



EC COMPETITION  
POLICY NEWSLETTER

Editors:  
Bernhard Friess  
Nicola Pesaresi

Address:  
European Commission,  
J-70, 00/123  
Brussel B-1049 Bruxelles  
Tel.: (32-2) 295 76 20  
Fax: (32-2) 295 54 37

World Wide Web:  
[http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)

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Towards a new motor vehicle block exemption — Commission proposal for motor vehicle distribution, adopted on 5 February 2002

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## State guarantees to German public banks: a new step in the enforcement of State aid discipline to financial services in the Community

*Stefan MOSER and Nicola PESARESI, Directorate-General Competition, Karl SOUKUP, member of Commissioner Monti's cabinet <sup>(1)</sup>*

By letter of 11 April 2002, the German government accepted the amendment of 27 March 2002 of the Commission's proposal for appropriate measures as regards the system of State guarantees to German public banks (*Anstaltslast and Gewährträgerhaftung*). By its acceptance, the German government formally put an end to the procedure of appropriate measures initiated in January 2001. It cleared the road to bringing the German system of State guarantees for public banks in line with the State aid rules of the EC Treaty, thereby removing a longstanding distortion of competition in Germany's and Europe's financial system.

The successful conclusion of this case marks a significant achievement in State aid policy. In this article we first present what we believe are the main lessons that can be derived from this case. A description of the case follows in the second part of this article.

### I. What lessons can be derived from this case?

The successful conclusion of this case represents an important result for many reasons and has notable implications in several respects. We suggest that they may be grouped into three separate categories: From a political point of view, some lessons can be derived on the role of the State aid provisions and the relationship between the Commission and the Member States. We suggest it may also represent a useful element in the present debate on the reform of the European Union and its institutions. We then discuss the economic implications of the case for the enhancement of competitive conditions in the European banking market. Finally, we describe the implications for State aid control policy. Although the three categories overlap to some extent, we believe that such a separation gives a useful key to interpret this case.

#### *a) Political implications*

This case confirms the *Commission's determination to carry out its duties*, conferred on it by the

Member States, to enforce the Treaty's provisions in the EU, and demonstrates that the Commission, in its role as a competition authority, takes into account in particular the interest of European consumers. It shows that the Treaty, which as regards competition rules had decisively been modelled along German thinking, works. It shows also that the Commission can play a useful role as a 'facilitator' when a Member State has difficulty in making necessary changes acceptable to stakeholders, which may have opposing interests.

The conclusion of this case is also *a major political achievement for the German federal government* to have effectively co-ordinated, in close collaboration with the Commission, the process of finding a workable solution in a matter which involves within Germany the competence of the *Länder*, and to have finally found a way to bring the sector of public banks in line with the principles of the Treaty.

It is worth mentioning that discussions started already in 1996 and were delayed by several factors. This was certainly partially due to the complexity of the file and the need to take account of the federal structure of the German State in terms of number of interlocutors and differentiated legal systems. However, it also shows the hesitations of the German side to accept that these basic legal arrangements could be subject to the Treaty's State aid rules. It was also difficult to accept the economic consequences of the adaptation of these traditional structures.

In 1998, at the Treaty negotiations in Amsterdam, Germany proposed an amendment to the Treaty to protect the functions carried out by their public banks from the application of State aid rules. In the end, the other Member States accepted only a rather general declaration. By this initiative, the whole Community learnt about the problem.

Against this background, the Commission maintained that *all Member States are treated equally*. The handling of this case reaffirmed this basic principle. In its previous actions, the Commission had

<sup>(1)</sup> The authors are particularly grateful to Ronald Feltkamp, Head of Unit DG COMP.H.3, and Klaus-Dieter Borchardt, at the time the responsible case-handler at the Legal Service, for their highly valuable contribution.

been equally firm vis-à-vis other Member States. It had already shown its determination in the handling of the French and Italian financial services crises of the 1990s (Crédit Lyonnais amongst others <sup>(1)</sup>). In the handling of the present case, the Commission also had to take into account the relationship between German public banks and other pending banking cases. While conducting the final discussions with Germany, the Commission had to decide upon an Italian aid scheme for bank restructuring <sup>(2)</sup>, which was also of significant importance as regards aid amount and number of beneficiaries: the Commission maintained that the two cases were to be assessed along the same principles.

