frameworks and guidelines cannot be applied to assess aid measures that specifically aim at widespread availability and use of high-speed broadband services in rural and remote areas. It therefore assessed the compatibility of the measure with the common market directly on the basis of Article 87(3)(c) of the EC Treaty. This involved establishing the necessity and proportionality of the measure.

## *Necessity of the measure*

Broadband connectivity is a type of service that by its nature is capable of positively affecting the productivity and growth of a large number of sectors and activities. Regional economic development benefits resulting from greater broadband deployment can include job creation and retention, more industrial growth, improved education and health systems and even reduced traffic congestion. <sup>(1)</sup> The social and economic case for broadband takes on added significance for rural and remote communities, where improved communications can address a variety of challenges posed by distance. <sup>(2)</sup>

The Commission supports the principle that the deployment of broadband infrastructure needs to be encouraged where broadband connectivity is

<sup>(1)</sup> US Department of Commerce, Office of Technology Policy, "Understanding Broadband Demand", September 2002.

<sup>(2)</sup> OECD, "Broadband Driving Growth: Policy Responses", October 2003.



not provided by the market at affordable prices. The scope for public intervention in underserved areas was emphasised in eEurope 2005.<sup>(1)</sup> The Action Plan set 'widespread availability and use' as its broadband objective, and highlighted the role Structural Funds can play in bringing broadband to disadvantaged regions. Structural Funds can be used to increase broadband coverage in underserved areas where geographical isolation and low density of population can make the cost of building new infrastructure or upgrading the existing one unsustainable <sup>(2)</sup>.

The necessity of the measure should, however, be well documented. A survey of the existing services and infrastructure should constitute the basis on which to evaluate the need for public intervention. In principle, such intervention should take place only in areas where there is no provision of service ('white' areas). However, because of the physical characteristics of a network, some duplication of existing infrastructure is always likely to take place and represents a sort of 'unavoidable' distortion. Duplication should, nevertheless, be minimised: a pure replica, in terms of geographical coverage, of existing services would not meet the requirements for necessity of aid.

### Proportionality

In order for the aid measure to be compatible with Article 87(3)(c) of the EC Treaty, it must be proportionate to the objective and must not distort competition to an extent contrary to the common interest. The trade-off between the advantages — in terms of local economic development and support to information society — and the disadvantages — in terms of distortion of competition and possible disincentives to private investment — has to be assessed. The extent of the measure in terms of service definition, as well as project design features, should also be evaluated to ensure that the least distorting model, which would nevertheless produce the required results, is adopted.

In its decisions, the Commission has positively assessed the following elements:

- *Open tender*: The selection of the service provider through open procedure in accordance with EC rules and principles on public procurement minimises the advantages to the direct beneficiary of aid.
- *Technology neutrality*: A project which aims at achieving a certain final service leaving to the provider the choice of technological means has the advantage of not favouring a priori any given technology.
- *Open access*: The obligation for the provider to lease capacity to resale operators and service providers on a transparent and non-discriminatory basis is seen as a more pro-competitive solution.
- *Use of existing infrastructure*: The freedom for the service provider to choose the most efficient way of procuring the necessary infrastructure, either by building, buying or leasing it from third parties minimises duplication and enhances economic efficiency. Since leasing facilities is expected to be more cost effective than building new infrastructure, existing operators have the possibility to contribute their infrastructure to the project, which limits the economic impact of the project for operators that already have infrastructure in place.
- *Short duration, small aid amount and intensity*: Other things equal, the smaller the amount and intensity of aid and the shorter the duration of the funding, the smaller the distortion of competition.
- *Reverse payment mechanism*. The existence of a reverse payment mechanism, under which the public funding is expected to diminish as demand for services picks up, ensures that only the minimum necessary public funds are used.
- *Cost allocation transparency and monitoring*: Clear specification of the cost eligible for public funding, separation of accounts where other activities are present and regular monitoring of the financial results ensure a high degree of transparency.
- *Minimisation of price distortion*: The appropriate pricing of the services is important to ensure that business end-users benefiting from the aid are not put in a position more favourable than their competitors located in regions where the same advanced broadband services are available on market terms. The risk of sending the wrong price signals to the market as a result of tariffs charged for a State funded service should also be considered. Finally, disproportionately low prices may necessitate more aid than the minimum necessary to address the undersupply of the service in certain areas. Benchmarking with tariffs offered by service

<sup>(1)</sup> COM(2002) 263.

<sup>(2)</sup> Commission staff working paper, 'Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications', 28.7.2003, SEC(2003) 895.



providers in areas which do not benefit from aid is a desirable proviso.

#### IV. CONCLUDING REMARKS

This article does not have the ambition to clarify all the issues that can be raised in connection with public funding of broadband projects. There are, however, certain elements that appear to have rather general relevance in the assessment.

In particular, projects that are attributed through open procedure, that impose open access to the basic infrastructure and take place in areas where there is no competitive supply (a mix of ‘white’ and ‘grey’ areas), are more likely to qualify for compatibility.

In general, although they involve higher budgets and a long time horizon, projects focussing on the deployment of open infrastructures tend to minimise competition distortions. State support for the high fixed-cost elements of networks lowers the entry barriers for all operators providing downstream services, who may access the network on equal terms.

In contrast, measures supporting the provision of end-to-end services are generally aimed at supporting the quick deployment of broadband services in regions without coverage. Of shorter duration than infrastructure projects, empirical evidence shows that subsidies for the provision of end-to-end services tend to favour the dominant operators.

## State aid aspects in the implementation of the Emission Trading Scheme

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### 1. The Emission Trading Scheme

The Emission Trading Scheme (ETS) <sup>(1)</sup> plays a major role in the Commission's Climate Change Policy. It aims at helping EU Member States to achieve compliance with their commitments under the Kyoto Protocol by using a market based instrument which allows achieving emission reductions at least cost.

The ETS is the first international trading system for CO<sub>2</sub> emissions in the world. It started on 1 January 2005 and, once all National Allocation Plans are implemented, will cover a total of more than 12000 installations in the EU-25 (combustion plants, oil refineries, coke ovens, iron and steel plants, and factories making cement, glass, lime, brick, ceramics, pulp and paper) representing close to half of Europe's emissions of CO<sub>2</sub>.

Within certain limits, Member States define the amount of emission allowances they will distribute to participants. By handing out fewer allowances than companies are expected to need for covering their actual emissions, Member States create scarcity, which is the prerogative for the creation of a functioning market of emission allowances. Apart from the initial allocation, Member States are not supposed to intervene in the development of the market, and have in particular no further influence on the development of the price for emission allowances.

A cornerstone of the implementation of the ETS are the so-called National Allocation Plans (NAPs). These plans establish the total number of emission allowances Member States plan to allocate for the 2005-2007 trading period and the methods of allocating them to the different installations in the economic activities involved.

Member States were obliged to submit their NAPs by end of March 2004 (by 1 May 2004 for the new Member States) in view of the start of the new system on 1 January 2005. However, most of the Member States were late in submitting their plans.

The Emission Trading Directive requires the Commission to assess compliance of these plans with Article 10 of the ETS directive and with eleven criteria established in Annex III thereof. The Commission may refuse a plan in total or in part within three months from its notification if the plan is found incompliant. By the mid of February 2005, the Commission had taken decisions on 21 NAPs <sup>(2)</sup>. The assessment of the plans of the Czech Republic, Poland, Greece and Italy is underway.

### 2. The assessment of the National Allocation Plans

The NAPS submitted to the Commission are far from uniform. Member States have opted for different approaches with regard to central elements of the allocations. Plans differ e.g. as regards the basis for initial allocations, rewards for early action, the consideration of technological emission reduction potential, the allocation to new entrants, and even to some extent with regard to the scope of installations covered by the scheme.

In January 2004 the Commission published guidance on the implementation of the allocation criteria, in order to ensure consistency and transparency. It grouped several plans for decisions at the same time, while assessing each plan on its own merits and it joined a communication to the Council and the European Parliament to each round of decisions, explaining the assessment of the plans and reasons for rejection.

<sup>(1)</sup> Introduced by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, OJ L 275, 25.10.2003, p. 32.

<sup>(2)</sup> On 7 July the Commission decided on the NAPs of Denmark, Ireland, the Netherlands, Slovenia and Sweden; on 20 October decisions were taken on the NAPs of Belgium, Estonia, Latvia, Luxembourg, the Slovak Republic and Portugal; in late December decisions were taken on the NAPs of Cyprus, Hungary, Lithuania, Malta and Spain. The decisions are accessible at [http://www.europa.eu.int/comm/environment/climat/emission\\_plans.htm](http://www.europa.eu.int/comm/environment/climat/emission_plans.htm).

Until now, the Commission required changes to plans mainly in three areas <sup>(1)</sup>.

- If the allocation chosen by a Member State for the 2005-2007 trading period was not consistent with the Member States obligation to achieve its Kyoto target. This was the case in particular where a Member State could not sufficiently substantiate its intended use of flexible mechanisms and could therefore not demonstrate that with the use of these mechanisms it would be able to respect its target.
- If the volume of allowances for the 2005-2007 trading period was inconsistent with assessment of progress towards the Kyoto target, i.e. the allocation exceeds projected emissions.
- If a Member State intended to intervene in the market after the initial allocation by redistributing the issued allowances among the participating companies during the 2005-2007 trading period. This State intervention would alter the correct functioning of the market and create uncertainty for business.

### 3. Involvement of DG Competition in the assessment of the NAPs

Criterion 5 of Annex III of the ETS directive requires that a National Allocation Plan *'shall not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities in accordance with the requirements of the Treaty, in particular Articles 87 and 88 thereof'*.

In its guidance document, the Commission confirmed that *'the normal state aid rules will apply.'*

By letter of 17 March 2004 to the Member States, the two director generals of DG Environment and DG Competition described under what circumstances state aid may be involved in National Allocation Plans and what they considered as potentially most distortive practices in the context of allowance allocation, potentially leading to incompatible state aid. The letter indicated that the assessment of the National Allocation Plans would primarily aim to ensure the environmental effec-

tiveness of the overall scheme and to prevent significant distortions of competition, which could arise in particular in case of over-allocation of allowances.

The letter clarified that the Commission would not request automatically state aid notification of all NAPs. However the Commission would assess state aid aspects of the plans in the context of the assessment of NAPs under the emission trading directive. Where a NAP seemed to contain aid and where such aid was likely to be incompatible, the Commission would take action under the state aid rules.

When examining the National Allocation Plans, the Commission took account in particular of experience it had in assessing national emission trading systems put already in force by some Member States before the Emission Trading Directive.

The Commission considered that the allocation of emission allowances confers a selective advantage to certain undertakings which has the potential to distort competition and affect intra Community trade unless the allowances were sold to the recipients at the market price <sup>(2)</sup>. As regards the use of state resources and their imputability to Member States, the specificities of the emission trading directive led to a differentiated assessment. Article 10 of the directive obliges Member States for the first trading period from 2005 until 2007 to allocate at least 95% of the allowances free of charge. This allows Member States to sell up to a maximum of 5% of the allowances. So far, Member States have made little use of this possibility. Only Denmark has decided to auction 5% of the allowances. Some other Member States envisage auctioning of unused allowances from the new entrants reserve at the end of the trading period or to auction a very limited number of allowances to cover the administrative costs of the implementation of the scheme. To the extent that a Member State does not use its possibility to sell allowances at a market price, the measure appears to be imputable to the Member States and to entail the use of State resources.

The measure may also contain state resources and be imputable to the Member State where a

<sup>(1)</sup> Where a plan has been approved by the Commission, the Member State can proceed to take a final allocation decision at national level. Before doing so, it can make changes to the number of allowances for individual plants as a result of improved data. A Member State may, however, not increase the total number of allowances it intends to put into circulation.

Where a part of a plan was rejected and the Member States implements the proposed changes, it will not have to submit its plan to the Commission a second time but can proceed with the allocation decision at national level.

<sup>(2)</sup> State aid N 653/1999 — Denmark, OJ C 322, 11.11.2000, p.9; State aid N416/2001 — United Kingdom, OJ C 88, 12.4.2002, p.16; State aid N35/2003 — Netherlands, OJ C 227, 23.9.2003, p. 8.

Member State allows banking of allowances from the first to the second trading period. Until now, all Member States with the exception of France excluded banking.

With the exception of Denmark, the Commission therefore could not exclude that the NAPs implied State aid pursuant to Article 87(1) of the Treaty.

The Commission assessed further if any potential aid was consistent with and seemed to be necessary to achieve the overall environmental objective of the ETS directive.

The Commission sought contacts with Member States in particular where a NAP seemed to contain one of the following features.

- Any potential aid does not contribute to achieve the environmental objective of the measure (this appears to be the case where a Member State allocates a total number of allowances which is not consistent with projected emissions or where it is inconsistent with its path to Kyoto)
- beneficiaries do not deliver a sufficient environmental counterpart for any potential aid (this will be the case where they receive more than realistically projected emissions, as the aid would then not have an incentive effect to change behaviour)
- a plan leads to discrimination between trading sectors or installations, e.g. by using unjustified different allocation methods for different sectors or applying an allocation method differently to certain undertaking; also with regard to unjustified different treatment of new entrants vis-à-vis incumbents.

When assessing the NAPs, the Commission encountered a limited number of such situations. Until now, most of potential threats to undistorted competition could be resolved in discussion with the Member State concerned. In several cases, Member States reduced the total number of allowances in order to comply with Criterion 1, 2 and 5 of the ETS directive. In some cases, Member States abandoned reserves established for specific sectors. The Commission therefore concluded for most NAPs that based on the information provided by the Member States, it considered that any potential aid was likely to be compatible with the common market should it be assessed in accordance with Article 88(3) of the Treaty.

It should be noted that the Commission until now screened all NAPs in the context of ETS directive in order to identify obvious problems of probably incompatible State aid. Until now, the Commission did not take any formal State aid decision on a National Allocation Plan. This does not give the Member State formal state aid approval of their NAP, but it indicates however that the Commission did not find obvious fault with the plan. This *prima facie* positive assessment can play a role in particular where complaints might be launched against a National Allocation Plan. Unless new evidence is brought forward, which casts doubts on the preliminary assessment, there is no reason why the Commission should come to a less positive assessment in case it would deal with a NAP in a state aid procedure.

In case any of the remaining four plans would contain features likely to create significant distortions of competition and the Member State concerned was not modifying its plan of its own accord, the Commission might need to request notification under Article 88(3) of the Treaty or to deal *ex officio* with a potentially illegal aid, had the aid already been granted. Considering the duration of a State aid investigation, in particular when a formal investigation procedure under Article 88(2) of the Treaty would need to be opened, this could considerably hamper this country's companies participation in the emerging carbon market.

#### 4. Experience gained from the process

The implementation of the emission trading directive followed an extremely demanding schedule, not least due to the late submission of most of the National Allocation Plans. While it was critical that Commission and Member States set up the major elements of the emission trading construction in a credible and workable manner, this phase also needs to be seen as a learning phase. One should not forget that the carbon market is an emerging market. At this stage it was most important to ensure a certain scarcity of allowances and to secure against major distortions of competition. In this setting, the screening of the NAPs under state aid aspects preferably without entering into formal state aid investigations proved valuable. However, experience gained during the first trading period may well bring to light the need for a refinement of the application of the available instruments or even of the instruments themselves.



## The Court of Justice rules for the first time on Article 21(3) of the Merger Regulation <sup>(1)</sup> in case C-42/01 Portuguese Republic v. Commission <sup>(2)</sup>

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On 22 June 2004, the Court of Justice rendered a judgement in case C-42/01 *Portuguese Republic v. Commission*. The Court upheld the Commission decision of 22 November 2000 adopted against the Portuguese Republic on the basis of Article 21(3) of the Merger Regulation ('Decision'). The Decision was taken in the context of the examination of a concentration notified to the Commission. In its Decision, the Commission obliged the Portuguese Government to take the necessary measures to comply with Community law and withdraw two decisions ('despachos' of 5 July 2000 and 11 August 2000) the Government took to oppose a proposed concentration, which had a Community dimension, on the basis of national legislation on privatisation. The present judgement marks the first ruling by the Court of Justice on Article 21(3) of the Merger Regulation <sup>(3)</sup>. The background to this judgement and some of the key findings of the Court are briefly analysed below.

### 1. Background to the Court proceeding

In July 2000, the Commission received a notification of a concentration by which the Portuguese company *Secil Companhia Geral de Cal e Cimentos SA* ('Secil') and the *Swiss Holderbank group* ('Holderbank') intended to acquire the whole of the shares in the Portuguese cement manufacturer *Cimpor Cimentos de Portugal SGPS* ('Cimpor'). Cimpor had been nationalised in 1970s but had been largely privatised in the 1990s. Through a public bid announced in June 2000, Secil and Holderbank sought to take control of Cimpor with a view to dividing the company on a geographical basis. Holderbank's offer to purchase part of Cimpor had a Community dimension within the meaning of the Merger Regulation, whereas Secil's bid for the other part of Cimpor did not. Consequently, only the acquisition by

Holderbank of its part in Cimpor fell within the scope of the Merger Regulation.

Subsequent to the notification of the transaction to the Commission <sup>(4)</sup>, the Portuguese Government refused to authorise the proposed transaction on the basis of national legislation on privatisation and adopted two decisions ('despachos' of 5 July and 11 August 2000) to that effect. These decisions were taken in application of *Decree Law 380/93*, according to which acquisition of shares representing more than 10% of the share capital with voting rights in companies that will be privatised is subject to previous authorisation by the Ministry of Finance. Pursuant to Article 4 of the Decree Law, the authorization shall be justified considering the objectives of Article 3 of the *Framework Law on Privatisation No 11/90*.

In September 2000, a letter by the Commissioner was addressed to the Minister of Finance indicating that the Portuguese Republic appeared to have failed to fulfil its obligations under Article 21(3) of the Merger Regulation by deciding to reject the proposal by Secil and Holderbank to acquire Cimpor without informing the Commission of its reasons and without giving it the opportunity to assess the compatibility of those reasons with Community legislation before adopting the measures in question. In October 2000, the Minister of Finance replied that he had applied *Decree-Law No 380/93* to the takeover bid by Secilpar and Holderbank. The contested Decision was adopted in November 2000.

In the Decision, the Commission found that none of the three legitimate interests set out in the second subparagraph of Article 21(3) were applicable and that the Portuguese Republic had failed to observe the procedure laid down in Article 21(3) of the Merger Regulation. The Commission therefore found that the Portuguese Republic had acted

<sup>(1)</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 ('Merger Regulation') now repealed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('The EC Merger Regulation') entered into force on 1 May 2004; See corresponding Article 21(4) of the EC Merger Regulation.

<sup>(2)</sup> Judgement of 22 June 2004 in case C-42/01 *Portuguese Republic v. Commission*. The Hearing was held in September 2003 and the Opinion of Advocate General Tizzano, positive to the Commission, was issued in January 2004.

<sup>(3)</sup> In 1999, the Commission adopted a decision against the Portuguese Republic pursuant to Article 21(3) in the context of merger case IV/M.1680-BSCH/A. Champalimaud. Proceedings before the Court were commenced but withdrawn at an early stage.

<sup>(4)</sup> Case No. COMP/M.2054-Secil/Holderbank/Cimpor.

in breach of that provision and required it to withdraw its decisions of 6 July and 11 August. The Portuguese Republic failed to comply with the Decision.

Subsequently, in January 2001, Secil and Holderbank withdrew their notification to the Commission and abandoned their merger plans.

In February 2001, the Portuguese Republic brought an action for annulment to the Court of Justice of the Commission decision based on Article 21 of the Merger Regulation.

In this context it should be noted that, during the Court proceedings, on 4 June 2002, the Court of Justice rendered its judgement in *Case C-367/98*. In that action, the Commission challenged on the basis of internal market rules, *inter alia*, Portuguese Law No.11/90 as well as Decree Law No. 380/93. The Court found the Portuguese rules providing for a manifestly discriminatory treatment of investors from other Member States with the effect of restricting free movement of capital. As to the argument based on the need to safeguard the financial interests of the Portuguese Republic, the Court held that it was settled case-law that such economic grounds, put forward in support of a prior authorisation procedure, cannot serve as justification for restrictions on freedom of movement. By adopting and maintaining in force, in particular, Law No 11/90 and Decree Law No 380/93, the Portuguese Republic had failed to fulfil its obligations under Article 73 B (now Article 56) of the Treaty.

The contested Decision in the present proceedings challenged the application of Decree-Law 380/93 to a specific case.

## 2. Article 21(3) of the Merger Regulation

The Merger Regulation provides the framework for the assessment of concentrations that have a Community dimension and ruling on their compatibility with the common market from the competi-

tion policy point of view. In relation to the Member States, this competence is exclusive and finds explicit expression in the first and second paragraphs of Article 21, which read as follows:

*'1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.*

*2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension. [...]*

While preserving the exclusive competence of the Commission to review the effects of concentrations having a Community dimension on competition, the Merger regulation allows Member States to review the compatibility of mergers with other policy interests, provided they are compatible with Community law.

Therefore, Article 21(3) provides that

*'3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation and compatible with the general principles and other provisions of Community law (emphasis added).'*

The three specific categories of interests, which are explicitly identified as legitimate in Article 21(3) are 'public security' <sup>(1)</sup>, 'plurality of media' <sup>(2)</sup> and 'prudential rules' <sup>(3)</sup>.

In this context it needs to be noted that the claim by a Member State of 'a legitimate interest' creates no new rights for the Member State. It is restricted to the recognition in Community law of the Member State's present reserved powers to intervene in certain aspects of concentrations affecting the territory coming within their jurisdiction on grounds other than those covered by the Merger Regulation <sup>(4)</sup>.

(1) The reference 'public security' is made without prejudice to the provisions of Article 296 of the Treaty on national defence, which allow a Member State to intervene in respect of a concentration which would be contrary to the essential interests of its security and is connected with the production of or trade in arms, munitions and war material. Moreover, there may be wider considerations of public security, in the sense of Article 297 and 30 of the Treaty, in addition to defence interests in the strict sense. The requirement for public security, as interpreted by the Court of Justice, could cover security of supplies to the country in question of a product or service considered of vital or essential interest for the protection of the population's health; Notes on Council Regulation (EEC) 4064/89 with a view to clarifying the scope of certain articles.

(2) 'Plurality of media' recognises the legitimate concern of Member States to maintain diversified sources of information for the purpose of plurality of opinion and multiplicity of views; Notes on Council Regulation (EEC) 4064/89 with a view to clarifying the scope of certain articles.

(3) 'Prudential rules' relate in particular to financial services and refer to the application of rules normally confined to national bodies for the surveillance of banks, stock broking firms and insurance companies. Prudential rules concern the good repute of individuals, the honesty of transactions and the rules of solvency; Notes on Council Regulation (EEC) 4064/89 with a view to clarifying the scope of certain articles.

(4) Notes on Council Regulation (EEC) 4064/89 with a view to clarifying the scope of certain articles.

Article 21(3) further provides <sup>(1)</sup> that *'any other public interest'*, which a Member State wishes to protect, *'must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of the Community law before the measure to protect such an interest is taken by the Member State (emphasis added)'*. The Commission has a time limit of one month <sup>(2)</sup> from the communication of the claimed public interest to make its assessment and inform the Member State of its decision.

For the Commission to recognise the compatibility of the public interest claimed by a Member State with the general principles and other provisions of Community law, it is important that prohibitions or restrictions placed on concentrations should not constitute a form of arbitrary discrimination or a disguised restriction in trade between Member States. In addition, measures which may be taken by the Member States must satisfy the criterion of appropriateness for the objective and must be limited to the minimum of intervention necessary to ensure protection of the legitimate interest in question. Therefore, where alternatives exist, the measure should be chosen which is objectively the least restrictive to achieve the end pursued <sup>(3)</sup>.

### 3. The main arguments advanced by the Commission

In the Decision, the Commission argued that the structure of Article 21(3) is built on the balance between on the one hand the Member State being under an obligation to communicate to the Commission in advance 'any other public interest' and to withhold from adopting measures to protect such interests, and, on the other hand, the Commission being under an obligation to assess and render a decision as to the compatibility of the claimed interest with the general principles and other provisions of Community law within a short deadline.

The Commission held that Article 21(3) would be deprived of all its effect if, as a result of the absence of communication of the claimed public interest, the Commission was not entitled to assess whether a measure adopted by a Member State was justified by one of the interests expressly considered as legitimate by Article 21(3). Member States could easily avoid the scrutiny of the Commission

by not communicating such measures. The Commission therefore considered that Article 21(3) should be interpreted in the sense that, irrespective of whether a measure is communicated, the Commission is entitled to adopt a decision assessing whether a measure not covered by one of the three interests mentioned in Article 21(3) should be recognised as compatible with the Treaty.

The Commission stated that the arguments underlying the two decisions opposing the concentration were encapsulated in the text of the second decision referring to the objective of Decree-Law No 380/93, according to which it is necessary *'to protect development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the economic policy guidelines in Portugal'*.

The Commission held that this objective is not one of the interests (public security, plurality of the media and prudential rules) regarded as intrinsically legitimate for the purposes of the second paragraph of Article 21(3) of the Merger Regulation. By adopting the decisions declining to authorise the acquisition of more than 10% of the shares in Cimpor, the Portuguese Republic, in the Commission's view, in effect prohibited the acquisition and thereby raised barriers to the freedom of establishment and free movement of capital enshrined in the Treaty, which could not be considered warranted under any essential grounds of public interest recognised in the case-law of the Court of Justice. In any event, the Portuguese Government had not advanced any such grounds. The interest underlying the two decisions of the Portuguese Minister of Finance, which were not notified to the Commission contrary to Article 21(3) of the Merger Regulation, were thus found to be incompatible with Community law.

One of the essential questions for the Commission in these proceedings was whether the Commission had the competence to adopt an Article 21(3) Decision under these circumstances or should have reverted to an infringement procedure under Article 226 of the Treaty, as argued by the Portuguese Republic in its action for annulment of the Commission decision. The Commission maintained that Article 21(3) should be interpreted as covering a situation where the Member State has not communicated to the Commission the public

<sup>(1)</sup> See paragraph 3, subparagraph 3, of Article 21; now of Article 21(4) of The EC Merger Regulation.

<sup>(2)</sup> Pursuant to Article 21(4) of The EC Merger Regulation, the time limit is 25 working days.

<sup>(3)</sup> Notes on Council Regulation (EEC) 4064/89 with a view to clarifying the scope of certain articles.



interest, other than public security, plurality of the media or prudential rules, it intends to protect prior to taking the measures.

#### 4. The Court's findings

As regards the preliminary question raised by the Portuguese Republic, the Court considered that withdrawal of the notification (11 January 2001) after the adoption of the Commission's decision cannot in any circumstances cause that decision to lapse. The decision thus continued to exist and to form the subject matter of the action brought by the Portuguese Government <sup>(1)</sup>. The Court then went on to analyse whether the Commission was entitled to adopt the contested decision.

The Court first recalled that the Merger Regulation is based on the principle of a precise allocation of competencies between the national and Community authorities. On the one hand, the Commission alone has competence to take all decisions relating to mergers with a Community dimension. On the other hand, the 29<sup>th</sup> recital of the Merger Regulation provides that '*concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States*'. <sup>(2)</sup> In addition, the Court noted that, for reasons of legal certainty and in the interest of the undertakings concerned, the Regulation also contains provisions <sup>(3)</sup> designed to limit the duration of the Commission's review <sup>(4)</sup>.

In the Court's view, the above elements demonstrated that the Community legislature intended to make a clear allocation between the interventions to be made by the national and the Community authorities, and that it wished to ensure a control of mergers within deadlines compatible with both the requirements of sound administration and the requirements of the business community. <sup>(5)</sup> Therefore, the Court dismissed the Portuguese Government's position on the third subparagraph of Article 21(3) of the Merger Regulation, to the effect that, in the absence of any communication of the interests protected by the decisions of 5 July and 11 August 2000, the Commission could not rule by decision on the compatibility of those interests with the common market <sup>(6)</sup>.

Secondly, the Court agreed with the Commission, and the Advocate General, that, if, in the absence of any communication by the Member State concerned, the sole option open for the Commission were to bring an action for failure to fulfil obligations under Article 226 of the Treaty, it would be impossible to obtain a Community decision within the short time limits laid down by the Merger Regulation. This would in turn increase the risk of national measures already taken irretrievably prejudicing a merger with a Community dimension and rendering the Commission's review under Article 21(3) ineffective by giving the Member States the possibility of circumventing the controls laid down by that provision <sup>(7)</sup>.

Consequently, the Court acknowledged that for the power to review public interests, other than those specified as legitimate, to be effective, the Commission must have the power to rule by decision as to the compatibility of those interests with the general principles and other provisions of Community law, irrespective of whether or not those interests have been communicated to it <sup>(8)</sup>.

Whereas the Court recognized that the Commission's task, in identifying the interests protected by the national measures, may be made more uncertain and complex if these interests have not been communicated to it, the Court emphasised that the Commission always has the possibility to ask the Member State concerned for information. The Court acknowledged that in this case the Commission had done so. However, should the Member State not provide the information as requested, the Commission is entitled to take a decision on the basis of the information which it has at its disposal <sup>(9)</sup>.

Thirdly, the Court held that '*in a situation such as that in this case, where the Member State has not communicated the interests protected by the national measures in question, it is inevitable that the Commission will first examine whether those measures are justified by one of the interests specified in the second subparagraph of Article 21(3) of the Merger Regulation. If in so doing, it finds that the Member State adopted the measures in question in order to ensure the protection of one of the*

<sup>(1)</sup> Paragraph 43 of the judgement.

<sup>(2)</sup> Paragraph 50 of the judgement; Case C-170/02 *Schlüsselverlag J. S. Moser v Commission* [2003] ECR I-0000, paragraph 32.

<sup>(3)</sup> Reference is made to Articles 4, 6, 10(1), 10(3), 10(6) and 21(3) of the Merger Regulation.

<sup>(4)</sup> Paragraphs 51-52 of the judgement.

<sup>(5)</sup> Paragraph 53 of the judgement.

<sup>(6)</sup> Paragraph 54 of the judgement.

<sup>(7)</sup> Paragraphs 55-56 of the judgement.

<sup>(8)</sup> Paragraph 57 of the judgement.

<sup>(9)</sup> Paragraph 58 of the judgement.



*legitimate interests enumerated in that subparagraph, it does not have to take its examination further and verify whether those measures are justified by any other public interest envisaged in the third subparagraph (emphasis added) <sup>(1)</sup>.*

Therefore, in light of the above considerations, the Court concluded that the Commission has the power under the third subparagraph of Article 21(3) of the Merger Regulation to adopt a decision as to the compatibility with the general principles and other provisions of Community law of public interests protected by a Member State other than those three explicitly mentioned as legitimate in Article 21(3). This is so even in the absence of communication of those interests by the Member States concerned. Therefore, the Commission, in adopting the contested decision, did not encroach on the jurisdiction of the Court of Justice or national courts, and did not infringe Article 21(1) of the Merger Regulation, Article 220 EC, Article 226 EC or committed any misuse of procedure <sup>(2)</sup>.

Finally, the Court also dismissed all other pleas by the Portuguese Republic in support of its action for annulment of the Commission decision.

As to the plea on the infringement of Article 253 of the Treaty (plea for lack of, or insufficient, indication of the legal basis) the Court found that the wording of the contested decision, and in particular paragraphs 60 to 64 of the grounds, clearly show that it is based on the third subparagraph of Article 21(3) of the Merger Regulation <sup>(3)</sup>. The Court also held that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In the Court's view the Commission supplied a sufficient, though brief, statement of reasons why it considered the interests underlying the two decisions by the Portuguese Government incompatible with the general principles and other provisions of Community law. The Court also recognised that the decision was adopted in a context that was well known to the Portuguese Government (proceeding in Case C-367/98 *Commission v Portugal*) and that the Portuguese Government had not supplied the least indication to the Commission as to the

compatibility of the public interests protected by the measures concerned with Community law <sup>(4)</sup>.

As regards the alleged breach of the principle of proportionality, the Court found that the public offer had been launched with a view to sharing the assets of Cimpor between Secil and Holderbank and the two concentration operations were thus "indissolubly linked". Therefore, in the Court's view, it was not possible to limit the effects of the contested decision only to the Holderbank/Cimpor concentration, which had a Community dimension. Consequently, the Commission was entitled to state in the decision that the Portuguese Republic was obliged to withdraw the decisions of 5 July and 11 August 2000 in their entirety, and to declare that the interests underlying those decisions were incompatible with Community law <sup>(5)</sup>.

## 5. Conclusions from the judgement

The above-mentioned proceedings were of considerable importance from the point of view of the Commission's exclusive competence to examine concentrations having a Community dimension. This judgement, which is the first ruling on Article 21(3) of the Merger Regulation, supported the position adopted by the Commission and provides useful guidance for any future application of that provision. It clarifies the interpretation of Article 21(3) in cases where a Member State fails to notify to the Commission 'any other public interest' (other than public security/plurality of media/prudential rules) it wishes to protect before taking measures to protect that interest.

The judgement confirms the Commission's competence to assess the compatibility of that interest with the general principles and other provisions of Community law and to adopt a decision addressed to the Member State to that effect, even in the absence of a communication of such an interest to the Commission before the measure to protect that interest is taken. In such circumstances, the Commission will first examine whether those measures are justified by one of the interests explicitly recognised as legitimate in Article 21(3) (public security/plurality of media/prudential rules). If it finds that the Member State adopted the measures in question in order to ensure the protection of one of these legitimate interests it

<sup>(1)</sup> Paragraph 59 of the judgement; by analogy, in relation to State aid, Case C-301/87 *France v Commission (Boussac St. Frères)* [1990] ECR I-307, paragraph 22.

<sup>(2)</sup> Paragraph 60 of the judgement.

<sup>(3)</sup> Paragraph 63 of the judgement.

<sup>(4)</sup> Paragraphs 66-69 of the judgement.

<sup>(5)</sup> Paragraphs 72-74 of the judgement.

does not have to take its examination further and verify whether those measures are justified by any other public interest envisaged in the third subparagraph.

Whereas this judgement is relevant in circumstances of wrongful non-communication by the Member State of its public interest claims other than public security/plurality of media/prudential rules, it may be appropriate to be cautious before drawing too far reaching conclusions as to its relevance for other scenarios that may arise under Article 21(3) of the Merger Regulation.

However, what can be drawn from this judgement is that the Court has unequivocally emphasised the

principle of a precise allocation of competencies between the national and Community authorities and interventions made by the national and by the Community authorities in view of efficient merger control respecting sound administration, legal certainty and the legitimate interests of the undertakings concerned.

Most importantly for the Commission's role in the effective enforcement of Community law, and in particular in safeguarding of an effective system of merger control in the Community, the Court recognises Article 21(3) as *lex specialis* taking priority over an action for failure to fulfil obligations under Article 226 of the Treaty in the circumstances of the case.

## Profit splitting mechanisms in a liberalised gas market: the devil lies in the detail

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### Introduction

Liberalisation of energy markets is a key element in the Lisbon agenda to improve European competitiveness. Recent years have therefore seen a range of actions at European and Member State level to open markets for competition, most prominently through the adoption of European legislation liberalising electricity and gas markets <sup>(1)</sup>.

In parallel, the Commission has pursued a series of anti-trust cases to remove, amongst others, commercial practices that entrench market segmentation <sup>(2)</sup>. In view of the high costs of entry into energy markets, established players' efforts to sell outside their traditional supply zones are likely to be, at least in the medium term, a crucial catalyst for competitive markets to develop in this sector. A number of cases challenging territorial restriction clauses found in upstream gas contracts were described in a recent article in this Newsletter <sup>(3)</sup>. The present article discusses further how other, more sophisticated, mechanisms might similarly have the effect of segmenting the European gas market. In particular, it reviews the compatibility with article 81 of the EC Treaty of so-called 'profit-sharing mechanisms', also dubbed 'profit splitting mechanisms' or PSMs, in contracts between gas producers and wholesalers.

### The importance to consumers of cross-border trade

Although gas has been internationally traded to a far greater extent than electricity, gas markets in most of Europe have nevertheless historically been sharply segmented by national legislation, commercial practice and contract terms. Prices paid by customers in different national markets and end-use sectors have varied markedly, due to these factors amongst others. One important reason probably lies in the different gas prices in upstream long-term gas contracts signed by

national incumbents with upstream producers. Indeed, upstream prices have tended to be set according to three main principles:

The first principle is the 'competing fuels principle'. This principle means that the evolution of the gas price is linked to the price of crude oil and its derivatives. It arose historically from gas being marketed predominantly in competition with heavy and light fuel oils.

The second principle is the 'market value principle'. This principle indicates that the gas price is negotiated separately for each target market (generally the territory of a Member State), taking into account the mix of competing fuels in this market. In this regard, it should be noted that the fuel mix naturally varies from country to country, leading to different price levels for each Member State.

The third principle is the so-called 'net-back principle'. This principle implies that, whatever price would be the result of the previous principles is then adjusted taking into account transport costs between the agreed delivery point and the point when the gas enters the importer's sales area. The net-back principle generally has the effect of lowering gas prices for those importers whose sales area is further away from the delivery point.

These, together with other relevant factors like local transport costs and margins, lead to price differentials between market prices and thus to a natural pressure for arbitrage between markets. The effect of such 'gas-to-gas' arbitrage should be, in the first instance, to equalise prices between markets. Competition between suppliers — of gas from the same and from different sources — should also create pressure for gas prices to fall towards costs. This is of particular importance within the areas of Europe that have historically relied heavily on a single source of gas (Russian, Algerian or North Sea gas).

<sup>(1)</sup> In particular Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas.

<sup>(2)</sup> For an overview, see MEMO/03/159 of 29.7.2003.

<sup>(3)</sup> See. H. Nyssens, C. Cultrera and D. Schnichels: 'The territorial restrictions case in the gas sector: a state of play', Competition Policy Newsletter, 1/2004, p. 48. See also the closure of the investigation concerning OMV (IP/05/195).

It is therefore of prime importance for competition that wholesalers who buy gas from producers are free to sell this gas outside their historic area of operation. It is in this perspective that legal monopolies for gas supply, import and/or export that were granted in the past by a large number of Member States are gradually being abolished by the liberalisation Directives. However, some contractual practices can achieve a similar effect as legal monopolies from the point of view of competition or the consumer.

