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1 September to
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Standard-setting from a competition law perspective

by Ruben Schellingerhout ⁽¹⁾

Competition rules to ensure that the benefits of standards materialise

Competition regulators pay attention to standard setting because legally a standard constitutes an agreement between companies. However, the Commission has always taken the view that there are also clear benefits associated with standard-setting. As early as 1992 the Commission outlined this general point. ⁽²⁾ In its 2001 Horizontal Guidelines it therefore provided guidance on when it considered standard setting to be unproblematic.

Since the adoption of the 2001 standardisation Guidelines, a number of issues have come to the fore. It became increasingly clear that malpractices were occurring in the standard setting process which could lead to serious distortions of competition. ⁽³⁾ In response, the Commission revised the Guidelines in 2010 to provide more guidance to standards bodies on how they could design their rules so as to avoid restrictive effects on competition. ⁽⁴⁾

This purpose of this article is to provide the full picture on standard-setting. It starts by outlining why competition law is concerned at all by standards. It then covers in more detail some of the issues that have arisen. The extended guidance in the revised Guidelines is then fleshed out in more detail. Finally, some thought is given to the future of standardisation.

Standards have a positive effect in the economy insofar as they promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. Standards tend to increase competition and allow lower output and sales costs, thus benefiting the economy as a whole. These benefits are

achieved through standards which ensure interoperability, maintain and enhance quality, and provide information. ⁽⁵⁾

Within the European internal market, standards provide the additional benefits of contributing to the achievement of market integration within the EU. Common standards, be they governmental or private, help eliminate restrictions to trade among Member States. Particularly in hi-tech markets, standards - if they are properly developed - play a positive role in promoting the efficient promulgation of new technologies in a manner that is most beneficial to the consumer and the economy in general. The European Commission recognises the general benefits that standardisation brings.

In a globalised economy, standards are clearly more important than ever. They often facilitate economies of scale, and secure multiple supply sources. The primary objective of standards is to define technical or quality requirements. Standards can cover various issues, such as standardisation of different grades or sizes of a particular product, standardisation of production processes or methods, or technical specifications in markets where compatibility and interoperability with other products or systems is essential.

Standards have their biggest impact on technology markets by securing interoperability. Standards provide the very foundation of interoperability. The development of electronic communications networks has seen a rise in the importance of interoperability between equipment used, between services provided, and between data exchanged. ICT interoperability and especially software interoperability, has become critical in an ever more interconnected world. Digital convergence, the spread of communications technology, and the Internet have created a greater need for interoperability among products and services.

Interoperability encourages competition on the merits of technologies from different companies, and helps prevent lock-in. When a particular technology is chosen over others transparently and fairly, any potential restrictions of competition are generally outweighed by the countervailing economic benefits.

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

⁽²⁾ Commission Communication on "Intellectual Property Rights and standardisation" COM(1992) 0445, section 4.2.10

⁽³⁾ Impact Assessment § 43

⁽⁴⁾ Guidelines available at: <http://ec.europa.eu/competition/antitrust/legislation/horizontal.html>. Impact Assessment at: http://ec.europa.eu/governance/impact/ia_carried_out/cia_2010_en.htm#comp. Public consultation at: http://ec.europa.eu/competition/consultations/2010_horizontals/index.html

⁽⁵⁾ Commission Communication "on the role of European standardisation in the framework of European policies and legislation," COM(2004) 674 final

Standards can be set by formal government standard setting bodies, through formalised industry collaboration in the framework of standard setting organizations or by means of ad hoc agreements between undertakings. Standards may also arise spontaneously with no connection to any collaborative process as a result of technologies achieving a high level of penetration in a given market.

The setting of standards, in spite of their benefits, can give rise to competition issues. Competition rules usually do not allow companies to discuss and agree the technical developments of an industry amongst themselves. Discussions in the context of standard setting can, for example, provide an **opportunity** to reduce or eliminate competition.⁽⁶⁾

However, the Commission takes the view that, under certain conditions, standardisation does not raise concerns. It is for that reason that it promotes open and transparent standard setting.

In order for the benefits of standards to be realised, the interests of the users of the standard also need to be protected. Certain behaviour in standard-setting organisations can directly lead to a restrictive effect on competition. Particular attention must be paid to the procedures used to guarantee that this does not happen. The Commission has therefore set out the conditions which will minimise the chance of this risk materialising.

Some commentators question whether there is a problem if intellectual property rights are not disclosed, because the owner of an intellectual property has a monopoly in any case. In their view this would allow it to charge what it likes as long as that charge is not excessive.

However, being included in a standard can change the market value of a technology. That value is not inherent in the intellectual property right. It is natural that a unique, pioneering, and innovative technology for which no alternative exists will be valued accordingly by the market. However, by being included in a standard, the holder of an essential patent can acquire an *incremental* degree of market power. In other words, it gives him a degree of market power which he would not possess in the absence of a standard.

This occurs when a switch to a different standard entails significant costs and industry gets “locked into” the standard. This creates a barrier to entry. As a result, potentially competing technologies are excluded from the market.

A standardisation agreement is not capable of producing restrictive effects on competition in the absence of market power. Therefore, restrictive effects

are most unlikely in a situation where there is genuine competition between a number of voluntary standards. The question of market power can only be assessed on a case by case basis.⁽⁷⁾

Overall, it would appear that the Commission is unlikely to take issue with standard setting if it is open and transparent. As a general rule, a company that has undue control of a standard presents the greatest risk of negative, restrictive effects on competition. The example of a patent ambush illustrates this very clearly.

Patent ambush - A system breakdown

A patent ambush is a clear example of a breakdown of the standardisation system. It means that a company first hides the fact that it holds essential intellectual property rights over the standard being developed. It then starts asserting these intellectual property rights once the standard has been agreed and when other companies are locked into using it. A patent ambush frustrates the aims of standard-setting organisations and has a negative impact on both consumer welfare and competitiveness.

A patent ambush prevents competition on its merits. During the standard-setting process multiple technologies may compete for incorporation into the standard, but – as a result of the ambush – crucial information on the cost of one of the technologies is intentionally hidden. Because disclosure only occurs once industry is locked-in, the company can charge a monopoly price which it would otherwise have been unable to charge.

The Commission’s investigation in the Rambus “patent ambush” case showed the potential restrictive effects on competition resulting from non-disclosure of relevant IPR. The Commission took the view initially that Rambus could only claim royalties for the use of its patents from manufacturers complying with the industry standard at a certain level due to allegedly intentional deceptive conduct.⁽⁸⁾ In this case, the alleged deceptive conduct consisted of the non-disclosure of the existence of patents and patent applications which were later claimed to be relevant to the adopted standard.⁽⁹⁾

⁽⁷⁾ Guidelines § 277.

⁽⁸⁾ The Commission’s preliminary view was that “Rambus’ practice of claiming royalties for the use of its patents from industry standard-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge raised concerns as to the compatibility with Article 102 of the Treaty on the Functioning of the European Union” (§ 3 commitments decision).

⁽⁹⁾ In the US the issue of patent ambush has led to decisions in other cases such as Dell Computer Corp., 121 FTC 616 (May 20, 1996) and in the matter of Union Oil Company of California, FTC Docket No. 9305 (2005).

⁽⁶⁾ Impact Assessment § 40.

The products in the Rambus case were synchronous DRAM-chips. The DRAM-chip is the computer's "working" memory, where information is continuously stored and read by different applications. Because these applications need to access the DRAM-chip, it is essential that the memory chip is compatible with the other components of a computer, such as the chipset and the microprocessor. It is therefore essential to have a standard.

The US-based standards organisation, JEDEC, developed an industry-wide standard for DRAM memory chips. Virtually all PCs have JEDEC-compliant DRAMs. Standard compliant memory chips account for around 95% of the market. In 2009, worldwide sales of DRAM memory chips exceeded 23 billion euros.

Because there are significant costs associated with switching, the industry is locked into the JEDEC standard. Firstly, the costs of developing standards are substantial. The development of the DRAM standards took around five years. The reason for this is that a DRAM needs to be interoperable with other computer components. All companies active in the sector would need to agree to a new standard.

Furthermore, there are significant costs associated with switching from a standard in the DRAM market. The DRAM memory chip is not an independent product, but is part of an eco-system. It is not only DRAM manufacturers who would need to adapt to a new standard, but the entire industry. Companies producing PCs and servers would need to develop and test new system architectures. Microprocessor and chipset manufacturers would also need to redesign their chips.

Overall these switching costs are prohibitive. Because industry is locked into JEDEC standards there are substantial barriers to the entry of a different product on the market.

Rambus asserts its patents against all standard compliant memory chips. Every manufacturer wishing to produce standard compliant chips has to take out a licence. This gives Rambus a dominant position

The Commission's preliminary view was that Rambus claimed royalties only after the industry was locked in to the standard and was therefore able to charge an artificially inflated monopoly price. It was only able to charge that price because it did not disclose its patent applications. If Rambus's technologies had been selected fairly and squarely, in an open competition on the merits, there would not have been a competition problem. However, this was not the case.

To address the Commission's concerns, Rambus undertook to put a worldwide cap on its royalty rates for products compliant with the JEDEC

standards for five years. On 9 December 2009, the Commission adopted a decision that rendered legally binding the commitments offered by Rambus.⁽¹⁰⁾ The Commission's decision introducing commitments had a clear effect on the market. After the decision, several manufacturers of DRAM chips, including the market leader Samsung, signed a licence.

Prevention is better than cure

The Commission considers that, in the case of problems like these, prevention is better than cure. This is why it has sometimes worked with standards bodies in order to adapt their rules in line with the Horizontal Guidelines and to minimise risks. An example of how this takes place occurred in 2000. DG Competition investigated allegations that, during the development of the standard for GSM smart cards, Sun had not respected ETSI's rules on intellectual property rights.⁽¹¹⁾ Sun only declared it had essential patents after that standard had been agreed, and then only identified what these claimed essential patents were long after the standard had been published and promulgated. Following the Commission's intervention, no reference was made in the standard to Sun's IPR. However, the Commission also scrutinised ETSI's rules on intellectual property rights.

In the course of the Sun investigation, DG Competition took the preliminary view that ETSI's rules on intellectual property rights did not provide sufficient protection against the risk of a 'patent ambush' during the ETSI standard-setting procedures.⁽¹²⁾ In response to the Commission's concerns, ETSI approved changes to its standard-setting rules which strengthened the requirement for early disclosure of those intellectual property rights which are essential for the implementation of a standard, and which minimise the risk of patent ambush occurring.

Through the Sun/ETSI and Rambus case the Commission sent a clear message to standards bodies. They have a responsibility to design clear rules in order to reduce the risk of competition problems, such as patent ambushes.

The lessons learned in these cases are reflected in the revised Guidelines. The revised horizontal Guidelines provide more guidance to standards bodies on how best to design their rules. This is in line with the principle that prevention is better than cure. I will now deal with the Guidelines.

⁽¹⁰⁾ Rambus case (38.636) documents available at: <http://ec.europa.eu/comm/competition/antitrust/cases>

⁽¹¹⁾ Case 37926 (Sun/ETSI)

⁽¹²⁾ Press Release 12 December 2005, IP/05/1565

More detailed guidance for standard setting

The revised Horizontal Guidelines provide guidance to companies as to which actions they can undertake without the risk of infringing competition law and without prescribing a specific set up. In general, it is not and should not be the role of an antitrust agency to interfere in the standard setting process. The Guidelines therefore leave the companies a choice, but they do have a responsibility to design clear rules that reduce the risk of competition problems.

The standardisation chapter sets out the criteria under which the Commission will normally not take issue with a standard-setting agreement. By analogy with block exemptions, this could be called a ‘safe harbour’. The chapter also gives more guidance on the Commission’s view on the inclusion of IPR in standards from the angle of competition law. Some new points are now dealt with in the guidelines, for example on “*ex ante*” disclosure. I will go into some more detail on each of these points.

The Guidelines point out that where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1).

The Court has confirmed that the Commission is right to apply these assessment criteria if a standard restricts competition. In EMC the complainant claimed that European cement producers had infringed Article 101 by creating barriers to entry, the most significant of those barriers being a standard.⁽¹³⁾ The Court held that the Commission was correct to examine whether the complaint was justified by assessing whether “*the procedure for adoption of the Standard had not been non-discriminatory, open and transparent*”⁽¹⁴⁾ and was not binding on the members. The Commission concluded that these criteria were fulfilled and rejected the complaint.

This means that standard-setting will normally not restrict competition if the following four principles are met.

1. Participation in standard-setting is unrestricted;
2. The procedure for adopting the standard in question is transparent;
3. There is no obligation to comply with the standard;

⁽¹³⁾ EMC Development Case T-432/05 of 12 May 2010.

⁽¹⁴⁾ EMC Development Case T-432/05 § 65

4. Access to the standard is on fair, reasonable and non-discriminatory terms.

Below I will go into some more detail for each of these four points.

Firstly, in order to ensure unrestricted participation, the rules of the standard-setting organisation need to guarantee that all competitors in the market affected by the standard can participate. They also need to have objective and non-discriminatory procedures for allocating voting rights.

By their nature, standards will not include all possible specifications or technologies, and in some cases it may be necessary for the benefit of the consumers or the economy at large to have only one technological solution. The Guidelines therefore stress the importance of non-discriminatory, open and transparent procedures.

Secondly, with respect to transparency, procedures need to be in place that allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.

Thirdly, where members of a standard-setting organisation remain free to develop alternative standards or products that do not comply with the agreed standard, the risk of a likely negative effect on competition is quite low. However, if the agreement binds members to only produce products in compliance with the standard, the risk of a negative effect on competition is high. Under certain circumstances this could even give rise to a restriction of competition by object?

Fourthly, the rules of the standard-setting organisation would have to ensure effective access to the standard on fair, reasonable and non discriminatory terms. Standards that are not accessible to third parties may discriminate or foreclose third parties or segment markets according to their geographic scope of application.

IPR disclosure policies allow members of the standard-setting organisation, and the standard-setting organisation itself, to have an early understanding of the IPR that might read on?? the standard under development. This in turn also allows the standard-setting organisation either to ask for a licensing commitment from the IPR holders or to try to work around that particular solution. The IPR disclosure obligation is also intended to avoid the standard being blocked at a later stage by an IPR holder that is unwilling to license on reasonable terms or at all. In practice, the problem of IP holders bluntly refusing to license their IPR seems to be rare.⁽¹⁵⁾

⁽¹⁵⁾ Impact Assessment § 70.

Case experience, academic research and literature, and also the input into the public consultation, show that the increasing involvement of intellectual property rights can lead to an increased risk of an outcome that is anti-competitive in various ways.⁽¹⁶⁾ For example, an owner of an intellectual property right that is essential for implementing the standard could “hold up” users after the adoption of the standard by refusing to license.⁽¹⁷⁾ This would mean that users would in effect be unable to apply the standard. If a company is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect.⁽¹⁸⁾ When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates.

However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power.

For the safe harbour this requires that a number of conditions be fulfilled:

- There must be clarity concerning the intellectual property rights situation.
- A commitment to license is made and respected.

Clarity on the intellectual property rights situation

Information on the IPR situation needs to be available in order for the members of a standard-setting organisation to take a properly informed decision. The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. Rules requiring ex ante good faith disclosure of essential IPRs are necessary to allow the members of a standard-setting organisation to factor in the amount of IPR reading on a particular technology when deciding between competing technologies. It could also lead them to choose a technology which is not covered by IPR.

Changing technology might be impossible once a standard is set, so this information needs to be available ex-ante. Different standard-setting organisations are organised differently and they therefore draft disclosure rules in different ways, but it is essential that their members are well informed. For example, since the risks with regard to effective

access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context as long as a commitment is given by the IPR holders to license royalty-free.

Industry can therefore get locked into the standard because switching to a new standard will entail significant costs. A company may therefore unfairly gain control over a standard, thereby unfairly excluding potentially competing technologies from the market and erecting an unjustified barrier to entry. It may therefore be able to charge an artificially inflated ex post monopoly price for its intellectual property rights. As we have already seen, this also depends on the market power which the standard confers. Where there are several competing standards, for example, the standard may not confer any market power.

There is therefore an important pro-competition rationale behind requiring the disclosure of patents and patent applications before a standard is set. A system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard, since it allows the participants to identify which technologies are covered by IPR and which are not. This enables the participants both to factor in the potential effect on the final price of the result of the standard (for example choosing a technology without IPR is likely to have a positive effect on the final price) and to verify with the IPR holder whether they would be willing to license if their technology is included in the standard.⁽¹⁹⁾ The Commission's practical experience so far shows that an IPR disclosure obligation is in principle positive for the competitive outcome and that it would therefore be beneficial for competition.⁽²⁰⁾

A commitment to license is given and respected

In order to ensure effective access to the standard, the IPR policy would also need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to at least offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms. This is the known as a FRAND commitment.

From an antitrust perspective, FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and

⁽¹⁶⁾ Impact Assessment § 43.

⁽¹⁷⁾ Impact Assessment § 40.

⁽¹⁸⁾ Guidelines § 268-269

⁽¹⁹⁾ Guidelines § 268.

⁽²⁰⁾ Impact Assessment § 74.

conditions. In particular, FRAND commitments can prevent IPR holders from making it difficult for a standard to be implemented. This could happen, for example, if there was a refusal to license or as a result of requesting unfair or unreasonable fees, in other words excessive fees, after the industry has been locked in to the standard.

To ensure the effectiveness of the FRAND commitment, IPR holders who provide such a commitment need to ensure that any company to which the IPR owner transfers its IPR is bound by that commitment, for example through a contractual clause between buyer and seller. The same conditions naturally apply to a commitment to license royalty-free.

Outside the safe harbour

For standardisation agreements that do not fulfil the safe harbour criteria, the chapter also provides guidance to allow companies to assess whether they are in line with EU competition law. For example, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.⁽²¹⁾

In a similar vein, the greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process. However, if the facts at hand show that there is competition between several such standards and standard-setting organisations (and it is not necessary that the whole industry applies the same standards) there may be no restrictive effects on competition.⁽²²⁾ In certain situations the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are kept informed and consulted on the work in progress.⁽²³⁾

Ex ante disclosure of maximum royalty rates

Many stakeholders asked for guidance on the points of unilateral ex ante disclosure of maximum royalty rates. For example, ETSI has for a number of years had the possibility of “ex ante” unilateral public disclosure of licensing terms. However, the ETSI members have not availed themselves of this possibility, perhaps because they were afraid of

infringing competition law. It therefore appeared appropriate for more guidance to be given.

The purpose of ex ante disclosures of the most restrictive licensing terms is to allow the standard setting organisations and the industry to make an informed choice about the technological solution to put in a certain standard, not only on technical but also on commercial grounds. The concomitant objective would then be to ensure competitive prices for those implementing the standards and therefore also increasing the likelihood of competitive prices at consumer level.

The Guidelines clearly recognise the potential benefits of such ex ante schemes. They have the potential to generate strong pro-competitive benefits by allowing a comparison on quality and price. The US Department of Justice also considers that “ex ante” IPR disclosure policies are in line with US competition law.

It goes without saying that those who innovate deserve to be rewarded accordingly, and that incentives to innovate are therefore important. Ex ante price disclosure rules would not reduce incentives to innovate. If a company has a unique, pioneering and innovative technology for which there is no alternative, then the market will value it accordingly. In the consultation on the horizontal Guidelines, some stakeholders expressed concerns that ex ante schemes like these might simply be some kind of artificial front for illegal price-fixing, but it is clear that this would create a problem. It is obvious that standardization agreements will be prohibited if they are used as a cover for a broader restrictive agreement the aim of which is to increase prices, reduce output, or exclude actual or potential competitors.

The future of standardisation

CEN, Cenelec and ETSI are the three standard-setting organizations currently recognised as European Standards Organisations.⁽²⁴⁾ Their rules are well established. In recent years, however, there have been signs of an increase in the more ad-hoc or one issue standard-setting organizations referred to as “consortia” or “fora.” These bodies are often more short-lived and more focused on the development of a particular standard or set of standards than is the case for the more formal and accredited standard-setting organizations.

Fora and consortia have produced many ICT standards. This is the case with standards covering

⁽²¹⁾ Guidelines § 294

⁽²²⁾ Guidelines § 295

⁽²³⁾ See Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*. The Decision can be found at: http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_416.

⁽²⁴⁾ Recognition given under Council Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998).

internet protocols established by IETF and web accessibility guidelines produced by W3C, although the WiFi Alliance that is promoting the WiFi standard and the Bluetooth group is also outside the more formal standard-setting organizations.⁽²⁵⁾

It is expected that better cooperation between the European Standards Organisations and ICT fora and consortia will reduce the risk of fragmentation, duplication and conflicting standards in the ICT field. The cooperation and coordination efforts will improve interoperability and thus increase the market uptake of innovative solutions.

In December 2010 the Commission announced a plan to promote interoperability among public administrations as a way to deal with this plethora of different standards.⁽²⁶⁾ This plan included a European Interoperability Framework. The Framework is an agreed approach to interoperability for organisations that want to collaborate in providing joint delivery of public services. It sets out common elements such as standards and specifications.

There are many different IPR policies adapted to individual circumstances to be found among standards-developing organisations. These differences do not in themselves pose a problem, provided that IPR policies relevant to the standard are given proper consideration in the process and that they comply with competition rules. Standard-setting

policies should also be stable, predictable, transparent and effective. They should enable competition and facilitate product innovation. Openness, and ease of access to standardisation processes, as well as the availability of standards to all interested parties, are important prerequisites to be ensured by the implementation of effective IPR policies.

Conclusion

The Commission has continued its policy of not prescribing in detail the rules that standards bodies must adopt. The Guidelines provide guidance as to what may or may not be problematic from an anti-trust perspective so as to ensure that industry can make the most informed choices, but they leave the final choice to industry. The Commission considers that different rules may be appropriate for different bodies and sectors, and industry will generally have a better knowledge of what works.

These views are shared by other regulators. The US Department of Justice and the FTC have already issued guidelines. The Japanese and South Korean regulators have recently also adopted quite similar guidelines on standard setting.

If standard bodies have designed effective internal rules, the European Commission is unlikely to intervene in individual cases.

⁽²⁵⁾ See www.wi-fi.org

⁽²⁶⁾ Communication "Towards interoperability for European public services," COM(2010) 744 final, Brussels, 16.12.2010

The new EU Competition Rules on Horizontal Co-operation Agreements

by Alexandra Boutin, Anna Emanuelson, Henning Leupold and Donnadh Woods ⁽¹⁾

1. Context

On 14 December 2010, the European Commission adopted new rules and guidelines for the assessment of horizontal co-operation agreements under EU competition law. This new regime consists of a set of guidelines, the so-called “Horizontal Guidelines”, ⁽²⁾ and two Block Exemption Regulations ⁽³⁾ (BER) regarding research and development agreements on the one hand and specialisation and joint production agreements on the other hand.

Horizontal co-operation agreements, i.e. agreements concluded between companies operating at the same level of the supply chain, such as agreements to co-operate on research and development, production, purchasing, commercialisation, standardisation, and exchange of information, can lead to substantial economic benefits, in particular if the companies involved combine complementary activities, skills or assets. Such co-operations allow companies to achieve various types of efficiencies and to respond to changing market environments. However, they can also lead to serious competition problems, in particular where they increase the market power of the parties to an extent that enables them to increase prices, limit output or reduce innovation efforts. The Commission’s approach enshrined in the new rules is to leave companies maximum freedom to co-operate, while at the same time protecting competition from types of co-operation which are harmful to consumers.

Under EU competition law, horizontal co-operation agreements first require an assessment to establish whether they fall under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) due to their anticompetitive object or effects and, if so, secondly, whether they comply with all the

conditions set out in Article 101(3) TFEU, in order to benefit from the legal exception provided for therein. Agreements falling under Article 101(1) TFEU which do not comply with Article 101(3) TFEU are null and void pursuant to Article 101(2) TFEU.

Prior to adopting the final texts, the Commission had published drafts of the revised Guidelines and BERs for public consultation in May and June 2010. A total of 119 stakeholders submitted contributions during the public consultation. This allowed the Commission to further improve and refine the texts prior to adopting the final versions. Many comments made by stakeholders found their way into the final texts – which shows the usefulness of the concept of public consultations in the EU decision making process and, on a broader level, that the Commission takes a constructive dialogue with stakeholders seriously.

The new EU competition rules on horizontal co-operation agreements should be seen as an evolution, not a revolution. Their aim is to provide comprehensive guidance and adequate legal certainty for companies wishing to co-operate with competitors. Whilst the Commission’s view on how competitors can co-operate has not fundamentally changed since the previous rules were put in place in 2000, the new Horizontal Guidelines are more detailed and user-friendly than the previous ones. Key features of the reform include the insertion of a new chapter on information exchange in the Horizontal Guidelines, a substantial revision of the chapter on standardisation agreements, and the revised BER for R&D agreements.

2. Main features of the EU’s new “Horizontal Regime”

A properly functioning system for **standard-setting** is vital for the European economy as a whole and for the information, communication and telecoms (ICT) sector in particular. The Horizontal Guidelines promote a standard-setting system that is open and transparent, and thereby increases the visibility of licensing costs for intellectual property rights (IPRs) used in standards. In doing so it attempts to strike a balance between the sometimes contradictory interests of companies with different business models (from the pure innovator to the pure manufacturer) involved in the standard-setting process. The system will thus provide sufficient

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

⁽²⁾ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.1.2011, p. 1).

⁽³⁾ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements (OJ L 335, 18.12.2010, p. 36) and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43)

incentives for further innovation and at the same time ensure that the traditional benefits from standardisation are passed on to consumers.