The Commission's action was closely watched by the competitors. The European Banking Federation had lodged a complaint and submitted documentary evidence to show the negative effect of the aid on competition. The presence of active complainants indicated to the Commission that action was of priority. The complainants also submitted useful information. They even threatened to take action against the Commission before the European Court, had the Commission, in their view, shown that it was not willing to take their interests into due account. *The complainants' contribution was highly valuable*; however, the Commission was keen to maintain a wider perspective and to strike a fair balance in the interest of European competition and consumers.

It should be recalled in this context that the Commission first attempted to bring the private and public banks together to find a solution at the national level. When it became clear that this was not possible, the *Commission decided to carry out a threefold exercise*: explaining the reasons of its action under the Treaty obligations, clarifying that the scope pursued was not the suppression of the German system of public banks but only the removal of the anti-competitive advantages attached to such a system, and showing its determination to apply the Treaty's provisions in an equal way also in politically sensitive cases.

It is interesting to note that once the scope and the reasons of the Commission's initiative had been understood, as well as the Commission's determination to ensure compliance with Community law, *the public banks themselves came up with the outline of a solution* which then became the basis for the discussions between the Commission and Germany.

Indeed, the gradual 'rapprochement' between Germany and the Commission was made possible thanks to *the specific procedure under Article 88 (1) of the Treaty*. This procedure provides for the possibility that after a Commission's proposal to bring aid into line with the Treaty rules, the Member State concerned actively participates in finding the best solution. This procedure has been specifically designed to facilitate the transition to full compliance with State aid rules for "existing" aid, i.e. those aid systems, like the guarantees for German public banks, which were either introduced before the Member State's accession to the Union or which did not constitute aid at the time they were put into effect and subsequently became aid due to the evolution of the common market. This shows that Community law provides the tools that allow to find good solutions for difficult long-standing problems.

This leads us to a broader reflection on the *future of the European Union* and its institutions, and possibly for the work of the Convention. In spite of strong political and economic pressures the Commission as a collegial body showed its ability to stand as an impartial guardian of the Treaty. It is not evident that had the same function been attributed to an external body, the same pressures would have been equally resisted. The Commission was actually created and equipped with the necessary powers precisely because situations like this were foreseen and the need for independent and uniform treatment was recognised.

Finally, it is worth considering that the political implications of this case go beyond the current Member States and extend to the Candidate Countries. In the context of *accession to the EU the Candidate Countries* are required to demonstrate that they are able to respect the Community's *acquis* including the Treaty's competition rules. The Competition chapter cannot be successfully closed if the Candidate Countries are not able to prove that they have adapted their legislative and administrative frameworks to comply with the State aid rules. They also have to show a sufficient and credible record of enforcement of these rules. It is clear that this represents a big challenge and requires considerable efforts on both political and economic levels. The adaptation of a former planned economy to a market-oriented model entails not only severe restructuring for the Candidate Countries' industrial sector but also a huge reform of their financial system. An attitude of the Commission vis-à-vis Germany, which would

(1) GAN, SDBO, CFF are other examples of the Commission's attitude. In Crédit Lyonnais, as the Commission accepted a large amount of aid, the importance of the decision lies in the establishment of a policy to require significant counterparts to offset the distortion of competition resulting from the aid.

(2) See Commission's decision of 11 December 2001, still to be published.

have been inconsistent with its principles and previous practice, would have meant a significant loss of political weight and credibility for advocating the need for an effective application of State aid rules in the Candidate Countries.

### b) Economic implications

The Commission's determination hinged on its consciousness of the necessity to remedy a *very significant economic distortion in the European banking market*. At the same time, the Commission affirmed its willingness to grant *sufficient transitional periods* to allow for an orderly adaptation process and give a fair chance to the undertakings in need of change, thus avoiding disruption of the markets. The decisive criterion for the Commission is the *balancing of the interests* of the competitors in levelling out the distortion of competition as soon as possible, the interest of the affected undertakings to adapt themselves with a fair chance of success, and the interest of consumers for an orderly adjustment which brings more competition together with better and cheaper services.

Firstly, the aid scheme was advantaging a large number of banks which represent around a third of the German banking market in terms of assets.

Secondly, although difficult to quantify precisely, the system of public guarantees probably has conferred more than *1 000 million Euro per year of economic advantage* to the German public banking sector. This represents the highest amount per case examined by the Commission. No other Member State has ever granted equivalent amounts on a regular basis <sup>(1)</sup>. Although even larger aids have been granted in the 1990s to some banks in France and Italy, they were *ad hoc* interventions in the context of serious banking crises <sup>(2)</sup>.