### **Further barriers to free movement: profit sharing mechanisms**

An earlier article on territorial restrictions described the progress achieved by the Commission in securing the removal of territorial restriction clauses from some upstream gas supply contracts. Since then, the Commission services have continued to work on this theme. For instance, in October 2004 the Commission adopted two decisions, the first on this subject in the gas sector, which formally confirm that territorial restriction clauses infringe Article 81 of the Treaty <sup>(1)</sup>.

However, the Commission's work on this theme has not only addressed contract clauses that explicitly forbid resale outside a particular territory. It has also covered a number of contractual mechanisms that have equivalent effects to a territorial restriction, by making resale economically unfeasible or at least less attractive. In particular, producers have sometimes replaced territorial restriction clauses with PSMs.

That effects similar to territorial restrictions might be achieved as effectively indirectly, by more sophisticated means, has long been recognised by the Commission. Paragraph 49 of the Commission Guidelines on Vertical Restraints <sup>(2)</sup> indeed states:

‘The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation [...] relates to market partitioning by territory or by customer. That may be the result of direct obligations, such as the obligation not to sell [...] to customers in certain territories [...]. It may also result from indirect measures aimed at inducing the distributor not

to sell to such customers, such as [...] profit pass-over obligations [...]’.

This position has been reflected in a number of Commission decisions. For example, in the JCB decision <sup>(3)</sup>, relating to construction and earth-moving equipment, the Commission dealt with a system of service fees payable when goods had been exported by a distributor to a destination outside its own territory. These fees were paid by the distributor of the country of origin, and paid to the distributor in the destination country. The fee supposedly related to the cost of after-sales services provided in the destination country for re-exported goods. The Commission argued that, given that the fee amounted to a substantial part of the potential gross margin from such exports, the fee acted as a *de facto* profit pass-over clause and that this deterred export sales and thus reinforced the territorial protection of other official distributors.

Similarly, in the Volkswagen <sup>(4)</sup> case, an antitrust infringement arose because a limit, imposed on the volume of sales outside the contract territory that could be taken into account for the purpose of calculating a bonus, was liable to induce dealers to remain within their own territory, and thus restricted consumers' and overseas dealers' ability to acquire vehicles in Italy.

The starting point is therefore to regard profit-sharing or profit pass-over mechanisms (PSMs) as likely to infringe Community anti-trust law. In recent territorial restriction cases the Commission has equally paid close attention to profit-sharing clauses. For instance, in the Nigerian LNG case <sup>(5)</sup> it ensured such clauses would not be inserted into contracts.

### **Do profit-sharing mechanisms always restrict competition?**

However, the antitrust effects of a PSM depend on what concrete mechanism is being applied. The rest of this article examines the application of profit-sharing in liquefied natural gas (LNG <sup>(6)</sup>) supply contracts. Some operators have indeed argued that profit-sharing mechanisms can provide a valid means of maintaining a commer-

<sup>(1)</sup> See Commission press release IP/04/1310. [See the article on the GDF case in this Newsletter on page 45].

<sup>(2)</sup> OJ C 291, 13.10.2000, p. 1.

<sup>(3)</sup> Decision of 21.12.2000, OJ L 69, 12.3.2002, p. 1.

<sup>(4)</sup> Commission decision of 28.1.1998, OJ L 124, 25.4.1998, p. 60.

<sup>(5)</sup> Commission press release IP/02/1869. See also Commission press release IP/02/1048 concerning the GFU case.

<sup>(6)</sup> LNG is gas that has been super-cooled at the port of departure. It is piped aboard an insulated tanker and can then be transported long distances before being piped ashore and regasified, and then injected into onshore transportation pipelines.



cial equilibrium between the parties to an LNG contract. LNG involves co-ordinating and time-tabling a complex chain of technical facilities, including upstream production sites, cooling facilities, tankers, re-gasification terminals and the final transport pipelines. Therefore, deviations of ships away from a pre-planned delivery schedule can sometimes cause a number of difficulties, both for the seller — in terms of re-arranging its production process — and for the buyer, who has to re-arrange its supply portfolio. In view of these technicalities, delivery schedules are arranged between the seller and the buyer. It is therefore natural that LNG contracts include provisions clearly outlining the conditions for such deviations, both between EC ports and on a larger inter-continental scale <sup>(1)</sup> in case the delivery schedule cannot be met any longer because of the deviation.

The issue is relevant for LNG because a tanker can be diverted during its journey (so long as terminal capacity is available in an alternative port). LNG supplies are therefore inherently more flexible to take advantages of price spikes in different national markets than gas supplies through pipelines. The type of arrangements discussed here would be difficult to justify in pipeline contracts, where deviations of the gas are unlikely to disrupt the upstream production process and where, anyhow, gas molecules are difficult to track in a meshed network.

Given these factors, some historic LNG contracts have included mechanisms to share profits arising from resale of an LNG cargo in a port/country other than its originally intended destination.

Such arrangements should however not lead to limiting the buyer's freedom to re-sell the gas within the European internal market wherever he deems commercially appropriate. The exact functioning of such profit sharing mechanisms is of considerable importance in assessing whether their object or effect is to restrict the resale of LNG between Member States <sup>(2)</sup>. Several dimensions of an LNG contract are relevant for determining a PSM's impact on competition.

### *Sharing of costs or sharing of profits?*

First, a consistent theme identified in the precedents cited above relating to profit sharing is that the pass-over of part of the total margin may be justified, where this compensates the recipient for costs that they demonstrably incur because of the re-sale. These might, for instance, be after-sales services, or charges to ensure that all distributors participate fairly in marketing costs.

However, in the case of LNG sales, no after-sales services appear to be provided by the seller. Nor does the seller appear to incur any marketing costs for such a non-branded commodity. It is hard to see, therefore, what costs arise that can legitimately be reclaimed through a systematic levy on resale.

### *The impact of the contractual regime*

Second, PSMs risk, by their nature, interfering with the freedom of a buyer to dispose of his goods as he sees fit. It is this interference which creates the basis for anti-competitive object or effects <sup>(3)</sup>. However, whether these practices lead to a restriction depends also on the stage in the value chain where the PSM is being applied.

LNG cargoes, like other international freight, can be shipped on the basis of internationally recognised commercial terms (INCOTERMS), established by the International Chamber of Commerce (ICC) <sup>(4)</sup>. The most likely contractual regimes for LNG shipments are as following (emphasis added):

- **FOB (Free on Board)** means that the seller delivers when the goods pass the ship's rail at the named port of *shipment*. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point.
- **DES (Delivered Ex Ship)** means that the seller delivers the contract goods when those goods are placed at the disposal of the buyer on board of the ship at the named port of *destination*. The

<sup>(1)</sup> LNG trading is beginning to emerge as a global market. Naturally, since the jurisdiction of European anti-trust law is limited to matters affecting trade within the single market, this article is of no relevance for trades not affecting the EC market.

<sup>(2)</sup> The present considerations apply merely to transactions which could affect trade between Member States. Mechanisms which apply merely to transactions between the Community and third countries are therefore unlikely to fall within the scope of EC antitrust rules.

<sup>(3)</sup> See judgment of the Court of Justice of 14 December 1983, Kerpen & Kerpen, case 319/82, ECR, p. 4173.

<sup>(4)</sup> An overview of the Incoterms, 2000 edition, can be found on the following website: [http://www.iccwbo.org/index\\_incoterms.asp](http://www.iccwbo.org/index_incoterms.asp)

seller has to bear all costs and risks involved in bringing the goods to the named port of destination before discharging.

- CIF (Cost, Insurance and Freight) means that the seller delivers the contract goods when those goods pass the ship's rail in the port of shipment. The *seller must pay the costs and freight* necessary to bring the goods to the named port of destination and procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. However, *the risk of loss of or damage to the goods*, as well as any additional costs due to events occurring after the time of delivery, *are transferred from the seller to the buyer in the loading port*.

In principle, both parties to a CIF or DES shipment have to agree about deviating a ship before it has arrived in the re-gasification terminal. Indeed, in the absence of both parties' agreement no deviation can be realised whilst still respecting the essential conditions of the contract (delivery of a gas volume at a certain delivery point within a certain period range). In other words, a change of delivery point encompasses a substantial change to the agreement, as in the absence of an agreed delivery point, there can be no contract. PSMs applying to a CIF or DES cargo which has not yet been delivered therefore constitute, in some sense, an agreement between the parties to change an essential element of the contract (the delivery point) in exchange for a price (determined, for instance, by means of the PSM). In this sense, a PSM included in these types of contracts does not interfere with the buyer's freedom, since the deviation of the cargo takes place before the ownership and/or risk of the gas has passed. In general, therefore, it is unlikely that PSMs in CIF or DES contracts would constitute an infringement of antitrust law, so long as they apply to what happens with the gas *before* its delivery.

On the other hand, PSMs that oblige the buyer to pay an amount to the seller in view of the use made by the buyer of the gas *after it has been delivered* would clearly restrict the buyer's freedom. This could exceptionally be the case for a PSM in a CIF/DES contract (if for instance the use of the gas

after its re-gasification is restricted <sup>(1)</sup>), but would normally more clearly result from a PSM in a FOB contract. PSMs in FOB contracts constitute, in principle, a limitation of the freedom of the buyer after transfer of property/risk. They can thus undermine incentives to sell gas in a different part of the European market than originally intended. Therefore they are, *prima facie*, to be considered as a violation of article 81(1) of the EC Treaty.

### 'Raw' vs. 'Net' PSMs

Thirdly, the likelihood of a restriction being considered a violation of article 81(1) of the Treaty depends also on the methodology of the PSM. Although contractual practice is extremely varied, two broad categories of PSM clauses can be identified, which have quite different effects.

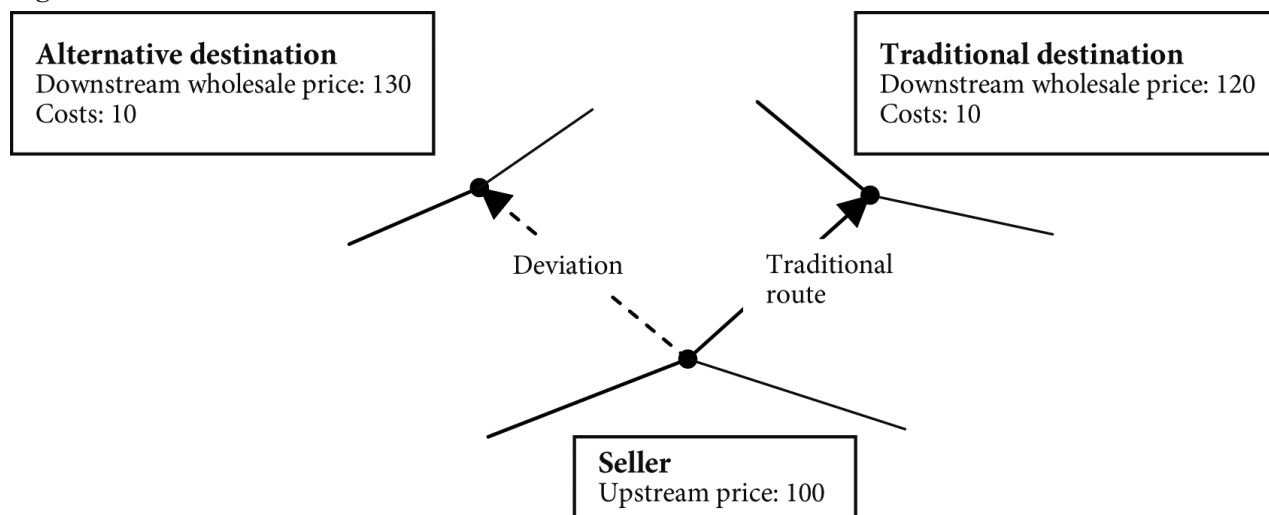
A first type of PSM splits the entire difference between, on the one hand, the upstream price between the seller and the European buyer and, on the other hand, the price obtained by the latter when re-selling in a territory alternative to the originally envisaged territory. Calling such mechanism a PSM could be considered a euphemism to the extent that what is being split is not really a profit, but rather the gross price differential between the upstream price and the downstream price in the new territory. Such mechanisms can be dubbed 'raw PSMs'.

A second type of PSM can be dubbed 'net PSM'. Such PSM applies where there is a positive 'incremental' profit differential between, on the one hand, the downstream profit expected to be made by the buyer in the originally envisaged territory and, on the other hand, the downstream profit effectively made when re-selling in the new territory. The term 'net' has been chosen in view of the fact that the split is to be applied to profits *after* deduction of the costs associated with the delivery of gas in the new territory.

The difference between raw PSM and net PSM clauses is significant as these clauses have quite different effects on the incentive for the operators concerned to change the destination of the cargoes and realise price arbitrage. This is illustrated by Figure 1.

<sup>(1)</sup> As regards Commission action over use restrictions, see IP/00/297, and M. Fernandez Salas, 'Long-term supply agreements in the context of gas market liberalisation: Commission closes investigation of Gas Natural', Competition Policy Newsletter 2/2000, p. 55.

Figure 1



In this illustrative schema, assuming that the PSM provides for a 50/50 share between operators concerned, the difference in the effects of raw and net PSM's can be described as follows:

- *raw PSM*: in the alternative destination, the difference between the final price (130) and the initial price (100) is 30, so 15 goes to the seller, leaving only 5 for the buyer (after costs of 10); whereas in the traditional destination, the realisable margin is 10 (downstream price (120) — upstream price (100) — costs (10)). The effect of the raw PSM is to reduce the margin of the buyer as compared to the margin originally expected in his traditional territory. The raw PSM operates, in reality, in a manner close to the ones condemned in the JCB and Volkswagen cases cited above.
- *net PSM*: the incremental profit as a result of the deviation is 10 (20 margin in the new territory as compared to only 10 margin in the original territory). Assuming again a 50/50 share of the additional profit, the application of the net PSM leaves the buyer with a profit of 15 (20-5 retroceded to the seller) as compared to the margin of 10 he would have made in the originally foreseen territory. In other words, the mere splitting of a real incremental profit will always lead to a higher margin, also for the buyer, in the new territory.

Because raw PSMs can be expected to (comparatively) reduce the margin of the buyer in case of deviations, they are likely to be considered as restrictions by object. Indeed, it can be presumed that a buyer will tend to sell its gas wherever it makes the biggest margin. Net PSMs, on the contrary, will tend always to leave an additional (even if reduced) margin in the new territory. It can

therefore again be presumed that the buyer will again, go for the higher margin in the new territory. In view of this logic, it can be considered, from a policy point of view, that net PSMs, do not appreciably restrict competition to the extent they do not abolish the 'incentive' for the buyer to still obtain a higher margin in a new territory. In line with this, only FOB contracts providing for the freedom of the buyer to deviate ships — without prior approval of the seller — containing the mere limitation that an incremental profit will be shared can be considered as not being appreciably restrictive. This reasoning also implies that in case of deviations with a profit (as compared to the upstream price) but without an 'incremental' profit (as compared to the originally foreseen destination) no retrocession can take place.

### *Sharing of confidential commercial information*

In addition, the practical operation of PSMs can have significant indirect effects. In particular, any application of a PSM implies the risk of sharing of confidential information between (potential) competitors. More specifically, the price offered by the wholesaler to its final customers is likely to be used for computing the precise profit to be shared by the parties. To the extent that the producer is itself an actual or potential competitor selling directly to those final customers — or that it may subsequently share the information with other downstream competitors — this information-sharing may itself be anti-competitive. As a consequence, this direct passing-over of information about commercial prices or margins should be avoided, for instance, by means of the appointment of an independent trustee. This trustee will then be in charge of receiving from both parties the

different pricing, margin or cost information which is necessary to compute the part of the increment to be retroceded.

### *Ability to determine likely effect*

Finally, it is also of great importance whether the contract terms are in fact clear enough to enable the buyer to determine in advance (and without the need for *ad hoc* renegotiation) what share of profit will be payable to the seller. In practice, PSM's appear by no means always so clearly drafted. Indeed, contracts not providing for clear wording as regards cost determination and the price comparators (raw prices or net incremental margins) will tend to be considered as having the purpose to oblige the buyer to ask for the prior approval of the seller before any transaction. Such vague clauses should therefore be considered to restrict competition in the same manner as the 'raw PSM's' described above.

### **Conclusion**

The authors' conclusion is that, to the extent that PSM's have the effect of creating a disincentive to resell gas outside the originally intended destination, thereby limiting the buyer's freedom to dispose of its gas as he sees commercially appropriate, they infringe anti-trust law. Such infringements are more likely in case of FOB contracts, in view of the fact that in CIF/DES contracts both parties' approval is anyhow necessary in order to amend the essence of the contract (delivery point and price). Where PSMs clearly maintain the incentives for the buyer to sell abroad — by leaving him systematically a positive incremental margin in a new destination where the LNG ship is deviated — they are considered, by the authors, as not being appreciably restrictive. This reasoning requires a detailed analysis of contractual mechanisms and their economic context. Unfortunately, the devil lies in the detail...



## The BdKEP decision: the application of competition law to the partially liberalised postal sector

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### 1. Introduction

On 20 October 2004, the Commission adopted a decision based on Article 86 regarding certain provisions of Germany's postal regulatory framework which bar commercial mail preparation firms from earning discounts for handing over pre-sorted letters at Deutsche Post AG's (DPAG) sorting centres<sup>(1)</sup>. The case was prompted by a complaint on 20 May 2003 from the Bundesverband der Kurier-Express-Post Dienste e.V. (BdKEP), a German association of courier, express and postal service providers.

The Commission found that the incriminated provisions of the German Postal Law induce DPAG to abuse its dominant position, thus to infringe Article 82, in two ways: First, they induce DPAG to discriminate between, on the one hand, bulk mailers who have access to the downstream sorting centres and the related discounts and, on the other, commercial providers of such services who do not have access to these discounts. Second, the provisions prompt DPAG to extend its market power from the (reserved) market for basic postal services upstream into the (liberalised) market for mail preparation services.

### 2. Mail preparation services and discounted postal tariffs

DPAG has the exclusive right to clear, sort, transport and deliver letters weighing less than 100 grams (the so-called reserved area). The market for mail preparation services is upstream of the reserved area. It involves the making up of postal items (printing, enveloping, labelling, franking), collecting, placing them in mailbags or containers complying with certain standards, bundling and sorting them to a greater or lesser degree by destination and delivering them to access points of the universal service provider. These activities were traditionally performed by the senders themselves.

They are now increasingly outsourced to specialised mail preparation firms and warrant a huge potential for market growth in Germany.

Since local post offices in Germany are not equipped to process bulk mail, mail preparation firms transport the letters directly to DPAG's sorting centres where they are fed into the public postal network. The German postal legislation provides for a graduated system of discounted postal tariffs for large customers which feed self-prepared mail into the postal network at sorting centres. The level of discount depends on the number of items per category and on whether the letters are handed over at the outbound sorting centre (i.e. closest to the sender) or the inbound sorting centre (i.e. closest to the recipient). The discounts, which reflect the costs avoided by DPAG, are fixed by the German postal regulator RegTP and reviewed once a year. Mail preparation firms which — as the overwhelming majority — work on behalf of several senders and consolidate their letters before feeding them into the public network are barred from these discounts as far as letters falling within the reserved area are concerned. Yet the costs savings for DPAG are the same irrespective of whether the mail is brought by customers themselves or by commercial providers acting on their behalf.

### 3. Article 82 complaints to the Bundeskartellamt

In the framework of the European Competition Network (ECN), the German Federal Cartel Office (Bundeskartellamt) informed the Commission that it had received two complaints under Article 82 and/or the German equivalent which related to the same subject-matter. Indeed, the complainants challenged DPAG's refusal to grant them quantity-based discounts for reserved mail items at the incumbent's sorting centres. DPAG's practice was however so far covered by the German postal

<sup>(1)</sup> Text of the decision available at: <http://europa.eu.int/comm/competition/liberalization/decisions/>

regulatory framework and in particular by the provisions under investigation by the Commission. The compatibility of the German provisions with Community law was thus a preliminary question for any further action at the national level.

The Bundeskartellamt and the Commission therefore agreed to closely co-ordinate their actions, proceeding in two stages and at two levels. First, the Commission would finalise the infringement proceedings under Article 86 and take a definitive view as to whether the German postal provisions infringe the competition rules. Should the Commission come to the conclusion that the provisions are contrary to Community law, the Commission decision would lift the obstacle of the justification of DPAG's behaviour through the German Postal Law. Indeed, under the ECJ's CIF case law <sup>(1)</sup>, national competition authorities are required to set aside the application of national law which contravenes Community law. A Commission decision ruling against the incriminated provisions in the German Postal Law would be a sufficient indication that these provisions contravene Community law. The Bundeskartellamt could then, in a second step, adopt a decision based on Article 82 (to the extent that trade between Member States is affected), enjoining DPAG to grant commercial mail preparation firms the applicable downstream access discounts. In such a way, the Bundeskartellamt's action at the national level would be a perfect supplement to an Article 86 decision which, in itself, would not have any immediate bearing on DPAG's behaviour. Thereby, the competitive disadvantage placed on mail preparation firms — if confirmed by the Commission's investigation — could in practice rapidly be removed.

#### 4. Infringement of articles 86-82 of the EC Treaty

The Decision finds that the contested provisions induce DPAG to abuse its dominant position, thus breaching Article 82, in two ways.

##### 4.1. Discrimination

First, they induce DPAG to discriminate between, on the one hand, large customers who have access to the downstream mail preparation discounts and,

on the other, commercial providers of such services who do not have access to these discounts. This amounts to not treating like cases alike, thereby discriminating between senders. Both major senders and commercial firms hand over similar volumes of mail at sorting centres, pre-sorted and presented in the same way and leading to the same savings in handling operations and efficiency gains for DPAG.

This finding is fully corroborated by Article 12 5<sup>th</sup> indent of the Postal Directive <sup>(2)</sup> which lays down a tariff non-discrimination principle for different types of large mailers: *'Whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions.'*

##### 4.2. Extension of a dominant position

Second, the relevant provisions induce DPAG to extend its market power on the (reserved) market for basic postal services into the market for mail preparation services where it is also a key player. DPAG charges the full postal tariff for professionally pre-sorted and prepared bulk mail delivered to a downstream access point which, in terms of volume and quality of preparation, would have given rise to the maximum available discount had it been handed over by the bulk mailer itself. DPAG thus enjoys the cost savings without any compensation for the mail preparation firms. At the same time, mail preparation firms which compete with DPAG do not have the possibility to procure their clients savings on postage which is a key argument in the cost savings-driven market for mail preparation services.

##### 4.3. No interference with Article 7 of the Postal Directive

During the proceedings, DPAG's main argument was that part of the mail preparation services as defined by the Commission, namely the pre-sorting of the mail and its transport from the sender's premises to a DPAG sorting centre on behalf of several senders, fall within the ambit of

<sup>(1)</sup> Judgment of the Court dated 9 September 2003 in Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) and Autorità Garante della Concorrenza del Mercato*.

<sup>(2)</sup> Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15/14 of 21.1.1998 as amended by Directive 2002/39 of 10 June 2002, OJ L 176, 5.7.2002, p. 21.

the reserved area of the Postal Directive and that, as a consequence, Articles 86 and 82 do not apply to the services concerned.

The Decision demonstrates why this allegation, if at all justified in law, is unfounded in the actual circumstances at hand. Pursuant to Article 7(1) of the Postal Directive, the scope of the reserved services includes the '*clearance, sorting, transport and delivery*' of certain items of correspondence. The reserved area thus has a clear beginning, the '*clearance*', and an ending, the '*delivery*', both chronologically and geographically. Both terms are defined by the Directive <sup>(1)</sup>.

Not only letter boxes and postal offices, but also DPAG's sorting centres are '*access points*' under the Directive since all clients, whether senders or mail preparation firms, can deposit their bulk mail items at these points. This means that in the case of bulk mail the reserved area only starts with the handing over of the mail items at the sorting centre. All activities which take place beforehand, in particular the pre-sorting and the transport from the sender's premises to the sorting centre, cannot be reserved <sup>(2)</sup>. The Commission has already taken this view in the 2001 SNELPD decision <sup>(3)</sup> and its 1998 Notice on the application of the competition rules to the postal sector <sup>(4)</sup>.

#### 4.4. No negative impact on DPAG's financial equilibrium

The incriminated provisions are not justified under Article 86(2), which sets out an exception to Article 86(1) where the application of the rules of competition would obstruct the performance of the particular tasks assigned to the undertaking which has been granted exclusive or special rights. First, the Postal Directive determines a maximum scope of services for which Member States can grant

exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service. Article 7 Postal Directive could thus be seen as a *lex specialis* to Article 86(2) in the realm of the postal sector. As the mail preparation activities under investigation do not fall within the ambit of the reserved services, there is a presumption that any special right in relation to these is not justified under Article 86(2).

More importantly, even on substance DPAG failed to demonstrate that removing the incriminated provisions would actually have any impact on the performance of the universal postal service. The German system of discounted postal tariffs is precisely designed not to obstruct the performance of DPAG's universal service obligations. The discounts are regularly reviewed by RegTP and mirror the avoided costs in each case and, in particular, take into account the fixed network costs which DPAG continues to bear even if part of it is not used or less used because of upstream consolidation.

## 5. Conclusion

The BdKEP decision is the 15th decision based on Article 86 adopted by the Commission and the first one ever addressed to Germany. It shows that the Commission is determined to use this legal basis whenever Member States adopt or maintain in force provisions which induce dominant undertakings to abuse their position. This is particularly important in the postal sector, where the Community legislator has decided a gradual and controlled liberalisation that Member States should not frustrate. After the SNELPD decision mentioned above and the Italian hybrid mail case <sup>(5)</sup>, this is the third illustration of the interaction between Article 86 and postal sector-specific regulation since the entry into force of the Postal Directive. In

<sup>(1)</sup> Clearance is the '*operation of collecting postal items deposited at access points*' (Article 2(4)), i.e. '*physical facilities [...] where postal items may be deposited with the public postal network by customers*' (Article 2(3)). Delivery or distribution (the equivalence of both terms can be derived from the French and German language version) is the '*process from sorting at the distribution centre to delivery of postal items to their addressees*'. The activities of '*sorting*' and '*transport*' can be reserved to the extent to which they take place between the beginning and ending defined by the Directive.

<sup>(2)</sup> This is confirmed by a comparison with the scope of the universal service defined in Article 3 of the Postal Directive. The universal service provider is under the obligation to ensure the '*clearance, sorting, transport and distribution of postal items up to two kilograms*' at all points in the national territory on every working day and not less than five days a week. If '*transport*' was construed as comprising the conveyance of mail items from the sender's premises to the sorting centre as alleged by DPAG, DPAG would be obliged to pick up mail items from all households and companies everywhere in Germany.

<sup>(3)</sup> Commission Decision of 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services, OJ L 120, 7.5.2002, p. 19.

<sup>(4)</sup> Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C39 of 6.2.1998, page 2. See in particular footnote 30: '*Even in a monopoly situation, senders will have the freedom to make use of particular services provided by an intermediary, such as (pre-)sorting before deposit with the postal operator.*'

<sup>(5)</sup> Commission Decision of 21 December 2000 concerning proceedings pursuant to Article 86 of the EC Treaty in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy, OJ L 63, 3.3.2001, p. 59.

terms of procedure, the BdKEP decision and the warning letter which the Bundeskartellamt addressed to DPAG in November 2004, demonstrate the ever closer co-operation between the Commission and the national competition autho-

rities within the new framework laid down by Regulation 1/2003. The Federal Republic of Germany and DPAG have filed an application for annulment of the Decision before the CFI (Cases T-490/04 and T-493/04).



## Capacity limitations for shipyards in the context of the Court of Justice' judgement on Kvaerner Warnow Werft (KWW)

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### Introduction

On 28 February 2002, the Court of First Instance annulled two Commission decisions concerning the East German shipyard Kvaerner Warnow Werft (KWW), which ruled that KWW had exceeded its capacity limitation and Germany had to recover parts of the earlier restructuring aid. The Commission filed an appeal, which was finally dismissed by the Court of Justice on 29 April 2004.

Since 1995 the Commission monitored the compliance of East German yards with the capacity limitation as a production limitation, in the meaning of limiting the output. According to the Court, the Commission's decisions were wrong in interpreting the capacity limitation of Eastern German shipyards as a production limitation.

Taking into account the judgment's reasoning, the Commission examined whether further to KWW also to other shipyards, which were subject to such limitation, the Court's interpretation of the notion 'capacity limitation' may apply. This article analyses the consequences of the judgement of the Court of Justice and the Commission's decision on capacity limitations for East German, Spanish and Greek shipyards.

### 1. Background

*Capacity limitations for shipyards in East Germany, Spain and Greece*

From 1992 to 1997, based on the Council Directive on aid to shipbuilding and its various amendments (see footnotes (1), (2), (3), and (4)) the Commission approved state aid for several shipyards in Germany, Spain and Greece. In a countermove these Member States accepted to reduce shipbuilding capacities and promised not to exceed these capacity limitations for a period of up to 10 years. The decisions concerned the following shipyards:

- East Germany: Volkswerft Stralsund, Aker MTW, Kvaerner Warnow Werft (KWW), Peene Werft and Elbwerft Boizenburg
- Spain: Astano, Astander, Puerto Real, Sestao, Sevilla, Barreras, Juliana and Astander and private sector yards
- Greece: Hellenic shipyard

*Starting point: Kvaerner Warnow Werft (KWW) in East Germany*

From 1992 to 1996, a profound restructuring of the five Eastern German shipyards was carried out. As a counterpart for the exceptionally large amounts of aid Germany reduced the shipbuilding capacity in Eastern Germany by 40% resulting in a total capacity limited to 327 000 cgt. Germany allocated this capacity between individual yards, from which 85 000 cgt were attributed to Kvaerner Warnow Werft (KWW).

The restructuring of all yards was carried out in a similar way: the yards were privatised and totally rebuilt with help of state aid. In total, the aid paid to the Eastern German yards amounted to about DEM 6 billion (ca. EUR 3 billion), from which the aid paid to KWW was DM 1.2 billion (ca. EUR 600 million). From 1993 to 1995, five decisions were taken regarding KWW, authorising the aid by tranches.

Since 1994, the Commission had monitored the compliance with the individual capacity limitations, which were supposed to be in force for up to ten years. From the beginning of the monitoring the Commission considered the capacity limitations as being a limitation of production, of the output of the yards in the meaning of tonnage built. Since this was the understanding between the Commission, Germany, and the yards concerned, the monitoring was always carried out as monitoring of actual production of the yards.

(1) Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, OJ L 380, 31.12.1993, p. 27.

(2) Council Directive 92/68/EEC of 20 July 1992 amending Directive 90/684/EEC on aid to shipbuilding, OJ L 219, 4.8.1992, p. 54.

(3) Council Directive 94/73/EC of 19 December 1994 amending Directive 90/684/EC on aid to shipbuilding, OJ L 351, 31.12.1994, p. 10.

(4) Council Regulation 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring, OJ L 148, 6.6.1997, p. 1.

In summer 1998, during a monitoring visit to KWW it was established that the production of the yard would exceed considerably the annual limit of 85 000 cgt. In summer 1999 a negative decision was taken due to exceeding the capacity limit in 1998 by 37 414 cgt (total production 122 414 cgt). This had repercussions to the previous year, and another negative decision was taken in 2000 concerning 8 862 cgt excess of the capacity limitation in 1997. Due to these decisions, KWW was ordered to pay back a total of DM 95 million (EUR 47.5 million) of incompatible aid. KWW reimbursed the whole amount with interest in April 2000 but appealed at the Court of First Instance.

## 2. The judgements of the Court

When the Commission implemented its decisions on restructuring aid it considered the capacity limitation as both a technical limitation ('bottlenecks') and a limitation of actual production. However, following KWW's appeal against the recovery of aid due to its excess of production the Court of First Instance ruled on 28 February 2002, in joint cases T 227-99 and T 134-00, that the Commission was wrong in interpreting the capacity limitation of KWW as a limitation of actual production.

The capacity limitation, in the light of the Commission decisions adopted between 1993 and 1995 authorising the aid, had to be understood as a technical limitation of the production facilities. As long as the production facilities of the yard as described in the Commission decisions authorising the aid were not changed, the yard could produce more than 85 000 cgt. In order to be able to claim that the capacity limitation was in fact a limitation of the actual production, the Commission should have clearly formulated its decisions in the period of 1993 to 1995 accordingly and should have imposed a production limit.

On 13 May 2002 the Commission appealed at the Court of Justice against this judgment. However, on 29 April 2004 the Court of Justice dismissed the appeal with the following arguments:

- With regard to the above mentioned Directives the Commission had a certain measure of discretion in setting the conditions to which the proposed aid was to be subject to in order to ensure that it remained compatible.
- The Court takes note that the actual production of an undertaking is not the same notion as production capacity.
- However, neither Directive 90/684 <sup>(1)</sup> as amended nor Directive 92/68 <sup>(2)</sup>, on which the authorising decisions for restructuring aid to the East German shipyards are based, include a definition of capacity or capacity restrictions.
- If the authorisation of aid was subject to the condition that not only the technical capacity of the yard but also its actual production should not exceed 85 000 cgt per annum, the Commission should have stated that clearly and unequivocally in its authorising decisions. None of the decisions mentions specifically that the capacity restriction constitutes a yearly ceiling on actual production.
- Neither the wording nor the broad logic of the authorising decisions supports the conclusion that the capacity restriction referred to KWW's actual production. Even if the technical restrictions of capacity proved to be inappropriate to avoid distortion of competition, this does not justify a capacity restriction, which was in reality a limitation on production.

Consequently, according to the judgement of the Court of First Instance of 28 February 2002 in cases Kvaerner Warnow Werft vs. Commission the Commission was wrong in interpreting the *capacity* limitation as a limitation of actual *production*. A capacity restriction may relate to production achievable under favourable normal conditions, given the facilities available. However, the figure indicated by the capacity restriction may be exceeded in periods of optimal conditions. Following this, the capacity limitation has to be understood only as a technical limitation of the production facilities. As long as the production facilities of the yard were not changed, shipyards can produce more than the capacity limitation authorised in the Commission decision.

## 3. Implications of the Court's judgment

### *East German shipyards*

The Court judgement concerned the two Commission decisions on Kvaerner (675/1999 and 336/2000), by which the Commission established that Kvaerner exceeded its production limitation. Since the judgement was limited to a specific yard and to specific years of production the Commission examined whether its basic rulings apply only to Kvaerner or whether it should also be applied to other EU yards subject to a capacity limitation.

<sup>(1)</sup> See footnote 1.

<sup>(2)</sup> See footnote 2.

On the one hand, using a narrow interpretation, the Court's ruling could be restricted only to KWW. On the other hand, if wording and sense of the original Commission decisions for further shipyards, which authorised state aid subject to capacity limitations, were rather similar to the one for KWW, the Court's judgment may apply accordingly to other concerned yards.

After the closure of one of the East German shipyards (Elbwerft Boizenburg) four yards were still subject to capacity limitations. The aid was approved by several Commission decisions referring to different measures, which were split up into several tranches. However, the critical wording in the different authorising decisions (Kvaerner Warnow Werft, Aker MTW, Volkswerft Stralsund and Peene Werft) was not identical and varied for different measures and tranches.

On the other hand, since the structure of the different decisions for the East German shipyards, to which the Court referred to, was rather the same it was doubtful that the Commission could apply two different methods of monitoring and differentiate between the limitation of capacity and the limitation of production. All authorising decisions had the same objectives with regard to the capacity limitations and it appeared difficult to justify a different treatment of the shipyards. In particular from an economic and political point of view such different treatment would not have been comprehensible.

The in-depth analysis of the Court's judgement supports this approach. Indeed, the Court did not even clearly state that the Commission could have interpreted the notion of limitation of technical capacity as equivalent to the one of production. Although the Court did not exclude that the Commission could have interpreted the limitations in this way with regard to its margin of discretion in the area of state aid the Court observed that the Commission did not use this interpretation in its decisions.

Consequently, it was doubtful that the Court would uphold the earlier decisions for Aker MTW, Volkswerft Stralsund and Peene Werft as regards their interpretation that technical capacity equals production.

#### *Spanish shipyards*

As in the German cases, the decision C 56/95, ex N 941/95 <sup>(1)</sup>, concerning aid to support the restructuring of publicly-owned yards in Spain refers as

well to Directive 90/684/EEC (latest amended by Regulation 1013/97, see footnote 4). In its first part the decision stipulates that the reduction of technical capacity will be achieved by both closures of facilities and the reduction of production ('cessation of a new building').

With reference to Council Directive 90/684/EEC the decision says that 'Spanish authorities have undertaken that production at the yards will not exceed the reduced capacity of 210 000 cgrt. The Commission will ... undertake a close monitoring of actual production levels to ensure that this level of production is not exceeded.' Finally, according to the decision's conclusive part 'the Spanish government shall co-operate ... to ensure that the production limitation and other conditions are respected'.

Taking into account that the Commission decision requests both a limitation of the production and a reduction of the technical capacity the wording appears substantially clearer than in the decisions on the German yards. In contrast to Council Directive 90/684, which according to the Court did not determine the form of a limit on the actual production of the yards, the decision precisely sets out the conditions for approving the aid. From the legal point of view, the shipyards had — further to the closure of certain facilities — to respect a limitation of the production. However, taking into account that the decision's legal basis was the same as for the East German shipyards (Council Directive 90/684) and with view to the Court's interpretation of the Commission's decision it appeared possible to apply the same monitoring procedures as for the East German shipyards.

#### *Greece shipyards*

In 1997, based on Council Directive 90/684 and Council Regulation 1013/97 covering both shipbuilding and ship repair the Commission approved investment aid for Hellenic Shipyards (N 401/97). The decision recalls that certain installations (slipways, docking facilities) shall be permanently closed. Referring to the Council Directive stipulating a reduction of capacity the decision says that 'there is a reduction in the yard's repair capacity equivalent to the reduction of the number of employees' (35% from the 1996 employment level), 'which cannot be compensated by the envisaged increase in productivity and a reduction of docking capacity for commercial vessels'. It appears that despite the reference to productivity, which may imply a limitation of production, the

<sup>(1)</sup> Case C 56/95 (ex N 941/95), OJ C 354, 21.11.97, p. 2.