In practical terms, the chapter on standardisation agreements contains certain criteria, which, if fulfilled by standard-setting organisations, provide comfort that the Commission will not take issue with a standard-setting agreement (safe harbour). These criteria include: (i) no obligation to comply with the standard, (ii) the procedure for adopting the standard is unrestricted with participation open to all relevant competitors on the market, (iii) transparency to ensure that stakeholders are able to inform themselves of upcoming, on-going and finalised work, (iv) effective access to the standard, and (v) for standards involving IPR, a balanced IPR policy, with a requirement for all IPR holders that wish to have their technology included in the standard to provide an irrevocable commitment to license their IPR on fair, reasonable, and non-discriminatory terms (“FRAND commitment”) and, if the standard is not royalty-free, a good faith disclosure of those IPRs which are essential for the implementation of the standard. However, these criteria are not a “straight-jacket”: failure to meet them does not mean that a standardisation agreement infringes EU competition rules. Consequently, the Commission gives detailed guidance for those standard-setting organisations whose rules do not meet the safe harbour criteria, in order to allow them to assess whether their agreements are in line with EU competition law.

Certain standard-setting organisations may wish to enable their members to unilaterally disclose, prior to setting a standard, the most restrictive licensing terms that they would charge for their IPRs if those were to be included in the standard. Such a system could enable a standard-setting organisation and the industry to make an informed choice not only on quality but also on price when selecting which technology should be included in the standard. The Commission assures standard-setting organisations that such a system would not normally infringe EU competition rules.

Information exchange can be pro-competitive when it allows firms to become more efficient and serve customers better. It also enables consumers to make better informed choices when deciding which product to purchase. However, there are also situations where the exchange of market information can be harmful for competition, in particular when companies use strategic information to coordinate their conduct on the market, leading to consumer harm. The new chapter on information exchange in the Horizontal Guidelines is the first Commission document to give comprehensive guidance on how to assess the compatibility of information

exchanges with EU competition law and it will therefore play a significant practical role for businesses and their legal advisors.

The information exchange chapter gives guidance regarding four key topics. Firstly, the chapter provides guidance on when information exchanges can fall within the scope of Article 101 TFEU. In particular, this section discusses the notion of a “concerted practice” in the context of information exchanges. Moreover, the chapter provides a clear definition of when information exchanges are considered to have an anti-competitive object, which is the case when competitors exchange individualised information regarding intended future prices or quantities. Exchanges of this type are the most efficient (cost-free) tool for coordination as they do not expose companies to the risk of losing market share during the period of attempted coordination. Companies are also unlikely to exchange such intentions for pro-competitive reasons. As regards the potential restrictive effects on competition to which information exchanges may give rise, the chapter explains that the main competition concerns relate to facilitating collusion. The chapter sets out the various factors that are relevant for the assessment and the interplay between these factors. A key question for the analysis is whether the data exchanged are “strategic” in nature. Only the exchange of strategic data (i.e. data that reduce strategic uncertainty in the market) can modify the characteristics of the relevant market in such a way that it becomes susceptible to collusion. Naturally the most strategic data relate to individualised prices and quantities, but depending on the nature of competition other types of data can also be strategic. Other relevant factors include assessing whether the data exchanged are public or non-public, whether the exchange takes place in public or in private, whether the exchanged data are aggregated or individualised, the age of the data, and the frequency of the exchange. Finally, the chapter also describes the types of efficiencies which exchanges of information may precipitate. Lastly, the chapter contains a number of practical examples to help businesses assess typical information exchange scenarios.

With a view to facilitating innovation in Europe, the Commission has considerably extended the scope of the **R&D BER**, which now not only covers R&D activities carried out jointly, but also so-called “paid-for research” agreements where one party merely finances the R&D activities carried out by the other party. In addition, the new Regulation gives parties more scope to jointly exploit the R&D results. Under the new regulation, for example, it is possible that only one party produces and distributes the products resulting from the joint R&D on the basis of an exclusive licence

by the other party. Moreover, the list of “hardcore restrictions” has been streamlined and it has been made clear that restrictions on active sales to territories not exclusively allocated to one party are considered hardcore and can therefore not benefit from the BER. It has furthermore been clarified that passive sales restrictions with regard to customers, and not only those with regard to territories, are also considered hardcore restrictions.

The scope of the **Specialisation** BER, which covers both specialisation and joint production agreements, has been slightly extended so that its benefit also applies to specialisation agreements where one of the parties to the agreement only partly ceases production. This enables a company that has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still avail of the Specialisation BER. The Specialisation BER also provides that, where the products concerned by a specialisation or joint production agreement are intermediary products which one or more of the parties use captively for the production of certain downstream products which they sell, the exemption is also conditional

upon a 20% market share threshold downstream. In such a case, looking only at the parties’ market position at the level of the intermediary product would fail to recognise the potential risk of closing off inputs for competitors at the level of the downstream products. Consequently, such a specialisation or joint production agreement will not benefit from the Specialisation BER, but will be subject to an individual assessment.

3. Conclusion

With the new EU competition rules on horizontal co-operation agreements, the Commission reaffirms its commitment to the path that it has been vigorously pursuing for more than a decade – an economics-based approach to competition law assessment. This does not mean less legal certainty for companies and their legal advisors. On the contrary, the new rules are based on solid economic principles that are predictable and therefore provide clear guidance to undertakings and their legal advisors.

Payment cards: Visa debit card fees go down

by Annamaria Marchi, Gabor Gal ⁽¹⁾

1. Background

Card payments represent about 35 % of all non-cash payments in the EU 27. It is estimated that businesses pay tens of billions of euros (25 billion in 2005) in fees per year to accept cards. The Commission has a long history of investigations and cases against card payment schemes and MasterCard and Visa in particular ⁽²⁾. For the most part, such cases have focused on so-called interchange fees. More effective competition in fees charged for payment card transactions is highly desirable as it is likely to lead to considerable benefits for merchants and consumers. It could also have important consequences more generally, as inefficiencies in the payments market, particularly for cross-border payments, are perceived to be one of the major barriers to cross-border trade, particularly over the internet.

The latest case has resulted in a Commission decision ⁽³⁾ to make commitments offered by Visa Europe binding. This will bring immediate benefits for merchants and consumers, based on the so-called Merchant Indifference Test, and will help ensure competition in the market. Below, we describe the background, details and importance of the commitments.

1.1. What are interchange fees?

In many payment card systems, each sales transaction at a merchant using a payment card is subject to a so-called interchange fee paid by the merchant's

bank (the 'acquiring bank') to the cardholder's bank (the 'issuing bank').

When a customer uses a payment card to buy from a merchant, the merchant receives from its bank (the acquiring bank) the sales price less a 'merchant service charge' (often referred to as 'MSC'), the fee a merchant pays to its bank for accepting the card as a means of payment for that transaction. A large part of the merchant service charge is determined by the interchange fee. The customer's bank (the issuing bank), in turn, pays the acquiring bank the sales price minus the interchange fee and the sales price is deducted from the customer's bank account. The interchange fee is therefore a fee that is ultimately charged to the merchant (through a reduction in the price paid), who generally passes the costs on to consumers in the price of the good or service.

Normally, interchange fees are either agreed *bilaterally*, between one issuing and one acquiring bank, or *multilaterally*, by a number of issuing/acquiring banks or by means of a decision binding all banks participating in a payment card scheme. The industry refers to these multilateral interchange fees as 'MIFs'. A MIF can be a percentage, a flat fee or a combined fee (percentage plus flat fee).

1.2 What are the Commission's concerns as regards interchange fees?

In the MasterCard Decision ⁽⁴⁾ the Commission established that multilaterally agreed interchange fees restrict price competition between merchants' banks by artificially inflating the basis on which these banks set the fees. It was found that such arrangements indirectly lead to increased retail prices, while there was no evidence that such fees generated efficiencies passed on to consumers. In the aftermath of the decision, in April 2009, undertakings offered by MasterCard to significantly reduce interchange fees for cross border transactions with consumer cards were accepted ⁽⁵⁾.

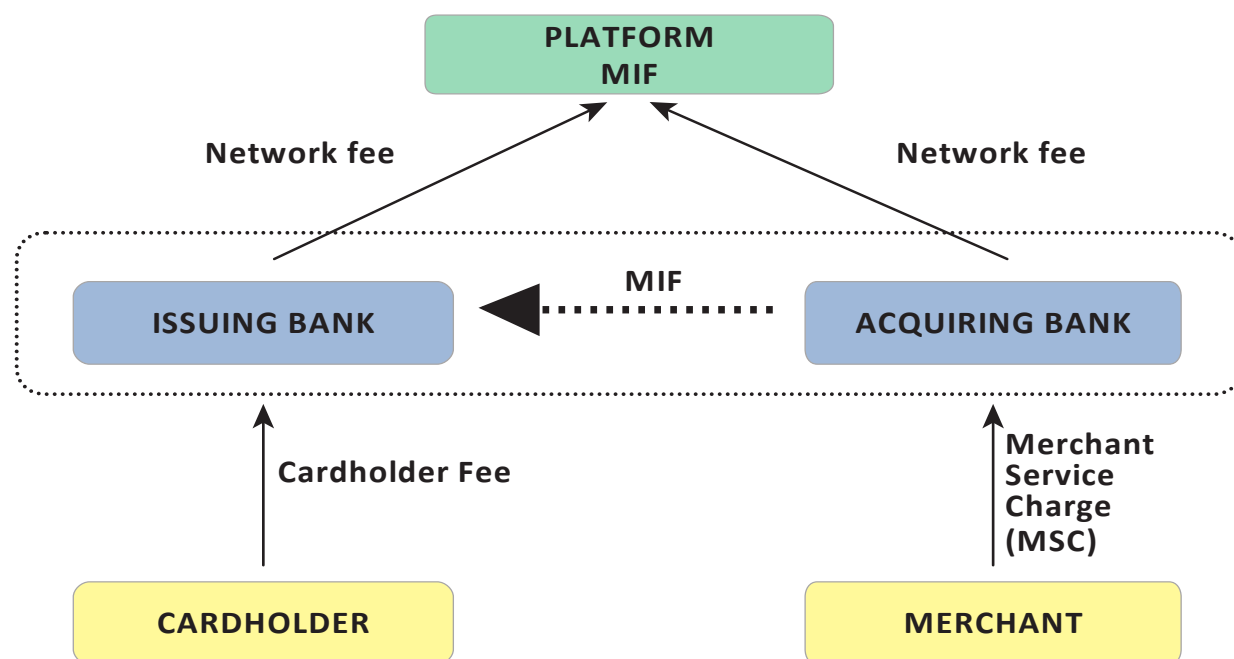
⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ In 2002, the Commission adopted a decision to grant Visa an exemption under Article 81(3)EC (now 101(3)TFEU) for its multilateral interchange fees (MIFs) until the end of 2007, provided that the average level of the MIFs was reduced (Case COMP/29.373 — Visa International — Multilateral Interchange Fee). This decision was followed by a sector inquiry into retail banking between 2005 and 2007, which also investigated interchange fees, and by the adoption of a further decision regarding MasterCard's interchange fees in 2007 (see footnote 4 below). In parallel with the MasterCard case, a new investigation into Visa's network rules started in 2006, leading to the adoption of the latest decision discussed in this article.

⁽³⁾ Commission Decision C(2010) 8760 final of 8 December 2010 in Case COMP/39.398 — VISA MIF. The Decision was adopted under Article 9 of Council Regulation (EC) No 1/2003.

⁽⁴⁾ Commission Decision C(2007) 6474 of 19 December 2007 in Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, and COMP/38.580 — Commercial Cards, OJ C264/8, 6.11.2009. The Decision is currently under appeal before the General Court. The full non-confidential version of the Decision is available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_1.pdf.

⁽⁵⁾ See IP/09/515 available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/515&format=HTML&aged=0&language=EN&guiLanguage=en>.



In parallel with the investigations into MasterCard's interchange fees, and after the expiry of its earlier decision exempting MIFs subject to certain conditions until 2007⁽⁶⁾, the Commission formally opened proceedings against Visa's MIFs in March 2008.

The Statement of Objections sent to Visa Europe in April 2009⁽⁷⁾ outlined the Commission's concerns that the MIFs set by Visa Europe may have as their object and as their effect an appreciable restriction of competition in the acquiring markets to the detriment of merchants and their customers. The MIFs appear to inflate the basis on which acquirers set the MSCs by creating a significant cost element common to all acquirers. They determine a minimum level for the merchant service charge below which merchants are unable to negotiate a price. According to the Commission's preliminary view, Visa Europe's MIFs are not objectively necessary.

The potential restrictive effect of the MIFs appears to be enhanced by the implementation of other system rules and practices such as the 'honour all cards

rule' (HACR)⁽⁸⁾, 'no surcharge rule'⁽⁹⁾, blending of merchant fees,⁽¹⁰⁾ and application of different MIFs to cross-border as opposed to domestic acquirers⁽¹¹⁾.

Furthermore, according to the Statement of Objections, the MIFs do not meet the requirements for an exception under Article 101(3) of the Treaty on the Functioning of the EU (TFEU) by producing efficiencies with a fair share of the resulting benefit being passed on to consumers. However, MIFs are not deemed to be illegal as such. They can be

⁽⁸⁾ This rule is a Visa system rule that obliges merchants who have contracted to accept payments with a particular brand of card (e.g., VISA, VISA Electron or V PAY) to accept all properly presented cards of this brand without discrimination and regardless of the identity of the issuing bank or the type of card within that brand.

⁽⁹⁾ This rule prevented merchants from adding surcharges to transactions with VISA, VISA Electron or VPAY payment cards.

⁽¹⁰⁾ 'Blending' is a practice whereby acquirers charge merchants the same MSC for the acceptance of different payment cards in the same payment scheme (e.g. VISA debit and credit) or for the acceptance of payment cards belonging to different payment card schemes (e.g. VISA and MasterCard credit cards).

⁽¹¹⁾ Cross-border acquiring is where acquirers recruit merchants resident in a different EEA country than the one where the acquirer is established. Visa Europe's rules impose the application of Intra-Regional MIF on cross-border acquired transactions even if they constitute domestic transactions, unless domestic MIFs have been registered with Visa Europe. In the Statement of Objections, the voluntary registration of domestic MIFs with Visa Europe was considered to increase the anti-competitive effect of Intra-Regional MIFs, since it puts cross-border acquirers at a disadvantage vis-à-vis their domestic competitors in cases where unregistered domestic MIFs are lower than the Intra-Regional MIFs.

⁽⁶⁾ Commission Decision 2002/914/EC of 24 July 2002 in Case COMP/29.373 — Visa International — Multilateral Interchange Fee, OJ L318, 22.11.2002.

⁽⁷⁾ See MEMO/09/151 available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/151&format=HTML&aged=0&language=EN&guiLanguage=en>.

considered compatible with EU antitrust rules if evidence is presented that they have positive effects on innovation and efficiency and do indeed allow a fair share of these benefits to be passed on to consumers in accordance with Article 101(3) TFEU.

2. The Commitment Decision on Debit MIFs

2.1. Visa Europe's Commitments on Debit MIFs

Following the Statement of Objections, Visa Europe submitted, in April 2010, a commitment proposal for its consumer debit card MIFs and other network rules. This was subsequently amended in response to the observations received by the Commission in the course of the market test. In December 2010, the Commission adopted a decision making the commitments binding on Visa Europe.

The commitments provide that the weighted average MIF for consumer immediate debit cards will be capped at 0.2 %. The cap will apply to cross-border transactions in the EEA and to domestic transactions in those EEA countries where the MIFs are set directly by Visa Europe or default to the cross-border MIFs⁽¹²⁾. When the commitments were proposed, the countries concerned were Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, and Sweden⁽¹³⁾. In those countries, debit card MIFs will be reduced on average by about 60 %, with the cross-border reduction amounting to about 30 %. This will help to cut the costs borne by merchants for card acceptance and is expected to lead to a decrease in retail prices charged to final consumers.

During the lifetime of the commitments the list of countries covered by the commitments could change, for example if Visa becomes responsible for setting the MIFs in other EEA countries.

In addition to the MIF reduction, Visa Europe undertook to maintain and further develop measures to enhance the transparency of its payment scheme. In particular, Visa Europe will ensure that merchants are offered and charged 'unblended' rates

(that is to say different rates according to the different types of Visa cards), will make commercial cards visibly and electronically identifiable⁽¹⁴⁾, and will allow merchants to freely choose to accept VISA, VISA Electron or VPAY cards (separate HACR for different types of VISA cards) and to have different acquirers for handling transactions with each type of payment card within the Visa Europe system and/or competing schemes. Furthermore, Visa Europe will publish all MIFs applicable in the EEA in a way that makes it easy for merchants to find the rates on Visa Europe's website, and will make compulsory the registration of all MIF rates by Visa Europe's members and the application of the registered rates to cross-border issued and acquired transactions.

The commitments were offered for a period of four years. A trustee appointed by Visa Europe and approved by the Commission will monitor Visa Europe's compliance with the commitments.

2.2. The Commission's assessment of the commitments

The weighted average MIF rate proposed by Visa Europe was assessed under the Merchant Indifference Methodology (MIT), a methodology developed in the economic literature⁽¹⁵⁾ to identify appropriate interchange fees.

The MIT seeks to establish the MIF at a level where merchants have no preference whether a payment is made with a payment card or with cash. It therefore ensures that the fees borne by merchants for card acceptance on average do not exceed the benefits that merchants derive from accepting payment cards rather than alternative means of payment, in particular cash. Such benefits may arise, for instance, from avoiding cash handling and transport or when the time needed for a payment card transaction is shorter than for a cash transaction or when the costs associated with card fraud are lower than those in the case of cash fraud.

Setting payment card MIFs at a level at which merchants are indifferent as to whether a payment is made by card or in cash also prevents card schemes

⁽¹²⁾ In most EEA countries, domestic MIFs rates are set by the national association of Visa Europe's member banks. However, in the countries of the Visa Europe Territory where the national banking associations have not agreed on specific domestic MIFs, the cross-border MIFs apply by default. .

⁽¹³⁾ In Luxembourg and the Netherlands, only Visa prepaid cards are currently issued. Prepaid cards are payment cards on which a certain amount of money is loaded in advance. They differ from other debit cards, which are normally linked to the cardholder's bank account.

⁽¹⁴⁾ Commercial cards are payment cards that are issued to public- or private-sector companies and self-employed individuals as well as their employees for use solely as a means of payment for business expenses. These cards normally carry a higher MIF than consumer cards. It is therefore important for merchants to be able to recognise this type of card in order to be able to steer their customers to the use of cheaper means of means of payment.

⁽¹⁵⁾ In particular, the article jointly authored by Professor Jean-Charles Rochet and Jean Tirole, 'Must Take Cards and the Tourist Test', No 496, IDEI Working Papers from Institut d'Économie Industrielle (IDEI), Toulouse, http://idei.fr/doc/wp/2008/must_take_cards.pdf.

from exploiting the reluctance of merchants to turn down card payments due to the fear that their competitors would steal their customers if they refuse to accept card payments. Furthermore, to the extent that the MIFs are passed on to cardholders by the issuers, they ensure that cardholders make efficient choices between payment instruments, thereby allowing for the promotion of efficient means of payment.

In order to assess whether the weighted average MIF rate of 0.2 % for debit card transactions complies with the MIT, the costs to merchants of accepting payments in cash were compared to costs of accepting payments by card. The Commission based its calculations on four studies published by the central banks of the Netherlands, Belgium and Sweden, comparing the costs of cards with the costs of cash⁽¹⁶⁾. On the basis of those data, it was concluded that the MIF rate offered by Visa Europe is in line with the MIT. If the MIF rate were higher, merchants would not receive any net benefit from any efficiencies resulting from cards. At the same time, the commitments only cap the MIF rates and do not prevent Visa Europe from introducing lower rates.

It has to be underlined that the commitments provide that the MIFs may be recalculated in line with the MIT should make reliable information regarding the costs of cards as compared to the costs of cash become available. The Competition Directorate-General will commission a study to collect further data on the costs of different means of payment.

The transparency measures envisaged by the commitments will also increase merchants' awareness of the costs of the different types of Visa card, allowing them to negotiate more effectively with acquiring banks. Merchants will also be able to make informed choices about the types of cards that they wish to accept and to steer consumers towards the use of more efficient means of payment. These commitments are therefore particularly important in the light of the Payment Services Directive, which allows merchants to offer rebates in order to incentivise the use of efficient means of payment and prohibits any limitation on surcharging

unless a Member State opts out from this prohibition⁽¹⁷⁾. Furthermore, the measures introduced by Visa Europe are expected to increase competition between acquiring banks and remove the obstacles to cross-border acquiring caused by the application of different rates to local and cross-border acquirers. These measures therefore represent an important complement to the MIF reductions that will be brought about by the commitments.

In the light of these considerations and the benefits to merchants and consumers, the Commission concluded that the commitments offered by Visa Europe are suitable to address the concerns raised by the Commission in its Statement of Objections without being disproportionate. The commitments were therefore made binding on Visa Europe under an Article 9 Decision, which brought the investigation into Visa Europe's debit MIFs to an end.

The commitments do not cover Visa Europe's MIFs for consumer credit cards, which will continue to be investigated by the Commission. Concluding the proceedings on the basis of the commitments is also without prejudice to the right of the Commission to initiate or continue proceedings against other Visa network rules, such as the HACR, the rules governing cross-border acquiring, Visa Europe's MIFs for commercial card transactions, or the Inter-Regional MIFs⁽¹⁸⁾.

Visa Europe's commitments are in line with the undertakings announced by MasterCard in April 2009 to comply with the prohibition decision of December 2007. MasterCard undertook to calculate its weighted average cross-border MIFs in accordance with the MIT. As a result, credit card MIFs were capped at 0.30 % and debit card MIFs at 0.20 %. MasterCard also undertook to implement a number of transparency measures similar to those in Visa Europe's commitments. Although MasterCard's undertakings also cover credit card MIFs, they only apply to cross-border transactions, unlike Visa Europe's commitments, which also apply to domestic MIFs in nine EEA countries.

⁽¹⁶⁾ De Nederlandsche Bank, 'Betalen Kost Geld', March 2004 (with a summary published under the title 'The cost of payments' in the DNB Quarterly Bulletin); data from this study were also used in Brits, H and C Winder, 'Payments are no free lunch', De Nederlandsche Bank Occasional Studies Vol. 3, No 2, 2005. Banque Nationale de Belgique, 'Couts, Avantages et Inconvénients des Différents Moyens de Paiement', December 2005. Bergman, M, Guibourg, G, and Segendorf, B, 'The Costs of Paying — Private and Social Costs of Cash and Card Payments', Riksbank Research Paper Series No 112, 2007. EIM, 'Het toonbankbetalingsverkeer in Nederland', 2007.

⁽¹⁷⁾ See Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, which provides that '[t]he payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. However, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments.'

⁽¹⁸⁾ Inter-Regional MIFs are interchange fees set by Visa International and/or Visa Inc. that apply, by default, to inter-regional transactions, that is to say transactions made with a card issued outside the Visa Europe Territory at merchants' outlets located in the EEA.

2.3. A 'Partial' Commitment Decision

This is the first time that Commission has adopted a 'partial' commitment decision, bringing the proceedings to an end insofar as debit card MIFs are concerned, while leaving open the investigation into the MIFs applicable to credit card transactions. The negotiations on a possible settlement with Visa Europe concerned the MIFs for both debit and credit card transactions. However, agreement could not be reached on the appropriate methodology for calculating the MIFs for credit card transactions.

The adoption of a 'partial' commitment decision ensures that the divergences between the Commission and Visa Europe on credit card MIFs will not prevent merchants and consumers from immediately benefiting from the considerable reduction in debit card MIFs and from the increased transparency and competition in the market that the commitments will bring about.

3. The wider context

The Commission's action on collectively agreed inter-bank fees is particularly important given that certain national debit card schemes, which generally apply lower or even no collectively agreed inter-bank fees, may withdraw from the market in view of the investment needed to comply with the

Single Euro Payments Area (SEPA)⁽¹⁹⁾ standards. Such national schemes are often being replaced by the two international schemes (Maestro and V-Pay/Visa Electron)⁽²⁰⁾. The continued existence of high inter-bank fees in countries not covered by the commitments may constitute a barrier to potential new entrants. Card issuing banks are likely to be reluctant to issue cards that do not generate the revenues from inter-bank fees they have been receiving so far. In addition, the continued existence of high inter-bank fees may make banks less interested in investing in innovation that may lead to more cost-effective payment solutions (with lower fees), for instance in the field of online payments.

Emerging innovative technological payment solutions (either online or mobile) and SEPA have the potential to transform the ways we use non-cash payment methods in Europe. But to achieve these benefits effective competition is essential, not only to ensure that the benefits are passed on to consumers but also to ensure a level playing field without unnecessary barriers to new entrants. Therefore, at such a crucial stage in the development of the payments market, it is all the more important that the Commission and national competition authorities actively enforce the competition rules and regulators ensure that the regulatory framework promotes competition.

⁽¹⁹⁾ SEPA (Single Euro Payments Area) is an initiative launched by the European banking industry to create a fully integrated market for retail payment services in the euro area, with no distinction between cross-border and national payments in euros. For card payments, a framework — that is to say, a set of high-level principles and rules — has been defined. It will be implemented by individual card schemes with the aim of establishing an integrated SEPA market where card-holders can make payments in euros abroad with the same ease and convenience as they do in their home countries. This may lead to the replacement of the various national schemes with international schemes that already cover all the euro countries, to alliances between national schemes and international schemes with a view to covering the entire euro area, and to the emergence of new pan-euro payment schemes in the market.

⁽²⁰⁾ This has happened for instance in the Netherlands and in Finland.