It is evident that fair competition cannot be established when the State so heavily distorts the market mechanism. German private banks and other European banks suffered from such a distortion. Moreover, as aid in general helps to perpetuate inefficient structures and discourages innovation, it finally results in a penalisation of the most efficient financial intermediaries. The whole economy and consumers eventually bear the costs.

It is probably worth considering that the Commission's action became even more necessary after the *introduction of the Euro*. The single currency

entails at the same time the removal of a significant cost component for the integration of European financial markets and encourages cross-border activities of banks. Besides other reasons, the distorting advantage from which the public banks benefited contributed to making the German banking market rather unattractive to enter for non-German banks.

It should also be recalled that State aid rules are one of the essential components of the legal framework establishing the *Common Market*. Without them, Member States would probably not resist attracting undertakings away from other Member States or protecting their national undertakings by ever more generous subsidies. Competition would become unfair, the Common Market would disintegrate and the level of subsidies would replace the performance of an undertaking as the most decisive criterion for survival on the market. The waste of taxpayers' money in such spiral for ever higher State aids would only be another negative consequence.

The abolishment of the State guarantees represents thus a fundamental contribution towards the *achievement of a single market for financial services in Europe* as also advocated by Member States at the European Council of 15-16 March 2002 in Barcelona. The prerequisite of a single market is access for all undertakings in the Community to the markets of all Member States.

This also paves the way for the *Commission's next actions* vis-à-vis similar aid schemes in other Member States. Following the successful conclusion of the German case, the Commission has decided to take the first step to bring a similar Austrian system of State guarantees in favour of certain public banks (*Ausfallshaftung* in favour of *Landeshypothekenbanken* and certain savings banks) in line with the Treaty rules. Guarantees and guarantee schemes in other Member States are also currently being examined to determine whether they must be altered or discontinued.

### c) Implications from the point of view of State aid control policy

This case is also relevant from the point of view of State aid control policy under several aspects. It breaks new ground in the Commission's assessment of the types of aid in favour of banks. *Four*

<sup>(1)</sup> The Commission has examined some other national schemes but of less importance. Among the most relevant is the previously mentioned Italian aid scheme for bank restructuring, which is considered to be worth between 1 000 and 3 000 million Euro.

<sup>(2)</sup> The banking crises of the 1990s probably had a cost between 20 000 and 30 000 million Euro for France and between 5 000 and 10 000 million Euro for Italy. Very large aids to banks were also granted by the Nordic countries before their accession to the EU.



*categories of aid* can be distinguished in this respect:

- (i) Ad hoc aid to ailing banks (rescue and restructuring aid);
- (ii) Investment aid (e.g. to stimulate the reorientation of banks or to allow them to expand their business);
- (iii) Operating aid;
- (iv) Aid to compensate extra-costs of services in the public interest.

When in the 1990s the Commission started to extend State aid control to fight distortions caused by State interventions in the financial sector, it first examined aids which fall under the first two categories above. Those were the most visible forms of aid. The Commission developed a quite large experience with ad hoc aids to ailing banks <sup>(1)</sup>, following the crisis of the French and Italian banking systems of the 1990s. It then extended its practice by addressing State support in form of investment aid to banks that, although not being in distress, needed a reinforcement of their capital basis (negative final decision in 1999 on the WestLB/Wfa capital transfer case, ordering recovery of more than 800 million Euro, which served also as a «test case» for several other still pending cases on German Landesbanks).

Only more recently, the Commission extended its attention to *less visible State interventions* in the form of state guarantees to banks which constitute *operating aid* falling under the third category above.

In that, the Commission benefited from the experience gained in other sectors. In 1993, the Commission concluded with the Italian government an agreement to phase out State guarantees to undertakings in 100 % public ownership (Andreatta-Van Miert agreement, Efim case). In 1999, the Commission adopted a Notice on the application of the State aid rules to State guarantees, in which it gave rather precise indications under what conditions State guarantees can be presumed to constitute State aid and fall under the requirement of notification to the Commission.

In the case of the German public banks, the aid takes the form of a double guarantee by the respective public owners to the banks. The advantage of such guarantee consists mainly, but not exclusively, in the better conditions for the bank when it raises funds on the financial markets. The guarantees are not stipulated in a commercial contract, but derive from the specific long standing public

status of the banks. The system has no (immediate) direct cost to the State budget, while providing the banks with on going indefinite support.