Commission could interpret the capacity reduction as a merely technical restriction based on the Court's judgement

#### **4. Conclusion for the three Member States and follow-up**

It follows from the analysis of the different decisions, that a strict interpretation of the judgement may require to continue the monitoring of production for certain East German shipyards but to end it for others. In Spain, the Commission could continue such monitoring since the conditions imposed were focussed on a limitation of the production. In contrast, the Commission was not authorised to carry out a monitoring of production of the Greek shipyards. Such a differentiated approach is not comprehensible both from an economical and from a political point of view

The Commission concluded that the decisions authorising state aid for the above mentioned ship-

yards were taken on the same legal basis and resembled the KWW decisions on which the Court of Justice had ruled. With regard to the differences of the decision's wording and their interpretation the Commission decided to clarify the way how it intended to carry out the monitoring of capacities for all the above mentioned decisions on state aid.

For reasons of coherence and equal treatment the Commission decided (NN 56/2003) to consider the capacity limitations of these decisions for East German, Spanish and Greek shipyards as merely technical limitations in so far as the decisions were based on Council Directive 90/684 as amended. However, the monitoring of *technical* capacity limitations will continue in the sense of the provisions set out in the concerned individual cases of state aid until the date foreseen by each of these decisions. The interpretation and monitoring of capacity limitations for further shipyards based on rules different from those mentioned above were not modified or replaced by the Commission's decision.



## Next EU enlargement: Romania and State aid control

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### 1. Introduction

In December 2004 the final chapters of the accession negotiations with Romania on Justice and Home Affairs (chapter 24) and Competition (chapter 6) <sup>(2)</sup> were finally closed.

Unlike for most other chapters, mere commitments are insufficient. For the closure of the competition chapter three elements need to be put in place <sup>(3)</sup>:

- The necessary legislative framework;
- An adequate administrative capacity; and
- A credible enforcement record.

The experience with the competition chapter has proven successful so that for future negotiations, depending on the chapter, legislative alignment and a satisfactory track record of implementation of the *acquis* as well as obligations deriving from contractual relations with the European Union will be the benchmarks for provisional closure.

### 2. Safeguard clauses

Like for Bulgaria and the other new Member States, safeguard clauses are foreseen in the event of serious shortcomings (under Articles 37, 38, and 39 of the 2003 Accession Treaty).

The Accession Treaty will contain a general **economic safeguard clause** (cf. Art. 37 of the 2003 Accession Treaty). This general economic safeguard clause applies to situations where 'difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area'. The safeguard clause would allow the Commission to determine the necessary protective measures. Both, new and current Member States are able to make use of this safeguard clause. The clause can be invoked for a period of up to three years after accession.

However, this general safeguard clause was considered insufficient. Hence, the Commission considered that the Accession Treaty should also contain a specific **internal market safeguard clause** (cf. Art. 38 of the 2003 Accession Treaty).

If a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, or an imminent risk of such breach, the Commission may upon motivated request of a Member State or on its own initiative, take appropriate measures. The Commission is authorised to take the decisions on the necessary measures. These measures should be limited in time and proportional, whereby 'priority shall be given to measures, which disturb least the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms'. Again, the clause can be invoked for a period of up to three years after accession. It is furthermore stated that the safeguard clause may be invoked even before accession on the basis of the monitoring findings and enters into force as of the date of accession. The measures shall be maintained no longer than strictly necessary, and, in any case, must be lifted when the relevant commitment is implemented. They may however be applied beyond the three-year period as long as the relevant commitments have not been fulfilled.

For Romania and Bulgaria, a further safeguard clause was introduced (**postponement clause**). For both countries, the Council may, on the basis of a Commission proposal, postpone enlargement for one year. The clause can be triggered if, based on the Commission's continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission's monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being

<sup>(1)</sup> The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission. The author would also like to thank P. Lindberg for his many useful comments.

<sup>(2)</sup> With two specific transitional arrangements regarding fiscal aid measures (Free Trade Areas and Deprived Areas). These transitional arrangements are modelled after the transitional arrangements applicable for, inter alia, Poland.

<sup>(3)</sup> On the accession process, see Devuyst Y., Känkänen, J., Lindberg, P., Orsich, I. and Roebing, G., 'EU enlargement and competition policy: where are we now?', CPN, No. 1, February 2002 and Känkänen, J., 'Accession negotiations brought to successful conclusion', CPN, No. 1, Spring 2003, p. 24-28.

manifestly unprepared to meet the requirements of membership by 1 January 2007 in a number of important areas. In principle, unanimity is required (see however the specific safeguards introduced for Romania, described in the next section).

### 3. Specific safeguards for Romania

The Commission was very critical of the Romanian progress on the competition chapter, in particular as regards the State aid track record and the restructuring of the Romanian steel sector. It had proposed the Council not to close the competition chapter <sup>(1)</sup>.

However, the Council has the final say in these matters. It decided to proceed with the closure but it introduced a series of additional safeguards.

These additional safeguards are linked to the postponement clause and to the so-called existing aid mechanism <sup>(2)</sup>.

#### 3.1. Postponement clause for Romania

Notwithstanding the general conditions triggering the application of the postponement clause and without prejudice to the internal market safeguard clause, the Council may, acting by qualified majority (whereas normally unanimity is required) on the basis of a Commission recommendation and after a detailed assessment in the autumn of 2005 of the progress made by Romania in the area of competition policy, decide to postpone the accession of Romania by one year, if it is based on shortcomings in Romania's fulfilment of specific conditions in the Competition area. These conditions are the following:

- (1) Romania must ensure effective control by the Competition Council of any potential State aid, including in relation to State aid foreseen by means of deferral of payments to the State budget of fiscal or social liabilities or deferrals of liabilities related to energy supply.
- (2) Romania must strengthen its state aid enforcement record without delay. Romania must ensure a satisfactory enforcement record in the areas of both anti-trust and State aid.
- (3) Romania must submit to the Commission by mid-December 2004 a revised steel restructuring

plan (including the National Restructuring Programme and the Individual Business Plans) in line with the requirements set out in Protocol 2 on ECSC products to the Europe Agreement and with the conditions set out in the Act of Accession. In particular, Romania must fully respect its commitment not to grant or pay any State aid to the steel mills covered by the National Restructuring Strategy from 1 January 2005 to 31 December 2008, and to fully respect the State aid amounts and the conditions regarding capacity reductions, decided in the context of Protocol 2 on ECSC products to the Europe Agreement <sup>(3)</sup>.

- (4) Romania will continue to devote adequate financial means and sufficient and adequately qualified human resources to the Competition Council.
- (5) Romania must fulfil the obligations undertaken under the Europe Agreement.

#### 3.2. Existing aid mechanism

##### 3.2.1. Normal operation of mechanism

In order to prevent incompatible aid from being 'imported' into the EU on the date of accession, a system was set up for examining measures which were put into effect in the acceding countries before accession and are still applicable after accession (the existing aid mechanism).

The purpose of this mechanism is to provide Acceding Countries and economic operators with legal certainty as regards State aid measures that are applicable after the date of accession. If a measure is qualified as 'existing aid', it benefits from a special protection against actions from the Commission — such an 'existing aid' can only be modified for the future through a special procedure laid down in Chapter IV of the procedural regulation 659/1999 <sup>(4)</sup>. When the Commission considers that an existing aid scheme is not or no longer compatible with the common market, it shall inform the Member State concerned and may issue a proposal for appropriate measures, including the amendment or abolition of the scheme. If the Member State accepts, the appropriate measures become binding. If the Member State refuses, the Commission must open the

(1) See Financial Times 'Defiant EU Commission says Romania not ready', 4 December 2004; Interview with Commissioner Rehn, BBC Romanian 'Amânarea aderării până în 2008 rămâne o posibilitate', 9 December 2004.

(2) For a more detailed description, see Roebeling, G., 'Existing aid and enlargement', CPN No. 1, Spring 2003, p. 33-37.

(3) See in this edition of CPN, article from Lienemeyer, M., 'State aid for restructuring the steel industry in the new Member States'.

(4) Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 EC [now Art. 88], OJL 83, 27.3.1999, p. 1.

formal investigation procedure. The final decision following the opening will become binding on the Member State.

Procedural regulation 659/1999 contains the following definition of 'existing aid': (i) pre-treaty or pre-accession aid; (ii) aid authorised by the Commission or Council; (iii) aid deemed to be authorised in accordance with Art. 4(6) (so-called 'Lorenz', where the Commission has not adopted a decision within two months for a notified aid); (iv) aid for which the limitation period has expired; (v) aid that did not constitute aid at the time when the aid was put into effect.

For the 2003 accession (like for the accession of Austria, Finland and Sweden <sup>(1)</sup>), aid pre-existing accession did not automatically get "existing aid" status.

Annex IV.3 of the 2003 Accession Treaty provided for three different types of measures which were put into effect before accession and are still applicable after accession, which will be regarded as existing aid.

- The first one covers aid measures put into effect in a new Member State before 10 December 1994 <sup>(2)</sup>.
- The second one consists of a list of State aid measures attached to the Accession Treaty. A list of 223 existing aid measures was attached to the 2003 Accession Treaty. The list was established on the basis of an assessment by the national State aid monitoring authority finding them compatible with the *acquis*, followed by a special screening of the measures by the Commission.
- The third type of existing aid covers other measures submitted to the Commission after the finalisation of the Accession Treaty list, which were assessed by the national State aid monitoring authority prior to accession and found to be compatible with the *acquis* and to which the Commission did not raise an objection. This so-called 'interim procedure' was necessary, in order to extend the existing aid mechanism to the period between the finalisation of the Accession Treaty and the date of accession.

All measures still applicable after the date of accession which constitute State aid and which do not fall under one of the previous categories shall be considered as new aid upon accession.

This mechanism does not apply to agriculture (production, processing and marketing of agriculture annex-I products) and transport. Both agriculture and transport work with a positive lists of aids put into effect before and still applicable after accession which need to be submitted within a certain period after accession — all measures which are on the list are regarded as existing aid for a period of three years. Fisheries follow the general regime.

In principle, the same mechanism will apply to both Romania and Bulgaria.

### 3.2.2. *Specific provisions for Romania*

For Romania, however, it is stipulated that there will be no list with existing aid measures attached to the accession treaty and no application of the interim procedure, until the Commission concludes that Romania's state aid enforcement record has reached a satisfactory level. In practice, the timing no longer allows for any list with existing aid measures for Romania <sup>(3)</sup> to be included in the Accession Treaty.

Furthermore, the interim procedure will only start running once the Commission accepts that Romania's state aid enforcement record has reached a satisfactory level. In practice that means that only cases with a positive assessment by the Romanian Competition Council after the date set by the Commission as being the date that Romania's enforcement record is satisfactory can be submitted.

Such a satisfactory level shall only be considered to have been reached once Romania has demonstrated the consistent application of full and proper State aid control in relation to all aid measures granted in Romania. In particular for restructuring cases, for regional aid cases and for decisions relating to services of general economic interest, it has been spelled out in detail in the EU Common Position which specific points need to be assessed by the Romanian Competition Council.

<sup>(1)</sup> See Art. 172 of the Act of Accession.

<sup>(2)</sup> Date of the Essen European Council, since at this European Council on 9 and 10 December 1994 each associated country was invited to empower a single authority to monitor and control all State aids in an independent way, on the basis of transparent legislation, and as uniformly as possible. The European Council also stressed the importance of satisfactory implementation of State aid control in the context of future accession.

<sup>(3)</sup> Such a list for the Accession Treaty containing 3 aid measures, has been prepared for Bulgaria.

The ‘suspension’ of the existing aid mechanism is in fact the logical consequence of an unsatisfactory enforcement record, since one of the criteria for submitting the aid measures is a finding of compatibility with the *acquis* by the national State aid monitoring authority. Naturally such a finding is not relevant if the quality of decision-making is unsatisfactory.

Furthermore, the special provisions for Romania allow the Commission to also recover incompatible aid granted in the pre-accession period between 1 September 2004 and the date fixed in the Commission decision that the enforcement record has reached a satisfactory level. Such a Commission decision establishing a failure by Romania to control its State aid can, therefore, have drastic consequences for the beneficiaries.

#### **4. Conclusion**

The Council has introduced very strong safeguards to ensure that Romania fulfils all obligations in the field of State aid control.

The postponement clause clearly constitutes a ‘last resort’ option, although the specific references to certain competition requirements <sup>(1)</sup> and the majority voting mean that the ‘fuse is quite short’. However, the specific provisions introduced in the existing aid mechanism may prove to be as effective to push Romania to quickly respect its obligations in field of State aid control. Not being able to have aid considered as ‘existing aid’ will act as a considerable disincentive for investors as it creates legal uncertainty. In addition, State aid granting authorities may become more sensitive to the serious implications of not playing by the rules, which should reinforce the position of the Romanian Competition Council in enforcing State aid rules. The special provision regarding the recovery of incompatible aid also constitutes a powerful incentive for all those involved to ensure that the rules are respected.

With these additional safeguards in place, the Competition Chapter with Romania could finally be closed, so that in April 2005 the Accession Treaty with both Romania and Bulgaria can be signed.

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<sup>(1)</sup> Similar provisions exist for Justice and Home Affairs.



## European Competition Day

The first European Competition Day this year will be held in Luxembourg on 3 May 2005. It is organised by the *Ministry of the Economy and Foreign Trade and the Competition Council*, in cooperation with the European Commission. The theme will be

***‘The competition rules and the liberal professions’***

For more information and the programme please see  
[http://www.eco.public.lu/actualites/conferences/2005/05/03\\_journee\\_conc/](http://www.eco.public.lu/actualites/conferences/2005/05/03_journee_conc/)



## Les décisions GDF

### La Commission est formelle: les clauses de restriction territoriale dans les contrats de gaz violent l'article 81

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#### Introduction

Le 26 octobre 2004, la Commission a adopté deux décisions concernant des clauses de restriction territoriale dans le secteur gazier, l'une adressée à GDF et ENI et l'autre à GDF et ENEL. GDF et ENI sont les opérateurs gaziers les plus importants respectivement en France et en Italie, tandis que ENEL est un producteur d'électricité italien actif aujourd'hui également dans le secteur gazier.

Ces deux décisions sont très intéressantes à maints égards: elles sont les premières décisions formelles adoptées par la Commission depuis une décennie dans le secteur de l'énergie et viennent confirmer, après un certain nombre d'affaires concernant les clauses de restriction territoriale clôturées par règlement à l'amiable<sup>(1)</sup>, que ces clauses violent l'article 81 du traité. Ainsi, elles clarifient le droit au bénéfice de tous les opérateurs du secteur. A ce stade du processus de libéralisation et d'intégration du marché gazier européen, elles sont en outre un exemple on ne peut plus classique du soutien que l'application du droit de la concurrence communautaire apporte à la création d'un marché compétitif et intégré à l'échelle européenne.

#### Les clauses de restriction territoriale objet de l'affaire

Les clauses en question dans cette affaire se trouvaient jusqu'à peu dans deux contrats conclus par GDF respectivement avec ENI et ENEL.

Le contrat entre GDF et ENI, conclu en octobre 1997, a pour objet le transport de gaz naturel acheté par ENI au Nord de l'Europe. GDF en assure le transport sur le territoire français jusqu'à la frontière avec la Suisse. Le contrat contenait une clause qui obligeait ENI à commercialiser le gaz exclusivement «en aval du point de relivraison».

Or, par un contrat postérieur, les Parties avaient convenu que ce point de relivraison serait situé à la frontière entre la France et la Suisse. Par ailleurs,

l'une des définitions données dans le contrat de transport se référait au système en aval du point de relivraison comme signifiant des infrastructures de transport situées en territoire suisse. La Commission a donc conclu qu'aux termes de la clause en question, ENI ne pouvait commercialiser le gaz objet du contrat de transit qu'au-delà de la frontière entre la France et la Suisse.

Cette clause a été supprimée en novembre 2003, après l'ouverture de l'enquête par la Commission.

Le contrat entre GDF et ENEL a été conclu, quant à lui, en décembre 1997 et concerne le *swap* (échange) de gaz naturel liquéfié acheté par ENEL au Nigeria. Aux termes de ce contrat, le gaz est livré à Montoir (France) par le fournisseur nigérian à ENEL qui le cède immédiatement à GDF. Ensuite, GDF relivre à ENEL des quantités équivalentes à différents points de relivraison (Baumgarten, à la frontière entre la Slovaquie et l'Autriche, Oltingue, à la frontière entre la France et la Suisse, et Panigaglia, le terminal de réception et regazéification de gaz naturel liquide en Italie).

Ce contrat contenait une clause, supprimée en novembre 2003, qui imposait à ENEL de n'utiliser le gaz qu'en Italie.

Selon les informations fournies par ENEL et ENI et non contestées par GDF, les deux clauses en question dans cette affaire auraient été introduites dans les contrats à la demande de GDF.

#### La restriction de concurrence

Telle que formulée, la clause contenue dans le contrat conclu par GDF et ENEL, en prévoyant que ce dernier utilise le gaz naturel en Italie, l'empêchait de le revendre dans d'autres Etats membres, et donc aussi en France. Elle interdisait, entre autres choses, toute possibilité de réexportation.

Quant à la clause contenue dans le contrat conclu par GDF et ENI, elle établissait qu'ENI commer-

<sup>(1)</sup> Voir notamment H. Nyssens, C. Cultrera et D. Schnichels, «*The territorial restrictions case in the gas sector: a state of play*», in Competition Policy Newsletter, 1/2004, p. 48.

cialise le gaz objet du contrat seulement en aval du point de relivraison, c'est-à-dire après la frontière franco-suisse. Autrement dit, la clause en question interdisait à ENI la commercialisation du gaz en amont du point de relivraison, et notamment en France. Cette interdiction de commercialiser le gaz en France concernait également l'hypothèse d'éventuelles réexportations vers la France de gaz qui aurait déjà quitté le territoire français.

Ces deux clauses restreignaient ainsi le territoire dans lequel les Parties pouvaient utiliser le gaz objet des contrats et visaient donc à cloisonner les marchés nationaux, en empêchant notamment des consommateurs de gaz naturel établis en France de s'approvisionner auprès d'ENEL et ENI.

Or, selon une jurisprudence constante de la Cour de justice, des clauses qui restreignent la liberté de l'une des Parties d'utiliser la marchandise livrée en fonction de ses propres intérêts économiques constituent des restrictions de la concurrence au sens de l'article 81 du traité <sup>(1)</sup>. En particulier, se prononçant sur les interdictions d'exportation, la Cour a dit pour droit qu'une clause de ce type «par sa nature même, [...] constitue une restriction de la concurrence [...], l'objectif sur lequel les contractants sont tombés d'accord étant d'essayer d'isoler une partie du marché» <sup>(2)</sup>.

La Commission a donc conclu que les clauses en question avaient pour objet de restreindre la concurrence à l'intérieur du marché commun, au sens de l'article 81, paragraphe 1, du traité.

Les restrictions pouvaient par ailleurs être appréciées comme étant sensibles car les volumes transportés ou échangés au titre de chaque contrat constituaient une part significative de la consommation de gaz naturel en France, et notamment de la consommation éligible. La Commission a, en outre, tenu compte des spécificités du secteur gazier européen, longtemps caractérisé par des démarcations géographiques, et en particulier du manque de fluidité dans ce secteur.

### Les explications alternatives données par les parties

Les Parties ont contesté l'interprétation de la Commission quant à l'appréciation du caractère

restrictif des clauses, en avançant que la Commission en avait mal compris la portée et la finalité. La Commission a cependant rejeté ces arguments en démontrant que les clauses établissaient bel et bien, dans le chef d'ENI et d'ENEL respectivement, des obligations qui visaient notamment à empêcher la commercialisation du gaz en France et ne pouvaient avoir aucun autre but que celui de restreindre la concurrence.

En particulier, en réponse à un argument des Parties que les clauses visaient à prendre en compte les intérêts économiques d'ENI et ENEL, qui étaient, dans un cas comme dans l'autre, de disposer du gaz là où ils en avaient besoin, c'est-à-dire en Italie, la Commission a fait valoir que la mention par les clauses en question du lieu de commercialisation ou du lieu où le gaz devait être utilisé ne reflétait pas un «intérêt» dont la connaissance aurait été nécessaire pour l'exécution des contrats. Par ces clauses, ENI et ENEL exprimaient plutôt les limites de leurs intérêts en matière d'utilisation directe et de revente (commercialisation en aval du point de relivraison, dans un cas, et utilisation en Italie, dans l'autre). Or, il n'y aurait normalement aucune raison pour une partie à un accord commercial de faire part de telles limites, dépourvues de rapport avec l'objet même du contrat, sauf à vouloir s'engager vis-à-vis de l'autre partie, *in casu* GDF, en vue de respecter de telles limites.

Quant à l'argument que les clauses en question ne pouvaient pas être interprétées comme limitant l'utilisation ou la revente de gaz car elles étaient contenues dans des contrats qui, par leurs objets mêmes, respectivement le transport et l'échange du gaz, ne comportent pas de dispositions relatives à la commercialisation du gaz, la Commission a relevé que le fait que les contrats conclus par GDF avec ENI et ENEL fussent l'un un contrat de transport et l'autre un contrat d'échange ne signifie pas en soi que les parties auraient été empêchées d'y introduire des clauses concernant d'autres aspects que le transport ou l'échange, et notamment l'utilisation et la commercialisation du gaz.

Enfin, la Commission a répondu à l'argument d'ENEL que la clause contenue dans son contrat avec GDF concernant l'utilisation du gaz en Italie était nécessaire pour la définition de la portée de l'obligation d'échange souscrite par GDF, en

(1) Voir notamment l'arrêt de la Cour de justice du 14 décembre 1983, *Société de Vente de Ciments et Béton de l'Est SA contre Kerpen & Kerpen GmbH und Co. KG.*, 319/82, Rec. p. 4173, point 6, et la décision 98/273/CE de la Commission du 28 janvier 1998 dans l'affaire COMP/35733, *VW*, point 143 (JO L 124 du 25.4.1998, p. 60).

(2) Voir notamment l'arrêt de la Cour du 1<sup>er</sup> février 1978, *Miller International Schallplatten GmbH contre Commission*, 19/77, Rec. p. 131, point 7.



faisant valoir que l'identification dans le contrat d'échange des points de relivraison aurait été largement suffisante dans ce but. L'indication que le gaz devait être utilisé en Italie, par contre, n'ajoutait aucun éclaircissement à cet égard, car elle concerne un élément temporel postérieur au moment auquel se termine le service effectué par GDF.

La Commission a enfin tiré parti, dans ses conclusions concernant la fonction objective desdites clauses, d'une analyse de leur historique, et notamment des formulations utilisées dans les premières moutures des contrats, ainsi que de certaines déclarations parfois contradictoires des Parties.

## La logique économique des clauses

Mais quelle pourrait donc être la motivation des Parties, et en particulier la motivation de GDF, à l'introduction de clauses de ce type dans des contrats de transport ou d'échange de gaz?

En réponse à cette question, il y a lieu de noter tout d'abord qu'il est parfaitement imaginable qu'un transporteur introduise dans un contrat de transport ou d'échange de gaz une clause de restriction de la revente dudit gaz, notamment dans l'hypothèse où le transporteur exerce également une activité de vente de gaz dans le territoire dans lequel il effectue le transport pour le compte d'un tiers et qu'il souhaite que le gaz transporté ne soit pas vendu par ce tiers à l'intérieur de son territoire.

Tel est justement le cas de GDF: en effet, ENI et ENEL auraient pu envisager de commercialiser en France le gaz que GDF transporte ou échange au titre des deux contrats. Or, la France est le pays dans lequel GDF exerce traditionnellement sa propre activité de vente. Les clauses en question, en empêchant la revente en France, répondent donc bien à l'intérêt que GDF pourrait avoir de protéger son territoire traditionnel de vente, logique du «chacun chez soi» bien connue dans le secteur gazier.

En effet, ce secteur, avant le début du processus de libéralisation, a été longtemps caractérisé par des démarcations horizontales, c'est-à-dire entre différents marchés géographiques, qui limitaient les activités des entreprises. Plusieurs Etats membres, en outre, ont longtemps accordé à certaines entreprises des droits spéciaux ou exclusifs. Enfin, les entreprises du secteur étaient et sont encore, souvent, intégrées verticalement et présentes dans toutes les phases de la filière

gazière en aval: importation, transport, stockage, distribution et vente aux consommateurs finals.

C'est cette structure traditionnelle que le processus de libéralisation en cours dans la Communauté essaie de modifier, avec l'objectif de créer un marché du gaz naturel compétitif et intégré à l'échelle européenne. Par l'ouverture de la demande, qui s'est faite de manière graduelle, le processus de libéralisation vise à offrir aux consommateurs européens, qui souvent ne pouvaient s'approvisionner qu'auprès du monopole actif au niveau national, régional ou local, la possibilité de choisir entre les offres de plusieurs entreprises, aussi bien nationales qu'étrangères. De même, par l'établissement du principe de l'accès des tiers aux réseaux, le processus de libéralisation entend permettre aux entreprises concurrentes d'accéder aux territoires de ventes traditionnellement desservis par les opérateurs verticalement intégrés.

Or, des clauses de restriction territoriale comme celles en question dans cette affaire, en empêchant des consommateurs de gaz naturel établis en France de s'approvisionner auprès d'ENEL et ENI, représentent l'une des pièces maîtresses d'un ensemble de pratiques qui perpétuent le cloisonnement du marché européen, cultivent la logique du «chacun chez soi» et contribuent au manque de fluidité dans le secteur.

Elles entravent ainsi la poursuite de l'objectif même du processus de libéralisation, c'est-à-dire l'intégration et l'ouverture à la concurrence des marchés nationaux.

Cette affaire est donc un exemple de la contribution que le droit de la concurrence peut donner au processus de libéralisation du secteur gazier européen.

## Les mesures correctives adoptées par la Commission

Bien que les infractions aient été terminées en novembre 2003, quand les clauses en question ont été supprimées, la Commission a estimé avoir un intérêt légitime à constater que les entreprises avaient contrevenu aux dispositions de l'article 81 du traité. En effet, dans le secteur gazier, qui n'a été ouvert que récemment à la concurrence, la constatation des infractions par l'adoption des deux décisions a permis d'affirmer clairement, au bénéfice non seulement des Parties mais aussi des autres entreprises opérant dans ce secteur, que les pratiques en question ne sont pas conformes au droit communautaire. En plus, l'intérêt à constater

les infractions était en l'espèce d'autant plus évident que les Parties ont contesté le caractère anticoncurrentiel des clauses en question et qu'il existait donc un risque que le comportement infractionnel fût répété.

La Commission a décidé, néanmoins, de ne pas imposer d'amendes. Entre autres facteurs, elle a tenu compte du fait que cette phase du processus

de libéralisation, qui s'est clôturée par l'entrée en vigueur, en août 2004, de la Deuxième Directive Gaz, a impliqué une évolution profonde dans les pratiques commerciales des acteurs qui y sont présents, notamment les pratiques liées à la commercialisation du gaz naturel dans des États membres autres que celui où chaque opérateur a été traditionnellement établi. C'est justement ces types de pratique qui étaient l'objet de cette affaire.

## Two recent veto decisions under the new Regulatory framework for electronic communications: The importance of competition law principles in market analysis

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### 1. Introduction

In October 2004, the Commission exercised its so-called 'veto power' under Article 7 of the Directive on a common regulatory framework for electronic communications networks and services (**Framework Directive**) for the second and the third time <sup>(1)</sup> On 5 October 2004, the Commission adopted a veto decision requiring the Finnish Communications Regulatory Authority (**Ficora**) to withdraw its draft regulatory measure concerning the market for access and call origination on public mobile telephone networks in Finland. On 20 October 2004, the Commission requested the Austrian Telecommunications Regulatory Authority (**TKK**) to withdraw its draft regulatory measure concerning the market for transit services in the fixed public telephone network in Austria.

Both veto decisions provide clarifications as to the standard of competition law based market analyses as required from National Regulatory Authorities (**NRAs**) under the new regulatory framework for electronic communications networks and services. These two notifications are also examples of a regulatory (designation of an undertaking with significant market power (**SMP**)) and a deregulatory (non-designation of an undertaking with SMP) measure which were subsequently considered incompatible with Community law. In other words, the Commission's assessment of the draft measure has been independent of the fact whether it has a regulatory or deregulatory effect on the market. What is important is to ensure the appropriate regulation of electronic communications markets, if necessary, on the basis of a thorough economic analysis in accordance with Community competition law principles.

### 2. The case of mobile access and call origination market in Finland (FI/2004/0082)

#### 2.1. The draft measure notified

The draft measure notified by Ficora concerned the Finnish market for access and call origination on public mobile telephone networks (**mobile access and call origination market**). In this market, service providers (**SPs**) and mobile virtual network operators (**MVNOs**) buy access and call origination services from mobile network operators (**MNOs**), in order to be able to offer their own mobile services on the retail market.

Ficora's market analysis concluded that TeliaSonera had SMP in the defined market, based on the following factors: (i) high market share (in excess of 60%), (ii) the fact that the most significant independent SP operates in TeliaSonera's network, (iii) the lack of countervailing buying power and (iv) network effects, economies of scale and scope, and financial strength.

#### 2.2. The Commission's veto decision

The information that the Commission received in the notification and as a result of several requests for information did not warrant the conclusion that Ficora had undertaken the assessment in accordance with Articles 14 and 16 of the Framework Directive, which specifically refer to the notion of SMP and the task of the NRA to determine whether or not there is a dominant operator on the market.

In its examination Ficora had to ensure on a forward-looking basis whether TeliaSonera was in a position to behave to an appreciable extent independently of its competitors, wholesale customers

<sup>(1)</sup> For a general review of the New Regulatory Framework and the Article 7 consultation mechanism see R. Krüger, L. Di Mauro, 'The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications', (2003) 3 *Competition Policy Newsletter* 33. For an overview of the principles of market analyses and the Commission's first veto decision, see L. Di Mauro, A.G. Inotai, 'Market analysis under the New Regulatory Framework for electronic communications: context and principles behind the Commission's first veto decision', (2004) 2 *Competition Policy Newsletter* 52.

and ultimately consumers in the relevant market. The evidence provided did not constitute a sufficient basis for concluding that this was the case. The Commission's view was based on three main reasons: first, the lack of taking into consideration the apparent market dynamics; second, the lack of evidence of capacity constraints and barriers to switching; and third, the undue weight given to evidence of network effects, economies of scale and scope, and substantial financial advantages.

#### *2.2.1. Lack of taking into consideration the apparent market dynamics*

The Commission noted that, despite the fact that the market share of TeliaSonera in the relevant market was in excess of 60%, other factors relevant for the assessment of SMP should have also been taken into account.

Firstly, even though there were no regulatory obligations for MNOs to provide access, both SPs and MVNOs have been able to conclude agreements on a commercial basis with each of the three nationwide-operating MNOs in the relevant market. There were over 10 SPs in the market, and at least three MVNO agreements have been concluded, with one SP concluding an MVNO agreement with two MNOs.

Secondly, SPs were usually negotiating with all MNOs and comparing prices and other terms. MNOs were apparently able to conclude agreements with different SPs due to their ability to provide flexible offers or types of services that were not provided by other MNOs.

#### *2.2.2. Lack of evidence of capacity constraints and barriers to switching*

The Commission found that, provided that MNOs are not subject to capacity constraints of their networks, and SPs are not locked in to their suppliers as a result of high switching costs and the absence of countervailing buying power, the competitive threat of other MNOs' attracting SPs or MVNOs which proved to be successful at retail level is likely to limit TeliaSonera's market power in the relevant market.

Firstly, no sufficient evidence was provided as to the existence of barriers to expansion in the relevant market. In fact, TeliaSonera's competitors had lower capacity utilisation rates, and there seemed to be no immediate impediment for them to take more traffic on their networks. Secondly, although switching between MNOs does entail some costs (such as the switching of the SIM card), Ficora did not consider the incentives of MNOs to bear the

costs of switching themselves, taking into account the apparent incentives for MNOs to provide access to SPs. In the course of the Commission's assessment it was revealed that some MNOs had already considered paying costs to be incurred by an SP ready to switch to their networks.

#### *2.2.3. Undue weight given to evidence of network effects, economies of scale and scope, and substantial financial advantages*

While not contesting that network effects and economies of scale and scope resulting from the overall size of a network may of course be taken into account as indicators of SMP, the Commission found that in this case these factors were themselves — in the absence of more detailed evidence as explained above — insufficient to substantiate a finding of SMP.

In particular, TeliaSonera's competitive advantage seemed to stem primarily from its superior capacity utilisation and not primarily (scale) economies. As opposed to differences in scale, differences in capacity utilisation do not offer a sustainable competitive advantage to an operator and can be overcome by attracting a larger number of customers onto existing capacity.

Furthermore, no evidence was provided that financial advantages of TeliaSonera — taking into account the fact that its competitors are also parts of large vertically and horizontally integrated telecommunications groups — were of such a degree that could serve as the basis of an SMP finding.

### **3. The case of the fixed transit services market in Austria (AT/2004/0090)**

#### *3.1. The draft measure notified*

TKK's draft measure concerned the Austrian market for transit services in the fixed public network. In addition to call origination and call termination, transit services are used to convey calls between telephone exchanges either at a local level or across regions. Telekom Austria (TA) is the incumbent operator which owns the traditional nationwide fixed telephony network and at the time of the market review offered around 90% of transit services to alternative network operators. Only a small number of operators had at the time of the review provided transit services in competition with TA, together accounting for the remaining 10% of the market.



Over the period taken into consideration for the market analysis, a number of operators had ceased purchasing transit services directly from TA and began to further roll out their networks by directly interconnecting with each other and/or TA either at the level of local or regional exchanges. With each direct interconnection, an operator would not need to buy the transit service from TA any longer. TKK's inclusion of such operators into the relevant market was based on the assertion that they can also act as a supplier of transit services to third parties. TKK included all operators which no longer demand transit services into its market definition irrespective of whether this has actually led to additional offers of transit services to third parties or not.

TKK had calculated that taking account of such direct interconnection decreases TA's share of all call minutes relating to transit services to below 50%. As a consequence, TKK found no SMP in the relevant market and considered the market for transit services in the fixed public telephone network to be effectively competitive.

### 3.2. *The Commission's veto decision*

#### 3.2.1. *The inclusion of direct interconnection into the relevant market*

The Commission Recommendation on relevant markets within the electronic communications sector (**Recommendation**) sets out those markets that are susceptible to ex ante regulation and that regulatory authorities are required to analyse under the Framework Directive. The Recommendation requires regulatory authorities to decide on the elements to be included in particular markets identified in the Recommendation, while adhering to competition law principles. The Commission concluded that, on the basis of the information provided in the notification, there was insufficient evidence to include direct interconnection in the relevant market.

The Commission was of the view that when determining the existence of demand-side substitutability, TKK did not provide sufficient evidence showing that network operators purchasing transit services could promptly shift to other products or services in response to price changes. In contrast, TKK found in its market analysis, that direct interconnection requires

network roll-out associated with high investments as well as substantial planning and time.

As far as supply-side substitutability is concerned, the Commission expressed the view that TKK should have ascertained whether a network operator that ceased to purchase transit services because of direct interconnection would actually use its productive assets, i.e. the newly-created capacity, to offer (relevant) transit services to third parties. The Commission states in its veto decision that a merely hypothetical supply-side substitution cannot be sufficient for the purposes of market definition. TKK did not provide evidence that network operators which ceased to purchase transit services subsequent to direct interconnection would systematically offer part of their new capacity to other operators demanding transit <sup>(1)</sup>. Therefore, the Commission made clear that TKK should not automatically include all direct interconnection in the relevant market <sup>(2)</sup>.

#### 3.2.2. *The importance of applying a thorough green field analysis*

When assessing the need for sector-specific regulation, a green field analysis should examine whether the market conditions that would prevail in the absence of regulation reflect those of an effectively competitive market. In this case the Commission was therefore interested to find out what effect a withdrawal of obligations may have on TA's supply of transit services, especially against the background that TKK had stated in the notification that the proposed withdrawal of regulation may lead to competitive disadvantages for operators with relatively small networks. Because of a lack of such examination, the Commission stated in its veto decision that insufficient consideration was given to the possibilities that would be open to operators which have, at this point in time, still insufficient traffic volumes to justify a further network roll-out in the event regulation were lifted.

In conclusion, the Commission asked TKK to focus in its future review of the market, necessary subsequent to the veto decision, on those undertakings that are actually offering transit services or those which would, in the short term, be willing and consider it economically viable to offer such services to third parties. The Commission also asked for a more detailed consideration of how

<sup>(1)</sup> In case UK/2003/0016, OFTEL emphasised in the case of interconnected mobile operators the lack of spare capacity and the high costs of developing systems for dealing with wholesale customers (including billing and account management).

<sup>(2)</sup> TKK itself argues that, since TA's captive sales are not offered on the market, these should not be considered for the calculation of market shares.

business models of alternative operators are affected by a possible withdrawal of remedies and how this may affect competition in the provision of the relevant electronic communications services.

#### **4. Conclusion: the importance of competition law principles**

When defining markets and determining whether an undertaking has SMP in the defined market, NRAs must act in accordance with Community law, especially Community competition law and the relevant case law of the Community Courts.

As regards the definition of the relevant market, NRAs shall base their definition on the factors which are used to define markets under Community competition law, namely demand-side substitutability and supply-side substitutability <sup>(1)</sup>.

In the Austrian case, the NRA had taken into account mere hypothetical supply-side substitution for the purposes of market definition. This led to inflated market boundaries and, at the subsequent stage of the SMP assessment, to a significant reduction of TA's market share, which presumably resulted in a substantial under-estimation of TA's market power. Therefore, the Commission had serious doubts as to the compatibility of the notification with Community law and vetoed the draft measure.

In the Finnish case, the NRA did not properly assess the barriers to switching on the part of SPs and MVNOs, by not establishing whether MNOs have incentives to bear the costs of switching themselves, and that some MNOs had already considered paying costs to be incurred by an SP ready to switch to their networks. Furthermore,

Community competition law was not correctly applied when the dynamic nature of the market and its effect on the market power of TeliaSonera was not properly assessed. In this context, it should be reiterated that a fundamental principle of SMP assessment in accordance with competition law principles is that market power should normally not be established on the sole basis of the existence of large market shares, but that NRAs should undertake a thorough and overall analysis of the economic characteristics of the defined market <sup>(2)</sup>.