Strategic underinvestment and gas network foreclosure – the ENI case ⁽¹⁾

by Frank Maier-Rigaud ⁽²⁾, Federica Manca ⁽³⁾ and Ulrich von Koppenfels ⁽⁴⁾

Introduction

On 29 September 2010, the Commission adopted a commitment decision addressed to ENI Spa (ENI) under Article 9 of Regulation 1/2003. With this decision, the Commission made binding on ENI the commitments it had offered to address the Commission's preliminary concerns regarding potential abuse of its dominant position in the market for gas transportation services. ⁽⁵⁾

The Commission's competition case concerning ENI's suspected abuse of a dominant position on the market for the transport of gas to Italy has its origin in the Commission's inquiry into the gas sector between 2005 and 2007. In the Final Sector Inquiry Report ⁽⁶⁾, the *insufficient unbundling of networks from the competitive parts of the gas sector (downstream supply)* was described as leading to a *systemic conflict of interest*. This structural conflict of interest, also at the heart of the ENI case, was identified as distorting incentives on the network segment (for instance for giving access to capacity or investing in additional capacity) due to substantial adverse supply-side interests of the same vertically integrated undertaking.

The competition concerns in the ENI case follow this logic and relate to practices resulting in possible anti-competitive foreclosure of competitors in the gas

supply markets in Italy, by limiting access to transport capacity. In particular, ENI's refusal to supply transport capacity to third-party shippers, to allow them to import gas into Italy, evidently arises from the inherent conflict of interest resulting from the vertical integration of ENI, dominant in both the transport business and the supply of gas on downstream markets. In order to resolve the conflict of interest and address these concerns, ENI committed to divest its shares in the three companies operating the relevant international transport pipelines, TAG, TENP and Transigas, which bring gas to Italy from Russia (TAG) and northern Europe (the TENP/Transigas system). This structural divestment will ensure that third-party requests to access the gas pipelines will be dealt with by an *independent entity unconnected* to ENI.

The decision of 29 September 2010 is noteworthy, as the commitments entered into by ENI consist of a structural divestiture of its international transportation activities to import gas to Italy. The rationale for this decision is to tackle competition problems on those pipelines that play a crucial role in creating a competitive single European gas market. The implementation of the commitments will bring about a substantial change in this sector, and will lay the foundations for more competition in the downstream supply markets.

This article provides an overview of the facts of the case and the Commission's competition concerns, and explains how these concerns are addressed by the structural remedies made binding by the Commission's decision.

The facts

ENI is an Italian state-controlled company active at multiple levels in the production, transportation and supply chain in the energy sector, predominantly natural gas and oil. ⁽⁷⁾

In April 2007, the Commission opened an *ex-officio* case ⁽⁸⁾ to investigate ENI's conduct in the operation and management of its international gas transmission networks, in particular with respect to the TAG, TENP and Transigas pipelines, which together account for more than 50 % of gas im-

⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors. The authors would like to thank Jasmin Battista, Giuseppina Bitondo, Walter Tretton and Eleonora Wåktare, who all contributed to the ENI case. For comments and suggestions on a previous version of this article we would like to thank Carlo Toffolon.

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⁽⁴⁾ European Commission, DG Competition, Unit 02, Antitrust and Merger Case Support, formerly Unit B-1, Energy and Environment Antitrust.

⁽⁵⁾ See press release IP/10/1197, 29.09.2010. A full non-confidential version of the decision can be found at: http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=1_39315.

⁽⁶⁾ Communication from the Commission: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) (COM(2006) 851 final).

⁽⁷⁾ ENI is a vertically integrated gas company, with activities in the production and import of gas, in the gas transmission and storage businesses, and in the downstream gas distribution business.

⁽⁸⁾ Case COMP/39.315 — ENI.

ports into Italy. Following almost three years of investigation, starting with surprise inspections carried out at the premises of ENI and its subsidiaries active in the transport of gas, the Commission came to the view that ENI may have infringed Article 102 of the Treaty on the Functioning of the European Union (TFEU) through its *constructive refusal* to supply transportation capacity. This assessment was communicated to ENI in a statement of objections issued in March 2009.

Relevant markets: gas network system as an essential facility

Italy is a net importer of natural gas from both EU and non-EU countries.⁽⁹⁾ The transport of natural gas to Italy is a distinct activity and instrumental in downstream activities for the wholesale and retail supply of gas.⁽¹⁰⁾ ENI was able to effectively control or influence, either by means of its ownership rights or by its rights to transportation capacity, the use of the infrastructures for the import of gas to Italy.⁽¹¹⁾ On the demand side, shippers willing to serve consumers in the downstream gas markets need to have access to viable transportation capacity. From a *consumer perspective*, it does not matter from where the gas originates, as long as there is a viable transportation route between origin and destination. On the supply side, there were no alternative routes to the ENI-controlled infrastructures that could be considered interchangeable or substitutable for shippers in terms of their characteristics, prices and effective use during the investigation period (2001-2008). Therefore, all of ENI's gas transport infrastructures may be considered indispensable, since access to ENI's transport system was

objectively necessary to import gas and compete in the gas supply markets in Italy. Third-party infrastructures were, and still are, insufficient to exert effective competitive pressure,⁽¹²⁾ and duplicating the existing infrastructure was, and still is, unreasonably difficult.⁽¹³⁾

On this basis, the conclusion reached was that ENI's import infrastructures constitute a unique system that could be considered in its entirety as an essential facility⁽¹⁴⁾ and that ENI's dominance in the provision and use of this essential facility (the market for gas transportation, i.e. the overall system of infrastructures used to transport gas to Italy) could not be challenged within the foreseeable future.⁽¹⁵⁾

In addition, ENI was found to hold a dominant position on the downstream gas supply markets in Italy.⁽¹⁶⁾ ENI also maintains a significant portfolio of long-term gas import contracts and remains a gas producer in its own right in Italy and abroad.⁽¹⁷⁾

⁽⁹⁾ The share of imports in national consumption has increased in the past ten years to over 80 %, see annual reports of the national regulator *Autorità per l'Energia e il Gas* (AEEG) from 2000 to 2010.

⁽¹⁰⁾ See e.g. cases IV/493 — *Tractebel/Distrigas II*, paragraph 27 et seq.; COMP/M.3410 — *Total/Gaz de France*, paragraphs 15-16; COMP/M.3696 — *E.ON/MOL*, paragraph 97.

⁽¹¹⁾ The infrastructures are: the Trans-Mediterranean and Trans-Tunisian pipelines (TTPC/TMPC), which in 2007 carried imports of Algerian gas to Italy accounting for about 25 % of national consumption; the Greenstream pipeline, for importing Libyan gas to Italy, accounting for 10 % of the gas consumed in Italy; the TENP/Transitgas pipelines, owned jointly with E.ON Ruhrgas (TENP) and Swissgas (Transitgas), carrying gas from Northern Europe through Germany (TENP) and Switzerland (Transitgas) and accounting for about 17 % of national consumption; the TAG pipeline, owned jointly with OMV, which imports Russian gas through Austria to meet about 27 % of Italian demand; the Slovenian pipeline, carrying marginal volumes of Russian gas via Slovenia (less than 1 %); and the Panigaglia LNG (liquefied natural gas) Terminal, accounting for around 3 % of the gas consumed in the country.

⁽¹²⁾ Only in 2009 did some limited new infrastructure become operational: namely the offshore LNG Terminal Rovigo (owned by Edison) with a capacity of 8 bcm (less than 10 % of national consumption).

⁽¹³⁾ There are technical, legal and economic obstacles making it impossible, or at least unreasonably difficult, for would-be importers to duplicate ENI's transport infrastructure system (i.e. to create an infrastructure system capable of providing volumes comparable to ENI's or, at the very least, volumes sufficient to exert an effective competitive constraint on ENI), alone or in cooperation with other users. See Case C-7/97 Bronner [1998] ECR I-7791, paragraphs 44 and 46; see also, in the different context of products covered by intellectual property rights, Case C-418/01 IMS Health [2004] ECR I-5039, paragraph 29.

⁽¹⁴⁾ Since gas infrastructures are considered to have the character of a natural monopoly, the EU has imposed obligations to allow third-party access to existing networks (see Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC and the previous Gas Directives from 2003 and 1998 – 'the Third Gas Directive', OJ L 211, 14.8.2009, p. 94, as well as the Communication from the Commission to the Council and the European Parliament, SEC (2005)1448, of 15 November 2005).

⁽¹⁵⁾ As said before, ENI's dominance is based on its ownership of import routes to Italy and its rights to this transport infrastructure. ENI has exclusive or joint control over the TSOs operating all pipelines and the Panigaglia LNG Terminal, and holds significant capacity/use rights to those infrastructures.

⁽¹⁶⁾ The statement of objections set out evidence of ENI's dominant position in the wholesale gas supply market and in the retail markets for gas supply to power plants and (large) industrial customers.

⁽¹⁷⁾ ENI's share of domestic production was around 85 % in 2008 while imports ranged between 60-70 % (see *Autorità per l'energia elettrica e il gas* [AEEG], Annual Report, July 2008, p. 120). Furthermore, ENI holds interests in exploration, production and operation, as well as in the transport of natural gas from Libya to Italy.

There are high entry barriers in the downstream gas supply markets due to difficulties in international gas procurement and existing bottlenecks in import capacity, combined with declining national production and difficulties with access to storage.⁽¹⁸⁾ The relatively limited transport capacities available to suppliers other than ENI translate into equally low market shares on the downstream gas supply markets. The Commission concluded that ENI's competitors in the downstream supply gas markets in Italy neither have the ability nor the economic incentives to exercise an effective competitive pressure on ENI. This is because they lack a sufficient degree of access to independent gas imports or domestic production, so their dependence on ENI's sales renders them more likely to align their prices.⁽¹⁹⁾

The practices

The 'theory of harm' set out in the statement of objections is that ENI may have intentionally operated and managed the TAG, TENP and Transigas pipelines in such a way as to limit gas inflows into Italy. Specifically, ENI refused to grant access to its available transport capacity (*capacity hoarding*), granted access in a less attractive form (*capacity degradation*), and strategically limited investment in new capacity on its network (*strategic underinvestment*). This conduct took place at least during the period 2000-2008, despite a steady and significant demand for transport capacity from third parties to import gas to Italy on these international pipelines.

The Court of Justice has held that refusal by an undertaking holding a dominant position in a given market to supply services to a rival undertaking competing in a neighbouring market, where these services are indispensable for the rival to pursue its business and to the extent that the conduct in question is likely to eliminate all competition on the part of that rival, constitutes an infringement of Article 102 TFEU, unless the refusal is objectively justified.⁽²⁰⁾ The same is true for access granted to competitors on terms less favourable than those granted

to the dominant undertaking's own business unit active in the same market ('constructive refusal to supply').

Capacity hoarding

The Commission's investigation showed that demand from third parties, both short- and long-term, largely exceeded the capacities offered. This led to *rejection* of third parties' transmission requests by ENI without objective justification. The Commission investigated whether some transportation capacity was indeed available on ENI's pipelines but not effectively offered on the market. In order to do so, the Commission requested, for the period 2001-2007, extensive data from ENI and the transmission system operators (TSOs) for the three pipelines concerned in order to establish hourly capacity utilisation rates. Based on this analysis, the Commission took the view that ENI may have hoarded available capacity that could have been profitably offered to third parties. In order to assess the likelihood of anti-competitive conduct by ENI, it is worth comparing the capacity available to third parties with ENI's capacity rights and utilisation. It was acknowledged that ENI had capacity rights of no less than 80 %⁽²¹⁾ while third-party competitors realistically could only hope to obtain on average less than 3-10 % of the available capacity on the pipeline.

In addition, the investigation gave rise to further concerns, namely that ENI may have understated its technically available capacity. As a result, the scarce transport capacity may have been managed in a manner that prevented many competitors from gaining sufficient and viable access to it.

Capacity degradation

The Commission further gathered evidence indicating that, even when capacity on the pipelines was offered, ENI made it more difficult to purchase and less valuable to third parties by various means (*capacity degradation*).

One practice was to delay allocation of available capacity: i.e. by organising sequential sales of capacity so as to engender expectations of scarcity. Another method was to offer capacity on a short-term basis (monthly allocations) rather than on a long-term basis (yearly allocations). Further, ENI may have organised auctions on complementary pipelines (such as TENP and Transigas) in an uncoordinated way, i.e. capacity was offered on a standalone basis

⁽¹⁸⁾ Recently, the Italian antitrust authority (Autorità garante per la concorrenza e il mercato, AGCM) conducted a sector enquiry into the gas storage system in Italy (decision No 19925 28/05/2009) together with the national regulator (AEEG). The main finding is that storage has been systematically 'rationed' as upgrades have been too conservative. Other barriers are regulatory in scope.

⁽¹⁹⁾ ENI sells gas to suppliers active in the Italian downstream gas markets, not only in the wholesale market in Italy (ENI's sales to competitors are around 25 %) but also directly at the Italian borders (6 % of gas imported is ENI gas sold directly at the border). Furthermore, though accounting for slightly less than 10 %, ENI has long-term capacity contracts with some competitors for Libyan gas transported via the Greenstream pipeline.

⁽²⁰⁾ See ECJ judgment of 26 November 1998, Case C-7/97, *Bronner* [1998] ECR I-7791, paragraph 38.

⁽²¹⁾ Some of the capacity rights are available to stakeholders in the joint ventures (OMV in the case of TAG, E.ON Ruhrgas in the case of TENP and Swissgas in the case of Transigas).

on each stretch of the network, whereas the value for a shipper wanting to import gas to Italy derives from access to the entire system, rendering capacity on individual stretches of the pipeline useless. Occasionally, ENI may also have offered capacity in an interruptible form⁽²²⁾ when it could have offered firm capacity. Finally, ENI may have imposed limitations on the amount of lots individual shippers could bid for.

The Commission took the view that all those practices would have reduced the value of capacity for ENI's competitors by making it more difficult for them to organise and plan their operations (from procurement of upstream gas to the contract with downstream clients) and rendering capacity less accessible by pushing up its price.

Strategic underinvestment

The statement of objections also raised concerns with respect to ENI's investment decisions whether or not to expand existing transport capacity on its pipelines. Indeed, gas flows can be reduced not only by hoarding or degrading capacity, but also by limiting expansion.

There is evidence that ENI may have refrained from investing in capacity expansion that would have allowed it to respond to requests from third parties.⁽²³⁾ Rather, ENI's decisions to enhance transport capacity over recent years have mainly addressed its own new long-term contractual commitments, with the aim of ensuring that transport capacity to Italy (and as a consequence gas supply in Italy) does not become too abundant. This was despite the fact that ENI itself acknowledged not only that the existing pipeline capacity might be insufficient to satisfy the growing demand for gas in Italy but also that it had an obligation as a holder of an essential facility⁽²⁴⁾ to provide third-party access and to give proper consideration to capacity

expansion that third parties could duplicate only at greater cost, if at all.⁽²⁵⁾

Concrete evidence substantiated the Commission's concern that the absence of additional investment in transportation capacity was not driven by a lack of profitability, but rather by ENI's aim of keeping tight control over transport capacity and thereby ultimately the quantity of available gas on the downstream market. Direct allocation of additional capacity to third parties would have indeed boosted competition on the downstream markets and jeopardised ENI's downstream margins.⁽²⁶⁾

The Commission took the view that, in the situation of scarce capacity that characterised the period under investigation, capacity enhancements were legally and technically feasible and also likely to be profitable from a TSO point of view. Legally, ENI was entitled to initiate the investments needed to enhance capacity on all pipelines. Technically, an existing pipeline system can always be expanded at a lower cost than a greenfield project of the same size, and this would also have been economically viable not least in view of substantial long-term capacity demands from shippers. Furthermore, even from a regulatory point of view, the investment cost could most likely have been recovered even under *ex-ante* tariff regulation.⁽²⁷⁾ ENI also neither estimated capacity demands, for instance via an '*open season*' pro-

⁽²⁵⁾ In this context, it is noteworthy that the mere fact that current capacities are fully used by an essential facility holder is not sufficient to exclude an abuse under Article 102 TFEU (see e.g. Commission Decision of 20.11.1974, OJ L 117, 1/9; Sea-Link, 21.12.1993, OJ L 15/18; Decision of 21 December 1993 — Port of Rødby, OJ L 55, 26.02.1994, page 52; Frankfurt Airport, 14.1.1998, OJ L 72, 11.03.1998, page 30). In such situations, a dominant essential facility holder is obliged to take all possible measures to remove the constraints imposed by the lack of capacity and to organise its business in a manner that makes a maximum amount of capacity available.

⁽²⁶⁾ In its Report of 11 June 2008 to the Prime Minister regarding action to be taken in order to promote competition and enhance the economy (*AS453 — Considerazioni e proposte per una regolazione proconcorrenziale dei mercati a sostegno della crescita economica*), the AGCM pointed out that in the absence of investment in new import infrastructure and storage facilities, the share of gas flowing independently from ENI had not increased between 2000 and 2008, with a negative impact on the wholesale market in Italy in terms of market concentration and competition.

⁽²⁷⁾ The TENP pipeline had not yet been made subject to *ex-ante* tariff regulation by the German regulator at the time of the investigation, since a request by ENI for exemption from such regulation was still pending. The Transitgas pipeline is not subject to tariff regulation under Swiss law. The TAG pipeline has been subject to regulated third-party access (rTPA) only since 2006. An obligation on TSOs to carry out '*capacity enhancements corresponding to need in accordance with the approved long-term planning of the balancing zone leader*' was also introduced. Network tariffs for cross-border transports must be based on the principles of non-discrimination and cost-orientation.

⁽²²⁾ Interruptible capacity is more limited in scope, as the transmission system operator is entitled not to provide (i.e. to interrupt) the transportation service under certain circumstances.

⁽²³⁾ Documents show that different expansion projects were studied and that additional capacity would have been necessary to satisfy the significant and credible long-term capacity demand of third-party shippers on ENI's international pipelines.

⁽²⁴⁾ The internal document in question referred to the expansion of the TTPC pipeline. .

cedure, nor did it explore the willingness of third parties to commit financially to an expansion project. On the contrary, it did not even follow up specific co-financing offers made by some shippers.

Having said that, ENI's long-term capacity management decisions were also not objectively justified in the light of both the First and the Second Gas Directives, under which gas TSOs had a special obligation to carry out commercially viable investment necessary to meet capacity demands.⁽²⁸⁾

Rationale of the conduct

Access to ENI's international network to transport gas into Italy is crucial for suppliers to effectively compete in the downstream gas markets in the country, where ENI continues to be a dominant company. However, due to the market caps on gas inflows imposed by Italian law on ENI⁽²⁹⁾, limiting its possibility to expand in terms of market share in reaction to price competition, ENI's strategy consisted of maintaining and securing its supply margins by preventing the development of effective competition in the downstream markets. Indeed, any incentive for ENI, as a transport operator, to increase the profits of its transport business by expanding the infrastructure to accommodate third party requests would have been more than outweighed by the negative repercussions of the additional influx of gas into Italy on the profitability of its own gas supply business downstream.

To protect its profits downstream, ENI retained control over the transport routes, by embarking upon a strategy of deliberately keeping capacity *tight* in order to limit third parties' access to import infrastructures and therefore foreclose downstream gas supply markets.

The Commission considered that *capacity boarding, capacity degradation* and *strategic limiting of investment in*

additional capacity were all forms of behaviour ultimately aimed at reducing the amount of gas flowing into Italy. By implementing this operation and management strategy, ENI engaged in a systematic and constructive refusal to supply. Such behaviour may have undermined, specifically on the TENP/Transitgas and TAG pipelines, the opportunities for ENI's competitors to independently supply gas to Italy, and restricted their ability and incentives to effectively compete downstream to the detriment of competition and ultimately final customers in those markets.

The structural remedies: paving the way for more competition

To address the Commission's concerns, ENI offered to divest its current shareholdings in companies connected with international gas transmission pipelines (TENP, Transitgas and TAG) to a suitable purchaser approved by the Commission that is *independent* of and *unconnected* to ENI and does not raise *prima facie* competition concerns.⁽³⁰⁾ With respect to TAG, the commitments stipulated that the purchaser should be Cassa Depositi e Prestiti (CDP), an Italian state-controlled bank, or another public entity directly or indirectly controlled by the Italian government. ENI also undertook not to prolong or renew any transport contract or enter into any new transport contract for the pipelines at stake.⁽³¹⁾

In response to the market test notice published on 5 March 2010 under Article 27(4) of Regulation 1/2003, the Commission received a significant number of responses from interested third parties representing different kinds of market participants. Most respondents welcomed the commitments as necessary for improving competition on the market for gas transmission.

The Commission took the view that the commitments are *sufficient* to address the concerns identified in the statement of objections, i.e. the constructive

⁽²⁸⁾ Article 7(1) of the First Gas Directive (Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998) and Article 8(1)(a) of the Second Gas Directive (quoted) require each transmission system operator to 'operate, maintain and develop under economic conditions secure, reliable and efficient' transmission facilities. The Third Gas Directive made this even more explicit, as Article 13(2) states that each 'transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity'. Recital 6 of the Third Gas Directive goes even further by stating that 'Without effective separation of networks from activities of production and supply (effective unbundling), there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.'

⁽²⁹⁾ Under Legislative Decree 164/2000, during the period 2002-2010 no operator was allowed, directly or by way of affiliated companies, to import or produce more than 75 % of annual domestic gas consumption. This market share cap was progressively reduced by 2 percentage points each year down to a limit of 61 % at the end of the period.

⁽³⁰⁾ In other words, ENI committed to divest its stakes in the transmission system operators (the TSOs), and if applicable in the companies holding shares in the TSOs. In particular, ENI will divest its shares in Eni Gas Transport GmbH (100 %), which is the co-owner of the pipeline TENP (49 %), jointly owned with E.ON Ruhrgas, and its entire participation in Eni Gas Transport Deutschland S.p.A. (100 %), the TSO for ENI's share of the pipeline; its participation in Transitgas AG (46 %), which is the owner of the Transitgas pipeline, jointly owned with Swissgas, and its entire participation in Eni Gas Transport International SA (100 %), the TSO for ENI's share of the infrastructure; and its participation in Trans Austria Gasleitung GmbH (89 %), which is the TSO for the TAG infrastructure, jointly owned with OMV.

⁽³¹⁾ ENI will not be excluded from participating on those pipelines in future auctions and/or other public allocation procedures, but only for reverse flow transportation capacity towards markets other than the Italian market.

refusal to grant access to transport capacity needed for third shippers to compete downstream. The commitments are *appropriate*, as the competition concerns arose from ENI's interests as a vertically integrated undertaking, active in both the provision of gas transportation services and gas supply in Italy. In particular, in the light of ENI's incentive to protect its downstream supply margins at the cost of comparably lower additional transportation revenues, only a structural separation of ENI from its transport business would eliminate those incentives.

The commitments are also *proportionate* as there is no equally effective alternative to the divestment of ENI's shares in its transport network businesses. Without structural unbundling, the incentives of a vertically integrated gas company, such as ENI, to continue to pursue the alleged anti-competitive behaviour would not be removed, with the risk that the alleged infringement could not be effectively brought to an end.⁽³²⁾

As a result, the Commission decided to declare the commitments binding upon ENI and to end its investigation.

With this decision, the Commission aims to restore proper incentives for managing and operating gas transport networks in Europe. In order to ensure this, *suitable buyers* for the TENP and Transit-gas pipelines should be operators independent from and unconnected to ENI without any activity on the downstream markets, and thus willing to run the transportation business with a view to maximising this activity. As far as the TAG pipeline is concerned, the Commission has already verified in its decision that CDP fulfils these criteria. In particular, CDP can be regarded as independent from and unconnected to ENI. Indeed, under the Commission's practice, notably in the field of merger control, two undertakings owned by the same state are to be considered independent of and unconnected with each other if they are part of different economic units with independent power of decision, and the Commission was satisfied that this was the case for CDP.⁽³³⁾

Conclusion

This case is the ninth major decision since the 2007 Energy Sector Inquiry, which had shown that consumers and businesses were losing out due to a lack of competition on electricity and gas markets.

In contrast to these other major cases, the ENI case presents some peculiarities, both in terms of procedure and outcome.

With regard to procedure, the commitment decision in this case was not based on a 'preliminary assessment' as provided for in Article 9 of Regulation 1/2003 but followed an in-depth investigation and the issuing of a statement of objections detailing the theory of harm and the available evidence.

In contrast to the commitments accepted in the other recent decisions concerning gas operators, such as E.ON gas⁽³⁴⁾ in Germany or GDF Suez⁽³⁵⁾ in France, where capacity releases were offered to meet competition concerns, the ENI decision relies on structural separation. Arguments have been presented according to which ENI could also have released capacities in similar magnitudes as in the case of E.ON or GDF Suez. What these commentators overlook is the fact that the theory of harm in the ENI case differs substantially from the other anti-trust cases mentioned above. In the present case, the Commission's investigation showed that ENI had designed a constructive refusal-to-supply strategy consisting of capacity hoarding, capacity degradation and strategic underinvestment in capacity aimed at limiting the total amount of gas flowing into Italy. In contrast, in the other gas cases referred to above, the long-term reservations by dominant shippers were found to be problematic, and not the way transmission networks were operated by a vertically integrated TSO as in the ENI case. In these cases, the foreclosure was not motivated by the aim of maintaining a tight control on total gas inflows but rather by the goal of limiting the number of competitors active in the downstream market at given gas inflow levels.

However, the ENI case follows a line started with the E.ON electricity and RWE cases,⁽³⁶⁾ in that a competition problem created by the conflict of interest inherent in vertically integrated energy incumbents owning and operating the electricity or gas transmission network while also supplying electricity or gas in their network area is solved through a structural remedy that separates ownership of the critical infrastructure from the supplier. The Commission's decision in the ENI case demonstrates that structural remedies are a legitimate and proportionate means to solve competition problems created by anti-competitive conduct.

⁽³²⁾ According to the case law, compliance with the principle of proportionality requires the Commission only to ascertain that the commitments address the problems it has identified and expressed to the undertakings; see Case C-441/07 P Commission v Alrosa Company Ltd.

⁽³³⁾ According to the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C95, 16.4.2008, p. 1), points 52 and 53.