Furthermore, this case demonstrates that it is possible to respect State aid rules without putting into question the public status of a Member State's institutions. One of the main reasons for the German banks' and Länders' opposition to the Commission's action was the concern that the abolishment of the guarantee would have meant the loss of the public status of the banks. This has not been the case. Indeed, in applying the State aid rules the Commission fully respects Article 295 of the Treaty, which provides for the *Community's neutrality vis-à-vis private or public ownership of undertakings*. However, in the present case it was not the public ownership of the banks, which led to the presence of State aid but the guarantees attached to it. By removing the guarantees for the commercial business of the public banks the Commission succeeded in ensuring fair competition without putting into question the public ownership and the public legal status of the banks.

The Commission's decision on the German banks is also important as it is one of the first to address the relationship between the banks' commercial business and *activities in the public interest* from a State aid point of view (see fourth category of aid above). This represents quite a new field of analysis. When an undertaking's business includes both commercial activities and activities in the public interest, it is essential that aid granted to the activities in the public interest does not spill over into the commercial area. In the present case, the Commission had to examine this for the special purpose banks, in particular KfW. It came to the conclusion that the aid was likely to produce such an effect and that an effective separation between the two fields of activities was necessary. The Commission concluded that if KfW wanted to keep the aid in the form of the State guarantees it would have to hive off the commercial business into a separate legal entity without any State support. Such a solution constitutes the benchmark against which the Commission will examine in the future similar aid schemes in favour of commercial institutions charged with public service tasks.

Finally, the Commission's decision also strengthens the enforcement of State aid provisions in the financial services sector from another perspective. By enlarging the scope of its analysis from ad-hoc rescue or restructuring aid to oper-

<sup>(1)</sup> Notably Crédit Lyonnais, Société Marseillaise de Crédit, Crédit Foncier de France, GAN-CIC, SDBO, Comptoir des Entrepreneurs, Banco di Napoli, Banco di Sicilia.

ating aid schemes and checking that public services activities or the fulfilment of public tasks are not over-compensated, the Commission has in a sense shifted its focus to a more *structural approach*. State aid control with respect to support to ailing banks, even when such support is considered incompatible, cannot prevent the distortion of competition, which in most cases has already occurred when the ailing bank pursued its imprudent business policy <sup>(1)</sup>. State aid control which removes structural imbalances eliminates potential sources of distorting business behaviour and thus can be considered to be more effective.

## II. Development and analysis of the case

### 1) Overview of the German banking system

The German banking system consists of universal banks and special banks.

There are 3 types of universal banks: nearly 300 commercial banks of private legal form (*private Geschäftsbanken*), nearly twice as many banks of public legal form (12 *Landesbanken*, *DGZ-Deka-Bank* and about 560 *Sparkassen*), and about 1 800 cooperative banks (*Genossenschaftsbanken*).

The special banks consist of about 30 private mortgage banks (*Hypothekenbanken*), about one dozen special credit institutions of public legal form and ca. 30 buildings & loans associations.

The public banking sector consists of both the universal and the special credit institutions of public legal form. This sector constitutes roughly one third of the German banking market and employs approximately 300,000 people. In addition, there are also some banks of private legal form in public ownership.

All credit institutions of public legal form (*öffentlich-rechtliche Anstalten*) have traditionally benefited from State guarantees: *Anstaltslast* and *Gewährträgerhaftung*, and, in some cases instead of *Gewährträgerhaftung*, a special refinancing guarantee of the State.

### 2) Description of the State guarantees and their economic effects

*Anstaltslast* is considered to be a general principle of law and says that the guarantor (*'Gewährträger'*) is obliged to secure the economic basis of

the *Anstalt*, to maintain it functioning for the complete duration of its existence and to cover possible financial gaps through the use of subsidies or other appropriate means. It was first recognised in 1897 as a general principle of law by a German court. Bankruptcy is practically impossible. *Anstaltslast* is creating, from a strictly legal point of view, only a liability in the inner relationship (*'Innenverhältnis'*). *Anstaltslast* is limited neither in time nor in amount. The *Anstalt* does not pay a remuneration for the guarantee.