Although the underlying notifications were quite different on substance, they have in common that European competition law principles have not been properly taken into account in the respective market analyses. The most important part of the Commission's assessment of the draft measures of NRAs is to verify whether Community law, in particular Community competition law, has been correctly applied to the facts gathered by the NRA. It is in this area that the Commission undertakes the most thorough scrutiny and checks whether the NRA has not erred in the application of the legal principles set out in Community law, including the case law of the Community courts.

In general, however, it has to be noted that the Commission has exercised its veto power only in case of 3 of the 134 notifications which have been assessed so far <sup>(3)</sup>. Although the Article 7 consultation is no approval regime, one may therefore conclude that the NRAs have well implemented the swift from the old regulatory framework to the new regulatory framework, i.e. from sector-specific regulation and antitrust law being two widely different but complementary regimes to one regime which is uniquely based on European competition law principles.

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<sup>(1)</sup> Commission Notice on the definition of relevant markets for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, point 20ff. Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p. 6, point 44ff.

<sup>(2)</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p. 6, point 78.

<sup>(3)</sup> This number refers to the notifications which have been completely assessed as of 31.1.2005.

## The Court of First Instance rejects Microsoft's request for interim measures concerning the Commission's decision of 24 March 2004

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### 1. The decision

On March 24 2004, the Commission adopted a decision in Case COMP/C-3/37.792 — Microsoft — by which it concluded that Microsoft had abused its dominant position in PC operating systems in contravention of Article 82 EC by (i) refusing to provide interoperability information necessary for competitors to be able to effectively compete in the work group server operating system market and (ii) tying to its dominant PC operating system its streaming media player, Windows Media Player. The Commission imposed a fine of EUR 497.196,304 on Microsoft and ordered Microsoft to bring to an end its infringement of Article 82 EC (Article 4 of the Decision). More specifically, the Commission ordered Microsoft to (i) provide to interested undertakings the interoperability information necessary to build work group server operating systems that fully interoperate with the Windows PC operating system, such supply having to be carried out on reasonable and non-discriminatory terms ('the interoperability remedy', Article 5 of the Decision) and (ii) to offer a full-functioning version of its PC operating system which does not incorporate Windows Media Player ('the tying remedy', Article 6 of the Decision). The Decision also foresees the establishment of a monitoring mechanism to oversee Microsoft's implementation (Article 7 of the Decision). Microsoft was granted a deadline of 120 days to implement the interoperability remedy and a deadline of 90 days to implement the tying remedy <sup>(1)</sup>.

### 2. The order of the President of the Court of First Instance <sup>(2)</sup>

#### 2.1. The procedure

On June 7 2004, Microsoft filed an application for annulment of the Decision with the Court of First

Instance ('CFI'). Additionally, on June 25 2004, Microsoft filed an application with the President of the CFI pursuant to Art 242 EC for the suspension of the operation of Articles 4, 5(a), 5(b), 5(c) and 6(a) of the Decision until the CFI rules on its application for annulment. Microsoft's application for suspension, which is the subject of the present article, was thus limited to the suspension of the interoperability and the tying remedy, and did not relate to the fine or the monitoring mechanism.

As the various time-limits imposed on Microsoft by the Decision would have elapsed during the procedure on interim measures, the Commission decided on June 25 2004 not to enforce Articles 5(a) to 5(c) and 6(a) of the Decision pending the outcome of the interim measures proceedings before the President of the CFI. The Commission nevertheless highlighted that this partial stay of enforcement of the Decision did not affect the relevant time-limits prescribed by the Decision. The Commission noted that, as a result, were an order of the President of the CFI rejecting Microsoft's application to be taken after these time-limits had elapsed, Microsoft would have to comply with the Decision immediately thereafter.

During the proceedings before the President of the CFI, fifteen organisations were granted leave to intervene in favour of the parties (five on the Commission's side). Two of these interveners (Novell and the Computer & Communications Industry Association, 'CCIA'), which had both intervened in favour of the Commission, withdrew their intervention after having entered into financial settlements with Microsoft. However, the parties to the proceedings agreed that the written and oral submissions by Novell and CCIA should remain part of the file and that the President should be able to rely on them for his appraisal of the case.

The order of the President of the CFI on Microsoft's application for suspension was finally

<sup>(1)</sup> For a more detailed discussion of the Decision, please refer to the Competition Policy Newsletter 2004, Number 2.

<sup>(2)</sup> Order of the President of the Court of First Instance of 22 December 2004 in Case T-201/94 R, Microsoft, not yet reported.

issued on December 22 2004. Microsoft's application for suspension was dismissed in its entirety.

The following paragraphs highlight some of the President's findings with respect to the dismissal of the requested suspension of the interoperability and tying remedy. For its application for interim measures to succeed, Microsoft had to establish a *prima facie* case and to prove that the circumstances of the given case gave rise to urgency. In case Microsoft were to prove both a *prima facie* case and urgency, the President would then have to balance the interests of Microsoft against the Commission's interest in preserving effective competition.

## 2.2. The interoperability remedy

### 2.2.1. *Prima facie* case

In arguing that it had a *prima facie* case as regards the suspension of the interoperability remedy, Microsoft presented three pleas. First, Microsoft argued that the Decision did not fulfil the conditions laid down by the Court of Justice in the *IMS Health* judgment<sup>(1)</sup> for the qualification of a refusal to licence intellectual property rights as an abuse prohibited by Article 82 EC. Second, Microsoft claimed that it had not refused the interoperability information at issue, since the request by Sun Microsystems on which the Commission relied to establish such a refusal was not sufficiently clear. Third, the Decision was, in Microsoft's view, inconsistent with the TRIPS Agreement ('Agreement on trade-related aspects of intellectual property rights').

On the second plea, the President concluded that Microsoft had not established *prima facie* that the Commission had erred in defining the scope of Sun's request (para. 200 of the order). As regards TRIPS, the President found that Microsoft in its application for interim measures had not sufficiently expanded on this claim for the President to be able to make a proper ruling (para. 201 of the order). Microsoft's arguments concerning TRIPS were indeed not described in its application for suspension, which merely cross-referred to Microsoft's application for annulment, and in a subsequent filing to the Court, Microsoft developed these arguments in an annex, rather than developing them in the body of its submission. The President confirmed the procedural rule that arguments that are not properly fleshed out in the body of the applicant's submission should be disregarded (paras. 86 and 88 of the order).

Consequently, in his examination of Microsoft's *prima facie* case, the President focused on whether the Commission correctly qualified Microsoft's refusal to supply interoperability information as an abuse of Art 82 EC. In this respect, the President came to the conclusion that a series of questions of principle had to be addressed in this context that could not be decided in summary interim measures proceedings and that therefore Microsoft's arguments as to this plea could not be rejected outright as unfounded.

The main questions that the President identified as deserving a closer examination, without prejudging the assessments to be made in the main case are as follows. A first question was whether the conditions set out in the *IMS Health* judgment are necessary or merely sufficient to justify compelling licensing of intellectual property rights (para. 206 of the order).

Another question was whether the nature of the protected information must be taken into account when ordering the disclosure of information (para. 207 of the order). The President concluded on this point by stating that account would have to be taken of the value of the underlying investment, the value of the information concerned to the dominant undertaking and the value transferred to competitors in the event of disclosure (para. 207 of the order).

The last question the President identified in connection with the *prima facie* case was whether the requirements for licensing of intellectual property rights set out in the *IMS Health* judgment were satisfied in the present case. In that regard, the President identified two sources of dispute between the parties that he considered sufficiently serious to constitute a *prima facie* case.

The first of these two sources of dispute was, in relation to the criterion developed in *IMS Health* that the requested input must be indispensable to viably compete. In this regard, the President noted that the disagreement between the parties boiled down to whether the information requested from Microsoft was actually necessary for interoperability as defined in Directive 91/250 on the legal protection of computer programs. The President underscored that, in order to answer this question, a thorough examination of the elements of fact in the light of the applicable legislation would be necessary.

<sup>(1)</sup> Judgment of 29 April 2004 in Case C-418/01, *IMS Health*, not yet reported.



The second source of dispute in applying the criteria developed in *IMS Health* that the President identified related to Microsoft's argument that its refusal was objectively justified. In this respect, the President noted that the Court dealing with the substance of the case would have to assess whether the Commission had committed a manifest error in the evaluation of the interests involved in this case, in particular in connection with the protection of the intellectual property rights relied on and the requirements of free competition enshrined in the EC Treaty.

### 2.2.2. Urgency

For an applicant to pass the legal test for interim measures as regards urgency, he must demonstrate that he will suffer serious and irreparable damage without the suspension. In this respect, Microsoft claimed that the implementation of the Decision would (i) harm its intellectual property rights (ii); interfere with its commercial freedom; and (iii) irreversibly alter market conditions.

As regards the alleged infringement of Microsoft's intellectual property rights, the President found that the mere 'breach of the exclusive prerogatives' of a holder of intellectual property rights entailed by an order to license these rights could not in itself constitute a serious and irreparable damage because otherwise, the urgency requirement would always be fulfilled in cases where intellectual property licensing is ordered (para. 250 of the order). In order to establish urgency, the applicant must show that the interference with its intellectual property rights creates harm to it that goes beyond the making available of protected information by way of licensing. In this respect, Microsoft argued that it would be required to disclose information on the internal structure and innovative aspects of its products. However, the President concluded that there was not sufficient evidence to prove that the information that Microsoft would have to disclose would reveal more than is necessary to ensure interoperability. There was also no risk that the information in question could be used by Microsoft's competitors to clone its products (para. 289 of the order).

Furthermore, Microsoft contended that the information it had to disclose would end up in the public domain without Microsoft being able to control its use, and that products built on the basis of the disclosed information would remain in the distribution channel for a long time. As regards the first of these arguments, the President noted that Microsoft could introduce appropriate contractual safeguards in its licence agreements to prevent breaches of confidentiality by its licensees. As

regards the second argument, the President stated that the economic impact of the products remaining in the distribution channel would be limited in time, essentially because the products remaining in the distribution channel would over time become technologically obsolete (paras. 282 and 285 of the order).

As regards Microsoft's assertion that it would be forced to alter its business policy, the President first pointed out that any decision requiring a dominant undertaking to bring an abuse of its dominant position to an end entails a change in its business policy. The President clarified that where an applicant invokes an interference with its business freedom in order to demonstrate that such a decision by the Commission must be suspended, it has to prove either that it would be prevented from resuming its initial business policy were the Decision to be annulled, or that the interference with its business policy would bring about serious and irreparable damage of another kind (paras. 291 and 293 of the order). The President concluded that Microsoft had failed to prove any of these specific circumstances. In particular, the President stressed that the disclosure of information of the same kind as the interoperability information at stake in this case was not an exceptional course of action to take for Microsoft, which had made similar disclosures in the past, and was making similar disclosures at present, notably under the US Settlement and under an agreement with Sun which was signed shortly after the Decision (para. 302 of the order). The President concluded that in view of these disclosures already offered by Microsoft, the Decision would not lead to a significant change of business policy on its part (para. 301 of the order).

As a last argument to support its claim for urgency with regard to the interoperability remedy, Microsoft maintained that mandatory licensing would irremediably alter the prevailing market conditions since the disclosure of the information at stake would reveal important aspects of its product design, and competitors would be allowed to reproduce functionalities which Microsoft had developed through its research and development efforts. With regard to this argument, the President reiterated that Microsoft had not proven to the requisite legal standard that the use which competitors could make of the disclosed information under the Decision would go beyond the use for mere interoperability purposes. Furthermore, Microsoft did not adduce evidence to support its contention that market conditions would be altered, let alone demonstrate how it would be prevented from regaining market shares lost as a result of the remedy (para. 319 of the order).

## 2.3. The tying remedy

### 2.3.1. *Prima facie* case

In support of its *prima facie* case as regards the tying remedy, Microsoft relied on five arguments. First, Microsoft contended that the Commission applied a speculative theory on tying, in particular in basing its analysis on the foreclosure effects which stem from the ubiquitous distribution of Windows Media Player resulting from its bundling with the Windows PC operating system. Second, Microsoft maintained that the Commission did not take the advantages of bundling Windows Media Player with the Windows PC operating system sufficiently into account. Third, Microsoft claimed that the Decision failed to establish an infringement of Art 82 EC. Fourth, Microsoft argued that the Decision was a breach of the Community's obligations under the TRIPS Agreement; and, fifth, Microsoft asserted that the remedy imposed by the Decision was disproportionate.

Two of Microsoft's arguments on the *prima facie* case, namely those on TRIPS and the alleged disproportionate nature of the remedy were dismissed by the President at the outset as having not been described in sufficiently clear terms to constitute a *prima facie* case. This was in particular due to a procedural mistake committed by Microsoft similar to that concerning its TRIPS argument with respect to the interoperability remedy (paras. 392 and 393 of the order).

As regards the other arguments brought forward by Microsoft, the President found that they could not be regarded as *prima facie* unfounded and that because of the complexity of the issues raised, these questions would have to be resolved in the course of the main action. The President then highlighted the questions he considered as particularly relevant for the main case.

The first point the President deemed to be important for the main action was whether “the Commission may rely on the probability that the market will ‘tip’ as a ground for imposing a sanction in respect of tying practiced by a dominant undertaking where that conduct is not by nature likely to restrict competition, should that be the case” (para. 400 of the order). In other words the President saw a need to clarify in the main action whether the Commission may partly rely on a prospective analysis of the risks for competition resulting from tying.

A second point that the President raised as a question that merited closer examination in the main action is ‘whether any positive effects associated with the increasing standardisation of certain products may constitute objective justification or whether, as the Commission contends, the positive effects of standardisation may be accepted only when they result from the operation of the competitive process or from decisions taken by standardisation bodies’ (para. 401 of the order).

Other questions that in the eyes of the President would have to be addressed in the main case were whether the Commission conducted a manifest error in appraising the impact of ‘indirect network effects’ on the competitive process in the media player market and whether the fact that for many years, Microsoft and other manufacturers have integrated certain media functionalities in their PC operating systems backs Microsoft's assertion that Windows Media Player and the Windows PC operating system constitute two different products (paras. 402 and 403 of the order).

### 2.3.2. Urgency

To establish urgency, Microsoft relied on two main arguments. First, Microsoft maintained that the unbundling remedy imposed by the Decision would interfere with its commercial freedom by forcing it to abandon its ‘*basic design concept*’ for the Windows PC operating system which constitutes a uniform and well-defined platform on which applications can run. Second, Microsoft claimed that the implementation of the Decision would damage its reputation as ‘*a developer of quality software products*’.

As regards the alleged damage to the Windows ‘*basic design concept*’, Microsoft argued that serious and irreparable damage would derive from (i) the costs associated with developing an unbundled version of Windows, (ii) the placing on the market of the unbundled version causing uncertainty for third parties and reducing the appeal of Windows and (iii) long-lasting effects going beyond any annulment of the Decision if the unbundled version sold in significant quantities.

The President rejected the arguments relating to Microsoft's ‘*basic design concept*’ on the following grounds. Research and development costs constitute mere financial damage which in principle cannot be taken into account when assessing serious and irreparable damage in an interim measure case <sup>(1)</sup>. Microsoft did not adduce

<sup>(1)</sup> Case C-213/91 R Abertal and Others v Commission [1991] ECR I-5109, para. 24.

sufficient evidence to back its assertion that the uncertainty about the uniformity of the Windows platform resulting from the marketing of an unbundled version of Windows would reduce the appeal of Windows to final consumers or Microsoft's customers (para. 419 of the order). Nor did Microsoft show that third parties would no longer design products for the Windows platform in the event that an unbundled version of Windows was brought to the market (para. 417 of the order). As to the alleged long-lasting effects of a significant distribution of the unbundled version, the President emphasised that Microsoft constantly held such a scenario to be very unlikely. Moreover, he endorsed the Commission's argument that in case of annulment of the Decision, Microsoft would be able to update its operating system in order to distribute Windows Media Player and, consequently, to restore at least to a very large extent the tying of Windows Media Player with its operating system (para. 440 of the order).

Concerning the possible damage to Microsoft's reputation, Microsoft referred to alleged malfunctions of the unbundled version of Windows. These malfunctions would be twofold. On the one hand, the functioning of the Windows operating system itself would be affected; on the other hand, certain applications and websites which call upon functionalities of Windows Media Player would not work properly.

The President first observed that functionalities absent from Windows because of the absence of Windows Media Player could 'be replaced to a reasonably large extent' through the installation of third party media players (para. 448 of the order). The same applied as regards malfunctions of applications and websites. In addition, the President noted that there were 'strong incentives for website and applications designers who currently rely on Windows Media Player to encourage users to download the software [Windows Media Player] or to distribute it themselves under the licenses normally granted by Microsoft for that purpose' (para. 449 of the order). The President concluded that it had 'not been demonstrated that the problems invoked by Microsoft could not be avoided, at least to a large extent' (para. 453 of the order). To the extent that some minor problems alleged by Microsoft were to persist, Microsoft had not shown that consumers would necessarily view these malfunctions as unforeseen and not as a logical consequence of the absence of a media player in the operating system. This was all the more the case since Microsoft was in a position to inform its customers about the difference between the bundled version (with a media player) and the

unbundled version (operating system only) (para. 454 of the order). The President concluded that Microsoft had not adduced evidence to demonstrate the defects it identified would be likely to have a substantial effect on the perception of the product by final consumers and customers. The President was therefore unable to evaluate the real consequences of these alleged problems on Microsoft's reputation. Even in the event that there was a risk of serious harm to Microsoft's reputation, the President found that there would be no structural or legal obstacles which would hinder Microsoft to implement publicity measures which would restore its reputation, should the Decision be annulled (para. 465 of the order).

Further Microsoft arguments relating to alleged damage to its trade marks and breach of its copyright were dismissed by the President. As regards trade marks, the President held that he obtained no evidence on the actual perception of the Windows trade mark from Microsoft and reiterated that Microsoft had not demonstrated that potential malfunctions resulting from the remedy would have a negative and significant effect on the perception of final consumers. The President rejected the copyright argument because it was too vague and not sufficiently developed by Microsoft (paras. 468 to 474 of the order). In summary, the President found that Microsoft had failed to demonstrate that the implementation of the tying remedy would be likely to cause serious and irreparable damage to Microsoft.

### 3. Conclusion

As is customary for summary proceedings on interim measures, the order of the President of the CFI focuses on the requirement to establish urgency. It is interesting that the President did not enter into the exercise of balancing the interest of the parties given that Microsoft was unable to prove that a serious and irreparable damage would result from the implementation of the remedies imposed by the Decision. As regards the *prima facie* case, the President was very careful not to prejudge the assessments that will have to be carried out by the Court in the main case. As regards urgency, the President refused to lower the burden of proof for the establishment of risk of serious and irreparable damage. This is essential to the effective enforcement of EC Competition law, in particular in markets such as the ones identified in the Decision, which are both fast-moving (which can lead to a sweeping impact of the anti-competitive behaviour in a short period of time) and which exhibit high barriers to entry (which

may make the harm to the competitive structure brought about by an abuse of a dominant position to a large extent irreversible).

On January 24 2005, Microsoft announced that it would not appeal the order to the President of the Court of Justice.



## The needles case: how to find within a complex scheme of bilateral agreements, a tripartite market sharing agreement

*Christian ROQUES, Directorate-General Competition, unit F-1*

### Introduction

The conduct in question, subject of the Commission decision adopted on 26 October 2004, consisted of a series of formally bilateral agreements that amounted to a tripartite agreement which had the object and the effect of sharing or contributing to share the geographic market for needles and the product market for needles and other haberdashery products. Such practices are by their very nature the worst kinds of violations of Article 81 of the Treaty to the extent that they concerned a product and geographic market sharing between different markets and not simply an allocation of quotas within one market and that the product market sharing agreements intervened at different market levels, i.e. manufacturing and distribution (both at the wholesale and retail levels).

Three undertakings and their respective subsidiaries, namely William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG, Coats Holdings Ltd and J & P Coats Ltd, Entaco Ltd and Entaco Group Ltd entered into a series of written, formally bilateral, agreements between 10 September 1994 and 31 December 1999, amounting in practice to a tripartite agreement under which these undertakings shared or contributed to sharing product markets (by segmenting the European market for hard haberdashery products) and geographic markets (by segmenting the European market for needles). These concerted practices and agreements constitute an infringement of Article 81(1) of the EC Treaty and had the object and the effect:

For William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG and Entaco Ltd and Entaco Group Ltd:

- of sharing the European hard haberdashery market by limiting the business activity of Entaco Ltd to the hand sewing and special needles business, a fact which amounts to product market sharing between the hand sewing and special needles market and the wider markets for needles as well as other hard haberdashery markets.
- of segmenting the European market for needles by restricting Entaco Ltd to the United

Kingdom, the Republic of Ireland and (partially) Italy and by preventing that undertaking from entering the Continental European markets for needles (with the exception of so-called label accounts), thereby effectively reserving those markets for William Prym GmbH & Co. KG and its subsidiaries, a fact which amounts to geographic market sharing in the needles market.

For Coats Holdings Ltd and J & P Coats Ltd:

- notably, of protecting the undertakings' own needle brand (Milward) at the retail level from competition on behalf of Entaco Ltd by way of i) an exclusive supply and purchasing agreement with Entaco Ltd covering the United Kingdom and (partially) Italy, ii) and by way of imposing on Entaco Ltd an obligation to respect the geographic market sharing agreement that undertaking had entered into with William Prym GmbH & Co. KG and its subsidiaries.

The Decision is based upon the existence of inter-conditional clauses contained in the above-mentioned series of written bilateral agreements and upon certain contemporaneous documents. These clauses were renewed over time.

In this context it should be highlighted that a leniency application submitted on behalf of Entaco Ltd confirmed all of the Commission's findings in these proceedings. Prym in its reply to the Statement of Objections confessed its participation to the infringements.

### The parties

- Coats Holdings Ltd (hereafter Coats) is a global leading thread producer, the second worldwide producer of zips, the main distributor of haberdashery products around the world and notably in Europe. Coats has a turnover of 1.7 billion Euros worldwide.
- William Prym GmbH & Co. KG (hereafter Prym) is a leader at the manufacturing level of hard haberdashery products. It is the third zip producer worldwide. It owns the well-known 'Éclair' brand. Coats was a main shareholder of Prym until 1994.

For both companies most consumers wear one or more of their products on a daily basis.

- Entaco Ltd (hereafter Entaco) was incorporated in April 1991 following a management buy-out by former employees of Needle Industries Ltd. Needle Industries Ltd was a wholly-owned subsidiary of Coats Viyella plc (later known as Coats plc, currently called Coats Holdings Ltd) until February 1991. It is a small company, mainly active in the needle business.

## Relevant markets

The Commission has identified three relevant product markets i) the European market for hand sewing and craft needles (including notably special needles), in which the product and geographic market sharing took place (market value around €30m), ii) the European market of 'other sewing and knitting products including pins, knitting pins/knitting needles' (market value around €30m), and iii) the European market for other hard haberdashery products including zips and other fasteners (€1,5 billion), in both of which the product market sharing only took place (from 10 September 1994 to 13 March 1997). The market for hand sewing and craft needles must be distinguished from the market for industrial machine needles which were not manufactured by the undertakings during the infringement period.

## Mechanism of the infringements

1. Coats was protected against Entaco and Prym competition at the retail level (for its Milward brand) since:

- Entaco could not compete with Coats by virtue of the agreements it had signed with both Coats and Prym respectively for the UK and Continental Europe at the retail level.

Under clause 2.2 of the Supply and Purchase agreement, Entaco is restricted from supplying Coats customers in the UK: *'Entaco shall not supply products to a customer of a UK Purchaser other than those customers to whom the Supplier supplies Products prior to the date hereof at existing business levels'*.

Under clause 2.2 of the Distribution agreement between Prym and Entaco, Entaco is restricted from selling to customers of Coats and Prym in Continental Europe: *'Entaco will not sell products to any person in the territory [Europe excluding the United Kingdom and the Republic of Ireland] other than the label*

*accounts and/or the Distributor [Prym Consumer] and/or the Coats group.'*

Therefore Entaco was not an independent force in the market since it could effectively only sell to Coats or Prym.

- Prym needed the support of Coats to stop Entaco entering the Continental European market. It must also be remembered that to enforce the market sharing agreements, all Coats (as the overwhelming buyer in UK) had to do was to buy from Entaco rather than Prym. This kept Prym limited to low activity in the UK while it disciplined Entaco to remain outside Continental Europe, because if it did not then Coats would stop considering Entaco as an exclusive supplier, a fact which is contained in clause 2.2 of the Supply and Purchase agreement between Entaco and Coats:

*'[...] (b) fulfil its obligations of cognate nature pursuant to an Agreement between the Supplier and Prym dated [10 September 1994]/ [1 April 1997].'*

In addition, Coats as the main distributor in Europe was in a position by using its orders of products to 'play off' Entaco and Prym against each other, which represented another mode to discipline Prym.

2. Entaco wanted to be the exclusive supplier of Coats in the UK as a security for its production; otherwise it would not have entered into the product market sharing agreement, limiting its business development. Indeed Entaco agreed to a very substantial limitation of its activity:

In the Heads of Agreement: *'Entaco agrees to restrict its manufacturing and distribution activities in the haberdashery sector to needles only, and not to widen its activities to include pins, safety pins, four-piece fasteners, knitting pins, or any other haberdashery product without the prior agreement of Prym'* (in addition to clause 2.3 of the Purchasing agreement between Prym and Entaco).

In the Distribution agreement under clause 2.2 as quoted above which amounts to a geographic market sharing agreement.

Entaco did not receive a similar guarantee from Prym. It needed as a consequence the security of an outlet for its production in the UK from Coats, which is what it received.

Entaco, being a management buy-out of Coats' former needle business, was facing competition

from two major companies, Prym and Coats which were linked by shareholding interests and a 'special partnership'. For Entaco, entering in this tripartite agreement was the best possible deal since it gained a secure outlet by just offering '*a face of independence to the market*' in exchange.

3. Prym, without the approval of Coats, would not have entered a market sharing agreement to the potential detriment of its main shareholder and its main partner (Coats) in the European haberdashery market.

### Rationale of the infringing practices

The main line of defence adopted by Coats was that it was not making sense that as a distributor in the needle sector, it would organise a cartel between its suppliers. However Coats is not only a distributor since it owns a brand at the retail level, namely 'Milward' competing with the other manufacturers Prym and Entaco. Compelling evidences found during the investigations demonstrate the involvement of Coats in order to protect its Milward brand from competition. Coats notably obliged Entaco to enter with Prym in the product and geographic market sharing agreements through a signed agreement. It seems quite irrational that a mere customer would knowingly enable its two main suppliers to enter into a product market sharing agreement to its detriment. A statement by Coats serves as a striking explanation for the undertaking's actions: '*in return, Entaco should not approach Coats' retail or*

*wholesale customer and especially not to offer better prices*'.

Another explanation is given by looking at the long-standing relationship between Coats and Prym which resulted in comprehensive agreements concerning the distribution of haberdashery products throughout the European Union between Coats and Prym and their various subsidiaries. Indeed from 1975 onwards Coats and Prym agreed to cooperate in the area of sales and distribution in a large number of countries world-wide by acting as joint trading companies or exclusive distributors of each other's products, according to their respective market strength in each Member State.

### Conclusion

The infringements were considered as 'very serious' as they had the object of partitioning national markets and sharing product markets, thereby restricting competition and affecting trade between Member States. The infringements lasted 5 years and three months.

As Entaco was the only undertaking to inform the Commission of the existence of the market sharing agreements and to bring decisive evidence without which the market sharing agreements might not have been disclosed, and in the light of its continuous co-operation, the Commission made it benefit from full immunity of fines.

Coats and Prym were condemned to a fine of €30m each, jointly and severally liable with their respective subsidiaries.





## Comment un armistice se transforme en cartel sur le marché de la bière française

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Le 29 septembre 2004, la Commission a adopté une décision infligeant une amende pour un montant total de 2.5 millions d'euros aux deux principaux groupes brassicoles de l'époque en France (Groupe Danone/Brasseries Kronenbourg <sup>(1)</sup> et Heineken N.V./Heineken France). Ces groupes sont sanctionnés pour avoir conclu un accord "d'armistice", destiné à établir un équilibre entre leurs réseaux intégrés de distribution de bière dans le secteur «horeca» (consommation hors domicile) en France. L'accord visait également à limiter les coûts d'acquisition des grossistes en boissons.

L'accord d'armistice a été conclu le 21 mars 1996 à la suite d'une «guerre d'acquisitions» de grossistes de boissons, au cours de laquelle chacun des deux groupes a racheté un grand nombre de grossistes en peu de temps, ce qui avait conduit à une inflation des coûts d'acquisition desdites entreprises. L'armistice avait donc pour but, d'une part, de mettre rapidement fin à l'accroissement des coûts d'acquisition des grossistes et, d'autre part, d'équilibrer les réseaux de distribution intégrés des parties.

Ceci ressort sans équivoque d'une note interne du groupe Heineken du 22 mars 1996, dans laquelle le PDG de Heineken France informe le conseil d'administration de Heineken N.V. de ce qui suit: «Hier nous sommes convenus avec Danone de mettre fin à la guerre stupide et coûteuse des acquisitions. Nous partageons l'objectif qu'il doit exister un équilibre entre nos deux groupes conformément à une règle générale selon laquelle aucun des deux ne doit être dominant sur le marché Horeca [... ]». Afin d'atteindre ces objectifs, les parties convenaient notamment:

(1) d'arrêter provisoirement les acquisitions (interdiction de procéder à de nouvelles acquisitions de distributeurs en dehors d'une liste agréée),

(2) d'équilibrer le volume total de bière distribuée par le réseau intégré de chaque partie, et

(3) d'équilibrer le volume des marques de bière commercialisées par chaque partie qui serait distribué par l'autre.

L'«armistice» du 21 mars 1996 visait donc à contrôler les investissements des deux groupes et s'assimilait à un accord de partage du secteur de l'horeca en France. Cet accord constitue ainsi une infraction par objet à l'article 81 du traité CE. Le Groupe Danone et Brasseries Kronenbourg n'ont en outre pas contesté l'existence de l'accord.

L'accord n'a cependant pas été mis en œuvre. Cette circonstance a été prise en compte par la Commission lors de la détermination du montant des amendes.

Dès lors, compte tenu de sa nature, son absence d'impact et son étendue géographique, l'infraction a été qualifiée de «grave». L'accord n'ayant pas été mis en œuvre, il n'y avait pas lieu de majorer le montant de base de l'amende pour la durée.

Au titre de circonstance aggravante, la récidive a été retenue contre Danone/Brasseries Kronenbourg, Danone (alors BSN) ayant déjà été condamnée en 1984 pour des accords de partage du marché visant notamment à maintenir un statu quo et à établir un équilibre dans le marché.

Aucune circonstance atténuante n'a été retenue. La Commission a, au contraire, clarifié pour la première fois que dans des procédures concernant des cartels secrets, la coopération (en l'espèce la non contestation par les deux parties des faits décrits dans la communication des griefs et la non contestation par le Groupe Danone/Brasseries Kronenbourg de l'existence de l'armistice) doit

<sup>(1)</sup> En 2000, soit plusieurs années après l'infraction, Brasseries Kronenbourg SA a été acquise par le groupe brassicole britannique Scottish & Newcastle.

*en principe* être prise en compte sur la base des communications sur la clémence <sup>(1)</sup> et non pas sous les lignes directrices pour le calcul des amendes <sup>(2)</sup>, afin de ne pas miner l'objectif des communications sur la clémence. Or, comme la communication sur la clémence de 2002 <sup>(3)</sup> ne prévoit pas de réduction de l'amende pour non contestation des faits, la Commission a conclu qu'il n'y a pas lieu de retenir cette circonstance atténuante en l'espèce.

En rejetant cette circonstance atténuante, la Commission a cependant également constaté que la non contestation des faits et de l'existence de l'armistice n'a pas contribué de manière significative à l'établissement de l'existence de l'infraction.

La Commission a dès lors infligé une amende d'1 million euros à Heineken N.V. et Heineken France et d'1,5 million d'euros au Groupe Danone/Brasseries Kronenbourg.

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<sup>(1)</sup> La communication de la Commission concernant la non-imposition d'amendes ou la réduction de leur montant dans des affaires portant sur des ententes (JO C 207 du 18.7.1996, p. 4) ou la communication de la Commission sur l'immunité d'amendes et la réduction de leur montant dans les affaires portant sur des ententes (JO C 45 du 19.2.2002, p. 3).

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

<sup>(3)</sup> La Communication sur la clémence de 2002 aurait été applicable *ratione temporis*, mais aucune partie n'a introduit de demande au titre de cette communication.

## Commission fines companies for colluding on raw tobacco prices in Spain

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On 20th October 2004, the European Commission adopted a prohibition decision imposing a total fine of € 20 million to five companies active in the raw tobacco processing market for colluding on the prices paid to and the quantities of tobacco bought from Spanish producers of raw tobacco. The Commission also imposed a symbolic fine to the producers' representatives for agreeing minimum prices and price brackets. Following an investigation which started in 2001, the Commission established that the infringements lasted from 1996 to 2001.

### Regulatory framework

The production of raw tobacco is subject to both Community and national legislation.

The common organisation of the market in raw tobacco ('CMO in raw tobacco') <sup>(1)</sup> requires each producer or producers' group and each processor to enter into 'cultivation contracts' at the beginning of each year's campaign. These contracts must include the prices or price brackets for each quality grade of the tobacco as agreed by the parties to the contract. Such 'contract prices' constitute the framework to be used at delivery of tobacco to fix its final price.

In Spain, a Law of 1982 and a Royal Decree of 1985 discipline the bargaining and the conclusion of 'standard' cultivation contracts between producers' representatives and processors. This regulatory framework (to include the action taken by the Agriculture Ministry thereafter) at least encouraged collective negotiations of 'contract prices' in the form of both minimum prices and price brackets between producers' representatives and processors. Since 2000, a new law clarifies that parties to the cultivation contract must agree contract prices individually.

### Summary of the infringements

*The processors' cartel:* The four Spanish processors of raw tobacco (Compañía española de tabaco en rama SA (Cetarsa), Agroexpansión SA, World Wide Tobacco España SA (WWTE) and Tabacos españoles SL (TAES)) as well as the Italian processor Deltafina, SpA. agreed, either directly or, from 1999 onwards, through their association ANETAB, the (maximum) average price they would pay to producers at delivery for each variety of tobacco and the quantities of tobacco that each of them could buy. By so doing, the processors aimed at avoiding that final transaction prices at delivery may be pushed above the level they would consider acceptable. Since 1998, they put in place a sophisticated monitoring and enforcement mechanism made of regular exchanges of information about prices and quantities throughout the campaign and transfers of tobacco at the end of it from processors that would purchase more tobacco than agreed to those that would purchase less. From 1999 to 2001, processors also agreed between themselves price brackets for each quality grade of the tobacco and minimum average prices per producer and per producers group for each tobacco variety (the 'contract prices') which they would then jointly offer to producer representatives during the negotiation of the annual standard cultivation contract.

*The producers' cartel:* The three agricultural unions representing the tobacco producers in Spain (ASAJA, UPA and COAG) as well as the cooperatives confederation CCAE <sup>(2)</sup> agreed between themselves on the 'contract prices' (see above) which they would then jointly propose to processors during the negotiation of the standard cultivation contract. By their very nature, minimum average prices would still be open to increase following negotiation at delivery.

<sup>(1)</sup> The CMO of raw tobacco was established in 1970 and replaced in 1992 by a new Regulation which was substantially amended in 1998. A complete overhaul of the tobacco CMO was adopted in April 2004 to take effect from 2006.

<sup>(2)</sup> Asociación agraria de jóvenes agricultores (ASAJA), Unión de pequeños agricultores (UPA), Coordinadora de organizaciones de agricultores y ganaderos (COAG) and Confederación de cooperativas agrarias de España (CCAIE).

In the decision, the Commission finds that these practices constitute two separate (single and continuous) infringements of Article 81 of the Treaty.

The practices cannot be exempted under Council Regulation No 26 of 4 April 1962, which provides for certain derogations from competition rules in respect of the production of and trade in agricultural products since they cannot be regarded as 'necessary' for the attainment of the objectives of the Common Agricultural Policy. In fact, the 1992 reform of the CMO in raw tobacco was precisely designed to enhance price competition.

The decision also concludes that neither the Spanish regulatory framework nor the Ministerial practice required the processors to agree on maximum average delivery prices for raw tobacco or to share out quantities of tobacco to be bought by each processor. Nor did such regulatory framework require processors and producers to agree collectively on 'contract prices' or otherwise remove all possibility of competitive behaviour on their part. Consequently, the conducts at issue are caught by Article 81 of the Treaty.

### Calculation of the fines

The Commission characterised the conducts in question as 'very serious' infringements of the competition rules. However, it also took account of the relatively limited size of the market (approx. € 25 million) when setting the starting amount of the fines (the highest starting amount was set at € 8 million).

Fines were adjusted in consideration of the contribution to the illegal conduct of, and the market position enjoyed by, each party involved. Bearing this in mind, the decision concluded that Deltafina should receive the highest starting amount for its prominent market position. Its position was further aggravated by the fact that it also acted as the cartel leader. The contribution to the illegal conduct by the Spanish processors was broadly taken as being similar. The starting amounts however took into

account the different size and the market shares of each processor involved. Cetarsa is the leading Spanish first processor (67% market share during the last year of the infringement) and received the highest starting amount of the fine. Agroexpansión and WWTE had both market shares of approx. 15% each and received the same starting amount of the fine. Taes, by far the smallest processor involved, received the lowest starting amount of the fine. Further adjustment was made in the case of WWTE and Agroexpansión to reflect their belonging to multinational groups of considerable economic and financial strength.

The decision concludes that only a symbolic fine of € 1,000 to each producers' representative is appropriate in consideration of the fact that the national regulatory framework and the involvement of the Agriculture Ministry engendered a considerable degree of uncertainty as to the legality of their conduct. Such regulatory framework was also considered in respect of the processors but only as a mitigating circumstance as their conduct exceeded by far the scope of such framework.

The 10% worldwide turnover limit mentioned in Article 15(2) of Regulation 17 was applied to Cetarsa to limit the fine imposed on it.