⁽³⁴⁾ Commission Decision of 4 May 2010 in case COMP/39.317 — *E.ON gas foreclosure*.

⁽³⁵⁾ Commission Decision of 3 December 2009 in case COMP/39.316 — *Gaz de France*.

⁽³⁶⁾ Commission Decision of 26 November 2008 in cases COMP/39.388 — *German Electricity Wholesale Market* and COMP/39.389 — *German Electricity Balancing Market*; Commission Decision of 18 March 2008 in case COMP/39.402 — *RWE gas foreclosure*.

SEPA Direct Debit (SDD) at the crossroads of competition enforcement and regulation

by Dominique Forest ⁽¹⁾

1. Introduction

The Commission has recently adopted a proposal for a Regulation to promote the transition to SEPA credit transfer and direct debit schemes ⁽²⁾. The proposal includes a provision regarding the use of so-called Multilateral Interchange Fees (MIFs, or collectively agreed inter-bank fees) in direct debit systems. The provision prohibits the use of such MIFs for direct debit transactions on a *per transaction* basis. For rejected transactions, however, their use is allowed under certain conditions. The proposal marks an important step in the ongoing dialogue between the Commission and the banking industry on the permissibility under EU competition rules of collective financing mechanisms for payment schemes. Once adopted, this element of the Regulation will bring clarity and predictability to joint financing mechanisms for SEPA Direct Debit. Similar to regulatory approaches ⁽³⁾ in other network industries requiring legal certainty to ensure sufficient adherence to a network, such an ‘ex ante’ regulatory instrument can provide an efficient solution ensuring across-the-board clarity compared to ‘ex post’, case-by-case antitrust enforcement action — which can always be taken if needed ⁽⁴⁾.

2. SEPA Direct Debit in context

The **Single Euro Payments Area** (SEPA), a self-regulatory project, aims to create an integrated euro payments area, to ensure that cross-border payments are as easy and efficient as domestic payments. Once implemented, it will cover credit transfers, payment cards and direct debit. The SEPA Direct Debit system is intended to create a pan-European

direct debit system enabling cross-border direct debit transactions for the first time. With SEPA Direct Debit (SDD), bank customers will for the first time be able to arrange to pay recurring bills, such as rent, mortgage, energy bills, telephone bills and magazine subscriptions, by direct debit to and from bank accounts in any of the 32 European countries participating in SEPA, instead of just within their own country as at present.

SEPA, while primarily devised by the banking industry itself, is strongly supported by the European Central Bank (ECB) and the Commission. However, SEPA also involves cooperation between — potential — competitors. This is why it has been closely scrutinised under competition rules. One of the competition issues identified by the Commission and the national competition authorities (NCAs) was the collective inter-bank charging mechanism, i.e. the Multilateral Interchange Fee (MIF ⁽⁵⁾), envisaged by the banking industry for SDD.

3. The transitional ‘business model’ for SEPA Direct Debit

The Commission raised doubts about the rationale of applying a collectively agreed inter-bank fee (‘Multilateral Interchange Fee’ or MIF) on a *per transaction* basis for SDD. There was extensive informal dialogue between the Commission and the European Payments Council (EPC), with the ECB as an observer, about the methodology underlying the proposed MIF and its justification. The Commission pointed to likely restrictive effects similar to those of multilateral interchange fees for payment cards as identified in the MasterCard Decision ⁽⁶⁾. In the course of the dialogue, the EPC did not succeed in convincing the Commission that a per-transaction MIF was justified on the basis of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU).

The lack of certainty about the compatibility of the proposed financing mechanism with the competition

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

⁽²⁾ See http://ec.europa.eu/internal_market/payments/sepa/cc_en.htm.

⁽³⁾ See for instance Regulation (EC) No 717/2007 of 27 June 2007, amended by Regulation (EC) No 544/2009, on roaming on public mobile telephone networks and the ‘Third package’ Regulations 714/2009 and 715/2009 on access to electricity and gas networks.

⁽⁴⁾ Recital 14 of the proposal for a Regulation on SEPA end dates specifies that ‘[...] In any event, rules should be without prejudice to the application of Articles 101 and 102 of the TFEU to multilateral interchange fees for R-transactions.’

⁽⁵⁾ An interchange fee is a transaction fee payable between the payment services providers involved in a transaction. A multilateral interchange fee is an interchange fee set by a collective agreement between payment service providers.

⁽⁶⁾ See Press Release IP/07/1959, 19.12.2007, and the provisional version of the decision <http://ec.europa.eu/competition/antitrust/cases/decisions/34579/remarks.pdf>.

rules meant that some banking communities were reluctant to sign up to SDD. To encourage migration to SDD, a transitional regime for national and cross-border MIFs per transaction was therefore introduced for SDD in Regulation 924/2009 on cross-border payments in euros⁽⁷⁾. During a transitional period, national MIFs could be maintained at their existing level (without prejudice to national competition authorities taking action on this issue) and a cross-border MIF of 8.8 cents could be applied.

As to the business model to be applied after October 2012, the new Regulation stated that ‘industry can make use of the legal security provided during this transitional period to develop and agree a common, long-term business model for the operation of the SEPA direct debit’.

4. From guidance on SEPA Direct Debit MIFs ...

With legal certainty for the interim period in sight, the long-term ‘business model’ appeared to be the key element determining the EPC’s decision to launch the system. To provide guidance in this respect, the Commission and the ECB issued a joint statement on 24 March 2009, in which they expressed the preliminary view that *‘there appears to be no clear and convincing reason for per transaction MIFs to exist after 31.10.2012’*, the deadline set by Regulation 924/2009.⁽⁸⁾ A MIF for transactions that cannot be properly executed or have been reclaimed by a payment service provider (R-transactions) could nevertheless be envisaged, provided it is economically justified, enhances efficiency and benefits users. Following this statement, the EPC plenary decided to launch the SEPA Direct Debit system on 1 November 2009.

Under the Commission and ECB’s joint statement, further guidance was scheduled for November 2009, *‘provided that the Commission will have received the necessary contributions by relevant market actors’*. In addition, recital 11 of Regulation 924/2009 referred to *‘a sustained dialogue with the banking industry and on the basis of contributions made by the relevant market actors’*. However, the industry was unable to agree on the mandate and composition of an EPC working group for this purpose at the EPC Plenary of 24 June 2009. Although, in the SEPA Roadmap,⁽⁹⁾ the industry was again encouraged to undertake ‘the design and implementation of long-term business models for SDD in line with competition rules’, this did not lead to the desired result.

Nevertheless, in order to provide clarification to facilitate adherence to the SDD, the Commission published a working document⁽¹⁰⁾ on 3 November 2009 aiming to provide further guidance. It built upon and complemented the guidance already issued in the joint statement. A public consultation was launched subsequently.

The working document focuses on general principles governing MIF arrangements — applying on a *per transaction* basis and concerning R-transactions — and alternative payment arrangements (e.g. bilateral). It outlines the principles applied in analysing such systems in the context of direct debit markets to determine whether they comply with competition law, and in particular with Article 101(3) TFEU.

The working document took the view that collectively agreed inter-bank fees applied *per transaction* restrict competition between payees’ banks by setting a floor under the fees they charge to their corporate customers. Companies will pass on these inflated fees to their customers in their own bills. Since the consumers’ own banks — the payer banks — receive MIF revenues from the payee banks, they might not charge the consumers, who think they receive the service for free. This is however not true as the costs are passed on by the billing company to their customers, the final consumers. Consumers have no way of knowing that they are paying indirectly via the company receiving the direct debit or how much they are paying.

Even if consumers knew that their bank is charging for the transaction and the level of the fee, the collective character of the fees prevents them from looking around and switching to a bank that will charge less for retail banking operations. Since the fee is agreed collectively by payers’ banks and payees’ banks, companies whose bank is being charged this ‘minimum floor’ are also prevented from looking for other banks to negotiate lower fees.

Business models using MIFs for R-transactions as a financing mechanism for the whole scheme tend to have equivalent effects to per-transaction business models, as MIFs are then set at a (high) level such that payer banks can recover all or a large part of their direct debit costs. Payer banks will then pass on these costs to the payee (with a mark-up), who might request reimbursement (with an additional mark-up) from the payer if the latter is deemed responsible for the R-transaction. Such MIFs are likely to restrict competition between payee banks, resulting in inflated costs to the whole system. They may introduce additional inefficiencies, as overcharging for the occurrence of errors may create excessive disincentives to avoid them in the system.

⁽⁷⁾ Cf. Articles 6 and 7 as well as recital 11 of Regulation (EC) No 924/2009.

⁽⁸⁾ http://ec.europa.eu/competition/sectors/financial_services/sepa_direct_debit.pdf.

⁽⁹⁾ Commission Communication, ‘Completing SEPA: a Roadmap for 2009-2012’, COM(2009) 471 10.9.2009.

⁽¹⁰⁾ http://ec.europa.eu/competition/sectors/financial_services/SEPA_working_document_en.pdf.

Furthermore, although in ‘two-sided markets’ a MIF might be considered necessary under Article 101(3) TFEU to create an incentive for the use of efficient means of payment, direct debit payments are typically made on a regular basis as part of long-term agreements. Companies have a clear interest and effective means to directly encourage consumers to use direct debit, in particular by granting rebates, which decrease the price for the final consumer in a transparent way. It is therefore neither necessary nor efficient for banks to apply a collective, indirect mechanism to encourage the use of direct debit.

However, the Commission working document acknowledged that under certain conditions, collectively agreed fees for R-transactions may benefit a scheme and its users, for instance if they lead to a more efficient allocation of responsibilities for R-transactions within the system.

5. ... to the SEPA End Dates Regulation

Although the deadline for achieving a fully fledged SEPA was initially 2010, the use of SEPA standards for credit transfers and direct debits has remained low and mostly limited to cross-border payments. Faced with this, the Commission adopted a proposal for a Regulation to promote the transition to SEPA credit transfer and direct debit schemes (the End Dates Regulation⁽¹¹⁾) on 16 December 2010. The proposal also provides greater clarity and predictability regarding collective agreements

on financing mechanisms for SEPA Direct Debit (Article 6)⁽¹²⁾.

Article 6 is in line with the earlier guidance under competition rules, as it clarifies that, after the transitional period, per-transaction MIFs will not be allowed for national and cross-border direct debits. The impact assessment⁽¹³⁾ accompanying the proposal confirmed the above analysis of per-transaction MIFs as it found that, on the basis of the public data available, there does *not* appear to be any correlation between the existence of (high) MIFs and (low) consumer fees for using direct debit. There does not appear to be a link either between the existence (and level) of a per-transaction MIF and bank account fees for consumers. In addition, only six Member States have a per-transaction MIF, with a clear trend towards a decreasing or zero MIF⁽¹⁴⁾.

Article 6 also defines the general conditions for interchange fees for R-transactions, in line with the working document. To preserve a level playing field between payment providers and to avoid circumvention of the ban on per-transaction MIFs,

⁽¹²⁾ Article 6 ‘Interchange fees for direct debit transactions’:

1. *Without prejudice to paragraph 2, no multilateral interchange fee per direct debit transaction or other agreed remuneration with an equivalent object or effect shall apply to direct debit transactions.*

2. *For direct debit transactions which cannot be properly executed by a payment service provider because the payment order is rejected, refused, returned or reversed (R-transactions) carried out by payment service providers, a multilateral interchange fee may be applied provided that the following conditions are complied with:*

(a) *the arrangement shall be aimed at efficiently allocating costs to the party that has caused the R-transaction, while taking into account the existence of transaction costs and the aim of consumer protection*

(b) *the fees shall be strictly cost based*

(c) *the level of the fees shall not exceed the actual costs of handling an R-transaction by the most cost-efficient comparable payment service provider that is a representative party to the multilateral arrangement in terms of volume of transactions and nature of services*

(d) *the application of the fees in accordance with points (a), (b) and (c) shall prevent the payment service providers to charge additional fees related to the costs covered by these interchange fees to their respective payment service users*

(e) *there must be no practical and economically viable alternative to the collective agreement which would lead to an equally or more efficient handling of R-transactions at equal or lower cost to consumers.*

For the purposes of the first subparagraph, only cost categories directly and unequivocally relevant to the handling of the R-transaction shall be considered in the calculation of the R-transaction fees. These costs shall be precisely determined. The breakdown of the amount of the costs, including separate identification of each of its components, shall be part of the collective agreement to allow for easy verification and monitoring.

3. *Paragraph 1 and the conditions set out in points (a), (b) and (d) of paragraph 2 shall apply also to bilateral and unilateral arrangements that have an equivalent object or effect.’*

⁽¹³⁾ Impact Assessment, Commission Staff Working Document SEC(2010) 1584 of 16.12.2010.

⁽¹⁴⁾ The only countries where per-transaction MIFs apply are Portugal, Italy, France, Sweden, Belgium and Spain with very low MIFs of 2 and 3 cents respectively for the last two.

⁽¹¹⁾ Proposal for a Regulation establishing technical requirements for credit transfers and direct debits in euros and amending Regulation (EC) No 924/2009.

all forms of interchange fees for R-transactions (multilateral, bilateral and unilateral) are covered. They are allowed if indispensable for the efficient handling of R-transactions and if appropriately designed. They should be strictly cost-based to incentivise efficient use of the scheme and not to finance its whole operation, thus preventing scheme participants from being overcharged relative to the actual costs they incur by causing an R-transaction. Also, such fees should efficiently allocate costs to the entity responsible while not causing users to be charged additionally for the costs already covered by the fees. Finally, they should not exceed the costs of the most efficient comparable — and representative — operator. Failing this, incentives for providers to improve the efficiency of their operations would be limited, as they could align in part or in full with the costs of less efficient providers.

The implementation of these objective criteria would be subject to monitoring and sanctions by the authorities in charge of monitoring the implementation of this provision at national and

European level and by the relevant courts and judicial bodies.

6. Conclusions and way forward

The creation of a level playing field through a regulation setting clear rules for financing models for SDD compatible with competition rules responds to calls from parts of the industry for greater ‘clarity’ and predictability, against the background of the threat of competition law enforcement. In addition, one single, harmonised Regulation is likely to avoid the need for competition enforcement proceedings and court procedures at national and/or European level to assess MIFs for SDD in the light of the guidance provided. While ‘ex ante’ regulatory tools have already been used by the Commission in other network industries, this is a new step in tackling the competition concerns raised by collectively agreed inter-bank fees. More than ever, regulation, self-regulation and competition law enforcement have complementary roles to play.

Main developments between 1 September and 31 December 2010

by John Gatti ⁽¹⁾

1. Introduction

Between 1 September and 31 December 2010 the Commission received 102 notifications. This represents an increase of 12% over the previous four months and an increase of 21% over the corresponding period of 2009. The Commission adopted a total of 94 first phase decisions, of which 92 were unconditional clearances. Decisions adopted under the simplified procedure accounted for 55 of the first phase total (i.e. 59%). Two first phase decisions were cleared conditionally. Two decisions were adopted under Article 8 after an in-depth second phase investigation. Both were conditional. One decision was taken under Article 4(4) to refer a case with a Union dimension back to a Member State, while Member States accepted 12 requests from parties for cases to be referred to the Commission and refused none under Article 4(5). Lastly, the Commission referred one case to Member States following requests made under Article 9. Part of the case was referred to one Member State and the remainder to another. The Commission also refused one request under Article 9. Two cases were abandoned in Phase I and one case, SCJ/Sara Lee, in Phase II.

2. Summaries of decisions taken in the period

2.1 Summaries of decisions taken under Article 6(2)

Reckitt Benckiser/SSL International

On 25 October 2010 the European Commission approved the proposed acquisition of SSL International by Reckitt Benckiser, both of which are British pharmaceutical companies. The decision is conditional upon Reckitt Benckiser's commitments to divest SSL's brands for mouth pain relief products in the UK and Ireland, where the merged entity would have had a very strong market position.

Reckitt Benckiser manufactures and sells household products, health and personal care products, food and pharmaceutical products, including over

the counter pharmaceutical products ("OTC"). SSL is primarily active in the personal care sector with *Durex* products and *Scholl* foot care and footwear. It also manufactures and sells OTC pharmaceutical products.

The Commission investigated a number of OTC pharmaceutical products in which both parties are active in the UK and Ireland, namely analgesics, mouth pain relief products, throat preparations, upper gastrointestinal treatments and antipruritics. The Commission also examined the parties' activities in manufacturing OTC pharmaceuticals for third parties.

The Commission found that the proposed transaction, as initially notified, would have raised competition concerns with regard to products for the treatment of mouth ulcers and other mouth infections or pains in adults and infants in the UK, as well as the same mouth pain relief products for adults in Ireland. This is due to the high combined market shares of the parties, the strength of their brands on these markets and the fact that Reckitt Benckiser's and SSL's products are close competitors.

To address the Commission's concerns, Reckitt Benckiser offered to divest SSL's brands for adult and infant mouth pain relief products in the UK and SSL's brand for adult mouth pain relief products in Ireland.

In view of these commitments, and following a market test, the Commission concluded that the transaction would no longer give rise to competition concerns and it authorised the concentration.

BASF/Cognis

On 30 November the European Commission cleared the proposed acquisition of Cognis by BASF, both of which are German chemical companies. The decision is conditional upon the divestment of activities in the sector of hydroxy monomers, a chemical product used in coatings and adhesives. The proposed transaction, as initially notified, would have created a very strong player in a market where concentration is already high. To address the Commission's concerns, BASF offered to divest activities in the sector in question.

BASF is the world's largest chemical company. It is mainly active in the supply of chemicals, crude oil and natural gas, including specialty chemicals,

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

plastics, performance products, functional solutions and agricultural solutions. Cognis is a supplier of specialty chemicals, nutritional ingredients and functional products.

The Commission's investigation revealed that the proposed transaction would not significantly alter the structure of the majority of the relevant markets, as a number of credible and significant competitors would continue to exercise a competitive constraint on the merged entity.

However, the Commission found that the proposed transaction, as initially notified, would have raised competition concerns in the market for hydroxy monomers, where the merged entity would have had a strong position in a market where the concentration level is already high. Hydroxy monomers are chemical products used in coatings and adhesives.

To resolve these competition concerns, BASF proposed to divest Cognis' entire hydroxy monomers production business, thus eliminating any overlap. BASF will also divest the multifunctional methacrylates and adducts businesses operating on the Hythe site. In addition, BASF will grant intellectual property rights that will allow the buyer to produce Polyalkylene Glycols (PAG) and PAG based lubricants, which are mainly used in industrial formulations and household products, exclusively for BASF for a transition period and thereafter in its own right.

In the light of these commitments, the Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The Commission's investigation showed that the divested businesses would be viable and that the commitments would resolve all of the competition concerns identified. The proposed operation was therefore approved.

2.2 Summaries of cases taken under Article 8

Unilever's/Sara Lee Household and Body Care business

The European Commission cleared the planned acquisition subject to conditions of the body and laundry care businesses of Sara Lee Corp of the US by the Anglo-Dutch consumer goods company Unilever on 17 November 2010. The Commission's in-depth investigation confirmed competition concerns in a number of deodorants markets. To remedy these concerns, the merging parties offered to divest Sara Lee's Sanex brand and related business in Europe.

Unilever supplies a wide range of branded consumer goods. In the personal care sector, where there were overlaps with Sara Lee, it is particularly strong in deodorants with its leading brands Axe, Dove and Rexona, which are present across Europe. Sara Lee supplies deodorants under the Sanex brand in a number of European countries. Its personal care business also includes other brands such as Radox, Duschdas, Badedas and Monsavon.

The Commission's in-depth investigation has shown that the merger would give Unilever a very strong leadership position in a number of deodorants markets by combining the parties' brands, in particular Sanex with Dove and Rexona. The Commission found that the merger, as initially notified, would raise competition concerns in Belgium, The Netherlands, Denmark, the United Kingdom, Ireland, Spain and Portugal, where it would remove an important competitive force and would have been likely to lead to price increases.

With a view to addressing the Commission's concerns, the merging parties made a commitment to divest Sara Lee's Sanex brand and related business in Europe. This is a clear and workable remedy, sufficient to restore competition in all markets where the Commission had concerns.

The Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The Commission's decision is conditional upon full compliance with the commitments.

Syngenta's / Monsanto's sunflower seed business

On 17 November 2010 the European Commission cleared the acquisition of the global sunflower seed business of the US company Monsanto by Syngenta, a Swiss company. The notified transaction combines two leading sunflower seed suppliers in Europe that have significant breeding activities. The decision is conditional upon the divestment of Monsanto's sunflower hybrids, commercialized or under official trial in Spain and Hungary, as well as the parental lines used in the creation of these hybrids or currently under development for the creation of hybrids for Spain and Hungary. The in-depth investigation confirmed the Commission's concerns with respect to the commercialization of sunflower seeds in Spain and Hungary, where the transaction would have removed a significant and innovative competitor to Syngenta, reinforcing the latter's market leader position. The transaction also raised concerns with regard to the activities of exchange and licensing of sunflower varieties, insofar as the merging parties would be in a position to

restrict the access of competitors to inputs necessary for the commercialization of sunflower seeds.

The proposed transaction combines two leading sunflower seed suppliers in Europe. Both are strong in the breeding and trading of new sunflower varieties (that is, sunflower hybrid seeds and parental lines) and in the commercialisation of sunflower hybrid seeds. Hybrids are the result of controlled pollination (as opposed to natural pollination by insects, birds or wind), through the breeding and crossing of parental lines. This ensures that all seeds descend from parents with known traits and have specific desired characteristics, such as disease-resistance or drought-resistance. Seed companies are constantly striving to develop new sunflower hybrid seeds that are more resistant and produce better yields. In order to do so, most companies exchange and license parental lines with other breeders (“trading of varieties”) with the aim of speeding up the long and complex breeding process. Sunflower hybrid seeds are then multiplied and sold to distributors and cooperatives (“commercialization of sunflower seeds”). Sunflower seeds are ultimately purchased and sown by farmers every year. Syngenta is also a significant producer of seed treatment products (fungicides and insecticides), which are applied to sunflower seeds in the early stage of their development to protect them from pests and diseases.

The Commission’s investigation showed that the transaction, as initially notified, would have resulted in high market shares combined with limited prospects of entry and expansion in both the Spanish and the Hungarian markets for the commercialization of sunflower hybrids. It would also have increased the ability and incentives for the merged entity to significantly reduce its activities in the exchange and licensing of sunflower varieties in the EU, leading in particular to a reduction in innovation, a foreclosure of competitors in the markets for the commercialization of sunflower seeds and ultimately to a reduction of choice of sunflower seed hybrids for customers. The investigation dispelled the initial concerns regarding the exclusion of competitors from the markets for sunflower seed treatment products.

With a view to removing the Commission’s concerns with regard to sunflower seeds, Syngenta offered to divest Monsanto’s hybrids commercialized in Hungary and in Spain in the last two years, as well as the hybrids that were already under official trial for registration in those countries. Additionally, Syngenta offered to divest Monsanto’s parental lines used to develop these hybrids, as well as the pipeline parental lines currently under development, with the aim of producing hybrids for the markets in Spain and Hungary. The commitments

include the right to use, cross, breed and license the offered parental lines, and to commercialize and license the resulting hybrids. The geographic scope of the rights to commercialize the hybrids varies according to whether the hybrid has already been commercialized, is already under official trials or will be the result of further crossing and breeding by the acquirer of the divested businesses. These rights may extend to Spain and/or Hungary, the EU or the EU plus Russia and the Ukraine or Turkey, which are the most significant European sunflower growing countries outside the EU. The extension of the rights to commercialize some types of hybrids to Russia, the Ukraine and Turkey was necessary, among other things, in order to fully ensure the long term viability of the divested businesses.

The scope of the remedy package thus ensures that the businesses to be divested can be run in a viable and sustainable manner and that the purchaser will be able to take over the competitive role played by Monsanto in the markets for the trading of sunflower varieties in the EU and for commercialisation of sunflower seeds in Spain and Hungary. The Commission therefore concluded that the commitments given were adequate to remedy its concerns and authorised the proposed transaction subject to full compliance with the commitments.

The transaction did not originally qualify for review under the EU Merger Regulation, as it did not meet the turnover thresholds. It was initially notified to the Spanish and Hungarian competition authorities, who subsequently requested the Commission to examine the transaction.

2.2 Summaries of cases taken under Article 9

ProSiebenSat.1/RTL/Joint Venture

On 24 September 2010 the European Commission referred the assessment of the joint venture between the German private broadcasters ProSiebenSat.1 and RTL to the competition authorities of Austria and Germany, at their request. The purpose of the joint venture is to create an internet platform on which consumers can watch repeats of television programmes in the seven days following the broadcast on free-to-air TV. After a preliminary investigation, the Commission found that the proposed transaction would affect competition in national online TV and advertising markets in Austria and Germany. These markets will now be examined by the Austrian and German competition authorities under national law.

RTL and ProSiebenSat.1 are the two most important private free-to-air broadcasting companies in Austria and Germany. RTL provides primarily

free-to-air TV and encompasses the TV-related activities of Bertelsmann, an international media group based in Germany. ProSiebenSat.1 is an international media company headquartered in Germany and primarily active in free-to-air TV. RTL and ProSiebenSat.1 hold significant viewer and advertising shares in linear TV in both Austria and Germany.

Austria and Germany requested the Commission to refer the parts of the planned joint venture concerning the Austrian and German national markets to their respective competition authorities, arguing that the transaction affects competition in their domestic markets.

The Commission's investigation confirmed that the proposed transaction would affect competition in the national markets for online "catch-up" TV and advertising in Austria and Germany. The Austrian and German competition authorities were well placed to investigate the effect of the transaction on their respective national markets.

The proposed transaction did not raise competition concerns in other EU Member States.