*Gewährträgerhaftung* is not considered a general principle of law but requires an explicit legal basis. It was explicitly introduced in several Länder laws in 1931/32 when the previous direct liability of the municipalities was replaced. It is defined as a direct liability and based on statute or by-laws, on the part of a regional authority or an association under public law with respect to the creditors of a public law credit institution for all of its obligations. *Gewährträgerhaftung* therefore creates the obligation for the guarantor (*'Gewährträger'*) to step in in the case of insolvency or liquidation of the credit institution. It creates direct claims of the creditors of the credit institution against the guarantor, who can, however, only be called in if the assets of the credit institution are not sufficient to satisfy the creditors. *Gewährträgerhaftung* is limited neither in time nor in amount. The credit institution does not pay a remuneration for the guarantee.

*Anstaltslast* and *Gewährträgerhaftung* combined have generally caused rating agencies to attribute the best possible rating (Triple-A) to the banks concerned. The risk for creditors of these banks has been classified as the same or very close to the risk of the German State. Consequently, investors ask only for a greatly reduced risk premium compared with the one based on the respective stand-alone rating of these banks. The guarantees thus result in extremely advantageous funding conditions and confer a significant economic advantage to the banks because of their specific construction (no remuneration, no limitation in time or amount). In addition, the guarantees confer also other advantages (e.g. improvement of reputation, banks can take higher risks, possibility to carry out certain derivatives business).

### 3) Assessment under the State aid rules

#### a) Characterisation of the measure as an aid scheme

The measure under review constitutes an aid system within the meaning of Article 88 (1) EC.

<sup>(1)</sup> See for instance Crédit Lyonnais.

Thus, the Commission conducted its analysis by reference to the terms of the scheme, and not by reference to the potentially numerous individual aids that have been granted under the scheme and which might be granted in the future. The measures necessary to bring the scheme into line with the Community State aid rules had to be determined by reference to the scheme as the whole, and not by reference to specific undertakings. As long as the scheme under review potentially admitted incompatible State aid, the scheme as a whole was not in line with the requirements of the Treaty State aid rules. The Commission had to be satisfied that the scheme as a whole is modified so as to eliminate any possibility of incompatible State aid.

#### *b) Ownership and legal form of a company*

According to Article 295 EC the Community is neutral as regards the national systems of property ownership and nothing in the Treaty prevents the State from owning undertakings. On the other hand, the competition rules have to be applied in the same way to private and to public undertakings. Neither the one nor the other type may be advantaged or disadvantaged by the application of these rules.

It was the Commission's opinion that it is not possible to justify *Anstaltslast* and *Gewährträgerhaftung* by referring to Article 295 EC. If the legal form of a company is associated with advantages that produce a distortion of competition which is prohibited by the State aid rules, then this legal form must be subjected to the discipline of these rules. The Member States are free to choose the legal form for undertakings, but they have, when doing so, to respect the competition rules of the Treaty.

In particular, this means that if a State guarantee is automatically linked to a certain legal status of a company, such guarantee may constitute State aid under Article 87 (1) EC, and cannot be justified under Article 295 EC.

#### *c) Aid within the meaning of Article 87 (1) EC*

*Anstaltslast* and *Gewährträgerhaftung* provide a very effective protection for creditors and business partners, because they reduce or even eliminate the risk of entering into business with the public law credit institutions concerned and providing capital to them. This has consequences for the terms at which business partners are willing to deal with these credit institutions or creditors are willing to provide them with financial funds and make these terms more favourable for the public law credit institutions. Because of this effect *Anstaltslast* and *Gewährträgerhaftung* could be considered as

having an effect on the competitive situation of these credit institutions.

In particular they improve the creditworthiness of the credit institutions and so normally the financing conditions because creditors ask a lower risk premium and offer better conditions when granting capital or are more willing to enter into business. The evaluation of the creditworthiness of the credit institutions is considerably based on the guarantees. The credit institutions in question explicitly point to the guarantees when raising financial funds.

The advantages arise, in particular, but not only, for activities on the (international) capital markets (e.g. issuing bonds or raising subordinated equity), in the business with large institutional investors, in the derivative and OTC business and, to a lesser degree, in the interbank business. The guarantees linked to the public ownership presumably increase also the general standing and reputation of the credit institutions in the public. The advantages in particular take the form of lower interest rates asked by creditors, the form of lower (or no) security asked or they can also decide whether a business partner on the market enters into a business relationship at all. These advantages on the funding side can be translated into advantages when the public law credit institution offer their services to (potential) customers. It should be remarked that in the financial services sector in some lines of business small differences in conditions can in fact be decisive for the choice of these (potential) customers.