The Commission notice on the non-imposition of fines in cartel cases of 1996 was applicable in this case and in particular section D since all the processors came forward only after the Commission's inspections. Reductions of the fines were granted to all in accordance with the value of their individual cooperation.

The decision finally finds that the parent companies of WWTE (Standard Commercial Corporation, Standard Commercial Tobacco Co. Inc. and Trans-Continental Leaf Tobacco Corporation Ltd.) and of Agroexpansión (Dimon Inc.) exercised decisive influence on their subsidiaries during the period considered and are therefore found to be jointly and severally liable for the fines imposed on their subsidiaries.



## Commission adopts cartel decision imposing fines on copper plumbing tube producers

*Harald MISCHÉ, Directorate-General Competition, unit B-2*

*In September 2004, the Commission imposed fines totalling EUR 222.3 million on the major European copper plumbing tube producers for operating a 13-year cartel in the copper plumbing tubes market. These companies include the KME group, the IMI group, the Boliden group, the Outokumpu group, the Wieland group, Halcor and HME Nederland BV. The Commission granted Mueller Industries full immunity under the 1996 Leniency Notice for disclosing the cartel existence first. This is the Commission's first decision against hard core cartels adopted in 2004. Some of these copper tubes producers were recently fined for being involved in another contemporaneous EEA-wide cartel (in the Commission's Industrial Tubes decision of December 2003).*

On 3 September 2004, the Commission adopted a decision imposing fines on the leading European copper plumbing tube producers for operating a price-fixing and market-sharing cartel in the EEA market for copper plumbing tubes, in breach of Article 81 EC, between at least June 1988 (concerning the first SANCO-club meetings) and March 2001. Some of these copper tube producers were recently fined by the Commission in the *Industrial Tubes Decision* <sup>(1)</sup> for being involved in another EEA-wide cartel, which was contemporaneous to the present one.

The participants in the cartel include the following companies: (i) the KME group (Europa Metal AG and its wholly-owned subsidiaries Europa Metalli SpA and Tréfinétaux SA), the IMI group (IMI plc and its former subsidiaries IMI Kynoch Ltd. and IMI Yorkshire Copper Tube Ltd.); (ii) the Boliden group (Boliden AB and its former subsidiaries Boliden Fabrication AB and Boliden Cuivre & Zinc S.A., hereinafter 'BCZ'); (iii) the Outokumpu group (Outokumpu Copper Products Oy and its parent company Outokumpu Oy); (iv) the Wieland group (Wieland Werke AG and its fully controlled subsidiaries Austria Buntmetall AG and Buntmetall Amstetten Ges.m.b.H.); (v) Halcor S.A.; (vi) HME Nederland BV; and (vii) Mueller Industries, Inc. (together with its subsidiaries

WTC Holding Company, Inc., Mueller Europe Ltd., DENO Holding Company, Inc. and DENO Acquisition EURL), which was the first company to approach the Commission and cooperate under the 1996 Leniency Notice.

Copper plumbing tubes are generally used for water, oil, gas and heating installations in the construction industry. These include two sub-families of products, *i.e.* plain copper plumbing tubes and insulated (or plastic-coated) copper plumbing tubes. For the purposes of the decision, both plain tubes and insulated tubes were treated as part of one product group, which the Commission estimated to be worth some EUR 1.15 billion in the EEA in 2000.

In consideration of different customers, end uses and technical specifications, the Commission considered that copper plumbing tubes and industrial tubes are different products <sup>(2)</sup>. Unlike industrial tubes, which are generally sold to industrial customers, original equipment manufacturers and part manufacturers, main customers for copper plumbing tubes include distributors, wholesalers and retailers, who sell these to installers and other end-consumers.

Tubes made of other materials, such as plastic or compounds (*i.e.* plastic with layers of aluminium), which have increasingly been used for the production of plumbing tubes since the early 1990s, put a certain amount of competitive pressure on plumbing tubes made of copper. However, for the purposes of this decision, the Commission treated copper plumbing tubes as a separate product.

The Commission launched an investigation in March 2001, after Mueller Industries disclosed the cartel existence and started to cooperate with the Commission under the 1996 Leniency Notice. The Commission carried out dawn raids at some companies' premises in March 2001 <sup>(3)</sup> and sent a Statement of Objections to the parties in September 2003. The Commission found that the copper tube producers had participated in a single, continuous, complex and, with respect to KME,

<sup>(1)</sup> Commission Decision of 16 December 2003, Commission Press Release IP/03/1746 of 16.12.2003.

<sup>(2)</sup> In line with the Commission findings in Case No COMP/M.3284, *Outokumpu/Boliden*.

<sup>(3)</sup> See Commission Press Release MEMO/01/104, 23 March 2001.

Wieland and Boliden, a ‘multiform’ infringement (relating to both the wider European cooperation, the SANCO club and/or the WICU/Cuproterm arrangements) of Article 81 of the EC Treaty and Article 53 of the EEA Agreement of long duration. In particular, the companies operated a price-fixing and market-sharing cartel in which they agreed on allocating volumes, market shares and customers, as well as on fixing price targets and joint price increases, discount rates and other commercial terms for plain copper plumbing tubes. As far as KME and Wieland are concerned, the agreement also covered plastic-coated copper plumbing tubes. The cartel members also established a system for monitoring the implementation of the anti-competitive arrangements, through an exchange of confidential information (on sales, orders, market shares and prices) and a market leader agreement, based on which each national ‘market leader’ reported on developments in its home market to the other participants, so that these could better coordinate their behaviour.

The anti-competitive conduct took place at both the European-wide and national level. However, the decision is principally limited to the European-wide arrangements. The cartel operated through regular meetings at both a top management level (so-called ‘Elephant meetings’ as of 1997) and an operational level (so-called “Sweepers meetings” as of 1997).

Producers market their copper plumbing tubes under different brands, depending on the various applications and on whether copper plumbing tubes are plastic-coated. Three brands, ‘SANCO’, ‘WICU’ and ‘Cuproterm’, were critical to the organisation and implementation of the cartel both at an initial phase and throughout its entire duration. ‘SANCO’ is a trademark for plain copper plumbing tubes produced by the KME Group, Wieland and BCZ. ‘WICU’ and ‘Cuprotherm’ are brand names for plastic-coated copper plumbing tubes produced by Wieland and KME (until 1998, also BCZ produced insulated tubes under the ‘WICU’ trademark). The SANCO brand provided a framework within which the SANCO producers, by regularly meeting in a so-called ‘SANCO-club’, were able to organize their co-operation and to implement their agreements, among other things through an exchange of confidential information. KME and Boliden started their illegal cooperation in June 1988 at the latest. Wieland joined later in 1989. KME and Wieland also cooperated with respect to WICU®- and Cuprotherm plastic-insulated copper plumbing tubes.

The cartel was organized at three levels, the SANCO club representing the first and oldest level

of the cooperation between the copper plumbing tubes producers. In parallel to the SANCO club, the largest European copper tube producers started a broader level of cooperation from at least September 1989, *i.e.* KME, Wieland, Outokumpu and IMI. Mueller joined this group in 1997, to form the so-called ‘group of the five’. As described in the minutes of a participant in the first European-wide meeting, the objective was ‘to keep the prices in the high price level countries high — if possible to increase even more’, by limiting quantities according to demand. Furthermore, the plan was to increase prices by creating shortages.

The cooperation reached its third level in 1998, when four smaller producers joined the ‘group of the five’, *i.e.* Halcor (just until August 1999), HME Nederland BV, Boliden and Buntmetall (to form the so-called ‘group of the nine’). These companies, as well as Mueller, had occasionally participated in the cartel between 1989 and 1994. However, the Commission could not establish continuity of the infringement with respect to these companies because it was not proven that they had any contacts at the European level during the period from 1994 until 1997 or 1998.

The way the meetings were organized and the intensity of the contact between the participants varied throughout the cartel duration.

The Commission characterised the behaviour in question as a ‘very serious’ infringement of Article 81 EC and Article 53 EEA and imposed fines for a total amount of EUR 222.3 million. The highest fine was imposed on the companies of the KME group, amounting to EUR 67.08 million. The IMI group was fined EUR 44.98 million, the Boliden group EUR 32.6 million, the Outokumpu group EUR 36.14 million, the Wieland group EUR 27.8411 million, Halcor S.A. EUR 9.16 million and HME Nederland BV EUR 4.49 million. Mueller was granted full immunity.

The addressee companies had undergone internal restructuring by the time of the Commission's decision. This resulted in a complex allocation of liabilities.

For instance, as concerns the KME group, including KM Europa Metal (‘KME’), Europa Metalli and Tréfinétaux, two different periods were distinguished for the purposes of allocation of liability. During the first period (between 1988 and 1995), Tréfinétaux was wholly-owned by Europa Metalli and the two companies' management was closely interlinked so that they were considered to have formed a single undertaking,

implying joint and several liability for the infringement. Although in 1990 their ultimate parent company, SMI (Società Metallurgica Italiana SpA), acquired some 77% of Kabelmetall AG (renamed later KM Europa Metal), the Commission found that Kabelmetall AG formed a separate undertaking from Europa Metalli and Tréfinmétaux until the restructuring of the group in 1995. KME's management was separate from that of its sister companies until this restructuring, when KME acquired 100% shareholding in both Europa Metalli and Tréfinmétaux. During the period from 1995 to 2001, the KME group was treated as a single undertaking with joint and several liability for the infringement.

In a similar way, two different periods were distinguished for the purposes of the allocation of liability within the Wieland-group. Wieland Werke AG acquired sole control over the Buntmetall group in 1999. Accordingly, Wieland Werke AG and the Buntmetall group were treated as a single undertaking with joint and several liability for the infringement only as of 1999.

## Calculation of fines

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence of aggravating and/or mitigating circumstances, as appropriate. All the companies concerned were found to have committed a 'very serious' infringement. The KME group, the Wieland group, the Outokumpu group, the IMI group and the Boliden group committed an infringement of long duration (exceeding five years). Fines were adjusted according to the companies' relative importance on the market concerned. Further upward adjustment for 'deterrence' was made in Outokumpu's case, with regard to its larger size compared to other competitors and its overall resources. Outokumpu's fine was also increased for recidivism, since the company had been the addressee of a previous decision finding an infringement of the same type (Commission Decision 90/417/ECSC, *Cold-rolled Stainless steel flat products* <sup>(1)</sup>). On the other hand, Outokumpu was rewarded by an attenuating factor for being the first undertaking to disclose the whole duration of the cartel extending over more than 12 years, by analogy to the 2002 Leniency Notice, which is not applicable in this case (see below). Its fine was therefore reduced accordingly. The KME group was also granted a mitigating factor for its cooperation in the

proceedings, since it was the first undertaking to provide sufficient evidence enabling the Commission to establish the existence of a continuous infringement with respect to the WICU/Cuprotherm arrangements starting from at least the beginning of 1991.

## Application of the 1996 Leniency Notice

Since the copper plumbing tubes investigation started in 2001, the 1996 Leniency Notice applied in this case. Mueller was granted full immunity from fines for having approached and cooperated with the Commission first. With the exception of HME, all the other companies involved in the proceedings cooperated with the Commission's investigation, but only after inspections had taken place. Since the inspections had produced sufficient evidence allowing the Commission to open proceedings and adopt a decision imposing fines, the Commission applied Section D of the 1996 Leniency Notice.

Outokumpu applied for leniency immediately after the Commission's inspections. It began cooperating with the Commission significantly earlier than the other participants and its cooperation was complete and extensive. As mentioned above, Outokumpu disclosed the whole cartel duration from the end of the 1980s until 2001, for which it was granted an attenuating circumstance and its fine was reduced accordingly. The company was given a 50% discount, which is the maximum reduction allowed under Section D of the 1996 Leniency Notice.

Wieland Werke and KME started cooperating with the Commission at a later stage in the procedure, more than a year and a half after the inspections took place and after the Commission had sent formal information requests in the context of the *Industrial Tubes* investigation (Case IV/38.240), in which these companies were also involved. KME was the only company besides Outokumpu to have provided an overall description of the arrangements for the period 1988 to 2001. Also, it contributed by providing explanations for the content and duration of national arrangements. Wieland provided a detailed description of meetings from 1993 until 2001, numerous minutes of cartel meetings of its employees, which helped in particular to establish continuity of the infringement. As a result, KME and Wieland were rewarded with a reduction of 35%.

<sup>(1)</sup> OJ L 220, 15.8.1990, p. 28.

Halcor also started cooperating after having received a formal request for information. Although the company provided detailed descriptions of how the cartel functioned and of its participation in the meetings at the European level in 1998 and 1999, and submitted contemporaneous notes of certain cartel meetings, its cooperation had only limited value because the Commission

was already in possession of evidence proving the infringement for the relevant period. Also, Halcor did not clarify its role in meetings between 1989 and 1994 or at a national level. As a result, Halcor was rewarded with a 15% reduction. Since IMI and Boliden started cooperating after receiving the Statement of Objections, they could only benefit from a 10% reduction for not contesting the facts.



## Commission fines members of the monochloroacetic acid cartel

*Christopher MAYOCK, Directorate-General Competition, unit E-1*

*In a decision adopted on 19 January 2005 the Commission found that four groups of undertakings had participated in a cartel in the market for monochloroacetic acid. The cartel ran for 15 years from 1984 until 1999 and covered the whole of the European Economic Area. Fines totalling almost EUR 217 million were imposed on Akzo, Hoechst and Atofina (now known as Arkema) for their involvement in the cartel. Clariant escaped the imposition of a fine altogether in view of its cooperation with the Commission under the 1996 Leniency Notice.*

### Summary of the infringement

Monochloroacetic acid (MCAA) is a reactive organic acid which is a chemical intermediate used in the manufacture of detergents, adhesives, textile auxiliaries and thickeners used in food, pharmaceuticals and cosmetics. The participants held over 90% of the European Economic Area (EEA) wide market for MCAA which had a value of approximately EUR 125 million in 1998, the last full year of the infringement.

Four groups of undertakings were involved in the cartel:

- Akzo (Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Chemicals BV, Akzo Nobel AB, Eka Chemicals AB, Akzo Nobel Base Chemicals AB);
- Atofina (Atofina SA (now Arkema SA) and its parent company Elf Aquitaine SA);
- Hoechst AG (involved 1984-1997 after which time it sold its MCAA business to Clariant); and
- Clariant (Clariant GmbH and its parent Clariant AG - involved 1997-1999).

The cartel ran from at least 1984 to 1999 with the principal aim of market sharing through a volume and customer allocation scheme. The participants would meet 2-4 times a year with these meetings taking place on a rotating basis in the respective countries of the participating undertakings. Bilateral contacts were also made, as well as the participants having contact during specially arranged meetings and on social occasions.

The cartel became more formalised from 1993 with implementation rules being laid down, the development of a mechanism to directly exchange sales statistics and the introduction of a compensation system. AC Treuhand, a Zurich based statistical agency, was also retained at this time to provide aggregated statistical data and general market information. The participants would typically meet the AC Treuhand representative twice a year close to Zurich airport. These legitimate Treuhand meetings served to provide a cover for the participants to meet unofficially, usually the evening before at a different location, to discuss the cartel arrangements. A total of 12 Treuhand meetings took place between May 1994 and January 1999 with cartel meetings taking place along side the Treuhand meetings and with other multilateral and bilateral contacts continuing throughout the period.

The Commission found that the participants had infringed Article 81 EC Treaty and Article 53(1) EEA Treaty by (i) allocating volume quotas, (ii) allocating customers, (iii) agreeing concerted price increases, (iv) agreeing on a compensation mechanism to ensure the implementation of quotas, (v) exchanging sales volumes and prices to ensure implementation, (vi) participating in regular meetings, both multilateral and bilateral, as well as other contacts to set up and to ensure the proper functioning of the cartel.

### Calculation of fines and application of the 1996 Leniency Notice

In fixing the amount of fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and attenuating circumstances. The role played by each undertaking was assessed on an individual basis.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into three groups according to their relative importance in the market concerned. Akzo as the largest producer of MCAA in the EEA was placed in the first category. Hoechst and Clariant were placed in the second category with Atofina in the third. Upward adjustment of the fine was made in the case of the Atofina and Akzo groups having regard

to their large size and overall resources. All participants, except for Clariant, committed an infringement of long duration (exceeding five years) for which the amount of the fine was increased proportionally to the term of their involvement.

As an aggravating circumstance the Commission took into account that both Hoechst and Atofina had been addressees of previous Commission decisions which established an infringement of the same type. In the case of Atofina the aggravating circumstance applied only to Atofina SA and did not extend to its parent company Elf Aquitaine SA as the latter was not in control of the former at the time of the previous infringement.

One attenuating circumstance was identified. In its cooperation with the Commission (see below) Akzo provided information that three of its companies (Eka Chemicals AB, Akzo Nobel Chemicals AB and Akzo Nobel AB) had participated independently in the infringement for a short eight month period prior to becoming part of the Akzo group. The result of the information provided by Akzo is that it would face a higher fine than it would have done without its cooperation. Accordingly, having regard to the particular circumstances of the case and in line with the principle of

fairness, the fine imposed on the above three companies was reduced to zero on the basis of a special attenuating circumstance of cooperation outside the Leniency Notice.

On the issue of leniency, as the investigation started prior to the introduction of the 2002 Leniency Notice, the 1996 Notice was applicable in this case.

Clariant was the first undertaking to provide decisive evidence of the cartel which triggered the Commission investigation. Clariant, having fulfilled the required additional conditions, was accordingly granted full immunity under the 1996 Leniency Notice. Atofina was the second undertaking to come forward and, as a result of its close cooperation with the Commission, it was granted a 40% reduction. Akzo was the third undertaking to cooperate with the Commission and it received a reduction of 25%.

Following application of the Leniency Notice the total level of fines imposed was almost EUR 217 million. On an individual basis the fines imposed were as follows: Akzo EUR 84.38 million, Hoechst EUR 74.03 and Atofina EUR 58.5 million.

## Merger control: Main developments between 1 September and 31 December 2004

*Mary LOUGHRAN and John GATTI, Directorate-General Competition*

### Recent cases — Introductory remarks

In the four months to December, the Commission received 72 notifications, some 23% fewer than in the previous period. As regards final decisions the trend was also downwards with 75 final decisions being adopted as compared to 84 between May and August. Of these final decisions over 50% were adopted under the simplified procedure.

However, there was a significant increase in the number of decisions adopted after an in-depth investigation as well as an increase in the number of decisions adopted in Phase I with conditions. One prohibition decision was adopted during the period pursuant to Art. 8 (3) and one case was cleared unconditionally pursuant to Art. 8 (2). Three other conditional clearance decisions pursuant to Article 8 (2) were also adopted in the period. The Commission also referred one case to the national authorities pursuant to Article 9.

### *A – Summaries of decisions taken under Article 8 of the Merger Regulation*

#### **AREVA / Urenco / ETC JV**

AREVA, the French nuclear group, and Urenco, a company set up by the governments of the UK, the Netherlands and Germany are the main European providers of uranium enrichment services which are needed to produce fuel for nuclear power plants. As a result of this transaction, AREVA acquired joint control over Enrichment Technology Company (ETC), Urenco's subsidiary active in the development and manufacturing of the centrifuges used to enrich uranium. Centrifuge technology offers significant advantages over the older gas diffusion technology currently used by AREVA. ETC is to supply both its parents and third parties with centrifuge equipment.

The operation was jointly referred to the Commission by France, Sweden and Germany in April 2004. The Commission's investigation identified competition problems in the downstream market

for enriched uranium. The Commission was concerned that the concentration could lead to the creation of a joint dominant position in this market in the European Union. In particular, the Commission considered that ETC could be used by AREVA and Urenco to co-ordinate, through the exercise of their respective veto rights, their capacity developments.

The case was also of interest in view of the efficiency claims made by the parties. These related to the substantial cost savings that AREVA would achieve by being able to adopt the modern centrifuge technology of Urenco. The Commission was, however, not sufficiently convinced of the merger-specificity of these claims, in particular with regard to the more restrictive aspects of the joint venture.

In order to eliminate the Commission's concerns at an early stage in Phase 2, AREVA and Urenco undertook to remove their respective veto rights in relation to future capacity expansions. Secondly, the flow of commercially sensitive information between ETC and its parents will be blocked by a series of measures which will be closely monitored. Finally, the parties have undertaken to provide the European Supply Agency ("ESA") with additional information, which will enable ESA to monitor the provision and pricing of enriched uranium more closely and to respond, if necessary.

#### **Sonoco / Ahlstrom / JV**

In May 2004, the Commission received a notification of a proposed concentration by which two major players of the coreboard and cores industry, Sonoco (USA) and Ahlstrom (Finland), intended to create a joint venture combining their European activities.

Cores are tubes produced from coreboard, which is itself produced mainly from recycled paper. Cores are used as the base around which various products, such as paper, film and yarn are wound. Among cores, high-end paper mill cores are high quality products used by the printing industry to roll magazine paper. Low value cores are standard products used in many industries.

The Commission's in-depth investigation identified concerns in the markets for high-end paper-mill cores in the whole Scandinavia and for low-value cores in Norway and Sweden, where the joint venture would have high market shares and where the significant competitive pressure exerted by Sonoco on the market leader Ahlstrom would be lost. To remedy these concerns, the parties proposed to divest Ahlstrom's only Norwegian core manufacturing facility in Sveberg. They also offered not to implement the merger before a buyer is found.

The European Commission approved the concentration on this basis, since it considered that this divestiture will allow for the entry of a new supplier in Scandinavia and will also remove the main part of the parties' overlap in the affected Scandinavian countries. Indeed, in late October, the Commission approved the acquisition of Sveberg by Abzac, a French core manufacturer which has significant activities in Continental Europe, but which was absent from the Scandinavian markets.

### **Continental/Phoenix**

The acquisition of Phoenix AG (Hamburg) by the German undertaking Continental AG involved two rubber companies which mainly serve the automotive industry. The transaction was approved subject to divestiture commitments which removed the competition problems arising from the parties' dominant position in the markets for air springs for commercial vehicles and for heavy steel cord conveyor belts. The proposed transaction involved the acquisition of sole control of Phoenix AG, a company which is also active in the production of technical rubber products (e.g. suspension systems, anti-vibration systems, hoses and conveyor belts) by Continental, a producer of tyres, brake systems and technical rubber products. Phoenix jointly controls Vibracoustic GmbH & Co KG, Germany, through which it distributes air springs for trucks and cars.

The acquisition would have led to significant overlaps in various technical rubber markets, in particular the markets for air springs and for steel cord conveyor belts. Air springs are used as suspension components in commercial vehicles, cars and rail vehicles. Heavy steel cord conveyor belts are used for the transport of heavy goods over long distances, in particular in the field of lignite mining.

In its first phase investigation the Commission identified potential competition concerns in the

markets for air springs for commercial vehicles, cars and rail vehicles as well as for heavy steel cord conveyor belts and for filter belts. The Commission's extensive market investigation confirmed its concerns in the markets for air springs for commercial vehicles (sold to original equipment manufacturers and suppliers — 'OEM/OES') and for heavy steel cord conveyor belts. Indeed, the acquisition combines the two leading players in these two markets and would lead to a combined market share in both markets of well above 60%, with only a few small competitors remaining. Furthermore, the Commission found evidence that there are significant barriers to enter both markets. This is mainly because the production and distribution of air springs and conveyor belts involves specific production and customer know-how. Accordingly, new suppliers have to undergo a lengthy qualification procedure before they can be considered as potential suppliers.

In order to eliminate the Commission's competition concerns, Continental undertook to divest Phoenix' 50% co-controlling stake in the joint venture Vibracoustic to the only other shareholder, Freudenberg (Germany). In addition, Continental will cause Phoenix to completely divest its production of air springs for commercial vehicles (OEM/OES), located in a plant in Hungary. These two commitments remove entirely the overlap of the parties' activities in the field of air springs for commercial vehicles (OEM/OES).

Continental also committed to sell a production line for wide steel cord conveyor belts to its competitor, Sempertrans. This divestiture will enable Sempertrans to compete over the full range of steel cord conveyor belts with the merged entity, thereby eliminating the competition concerns in the field of steel cord conveyor belts.

### **Oracle/PeopleSoft**

The Commission approved Oracle Corp's acquisition of PeopleSoft Inc. The two companies are rival makers of software applications for businesses. After a detailed investigation, the Commission concluded that there was insufficient evidence of competitive harm. Especially as the large and complex companies (often multinationals) that use the software to automate their financial management systems and their human resource processes have other suppliers to serve their needs in addition to the merging parties.

In June 2003 Oracle, the world's second largest software company launched a hostile bid for its software rival, PeopleSoft. The transaction was



notified in Europe in October 2003 under the Merger Regulation, whilst also being subject to scrutiny by the US Department of Justice.

Enterprise application software allows corporations to automate and manage some critical business functions such as financial planning and reporting (FMS), human resources processes (HR), relationships with customers and supply chain management. FMS and HR applications are critical to large multinational corporations.

The Commission's detailed investigation established that there are separate markets for 'high-function' HR and FMS software purchased by such enterprises which require high standards of performance and support. This market is known in the industry as 'enterprise software' or 'tier-one software' and is different from so-called 'mid-market' software. The Commission also established that the markets are world-wide in scope.

The Commission concluded that even though the proposed merger reduced the number of big players from three to two, with SAP remaining the largest player in the sector and the relevant markets, the markets would remain competitive. Typically customers invite various vendors to bid for "enterprise software" projects (both FMS and HR) and evidence shows that other vendors such as Lawson, IFS, Intertia and QAD have won bids to supply systems to large and complex enterprises in competition with Oracle, PeopleSoft and SAP. Also Microsoft, a recent entrant into business application software and still perceived mainly as a mid-market player, managed occasionally to win bids in the 'enterprise software' market and appears to pose a competition constraint in this market.

The Commission reached this conclusion after analysing hundreds of HR and FMS bids launched by large enterprises in recent years. The Commission also carried out various econometric tests with this data which revealed that Oracle's bidding behaviour was not particularly affected by the specific identity of the rival bidders in the final rounds of a given bidding contest, i.e. the presence of PeopleSoft or SAP as rival did not necessarily give rise to more aggressive discounting compared to Oracle's behaviour vis-à-vis other bidders.

The heterogeneity of the products, the asymmetries in the market shares of the different players and the lack of price transparency also rendered coordinated effects implausible in the industry.

The Commission conducted its investigation in close cooperation with the antitrust division of the

US Department of Justice. It also took into account evidence that became available during the US trial in the US District Court of Northern California.

## *B – Summaries of decisions taken under Article 6*

### **Owens-Illinois / BSN Glasspack**

In October the Commission unconditionally approved the acquisition of the French glass container manufacturer BSN Glasspack S.A. by its US-based competitor Owens-Illinois Inc. The glass containers produced by the merging firms are used to package products such as soft drinks, wine, mineral water, olive oil, ketchup and other food products.

Owens-Illinois is an international manufacturer of glass containers, machinery for manufacturing glass containers, and plastic containers and associated equipment. In the European Union it has glass manufacturing operations in Finland, Italy, Spain and the United Kingdom. BSN manufactures and sells glass containers for beverages and food and has production facilities in France, Belgium, Germany, the Netherlands and Spain. The two companies European plant networks were in fact largely complementary. However, Owens-Illinois and BSN Glasspack are direct competitors in two regional markets comprising, North-Eastern Spain/South-Western France and South-Eastern France/Northern-Italy. Glass containers are bulky products which are typically delivered within a range of 300-400km from the production plant. The delivery area of a plant can thus encompass regions on both sides of a national frontier.

The transaction, as originally notified, would have led to high market shares in the regions concerned and would have removed an important competitor in what are already highly-concentrated markets. Besides the merging partners, the only other major player in these regions is French company St. Gobain, the other competitors in the affected regions being rather small. Therefore, in these areas, the effect would have been to reduce the number of significant suppliers from three to two.

In order to remove the Commission's concerns, Owens-Illinois offered to divest a production plant to an independent and viable competitor in each of the two affected regions, in Milan and Barcelona.

The deal did not raise concerns in the rest of the EEA as the two partners' business activities either

do not overlap or, where they do, the merged entity will face competition from a number of large competitors, including St. Gobain, Rexam, Ardagh, Weigand and Allied Glass.

### **Syngenta CP / Advanta <sup>(1)</sup> and Fox Paine/Advanta <sup>(2)</sup>**

The Commission authorised, subject to conditions, the proposed acquisition of Dutch-based seed producer Advanta B.V. by Swiss-based Syngenta Crop Protection AG. Syngenta Crop Protection AG is a subsidiary of Syngenta AG which, like Advanta B.V., is active in the breeding, production, processing and sale of various kinds of seeds.

The Commission's market investigation pointed to serious competition concerns in a number of national seed markets within the EU. These were sugar beet seeds in Belgium, Finland, France, the Netherlands, Portugal, Spain, Austria, Ireland and Italy, maize seeds in Denmark, the Netherlands and the United Kingdom, sunflower seeds in Hungary and Spain as well as the French market for spring barley seeds and the UK market for vining pea seeds (a type of pea seeds).

The operation would have created a very strong market leader, often twice or more the size of its nearest competitor. In the market for sugar beet seeds, the proposed operation would also have brought together two of the three major European sugar beet seed breeders, which are also the main suppliers of sugar beet seeds in Europe.

In order to remove the Commission's concerns, Syngenta offered to divest Advanta's whole European seed business to an independent purchaser, thereby removing entirely the overlap of the parties' operations on all relevant markets within the European Union. Based on this commitment, the Commission was able to clear the operation.

A few days later, the Commission approved the proposed acquisition by Fox Paine, a US manager of investment funds, of Advanta's worldwide activities in seeds for sugar beet, oilseed rape, sorghum, sunflower, grasses as well as the maize and cereals businesses outside North America. The commitments given by Syngenta in the Syngenta/Advanta concentration will be fulfilled through the implementation of this transaction.

The Commission's review of the Fox Paine/Advanta transaction showed that Fox Paine has

interests in several sectors, including a majority holding in US seed-producer Seminis, which develops, grows and sells fruit and vegetable seeds including in Europe. The activities of Seminis and Advanta overlapped in the markets for vining pea seeds and onion seeds, but the market investigation did not reveal any particular competition concern as the parties would continue to face competition from other important players.

### **Total/Gaz de France**

La Commission européenne a autorisé le projet d'acquisition par Total auprès de Gaz de France (GDF) de plusieurs actifs gaziers dans le Sud-Ouest et le Centre de la France, dont certains étaient déjà co-détenus par Total avec GDF. Le feu vert a été possible après que Total s'est engagé à mettre en œuvre diverses mesures visant à garantir un accès adéquat et équitable des tiers à son réseau de transport et à ses installations de stockage de gaz naturel dans le Sud-Ouest.

La Commission a reçu une notification par laquelle Total acquiert auprès de GDF le contrôle exclusif d'un ensemble d'actifs gaziers situés dans le Sud-Ouest et le Centre de la France. Dans le Sud-Ouest, les actifs en question consistent essentiellement en la société Gaz du Sud Ouest («GSO»), plusieurs canalisations de transport de gaz naturel et les installations de stockage de gaz naturel situées à Izaute (département des Pyrénées-Atlantiques). Dans le Centre de la France, Total acquiert auprès de la Compagnie Française du Méthane («CFM», société filiale de GDF) un portefeuille de clients éligibles ainsi que le personnel commercial afférent à ces clients.

Total est un groupe français actif principalement dans les secteurs pétroliers et gaziers. Les actifs gaziers de Total en France résultent essentiellement des positions historiques dont bénéficiait Elf Aquitaine avant son acquisition par Total en février 2002.

GSO est une société française active dans le transport et la fourniture de gaz naturel aux clients éligibles uniquement dans le Sud-Ouest de la France.

La présente opération s'inscrit dans le cadre du dénouement des participations croisées de Total et GDF, l'opérateur historique sur le marché du gaz en France, dans les sociétés GSO et CFM.

En ce qui concerne le Sud-Ouest de la France, l'enquête de la Commission a révélé que l'opéra-

<sup>(1)</sup> COMP/M.3465-Syngenta/Advanta, 17.8.2004.

<sup>(2)</sup> COMP/M.3506-Fox paine/Advanta, 20.8.2004.

tion notifiée soulevait des problèmes de concurrence verticaux dans la mesure où elle conduisait à conférer à Total, via GSO, une position forte sur le marché de la fourniture de gaz aux clients éligibles ainsi qu'une situation de monopole sur l'ensemble des infrastructures de transport et de stockage de gaz naturel. Compte tenu des capacités limitées de transport et de stockage de gaz naturel disponibles dans cette région, la Commission a estimé que l'opération aurait pour effet de renforcer les incitations et la capacité de Total à restreindre l'accès des tiers à ses infrastructures gazières afin de protéger et de renforcer sa position sur le marché aval de la fourniture de gaz aux clients éligibles.

Afin de résoudre les problèmes de concurrence et éviter, ainsi, une enquête approfondie, Total a proposé de mettre en œuvre diverses mesures destinées à faciliter et à garantir un accès adéquat et équitable des tiers à son réseau de transport et à ses installations de stockage de gaz naturel dans la zone GSO. En particulier, les engagements prévoient, en cas de changement de fournisseur par un client donné, le transfert au bénéfice du nouveau fournisseur des capacités de transport et de stockage nécessaires à l'approvisionnement de ce client dont bénéficiait l'ancien fournisseur.

### **BayerHealthcare/Roche (OTC Business)**

In November the Commission decided to authorise the acquisition of the worldwide Roche OTC <sup>(1)</sup> business by Bayer in a deal which creates the largest European OTC consumer health company.

The operation raised serious competition concerns in the OTC segments of the non-narcotic analgesics (N2B) market in Austria and of the topical antifungals (D1A) market in Ireland. In examining pharmaceutical markets the Commission uses as a starting point the Anatomical Therapeutic Chemical classification (ATC) system, which subdivides medicines into different therapeutic classes. The ATC system is hierarchical and has 16 categories (A, B, C, D, etc.) each with up to four levels. The first level (ATC 1) is the most general and the fourth level (ATC 4) the most detailed.

In the Austrian market nonnarcotic analgesics for the OTC sales Bayer and Roche market the well known brands Aspirin and Aspro respectively. The parties would have a combined market share of more than 50%. The Commission market investigation revealed that Aspirin and Aspro are direct

competitors, that there exist entry barriers to the OTC market for these products in the form of the high level of advertising/marketing costs and that there is a substantial level of brand loyalty to existing OTC brands.

In the market for topical antifungals sold as OTC in Ireland, the new entity would have attained a very strong market position with a significant increment of market share. The operation would have brought the number one and two market operators together, while the remaining competitors would have been very small. As a result, the Commission considered that the transaction would give rise to serious doubts.

In order to remove the competition concerns, the parties offered the following commitments:

- as regards non narcotic analgesics : to divest the Aspro and Aspro C products in Austria
- as regards topical antifungals: to divest the marketing authorisation and trademarks for the existing formulations of Caldesene and Desenex, which are the two Roche products in Ireland.

### **Cytec/UCB Surface Specialities**

The Commission cleared the proposed acquisition of UCB's Surface Specialities (Surface Specialities) business by Cytec Industries Inc. (Cytec) of the US. The Commission's review highlighted serious concerns in two amino resins markets, but Cytec was able to address these concerns by offering to divest Surface Specialities' Fechenheim plant (Germany), which accounts for almost all of Surface Specialities European production. This divestment eliminates the competition concerns resulting from the transaction.

Cytec produces specialty chemicals and materials, including mining and water treatment chemicals, coating chemicals, adhesives and composite materials and building block chemicals. Surface Specialities, part of the Belgian chemicals and pharmaceutical company UCB, produces coating chemicals, adhesives and chemicals used for graphic arts applications.

The Commission's market investigation identified serious competition concerns resulting from the combination of the merging parties' activities in the markets for amino resins used as crosslinkers in industrial liquid coatings and for use as adhesion promoters for reinforced rubber. The Commission

<sup>(1)</sup> OTC: over the counter.

has also verified whether the combination of Cytec as an important supplier for acrylamide with Surface Specialties buying acrylamide as an input for the production of adhesives and resin additives could foreclose acrylamide supplies for third

parties. The market investigation has not confirmed these concerns, since Cytec faces credible competitors for the supply of acrylamide and Surface Specialties' total needs appear to account for only a marginal part of Cytec's output.



## First experiences with the new merger regulation : Piaggio / Aprilia

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### Introduction

On 22.11.2004, the Commission authorised under the Merger Regulation, the proposed acquisition of Aprilia S.p.A. by Piaggio & C. S.p.A. subject to a condition intended to safeguard competition in the Italian market for small scooters, where the two motorbike producers are strongest. The transaction raised serious doubts that competition might be reduced to the detriment of Italian customers of scooters with engines up to 50cc. However, Piaggio was able to allay these doubts by offering to supply its most advanced 50cc engine to all producers that express an interest.

The Commission decision in this case is interesting in many respects as it shows a number of novel features relating to the application of the procedural and analytical framework set out by the new merger regulation.

The case is one of the first competition sensitive transactions to be referred to the Commission based on the new pre-filing referral procedure pursuant to Article 4(5) of the new Merger Regulation. According to the new rules governing the referral system of Regulation 139/2004, before a formal filing has been made in any EU jurisdiction, the parties to a merger can request their transaction, lacking Community dimension, to be referred by the Member States competent to review the deal to the Commission for the purpose of its competitive assessment.

In this case the referral to the Commission was appropriate for a number of reasons. The centralised treatment by the Commission avoided the costs of multiple filings in a large number of countries (the transaction was reviewable in seven Member States) as well as the risks of conflicting decisions in parallel national proceedings. Moreover the transaction was genuinely cross-border as it affected competition in almost all the Member States in which it was reviewable. The fact that a number of national markets were significantly affected by the transaction militated in favour of the European Commission dealing with the case with a view to securing a coordinated investigation and a coherent set of remedies across the EU.

As regards the substantive assessment, the case illustrates well a gradual shift in emphasis which is progressively being recorded in the analysis of the effects on competition stemming from a merger relating to differentiated products. While the analysis was conducted based on the traditional concept of single dominance and conventional market definition, consistent with the new Commission guidelines on horizontal mergers the investigation was mainly focused on the issue of closeness of substitution of the models manufactured by Piaggio and Aprilia.