Crédit Agricole/ Cassa di Risparmio della Spezia/ Agences Intesa SanPaolo

On 10 November 2010 the European Commission approved the acquisition of the retail bank Cassa di Risparmio della Spezia SpA of Italy and a number of other retail bank branches of Intesa SanPaolo in Italy by Crédit Agricole of France, as

the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. It considered that there was no need for the matter to be examined by the Italian competition authority, which had asked for the case to be referred under Article 9 of the Merger Regulation.

Under the proposed transaction Crédit Agricole would acquire: (1) Cassa di Risparmio della Spezia SpA, an Italian bank which is currently indirectly controlled by Intesa SanPaolo SpA; and (2) a network of 96 branches belonging to Intesa SanPaolo SpA or undertakings within the same group (referred to collectively as the "Target"). Crédit Agricole is already active in retail banking services in Italy through a number of subsidiaries.

The two banking networks are complementary to a significant extent in terms of their geographic distribution. The Target's branches are mainly located in Northern and Central Italy, in particular in the regions of Liguria, Lombardy, Tuscany, as well as in Latium. The Target also has a small number of branches in Emilia Romagna and Veneto, whilst Crédit Agricole has a bigger presence in Emilia Romagna.

The Commission's investigation has shown that the acquisition will not raise any competition concerns, in particular because Crédit Agricole currently has only a relatively limited share of the retail banking market in Italy and the transaction will lead to only minor overlaps in certain regions or provinces.

Main developments between 1 September and 31 December 2010

by Alessandra Forzano and Alfredo Gómez Alvarez ⁽¹⁾

Policy developments

Following a public consultation on the State aid temporary rules established in response to the economic and financial crisis, the Commission believes there are still grounds for considering that the requirements for the application of Article 107(3)(b) have been fulfilled.

On 1 December 2010 the Commission adopted the Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis as well as the Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis. However, the continuous, timely availability of specific crisis aid measures must go hand in hand with a gradual disengagement from temporary extraordinary support. This approach has already started in the financial sector, with the tightening of conditions for new government guarantees from July 2010 through a fee increase and a closer scrutiny of the viability of heavy guarantee users. The new Communication requires that, as of 1 January 2011, every bank in the EU having recourse to State support in the form of capital or impaired asset measures will have to submit a restructuring plan. So far this was limited to distressed banks, i.e. banks that in particular received support of more than 2 % of their risk-weighted assets.

The prolonged Temporary Framework will maintain some measures facilitating access to finance, especially for SMEs. These include subsidised State guarantees and subsidised loans *inter alia* for green products. In these areas, the market is not yet able to meet small companies' financing needs entirely. The introduction of stricter conditions for those measures will facilitate a gradual return to normal State aid rules while limiting the impact of their prolonged application on competition. For example, under the new rules large firms are excluded from working capital loans and firms in difficulty can no longer benefit from the Framework.

The Commission also concluded that one of the measures introduced during the crisis should be made permanent and has modified the Risk Capital

Guidelines accordingly. This concerns the increase from € 1.5 million to € 2.5 million of the maximum equity or other finance that a Member State can invest in a start-up company. This is because private equity investors have moved towards less risky investments during the crisis, making access to finance difficult for start-ups especially in their early stages. The adapted guidelines will expire as planned at the end of 2013.

Finally, as companies are still finding it difficult to obtain adequate trade insurance coverage from private insurers in many sectors and Member States, the Commission also extended the procedural simplifications on short-term export credit insurance that were introduced by the Temporary Framework. This is valid until the end of 2011. At the same time the Commission prolonged the validity of its 1997 Communication on short-term export credit until 31 December 2012.

Cases adopted ⁽²⁾

Decisions taken under Article 106 TFEU: services of general economic interest

Preferential dispatch of indigenous coal plants in Spain

On 29 September 2010 the Commission authorised the compensation which Spain intends to grant to electricity generators to meet the costs of fulfilling a public service obligation, namely producing specific volumes of electricity out of indigenous coal. ⁽³⁾

The EU electricity liberalisation directives governing the functioning of the EU electricity market allow Member States to impose such public service obligations on electricity generators, for reasons of security of energy supply, consisting in the production of electricity from domestic fuel sources within a limit of 15 % of national electricity consumption.

In all, 10 power plants are concerned by the public service obligation. The Spanish authorities have given a firm commitment that under no circumstances will the scheme be prolonged beyond 31 December 2014.

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

⁽²⁾ This is only a selection of the cases adopted in the period under review.

⁽³⁾ N178/2009.

The Commission has ensured consistency between this measure and the Coal Regulation (as adopted on 10 December 2010 ⁽⁴⁾) which allows specific types of State aid to the coal industry under certain conditions.

Decisions taken under Article 107(3)(b) TFEU

Banking

Schemes

The Commission has extended a number of bank guarantee schemes for credit institutions in Ireland, Spain, Sweden and Poland. ⁽⁵⁾ The extended schemes are in line with the 2010 Communication on support measures for banks during the financial crisis.

Furthermore, the Commission approved the re-introduction of the Italian recapitalisation scheme and extended a number of recapitalisation schemes in Hungary and Poland, the Austrian support schemes for financial institutions and the liquidity scheme in Hungary, as well as a winding-up scheme in Denmark until 30 June 2011. ⁽⁶⁾ Moreover, the Commission authorised the transfer of the second tranche of assets to the Irish National Asset Management Agency (NAMA). ⁽⁷⁾

Hellenic Financial Stability Fund for credit institutions

On 3 September 2010 the Commission authorised a scheme for the recapitalisation of credit institutions in Greece by the Hellenic Financial Stability Fund (FSF). ⁽⁸⁾

Its capital, which amounts to € 10 billion, stems from the euro-area/IMF financial assistance to Greece. On 14 December 2011 the Commission prolonged its authorisation until 30 June 2011. ⁽⁹⁾ The Fund aims at safeguarding the stability of the Greek banking system when capital is not available through normal, generally private, sources. It can provide equity capital to credit institutions by acquiring preference shares and, under certain circumstances, common shares in respective banks. In the case of preference shares, the scheme requires a remuneration of 10 % of the shares and stipulates

several behavioural restrictions such as a dividend and a coupon ban. In principle all banks which benefit from the fund are required to present a restructuring plan to the Commission.

Ad hoc aid

WestLB

On 5 November 2010 the Commission extended its ongoing State aid investigation into WestLB after reaching the conclusion that the bank had received an estimated € 3.4 billion in State subsidies more than it was initially foreseen in the process of transferring its portfolio of impaired assets to a bad bank. ⁽¹⁰⁾

Before the Commission can approve the aid, further restructuring measures should be considered with a view to addressing the distortions of competition or, alternatively, its gradual reimbursement.

Restructuring aid for Parex Banka

On 15 September 2010 the Commission approved a thorough restructuring of Parex, ⁽¹¹⁾ Latvia's second biggest bank before the crisis.

The bank, which was partly nationalised in November 2008, benefited from State aid for a total of around 1.1 billion lats (1.6 billion €). Following the Commission's in-depth investigation into a first restructuring plan in July 2009, a new bank named Citadele banka was registered in June 2010 to which core and well-performing assets and operations as well as part of the State liquidity measures of Parex were transferred on 1 August 2010.

Under the restructuring plan Parex banka's commercial model as resumed by Citadele banka focuses on its core business in the Baltic countries, while discontinuing more risky lending and leasing in the Commonwealth of Independent States. By refocusing on its core activities and materially reducing the size of its total assets from 3.4 billion to around 1.5 billion lats, Citadele banka should return to profitability in 2011 and repay the State the liquidity support received. Until full repayment of the State liquidity support, the Commission has subjected Citadele banka to market presence caps in deposits and lending markets as well as an acquisition ban. These measures aim at limiting any distortion of competition caused by the aid.

⁽⁴⁾ Council Decision 2010/787/ of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines.

⁽⁵⁾ Ireland: N 347/2010 and N 487/2010; Spain: N 530/2010; Sweden: N 543/2010; Poland: N 533/2010.

⁽⁶⁾ Italy: N 425/2010; Hungary: N 535/2010 and N 356/2010; Poland: N 534/2010; Austria: SA.32018; Denmark: N 407/2010.

⁽⁷⁾ N 529/2010.

⁽⁸⁾ N 328/2010.

⁽⁹⁾ SA.31999.

⁽¹⁰⁾ C 40/09 (ex N 55/09).

⁽¹¹⁾ C 26/09.

Restructuring of CajaSur

On 8 November 2010 the Commission authorised aid for the restructuring of CajaSur.⁽¹²⁾

CajaSur provided retail banking services, mostly in the region of Andalucía, and came into financial difficulties as a result of its significant exposure to real-estate-related transactions. The Bank of Spain intervened in May 2010, placing it under the control of the Fund for Orderly Bank Restructuring (FROB), which provided CajaSur with two temporary rescue measures: a capital injection of € 800 million, and a liquidity line of € 1 500 million.

In July 2010 another Spanish savings bank (BBK), agreed to buy the banking business of CajaSur. Before the sale becomes effective, CajaSur must repay the capital injection to FROB. The liquidity measure, which was never used, will be terminated. As part of the sale, a guarantee for five years of approximately € 392 million on losses stemming from a € 5.54 billion portfolio of loans was granted by the FROB to the banking business bought by BBK.

The Commission considered that the liquidation of CajaSur and the sale of its banking business to BBK via an open and competitive tender procedure limited distortions of competition and ensured that the sold business became viable without continued State support.

Liquidation of Fionia Bank

On 25 October 2010 the Commission approved the Danish Government's measures for the liquidation of Fionia Bank.⁽¹³⁾

Fionia Bank was a regional, full-service bank based on the island of Funen and neighbouring islands in central Denmark.

At the beginning of 2009 the Danish Financial Supervisory Authority ordered Fionia Bank to increase its capital ratios. As the bank also had liquidity problems, it was put under State control and received a credit facility and a capital injection. These measures received temporary clearance from the Commission on 20 May 2009 pending the submission of a restructuring or liquidation plan.⁽¹⁴⁾ As the bank's problems worsened in line with negative market conditions, especially in the real estate sector, Denmark considered that controlled liquidation was the best option.

In August 2009, after an open, transparent and unconditional tender procedure, Denmark sold the main part of Fionia's business operations to

Nordea. The agreement involved the network of branches, including their staff. Fionia's high-risk assets were carved out and transferred to a newly established subsidiary of the Financial Stability Corporation (FSC), the State's bail-out fund, which serves as a winding-up vehicle. This included a loan portfolio of approximately € 1.4 billion that may be at least partly impaired. In order to meet regulatory requirements and for the purpose of liquidation, the FSC also capitalised this subsidiary, called Nova Bank Fyn, which also received the credit facility, since increased, in order to fill the funding deficit left by the transfer of certain parts of the bank to Nordea.

The Commission found that the liquidation plan ensures that distortions of competition are kept to a minimum. The Commission's approval of the State aid involved in the liquidation process covers the requirement that the pricing policy of Nova Bank Fyn will be designed to encourage customers to find more attractive alternatives as quickly as possible in order to limit the costs for the State to a strict minimum. Moreover, Nova Bank Fyn will not pursue any new activities but merely phase out ongoing operations. The Commission also concluded that Nordea had not received any State aid to buy Fionia since the sale price was in line with its market value.

Irish Banks

The Commission has authorised emergency measures for three Irish banks: Anglo Irish Bank, Allied Irish Bank and Irish Nationwide Building Society (INBS).

For Anglo Irish Bank, the Commission approved a recapitalisation of up to € 4.946 billion and a guarantee covering a number of off-balance sheet transactions.⁽¹⁵⁾ The Commission also approved a recapitalisation of € 2.7 billion of INBS.⁽¹⁶⁾ Finally, the Commission endorsed a recapitalisation of Allied Irish Bank covering its capital requirements until the end of 2010 and the capital requirements resulting from the Programme for Support agreed between the Irish authorities, the IMF and the EU.⁽¹⁷⁾ The Commission's approval of these emergency measures to help preserve financial stability in Ireland does not prejudice future decisions on restructuring (for Allied Irish Bank) or on orderly resolution (for Anglo Irish and INBS).

With regard to Allied Irish Bank, the final decision will depend on the Commission being satisfied that the bank will be commercially viable in the long term without further injections of taxpayers'

⁽¹²⁾ N 392/2010.

⁽¹³⁾ N 560/2009.

⁽¹⁴⁾ NN23/2009.

⁽¹⁵⁾ SA.32057.

⁽¹⁶⁾ NN 50/2010.

⁽¹⁷⁾ N 553/2010.

money, that there is a significant contribution to the restructuring costs from the bank's shareholders and subordinated debt holders, and that the bank will reduce its activities to offset the distortion of competition caused by the aid.

Real economy cases adopted under the Temporary Framework

Schemes

On 10 September 2010 the Commission authorised a Bulgarian aid scheme to help businesses deal with the current economic crisis.⁽¹⁸⁾ Aid of up to € 500 000 per firm could be granted until the end of 2010 to small- and medium-sized enterprises facing funding problems.

In line with the stricter conditions of the Temporary Framework adopted in December 2010, the Commission also extended until the end of 2011 certain Italian, Hungarian and German schemes allowing for limited amounts of aid,⁽¹⁹⁾ subsidised guarantees⁽²⁰⁾ and subsidised loans.⁽²¹⁾

Furthermore, the Commission extended its authorisations of the Danish, Finnish and German short-term export-credit insurance schemes and as well as the Hungarian export-credit insurance scheme for SMEs with limited export turnover.⁽²²⁾

Ad hoc aid

Péti Nitrogénművek

On 27 October the Commission concluded that part of the State support granted in 2009 to fertiliser producer Péti Nitrogénművek infringed EU State aid rules.⁽²³⁾

In January 2009 Hungary issued guarantees in favour of Nitrogénművek covering an investment loan of € 52 million and debt amounting to HUF 10 billion (around € 35 million), both provided by the State-owned Hungarian Development Bank MFB. In October 2008 Nitrogénművek had stopped production and the support package was aimed at re-launching the company's operations. Hungary did not notify these measures to the Commission. The Commission opened the formal investigation procedure on 29 April 2009 because it was not sure that the measures were in line with EU State aid rules.

⁽¹⁸⁾ N 333/2010.

⁽¹⁹⁾ Italy: SA.32036; Germany: SA.32031; Hungary: SA.32040.

⁽²⁰⁾ Italy: SA.32035; Germany: SA.32032.

⁽²¹⁾ Italy: SA.32039; Germany: SA.32030.

⁽²²⁾ Denmark: SA.32047; Finland: SA32075; Germany: SA.32033; Hungary: N483/2010.

⁽²³⁾ C14/2009.

In the light of the investigation, the Commission found that the measures confer a selective advantage to Nitrogénművek and therefore constitute State aid. However, as the company's difficulties were caused by the financial and economic downturn, it was entitled to receive aid under the Commission's Temporary Framework for State aid to business during the crisis.

As the remuneration paid by Nitrogénművek for the State financing package was too low, the Commission concluded that the measures comply only partly with the Temporary Framework. The difference between the remuneration that Nitrogénművek should have paid according to the Temporary Framework and the remuneration it actually paid to the Hungarian authorities must be repaid by the company.

Decisions adopted on the basis of Article 107(3)(a) and (c) TFEU

Regional aid

Fri-el Acerra

On 15 September 2010 the Commission decided that the regional investment aid of € 19.5 million that Italy intended to grant towards the takeover and conversion, by Fri-el Acerra S.r.l, of a closed thermoelectric power plant into a power plant fuelled by bioliquids is not compatible with EU State aid rules.⁽²⁴⁾

In July 2008 the Italian authorities notified an aid measure in favour of Fri-el Acerra S.r.l. In 2006 Fri-el had bought a disused thermoelectric power plant that used to belong to NGP in order to convert it into a bio-fuelled power plant, mostly from palm oil. The eligible expenses of the project amounted to € 80.6 million and the notified regional grant was € 19.5 million.

The Commission launched an in-depth investigation in March 2009 over concerns that the aid did not meet the criteria of the regional aid guidelines 2007-2013 contributing to the development of Campania (an area eligible for regional aid under Article 107(3)(a) TFEU). In particular, the Commission had doubts about the incentive effect of the aid, the takeover conditions of the closed thermoelectric power plant and the impact of the investment project on the development of the region. The in-depth investigation convinced the Commission that the takeover of the closed thermoelectric power plant was carried out under market conditions between independent parties and that the transfer

⁽²⁴⁾ C8/2009.

of the plant could be considered as an initial investment, in line with the regional aid guidelines.

However, the Commission found that the aid did not contribute to attracting new regional investment to Campania, because the investment project was launched in February 2006, long before the decision to grant the aid. The project is now finished and the bio-fuelled power plant has been operational since 2009.

Sovello 3

On 14 December 2010 the Commission authorised € 15.5 million of regional investment aid for the German company Sovello AG for the production of solar modules in Bitterfeld-Wolfen (Thalheim, Sachsen-Anhalt), Germany. ⁽²⁵⁾

Sovello already has two solar module production plants in Bitterfeld-Wolfen (Sovello1 and Sovello2), for which it received regional aid. The new investment covers the extension of the existing production site through the construction of a third plant (Sovello3) on adjacent land. The investment costs are € 147 million, while the aid amounts to € 15.5 million.

The Commission took into account aid granted to a previous investment project by Sovello and verified whether the notified aid was fully in line with the regional aid guidelines, in particular their thresholds regarding the market share and production capacity of beneficiaries of aid for large regional investment projects. The guidelines also provide for a progressive reduction of the regional aid ceiling for large projects, because these suffer less from typical regional handicaps than smaller projects do.

The Commission noted that Sovello's market shares on the world market for solar modules are well below 25 % before and after the investment. As the photovoltaic market has a double-digit growth rate, which is significantly higher than the EEA growth rate, the Commission concluded that the additional production capacity created by the project would not raise concerns. As these thresholds were not exceeded, the Commission concluded that the positive impact of the investment on regional development outweighed any distortion of competition.

R&D&I

Mapper

On 29 September 2010 the Commission authorised The Netherlands to grant € 15.6 million of soft loans and a direct grant of € 5.7 million to Mapper

Lithography B.V. for the development of 'E-beam lithography'. ⁽²⁶⁾

Mapper is a young medium-sized enterprise, a spin off from the Technical University Delft in 2000. It is developing so-called 'maskless parallel electron beam writing' (in short: 'E-beam') technology for use in lithography machines. Such machines image the circuit patterns of semi-conductor chips on silicon wafers and are the centrepieces of semiconductor manufacturing.

Current lithography still relies on photo masks for that purpose. The number of transistors that can be placed on an integrated circuit is expected to increase exponentially, doubling approximately every two years (so-called 'Moore's Law'). However, existing mask-based lithography will soon have reached its physical limits. Various technologies are currently being explored in order to overcome these limits. 'E-beam' involves the use of parallel electronic beams that 'write' the blueprint of a chip on a wafer (without any mask). If successful, Mapper will help tackle a new miniaturisation challenge.

The Commission found that Mapper would not have been able to carry out this risky R&D project had it not received the aid. The aid addresses a specific failure of the private venture capital market and is limited to the necessary minimum. The impact on competition is limited, given that E-beam technology as such is currently not available and that Mapper is a new entrant on the market. The Commission further established that Mapper's project is in line with European priorities, such as those defined by the European Union's R&D Framework Programmes, the ENIAC Joint Technology Initiative and the EUREKA programmes.

GoBiGas

On 14 December 2010 the Commission authorised the support that Sweden intends to grant to the Gothenburg Biofuels Gasification (GoBiGas) research and development (R&D) project to develop a pre-commercial demonstration plant for the indirect gasification of low-quality forest raw material residue into bio-methane. ⁽²⁷⁾

On 23 June 2010 Sweden notified the GoBiGas project, based on an existing support scheme approved by the Commission in 2008. ⁽²⁸⁾

The project will be carried out over a ten-year period and its costs are estimated at a total of SEK 978 million (€ 105 million). The public aid amounts to SEK 222 million (€ 24 million) and will be provided to GoBiGas AB.

⁽²⁶⁾ NN39/2010.

⁽²⁷⁾ N276/2010.

⁽²⁸⁾ N561/2007.

It is expected to produce valuable information regarding the up-scaling and viability of the new technologies involved in the production of second-generation biofuels. Furthermore, it can produce useful input for the European standardisation work on gas quality, for example.

The Commission assessed the project under the EU framework for R&D&I, which allows aid that is well designed, palliates a market failure and results in benefits that outweigh potential distortions of competition brought about by the aid. The Commission found that the research project could not attract sufficient financing from the financial market and that the benefits of the project clearly outweigh any distortion of competition brought about by the aid.

Energy & environment

Carbon capture and storage project in The Netherlands

By its decision of 27 October 2010 the Commission authorised The Netherlands to provide a € 150 million grant for a CO₂ capture and storage (CCS) demonstration project to a joint venture between E.ON and GDF Suez.⁽²⁹⁾

The joint venture will construct a CO₂ capture plant in the Rotterdam port area. The aim is to capture part of the CO₂ emitted by E.ON's coal-fired power plant and transport it to a depleted gas field in the North Sea for storage.

The development of CO₂ capture and storage is part of the 2008 climate and energy package, which is geared towards the EU 2020 environmental objectives. The Commission concluded that the Dutch State aid is an appropriate and proportionate measure necessary to achieve an objective of EU interest, and that, despite its strategic interest, without the aid the large-scale CCS project would not have been developed, at least not before 2020.

The Commission also considered that the distortions of competition and the effect on trade were limited and that, on balance, the positive effects of the measure outweigh any negative effects on competition. In particular, the beneficiary's obligation to share and disseminate information effectively about the results and progress of the project will minimise potential distortions of competition. The project also receives EU support from the European Energy Programme for Recovery and it is part of the European CCS Demonstration Project Network which will foster knowledge-sharing of CCS demonstration projects.

Transport

Air Malta

On 15 November 2010 the Commission authorised a short-term € 52 million State loan to tackle liquidity problems at Air Malta.⁽³⁰⁾

The Maltese authorities had notified emergency support to prevent the collapse of Air Malta. If Air Malta did collapse, it would disrupt the economy of the island, as more than half of the destinations served from Malta's international airport are only operated by Air Malta.

The Commission granted temporary approval, as the measure is in line with the guidelines on the rescue and restructuring of companies in difficulties and the aid amount is limited to what is needed to keep the company in business over the next six months. Moreover, the Maltese authorities have committed to submit a restructuring plan within six months.

Other

Switch-over to digital TV broadcasting in Slovakia

On 17 November 2010 the Commission approved a € 7 million aid scheme supporting parallel analogue and digital broadcasting during the transition to digital TV in Slovakia.⁽³¹⁾

Under this scheme broadcasters and network operators who fulfil certain criteria defined by the Slovak authorities are entitled to a 50 % contribution to the costs related to analogue signal transmission and the purchase or rental of temporary mobile analogue transmitters during the transition period when signals will be transmitted simultaneously in both analogue and digital form.

According to the Slovak authorities, broadcasters would not switch to digital broadcasting in advance of the legal deadline (end of 2012), because the population are unwilling to acquire digital decoders. Thus, in order to avoid a 'last-minute' switchover as well as blank signal reception spots, the Slovak authorities provided for a transitional period of parallel transmission of analogue and digital broadcasting for a maximum of 12 months, to end by December 2011.

The Commission examined the measure under Article 107(3)(c) TFEU, and found that the scheme targeted only the additional costs that simultaneous broadcasting would trigger in connection with broadcasting in both analogue and digital

⁽²⁹⁾ N381/2010.

⁽³⁰⁾ N 504/2010.

⁽³¹⁾ N671b/2009.

mode and that it did not favour one technology over another. The beneficiaries will be selected in open and non-discriminatory calls based on clear pre-defined criteria and the Slovak authorities will submit annual reports to the Commission on the allocation of the funds. The Commission therefore concluded that the measure would facilitate the digital switch-over without unduly distorting competition.

Another measure supporting the purchase of digital television terminal equipment for socially vulnerable groups in Slovakia was approved by the Commission on 15 September 2010.⁽³²⁾

The aim is to bring digital television within the reach of citizens on a low income, old-age pensioners and handicapped persons, who would no longer be able to receive television signals with their existing TV sets. The scope of this measure is limited, as it enables persons who fulfil social exclusion criteria defined by the Slovak authorities (approximately 10 % of the population) to receive a contribution of up to € 20 for the purchase of digital decoders.

The Commission examined this measure under Article 107(2)(a) TFEU, which makes provision for aid of a social character. The Commission found that the scheme was targeted at individual consumers and that it was technologically neutral, as it did not favour any particular transmission platform. Finally, all set-top-boxes, irrespective of their geographical origin, are eligible for the subsidy.

Legal downloads of music in France

On 12 October 2010 the Commission approved a French scheme that subsidises legal downloads of music by French residents aged from 12 to 25 years.⁽³³⁾

France proposed the creation of a *Carte musique* for young Internet users to download music from subscription-based website platforms. The measure is aimed at combating illegal downloads. The card would include a € 50 credit for the purchase of music online but would cost the consumer € 25, with the remainder borne by the French State. The notified scheme is expected to last two years and each consumer would be able to buy one card a year. The French Government expects one million cards will be sold each year.

The measure requires website operators to contribute to the scheme by reducing the price of the music, extending the duration of the subscription and/or contributing to the cost of advertising the card. It caps at € 5 million the benefit each operator may draw from

the scheme, to ensure that independent and niche operators are also able to benefit from the scheme. As a result, the scheme will help preserve pluralism and cultural diversity in the online music industry. The Commission therefore concluded that the benefits of the measure outweigh any distortion of competition that might be brought about by the aid.

CELF

On 14 December 2010 the Commission adopted a negative decision with recovery on the Centre d'Exportation du Livre Français (CELF).

The CELF case dates back to the beginning of the 90's with the lodging of a complaint against State aid granted (approximately € 4.8 mio) to CELF by the French Ministry of Culture from 1980 to 2001, to boost the distribution of French books abroad.