The coverage by State guarantees generally allows public banks also to take higher risks, e.g. in terms of financing volume, and therefore to take on business which banks threatened eventually by the risk of insolvency as an ultimate sanction would not do, in particular for internal risk management reasons. Banks covered by guarantees can therefore out-compete other banks either by taking over larger financing volumes (with a given risk per chunk) or accepting business with a higher risk content per chunk.

The State aid rules of the Treaty apply only to State measures which distort competition by favouring certain undertakings and only insofar as they affect trade between Member States. The more favourable conditions and the better market access, respectively, improve the competitive situation of the public law credit institutions. Within the sector of financial services the single market has to a large extent been achieved, there is strong competition between financial institutions of different Member States which is further intensifying with the European Monetary Union and the introduc-



tion of the single currency. Distortion of competition affects thus also trade between Member States. In this context reference has also to be made to the jurisprudence of the Court, stating that relatively small aid amounts and State aid to relatively small companies which are only active within their home country can in principle have effects on trade within the Community.

Therefore, the guarantees therefore constitute State aid within the meaning of Article 87 (1) EC.

*d) Existing aid within the meaning of Article 88 (1) EC*

*Anstaltslast* has been, since its recognition as general principle of law in 1897, an integral element of an *Anstalt*, to which public tasks are transferred. Also where *Anstaltslast* is introduced explicitly in written legal provisions this is based on this general legal principle. The facility of *Anstaltslast* could thus be regarded as a scheme for public law credit institutions in Germany. The creation of *Anstaltslast* dates back to before entry into force of the EC Treaty.

*Gewährträgerhaftung* is — contrary to *Anstaltslast* — not accepted as a general principle of law, but requires an explicit legal basis to be created. Given the founding dates of certain public law credit institutions and changes in the relevant laws it could not be excluded that for individual credit institutions *Gewährträgerhaftung* was created after entry into force of the EC Treaty. However, good reasons pleaded in favour of treating the aid contained in *Gewährträgerhaftung*, when qualifying it as new or existing aid, in total in the same way as *Anstaltslast*.

Especially it had to be taken into account that *Gewährträgerhaftung* is in practice linked in its existence to *Anstaltslast* and is in its practical importance subordinate to the latter. This is because the obligation of the guarantor to intervene in the case of financial problems of the credit institution already under the concept of *Anstaltslast* actually prevents that situations arise in which *Gewährträgerhaftung* would be called upon. This means that as long as *Anstaltslast* exists *Gewährträgerhaftung* has practically no importance. This is underlined by the fact that in practice *Gewährträgerhaftung* has never been used by now in the

German public banking sector because in the case of difficulties of a public credit institution the guarantors already stepped in under *Anstaltslast*. *Gewährträgerhaftung* therefore is merely an reinforcement of *Anstaltslast*. It always presupposes *Anstaltslast*, whereas *Anstaltslast* may exist on its own without *Gewährträgerhaftung*.

Because of this linkage the Commission arrived at the opinion that *Anstaltslast* and *Gewährträgerhaftung* form, as regards their assessment under the State aid rules, a single scheme in favour of the public law credit institutions. With regards to the subordinated character of *Gewährträgerhaftung* the legal status of *Gewährträgerhaftung* under State aid law had to follow that one of the *Anstaltslast*, i.e. the status as ‘existing aid’. Therefore, the Commission took the view that the State aid contained in *Anstaltslast* and *Gewährträgerhaftung* constituted existing aid.

*e) Compatibility of the aid*

It appeared clearly from the examination that none of the exemption clauses of Article 87 (2) and (3) EC were applicable in the situation at hand.

In connection with the question of compatibility it has also to be noted that the aid involved in *Anstaltslast* and *Gewährträgerhaftung* favours the credit institutions concerned on a permanent basis and therefore has to be considered to constitute operating aid.