The most cogent evidence substantiating the Commission concerns resulting from the merger came from the pattern of substitution which was recorded in the segment of "up to 50 cc scooters" over the first semester 2004 in Italy, as a result of a dramatic drop in Aprilia's sales due to its financial troubles.

A third noteworthy aspect of the case concerns the remedies submitted by the parties. As a result of the investigation it was concluded that a 'pure' structural remedy, i.e. a traditional divestiture of a 'stand alone business' was somehow 'unrealistic', given the features of the industry. Conversely, Piaggio's commitment to supply its unique, state of the art four stroke engine to competitors enables them to fill part of the gap and exercise more effective competitive constraint on the merged entity by broadening the range of their models' motorization.

### Background

The operation concerns the sector of two-wheeled motor vehicles. Like the automobile sector, this industry is going through a process of consolidation. Over the last few years, four factors seem to have been driving this industry: i) the need to attain a critical mass in order to obtain economies of scale and to reduce production costs; ii) investments in research and development in order to ensure technological innovation; iii) the need to develop a complete range of models; iv) marketing and advertising to promote the brand. These characteristics lead competitors to either consolidate or leave the market.

The global market for two wheeled motor vehicles is characterized by the preponderant presence of Asian producers, who supply approximately 90% of worldwide demand. Among these, the Japanese producers — in particular the leader Honda, followed by Yamaha and Suzuki — are active practically in all the developed areas of the globe, with a presence in both the Asian and the western markets (mainly Europe and United States). The Japanese producers have i) a complete range of models (from small scooters to high powered motorbikes), focused on the most profitable niche of the market. i.e. motorcycles above 400 cc; ii) impressive production volumes (Honda and Yamaha produce respectively approximately 9 and 7 million models a year); iii) renowned brands, supported by huge advertising investments; iv) a reliable distribution network based mostly on exclusive relationships.

Against this global background, the European market appears to be still quite fragmented. The Japanese producers are well established on the continent with local production, a complete model range and leading market positions (both Honda and Yamaha have market shares of around 18%, and Suzuki is third with 12%). European producers, on the other hand, lack a complete range of models and cannot count on important volumes of sales. The European companies are essentially operating in "niches", usually specializing in a few segments of the two wheels sector (e.g. Piaggio, which created the famous Vespa, has traditionally focused on scooters).

The market for two wheeled vehicles in Europe has some pro-competitive characteristics, both at the level of production where there are numerous, aggressive competitors who market a wide range of models, and at the distribution level where, unlike in the automobile sector, multi-brand distributors constitute the main sales channel (70% of total sales in Europe). The contractual power of the producers is greater vis-à-vis exclusive dealers than multi-brand ones. Another pro-competitive element, particularly for low-powered two wheel vehicles, is the wide-spread presence of sub-dealers, distributors that source from the official dealers and have no direct contractual link with the producer.

Both Piaggio and Aprilia are Italian motorcycles manufacturers. Piaggio is the fourth largest European manufacturer, with a market share, in value, of 10% in the EU and is the market leader in the scooter segment. It has a marginal presence in the other two-wheel segments. Its main brands are 'Piaggio', 'Vespa', 'Gilera' and 'Derbi'. Aprilia, whose main brands are 'Aprilia', 'Moto Guzzi'

and 'Moto Laverda', is a smaller producer with a more mixed portfolio, and some popular brands in motorcycles (Aprilia and Guzzi). It has a share of about 6% in the EU.

In the course of 2004, Aprilia experienced a serious financial crisis, with a debt exposure of approximately 320 million Euro. The company was forced to interrupt its production for approximately two months in the course of the first semester of 2004, which caused serious negative repercussions on its market position.

Through the acquisition of Aprilia, Piaggio aimed at increasing its own critical mass in terms of production volumes and reaching considerable economies of scale in components sourcing and research and development. The operation would also enable Piaggio to widen its range of models and enter the segments of motorcycles thanks to the renowned Aprilia brands (among which Aprilia and Motoguzzi).

The Commission's analysis covered numerous European countries, and focused on the markets for scooters and for small motorbikes, where the activities of the two companies overlapped.

## Market definition

### *The product markets*

Following a thorough market investigation, the Commission concluded that two distinct markets for scooters could be identified: (a) scooters with engines smaller than 50cc; and (b) scooters with engines bigger than 50cc.

The existence of a distinct market for scooters below 50cc is due mainly to the fact that demand for these models is largely captive. Indeed, in the three main European markets (Italy, France and Spain), young people between 14 and 16 years can only drive scooters with engines below 50cc. This category of consumers has progressively become the most important source of demand for small scooters, while older consumers increasingly prefer larger engines. The market has shrunk considerably in the last ten years (from 96% of all scooters sold in Italy in 1994 to 37% in 2003), and some industry experts forecast that it may all but disappear, should legislation on driving age become more restrictive in the countries mentioned above. As regards supply-side substitutability, this segment can be distinguished from that of scooters with larger engines. In particular, smaller operators (i.e., Malaguti, Kymco and Peugeot) produce scooters with engines of less than below 50cc segment, while the Japanese

leaders, with the exception of Yamaha, are practically absent from such segment.

Some competitors have suggested that the market of scooters with engines larger than 50cc could be further subdivided into those whose engines are between 50cc and 125 cc and those above 125cc, due to the fact that the 50cc-125cc segment is also captive, since in many countries youth between 16 and 18 years-old are only allowed to drive scooters of up to 125cc. This phenomenon is similar to the one that explains the segmentation of scooters up to 50cc and above 50cc. Nonetheless, there is a substantial proportion of older customers, particularly women, that opts for scooters below 125cc for urban usage. As a consequence, a considerable part of the demand is not captive, and is subject to greater price elasticity (as these customers can opt for a more powerful scooter), and therefore scooters between 50cc and 125cc should not constitute a separate relevant market. Further, from the supply point of view, there is a high degree of substitutability between the two sub-segments, since the models in between 50-125 are the generally same as the less powerful ones, except for the obvious difference of a more powerful engine. Finally, the competitive picture is homogeneous, since more or less all the companies operating in the lower segment are also active in the higher one. In any case, further investigation proved unnecessary, since, regardless of the market definition, the operation would not cause any reduction of competition for scooters with engines larger than 50cc.

### *Geographic market*

The notifying party claimed that the geographic market had a community dimension in view of the following considerations: i) the competitive picture is quite homogenous within the EU territory, and there are no pronounced differences from country to country; ii) producers have centralised their production in a few productive plants that serve the whole European territory; iii) transport costs are not excessive; iv) there are no barriers to trade between Member States; v) technical specifications have been harmonised at EC level; vi) drivers' licenses regulation are being harmonised; vii) models' selling prices do not vary much; and viii) national distribution systems are substantially comparable.

However, the Commission ascertained that there were still a number of elements militating in favour of national geographic markets, such as price differences, driver's licence regulations and distribution channels. Particularly regarding prices, the results of the preliminary investigation

showed that there were non-negligible price differences for the same model scooter from country to country. These differences varied from a minimum of 5% difference to up to 20-30%, with an average of 10% price difference. As regards distribution and retail sales, no significant parallel imports were recorded, with the exception of small countries (e.g. Slovenia). In view of the above, the Commission concluded that the geographic markets were national.

### **Assessment: horizontal aspects**

The investigation focused on the market of scooters up to 50cc in Italy, where the main competition concerns were identified.

#### *The market of scooters up to 50cc in Italy*

The evolution of the market of the scooters up to 50cc in Italy clearly indicates declining trend, in terms of both volume and value. Unit prices have also fallen in the last decade. The factors that have contributed to the decline of the market include the significant increases of the cost of insurance of this type of vehicles and the competitive pressure exerted by the neighbouring market of more powerful scooters. The recent introduction of licensing requirements has accelerated this downward trend. For these reasons, the market of motorcycles with engines of less than 50cc is progressively becoming a residual market, that serves the demand of young people between 14 and 16 years-old who are not allowed to drive more powerful motorcycles.

From a competition stand-point, Piaggio is the leading supplier in the market (with a market share of 35-40% in 2003) and Aprilia number 2 (market share of 16-20%). The combined market share is between 55% and 60%. The next competitors (Yamaha and Malaguti) have relatively small market shares (between 10 and 15%), while Honda has withdrawn from the market and is planning to re-enter only with a niche product.

In its assessment of the transaction, the Commission analysed the models offered by the various producers with the aim of understanding the closeness of substitution of the models manufactured by Piaggio and Aprilia. To this end, two main sub-segments of small scooters were identified: i) high wheels scooters and ii) sport scooters. In the strategic high wheels segment, Piaggio was the uncontested leader (Liberty 50cc, which accounts for approximately half of the sales), followed by Aprilia (Scarabeo, with around a quarter of the segment's sales). The evolution of market shares in



the first semester of 2004 with respect to the previous year was then analysed, to understand which models had benefited most from Aprilia's sudden sales drop following the production cuts induced by its financial difficulties. The figures showed that Piaggio's Liberty 50cc gained almost all of Aprilia's losses, increasing its market share by about 11%.

Despite this evidence, the parties argued that the market was tiny in terms of value, in constant decline and likely to disappear over the time as a result of the toughening of the driving license requirements. Moreover, it was a trendy, fashionable and volatile market. This implies that if a manufacturer meets the tastes of the youth with a particular model, its sales will immediately increase only to fall once the fashion is over. Finally, according to the parties, large competitors with small market shares in this segment, yet well established in neighbouring segments (Honda and Yamaha), can easily expand their sales.

However, based on the evidence collected in the course of the investigation, the Commission concluded that the acquisition of Aprilia by Piaggio raised serious doubts as to its compatibility with the common market. The merger would enable the new entity to dominate the Italian market for scooters with engines below 50cc through a broad portfolio (Vespa in classic scooters, Piaggio and Aprilia in the segment high wheel, Aprilia and Gilera in the sports segment) of very well-known brands and models, some of which are close substitutes.

### *The market of scooters above 50cc in Italy*

Regardless of the product market being retained (i.e., a single market of all scooters above 50cc, or a further break down into i) scooters between 50 and 125cc, and ii) scooters above 125cc), the competitive situation would be similar. The merger involves the market leader and the number 4, number 2 being Honda, and number 3 Yamaha.

In the first semester of 2004, aggregate market shares of the merging entity varied between 39% (scooters above 50cc) and 47% (scooters between 50 and 125cc). Honda and Yamaha have both a strong presence (roughly 20% each).

As regards closeness of substitution, most respondents have indicated that players like Piaggio, Honda, Yamaha, and Aprilia, produce interchangeable models across the whole range of scooters with engines above 50cc. With respect, for example, to the best selling models in this

segment, the market investigation shows that Aprilia's Scarabeo, Honda's SH and Piaggio's Liberty are perceived as very close substitutes. The figures of the first semester 2004 showed that, unlike the situation for smaller scooter (below 50 cc), Aprilia's big losses were to the advantage of Yamaha, Piaggio, and Honda (the latter gained primarily in the up to 125 cc segment).

In the light of all the above, the Commission concluded that Japanese manufacturers would provide strong post-merger competitive constraints. In particular, Honda has the best selling model in the low-end of the segment (SH 125), while Yamaha, and to a lesser extent Suzuki, are very strong in the upper end (400 and 500 cc). More importantly, the Japanese manufacturers have a broad portfolio, a strong brand image, supported by massive investments in marketing as well as an established own distribution network, mainly based on exclusive dealerships.

### *The scooter markets outside Italy*

As to the competitive assessment of the transaction with respect to markets other than Italy, the merger would give rise to some overlaps in a number of countries. On average, in both scooters markets (below and above 50cc), the merging entity would reach aggregate market shares of something in the range of 35-40% in the UK, France, Spain (with Piaggio between 30-40%, and Aprilia between 5-15%), with peaks of 45% in one or the other segment. In Slovenia, the merging entity would reach an aggregate market share of 65%, although the market was minuscule, and heavily influenced by cross-border trade.

However, after the market investigation the Commission reached the conclusion that no competition concerns should arise from the merger. First, the market investigation has shown that Aprilia is not considered a sufficiently strong player outside Italy. Aprilia suffered a significant drop in sales over the first semester of 2004. It lost something between 30-40% of its market share. Further, Aprilia does not have a well established distribution system in all countries, which has on some occasions affected its after sales service. Additionally, in all these countries, the Japanese players are very well established and capable of exerting a strong competitive constraint over the merging entity. Typically, Yamaha has a very strong presence in the low end of the spectrum of scooters (segment of scooters up to 50 cc) and in top-end (scooters of 500 cc), while Honda is generally the market leader in mid-range scooters (125-200 and 250cc). Moreover, the Japanese producers are present across the whole portfolio.



Another important element is the fact that, in a number of countries there are also important local players, such as Peugeot in France. Finally, a number of new entrants from Asiatic countries (above all the Taiwanese Kimco), favoured by the ease of entry due to multi-brand distribution systems, are aggressively penetrating the European market with cheap and good models.

## Vertical foreclosure

The Commission also considered carefully whether foreclosure could arise at the distribution level in Italy as a result of the merger.

However, the investigation has shown that, in contrast to car distribution, multi-brand dealerships are popular for two-wheel vehicles both in the form of multi-brand dealers (official dealers who purchase from several manufacturers), and multi-brand sub-dealers, i.e. those retailers that have no contractual relation whatsoever with the manufacturer and source from various official dealers. These two channels are by definition open and contestable. About 70% of the total sales of motorcycles in the EU is performed by multi-branding dealers, and similar figures apply at national level. Moreover, while Piaggio, as well as Aprilia, typically resort to this channel, the Japanese leaders seem to opt for the exclusive dealership.

In Italy, post-merger, Piaggio would have its models sold in roughly 63% of the total number of outlets active in Italy, while Aprilia in 30% of the outlets, with some of Piaggio and Aprilia outlets overlapping due to multi-brand dealerships selling both marques. However, only a fraction of these outlets were tied to Piaggio/Aprilia by exclusive contracts (about 12% of the total number of dealers, and about 6% of the total number of outlets). In terms of volume of sales Piaggio/Aprilia exclusive channel would make about 32% of Piaggio/Aprilia aggregate sales, which represented around 16% of the total market in volume in Italy. None of the multi-brand dealers proved to be de facto exclusive dealers for Piaggio or Aprilia, as it appeared from their sales mixes.

## Remedies

In order to address the competition concerns identified in the investigation with respect to the market for scooters up to 50cc in Italy Piaggio offered to supply, for an indefinite duration, Piaggio's four stroke engine currently mounted on

Piaggio's 50cc scooter *Liberty*, to any competitor, under competitive terms and conditions. After an in-depth market testing, the Commission concluded the remedy would address the competition concerns stemming from the operation more effectively than other pure structural remedies. In particular, the Commission market survey showed that a traditional divestiture of a 'stand alone business' was considered 'unrealistic' by the actors of the market, given the features of the industry. First, the parties had no plans to divest, and in any event there was spare capacity, thus every manufacturer was attempting not to expand its capacity, rather to improve productivity, by running production sites at full capacity in order to improve economies of scale. Moreover, it was argued that there is little added value in a plant, as two wheel vehicle manufacturers are largely brand owners, the bulk of the value added of a scooter being supplied by component manufacturers. The market expressed no interest for a solution involving the divestiture of a brand. Finally, such a remedy would have also raised an issue of proportionality as it would have significantly affected a number of markets in which no competition concerns were identified.

Conversely, the feedback from the market of the remedy proposed by Piaggio was positive in all respects. First, supply of engines by motorbikes manufacturers to competitors proved to be a common practice in the industry. Thus, no or limited problems of monitoring would arise, given that a contractual model, including pricing, already existed, and could be used as a relevant benchmark. Second, Piaggio was the only scooter manufacturer to market in the EU a four stroke engine for a 50cc scooter. Third, Piaggio's sales figures showed that its models equipped with such an engine (*Liberty 4t*, and *Vespa*), were quite successful and were outperforming the sales of the same but cheaper models equipped with a two stroke engine. Moreover, the industry expressed a certain interest in purchasing this engine, and acknowledged its value, in terms of technical characteristics, performance and environmental impact. Against this background, the Commission concluded that the availability of this engine to competitors at competitive conditions would enable some of them to exercise more effective competitive constraint on the merged entity's position by broadening the range of engines available for their models. As a result of this, the merged entity would come under stronger pressure from competitors acting as a more effective constraint to the parties' ability to raise prices.

## EDP/ENI/GDP: the Commission prohibits a merger between gas and electricity national incumbents

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*On 9 December 2004, the European Commission decided to block the proposed acquisition of Gás de Portugal (GDP), the incumbent gas company in Portugal, by both Energias de Portugal (EDP), the incumbent electricity company in that same country, and ENI, an Italian energy company. After an in-depth investigation, the Commission concluded that the deal would have strengthened EDP's dominant position, notably in the Portuguese electricity wholesale and retail markets, and GDP's dominant position in the various gas markets in Portugal, as a result of which effective competition would have been significantly impeded.*

*This case illustrates how a given merger may lead to different anticompetitive effects. The Commission's decision relies on the horizontal effects of the merger on some of the affected markets (elimination of a significant potential competitor), as well as on various vertical effects (essentially, input foreclosure in the wholesale electricity market and customer foreclosure in some gas markets).*

### I. The notified operation

On 9 July 2004, Energias de Portugal ('EDP') and ENI notified a concentration concerning the acquisition of joint control over Gás de Portugal (GDP). The former Merger Regulation, Regulation 4064/89, was applicable in this case as the underlying binding agreement was concluded before 1 May 2004, the date of entry into force of the new Merger Regulation <sup>(2)</sup>.

EDP is the incumbent electricity operator in Portugal. As such, its main activities consist of generation, distribution and supply of electricity in Portugal. EDP has also recently acquired joint control of Portgás, one of the six Portuguese local gas distribution companies ('LDCs'). In addition, EDP is active in Spain where it has substantial

electricity and gas activities through its Spanish affiliates (Hidrocantabrico and Naturcorp) <sup>(3)</sup>. ENI is an Italian company active internationally at all levels of the energy supply and distribution chain.

GDP is the incumbent gas company in Portugal. It is a wholly owned subsidiary of the Portuguese company Galp Energia currently jointly controlled by the Portuguese State and ENI, with interests in both the oil and gas sectors. GDP and its subsidiaries cover all levels of the gas chain in Portugal. GDP has exclusive rights for import, storage, transportation and wholesale supply of natural gas. Natural gas is imported into Portugal by GDP's subsidiary, Transgás, through a Maghreb-Spain-Portugal pipeline and through the Sinès liquefied natural gas (LNG) terminal. GDP is also responsible for the transport and supply of natural gas through the Portuguese high-pressure gas pipeline network and is about to operate the first underground natural gas storage caverns in Portugal. Finally, GDP is active in the natural gas supply to large industrial customers and also controls five of the six LDCs in Portugal.

The notified concentration was part of a wider operation including the transfer of the gas transmission network, currently owned by GDP, to Rede Eléctrica Nacional SA ('REN'), the Portuguese electricity grid operator. The transfer of the network constituted a distinct concentration, which fell under the competence of the Portuguese Competition Authorities.

### II. Market definitions retained by the Commission

#### a. Relevant electricity markets

As regards electricity, the Commission identified the following affected markets: the market for the wholesale supply of electricity, the provision of

<sup>(1)</sup> The authors are part of the EDP/ENI/GDP case team which was managed by Paul Malric-Smith and also comprised Miguel de la Mano, from the Chief Economist team, Concetta Cultrera, Beatrice de Taisne, and Luis Blaquez.

<sup>(2)</sup> Council Regulation (EC) N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 29.1.2004, L 24, p. 1.

<sup>(3)</sup> See Cases COMP/M 3448 — EDP / Hidroelectrica del Cantabrico. and COMP/M.2684 — EnBW/EDP/Cajastur/Hidrocantabrico.

regulating/balancing power services <sup>(1)</sup>, and the markets of retail supply of electricity to large industrial customers and to smaller customers <sup>(2)</sup>. All these markets were found to be of national dimension.

### *Wholesale supply of electricity*

As in previous decisions, the Commission considered the market for wholesale electricity as a distinct market, which encompasses the production of electricity at power stations as well as electricity imported through interconnectors for the purpose of resale to retailers. The Commission took specific account of the ongoing evolution of the current Portuguese regulatory framework. Until 2004 most of the electricity produced in Portugal (around 80%) was supplied by power stations pursuant to long-term power purchase agreements ('PPAs') that provided for the exclusive supply of electricity to a single buyer, REN, under regulated tariffs. EDP was the main generator operating in this regulated segment of the market. However, in view of the future termination of the PPAs and the end to the exclusive relationship between REN and the producers, the Commission took the view, as the parties did, that the wholesale market includes all the previously regulated generation, given that the latter will also be available on the open market.

With respect to the geographic scope of the wholesale market, the level of interconnections (as well as the frequency of congestions) with Spain clearly confirmed that it currently remains a national market. The parties nevertheless called for a 'transitional market approach', arguing that the market would become Iberian in scope once the Iberian trading market, called MIBEL, was established. This view was not confirmed by the Commission's in-depth investigation. In particular, the Commission established that many important regulatory barriers would still have to be removed for the purpose of the establishment of the MIBEL and that competitive conditions between Spain and Portugal were likely to remain significantly different even after the launch of the MIBEL. The information gathered by the Commission also showed that the projected level of interconnection capacity between Spain and Portugal would not

allow effective integration of both markets in the foreseeable future.

### *Retail supply of electricity*

As concerns electricity retail supply, which involves the sale of electricity to the final consumer, the Commission came to the conclusion that two distinct markets should be considered for the purpose of the decision: the supply of electricity to Large Industrial Customers ('LICs') which are connected to the high and medium voltage ('HV' and 'MV') grid, and the supply of electricity to smaller industrial, commercial and domestic customers which are connected to the low voltage ('LV') grid (essentially, because of their respective consumption patterns as well as the terms and conditions under which they purchase electricity). Conversely, no further distinction was made between customers purchasing electricity in the regulated system (in which tariffs are determined by the national regulator) and those who are in the non-regulated system, since consumers can choose freely to be supplied under either system depending on the prices and conditions applied.

### *b. Relevant Natural Gas markets*

By contrast to the electricity markets, which have been fully open to competition since mid-2004, the Portuguese gas markets were still under a legal monopoly at the time of the proposed transaction. However, the second gas directive (EC/2003/55) provides for a clear and binding calendar pursuant to which 33% of the Portuguese gas market should be liberalised at the latest by 2007, all non-residential customers at the latest by 2009 and all customers at the latest by 2010. In addition, information provided by the parties showed that the Portuguese government had then decided to anticipate the liberalisation process by making the supply of gas to power producers open to competition possibly in 2005.

The Commission, taking into consideration this regulatory framework, identified four distinct affected gas markets: (i) supply of gas to power producers (gas-fired power plants, so-called 'CCGTs' <sup>(3)</sup>); (ii) supply of gas to LDCs; (iii) supply of gas to LICs; and (iv) supply of gas to

<sup>(1)</sup> See also Case COMP / M.3268-Sydkraft/Gräninge. In the EDP/ENI/GDP decision, the Commission identified the provision of balancing power and ancillary services as an emerging market, the exact delineation of which could be left open. For the purpose of the present article, this market is not discussed further.

<sup>(2)</sup> The markets relating to the operation of transmission (high voltage) and distribution (low voltage) grids was not affected by the concentration.

<sup>(3)</sup> CCGTs stands for 'Combined Cycle Gas Turbines' power plants.



small industrial, commercial and domestic customers.

The question arose as to whether non-retail customers, i.e. power producers, LDCs and LICs should be considered as part of a single, wider wholesale market. Several elements gathered during the in-depth investigation revealed that there were strong differences between these markets. As regards more specifically the supply of gas to power producers, it was apparent that not only it would be the first market to be opened to competition in Portugal, but also that power producers have unique demand needs in terms of quantity and flexibility of supply. More generally, the market investigation also revealed significant differences between power producers, LDCs and large industrial customers in terms of margins, customer relationships, commercial needs and growth dynamics.

### III. Competitive assessment

#### a. Electricity markets

##### *Wholesale electricity*

The Commission found that EDP holds a dominant position on the wholesale market for electricity in Portugal, irrespective of whether it is considered under the current structure or after the termination of the PPAs. The Commission noted in particular that EDP's generation portfolio would remain unmatched. In addition to being the largest importer of electricity, EDP indeed holds [70-80]% of generation capacity and accounts for [70-80]% of generation in Portugal. Pursuant to the Court's case-law<sup>(1)</sup>, the Commission also took account of the advantages that would derive from the state aid scheme to be put in place in order to compensate existing power generators for the termination of the PPAs. Finally, the in-depth investigation revealed that EDP's new CCGT ('TER') would be a significant element of EDP's market power whereas the construction of new CCGTs by other electricity operators in the near future was still very uncertain.

In assessing the effects of the transaction, the Commission then found that the operation would significantly impede effective competition through the strengthening of EDP's dominant position as a result of horizontal and non-horizontal effects.

As for the horizontal effects, the Commission considered that, absent the merger, GDP would have been the most timely, likely and effective competitor in the wholesale electricity market in Portugal. The Commission noted *inter alia* that having access to competitive gas resources confers a significant advantage in electricity as CCGTs now constitute the most common way of generating new power. The entry of GDP in wholesale electricity was all the more likely to be successful as it could have relied on its national brand and its existing gas customers, to whom it could have offered a joint supply of gas and electricity. This analysis was largely confirmed by confidential documents gathered by the Commission. This significant potential competition would have been lost after the merger without being compensated by other elements, thereby strengthening further EDP's dominant position and significantly impeding effective competition.

The Commission also found that, by allowing EDP to acquire the dominant supplier of gas, which is the main input for the production of electricity today, the operation would have caused various non-horizontal effects, each of which would have significantly impeded effective competition through the strengthening of EDP's dominant position.

First of all, EDP would have had a significant competitive advantage over its existing competitor by gaining immediate access to proprietary information regarding its gas supplies (both in terms of prices and daily needs). Given the volatility of a CCGT's production, such information would have allowed EDP to raise its prices at critical moments. Such a structural advantage was also likely to deter further entries. Second, EDP would have had the ability and the incentive to maintain a privileged and preferential access to the Portuguese gas infrastructure (Sinès LNG terminal, import pipeline and underground storage) to the detriment of companies actually or potentially involved in electricity generation. Given the lack of free capacity for third parties even if third parties' access were applied, the operation would thus have provided EDP with all the necessary means and incentives to make access to the gas network more difficult for its competitors. Finally, the merged entity would have had, immediately or in the near future, the ability and the incentive to raise its rivals' costs, thereby foreclosing actual and potential competition.

<sup>(1)</sup> Case T-156/98, RJB Mining / Commission, [2001] ECR II-337.



*Retail markets for electricity*

On the retail markets, the Commission's investigation confirmed that EDP currently holds a dominant position. Such a position would have been significantly strengthened and effective competition significantly impeded because of the elimination of GDP, which would have been the most likely and effective potential entrant on these markets thanks to its wide gas customer base, its well-known national brand as well its ability to make dual-fuel offers. Moreover, after the acquisition of its main potential competitor, EDP would have remained the only company able to propose within a short period of time dual-fuel offers whereas, absent the merger, both companies would have been in a position to do so for the benefit of consumers.

*b. Gas markets*

As regards GDP's position on the affected gas markets, the Commission's investigation confirmed that GDP was currently dominant (except for the distribution of gas in the area of Porto where Portgás — a company in which EDP has recently acquired joint control — is active) and would continue to enjoy this position after the opening of the markets thanks to its significant incumbency advantages. According to the Commission, GDP's dominant position would have been strengthened in various ways by the merger, depending on the gas markets under consideration, as a result of which effective competition would have been significantly impeded.

*Gas supply to power producers and to LDCs*

With respect to these markets, the Commission relied on the vertical effect of the merger by considering that the merger would lead to a significant foreclosure of the challengeable demand. On the market for gas supply to CCGTs, the operation would have foreclosed all the gas demand of CCGTs which, absent the merger, could have been challenged by competitors of GDP once CCGTs are eligible. As to gas supply to LDCs, the merger would have foreclosed the gas demand of the only LDC which is so far not controlled by GDP,

namely Portgás. Further to the operation, gas supply to LDCs would have no longer been challengeable by gas competitors.

*Gas supply to LICs and to small customers*

On these markets, the Commission's investigation revealed that, absent the merger, EDP would have been the most likely and effective potential entrant. Apart from the fact that effective entry of electricity incumbents in gas markets has been witnessed in other Member States, EDP has already access to large quantities of gas for the operation of its CCGT, which confers a strong incentive to enter the gas supply markets. Besides, EDP can rely on its electricity customers, to which it can offer a joint supply of gas and electricity (dual-fuel), as well as on the experience, the reputation and the customer base of the gas distributor Portgás, which it jointly controls. Concerning Portgás, the Commission also noted that, absent the merger, this company would have been the only gas supplier independent of GDP already established in Portugal. At the moment of the market opening, it would have therefore been the only company ready to compete with GDP immediately and effectively for the supply of gas to small customers.

The Commission came therefore to the conclusion that the concentration would remove GDP's main potential competitor and raise further the barriers to entry in these markets, thereby significantly impeding effective competition through the strengthening of GDP's dominant position.

**Conclusion**

Remedy proposals were submitted by the parties at different stages of the procedure. On the basis of the analysis of these proposals, and following market testing, the Commission concluded that these commitments were insufficient to eliminate the various competition concerns identified and, consequently, had to declare the proposed concentration incompatible with the common market. Since then, an action for annulment has been brought by EDP against the Commission's decision before the Court of First Instance (Case T-87/05).



## Décision finale positive dans le dossier des centres de coordination belges

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Le 8 septembre 2004, la Commission adoptait une décision finale au sujet du nouveau régime belge des centres de coordination prévu par la loi du 24 décembre 2002 *modifiant le régime des sociétés en matière d'impôts sur les revenus et instituant un système de décision anticipée en matière fiscale* <sup>(1)</sup>. Cette décision est l'aboutissement de près de cinq années d'enquête menées par la Commission. Dès 1999, elle s'était intéressée à l'ancien régime des centres de coordination, en vigueur depuis 1983, qu'elle avait autorisé à l'époque. En 2002, c'est le nouveau régime notifié qui fait l'objet de son attention.

L'historique de ce dossier, les questions de principe qu'il a soulevées, sa sensibilité politique et économique liée à la taille et au caractère multinational des groupes bénéficiaires, en ont fait et en font encore un dossier intéressant à de nombreux égards.

### L'ancien régime des centres de coordination

Aux termes de l'arrêté royal n°187 du 30 décembre 1982, un centre de coordination est une entreprise faisant partie d'un groupe multinational et fournissant des services au profit exclusif des entreprises du groupe. La législation limitait le type d'activités éligibles. Il devait s'agir d'activités dites accessoires parmi lesquelles la gestion du personnel, de l'informatique, la comptabilité, le conseil fiscal, la recherche ou encore la gestion financière (gestion centralisée de la trésorerie, financement d'investissements, émission de titres). Pour bénéficier du régime, le centre doit obtenir l'agrément des autorités fiscales, délivré pour une durée de 10 ans, mais qui peut être renouvelé.

L'intérêt principal du régime réside dans le mode de calcul du revenu imposable des centres, non pas selon les règles du droit commun, mais selon une méthode alternative de type «cost plus» ou «coût de revient majoré». Cette méthode, reconnue par l'OCDE, vise d'ordinaire à éviter la double imposition et à limiter l'évasion fiscale. Elle consiste à fixer le revenu imposable du centre à un pourcentage de ses frais de fonctionnement

(«cost»). La particularité de la législation belge provient de l'exclusion de postes de frais importants, comme les frais de personnel et des frais financiers. Quant au taux de marge (le «plus»), il était fixé de manière forfaitaire pour l'ensemble des activités du centre et, à défaut d'informations disponibles, à 8% des frais. La base imposable ainsi obtenue était soumise au taux plein de l'impôt des sociétés.

Autre intérêt du régime, les centres étaient exonérés du droit d'apport, un droit d'enregistrement de 0.5% qui frappe les apports en capital («capital duty»), et du précompte mobilier («withholding tax») sur les revenus mobiliers distribués.

Cette combinaison de mesures permet, *a posteriori*, d'expliquer le succès rencontré par le régime, en particulier pour l'exercice des activités financières. En effet, le financement des investissements et des opérations d'un groupe requiert des capitaux propres importants. Or, la société mère pouvait apporter au centre d'importants montants sans devoir s'acquitter du droit d'apport. De plus, hormis les frais de personnel et les frais financiers, les activités financières génèrent peu, voire pas de frais. Pour les centres dont l'activité principale est la gestion financière du groupe, le résultat était une base de coûts, donc une base imposable et un impôt virtuellement inexistants. Finalement, le centre pouvait distribuer les bénéfices engrangés sous la forme de revenus mobiliers — dividendes, intérêts, redevances — en exonération de précompte mobilier.

### Code de conduite

En décembre 1997, les États membres réunis au sein du Conseil s'engagent, dans un *Code de conduite dans le domaine de la fiscalité des entreprises* <sup>(2)</sup>, à supprimer les mesures fiscales «potentiellement dommageables», et à ne plus en introduire de nouvelles. Un groupe de travail «Code de Conduite» est créé.

À la demande des États membres, la Commission s'engage à examiner — ou réexaminer — les mesures dommageables à la lumière des articles 87 et 88 du traité applicables en matière d'aides d'État.

<sup>(1)</sup> Cf. *Moniteur Belge* du 31 décembre 2002 (Ed 2), p. 58817 et suiv.

<sup>(2)</sup> Cf. *Journal Officiel de l'Union européenne* — JO°C 2 du 6.1.1998.

Par mesure dommageable au sens du Code de conduite, on entend «les mesures fiscales établissant un niveau d'imposition effective nettement inférieur, y compris une imposition nulle, par rapport à ceux qui s'appliquent normalement dans l'État membre concerné». Des critères plus précis seront ensuite définis. L'évaluation du caractère dommageable prendra notamment en compte si les avantages sont accordés exclusivement pour des activités isolées du marché national, s'ils le sont même en l'absence d'activité économique réelle ou si les règles de détermination des bénéfices issus des activités internes d'un groupe multinational divergent des principes généralement admis sur le plan international, notamment les règles approuvées par l'OCDE.

Dans son rapport <sup>(1)</sup> au Conseil ECOFIN, en novembre 1999, le groupe «code de conduite» identifie 66 mesures potentiellement dommageables. Le régime des centres de coordination en est l'une des plus importantes <sup>(2)</sup>.

En juin 2003, une étape importante du travail de ce groupe est franchie: le Conseil décide que l'ensemble des mesures, une fois adaptées par les États membres, cesseront de constituer des mesures dommageables. Dans le cadre de cet accord, la Belgique s'est engagée à modifier certains aspects de l'ancien régime.

Comme elle s'y était engagée, la Commission entame l'évaluation des mesures dommageables au regard des règles applicables en matière d'aides d'État. Le 11 novembre 1998, la Commission adoptait une *Communication sur l'application des règles en matière d'aides d'État aux mesures relevant de la fiscalité directe des entreprises* <sup>(3)</sup> et, dès 1999, de nombreux régimes figurant sur la liste des mesures dommageables font l'objet d'investigations. Le 11 juillet 2001, la Commission adopte simultanément 15 décisions à l'égard de régimes fiscaux visant à favoriser notamment les activités offshore et les activités de financement intra-groupe. Outre les centres de coordination belges, la Commission s'intéresse à des régimes en Allemagne, en Finlande, en France, en Grèce, en Irlande, en Italie, au Luxembourg, aux Pays-Bas, au Royaume-Uni (Gibraltar) ou en Suède.

## Aide existante, confiance légitime

Une particularité évidente de l'ancien régime des centres de coordination est d'avoir été approuvé par

la Commission en 1984. À l'époque, elle avait considéré que le régime ne soulevait pas d'objections. Quinze ans plus tard, cette ancienne décision déterminera le choix de la procédure à suivre pour le réexamen du régime des centres de coordination. Elle aura également des implications pour la détermination de la période d'extinction de certains effets de l'ancien régime et aura même des répercussions sur l'examen d'autres mesures fiscales.

Pour avoir été autorisé antérieurement par la Commission, le régime est qualifié de régime d'aide existant. Par opposition au statut d'aide nouvelle, celui d'aide existante est plus favorable en termes de procédure puisque l'État membre et la Commission doivent, selon le traité, collaborer pour déterminer quelles modifications il convient d'apporter à la mesure concernée. Ce statut est plus favorable aussi pour les bénéficiaires puisque, quoiqu'il arrive, le remboursement des aides qu'ils ont reçues par le passé ne leur sera pas réclamé. Dans certains cas, ils pourront même bénéficier d'une période transitoire, pendant laquelle ils continueront à bénéficier des avantages de la mesure.

Malgré ce statut protecteur, la Belgique et les bénéficiaires ont contesté que la Commission ait un quelconque droit de réexaminer ce régime, fusse en tant qu'aide existante, parce qu'elle avait elle-même décidé qu'il ne s'agissait pas d'un régime d'aide, qu'en l'absence d'aide, il ne peut y avoir d'aide existante, ni de réexamen de la mesure. Cette position n'a pas été suivie par la Commission qui a estimé que le caractère d'aide est une notion objective donc indépendante de l'appréciation qui a pu en être faite — à tort ou à raison — dans le passé. Le seul impératif qui s'impose à la Commission dans ce cas précis est le respect des droits acquis ou de la confiance légitime que la décision précédente avait pu susciter dans le chef des bénéficiaires. En qualifiant le régime d'aide existante et en lui appliquant la procédure propre à ce type d'aide, la Commission est convaincue d'avoir répondu à cet impératif. Après avoir initié la procédure de coopération prévue à l'article 17 du règlement de procédure <sup>(4)</sup>, la Commission a adressé, le 11 juillet 2001, une série de recommandations concrètes à la Belgique, une «proposition de mesures utiles» visant à la modification du régime.

Comme mentionné précédemment, la Commission a pris en compte les effets de la décision posi-

<sup>(1)</sup> Cf. [http://europa.eu.int/comm/taxation\\_customs/resources/documents/primarolo\\_fr.pdf](http://europa.eu.int/comm/taxation_customs/resources/documents/primarolo_fr.pdf).

<sup>(2)</sup> Est-ce un hasard, le régime porte le numéro « A-001 » dans la liste.

<sup>(3)</sup> JO C 384 du 10.12.1998.