In its judgment of 15 April 2008, the Court of First Instance (now the General Court) annulled the Commission's decision dated 20 April 2004, which authorised the State aid granted by the French authorities to CELF. It was the third judgment in this case to annul a positive decision of the Commission.

On 8 April 2009 the Commission adopted a decision extending the formal investigation procedure and requesting the French authorities and interested parties to submit their comments on the factual and legal background of the case following the Court's judgment. After an information injunction sent on 20 November 2009, France was not able to submit detailed data to resolve the flaws to which the General Court refers in its judgment.

No aid decisions

Reconstruction of Funicular at Mt Sněžka

On 29 September 2010 the Commission decided that financial support of CZK 250 million (€ 10 million) for the reconstruction of a cableway on Mount Sněžka did not constitute State aid.⁽³⁴⁾

The support will be granted to the municipality of Pec pod Sněžkou, as owner and main shareholder of the cableway operator that connects the town with the summit of Mount Sněžka. Mount Sněžka is situated on the border between the Czech Republic and Poland, in the protected area of the Krkonoše / Karkonosze National Park and thus subject to strict regulations (e.g. limitation on capacity, prohibition of sport/tourism facilities, etc.).

The cableway is the most environmentally-friendly means of transport in this protected area, de facto replacing the need for a main access road.

⁽³²⁾ N671a/2009.

⁽³³⁾ N97/2010.

⁽³⁴⁾ N702/1999.

Pedestrian paths are the only alternative means of access to the summit available to the general public.

Restrictions imposed by the national parks, for economic, legal and environmental reasons, prevent a cableway or any alternative means of transport to the summit from being newly constructed or operated on either side of the mountain. Hence, the service provided by the cableway is not subject to competition and trade between Member States and, consequently, exempts the funding provided by the State from EU State aid control.

Decisions under Article 108 TFEU

Commission refers Spain and Italy to Court for failure to respect Court ruling to recover illegal aid

On 30 September 2010 and on 24 November 2010 the Commission decided to refer Spain to the Court of Justice for failing to implement a previous Court ruling which confirmed certain Commission decisions finding that incompatible aid had

been granted and had to be recovered, namely State aid granted to the Magefesa group and State aid granted by the Basque Provinces of Alava, Guipúzcoa and Vizcaya.

On 28 October 2010 the Commission decided to refer Italy to the Court of Justice for failing to implement a previous Court ruling decision ordering the recovery of illegal and incompatible State aid from utilities with a majority public capital holding.⁽³⁵⁾

Neither Spain nor Italy have yet completed these recovery procedures.

As these are all referrals to the Court for failure to respect a previous Court ruling, the Commission has asked the Court to impose a daily penalty payment and a lump sum per day for the period between the Court judgment and the second Court ruling. These payments would act as an incentive to ensure that the illegal aid amounts are recovered rapidly from the beneficiaries. The proposed fines take into consideration the seriousness of the infringement, the very significant period which has already elapsed since the previous Court judgment and the situation of the Member State.

⁽³⁵⁾ C27/1999.

Prolongation of the State aid temporary framework

by Mercedes Campo ⁽¹⁾

1. Introduction – The State aid temporary framework

The Commission adopted the State aid temporary framework in December 2008 as a response to the global financial crisis. At that time, and in view of the serious risk of a credit crunch, it was decided that extraordinary policy responses were required, including in the real economy, but for a limited period of time only.

The aim of the temporary framework was to remedy the negative effects of the crisis by facilitating firms' access to finance. The framework provided Member States with additional possibilities of access to State aid for a period of two years, until the end of 2010.

As for the Banking Communications, the legal basis of the temporary framework was Article 107 (3)(b) of the TFEU, which allows the Commission to declare aid *"to remedy a serious disturbance in the economy of a Member State"* compatible with the common market.

The temporary framework contained two different sets of instruments: new measures and a temporary adaptation of the existing State aid measures.

New aid measures:

These new aid measures – which are set out below – applied to SMEs and large companies in all sectors, provided they were either sound firms or firms which were not in difficulty on 1 July 2008 *but had got into difficulty thereafter as a result of the crisis*. Firms already in difficulty on 1 July 2008 were excluded because their difficulties were deemed not to be a result of the financial crisis.

- **Compatible limited amount of aid** (the 500k measure) which allowed the granting of € 500 000 per undertaking through general schemes to cover investments and/or working capital.
- **Subsidised guarantees**, SMEs were able to receive a reduction of up to 25% of the annual premium to be paid for new guarantees granted in accordance with the temporary framework safe-harbour provisions. For large companies

the reduction was limited to 15%. The guarantee could relate to both investment and working capital loans and it may cover up to 90% of the loan. The safe-harbours premiums could be applied during a period of 2 years with reduction, plus 8 additional years without reduction. The maximum loan benefiting from the guarantee was not allowed to exceed the total annual wage bill of the beneficiary for 2008.

- **Subsidised loans**, reduction of the interest payments to be paid by the end of 2012 and for all types of loans (without any limit on the amount). The subsidised interest rate was calculated on the basis of the Central Bank overnight rate, instead of the one year interbank offered rate (which is the reference contained in the Commission Communication for setting the reference and discount rates).
- **Subsidised loans for the production of green products**, investment loans for projects involving the early adaptation to future Community product standards - or even going beyond those standards - benefit from a subsidised interest rate calculated on the basis of the above mentioned methodology, plus an additional reduction of 50% for SMEs and 25% for large companies.

The Commission introduced this "green measure" within the TF because it was considered necessary to maintain environmental goals as a priority despite the financial crisis.

Temporary adaptation of existing State aid instruments:

- **Risk capital guidelines**, the temporary framework temporarily increased the tranche of finance per target SME (from € 1.5 million to € 2.5 million) and reduced the minimum level of private participation (from 50% to 30%).
- **Communication on short-term export credit insurance**, simplification of the procedural requirements allowing the State to insure short-term export credit demands deemed to be non marketable, including within the Community (*escape clause*).

The temporary framework stated that the Commission may provide further clarifications on its

⁽¹⁾ The views expressed in this article are entirely personal and do not reflect any official position of the European Commission.

approach to specific issues. Using this possibility, the Commission adopted a range of amendments to the Framework⁽²⁾.

2. Phasing-out of the State aid temporary framework: the Commission's assessment of the situation

An appropriate and timely “exit strategy” from the exceptional measures, which was adopted to counter the financial and economic crisis, is a key element for European recovery.

State aid control remains a key EU instrument to facilitate a successful exit from the crisis. This exit process, for the real economy as well as for the financial sector, should lead to viable solutions that do not discriminate between Member States, while at the same time promoting a return to normal functioning of the market.

Delaying the exit from State support would damage the level playing field and European economies at large; yet it would equally be wrong to place financial stability at risk by an overly abrupt disengagement.

Within the context of this global exit strategy the Commission had to decide whether or not it was appropriate, in view of the economic situation, to stop the application of the temporary framework on the planned date – 31 December 2010.

As already mentioned, the purpose of the temporary framework was to unblock bank lending to companies and thereby ensure their continued access to finance. Consequently, when the financial situation normalises, the temporary framework should normally lapse, giving priority to normal State aid rules.

In order to decide on the expiry/prolongation of the temporary framework, a range of factors were taken into account: the use made of the temporary framework by Member States, the capacity of the financial institutions to supply adequate credit to the creditworthy corporate sector, the effectiveness of the Framework to remedy that problem without leading to distortions that would run counter to the single market and its capacity to contribute to a sustainable recovery beyond 2010, in line

with the overall exit strategy designed to support European growth.

2.1. Evaluation of the use made of the State aid temporary framework

The Commission collected information about measures taken by Member States under the temporary framework as well as the state of credit supply to creditworthy companies⁽³⁾.

The temporary framework has generally been very well received by the Member States and stakeholders. Between 17 December 2008 and 1 October 2010, the Commission approved 73 schemes⁽⁴⁾ and 4 *ad hoc* aid measures on very short deadlines. The majority of these are schemes for aid of up to € 500 000 per company (23 Member States), subsidised guarantee measures (14 Member States) and subsidised loan interest (7 Member States). Moreover, 12 Member States facilitated export activities via export credit schemes.

In 2009 the Commission approved measures totalling approximately € 81.3 billion⁽⁵⁾. However, the aggregated aid element of the measures implemented by Member States in 2009 is estimated at € 2.2 billion⁽⁶⁾. It appears that Member States were cautious when determining the budget, given the uncertainties as to the depth and duration of the crisis, but they were strict when it came to granting aid, also in view of the budgetary constraints.

In general, the temporary framework was implemented by adopting separate aid schemes for each aid instrument. All of the approved temporary framework schemes were open to all sectors. This horizontal approach is justified by the need to support the economy as a whole.

The significant use of the framework shows that the Commission has provided the Member States with a useful tool to confront the impact of the crisis

⁽²⁾ On 25 February 2009 and in December 2009, the Commission introduced some technical adjustments, in particular as regards aid in the form of guarantees. In October 2009, the Commission introduced an amendment to the Framework in order to allow for a compatible limited amount of aid of EUR 15.000 for the agricultural sectors, which was initially excluded from the scope of application of this measure.

⁽³⁾ DG Competition carried out an initial evaluation of the temporary framework in October 2009 through a questionnaire sent to the Member States and published in DG Competition's webpage, with a view to obtaining comments from third parties. At that time, Member States considered the temporary framework as a useful tool which has provided an important support for companies and confirmed that companies were still facing difficulties on access to finance. On 17 March 2010 a second questionnaire was launched focusing on the impact and effectiveness of the temporary framework in the reactivation of access to finance. In addition, a multilateral meeting with the Member States was held on 26 October 2010.

⁽⁴⁾ Figure includes only measures that fall under aid to industry and services.

⁽⁵⁾ Autumn Scoreboard data 2010.

⁽⁶⁾ According to the annual reports submitted by Member States and their reply to the Commission's questionnaire on the Temporary framework.

on the real economy, which serves as an additional instrument to secure credit flows to firms.

2.2. Access to finance

Among other sources, the Commission assessment made use of a range of ECB surveys on access to finance by SMEs and the euro area bank lending survey. These surveys are widely used as a means of analysing issues of access to finance within the euro area and they rely on objective, comparable and continuous data-sets, which are regularly updated.

In general, large companies appeared to be less negatively disposed to the availability of bank financing than SMEs, as the former had partially replaced it with market-based financing.

As regards credit standards, banks that reported a tightening of their credit standards during 2010 were in a slight majority, although the position was far less serious than in 2008 and the first half of 2009, when the vast majority reported a tightening. The industry- or firm-specific outlook, together with expectations as regards general economic activity remained the most important factors contributing to a net tightening of credit standards. Tighter standards were expected in order to meet an increasing demand for funding by enterprises, in particular by SMEs.

While recovery is still fragile and uneven across the Union, some Member States are nevertheless posting modest or even more robust growth rates. In addition, despite some pockets of vulnerability, the health of the banking sector has improved in broad terms compared with the situation one year ago. Lending to the private sector appears to have turned positive in line with past patterns. As the economic recovery establishes itself on firmer ground, and concerns about fiscal sustainability are addressed, conditions on the financial market should continue to improve gradually and provide support to the recovery. However, the uncertainty about developments in particular market segments and countries still remains.

2.3. The Commission's assessment

The temporary framework has provided ample possibilities for credit support during the crisis. However, it is necessary to prepare the recovery and scale down the support by reserving it only for those companies that really need it.

Despite encouraging signs of stabilisation in financial markets, the Commission - in view of the outstanding problems around access to finance and of the fragility of the recovery - considered it premature to let the temporary framework expire totally by the end of 2010. On the other hand, given that

the market situation was far from being as dramatic as in 2008/2009, a full prolongation was not an option either. All in all, it was agreed that a gradual phasing-out of the Framework was the most appropriate response to the market situation.

This type of approach was also in line with that taken with regard to the crisis rules in the financial sector.

3. The prolonged State aid temporary framework

3.1. Main features

The main principles applied to the phasing-out of the temporary framework were the following:

Maintenance of measures that address the remaining market failures: although the market situation has improved, SMEs still face problems of access to finance (although these difficulties appear to be less pronounced for large companies). Therefore, it seems justified to prolong those temporary framework measures that are aimed at facilitating access to finance by SMEs. In the same vein, as regards access to trade, there are still groups of companies and sectors that are finding it difficult to obtain coverage from a private insurer. Consequently, there was also a strong case for prolonging the procedural simplification on short-term export credit insurance during 2011.

Tightening of conditions; measures that will be prolonged during 2011 will be subject to tighter conditions to reflect a gradual transition to the normal State aid regime. This approach will also help to limit possible distortions of competition. In practical terms, this means the following:

- *Some measures will be only applicable to SMEs only* * SMEs face particular problems of access to finance compared to large companies.
- *Reduction of the allowed guaranteed amount from 90% to 80%* * This would align the temporary framework provision with the provision in the Guarantee Notice and increase the incentive for the banks providing the underlying loans to carry out a thorough risk assessment.
- *A smaller reduction applied to the annual guarantee premium for SMEs from 25% to 15%.*
- *A smaller reduction applied for green products for SMEs from 50% to 25% and for large companies from 25% to 15%.*
- *No working capital loans for large enterprises* * working capital loans involve operating aid, which

may be highly distorting if granted to large companies. Instead, long term recovery should be promoted by encouraging investment aid.

Exclusion of firms in difficulty: the temporary framework aid measures were granted to firms in difficulty if they fell into difficulties after the cut-off date of 1 July 2008. The reasoning behind this provision was that firms that might fall into difficulty because of the financial crisis should benefit from more favourable treatment than firms that were already in difficulty before the crisis. The distinction has become increasingly difficult to maintain from an economic point of view, as the initial credit crunch grew into a wider and deeper recession, requiring the restructuring of entire sectors of the economy which were often already burdened by excessive debts.

Therefore, firms in difficulty should make use of the appropriate instrument: namely the Rescue and Restructuring Guidelines.

Encouraging long term recovery in line with the EU 2020 priorities; those temporary measures that contribute to the EU 2020 objectives should be encouraged, either by prolonging their application under the Framework (as with the subsidised loans for the production of green products) or, where possible, by incorporating them into the respective guidelines based on Article 107(3)(c) of the TFEU (as with some of the temporary venture capital adaptations).

Elimination of the compatible limited amount of aid (500k measure); the 500k measure is not targeted at one particular objective because this does not encourage the efficient use of public money. Moreover, it may often include operating aid which can have very distortive effects and which is extremely restricted under the normal State aid rules. Consequently, prolonging it will run counter to the need to plan a gradual phasing-out of the exceptional crisis support measures.

Therefore, the Commission considered that the measure should be terminated by 31 December 2010. Nevertheless, the prolonged temporary framework still allows Member States to process pending applications during 2011, as long as they were introduced before 31 December 2010 on the basis of schemes approved by the Commission.

3.1. Content

In December 2010, the Commission decided to prolong the temporary framework until the end of 2011, with a special focus on SMEs and a limited range of measures (see table for details):

- subsidised loans for the production of green products (with a smaller reduction);
- the prolongation of the procedural simplification to activate the "escape clause" for short-term export credit finance remains unchanged, which requires the prolongation of the Communication from the Commission on short-term export-credit insurance (until 2012), which also expires at the end of 2010;
- the 500k measure will not be prolonged, but Member States will still be able to process pending applications submitted before 31 December 2010 on the basis of schemes approved by the Commission;
- the temporary increase of the safe-harbour tranche of finance from € 1.5 million to € 2.5 million per target SME will be introduced into the Risk Capital Guidelines (the lowering of the minimum level of private participation from 50% to 30% will not be extended).

4. Concluding remarks

The temporary framework is not an instrument to tackle the manifold effects of the recession as such. It constitutes a well targeted instrument which seeks to address the need for access to finance. The current market conditions justify a prolongation (although under stricter conditions) of this exceptional measure for one more year.

However, we should bear in mind that the ultimate objective of the exit strategy is to revert as soon as possible (market conditions permitting) to the normal State aid rules which already provide many possibilities of stimulating the economy by supporting, for instance, SMEs, employment, research, innovation or environmental protection, while at the same ensuring a level playing field for firms and Member States in the internal market.

CHANGES BETWEEN THE ORIGINAL AND THE NEW TEMPORARY FRAMEWORK AS FROM 2011

Temporary State aid framework to ease access to finance during crisis (ends 31 Dec 2010)	New Temporary Framework for 2011
Subsidised guarantees on bank loans <ul style="list-style-type: none"> - SMEs: reduction of up to 25% compared with margin grid [estimated market rate] for investment & working capital loans - Large: up to 15% reduction from margin grid for investment & working capital loans - Up to 90% guarantee coverage - Firms in difficulty as of 1 July 2008 included 	Subsidised guarantees on bank loans <ul style="list-style-type: none"> - SMEs: up to 15% reduction from margin grid for investment & working capital loans - Large: 0% reduction; only investment loans, Up to 80% guarantee coverage - Firms in difficulty excluded
Subsidised bank loans <ul style="list-style-type: none"> - SMEs: investment & working capital loans - Large: investment & working capital loans - Firms in difficulty as of 1 July 2008 included 	Subsidised bank loans <ul style="list-style-type: none"> - SMEs: investment & working capital loans - Large companies - investment loans only - Firms in difficulty excluded
Subsidised loans for Green products <ul style="list-style-type: none"> - Interest-rate reduction of 50% for SMEs - Interest-rate reduction of 25% for large companies 	Subsidised loans for Green products <ul style="list-style-type: none"> - Interest-rate reduction of 25% for SMEs - Interest-rate reduction of 15% for large companies
Aid up to €500.000 per company with notification	Normal €200,000 <i>de minimis</i> (no aid) rule applies
Export credit insurance	Export credit insurance <ul style="list-style-type: none"> - No changes in TF - The short-term export-credit communication is prolonged for two years
Aid to promote Risk Capital investment <ul style="list-style-type: none"> - Increase in the maximum tranches of finance to €2.5 million from €1.5m per SME over 12 months - Reduction of the level of private participation from 50% to 30%. 	Aid to promote Risk Capital investment <ul style="list-style-type: none"> - Incorporated into point 4.3.1 of the Risk Capital Guidelines. <i>(the mid-term Review of the Risk Capital Guidelines explains why this modification is necessary and justified).</i> - Revert to normal 50/50 rule.

State Aid Control in a Stability Programme Country: The Case of Greece

by Yassine Boudghene, Matthaeus Buder, Zetta Dellidou, Cristophe Galand, Violeta Iftinchi, Max Lienemeyer, Christos Malamataris, Danila Malvolti ⁽¹⁾

Snapshot

This article is written looking back from June 2011, newer developments are not reflected.

Introduction

The substantial support programme, designed by the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) to address the sovereign crisis in Greece, was not without impact for the normal safety measures that Greece had devised to react to the global financial crisis. In order to describe how these measures coincide, an explanation will be given of the general Greek State aid support measures, adopted before the sovereign crisis (section 2). After describing the support programme (section 3), the analysis will address the Commission's assessment of the general measures put forward under the programme. Emphasis is placed on measures dealing with problems of liquidity and solvency (section 4). Some general thoughts will then be presented about the impact of the programme on the assessment of the return to viability of the credit institutions concerned (section 5). Finally, there is a conclusion (section 6).

State aid support measures adopted before the sovereign crisis

During the last quarter of 2008, Greece, like other European Member States, put forward a comprehensive package of emergency measures designed to ensure the stability of its financial system in the wake of the global financial crisis. As the measures are funded from State resources, are selective and have the potential to distort competition and trade between Member States, they constitute State aid and had to be deemed compatible by the Commission under Article 107 (3) lit b TFEU ⁽²⁾.

In detail, the package of State aid measures included (i) a Recapitalisation Scheme, (ii) a Guarantee Scheme, and (iii) a Government Bond Loan Scheme:

- the *Recapitalisation Scheme*, with a total budget of EUR 5 billion, allows the State to inject Tier 1 capital into participating institutions in the form of preference shares that need to be remunerated at 10%. The aim is to enhance solvency;
- the *Guarantee Scheme*, with a total budget of EUR 15 billion, allows participating institutions to issue certain debt instruments with a maturity ranging from three months to three years, with a State guarantee. The objective is to enhance liquidity, by allowing credit institutions to have better access to funding;
- In the context of the *Bond Loan Scheme*, with a total budget amount of EUR 8 billion, Greece lends to participating institutions (against collateral and applying specific haircuts) specifically issued Greek government bonds, with a maturity of up to three years. The objective is also to enhance liquidity, as banks can use such bonds as collateral in the refinancing transactions or marginal lending facilities of the ECB or as collateral in interbank transactions.

In order to achieve compatibility with the internal market, Greece made various commitments. In particular, Greece agreed that the recapitalisation would need to be followed up by a restructuring plan after six months and it also agreed to go along with several behavioural restrictions, such as a government representative on the board of the bank, a dividend and a hybrid coupon ban.

The total package of support measures, initially amounting to EUR 28 billion, was of a relatively limited size in comparison with other countries. Moreover, as of end-December 2009, it was used for only 40% of the budget.

Most of the 19 commercial banks incorporated in Greece participated in the support measures. The Recapitalisation Scheme, in particular, was used by 10 banks, which were reported to have received capital injections totalling around Euro 3.7 billion: They were the National Bank of Greece (NBG), Eurobank EFG, Piraeus Bank, Alpha Bank, Agricultural Bank of Greece (ATE), Hellenic Postbank (TT), Attica Bank, Proton Bank, First Business Bank (FBB) and Panellinia Bank.

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

⁽²⁾ The measures were approved by the Commission Decision of 19 November 2008 in State Aid Case N 560/2008 "Support Measures for The Credit Institutions in Greece", OJ C 125, 05.06.2009, p. 6.

General measures in the context of the Greek sovereign crisis

As underlined by the limited support measures in the last chapter, the 2008 financial crisis had a relatively limited impact on the Greek banking sector. This is due, *inter alia*, to the lesser degree of openness of the economy⁽³⁾ and to the fact that the main Greek banks were universal banks. They were less exposed to “toxic” structured credit assets and traditionally did not rely very heavily on wholesale funding.

Notwithstanding this, the Greek sovereign crisis did seriously affect the Greek banks. Starting from the last quarter of 2009, the uncertainties and fears around the budgetary situation of Greece gradually increased. They were further fuelled in October 2009 by the revision of the estimates of the 2009 deficit from 6.7% of gross domestic product (GDP) to 12.7% of GDP, which led to a sharp increase in the credit spreads of Greek government bonds. This gradually foreclosed access of the Greek sovereign to the international bond market and subsequently also the access of the Greek banks.

In order not to compromise the refinancing of the Greek sovereign, a quick response was vital. With the aim of supporting the Greek government, the Eurozone countries agreed on 2 May 2010 to provide EUR 80 billion in bilateral loans to Greece over a three-year programme, while the IMF agreed to provide EUR 30 billion under its Stand-By Arrangement for Greece, putting together a joint package totalling EUR 110 billion⁽⁴⁾. These loans are conditional on the fulfilment of a Programme plan⁽⁵⁾ including provisions for fiscal, structural

and financial sector reforms⁽⁶⁾. The application of this Programme plan in the Greek economy is being closely monitored by a joint mission of the EC, ECB and IMF (the so-called ‘Troika’), with further disbursements being subject to approval by the Eurosystem.

The fiscal problem of Greece is impacting on banks in (mainly) two ways: (i) the government’s foreclosure of access to international capital markets has been extended to the Greek banks and has been having a severe impact on their funding capacity (ii) the austerity measures are impacting on the asset quality of Greek banks, leading to an increase in non performing loans which is in turn weighing on the profitability and the solvency of the Greek bank. Special measures were designed to contain these effects and will be discussed in the following section.

In addition, the Greek State has considered its shareholding in public companies and intends in the medium term to sell most of its stakes. To this end, during the summer of 2010 the Greek authorities assessed their strategy with regard to their holdings in three banks: ATE Bank, Attica Bank and TT. The conclusions of the strategic review⁽⁷⁾ were that, ATE should be restructured on a stand-alone basis, with reduced lending to public entities and more enhanced corporate governance. A recapitalisation of the bank will take place in the short term and is subject to the Commission’s approval. As regards government stakes in TT and Attica Bank, the government will consider disposing of its direct holdings in TT and its indirect holdings in Attica Bank.

State aid measures in the context of the sovereign crisis

In order to address the above-mentioned issues, the support measures that existed before the sovereign

⁽³⁾ OECD Document DAF/COMP(2010)9, Roundtable on Competition, Concentration and Stability in the Banking Sector, 18.10.2010, p. 123seq, 128seq, also available at <http://www.oecd.org/officialdocuments/displaydocumentpdfv2/?cote=DAF/COMP%282010%299&docLanguage=En>.

⁽⁴⁾ Statement by President Van Rompuy following the Eurogroup agreement on Greece (02 May 2010), also available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114128.pdf. See also the European Commission Press Release of 3 May 2010, “Euro area and IMF agreement on financial support programme for Greece”, also available at http://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-05-03-statement-commissioner-rehn-imf-on-greece_en.htm. For an analysis of the response to the Greek sovereign crisis at the EU level, see K. Featherstone, “The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime” (2011) 49 *Journal of Common Market Studies* 193-217.

⁽⁵⁾ In accordance with Article 1(3) of Law 3845/2010, Annex III (Memorandum on economic and financial policy) and Annex IV (Memorandum of Understanding on specific economic policy conditionality) are jointly referred to as the ‘Programme plan’.