*f) Article 86 (2) EC*

Article 86 (2) EC provides for interventions by the Member States in the case of undertakings entrusted with the operation of services of general economic interest. It allows exemptions from the full application of the rules of the Treaty, including the rules on State aid, in so far as the application of these rules obstructs the performance, in law or in fact, of the particular tasks assigned to such undertakings. As an exemption clause it has, as confirmed by the jurisprudence of the Court, to be interpreted in a narrow sense. As explained in the ‘Report on services of general economic interest in the banking sector’, adopted by the Commission on 17.6.1998, the following conditions must be satisfied in order for Article 86 (2) EC to apply <sup>(1)</sup>:

<sup>(1)</sup> Note: This approach is based on the rulings FFSA and SIC of the CFI, which were unquestioned at the time of decision and also acceptance by the German authorities, and which also formed the basis of the communication of the Commission on services of general interest of 20.9.2002 and the report of the Commission to the Laeken European Council of 17.10.2002. The possible change initiated by the ECJ in its judgement *Ferring vs. ACOSS* has in the opinion of the authors no impact on the assessment of this case. With the possible exception of the last criterion of Article 86(2) EC, the same examination would be conducted within the second element of Article 87(1) EC (“favouring of a certain undertaking”). This issue awaits further clarification by the ECJ, in particular in view of the conclusions of Advocate-General Léger on 19.3.2002 in the *Altmark* case, largely supporting the doctrine based on the rulings FFSA and SIC of the CFI.

- The service in question must be a service of general economic interest and must be accurately defined by the Member State. It is primarily the competence of the Member States to determine the services of general economic interest. This definition is only subject to control for manifest error. According to Article 86 (3) EC the Commission must ensure the proper application of the exemption contained in Article 86 (2) EC. As explained in the Communication from the Commission on 'Services of general interest in Europe' these services 'are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so.' <sup>(1)</sup>
- The undertaking in question must explicitly be entrusted by the Member State with the provision of such clearly defined service.
- The application of the competition rules of the Treaty must obstruct the performance, in law or in fact, of the particular tasks assigned to undertakings entrusted with the operation of services of general economic interest. The exemption should be limited to what is necessary. This means that any compensation granted for the provision of services of general economic interest must be proportionate to the costs of the particular task provided, i.e. the State aid must be limited to what is necessary for the undertaking to perform the specific service in question. In order to ensure that this principle of proportionality is met the specific costs of the services of general economic interest as well as the value of any compensation facility granted have to be duly identified and calculated.
- The exemption must not affect the development of trade within the Union to an extent that would be contrary to the Community's interest. As laid down in the Report, it is in the Community's interest that the distortion of competition is kept to a minimum and the Commission will have regard to the extent to which there is competition on the market, that is, to the extent to which the market in question has been liberalised. With respect to the liberalisation of the market, the financial services sector has been the subject of Community legislation aiming at establishing fair and open competition. Free movement of capital, right of establishment and freedom to provide services have been widely achieved in this field of economic activities. Competition is already strong and will further intensify with the European Monetary Union

and the introduction of the single currency. With that in mind, it must be noted that each intervention by Member States in this sector risks causing significant distorting effects, which can only be balanced by a Community interest carrying particular weight.

The information provided by the German Government did not allow the Commission to conclude that the existing aid scheme of *Anstaltslast* and *Gewährträgerhaftung* would always satisfy the conditions for the application of Article 86 (2) EC. To the contrary it appeared from the analysis of the Commission that at least significant parts of the activities of most of the credit institutions benefiting from *Anstaltslast* and *Gewährträgerhaftung* might not be regarded as services of general economic interest. Furthermore for most situations where services of general economic interest are claimed, the Commission was not informed of precise definitions of the services in question exist. Also, it appeared that no calculations of costs of possible services of general economic interest exist; lacking such calculation no assessment of the proportionality of possible compensation measures could be made.

#### 4) Development of the case and solution found

##### a) Non-paper of 1995 and first discussions

On the basis of a non-paper prepared by DG Competition in 1995, Commissioner van Miert voiced for the first time in 1996 to the German authorities that he regarded the State guarantees to constitute State aid under Article 87 EC. The strong reaction by German politicians showed the high sensitivity of the issue. The Commission's statement was followed by contacts and exchanges of information and opinion between the Commission and the German Government and a reinforced debate in the public and academic world.

##### b) Amsterdam Declaration on Public credit institutions in German of 18.6.1997

On 18.6.1997 the Declaration on 'Public credit institutions in Germany' was adopted as annex to the 'Amsterdam Treaty' at the request of the German Government, stating 'the Commission's opinion to the effect that the Community's existing competition rules allow services of general economic interest provided by public credit institutions existing in Germany and the facilities granted to them to compensate for the costs

<sup>(1)</sup> Communication from the Commission: Services of General Interest in Europe, COM(2000) 580 final of 20.9.2000.

connected with such services to be taken into account in full.’