<sup>(4)</sup> Règlement n° 659/1999 portant modalités d'application de l'article 88 CE — JO L 83 du 27.3.1999.



tive de 1984 à propos des centres de coordination belges dans d'autres dossiers également. Ainsi, il a été tenu compte de la confiance légitime que cette décision avait pu susciter dans le chef des bénéficiaires de régimes de mesures fiscales adoptées par d'autres États membres sur le modèle — ou dans l'esprit — du régime des centres de coordination belges. Ces régimes n'ayant pas été notifiés à la Commission, les aides accordées par le passé auraient dû être récupérées. Mais la Commission a appliqué la jurisprudence de la Cour selon laquelle la récupération des aides ne peut être exigée si elle constitue une atteinte à un principe fondamental du droit communautaire, comme le respect de la confiance légitime que la Commission a elle-même créée dans le chef des bénéficiaires.

### La décision finale du 17 février 2003 concernant l'ancien régime

Les mesures utiles proposées par la Commission n'ayant pas été acceptées par la Belgique, la Commission se voit contrainte, en février 2002, d'ouvrir la procédure formelle d'examen à l'égard de ce régime.

Le 17 février 2003, la Commission clôture cette procédure et adopte une décision finale <sup>(1)</sup> négative. Elle estime que ce régime n'est plus compatible avec les règles applicables en matière d'aides d'État et que la Belgique doit y mettre fin au plus tôt. Selon l'évaluation faite par la Commission, le régime apparaît extrêmement avantageux — des taux de taxation effectifs de l'ordre de 2 à 3% sont évoqués — et très sélectif — le centre doit appartenir à un groupe multinational implanté dans quatre pays au moins et répondre à des critères restrictifs de total de bilan et de chiffre d'affaire.

En ce qui concerne le «cost plus», la Commission reconnaît que le recours à une méthode alternative peut se justifier dans certaines circonstances mais critique l'application qui en est faite dans le cadre du régime belge, l'exclusion des frais de personnel et des frais financiers du calcul de la base de coûts, l'application d'un taux de marge forfaitaire inadapté et, *in fine*, une imposition effective artificiellement réduite, presque inexistante alors que le taux d'imposition applicable en Belgique dépasse les 40%. La Commission critique également les exonérations de précompte mobilier et de droit d'apport accordées aux centres ou aux entreprises multinationales dont ils font partie.

La décision finale interdit donc à la Belgique d'accorder le bénéfice du régime à de nouveau

entrants et autorise une période transitoire pour les centres agréés avant le 31 décembre 2000. Ces centres peuvent bénéficier du régime jusqu'à la fin de leur agrément en cours et au plus tard le 31 décembre 2010. Ce dispositif repose sur l'argument, avancé par la Belgique, que les agréments accordés par la Belgique aux centres de coordination avaient une durée fixe de 10 ans et que la Belgique devait donc garantir aux centres le bénéfice du régime jusqu'à l'expiration de ces dix ans. Les agréments ayant été accordés ou renouvelés de manière étalée depuis 1983, ils arriveront progressivement à expiration entre 2003 et fin 2010, et le régime perdra de son influence sur le plan économique jusqu'à ne plus revêtir qu'une importance marginale à la date de son échéance.

La Commission ayant approuvé le régime à l'origine, les bénéficiaires ne sont pas tenus de rembourser les aides qu'ils auraient pu percevoir dans le passé.

### Le contentieux

Peu après la notification de la décision aux autorités belges, il est apparu que celles-ci n'étaient pas satisfaites par la période transitoire accordée par la Commission. L'agrément de certains des centres expirait entre juillet 2003 et décembre 2005 et la Belgique avait l'intention de prolonger les avantages du régime pour tous ces centres, jusqu'à la fin de l'année 2005.

La Belgique a dès lors introduit un recours devant la Cour de Justice demandant la suspension immédiate et l'annulation de la décision de la Commission en ce qu'elle interdit tout renouvellement des agréments après le 17 février 2003. Forum187, l'association qui défend les intérêts des centres de coordination, a également introduit un recours devant le TPI en vue d'obtenir l'annulation de l'intégralité de la décision et d'en suspendre les effets immédiats. Par ordonnance du 26 juin 2003, le Président de la Cour a fait droit à la demande de la Belgique et de Forum187 et, en attendant le jugement sur le fond, a ordonné la suspension de la disposition de la décision qui interdit le renouvellement du régime.

En parallèle, les autorités belges avaient demandé au Conseil de prendre une décision au titre de l'article 88 paragraphe 2, alinéa 3 du traité CE pour autoriser le renouvellement du régime aux centres dont l'agrément arrive à échéance entre le 17 février 2003 et le 31 décembre 2005. Cette disposition du traité permet au Conseil, à la demande d'un État membre, d'autoriser une mesure d'aide d'État

<sup>(1)</sup> Cf. JO L 282 du 30.10.2003.

pour autant que l'État concerné établisse l'existence de circonstances particulières. Le 16 juillet 2003, le Conseil décide <sup>(1)</sup> d'autoriser le renouvellement du régime des centres de coordination demandé par la Belgique. Le même jour, la Commission publie <sup>(2)</sup> un communiqué annonçant son intention de former un recours contre la décision du Conseil. La Commission estime en effet que l'article 88, paragraphe 2, alinéa 3 du traité ne s'applique plus après que la Commission ait pris une décision finale sur la mesure concernée <sup>(3)</sup>, et, par voie de conséquence, que le Conseil a détourné le pouvoir que lui confère cette disposition.

## Le nouveau régime des centres de coordination

Les critères d'évaluation établis dans le cadre du code de conduite visent à éviter une concurrence fiscale déloyale — ou dommageable — entre États membres. Les critères «aides d'État» visent, eux, à éviter en principe qu'un État membre n'offre des avantages — fiscaux ou autres — à certaines entreprises au détriment d'autres entreprises établies sur son territoire. Ces deux processus — «Code de conduite» vs «Aides d'État» — ont donc en principe des objectifs différents. Pourtant, dans de nombreux cas, on a constaté que la suppression des aspects dommageables d'une mesure permettait, en même temps, d'en supprimer le caractère d'aide d'État, et vice versa.

En mai 2002, la Belgique notifie le projet d'un régime de centres de coordination modifié. La modification répond aux exigences du code de conduite (elle sera avalisée par le Conseil en juin 2003) et, en partie, aux critiques adressées à l'ancien régime en matière d'aides d'État. Mais la réforme proposée reconduit des éléments identifiés, dans l'ancien régime déjà, comme des aides d'État.

Le nouveau régime de *cost plus* est corrigé de manière à inclure l'ensemble des coûts du centre dans la base du calcul *cost plus*. Autre évolution, le taux de marge (le «plus») appliqué à cette base de coûts sera désormais fixé, pour chaque activité et pour chaque centre, en fonction du taux du marché. Ces taux de marge seront fixés par une décision anticipée (ou «ruling»), valable 5 ans, délivrée au centre par l'administration fiscale.

En avril 2003, la Commission autorise <sup>(4)</sup> le nouveau régime de *cost plus*. Elle estime en effet que le simple fait d'accorder des agréments ou des décisions anticipées aux centres de coordination ne constitue pas une aide d'État. L'application d'une méthode alternative n'est pas non plus une aide d'État et la méthode *cost plus* répond désormais aux standards internationaux. La décision précise néanmoins: «(...) que cette évaluation s'applique au régime tel que présenté par les autorités belges — tenant compte des règles d'établissement des décisions anticipées — et moyennant le respect des engagements pris par la Belgique quant à certaines modalités pratiques d'application du régime. Elle ne couvre en aucun cas d'éventuelles mesures d'application (arrêtés royaux, ministériels, circulaires, etc) ou décisions anticipées individuelles qui, s'écarteraient des principes décrits ci-dessus, auraient pour effet d'octroyer un avantage économique à certains centres ou aux entreprises des groupes auxquels ces centres appartiennent».

Mais le nouveau régime reconduit les exonérations de précompte mobilier et de droit d'apport, déjà présentes dans l'ancien régime et que la Commission a qualifiées d'aides incompatibles, en 2001 déjà et encore en février 2002 dans sa décision d'ouverture <sup>(5)</sup>. Vu la détermination de l'État membre à maintenir ces exonérations, la Commission ouvre la procédure formelle d'examen, le 23 avril 2003, en même temps qu'elle autorise la partie *cost plus* du régime. Elle ouvre également la procédure au sujet de la non taxation des avantages anormaux et bénévoles <sup>(6)</sup> (éventuellement) perçus par les centres. Sorte d'effet secondaire de l'application du *cost plus*, cette non taxation était susceptible de remettre en cause l'objectif formulé par la Commission d'aboutir, pour les centres, à un niveau d'imposition comparable à celui des autres entreprises établies en Belgique.

Dans le courant de l'année 2004, des réunions techniques ont permis aux autorités fiscales belges et à la Commission de dégager des pistes pour une solution. Deux voies s'offraient à la Belgique: soit éliminer l'avantage du régime des centres en les soumettant au régime de droit commun, soit généraliser l'avantage réservé, jusqu'à présent, aux seuls centres de coordination.

(1) Cf. JO L 184 du 23.7.2003.

(2) Cf. IP/03/1032 du 16 juillet 2003 sur <http://europa.eu.int/rapid/>

(3) Cette position apparaît confortée, entre-temps, par l'arrêt de la Cour rendu le 29 juin 2004 dans l'affaire C-110/02 Commission des Communautés européennes/Conseil de l'Union européenne.

(4) Cf. JO C 209 du 4.9.2003.

(5) Cf. JO C 147 du 20.6.2002.

(6) Cette expression désigne par exemple des services prestés à un prix anormalement bas (avantage anormal) ou gratuitement (avantage bénévole).

En ce qui concerne le précompte mobilier, la Belgique s'est engagée à généraliser l'exonération litigieuse en l'étendant aux autres entreprises établies en Belgique. Pour le droit d'apport, la solution proposée consiste à soumettre les opérations de centres au droit d'apport comme les autres entreprises, droit d'apport dont le taux serait réduit. Enfin, les centres devraient, à l'avenir, être imposés sur les avantages anormaux et bénévoles reçus, pour autant qu'ils auraient été imposés selon le régime de droit commun. C'est en tenant compte de ces engagements que la Commission décidait, le 8 septembre 2004, d'autoriser le régime des centres de coordination, qui une fois modifié, ne devrait plus contenir d'élément d'aide.

### À suivre...

À l'instigation du Conseil et de la Commission, le régime des centres de coordination, sous ses anciens atours, semble voué à l'extinction progressive entre 2006 et 2010. Dans le courant de l'année 2005, la Cour devra tout de même se prononcer sur les recours en suspens, notamment sur la qualification du régime en tant que régime d'aides d'État, mais aussi sur l'étendue des pouvoirs accordés au conseil dans le cadre de l'article 88, paragraphe 2, alinéa 3 du traité.

Suite à la décision du 23 avril 2003 autorisant le *cost plus*, la Belgique semble avoir éprouvé des difficultés à mettre en œuvre une méthode qui réponde de manière satisfaisante à l'objectif, au respect duquel elle s'était engagée, d'aboutir à une taxation comparable à celle qui aurait été obtenue par application du droit commun, et ce quelles que soient les opérations effectuées par le centre.

Les autorités belges se sont donc tournées vers des solutions alternatives au régime des centres sous la forme de mesures générales. Des discussions techniques exploratoires ont eu lieu entre la Belgique et les services de la Commission et, récemment, la presse a relayé le consensus dégagé au sein du gouvernement belge en faveur de la déduction d'intérêts notionnels. Cette mesure permettrait à toute entreprise établie en Belgique de déduire de sa base imposable des intérêts notionnels correspondant à un pourcentage de ses fonds propres.

À l'heure où cet article est rédigé, le projet définitif n'a pas été présenté à la Commission. Le cas échéant, elle s'attachera à vérifier que la mesure est effectivement générale et n'accorde pas, en droit ou en fait, d'avantage économique à certaines entreprises ou à certaines productions et susceptible de constituer des aides d'État incompatibles au sens de l'article 87 du traité.

## State aid for restructuring the steel industry in the new Member States

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### 1. Introduction

Steel is an important industrial sector in many of the new Member States. Altogether they produce 23 million tonnes of liquid steel: Poland produces about 9 million, the Czech Republic about 6 million, Slovakia 5 million, Hungary 2 million and Slovenia about 0.5 million tonnes. Moreover, the four candidate countries, i.e. Bulgaria (2 million), Romania (6 million), Croatia and Turkey have also a significant steel production. Altogether they have an annual output of almost 50 million tonnes (about 5% of the world production) and provide about 220,000 jobs.

The steel producing capacity in the new Member States is today about 30 million tonnes. As the capacity has been above 50 million tonnes in the beginning of the 90ies it has already significantly decreased. Similar overcapacities occurred also in the old Member States in the 80ies and 90ies, where an intensive restructuring has taken place. It was complemented by privatisation and consolidation of the former State owned companies. Thereafter, the ECSC Treaty, and after its expiry in June 2002, the EC Treaty have implemented sector specific rules prohibiting any kind of rescue and restructuring aid.

However, there is a common understanding that these rules cannot immediately be applied to acceding Member States but that they should also have the opportunity to restructure and privatise their industry before being subject to the strict EC

State aid rules. Therefore, after a short overview about the EC State aid rules on steel <sup>(2)</sup>, this article will present the existing transitional rules for some new Members States <sup>(3-5)</sup> and some candidate countries <sup>(6)</sup>.

### 2. The EC State aid rules for steel

Financial support of Member States to their industry generally amounts to State aid, which is under the EU rules, Article 87 (1) EC Treaty, prohibited. However, the Communication from the Commission on Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter 'EC Restructuring guidelines') <sup>(2)</sup> expresses that restructuring aid to firms in difficulty may if certain strict conditions are met not be contrary to the Community interest.

On the other hand, the 1996 Steel Aid Code <sup>(3)</sup> of the European Coal and Steel Community (ECSC) prohibited restructuring and investment aid completely. This was the result of lessons learned from the overcoming of the steel crisis which started in the early 80ies and continued until the mid 90ies. A reduction of overcapacity was only achieved after the Steel Aid Code made capacity reduction a precondition for State aid. <sup>(4)</sup>

Since the expiry of the ECSC Treaty in 2002 <sup>(5)</sup>, the general EC State aid rules apply to the steel sector <sup>(6)</sup>. However instead of the EC Restructuring guidelines, the EC issued a so called *Communication from the Commission on Rescue*

<sup>(1)</sup> This Article summarises the result of the work of many colleagues in the Commission Services with whom DG Competition has collaborated on this issue. In DG Competition, many issues have been in the last two years successfully solved thanks to the contribution of Ewa Szymanska.

<sup>(2)</sup> OJ C 244, 1.10.2004, p. 2.

<sup>(3)</sup> Commission Decision No 2496/96/ECSC, OJ L 338, 28.12.1996, p. 42.

<sup>(4)</sup> These principles were embodied in the person of the former EC Industry Commissioner, the Belgian Etienne Davignon. The Davignon plan resulted in the dismantling of about 32 million tonnes of hot rolled steel in 1985 in exchange for about € 40 billion of State aid. In the 90ies 19 million tonnes of hot rolled capacity were closed, 100,000 people laid off, while about € 17 billion of aid was granted.

<sup>(5)</sup> See the Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ C 119, 22.5.2002, p. 22.

<sup>(6)</sup> That means that various horizontal regimes were opened to the steel sector, including all State aid block exemption regulations, for example the Commission Regulation 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 10, 13.1.2001, p. 30.



and Restructuring aid and closure for the steel sector<sup>(1)</sup> which stipulates that rescue and restructuring aid in the steel sector is not permitted. Only closure aid, as an exception from the prohibition to grant restructuring aid, is exceptionally allowed. Such closure aid may be aid to redundant employees that are laid off or aid to support companies to close their facilities. The latter is however only accepted if the entire legal entity is closed.

In addition, also regional investment aid is prohibited under point 27 of the *Multisectoral framework on regional aid for large investment projects*.<sup>(2)</sup> In sum, essentially any kind of significant investment aid in the steel sector, be it for restructuring or other purposes, is prohibited. The Commission has made sure that its laws were not circumvented by abusing the defence that the investments were allowed in view of the market investor principle<sup>(3)</sup>. Consequently, the Commission has in recent years only authorised a very limited amount of aid for objectives such as environmental protection or research and development (R & D).

### 3. Overview of the transitional rules for the new Member States

The restructuring of the steel industry was initiated on the basis of several Europe Agreements. This was the case for Poland, the Czech Republic, Hungary, Slovakia, and Slovenia. For example, Article 8(4) of Protocol 2 of the Europe Agreement with Poland stipulated that, during the first five years after entry into force of the Agreement, Poland could exceptionally, as regards steel products, grant State aid for restructuring purposes, given three conditions.

These conditions are that:

- restructuring leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period;
- the amount and intensity of restructuring aid is strictly limited to what is absolutely necessary in order to restore viability and that the aid is progressively reduced; and

- restructuring is linked to a global rationalisation and reduction of overall production capacity.

In the event the restructuring could not be achieved in the five years grace period, which was the case of Poland and the Czech Republic, an extension of the grace period for granting State aid in the steel sector was negotiated. However, the EU indicated that it would consider the prolongation under condition that a national restructuring programme was set up, which was eventually accepted by a Council decision and then incorporated into the Treaty of Accession. In fact, the Treaty of Accession signed in Athens on 16 April 2003 by the Heads of State and Government of the enlarged EU incorporated *Protocol No 2 on the restructuring of the Czech steel industry* and *Protocol No 8 on the restructuring of the Polish steel industry*<sup>(4)</sup>. Moreover, point 4 (2) of Annex XIV allows the application of a fiscal aid scheme to the Slovakian steel sector.

These rules essentially provide for an exception of the rule that restructuring aid for the steel sector is prohibited and are also *lex specialis* to the normal transitional rules in the Accession Treaty<sup>(5)</sup>.

Thus, Protocol 2 of the Europe Agreement and the Accession Treaty protocols provide the legal background for the steel restructuring. The national restructuring programmes are the common denominator of most transitional regimes and have generally been a precondition for the EU's approval exceptionally allowing the candidate States to derogate from the normal rules.

### 4. Key Parameters of a National Steel Restructuring Programme

There are no clear EC Guidelines for setting up a steel restructuring programme. However, Protocol 2 of the Europe Agreement indicates the main parameters of a restructuring programme, i.e. viability, the minimum amount of State aid necessary to achieve viability and the reduction of capacity. Moreover, the overall aim of the requirement to produce a national restructuring programme in a pre-accession context is clearly to obtain transparency in the steel sector.

<sup>(1)</sup> OJ C 70, 19.3.2002, p. 22.

<sup>(2)</sup> OJ C 70, 19.3.2002, p.8. The Commission also emphasised in this framework the incompatibility of investment aid to the steel sector for large individual aid grants made to small and medium-sized enterprises (SMEs) within the meaning of Article 6 of Council Regulation (EC) No 70/2001, which are not exempted by the block exemption regulation.

<sup>(3)</sup> Commission Decision *Carsid* of 15 October 2003, OJ L 47, 18.2.2005, p. 28.

<sup>(4)</sup> OJ L 236, 23.9.2003, p. 934 (Protocol No 2) and p. 948 (Protocol No 8).

<sup>(5)</sup> This means that steel restructuring aids were not subject to the so called 'existing aid mechanism' under the Accession Treaty. This was confirmed in Commission Decision of 14 December 2004, Restructuring aid to the Czech steel producer Trinecké Zelezářny a.s., OJ C 22, 27.1.2005, p. 2.

In addition, some guidance can be drawn from the general EC Restructuring guidelines. While these guidelines are not directly applicable to the steel industry because the EC regime prohibits restructuring aid for the steel sector, these general rules should however at least be considered as a source of inspiration for the exceptional case where restructuring in the steel sector is nevertheless allowed. Although the rules in the EC Restructuring guidelines appear to limit the availability of aid far more than it can be observed during the recent steel restructuring, point 56 of the guidelines mitigates against this presumption as it allows for less stringent rules in assisted areas especially regarding the implementation of compensatory measures and for the beneficiary's own contribution. The candidate countries and especially the steel regions could generally be viewed as assisted areas.

#### 4.1. Viability

The first point of Article 8 (4) of Protocol 2 of the Europe Agreement and the EC Restructuring guidelines are based on the principle that the overall aim of any restructuring is to achieve long term viability of the companies concerned. The restructuring programme must therefore show that viability of the beneficiary companies under normal market conditions will be restored at the end of the restructuring period. In order to do so individual business plans of all beneficiaries of State aid must be presented.

Viability for the Commission essentially implies that the companies return to profitability at the end of the restructuring period. According to long-standing practice, which is also reproduced in Annex 3 of the Polish and Czech Steel restructuring protocol, the Commission considers that the companies should achieve a reasonable operating margin (i.e. an EBITDA over turnover of at least 10% for steel companies and 13,5 % for integrated mills) and a minimum return on sales (i.e. the EBIT must be at least 1.5% of the sales) <sup>(1)</sup>.

While it remains that the above two criteria are the benchmarks of financial performance in the Commission's viability test, some special accounting conditions must also be observed, which have the purpose to safeguard against companies 'under-investing' to boost short-term

performance as a means of satisfying the viability criteria. These special accounting conditions include minimum levels of financial charges (3.5%) and depreciation (5% for steel companies and 7% for integrated mills), expressed as a percentage of steel sales revenue, and a price-cost squeeze. If the special accounting criteria are not met in the companies actual forecast, the projections need to be adjusted by simulating that financial charges and depreciations are meeting the special accounting criteria.

The viability test should be performed on the basis of an individual business plan of a company which concentrates on the company's steel products related revenues and costs only. Therefore, the variable costs associated with non-steel products revenue must be ignored. The viability test should be applied to a sound set of financial projections for the restructuring period, i.e. profit and loss accounts, balance sheets and cash-flow statements. The financial projections should be prepared in current, not constant, prices taking into account inflation and exchange rate movements. This is necessary since costs are subject to widely differing inflation rates, some of which have no relationship with product prices.

#### 4.2. Minimum amount of State aid necessary to restore viability

The main condition for establishing the amount of admissible State aid is emphasised in the second point of Article 8 (4) of Protocol 2 as well as in the EC Restructuring guidelines, i.e. that the intensity of aid should be strictly limited to the necessary amount to reach the objective of the restructuring programme (i.e. viability).

The 'minimum necessary' is determined by two factors. It is the result of the total amount of funds needed to achieve viability minus the amount that the beneficiary himself is able to contribute. While in the EU a significant own contribution is necessary, this rule has in the past not been applied systematically in the accession countries <sup>(2)</sup>. Indeed, in cases where State owned companies in difficulties are on the brink of privatisation, an own contribution by the old owner does, in most cases, not make sense, as the restructuring is not assessed in view of the credibility of the existing owner but because of the envisaged privatisation.

<sup>(1)</sup> It cannot be excluded that the Commission will review the viability criteria in the near future, in particular in order to take account of changes in the International Accounting Standards.

<sup>(2)</sup> The EC Restructuring guidelines establish in their 2004 version in point 44 the rule that the contribution must be at least 25% in case of small enterprises, 40% for medium and 50% for large enterprises. Owner contributions were for example not an issue in Poland and the Czech Republic.

On the other hand, the more a company's eligibility for restructuring is questionable given that the company is on the verge towards viability, the more an owner contribution is indispensable.

In order to assess the 'minimum necessary', the restructuring programme needs to provide information about the total amount of restructuring aid granted to the steel industry from the entry into force of the grace period until the end of the restructuring period. The information should be given at a company level and per year.

Apart from restructuring aid, also all other aid should be identified for each company. If these aids are compatible under the other rules applicable in the EC they will not be considered as restructuring aid and need not to be compensated. However, it is doubtful whether other aid, with the exception of closure aid or aid that is exempted under a block exemption, can be compatible, as aids, such as environmental aid or aid for R & D, are normally apt to promote public policy objectives and it is doubtful whether firms in difficulty are the right vehicle to promote such objective <sup>(1)</sup>. But that does not mean that such aid is prohibited. Rather, if financial support is for example given to help an ailing company to comply with environmental standards it should simply be considered as restructuring aid.

Another difficulty is to properly quantify the amounts of State aid. There are certain rules to calculate the aid values. For instance, for direct subsidies <sup>(2)</sup> the Commission accepted in the past <sup>(3)</sup> that the aid values were assessed by looking at their net grant equivalent, which reduces the subsidy by the amount of potential tax liability on the gross amount. This is however questionable, as restructuring aids are normally assessed by reference to their gross grant equivalent whereas the concept of net grant equivalent is only used in the context of regional investment aid. A net calculation makes indeed sense for regional aid in order to compare aids in different regions with different tax systems and in order to achieve similar standards of living. This is however not necessary for restructuring firms in difficulty (which should hardly be liable for tax) where the

aim is solely to achieve viability of the company with the minimum necessary amount of State aid.

Finally, for certain instruments the aid value needs to be established. For example, in case of a credit the aid is the difference between the interest paid compared with an average rate, the so called reference rate, which may need to be increased by 4% or more for companies in difficulty depending on the financial risk involved (it can be up to 100% if no bank would provide the loan without a guarantee) <sup>(4)</sup>.

In the end, in order to assess the proportionality of the aid, the restructuring aid is considered and assessed on a case by cases basis. The main factor is whether the granting of restructuring aid is sufficiently compensated, in particular through capacity reductions.

#### 4.3. *Compensatory measures — Capacity reductions*

In exchange for restructuring aid, the Commission normally requests that capacities are reduced over the restructuring period to offset the distortive effects of the aid granted <sup>(5)</sup>.

However, this must be seen against the background of the factual situation in the last century where there was a clear presumption of the existence of overcapacities. Their reduction was therefore a logical prerequisite to make any public support compliant with the common interest. Today, the focus has shifted onto the reduction of inefficient capacities. The degree of reduction can thus only be established on a case-by-case basis. Where no inefficient capacities exist also other compensatory measures may be feasible <sup>(6)</sup>.

While the restructuring programme should indicate the historical evolution of the national capacities up to the end of the restructuring period, the emphasis should clearly be on identification of each company's capacities (see in this respect Annex 2 of the Protocols). The identification of an individual capacity is necessary to monitor that capacity reductions have been/will be realised. Capacities will only be considered reduced when designated facilities are permanently closed, i.e.

<sup>(1)</sup> Point 20 of the EC Restructuring guidelines.

<sup>(2)</sup> In addition, in case of subsidies that will be disbursed in the future their current net present value must be calculated by discounting the aid value to the base year.

<sup>(3)</sup> This was the case in Poland and the Czech Republic but not any longer in Romania.

<sup>(4)</sup> Commission notice on the method for setting the reference and discount rates, OJ C 273, 9.9.1997, p. 3.

<sup>(5)</sup> The Commission normally looks at reductions in *finished products* capacity only.

<sup>(6)</sup> See point 40 of the EC Restructuring guidelines. The Commission has for example accepted production and sales caps in Slovakia, see details under 5.3.



where the key elements of a facility are physically destroyed so that they cannot be restored to service <sup>(1)</sup>.

In the past, the reduction in capacity was considered mainly at an aggregated national level. Although this may very well have been the motivation and starting point for many restructuring programmes, it is *de jure* not enforceable. Instead, a capacity reduction can only be requested from companies that have received aid. Only for them concrete capacity reductions are negotiated and can be remedied by recovery of State aid in case of non-compliance. Other companies, which have not received State aid, must in a market economy remain free to do what they want and may thus also increase capacity.

#### 4.4. Scope of a restructuring programme

The scope of a restructuring programme follows mainly from the above analysis. The companies participating in the programme are selected by the Government depending on being eligible in view of the prospect of viability and proportionality.

The length of the restructuring programme, i.e. the restructuring period also follows from the timing for achieving viability. To this end, the programme must be as short as possible. In any event, a limited period of ideally five years is recommended in order to work with realistic assumptions.

Moreover, the restructuring period does not need to be identical with the grace period within which the granting of aid is permitted. It is rather logical that the restructuring period will be longer, as viability is so to speak the fruit of the State aid. Furthermore, restrictions on capacity should generally last at least throughout the restructuring period.

### 5. The existing transitional regimes in the new Member States

#### 5.1. Poland

Poland is the biggest steel producer amongst the new Member States, with a crude steel output of 9.1 million tonnes in 2003 (about 8.5 million tonnes hot rolled products). The country is a net exporter of steel. Exports in 2003 amounted to 3.5 million tonnes.

#### *The basis for the Polish steel restructuring: Protocol 8*

The rules for granting State aid to the Polish steel industry are laid down in Protocol No 8 to the Accession Treaty on the restructuring of the Polish steel industry. The Protocol is based on a national restructuring plan (Restructuring and Development Plan for the Polish Iron and Steel Industry).

Background is that in March 2003 this national restructuring plan was adopted after extensive work and after in-depth assistance of various consultants. The Commission assessed the restructuring programme in a proposal for a Council Decision on the fulfilment of the conditions laid down in Article 3 of Decision 3/2002 of the Association Council (extension of the grace period for public aid in the steel sector). The Member States approved the proposal in July 2003, and prolonged the grace period to grant State aid as foreseen in the Europe Agreement retroactively as of 1 January 1997 until 2006 (provided however that State aid is granted only until 2003).

In the end, Protocol No 8 transforms the results of the negotiation about the national restructuring plan into law. It comprises 18 paragraphs, which stipulate all the conditions for the exception to the rule that restructuring aid for the steel sector is prohibited. The Protocol also comprises procedural rules for a revision of the rules on the basis of changes in the individual business plans or the national restructuring plan (point 10).

In order to ensure that the conditions laid down in the Protocol are complied with, Protocol No 8 sets out detailed provisions for monitoring and reporting. Poland has to submit reports to the Commission every six months concerning the fulfilment of the obligations and requirements contained in the Protocol. In addition, an independent evaluation is carried out by a consultant in 2003, 2004, 2005 and 2006. Last summer the Commission presented a Communication to the Council and Parliament about the progress achieved during 2003, the first year of monitoring the Polish and the Czech steel restructuring <sup>(2)</sup>.

#### *State aid, Viability and Capacity*

On the basis of the plan, the Protocol accepts the granting of State aid for the period of 1997 until 2003 up to a maximum of PLN 3.39 billion (in

<sup>(1)</sup> Capacity reductions are defined in Commission Decision 3010/91/ECSC OJ L 286, 6.10.1991, p. 20.

<sup>(2)</sup> Report from the Commission to the Council and the European Parliament — First monitoring report on steel restructuring in the Czech Republic and Poland, of 07.07.2004 — COM(2004)443 final.



2003 about € 770 million <sup>(1)</sup>). The granting of aid is made subject to several conditions, *inter alia* that viability is reached by 2006. Moreover, the Protocol lays down that during the restructuring period from 1997 to 2006 restructuring aid may only be granted to companies listed in Annex 1 of the Protocol (point 6, last sentence). Poland has selected 8 companies to be included in this list <sup>(2)</sup>.

The monitoring shows that Poland granted a total amount of PLN 2.75 billion (€ 625 million) in the period 1997-2003. The majority of aids was granted in 2003 (PLN 2.1 billion). The figures of total State aid granted are below the ceilings specified in the Protocol. As no more State aid may be provided after 2003, the amount of State aid which has been approved by the Protocol but was not granted, i.e. 20% of the Protocol ceiling, is forgone.

The aid was focused primarily on financial restructuring to address the debt burden of the companies so as to facilitate their access to financing and their acquisition by strategic investors. The above mentioned Commission Communication concluded that the fact that the amount of State aid granted is lower than envisaged will not have a critical effect on the financial projections of the beneficiary companies, as the aid granted is deemed sufficient to help the companies to achieve viability by 2006. Nevertheless, the Commission is putting pressure on Poland to profit from the current favourable conditions as much as possible and to advance its investments.

Since the beginning of the 1990s, the Polish steel industry has gone through a process of restructuring and conversion. As a result, the production capacity was reduced considerably between 1992 and 2002, *inter alia*, the overall crude steel capacity was reduced from 19.7 million tonnes per annum in 1992 to 12.2 million tonnes per annum at the end of 2002, representing a 40% reduction over that period. Reductions in hot rolled production capacity were not as significant. They were reduced from 10.5 million in 1992 to 9.27 million in 1997.

Protocol No 8 specifies that the net reduction of capacities in the years 1997-2006 will amount to a minimum of 1.35 million tonnes. Details as well as

a timetable for the closure and dismantling of installations are set out in Annex 2 of Protocol No 8. In 2003 about 900,000 tonnes were closed in Poland as scheduled.

The restructuring of the Polish steel industry has followed the process of the EC steel restructuring. As the Commission concludes that Poland is so far meeting its Protocol obligations concerning State aid and capacity reduction, the restructuring process is, apart from some investments that have not been made, successful.

### *The prohibition of granting additional restructuring aid to the steel industry*

In order to ensure that no additional restructuring aid is granted for the period of 1997 until 2006, point 18 of the Protocol gives the Commission the power in case of non-compliance to take 'appropriate steps requiring any company concerned to reimburse any aid granted'. The Commission considers this as an appropriate basis to open proceedings under Article 88 (2) EC Treaty.

Therefore, the Commission has, on 19 May 2004, taken its first decision to launch an in-depth probe into possible aid granted to a steel company in a new Member State <sup>(3)</sup>. The company concerned is the Polish steel producer Huta Czysta S.A. As the company is in financial difficulties, Poland is currently planning financial measures in order to restructure the company. The Commission is therefore seeking clarification whether restructuring State aid was and will still be granted to the company.

## 5.2. Czech Republic

The factual and legal conditions for the restructuring of the Czech steel industry were similar to those of Poland. The Czech restructuring was originally based on Article 8(4) of Protocol 2 of the Europe Agreement. On the basis of a national restructuring plan the grace period was prolonged by a Council decision and special rules are now laid down in the special protocol to the Accession Treaty, Protocol No 2 on the restructuring of the Czech steel industry <sup>(4)</sup>.

<sup>(1)</sup> 1 € = 4.3996 PLN, average exchange rate in 2003.

<sup>(2)</sup> There are 17 steel companies in Poland. The main steel group is MPS, Mittal Steel Poland, formerly called Polskie Huta Staly (PHS), which has been taken over by LNM holdings (see Commission Decision of 5.2.2004 — Case IV/M.3326 — LNM / PHS). The Protocol concerns the following eight steel producing companies: PHS, Huta Bankowa, Huta Buczek, Huta Lucchini-Warszawa, Huta Łabędy, Huta Pokój, Huta Andrzej and Huta Batory. The last two in the meantime went bankrupt.

<sup>(3)</sup> OJ C 204, 12.8.2004, p. 6.

<sup>(4)</sup> As Protocol 2 and 8 are in most points identical the Czech Protocol will not be discussed in detail.

*State aid, Viability and Capacity*

Protocol No 2 stipulates that State aid may be granted to three beneficiary companies <sup>(1)</sup>. It is limited to a maximum of CZK 14.14 billion (€ 444 million <sup>(2)</sup>) to be granted in the period 1997-2003 and specifies maximum amounts for each of the three beneficiary companies.

The monitoring shows that the Czech Republic granted a total amount of CZK 12 billion (€ 377 million) in the period 1997-2003. In 2003, a total of CZK 4.4 billion (€ 138 million) of restructuring aid was granted.

The aid also focused primarily on financial restructuring to address the debt burden of the companies so as to facilitate their access to financing and their acquisition by strategic investors. The Commission's monitoring communication concludes again that although the amount of aid granted is lower than envisaged, this will not have a critical effect on the financial projections of the beneficiary companies and the aid granted is deemed to be sufficient to help the companies to achieve viability by the end of the restructuring period.

The Protocol specifies that the net capacity reduction to be achieved by the Czech Republic for finished products (hot rolled and cold rolled) during the period 1997-2006 must reach a minimum of 590,000 tonnes. A timetable for the dismantling of installations, as well as for new capacities to be installed, is specified in Annex 2 of the Protocol. Companies confirmed that the closures scheduled for the years 2004-2006 will be realised <sup>(3)</sup>.

Similar to Poland also the restructuring of the Czech steel industry is comparable with the EC steel restructuring, whereas the reduction of capacity goes beyond the ratio of State aid and capacity reduction in the EU in the past. The Commission concluded in its Communication that the Czech Republic is meeting its Protocol obligations concerning State aid and capacity reduction. However, the Commission is insisting that the Czech Republic profits from the current favourable conditions as much as possible and advances its investments.

*The prohibition of granting additional restructuring aid to the steel industry*

In order to ensure that no additional restructuring aid is granted in the period from 1997 until 2006, point 20 of Protocol No 2, similarly to the above mentioned provision in the Polish Protocol, provides for the possibility to take appropriate steps requiring any company concerned to reimburse any aid granted.

Therefore, on 14 December 2004, the Commission decided under Article 88 (2) EC Treaty to launch an in-depth probe into possible State aid in favour of Trinecké Zelezárny, a.s. <sup>(4)</sup>, a steel producer in the Czech Republic. The Commission has reason to believe that certain transactions between the Czech Government and the company executed in April 2004 could involve State aid which might not be compatible with EC State aid rules.

Similar as in the above mentioned Polish case, the Commission underlined with the opening of proceedings in this case its readiness to follow up the granting of any illegal restructuring aid to the steel sector, even if it was granted before the accession of Poland or the Czech Republic to the EU.

*5.3. Slovakia*

Protocol 2 of the Europe Agreement with Slovakia is identical to those of Poland and the Czech Republic. It states that State aid for the restructuring of the steel sector could only be granted during the grace period, which expired in March 1997.

However, initially and in contrast to the two other countries, Slovakia did not request a prolongation, so that aid to the steel sector should have been covered by the general rules on State aid from April 1997 on. However, in 1999, Slovakia adopted a law providing for an income tax exemption to certain sensitive sectors with the aim of stabilising employment. This measure was also applied to Kosice Steel Works, the largest Slovak steel company, which was taken over by US Steel in 2000.

The Commission considered this measure as a breach of the Europe Agreement. Therefore, it was

<sup>(1)</sup> The beneficiaries are Ispat Nova Hut, Válcovny plechu Frýdek-Místek (VPFM) and Vitkovice Steel.

<sup>(2)</sup> 1 € = CZK 31.846, average exchange rate in 2003.

<sup>(3)</sup> The Czech Republic has obtained on 3 March 2005 the Commissions agreement for a postponement of the closure of capacity of hot rolled products in VPFM from the end of 2005 until mid 2006 (case N 600/04).