⁽⁶⁾ The program includes *inter alia* a sustainability-enhancing fiscal consolidation through measures that generate savings in public sector expenditure and improve the government’s revenue-raising capacity, financial sector policies aiming at stabilising the Greek financial system, medium-term structural reforms in order to improve the Greek economy’s competitiveness through the modernization of the public sector, the increase in efficiency and flexibility of product and labour markets and the creation of a more open and accessible business environment for domestic and foreign investors, including a reduction of the State’s direct participation in domestic industries. See for details DG Economic and Financial Affairs, “The Economic Adjustment Programme for Greece: Second Review - Autumn 2010”, Occasional Paper No. 72, also available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp72_en.pdf

⁽⁷⁾ See IMF, “Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding”, 8 December 2010, pp.12-14, available at <http://www.imf.org/external/np/loi/2010/grc/120810.pdf>.

crisis were reinforced. The Commission subsequently approved amendments to the measures and prolonged them several times⁽⁸⁾, while, at the same time, other measures were put in place.

4.1. Liquidity: increased budget for the Guarantee Scheme

Greek banks have lost access to wholesale markets and have experienced some deposit outflows, resulting in an increased dependence on ECB refinancing operations. Moreover, the repeated downgrades of the Greek government rating have eroded the quality of collateral that Greek banks could use in such refinancing operations and required an increase in the eligible collateral.

The Programme plan did not provide for the allocation of any additional liquidity support to the Greek banks. Instead, it was decided to continue to rely on a combination of State-guaranteed bonds which could be used as collateral to obtain funding from the Eurosystem. To ease the liquidity strains, first the initial amount of EUR 15 billion was fully allocated. Subsequently, Greece needed to raise the ceiling of its Guarantee Scheme. To that end, on 12 May 2010 the ceiling for the Guarantee Scheme was raised to EUR 30 billion. On 30 June 2010 the ceiling was further raised to EUR 55 billion. Another increase of the ceiling by EUR 30 billion is planned for the first half of 2011.

As the issuance of State guarantees for bonds constitutes State aid, these instruments had to be approved by the Commission. The Commission found the guarantees compatible with the internal market under the standard rules incorporated in the Commission's banking communication.⁽⁹⁾ Under these rules, the support has to be limited to six months and, if it has not been used during this

period, will need to be extended⁽¹⁰⁾. This type of support measure has been the typical instrument to deal with the market failure stemming from the financial crisis and a priori requires no follow up as such, and in particular does not require the provision of a restructuring plan⁽¹¹⁾. This liquidity support, albeit resulting in a significant exposure to the Eurosystem, did not bring anything new from the point of view of State aid control.

4.2. Solvency: The Financial Stability Fund

With the Financial Stability Fund (FSF), the Programme plan put forward a relatively novel instrument. Anticipating a further worsening in asset quality and increasing provisions, which might impact on the banks' solvency, a "safety net" for banks was established in order to maintain the stability of the Greek banking system. To this end, the FSF received EUR 10 billion under the Programme plan which is to be used for recapitalising the banks in Greece.

The FSF was established by Law 3864/2010 of 13 July 2010. The FSF is a legal person governed by private law, and is administratively and financially independent. It is funded by the government with resources from the programme. The FSF is managed by a Board of Directors, where representatives of the EC and the ECB also participate, without voting rights.

The activation of the FSF can occur when a credit institution does not comply with the first pillar⁽¹²⁾ or second pillar⁽¹³⁾ capital requirements or when there is a well-founded risk that such a credit institution may not, in the opinion of the Bank of Greece, be able to comply with Pillar 2 capital requirements. However, participation in the FSF comes only after the credit institution has failed to increase its own funds with the support of its current or new shareholders or to ease its capital strains in some other way. This has to be set out in a business plan "*specifying the amount of the required capital injection and detailing the measures which the credit institution intends to take in order to safeguard and strengthen its solvency the soonest possible, by increasing its capital and/*

⁽⁸⁾ Commission Decision of 18 September 2009 in State Aid Case N 504/2009 "Prolongation and amendment of the Support Measures for the Credit Institutions in Greece", OJ C 264, 06.11.2009, p. 5, Commission Decision of 25 January 2010 in State Aid Case N 690/2009 "Prolongation of the Support Measures for the Credit Institutions in Greece", OJ C 57, 09.03.2010, p. 6, Commission Decision of 12 May 2010 in State Aid Case N 163/2010 "Amendment to the Support Measures for the Credit Institutions in Greece", OJ C 166, 25.06.2010, p. 2, Commission Decision of 30 June 2010 in State Aid Case N 260/2010 "Extension and amendment to the Support Measures for the Credit Institutions in Greece", OJ C 238, 03.09.2010, p. 3, Commission Decision of 21 December 2010 in State Aid Case SA.31998 (2010/N), "Fourth extension of the Support Measures for the Credit Institutions in Greece".

⁽⁹⁾ Commission Communication of 13 October 2008, OJ 2008/C 270/08, as of second half 2010 also the phasing out recommendations are applied, cf: http://ec.europa.eu/competition/state_aid/studies_reports/phase_out_bank_guarantees.pdf

⁽¹⁰⁾ This happened several times. See above footnote 8.

⁽¹¹⁾ However, since July 2010 a viability review needs to be provided in certain cases. Cf Commission Decision of 30 June 2010 in State Aid Case N 260/2010 "Extension and amendment to the Support Measures for the Credit Institutions in Greece", OJ C 238, 03.09.2010, p. 3. This is based on a general policy considerations, see http://ec.europa.eu/competition/state_aid/studies_reports/phase_out_bank_guarantees.pdf

⁽¹²⁾ The level of Pillar 1 capital requirements is set up at present at 8% of Risk Weighted Assets.

⁽¹³⁾ As established for each credit institution by the Bank of Greece (BoG), in its capacity of competent supervisory authority.

or restoring its profitability through cost-cutting, reducing risks or receiving support from other companies of its group, etc. The plan may also include any prospects of a merger or absorption, or a transfer of its activities or units to another credit institution or financial organisation.”

On the basis of the business plan, the capital injections shall be carried out by the FSF through the issuance of preference shares with a remuneration of 10%. If the credit institution does not comply with the Pillar 1 capital requirements, the capital shall be increased by the issuance of common shares.

Thereafter the FSF and the credit institution shall jointly draw up a detailed restructuring plan or amend any plan already submitted to the Commission, in accordance with the applicable EU State aid legislation and the relevant guidelines provided by the Commission. Within six months from the granting of the capital injection, Greece shall submit the restructuring plan to the Commission. To this end, the FSF will be equipped with very far reaching powers to impose restructuring measures and to monitor the restructuring process.

On 3 September 2010, the Commission approved the FSF as a recapitalisation scheme⁽¹⁴⁾ in line with the rules on support schemes for the financial sector during the crisis. Despite the existence of the FSF, which is established under Greek law until 2017, the FSF was approved, as is the case for all crisis-related State aid schemes, for a six-month period. This allows the Commission to reassess the necessity, appropriateness and proportionality of the measures every six months.

In its assessment of the FSF, the Commission concluded that the capital measures provided under the FSF do constitute State aid, given that it is financed through State resources and is selective, and therefore has the potential to distort competition and affect inter-State trade.

The Commission then concluded that the measure was compatible under Article 107(3)(b) TFEU to remedy a serious disturbance in the economy of a Member State. This was the case despite the existence of the original recapitalisation scheme, because the FSF is an additional instrument that is based on the Programme plan. The Commission found that the FSF scheme was appropriate, necessary and proportional to the objective of Article 107(3)(b). In

this context, the Commission took note of the obligation of the credit institution to submit a restructuring plan, drafted in cooperation with the FSF and an undertaking by the beneficiaries to continue to provide the same behavioural commitments as under the 2008 support measures.

A novelty of the FSF is that it is no longer strictly speaking an emergency recapitalisation scheme. The national authorities have been forced to go a step further and also to intervene in the restructuring process under the emergency programme. It therefore comes very close to a scheme that allows restructuring measures to maintain the viability of a financial institution on the basis of the restructuring plan. However, given that any aid must be subject to a restructuring plan and to the final approval of the Commission, it is still in line with the Commission’s regulatory framework.

Impact of the Programme on the assessment of the return to viability of the relevant banks

The Recapitalisation Communication requires that the rescue obligations be followed up by a restructuring plan for distressed banks or a viability report for fundamentally sound banks. The demarcation is assessed on the basis of the risk profile of the bank. For this, four indicators have been identified in the Annex of the Recapitalisation Communication. The decisive factor in Greece should be the amount of aid in relation to the banks’ risk weighted assets, since the other indicators, like CDS and rating, are strongly affected by the Greek sovereign problems.

In the summer of 2010, the Greek authorities submitted the first versions of the viability reviews and restructuring plans for the 10 banks⁽¹⁵⁾. The assessment is still ongoing and aims to determine whether the measures provided for in the plans restore the viability of the banks, address possible distortions of competition and provide sufficient burden-sharing from both the bank itself and its stakeholders (shareholders, subordinated debt holders, etc).

This Commission’s assessment will certainly not be unaffected by the Programme plan put in place in May 2010. A significant advantage for the assessment is, *first*, the information flow between the Commission and the Greek authorities, which is in particular enhanced through the regular missions

⁽¹⁴⁾ Commission Decision of 3 September 2010 on State aid Case N 328/2010, “Recapitalisation of Credit Institutions in Greece under the Financial Stability Fund (FSF)”, OJ C 316, 20.11.2010, p.7. The FSF was prolonged until end-June 2011. See Commission Decision of 14 December 2010 under State aid case SA.31999 (2010/N), “Prolongation of the Recapitalisation of credit institutions in Greece under the Financial Stability Fund (FSF)”, OJ C 62, 26.02.2011, p.16-17.

⁽¹⁵⁾ For a more precise distinction, see Commission Decision of 18 September 2009 in State Aid Case N 504/2009 “Prolongation and amendment of the Support Measures for the Credit Institutions in Greece”, OJ C 264, 06.11.2009, p. 5

and information updates received from the Bank of Greece in the context of the programme.

At the same time, the programme poses a *second* challenge to the viability reviews in that it sets out a number of parameters which cannot be ignored. The Commission's evaluation has to take into consideration the provisions and the assumptions of the programme, in particular regarding overall GDP growth, unemployment, inflation and, where appropriate, its impact on credit provision and on savings⁽¹⁶⁾. In terms of credit supply, this means that in principle the banks should not count on either on growth in deposits, or on a net increase in credits, at least for 2011 and 2012.

Third, the exit from State aid, which is a cornerstone of all viability reviews and restructuring plans, will also be challenging because the banks' funding is heavily reliant on State guarantees which are provided on instruments used as collateral for receiving ECB funding. As the viability reviews should explain how State support measures are redeemed, some assumptions have to be made as regards the reopening of financial markets. However, this will depend very much on confidence being restored in Greece, which the Programme plan assumes will happen in mid 2012. However, even though a viability assessment is based on prudent assumptions, the uncertainties around the reopening of wholesale markets for Greek financial institutions cannot be ignored. Consequently, several banks should consider a de-leveraging process aimed at relying on more stable sources of funding going forward.

Finally, more interference can be expected if a bank has to raise capital from the FSF. As indicated above, in such a case, the FSF should be driving the restructuring process. It remains to be seen whether the intention of the aid grantor and the Commission are closely enough aligned.

Conclusion

Although the financial crisis had initially not resulted in much State support for Greek banks, the Greek sovereign crisis underlined the need for enhanced State measures. The Programme plan had the same effect as State aid rescue packages had had in 2008-2009 in Europe: it stabilized the sector and contained any threats to financial stability. Therefore, as in other countries in Europe, the return to viability should now be on the agenda.

However, it needs to be emphasized that, so far, the crisis in Greece has mainly been a liquidity crisis, and not much State capital support has been required. Notwithstanding this, the redemption of liquidity support is no less of a challenge and will probably take longer than in other countries. This will depend on the implementation of the measures set out in the programme and how it is perceived by the market.

Moreover, until now, in-depth restructuring has not been on the agenda for the major financial institutions in Greece. However, while the obvious problems of the Greek banks were caused in the main by the sovereign crisis, the possibility that some banks in Greece were already facing structural problems cannot be ruled out. They now need to reconsider their individual business models and will need to undertake structural adaptations. Furthermore, if the banks are unable to reduce their dependence on State guarantees, they will also need to consider structural measures, in particular deleveraging.

From a State aid perspective, the priority remains to ensure that the State aid measures to support the Greek banking sector are compliant with EU rules. There is no reason for any deviation from the normal crisis management, including "*adherence to principles and flexibility on procedure*"⁽¹⁷⁾, which should mainly be a timing issue.

⁽¹⁶⁾ The programme makes the following assumptions on growth: GDP is projected to decline by 3 percent in real terms in 2011 while the economy is projected to grow by 1 percent in 2012 and by slightly above 2 percent in 2013 and 2014. See http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp77_en.pdf

⁽¹⁷⁾ See the speech of the European Commissioner for Competition Policy, Neelie Kroes, "The Road to Recovery", address at 105th meeting of the OECD Competition Committee, Paris, 17th February 2009, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/63&format=HTML&aged=0&language=EN&guiLanguage=en>.

State aid to broadband: primer and best practices

by Filomena Chirico and Norbert Gaál ⁽¹⁾

“In the 21st century, the social and economic development of every country on earth will depend on broadband” (ITU, Build on Broadband)

Introduction

In 2010, European governments allocated national and European funds worth almost 2 billion EUR to developing high-speed and very high speed broadband networks ⁽²⁾. Even more far-reaching plans are currently being defined in many European countries to achieve the ambitious goals set in the Europe 2020 Strategy ⁽³⁾ and the Digital Agenda ⁽⁴⁾. To reap all the benefits of widespread broadband deployment ⁽⁵⁾, these initiatives redefined the European goal of ensuring universal broadband coverage for all citizens by 2013, so that, by 2020, (i) all Europeans should have access to much higher internet speeds of above 30 Mbps and (ii) at least half of all European households should subscribe to internet connections above 100 Mbps.

Estimates indicate that to achieve the first objective, up to €60 billion of investment would be required, and up to €270 billion for the second ⁽⁶⁾. Such investments would have to come primarily from commercial operators. However, due to the economic characteristics of the industry, private investment alone will not suffice to attain such ambitious coverage goals. Governments will have to step in with the smart (and pro-competitive) use of

public funds ⁽⁷⁾ to extend high-speed and very high speed, next-generation access network coverage to areas in which market operators are unlikely to invest on commercial terms.

It is important to underline at the outset that public funds have to be used cautiously in a sector such as electronic communications, which has already been fully liberalised, and in principle, they should be complementary to and not substitute for private investment. State intervention should as far as possible limit the risk of crowding out private investment and of altering commercial investment incentives and should not therefore distort competition.

In other words, the goal of achieving ambitious infrastructure development targets needs to be qualified in the sense that there should also be *effective competition* between and on these infrastructures. Effective competition will help to maximise consumer welfare ⁽⁸⁾, in the form of lower prices and a wider range of better services for European citizens and companies. Several examples suggest that smartly-used public funds can lead to wider coverage, increased competition, more investment and better end-user prices in this sector ⁽⁹⁾.

The conditions in EU State aid rules on the granting of public funds are there to ensure that only pro-competitive interventions take place in this sector. The European Commission's approach is codified in the Broadband Guidelines ⁽¹⁰⁾ of 2009. These are based on well-established Commission case practice, developed since 2003 to correct market

⁽¹⁾ This article reflects the personal opinions of the authors and may not be regarded as stating an official position of the European Commission or of its Competition Directorate-General. Responsibility for the information and views expressed lies entirely with the authors. The authors would like to thank Wouter Pieké and Lambros Papadias for their valuable comments and support.

⁽²⁾ See IP/11/54

⁽³⁾ EUROPE2020: A European strategy for smart, sustainable and inclusive growth. See: http://ec.europa.eu/europe2020/index_en.htm.

⁽⁴⁾ A Digital Agenda for Europe. COM/2010/0245 f/2.

⁽⁵⁾ According to estimates in a Commission study, broadband development could contribute to the creation of more than 1 million jobs in Europe and broadband-related growth of economic activity of € 849 billion between 2006 and 2015. The benefits would even be higher if a faster adoption rate in the EU could be achieved. See The Impact of Broadband on Growth and Productivity. Report by Micus, A study on behalf of the European Commission (DG Information Society and Media).

⁽⁶⁾ See Broadband Communication, available at: http://ec.europa.eu/information_society/activities/broadband/docs/bb_communication.pdf.

⁽⁷⁾ The Digital Agenda (in Key Action 8) calls Member States “to use public financing in line with EU competition and State aid rules” in order to meet the coverage, speed and take-up targets defined in Europe 2020.

⁽⁸⁾ See State aid Action Plan: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0107:EN:NOT>.

⁽⁹⁾ See for instance, Report I-Com Istituto per la Competitività “Intervento pubblico e Banda Larga: un'analisi dell'efficacia delle politiche a livello internazionale e italiano”: <http://www.i-com.it/AllegatiDocumentiHome/420.pdf> or L'intervention des collectivités territoriales dans le secteur des communications électroniques. Arcep report, 2009.

⁽¹⁰⁾ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235, 30.9.2009, p. 7.

failure in the case of lack of basic broadband networks. The Guidelines extrapolate the fundamental tenets and apply them to the new area of very high speed, fibre-based Next Generation Access (NGA) networks, in which market failure has the potential to be substantially more serious, due to the economic characteristics of NGA networks⁽¹¹⁾.

The Guidelines are an important pillar of the Digital Agenda, and aim to create legal certainty for public and private stakeholders by providing a clear and predictable framework on the role of State aid in this sector. After the Guidelines were adopted, there was a noticeable improvement in the design of national/regional aid measures, as well as accelerated treatment of notifications submitted for Commission assessment under State aid rules. This allowed the Commission to adopt a record number of decisions⁽¹²⁾. Between 30 September 2009 (publication date of the Guidelines) and 31 January 2011, the Commission assessed and approved 30 broadband measures and authorised the use of more than €2.2 billion of pro-competitive public funding⁽¹³⁾.

The conditions of the Broadband Guidelines have been explained in detail in a previous article⁽¹⁴⁾. In this article, we will therefore focus more on our experience with various types of public intervention in different countries, while providing a brief explanation of some basic concepts frequently used in State aid regarding broadband decisions. We will then highlight a number of best practices leading to transparent and pro-competitive public intervention.

Some basic concepts

Different countries have different approaches to broadband deployment. This section aims to introduce some basic concepts underlying public intervention to support such projects. That said, the task of simplifying complex concepts comes at a cost,

and at times, may result in a loss of accuracy and precision.

General objective of public intervention

In the Broadband Guidelines, a distinction is drawn between so-called basic broadband networks and very high speed, so-called next generation access (NGA) networks. It is useful to clarify that distinction for the purpose of applying the Guidelines:

- (1) **Basic broadband** services can be delivered over several different technology platforms, such as xDSL, cable, mobile, wireless and satellite solutions. In its decision-making practice, the Commission uses the benchmark of at least 2 Mbps download speeds⁽¹⁵⁾ at affordable prices to consider a certain Internet access service as “basic broadband”.
- (2) In the current definition, and subject to future technological and market developments, **NGA networks** are fixed fibre networks, typically FTTx solutions capable of providing at least 40 Mbps download speeds or advanced cable networks based on Docsis3.0 standard, capable of providing at least 50 Mbps download speeds.

Broadband infrastructure elements

Whether used to fund the deployment of basic or NGA networks, State aid can be granted either to build a complete end-to-end broadband infrastructure, or just to fund certain segments of the broadband value chain. Broadly speaking, we can differentiate the parts of the broadband networks both vertically and horizontally.

From the vertical point of view, we can distinguish:

- (1) **Passive infrastructure elements:** typically ducts, manholes, street cabinets or, in some cases, dark fibre. The passive infrastructure is basically the physical infrastructure of the networks. In particular, for NGA network rollout, passive infrastructure elements are considered the most significant part of total investment costs⁽¹⁶⁾. For this reason, it is commendable that many European countries have adopted administrative measures to map existing ducts and other passive elements and/or to facilitate their use for

⁽¹¹⁾ For an overview of the Commission's decision-making practice up to the adoption of the Broadband Guidelines see, Lambros Papadias 'The application of the State aid rules to the electronic Communications sector', in "EC Competition and Telecommunications Law (Koenig eds) Second edition, Kluwer 2009, p153-226.

⁽¹²⁾ See communications of the Commission in MEMO/10/31 and IP/11/54.

⁽¹³⁾ In line with the announcements of the Member States, the amount of public funding earmarked for broadband development is expected to increase further. The European Commission is also planning to focus several of its financial instruments to achieve the goals of the EU2020/Digital Agenda: *inter alia* structural and regional funds (such as ERDF, ERDP, EAFRD, TEN, CIP) and possibly credit enhancement (backed by the EIB and EU funds).

⁽¹⁴⁾ See in Lambros Papadias, Filomena Chirico and Norbert Gaál: "The new State Aid Broadband Guidelines: not all black and white". Competition Policy Newsletter 2009-3.

⁽¹⁵⁾ In line with the recommendations by the ITU-T Telecommunication Standardization Sector, Recommendation I.113

⁽¹⁶⁾ They could consist up to 70-80% of the total (greenfield) investment costs. See for instance WIK Consult study for Vodafone, "Fibre Competition: Is Europe on the Right Track?" Available at: http://www.vodafone.com/content/index/about/about_us/policy/news/fibre_competition.html.

NGA network roll-out⁽¹⁷⁾. These measures are a good, non-intrusive way for governments to incentivise private investments without resorting to the use of direct subsidies to companies.

- (2) **Active wholesale layer:** The passive infrastructure is activated by means of the active equipment installed by a wholesale operator who manages and maintains the network and provides wholesale services to retail operators. This active layer includes the management, control and maintenance systems necessary to operate the network, such as switches, routers and splitters.
- (3) **Active retail layer:** The wholesale operator provides access to retail operators who can then offer television, broadband, telephony and other internet-based services to end-customers. To provide these services, retail service providers will have to invest, *inter alia*, in their own equipment, procure content and operate their own service platform (maintenance, customer care, and billing). The wholesale and retail layers can be carried out by the same telecommunications operator. However, it is important to keep in mind that they are conceptually separate, especially in the light of the wholesale access obligations imposed on the recipient of State aid pursuant to the provisions of the Guidelines.

Horizontally, telecommunication networks can also be divided into three main parts.

- (1) **Backbone (or trunk networks):** very high capacity, long-distance networks typically connecting major cities, gathering together and transporting data traffic from backhaul networks. This part of the network seems to attract a significant amount of private investment and so far, no need for public intervention has been reported.
- (2) **Backhaul (or regional, or middle-mile networks):** backhaul networks are intermediate networks between backbones and access networks. They connect municipalities, and gather together and transport data traffic from access networks.
- (3) **Access networks (or last mile/kilometre):** the last part of the network reaching the end-user premises. A broadband network can only be as fast as its last kilometre: this part of the network determines what types of broadband service the end-users can get, and this is the area in which the largest investments are likely to be required for NGA networks to replace existing copper lines with fibre.

⁽¹⁷⁾ For instance regulatory initiatives in France, Portugal, etc.

Public intervention models in the EU

On the basis of the significant case practice of the Commission⁽¹⁸⁾, different patterns of State intervention seem to emerge. Until a few years ago, State aid schemes were, with few exceptions⁽¹⁹⁾, small, localised projects initiated by a region, typically in a handful of countries (such as UK⁽²⁰⁾ or Italy⁽²¹⁾). In more recent times and with the recognition of the pivotal importance of broadband development for social and economic development, more and more national broadband strategies have been designed which explicitly plan to use public subsidies with the dual objectives of bridging the existing (basic broadband) digital divide and accelerating NGA investments.

Due to considerable differences in geographical topology, population density, telecommunication landscape, competitive conditions, constitutional systems and financial means, national broadband strategies vary across countries. For instance, due to their high population densities, favourable topologies and relative degree of competition, Belgium, Denmark, the Netherlands and Luxemburg have so far not deemed it necessary to use State aid to extend broadband coverage. In other countries (e.g. Finland), support to basic broadband has not been considered necessary (as universal basic broadband coverage could have been achieved by market forces complemented with regulatory measures), so public funds have only been used to achieve the goal of universal NGA coverage⁽²²⁾. Besides these examples, most EU countries have resorted to some kind of public intervention (including State aid) to achieve both universal basic broadband coverage objective and to accelerate and widen NGA roll-out.

In all of these cases, the Commission applies the Broadband Guidelines to assess the compatibility of projects with the internal market. The following sections describe the most recurring types of public intervention assessed by the Commission.

⁽¹⁸⁾ More than 70 broadband measures have been assessed under the EU State aid rules. The list of Commission decisions and the Commission decisions referred in this article is available at: http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

⁽¹⁹⁾ For example: N 201/2006 - National broadband project - Greece, N 284/2005 - Metropolitan Area Network Broadband Program, Ireland.

⁽²⁰⁾ See for instance Commission decisions in cases N282/2003 - Cumbria Broadband-Project ACCESS, N213/2003 - ATLAS: Broadband infrastructure scheme for business parks, etc.

⁽²¹⁾ See for instance Commission decisions in cases N264/2006 - Broadband for rural Tuscany, N412/2007 - Aid to reduce digital divide in Piedmont, and others.

⁽²²⁾ In the case of Finland, commercial operators will provide NGA coverage in 95% of the country, but according to the Finnish government, only via public funds can be the remaining 5% of the population covered.

Aid to roll-out access (last-mile) infrastructures

This is probably one of the most common type of intervention in the basic broadband field, with public funding being used to roll out the missing last-mile infrastructure. In some countries, it is conceived as the primary target for public funding⁽²³⁾.

Once the white (or white NGA areas) are clearly identified, the granting authorities launch a competitive tender procedure to select an operator that will receive public funds to build the missing infrastructure. The advantage of this solution is that end-users receive a “turnkey” solution: retail services from the selected operator. Its disadvantage is that only one technology receives funding and only one operator benefits directly from the aid measure. However, the open tender requirement and the access obligations attached to the granting of State aid limit the distortive nature of the subsidy. In addition, as a result of public intervention, more competition will take place, thanks to the wholesale services obligations.