<sup>(4)</sup> Commission Decision of 14 December 2004, Trinecké Zelezárny a.s., OJ C 22, 27.1.2005, p. 2.

agreed in 2002 to limit the authorisation of State aid in form of the tax regime under Annex XIV of the Accession Treaty to an amount of USD 500 million for a period of up to 2009, under the condition that production would be capped at 3% and sales would be capped at 2%. Annex XIV of the Treaty of Accession thus entailed a transitional exemption from the EU State aid rules, under which Slovakia could continue to grant fiscal aid to US Steel Kosice until 2009.

However, the level of production of products covered by the agreement was already in 2002 more than 3% higher than the corresponding 2001 level and even higher in 2003. As the Commission found this to be a breach of the Accession Treaty, it adopted in 2004 a decision of appropriate measures, essentially requiring US Steel Kosice to pay back some of the aid and reducing the ceiling for permissible aids of USD 500 million considerably <sup>(1)</sup>.

#### 5.4. *New steel producing Member States without transitional rules*

Several other new Member States with considerable steel production capacities have not requested any transitional mechanism. However, restructuring aid was granted by these States before accession under the Europe Agreements.

Slovenia's Protocol 2 to the Europe Agreement contains identical provision than Article 8(4) of Poland. Therefore, Slovenia has come up with a restructuring programme allowing State aid of a permissible amount of € 220 million until the end of 2001 in return for capacity closure. The Commission confirmed in 2001 that the Slovenian steel restructuring programme was considered in compliance with Protocol 2 and established that only € 162 million of State aid had been granted.

Slovenia has thereafter voluntarily reported on the implementation of the restructuring programme. However, privatisation of State owned companies was not achieved and thus leaves room for doubts regarding the viability of the steel companies.

Hungary granted restructuring aid for its steel sector on the basis of the Europe Agreement. In the period between 1992 and 1996 about

€ 670 million of aids were granted for restructuring or as operating aid. Hungary envisaged a prolongation of the grace period, because the steel producer DAM was receiving aid between 1997 and 1999. However, when DAM was liquidated in March 2000, Hungary withdrew its request for a prolongation. In the meantime, the main Hungarian steel producers, Dunafer, DAM and OAM are privatised.

### 6. Transitional regimes in Candidate countries

All four candidate countries have a significant steel production and asked for a grace period to grant State aid for restructuring their steel industries. While discussions with Croatia and Turkey are still ongoing, the EU has agreed on a transitional regime with Bulgaria in 2004 and the Commission has agreed on the main parameters of a national restructuring programme with Romania in the beginning of 2005.

The concept of the regimes for Bulgaria and Romania is based on the Protocols for Poland and the Czech Republic. However, in particular as regards Romania the EU is introducing a series of additional safeguards, amongst others the postponement clause, which allows the Council with qualified majority in case of non-compliance with the main parameters of the steel restructuring commitments (*inter alia* that no State aid is granted after 2004) to postpone enlargement for one year <sup>(2)</sup>.

#### 6.1. *Bulgaria*

The total crude steel capacity of the entire Bulgarian steel industry amounted to about 3.2 million tonnes in 2002. The national production capacities for hot-rolled steel were 4.4 million tonnes in 2002.

For Bulgaria, Article 9(4) of Protocol 2 of the Europe Agreement stipulated the usual exception as described above. After expiry of the five year grace period, Bulgaria requested a prolongation and submitted a national restructuring plan to the Commission in March 2004, which was approved by the Council. Because the restructuring will be finalised before accession, no special protocol to the Accession Treaty will be necessary.

<sup>(1)</sup> Commission decision of 22 September 2004, C (2004) 349 fin in case SK 5/04, Reduction of a tax concession granted by Slovakia to U. S. Steel Kosice, Slovakia, not yet published.

<sup>(2)</sup> See K. Van de Casteele, *Next EU enlargement, Romania and State aid control*, in this edition.

The national restructuring programme includes the granting of State aid up to 2005 for one steel company, Kremikovtzi AD, in order for it to attain viability by the end of 2007. In sum, the programme fixes an amount of about BGN 450 million (around € 220 million) in exchange for a capacity reduction of about 0.5 million tonnes.

## 6.2. Romania

Also Romania was, under 9(4) of Protocol 2 of its Europe Agreement, allowed to grant public aid for steel restructuring purposes. In the beginning of this year, a prolongation of the grace period has been accepted by the Council and a Protocol to the Accession Treaty similar to those of Poland and the Czech Republic has been drawn up.

The national restructuring programme, which is the basis for the Protocol, authorises an overall amount of State aid of about ROL 50 billion (approximately € 1.3 billion) for the grace period between 1993 and 2004 for six companies. Since 31 December 2004, no further State aid could be granted to any steel mill.

Most of this aid relates to the amounts granted in the privatisation of Ispat — Sidex in the past. It also includes State aid that resulted from the privatisation agreements of other companies. The largest part of the State aid consists of debt write-offs and waivers of penalties related to the late payments of the debt. In exchange, the programme identifies a reduction of capacities in finished

product of a minimum of 2 million tonnes to be closed until 2008.

## 7. Conclusion

Not only because of the very favourable economic conditions in the steel sector, restructuring of the steel industry in most of the new Member States can so far be seen as a success. Inefficient capacities have been closed, privatisation has been achieved in most new Member States and it seems that many companies will restore viability. However, the steel industries still have to increase their efforts and make the scheduled investments, and should not rely on a continuation of the positive economic situation.

The Commission will continue to closely monitor the results. Moreover, the Commission will follow up cases where Member States do not comply with the restructuring programmes, in particular where aid is given to companies which are not foreseen as beneficiaries in a restructuring programme (also if they are situated in countries that have not made use of the possibility of a restructuring programme).

In so far as the restructuring has been successful, it is certainly also due to the pre-accession cooperation between the stakeholders, i.e. the steel industry and the administration in the Accession States as well as the Commission services (besides DG Competition also DG Enterprise, DG Enlargement and DG Trade).



## Flemish region authorized to participate in the capital increase of the R&D company OCAS

*Christophe GALAND, Directorate-General Competition, unit H-1*

On 20 October 2004, the Commission authorized the region of Flanders, Belgium, to participate to the capital increase of O.C.A.S., whose initials stands in Dutch for Research Centre for the Application of Steel. Up to that date the company was a 100% subsidiary of the steel group Arcelor. Within the latter, OCAS was charged with research and development in the flat carbon sector with a specialisation on application for the automotive sector.

Arcelor wished to transform OCAS from an automotive-focused centre to a general-industry dedicated centre. This meant a shift from a concentrated to a highly fragmented customer base, requesting a more client oriented approach. Consecutively and in parallel, Arcelor planned to transform OCAS from a research department fully financed by the group to a profit centre, which means a more autonomous company responsible to generate its own revenues.

The new business plan of OCAS comprises three main fields of activities:

- (1) First, OCAS will continue to carry out research for the Arcelor group, its main activity up to now, but will start to charge the latter for this service. The price will cover the costs incurred increased by a profit margin.
- (2) Secondly, OCAS will start to offer R&D services to third parties, more precisely steel-using companies. OCAS has indeed at its disposal very specialized staff and infrastructure which allow it to become a competitive provider of R&D services in this field. These services will be charged to the client.
- (3.a) Thirdly, OCAS will start to undertake research activities for its own account.
- (3.b) The business plan foresees to value the results of this activity by means of licences sold to third companies or through the creation of spin-off companies responsible to bring niche products to the market and organise appropriate selling.

In order to realize this ambitious business plan, the company needs additional equity. The first two activities mentioned above do not require a lot more equity than OCAS had until now at its

disposal. Indeed, these activities mainly use existing infrastructure. In addition, they generate continuous revenue from the clients, limiting the need for increased working capital. Conversely, the launch of the third activity will require a lot of fresh capital. Indeed, research activities require years of investment before being able to generate the first revenues from it. Moreover, as the outcome of research is uncertain, the risk of this activity is very high and a buffer in the form of additional capital is required.

The Flemish region notified its participation in the capital increase of OCAS not as an aid but for the sake of legal certainty. Indeed it considered that its investment would be acceptable for a normal market economy investor, as the outlook for profit was sufficiently promising. In addition, Flanders underlined that a private sector company, namely Arcelor, was participating in the same capital increase, buying the other half of the new shares.

The Commission undertook a detailed analysis of the case. It first verified whether or not the investment of the Flemish government fulfilled the definition of State aid under Article 87 (1) of the EC Treaty. It came to the conclusion that the profit forecasts were not precise and high enough to conclude that this investment would generate a return which was sufficient to remunerate the high risk endured. The importance of the risk follows from the kind of activities undertaken and the turn the project represents compared to current organisation. The comparison of the investment with the one of a private sector company was not considered as applicable because the company, Arcelor, is able to benefit from its investment by other means than the mere dividends and capital gains.

The two first activities included in the business plan, R&D services for Arcelor and third parties, were deemed to contain few or no elements of aid. Indeed, these services will be charged to the clients on the basis of the costs increased by a profit margin. They therefore have the potential to be profitable and should not create any advantage for the clients. On the other hand, the third activity that OCAS would like to develop, namely own R&D activities and valorisation of it, which should

consume the majority of the financial resources collected, was more problematic. Indeed, a provision of the shareholders agreement provides that the Arcelor group can use for free the intellectual property developed by OCAS, while all the other companies will of course have to pay. Even if this provision is the counterpart of the access of OCAS to the know-how of the Arcelor group, the Belgian authorities were not able to prove that this does not represent an advantage to Arcelor. The Commission therefore concluded that the participation of the Flemish region to the capital increase of OCAS, which will mainly be used to finance the own research activities of OCAS (3.a here above), creates an advantage to Arcelor through the free access of this group to the result of these activities. However, the creation of spin offs in order to value the result of the research activity as described under 3.b was considered as free of aid. Indeed, Arcelor, main shareholder of OCAS, can not derive any advantage from the activity of the spin offs other than the mere financial return, as it generates no or few intellectual property. Therefore, this private sector company will authorise the creation of such spin offs only if the profit outlook is sufficient, which implies that there is no aid element included in the simultaneous provision of capital by the Flemish region to these spin offs.

Given the conclusion that the participation in the capital increase of OCAS represented, State aid in favour of Arcelor as far as activity 3.a is concerned, the Commission services analysed its compatibility with the Treaty and came to the conclusion that it was compatible under the R&D guidelines since the research activities at stake represent additional research for Arcelor compared to the ones normally undertaken. Indeed, these latter, included in the first activity of OCAS, will be charged to Arcelor and were deemed to contain no aid. In addition, the State intervention has a real incentive effect. As this ambitious project to transform OCAS requires a lot of resources and presents a high level of risk, it is unlikely that it would have been undertaken without public support. Thirdly, given the fact that Arcelor owns the current shares of OCAS and will contribute to half of the capital increase, the aid intensity in favour of OCAS derived from the public participation to the capital increase will in any case remain below the level of 50% authorised for industrial research.

This case illustrates that public measures promoting innovation and competitiveness of the European industry can, if correctly designed, be approved by the Commission on the basis of the existing guidelines.

## Aid in favour of Trinecké Zelezárny, a.s. a steel producer in the Czech Republic

Ewa SZYMANSKA, Directorate-General Competition, unit H-1

On 14 December 2004 the Commission decided to launch a formal investigation on possible State aid in favour of Trinecké Zelezárny, a.s. (TZ), a steel producer in the Czech Republic. The Commission has reasons to believe that certain transactions between the Czech Government and TZ executed in April 2004 could constitute a disguised restructuring aid to a steel producer.

### Facts

Restructuring State aid may be granted to the Czech steel industry only under the National Restructuring Programme accepted by the EU in Protocol No 2 of the Treaty of Accession<sup>(1)</sup> and only to companies included therein. Trinecké Zelezárny is not one of these companies and thus it is not eligible for restructuring aid. TZ was privatised in the mid 1990s, has been fully restructured without state support and has been making profit since 1997.

On 12 November 2003 the Czech Government adopted a resolution concerning the finalisation of the restructuring of the steel sector and proposing a solution for TZ. In the resolution, the Czech Government gave its consent to the following transactions:

- An acquisition by the Czech Government of shares in ISPAT Nova Hut (steel company) from TZ. The price for these shares was to be determined by the Ministry of Finance in an agreement with the Ministry of Industry and Trade.
- A transfer of 10,000 bonds, issued by TZ and currently held by CCA, back to their issuer — TZ, for only 10% of their nominal value. The difference between the nominal value of the bonds and the price to be paid by TZ should represent the value of the State aid to be provided to TZ for a number of projects concerning R&D, environment, training and closure.

The Commission was assured by the Czech authorities, that the proposed State aid measures would only be implemented upon a positive decision of the Czech Office for the Protection of

Competition (OPC) issued after consultation with the Commission. On 22 and 30 April 2004 the Czech Competition Office authorised both above-mentioned transactions, although the technical consultation with DG Competition had not been finished and despite the fact that the Czech authorities were fully aware of all concerns raised by the Commission in respect of these measures.

### Assessment

Protocol No 2 of the Treaty of Accession *on the restructuring of the Czech steel industry* allows the granting of restructuring State aid to the Czech steel industry in connection with its restructuring in the period between 1997 and 2003 of up to a maximum of CZK 14.147 million (€ 453 million). The Protocol combines the granting of State aid with several conditions, *inter alia* with re-establishing viability and the commitment to reduce capacity.

Point 1 of Protocol No 2 provides that '*notwithstanding Articles 87 and 88 of the EC Treaty, State aid granted by the Czech Republic for restructuring purposes to specified parts of the Czech steel industry shall be deemed to be compatible with the common market*' if, *inter alia*, the conditions set out in the Protocol are met.

Point 3 of the Protocol provides that '*only companies listed in Annex 1 shall be eligible for State aid in the framework of the Czech steel restructuring programme*.' Trinecké Zelezárny is not mentioned under Annex 1.

The last sentence of point 6 provides that '*no further State aid shall be granted by the Czech Republic for restructuring purposes to the Czech steel industry*'.

Point 20 provides that '*the Commission shall take appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in this Protocol*' in case the monitoring of the restructuring shows non-compliance by way of granting '*additional incompatible State aid to the steel industry*'. This provision enables the Commission to open a

<sup>(1)</sup> OJ L 236, 23.9.2003, p. 934.

formal investigation, as in the absence of specific provisions in Protocol No 2 normal rules and principles should apply <sup>(1)</sup>.

The Protocol aims at ensuring a transition between the arrangements concerning State aid for the restructuring of the Czech steel industry under the Europe Agreement and the end of the extended restructuring period (31 December 2006). In order to achieve this objective, it covers a time-frame extending before and after accession. More precisely, it authorises certain aid measures granted or to be granted until the end of 2003 and forbids any further State aid for restructuring purposes to the Czech steel industry until the end of 2006, i.e. the end of the restructuring period. In this respect, it clearly differs from other provisions of the Treaty of Accession such as the interim mechanism set out in Annex IV of the Treaty of Accession (the 'existing aid procedure'), which only concerns State aid granted before accession insofar as it is 'still applicable after' the date of accession. Protocol No 2 can therefore be regarded as *lex specialis* which, for the matters that it covers, supersedes any other provisions of the Treaty of Accession. Consequently, although Articles 87 and 88 of the EC Treaty would not normally apply to aid granted before accession and not applicable after accession, the provisions of the Protocol extend State aid control under the EC Treaty to any aid granted for the restructuring of the Czech steel industry between 1997 and 2006.

The Protocol does not apply to other State aid measures granted to the Czech steel industry for specific purposes that can be declared compatible on other grounds, such as research and development aid, environmental protection aid, training aid, closure aid, etc. These aid measures do not fall under the scope of Articles 87 and 88 if they are granted before accession and are not applicable after accession. In any event, the Protocol does not limit the possibility to grant other kinds of aid to Czech steel companies in accordance with the Community *acquis*. Of course, it does not rule out the possibility to adopt measures that do not qualify as aid, e.g. capital injections in accordance with the market economy private investor test. On the other hand, a measure concerning Czech steel companies that constitutes State aid and cannot be held to be compatible with the common market under other rules shall be considered as restructuring aid — given the residual character of this

qualification — or, in any event, as aid related to the restructuring of the Czech steel sector and will therefore be subject to Protocol No 2.

The Commission can thus open the formal investigation procedure provided for in Article 88(2) of the EC Treaty in case it suspects that the Czech authorities have granted aid to steel companies that is not compatible with the common market on grounds other than restructuring and, as a result the Czech Republic does not comply with to Protocol No 2. *Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93* <sup>(2)</sup> is also applicable here.

Before opening a formal procedure the Commission analysed information submitted by the Czech Government and considered that the aid granted for environmental and R&D projects is compatible with the relevant EC State aid rules. However, it raised doubts as to the compatibility of the aid granted for closure and training projects.

The Commission has assessed the closure aid according to the *Communication from the Commission on Rescue and restructuring aid and closure aid for the steel sector* <sup>(3)</sup>.

In its decision of 30 April 2004 the Czech Competition Office stated that the aid is in line with the above-mentioned Communication and covers measures involving the shutdown of a part of the furnace. In the Commission's opinion this assessment is not correct because a shutdown of a part of the furnace cannot be treated as a total or partial closure of a steel plant. A furnace is a single piece of equipment and partial closure is not possible. Moreover, the Commission has doubts that all the redundant workers are working for the part of the furnace which is planned to be closed. The Commission has also doubts about the calculation of the redundancy costs.

The Commission has assessed the training aid according to *Commission Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid* <sup>(4)</sup>.

The vague and contradictory information provided in the decisions of the Czech Competition Office does not allow the Commission to verify that the definitions of general and specific training are respected. In addition, the incentive effect of the aid is not demonstrated.

<sup>(1)</sup> See also point 1 of Protocol No 2 which states 'notwithstanding Articles 87 and 88 of the EC Treaty...'.

<sup>(2)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(3)</sup> OJ C 70, 19.3.2002, p. 1.

<sup>(4)</sup> OJ L 10, 13.1.2001, p. 3.



As regards the purchase of shares from TZ, the Commission will investigate whether the price paid by the Czech Government for the shares (CZK1250) was a market price. This price was based on two experts' valuations. However, other information suggests that these two valuations might have overestimated the price. Should this be the case, this transaction would involve State aid, which could not be found compatible.

### Final comments

Trinecké Zelezárny a.s. is neither covered by Protocol No 2 nor by the 'Updated National Programme of the Czech Steel Industry Restruc-

turing' submitted to the Commission in December 2002. None of the documents which the Commission formally adopted even mention TZ in the context of the restructuring.

At the same time, documents submitted to the Commission in 2004 give the impression that the measures concern restructuring aid to Trinecké Zelezárny a.s. or, in any event, aid granted to that company and linked to the restructuring of the Czech steel sector. Also the title of the Resolution of the Government of the Czech Republic No.1126 adopted on 12 November 2003 states that this resolution '*concerns the finalisation of the restructuring of the steel sector — proposal to Trinecké Zelezárny a.s.*'

## **German Landesbanken: Recovery of more than €3 billion, plus interest, from WestLB and six other public banks**

*Martha CAMBAS, Elke GRÄPER and Yvonne SIMON,  
Directorate-General Competition, unit H-2, and  
Stefan MOSER and Annette SÖLTER,  
formerly Directorate-General Competition*

On 20 October 2004, the European Commission concluded its long-standing investigation of the transfer of public assets, in the 1990s, to seven German public banks (Landesbanken) by ordering Germany to recover €3 billion plus interest. The decisions end the probe of the aid to the Landesbanken which occupied the Commission for about 10 years and which culminated in a landmark agreement, in 2001, to abolish the state guarantees known under the term 'Anstaltslast and Gewährträgerhaftung' attached to the banks' statute.

At the beginning of the nineties, the introduction of the Own Funds and Solvency Ratio Directives required European banks to increase their capital adequacy ratios. If the banks' level of activities was to be maintained, this required them to take up fresh capital. This was the background for most of the Landesbanken subject to the Commission's investigation. In all cases, the capital was provided by the German Länder, which partly or fully owned the banks, by way of a transfer of public housing and other assets.

The financial transfers triggered a complaint by the Association of German Private Banks (BdB) as they were under the same obligation to increase their solvency ratios without, however, being able to rely on public support. The complaint addressed the following seven banks:

**Westdeutsche Landesbank Girozentrale (WestLB)**, then the biggest of the German public banks, to which the Land of North Rhine-Westphalia transferred at the beginning of 1992 a housing asset (Wohnungsbauförderanstalt, Wfa). Of this asset, about DM 2.5 billion were to be used for the extension of business and DM 3.4 billion as a guarantee. WestLB was transformed into a private law company (WestLB AG) as of 1 August 2002;

**Landesbank Berlin**, a bank owned entirely by the Land Berlin which transferred at the beginning of 1993 a special reserve (Zweckrücklage) worth

DM 1.7151 billion and liquid cash (WBK Grundkapital) worth DM 187.5 million;

**Norddeutsche Landesbank**, to which the Land of Lower Saxony transferred in 1991 three Landes-treuhandstellen of a total value of DM 1.754 billion;

**Bayerische Landesbank**, to which a special reserve in form of trustee claims of Bavaria was transferred in two instalments, the first one worth DM 655 million at the end of 1994, and the second one worth DM 542 million at the end of 1995;

**Hamburgische Landesbank** <sup>(1)</sup>, fully owned by the City of Hamburg which transferred assets of Hamburgische Wohnungsbaukreditanstalt worth DM 959 million at the beginning of 1993;

**Landesbank Schleswig-Holstein** <sup>(1)</sup>, to which the Land of Schleswig-Holstein transferred at the beginning of 1991 a housing asset (Wohnungsbaukreditanstalt) and an economic promotion asset (Wirtschaftsaufbaukasse) worth DM 1.306 billion. At the beginning of 2000 a real-estate reserve of some DM 300 million was transferred as well;

**Landesbank Hessen-Thüringen**, a fairly recent transfer dating to the end of 1998 where the Land of Hessen invested into a silent partnership based on its claims in respect of loans granted to promote social housing construction with a cash value of DM 2.3 billion.

In 1999, the Commission adopted a first negative decision concerning the transfer to WestLB and ordering the recovery of some € 800 million. In 2003, the Court of First Instance annulled the decision taking the view that the Commission had not sufficiently explained its calculations of the aid element but confirmed the decision on the substance.

The Commission's assessment of the cases showed that the remuneration agreed by the Länder in return for the transfer of assets was very low (about

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<sup>(1)</sup> The Landesbanken of Schleswig-Holstein and Hamburg merged in 2003 to become HSH Nordbank AG.

1% p.a.) and did not correspond to the normal return on investment that a private investor would have required. The appropriate remuneration was calculated at some 6-7%, except for Landesbank Hessen-Thüringen where it was found to be lower.

The Commission therefore established that the agreed remuneration constitutes State aid within the meaning of Article 87(1) of the EU Treaty and ordered Germany to take measures to recover the difference from the Landesbanken.

Although the seven cases are similar in many respects, they differ in the overall amount, form of capital transferred, the date of transfer and the amount of capital actually used to underpin commercial business, amongst other things. As a result, the amounts to be recovered from each bank are:

- WestLB: €979 million plus interest
- Landesbank Berlin: €810 million plus interest
- Norddeutsche Landesbank: €472 million plus interest

- Landesbank Schleswig-Holstein: €432 million plus interest
- Bayerische Landesbank: €260 million plus interest
- Hamburgische Landesbank: €90 million plus interest
- Landesbank Hessen-Thüringen: €6 million plus interest

The closing of the procedures was facilitated by bilateral negotiations and an ensuing agreement reached in September 2004, between the Landesbanken, the Länder (regions) concerned and the complainant, BdB, on the appropriate remunerations for the transferred assets. The Commission reviewed these remunerations and considered that they were in conformity with the market economy investor principle.

As of January 2005, the overall amount of €4.3 billion (including interest) had been paid back by all banks concerned to the respective Länder (regions).





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02 29 50625

02 29 55303

02 29 53584/02 29 65424

02 29 60216

## Reporting directly to the Commissioner

Hearing officer

Hearing officer

*Serge DURANDE*

*Karen WILLIAMS*

02 29 57243

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://europa.eu.int/comm/competition/speeches/index\\_2004.html](http://europa.eu.int/comm/competition/speeches/index_2004.html)*

#### Speeches by the Commissioner, 1 August 2004 – 31 December 2004

9 Dec: *Introductory remarks at press conference on Choline Chloride cartel and EDP/ENI/GDP merger decisions* – KROES Neelie – Brussels, Belgium (Press conference)

28 Oct: *A reformed competition policy: achievements and challenges for the future* – MONTI Mario – Brussels, Belgium (Center for European Reform)

22 Oct: *Competition for consumers' benefit* – MONTI Mario – Amsterdam, The Netherlands (European Competition Day)

7 Oct: *International Antitrust – A Personal Perspective* – MONTI Mario – New York, USA (Fordham Corporate Law Institute)

21 Sep: *Energy liberalisation: moving towards real market opening* – MONTI Mario – Brussels (European Commission, DG Competition)

17 Sep: *Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation* – MONTI Mario – Fiesole, Italy (IBA – 8th Annual Competition Conference)

#### Speeches and articles, Directorate-General Competition staff, 1 August 2004 – 31 December 2004

22 Oct: *The Microsoft Decision – promoting innovation* – MENSCHING Jürgen – London, UK (Sweet and Maxwell, 4th Annual Competition Law Review Conference)

15 Oct: *Electronic communications markets: current activities / objectives of DG Competition*

*and review of recent cases* – VAN GINDERACHTER Eric – Brussels, Belgium (IBC 9th Annual Conference, Communications and Competition Law)

5 Oct: *European music cultures and the role of copyright organisation – competition aspects* – UNGERER Herbert – The Hague, The Netherlands (European Music Cultures – Sound or Silence)

20 Sep: *Application of EU Competition Rules to Broadcasting, Transition from Analogue to Digital* – UNGERER Herbert – Naples, Italy (Universita di Napoli)

17 Sep: *Consumers and competition policy; the Commission's perspective and the example of transport* – WEZENBEK Rita – Groningen, The Netherlands (University of Groningen)

#### Community Publications on Competition

##### New publications and publications coming up shortly

- *EU Competition policy and the consumer*
- *Competition policy newsletter, 2005, Number 2 – Summer 2005*
- *Report on competition policy 2004*

Information about our other publications can be found on the DG Competition web site: <http://europa.eu.int/comm/competition/publications>

The annual report is available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Most publications, including this newsletter, are available in PDF format on the web site.



## Press releases

1 August 2004 – 30 December 2004

*All texts are available from the Commission's press release database RAPID at: <http://europa.eu.int/rapid/start/> Enter the reference (e.g. IP/05/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.*

### Antitrust

**IP/04/1525 – 21/12/2004** – Telecommunications: the Commission calls on Luxembourg to comply with a Court judgment

**IP/04/1513 – 20/12/2004** – Competition: Alrosa and De Beers offer diamond trade commitments

**IP/04/1372 – 16/11/2004** – Commission creates level playing field for all grain brandy producers in Germany

**IP/04/1335 – 29/10/2004** – Commission authorises Wendel to acquire exclusive control of Bureau Veritas

**IP/04/1330 – 29/10/2004** – Commission approves Flextronics' acquisition of Nortel manufacturing activities

**IP/04/1325 – 28/10/2004** – EU and the Republic of Korea agree terms for bilateral competition dialogue

**IP/04/1314 – 26/10/2004** – Commission closes investigation into contracts of six Hollywood studios with European pay-TV's

**IP/04/1313 – 26/10/2004** – Commission fines Coats and Prym for a cartel in the needle market and other haberdashery products

**IP/04/1310 – 26/10/2004** – Commission confirms that territorial restriction clauses in the gas sector restrict competition

**IP/04/1301 – 26/10/2004** – Commission disagrees with Austrian regulator on transit services in the fixed public telephone network

**IP/04/1279 – 21/10/2004** – Commission welcomes France's ending of the discrimination against suppliers of telephone services on cable networks

**IP/04/1256 – 20/10/2004** – Commission fines companies in Spanish raw tobacco market

**IP/04/1254 – 20/10/2004** – The Commission acts against the discrimination of mail preparation service providers in Germany

**IP/04/1247 – 19/10/2004** – Commission close to settle antitrust probe into Coca-Cola practices in Europe

**IP/04/1235 – 15/10/2004** – Accessing technical information for motor vehicles: manufacturers must do better

**IP/04/1213 – 13/10/2004** – Commission adopts White Paper on liner shipping conferences

**IP/04/1153 – 29/09/2004** – Cartel fine in the French beer market

**IP/04/1133 – 23/09/2004** – Public procurement: Commission consults on more open and efficient defence procurement

**IP/04/1125 – 22/09/2004** – Commission approves restructuring of British Energy

**IP/04/1110 – 17/09/2004** – New cartel procedure used for the first time for the liberalisation of the central marketing of Bundesliga rights

**IP/04/1101 – 14/09/2004** – Industrial property: Commission proposes more competition in car spare parts market

**IP/04/1065 – 03/09/2004** – Commission fines companies in copper plumbing tubes cartel

### State aid

**IP/04/1494 – 16/12/2004** – Tax incentives for Italian companies participating in trade fairs abroad are illegal

**IP/04/1484 – 15/12/2004** – Commission launches in-depth investigation into French tax scheme for 'fiscal economic interest groupings' (EIGs)

**IP/04/1475 – 14/12/2004** – Commission launches probe into Czech steel company Trinecké elektrárny

**IP/04/1430 – 01/12/2004** – Commission opens formal investigation into UK Nuclear Decommissioning Authority

**IP/04/1429 – 01/12/2004** – Commission declares compatible the aid linked to stranded costs in the energy sector in Italy

**IP/04/1427 – 01/12/2004** – Commission approves real estate transfer tax exemption for housing companies in Eastern Germany

**IP/04/1424 – 01/12/2004** – Commission gives the go-ahead for restructuring aid to Bull

**IP/04/1371 – 16/11/2004** – Commission approves public funding of broadband projects in Pyrénées-Atlantiques, Scotland and East Midlands

**IP/04/1370 – 16/11/2004** – Commission opens formal investigation into possible subsidies to Finland's Componenta

**IP/04/1367 – 16/11/2004** – The European Commission approves German on-board training aid in favour of seafarers

**IP/04/1366 – 16/11/2004** – The European Commission authorises Belgian aid scheme extension until 2010 to boost the use of inland waterways

**IP/04/1365 – 16/11/2004** – New Member States grant more subsidies than old ones, but amount likely to fall

**IP/04/1269 – 20/10/2004** – Commission gives conditional authorisation for most of the aid paid to the French company Sernam

**IP/04/1268 – 20/10/2004** – Air transport / outermost regions: the Commission authorises social aid for Guadeloupe

**IP/04/1267 – 20/10/2004** – The Commission approves public financing to maritime ports in Belgium

**IP/04/1266 – 20/10/2004** – Commission adopts decision in favour of the development of Girona airport

**IP/04/1265 – 20/10/2004** – Air Transport / Outermost regions: Commission authorises French aid to Air Caraïbes

**IP/04/1263 – 20/10/2004** – The Commission approves the Italian aid scheme for shipping companies

**IP/04/1261 – 20/10/2004** – Commission orders Germany to recover more than 3 bln, plus interest, from WestLB and six other public banks

**IP/04/1260 – 20/10/2004** – Commission adopts decisions on German, Spanish and Greek shipyards

**IP/04/1259 – 20/10/2004** – Commission approves risk capital scheme for small and medium sized enterprises in Northern Ireland

**IP/04/1258 – 20/10/2004** – Commission clears past Hungarian aid in favour of Postabank (now Erste Bank Hungary); opens probe regarding potential post-EU accession subsidies

**IP/04/1257 – 20/10/2004** – The Commission clears Swedish tax-relief programme for energy-intensive industries that cut their power consumption

**IP/04/1253 – 20/10/2004** – Italian law on disaster aid: the Commission says the aid must be linked with and in proportion to the damage caused

**IP/04/1252 – 20/10/2004** – La Commission autorise une aide régionale en faveur de Total France

**IP/04/1228 – 14/10/2004** – Commission approves Italian tax breaks to SMEs investing in information technology projects

**IP/04/1187 – 06/10/2004** – Commission approves Italian regional aid to restructure the freight market and to develop road-sea combined transport

**IP/04/1186 – 06/10/2004** – Commission authorises German aid to support its railway infrastructure for freight transport

**IP/04/1125 – 22/09/2004** – Commission approves restructuring of British Energy

**IP/04/1124 – 22/09/2004** – Commission approves Italian public financing of Elba airport

**IP/04/1123 – 22/09/2004** – Commission authorises public compensation for stranded cost in Portugal

**IP/04/1119 – 21/09/2004** – Statement on German Landesbanken

**IP/04/1082 – 08/09/2004** – Centres de coordination en Belgique: la Commission approuve une version modifiée du régime fiscal

**IP/04/1081 – 08/09/2004** – Commission authorises State cofinancing of theme park project in Alsace



## Merger

**IP/04/1542 – 23/12/2004** – Commission opens in-depth investigation into Bertelsmann/Springer rotogravure joint venture

**IP/04/1538 – 23/12/2004** – Commission approves acquisition of Sovereign by Henkel

**IP/04/1537 – 23/12/2004** – Commission clears ECT and P&O Nedlloyd joint venture to create new Rotterdam container terminal

**IP/04/1536 – 23/12/2004** – Commission clears Carlyle's and Advent's joint acquisition of HT Troplast

**IP/04/1535 – 23/12/2004** – Commission approves acquisition of SNECMA by SAGEM

**IP/04/1531 – 22/12/2004** – Commission clears acquisition of HMG by Sovion in abattoir and meat products sector

**IP/04/1511 – 20/12/2004** – Commission clears Cytec's acquisition of UCB's Surface Specialties business, subject to conditions

**IP/04/1492 – 16/12/2004** – Commission clears Slovak Telecom's acquisition of sole control over EuroTel's mobile telephony business

**IP/04/1465 – 13/12/2004** – Commission approves acquisition of Menlo Worldwide Forwarding by United Parcel Service

**IP/04/1464 – 10/12/2004** – Commission clears acquisition of HDW by ThyssenKrupp

**IP/04/1455 – 09/12/2004** – Commission prohibits acquisition of GDP by EDP and ENI

**IP/04/1452 – 09/12/2004** – Commission clears acquisition of RMC by Cemex

**IP/04/1451 – 09/12/2004** – Commission clears the acquisition of Schils by Van Drie

**IP/04/1425 – 01/12/2004** – Commission decides to allow Fortum to increase its shareholding in Gasum in the Finnish energy sector

**IP/04/1420 – 01/12/2004** – Commission clears Körber's acquisition of Winkler + Dünnebier

**IP/04/1405 – 25/11/2004** – Commission welcomes Council agreement on making cross-border mergers easier

**IP/04/1397 – 24/11/2004** – Commission refers Shell and Cepsa aircraft refuelling joint venture to Spanish competition authorities

**IP/04/1393 – 23/11/2004** – Commission approves planned acquisition of Aprilia by Piaggio subject to conditions

**IP/04/1386 – 19/11/2004** – Commission approves planned acquisition of Roche Consumer Health by Bayer subject to conditions

**IP/04/1380 – 18/11/2004** – Commission approves IBM's acquisition of Maersk Data and DMdata

**IP/04/1378 – 17/11/2004** – Commission clears acquisition of Magneti Marelli Sistemi Elettronici by FIAT

**IP/04/1359 – 16/11/2004** – Commission clears retail joint venture between Kesko and ICA in the Baltic States

**IP/04/1354 – 11/11/2004** – Commission clears video-on-demand JV between Walt Disney and Columbia Pictures in the United Kingdom and Ireland

**IP/04/1347 – 08/11/2004** – The Commission approves a joint venture between Adecco, Manpower and Vedioorbis in France

**IP/04/1329 – 29/10/2004** – Commission clears Cargill acquisition of Brazilian pork and poultry producer

**IP/04/1326 – 29/10/2004** – Commission clears the acquisition of two manufacturers of printing inks by CVC

**IP/04/1312 – 26/10/2004** – Commission clears Oracle's takeover bid for PeopleSoft

**IP/04/1311 – 26/10/2004** – Commission clears the acquisition of Phoenix by Continental

**IP/04/1262 – 20/10/2004** – Commission clears the joint acquisition of regional German water supplier by Midewa and Stadtwerke Halle

**IP/04/1200 – 11/10/2004** – Commission gives conditional clearance to Total's purchase from GDF of several gas assets in South-West and Central France

**IP/04/1190 – 06/10/2004** – Commission clears Sonoco core board and cores JV with Ahlstrom subject to conditions

**IP/04/1189 – 06/10/2004** – Commission clears uranium enrichment equipment joint venture between AREVA and Urenco

**IP/04/1174 – 05/10/2004** – Commission clears acquisition by tobacco manufacturing group Altadis of Italy's tobacco distribution company, Etinera

**IP/04/1170 – 04/10/2004** – Commission clears acquisition of Volvo's axle production business by ArvinMeritor

**IP/04/1157 – 30/09/2004** – Commission initiates in-depth examination of the planned Austrian fertilizer wholesale joint venture

**IP/04/1141 – 27/09/2004** – Commission clears acquisition of New Venture Gear by Magna

**IP/04/1140 – 27/09/2004** – Commission clears TeliaSonera's acquisition of Orange's Danish mobile telephony business

**IP/04/1122 – 22/09/2004** – Commission clears JV between Seiko Epson and Sanyo in the field of small LCD screens

**IP/04/1108 – 17/09/2004** – Commission clears north England passenger rail JV between Serco and NedRailways

**IP/04/1106 -16/09/2004** – Commission clears TV ratings joint venture between VNU and WPP

**IP/04/1105 – 15/09/2004** – Commission clears Banco Santander's takeover bid for Abbey National

**IP/04/1098 – 14/09/2004** – Commission approves acquisition of Shell's Portuguese activities by Repsol

**IP/04/1097 – 13/09/2004** – Commission clears acquisition of Polish slaughterhouse Sokolów by Danish Crown and Finnish HK Ruokatalo

**IP/04/1093 – 10/09/2004** – Commission clears the acquisition of Synstar by HP

**IP/04/1092 – 09/09/2004** – Commission authorises EDP acquisition of sole control over Hidrocontábrico

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