Aid to roll-out backhauls/regional network

Generally speaking, the practice of the Commission shows that in this segment of broadband networks, there is often market failure. Sizeable areas of Europe are totally uncovered by backhaul networks, or the infrastructure is out-dated and inadequate (i.e., not built with optical fibre and suffering from severe capacity limits). The rollout of fibre-based backhaul networks is also an indispensable pre-requisite for any future NGA network deployment. Therefore many public authorities direct available funds into backhaul network deployment⁽²⁴⁾ to pave the way for both basic and NGA roll-out.

Moreover, since backhaul networks are able to support different types of technology platforms at the access level, operators can offer end-users whatever access technology they prefer or can afford (*inter alia*, xDSL, cable, mobile, wireless, FTTx solutions). Thus, such intervention not only indirectly benefits several technologies and operators, it also stimulates infrastructure-based competition.

The Broadband Guidelines of 2009 do not specifically address the case of backhaul networks. However, according to the logic of the Guidelines, for the reasons explained above, possible distortions of competition resulting from the deployment of subsidised

backhaul networks have to be assessed both at the level of basic broadband networks and at the level of NGA networks. On the basis of the Commission's practice, three scenarios could be considered:

- i. A subsidised backhaul network is deployed only in areas where there is no (optical fibre) backhaul infrastructure available (and no broadband retail services are offered of minimum 2 Mbps at affordable prices)⁽²⁵⁾. These areas are characterised by total market failure; therefore the distortion of competition is considered minimal.
- ii. A subsidised backhaul network is rolled out in such a way that the access points of the network are sufficiently close to the end-user premises (e.g. less than 1.5 – 2 kms⁽²⁶⁾), allowing the latter to benefit from NGA-type networks and services. This type of intervention can be considered as support to an NGA infrastructure within the meaning of the Broadband Guidelines, and can thus be authorised in white NGA areas. This scenario concerns mostly rural areas and may not be automatically applicable to urban zones.
- iii. A subsidy is granted to deploy a backhaul network crossing areas with different characteristics in terms of availability of infrastructure at backhaul and/or access level. In such a case, first of all, each area has to be identified as white, grey or black, from the basic broadband and from the NGA point of view. On the basis of such thorough mapping, the backhaul network can be rolled out (and made available for access) in each area, according to its characteristics. For instance, in areas where an existing basic broadband access infrastructure is already available, but no operator has plans to invest in NGA networks, the new backhaul network could be used to give access to NGA infrastructures (FTTx solutions or DOCSIS 3.0 cable), provided that the other conditions of the Broadband Guidelines are respected⁽²⁷⁾.

The same reasoning applies when public authorities want to open up (wholesale access) a network constructed to link up and provide services only to public entities (schools, libraries, clinics). Typically, the provision of broadband services to the public

⁽²³⁾ See for instance cases from Germany, such SA32021 Broadband in rural areas of Saxony or N299/2010 Broadband scheme of Bavaria.

⁽²⁴⁾ The Commission has assessed backhaul measures from, *inter alia*, Italy, Spain, Lithuania, Ireland, Estonia.

⁽²⁵⁾ See for instance Commission decision in case N183/2009 RAIN project, Lithuania.

⁽²⁶⁾ Construction of a backhaul networks can be considered as an “NGA-type of infrastructure” if the access point is at max. 2 kms distance from the end-user premises. Taking into account the economic realities of rural areas, such definition allows end-users to benefit from cost-effective NGA networks and guarantees that new services will be considerably superior to existing ones. See Commission decision N62/2010 High-speed Broadband Construction Aid in Sparsely Populated Areas of Finland.

⁽²⁷⁾ See for instance Commission decision in case N407/2009 Xarxa Oberta, Spain.

administration does not constitute State aid within the meaning of Article 107 TFEU, as long as the public entities do not engage in economic activity⁽²⁸⁾. Conversely, allowing third-party commercial operators to use the public network to extend their own coverage and services would constitute a selective advantage to them, and would therefore be considered State aid. Such a form of subsidy could be considered compatible if the public administration network is opened to third-party operators on the same conditions described for the three scenarios above.

Aid to passive infrastructure elements

Broadband roll-out, especially NGA deployment, can also be supported by granting aid at the lowest level of the telecommunication infrastructure value chain, with the aim of reducing investment costs. Civil works (such as digging in the public domain, construction of ducts) are deemed to constitute a significant part of investment costs for constructing an NGA network. Moreover, ducts (with sufficient space) opened for access to different operators could encourage infrastructure-based competition. Beyond the cases described in the Broadband Guidelines as falling outside the notion of State aid⁽²⁹⁾, whenever public authorities undertake civil works to the advantage of the telecommunication sector, then: a) the intervention can take place only in such areas where there is no comparable infrastructure available and b) all the compatibility conditions set out in the Guidelines have to be fulfilled⁽³⁰⁾.

Best practice in State aid measures

Regardless of the type of public intervention devised, all aid measures have to comply with the general compatibility criteria set out in paragraph 51 of the Broadband Guidelines and, where applicable, with the specific compatibility criteria set out for NGA networks (in particular paragraph 79). Drawing on the Commission's experience, the following sections provide a best-practice primer on how these criteria can be fulfilled.

General compatibility criteria

Detailed mapping and coverage analysis: Detailed mapping of currently-available broadband infrastructures is the first and fundamental step needed

to identify areas affected by market failure and thus to verify whether and where State aid is actually justified. This verification should be carried out in two steps: first, the public authorities should carry out a market analysis to identify existing broadband networks and services in the targeted areas, so as to identify areas lacking adequate broadband infrastructure. The choice of minimum territorial unit is left to the discretion of the granting authority. Mapping can be done per postcode, per municipality, per local-exchange area⁽³¹⁾, etc. Second, the results of the market analysis, including the identified targeted areas as well as the subject of the measure (NGA/basic broadband/backhaul network/etc.) should be open for public consultation. Best practice in public consultations includes publication of the details of the measure on a prominent webpage to which adequate publicity is given, and enough time for stakeholders to submit their comments. If an operator raises concerns on the planned State aid measure during this process (e.g. due to existing investment plans), the granting authority should analyse the concerns in detail⁽³²⁾. Aid can only be granted if, as a result of such market analysis and consultation with stakeholders, it is concluded that there is no comparable broadband offer provided or expected to be provided by the market in the targeted area in the next three years. To further increase transparency, after an operator is selected through an open tender procedure, the granting authorities should publish information on the winning bid, the selected operator, the exact areas to be covered, the timeframe for investment to take place, the proposed technological solution(s), the aid amounts and/or aid intensity of the measure⁽³³⁾.

Open tender process: The Guidelines refer to the principles of the public procurement Directives⁽³⁴⁾ to ensure that (1) no technology platform or

⁽²⁸⁾ See for instance Commission decision in case N46/2007 Welsh public sector scheme.

⁽²⁹⁾ See Paragraphs 60 and 61 of the Guidelines. However, in reality such a situation is not common everywhere: telecommunication and utilities (electricity, water, etc.) use different ducts in many European countries, the ducts need to be buried at different depths; for security reasons, different distances need to be respected, etc.

⁽³⁰⁾ See for instance Commission decision in case N368/2009 Broadband support in Saxony, Germany

⁽³¹⁾ N 305/2010 Reduction of the digital divide in Trentino, Italy

⁽³²⁾ As described in paragraph 42 of the Broadband Guidelines, public authorities may require the submission of a business plan, together with a detailed calendar deployment plan as well as proof of adequate financing or any other type of evidence that would demonstrate the credible and plausible character of the planned investment by private network operators.

⁽³³⁾ See for instance the State aid broadband scheme of Bavaria, Germany: <http://breitband.bayern.de/bb/inhalte/Anhaenge/foerder-statistik/Breitband-Foerderung-Beschaeidliste.pdf>.

⁽³⁴⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. OJ L 134, 30.4.2004, p. 114–240. Although procuring telecommunication networks and services do not fall within the scope of the Public Procurement Directives, it is required that the selection procedures shall be in line with the principles of those Directives (such as openness, non-discrimination, sufficient publicity).

(2) operator is favoured when granting aid, (3) the most appropriate (technological, financial, etc.) solution comes up as a result of market forces and (4) the aid amount is reduced to the minimum necessary (“gap funding”). Because of the need to run an open tender process, in the broadband sector, aid amounts and aid intensities are usually only known *ex post*, i.e. after the tender process, and typically, also after the Commission decision. For the purpose of assessing the compatibility of the aid, the Commission analyses the tender documents which form part of a notified measure. Therefore, public authorities should not launch a tender without a prior State aid clearance: if the Commission comes to the conclusion that certain provisions of the tender documents are not in line with the Broadband Guidelines or other relevant Commission legislation, the public authorities may have to re-design and re-run the whole tender process in line with the EC rules, a rather costly procedure.

Most economically advantageous offer: The selection criteria shall be objective and cannot be designed so as to exclude certain technologies. Diverse award criteria (for instance, the amount of public funding required, the amount of private investment, geographical coverage to be achieved, the pro-competitive nature of the proposed technological solution, tariffs and affordability) would offer public authorities the possibility of differentiating between proposals, based partly but not only on prices, and to select the most advantageous offer.

Technological neutrality: It must be left to market forces, ideally in the course of the tender process, to let the most suitable technological platform (or combination of platforms) emerge. In many cases, one single technology may not be able to provide the requested coverage or would not be economically reasonable⁽³⁵⁾. A mix of different technological solutions is often the best way to maximise the coverage, given the limited public funds available⁽³⁶⁾. However, it is important to bear in mind that in this case too, the choice of technology in each targeted area should not be pre-determined by the granting authorities, but should be left to the operators to decide (again, via the competitive tender process). In certain cases, the principle of

technological neutrality is also fulfilled when a specific technology seems to have been chosen *ex ante*. This is the situation regarding fibre-based backhaul networks and of NGA networks. In reality, at the current stage of market and technological development, to achieve the public interest objectives of (1) offering reliable and resilient backhauling services or of (2) allowing delivery of broadband access services with enhanced characteristics (NGA), the limited availability of suitable technologies limits the choice of the public authorities to fibre infrastructures. However, this situation may change in future, especially with regard to mobile services, and in that case, all comparable technologies may need to be put on an equal footing.

Use of existing infrastructure: Public authorities shall encourage the use of existing infrastructure to reduce the amount of aid needed and to avoid wasteful duplication. Existing infrastructure could consist of (1) a network that is already deployed and owned by the regional government itself; (2) other available passive infrastructures, for instance existing ducts along the road or railway network (3) infrastructure of existing operators (in the form of obtaining duct access, renting dark fibre capacity from them etc.); (5) other alternative infrastructure (sewers, manholes, etc.). Public authorities can incentivise operators to provide information on their existing infrastructure and map them in a central database to support private and public investment⁽³⁷⁾. At the same time, this condition should not end up favouring existing incumbents that have significant infrastructure in place, especially in cases where third parties may not have access to such infrastructure or inputs necessary to compete with an incumbent. It is for the granting authorities, together with the National Regulatory Authority, to assess whether third parties can obtain adequate access to the incumbent’s infrastructure and hence are able to compete in the tender procedure on a level playing field⁽³⁸⁾.

Wholesale access: A *sine qua non* condition for granting State aid is the obligation for the aid recipient to provide open wholesale access, regardless of

⁽³⁵⁾ Typically, this is the case of imagining a fully-fledged wired network to reach settlements comprising a few scattered households. Such households might be more efficiently reached by wireless, mobile, satellite or other alternative solutions. See for instance Commission decision in case N461/2009 Cornwall & Isles of Scilly Next Generation Broadband network.

⁽³⁶⁾ See, for example the case N646/2009 National broadband plan for rural areas in Italy in which the authorities designed a combination of backhaul infrastructure rollout and end-user direct subsidisation for the purchase of satellite equipment in the ultra-remote areas of the country.

⁽³⁷⁾ For instance, Germany has started to draw up a map (Infrastruktur-Atlas) to identify infrastructure that can be reused – the information is provided by the operators on a voluntary basis. Available at: http://www.bundesnetzagentur.de/cIn_1932/sid_36A07B74A782DAA6BCB14427FC8B773D/DE/Sachgebiete/Telekommunikation/Infrastrukturatlas/infrastrukturatlas_node.html.

⁽³⁸⁾ Until now, only one Commission State aid decision (out of almost seventy) has been challenged before the General Court, on the grounds that the selected (incumbent) operator did not provide the necessary access products to its competitor that would have allowed the latter to make a competitive bid. See Court case T362/2010.

the presence of significant market power. In return for receiving taxpayers' money, the selected operator must give back part of the benefit thus received in the form of increased competition, as opposed to the scenario had it invested solely its own resources. Abandoning such a condition would perhaps require less aid from the granting authorities as the selected operator would be able to rely on monopolistic rents to fund the network rollout. Although in the very short term there may be a trade-off between requesting better/more access products and the need to lower investment costs (and hence State aid), in the long term, only effective competition is able to maximize consumer welfare. Allowing monopoly rents means higher costs for consumers and society in the medium/long run. State aid cannot be used as a tool to support the creation of local monopolies, and the design of the access products is one of the crucial criteria for a successful State aid scheme.

Price benchmarking: the pricing of wholesale access products is crucial for the success of a State aid measure: high wholesale prices would prevent market entry of third party operators and hence reduce competition,⁽³⁹⁾ or wrongly-set pricing could distort incentives for alternative operators to move up the "ladder of investment". Therefore an effective and continuously-revised price benchmarking mechanism (to reflect continuous price decreases) advised by the NRAs requires close attention.

Claw-back mechanism: Although granting authorities may experience difficulties in obtaining relevant data from the operators selected, proper monitoring of the implemented State aid scheme is essential (particularly if EU funds are also used) for the granting authorities to be able to intervene if the selected operator does not fulfil contractual obligations and to claw back public funds if overcompensation occurs. Most granting authorities use the average rate of return in the industry as a benchmark and share any extra profit above that in proportion to the original aid intensity of the measure, thus preserving the profit incentives of the subsidised operator.

Specific compatibility criteria for NGA networks

Since the potential distortion of competition could be higher, measures supporting the roll-out of NGA infrastructures in areas where any basic broadband infrastructure already exists (i.e. all areas

which are non-white) require additional conditions to be fulfilled.

Access obligations: The access obligations imposed on the chosen operator include access to both passive and active infrastructure level for at least seven years, without prejudice to any similar regulatory obligations that may be imposed by the NRA. The subsidised network has to be designed in a way that guarantees that several alternative operators have access to the subsidised infrastructure at all levels. The supported infrastructure will have to offer sufficient access to ducts, shall have sufficient dark fibre capacity, as well as access to cabinets, and active access products. In the case of NGA networks, besides the above-mentioned trade-off between lower investment costs and the access obligation, an additional argument may be put forward, that in low-density areas, access to the passive level will not result in additional competition, since it may not be economically feasible to create an alternative network. In the absence of counterfactuals and to avoid pre-empting the outcome of market forces, the Broadband Guidelines require that as a quid pro quo for benefiting from public funds, the new network should be opened at as many levels as possible, thus allowing market forces to decide which access products suit them best.

The role of the National Regulatory Authorities (NRA)

The role of NRAs is important in relation to aid granted for NGA network rollout. In setting the conditions for wholesale network access, public authorities are requested to seek the expert advice of the NRA, especially since NGA network rollout began only recently and access products are not yet fully designed or available. It is good practice in some countries to also seek the opinion of the National Competition Authority⁽⁴⁰⁾. In the Commission's experience, NRAs have shown varying degrees of involvement (and willingness) regarding State aid schemes. In well-designed projects, members of the NRA are part of the team designing the State aid measure, or provide guidance on how to set the access conditions in the most appropriate way⁽⁴¹⁾. In other cases, the NRA helps the granting authority to solve disputes between access seekers and the operator of the subsidised infrastructure. If the NRA raises serious doubts on the design of an aid measure, this should ring a warning bell for the granting authority and the Commission as to the overall beneficial effect of the aid measure. Fortunately, more and more NRAs now recognise that they can perform their role in

⁽³⁹⁾ For instance, increasing wholesale prices by 10% can have a significant impact on the critical market shares for entrants and their competitive coverage. See WIK Consult study for Vodafone, reference in footnote 16.

⁽⁴⁰⁾ This is consistently done in Italy, for instance.

⁽⁴¹⁾ See for instance, a guidance provided by the Swedish regulatory authority, PTS to granting authorities: http://www.pts.se/upload/Ovrigt/Internet/Bredband2010/riktlinjer_bredbandsstod_landsbygd_2010-09-16.pdf.

keeping the electronic communications markets open and maintaining competition better if their core activity relating to the application of sectoral regulation is accompanied by active involvement in State aid measures.

Effective and full unbundling: The NGA network architecture that will benefit from State aid should provide for effective and full unbundling and thus satisfy the different types of network access that operators may seek, including active and passive access products on an open wholesale basis. In the NGA area, effective and full unbundling projects are not yet systematically available, or may be currently under design⁽⁴²⁾, so the networks benefiting from State aid will either be operational when those access products are available or will otherwise play a pioneering role in devising adequate access products. While fully respecting the principle of technology neutrality, to allow for full and effective unbundling, the Broadband Guidelines express their strong preference for the deployment of multiple-fibre lines that are able to host both P2P and PON technologies and are therefore considered to be conducive to long-term competition. In this respect, while fully respecting the principle of technology neutrality, the granting authorities have strong leverage to promote pro-competitive network architectures, for instance, by rating such bids higher in the context of the open tender procedure.

Remarks on successful designs

“In a few years’ time, broadband access will be so cheap that we won’t even know if we are online or not”. Gerd Leonhard, media futurist

On the basis of the Commission’s experience in assessing State aid broadband projects, the following factors can lead to a successful basic broadband or NGA deployment project.

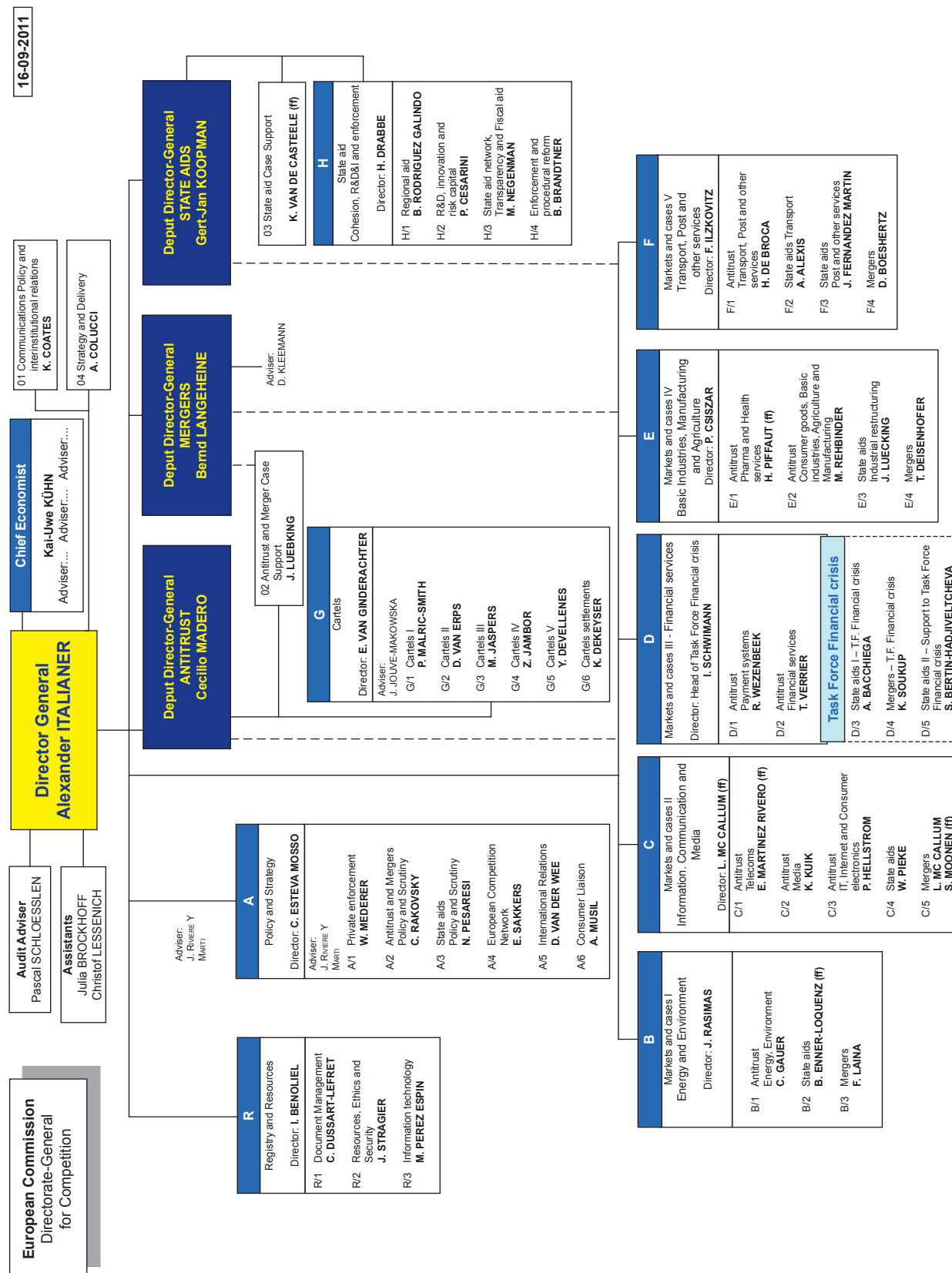
- o Full transparency as regards the aid measure, together with the active involvement of all stakeholders (commercial operators, the NRA, local authorities, etc.) in the design of the projects is crucial to find the right balance between commercial incentives and the public interest.
- o The availability of adequate fibre backhaul networks in each region is a fundamental prerequisite for any broadband development.
- o In the vast majority of cases, given the economics of networks, widespread (or even universal) broadband coverage can only be achieved via the use of a mix of technologies.
- o Aid limited to passive infrastructure elements could support the NGA roll-out of several operators.
- o Public ownership limited solely to passive infrastructure elements could be a good way to benefit all market operators in a non-discriminatory way. At the same time, the distortion of competition arising from such intervention could be limited, since public companies do not compete directly in the core activities of the telecommunication operators (wholesale and retail service provision).
- o To create a competitive market for broadband, with lower prices and a higher level of services for the end user, granting authorities should support crucial pro-competitive features, in particular: full and effective wholesale access to the subsidised networks and network architectures conducive to long-term competition (such as multiple fibre deployment, point-to-point infrastructures).

The Broadband Guidelines aim to make public funding of broadband infrastructure a “*smart investment*”, that is, an investment that not only contributes to and incentivises infrastructure development, but also favours the creation of a more open, competitive landscape in electronic communications – perhaps making their regulation easier in future too.

In addition to the objective of low prices, as Leonhard puts it, “good broadband access should be so ubiquitous that it will not make a difference if we are in a small village or in a big city”, and broadband access should be offered on different competing platforms so that “it won’t even matter what technology we are using”. Smartly-designed State aid measures could contribute to achieving these aims.

⁽⁴²⁾ For instance, Ofcom accepted enhanced bitstream-type of access (VULA) in the UK on BT’s optical fibre network (also taking into account e.g. BT’s functional separation). The European Commission has accepted telecoms regulator Ofcom’s proposal to order BT to provide ‘virtual’ access to alternative operators on the basis that such access should be only a transitional measure, and full fibre unbundling should be imposed as soon as technically and economically possible.

Organigram of the Competition Directorate-General (1 November 2011)



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From 1 September 2010 to 31 December 2010

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**Joaquín Almunia,
Vice-President European Commission
responsible for Competition policy**

SPEECH/10/736 - 8 December

Press conference on LCD cartel, Visa and French chemists' association decisions

Brussels - European Commission

SPEECH/10/722 - 3 December

Converging paths in unilateral conduct

Management Centre Europe, Brussels ICN Unilateral Conduct Workshop

SPEECH/10/711- 1 December

Commission prolongs crisis framework with stricter conditions – trend towards less and better targeted aid continues despite crisis-related spike

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Valladolid, Spain - University of Valladolid, School of Law Valladolid

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The past and the future of merger control in the EU
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Alexander Italianer: The interplay between law and economics

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Nadia Calvino: La politique de concurrence de la Commission européenne et la crise : enjeux, stratégie de sortie de crise et priorités à venir

Bordeaux, France - LIDC

23 September

Alexander Italianer: Safeguarding due process in anti-trust proceedings

New York City, USA - Fordham Competition Law Institute

15 September

Alexander Italiener: Safeguarding and promoting competition in the age of digital convergence en Seoul, South Korea - 6th International Competition Forum Seoul

Press releases and memos

From 1 May 2010 to 31 August 2010

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Antitrust

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Antitrust: Commission sends Statement of Objections to Czech energy companies Energetický a průmyslový holding and J&T Investment Advisors for obstruction during inspection

IP/10/1741 - 17/12/2010

Antitrust: Commission opens investigation against Deutsche Telekom concerning behaviour of its subsidiary Slovak Telekom on broadband markets

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Antitrust: Commission opens antitrust proceedings against a number of cement manufacturers

IP/10/1685 - 08/12/2010

Antitrust: Commission fines six LCD panel producers €648 million for price fixing cartel

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Antitrust: Commission makes Visa Europe's commitments to cut interbank fees for debit cards legally binding

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Antitrust: the Commission rules against the Ordre national des pharmaciens for restrictions on competition in the French clinical analysis market

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Antitrust: Commission probes allegations of anti-trust violations by Google

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Antitrust: Commission fines prestressing steel producers € 458 million for two-decades long price-fixing and market-sharing cartel

IP/10/1197 - 29/09/2010

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Antitrust: Statement on Apple's iPhone policy changes

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State aid: Commission opens in-depth inquiry into state measures in favour of Greek textile producer United Textiles and its lending banks

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State aid: Commission opens in-depth investigation into property sale by Swedish Vänersborg municipality

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