*c) Report on services of general economic interest in the banking sector of 17.6.1998*

The Presidency conclusions linked to that Declaration requested the Commission to establish a ‘Report on services of general economic interest in the banking sector’, adopted by the Commission on 17.6.1998. This Report was presented to the Council of Ministers on 23.11.1998. It is based on an enquiry with Member States on the respective framework and provision of such services and analyses further to application of the State aid rules in this context.

*d) Commission Notice on State guarantees of 23.11.1999*

On 23.11.1999 the Commission adopted the ‘Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees’ <sup>(1)</sup>. This Notice explains the principles the Commission applies in assessing State guarantees under the State aid rules. In its paragraph 2.1.3. the Notice states that the ‘Commission also regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability’.

*e) Complaint by the European Banking Federation of 21.12.1999*

On 21.12.1999 the European Banking Federation filed a complaint against *Anstaltslast* and *Gewährträgerhaftung*. This complaint was supplemented later by detailed information on the guarantee system and its effects.

*f) Beginning of the procedure for appropriate measures*

As provided for in Regulation (EC) No 659/1999, the Commission services, after having entered into consultations with the German authorities sent on 26.1.2001 a letter according to Article 17 (2) of the Regulation to the German authorities, informing them of the Commission’s view that the existing aid scheme of *Anstaltslast* and *Gewährträgerhaftung* was not compatible with the Common

Market and giving them the opportunity to submit their comments.

*g) Formal recommendation of appropriate measures of 8.5.2001*

On 8.5.2001, the Commission adopted a recommendation of appropriate measures in order to adapt the existing aid scheme of State guarantees for public credit institutions in Germany to comply with the State aid rules of the EC Treaty. The Commission proposed to the Federal Republic of Germany the following appropriate measures:

- ‘(i) that the Federal Republic of Germany takes any legislative, administrative and other measures necessary to eliminate any State aid within the meaning of Article 87 (1) EC resulting from the system of *Anstaltslast* and *Gewährträgerhaftung* and granted to public law credit institutions, or to render such aid compatible with the common market within the meaning of Article 87 EC, or in conformity with the rules provided for in Article 86 (2) EC;
- (ii) that any such aid is eliminated or rendered compatible with effect from 31.3.2002 unless the Commission agrees (for all public law credit institutions or for certain undertakings or groups of undertakings) to a later date or to later dates, should that be considered objectively necessary and justified by the Commission in order to allow an appropriate transition for the undertaking or undertakings in question to the adjusted situation; and
- (iii) that the Federal Republic of Germany communicates the relevant measures adjusting the aid scheme to the Commission as soon as possible and in any event no later than 30.9.2001.’

Subsequently, a number of discussions took place between the Commission and the German authorities, and supplementary information was provided.

*h) Understanding on Landesbanks and savings banks of 17.7.2001*

On 17.7.2001, Commissioner Mario Monti concluded with State-Secretary Caio Koch-Weser, the Finance Ministers of Baden-Württemberg, Bavaria and Northrhine-Westphalia, Gerhard Stratthaus, Kurt Falthäuser and Peer Steinbrück, and the President of the German savings banks association, Dietrich Hoppenstedt, an understanding on *Anstaltslast* and *Gewährträgerhaftung* as regards Landesbanken and savings banks.

<sup>(1)</sup> O.J. C 71 of 11.3.2000, page 14-18.



The understanding provides for a 4-year transitional period, which lasts from 19 July 2001 to 18 July 2005. During this period the two existing guarantees may remain in place.

After that, on the basis of the so-called 'platform-model', one guarantee (*Anstaltslast*) will be replaced by a normal commercial owner relationship governed by market economy principles, implying no obligation of the State to support the bank any more. The other guarantee (*Gewährträgerhaftung*) will be abolished.

However, *Gewährträgerhaftung* can be maintained (grandfathered) also after 18 July 2005 to protect creditors along the following lines:

- For liabilities existing at 18 July 2001, *Gewährträgerhaftung* can be maintained without any limits until they mature.
- For liabilities created between 19 July 2001 and 18 July 2005, *Gewährträgerhaftung* will only be maintained for those maturing before the end of 2015. Otherwise, for those maturing after 2015, *Gewährträgerhaftung* will not be grandfathered.

The German authorities engaged themselves (i) to submit to the Commission before 30 September 2001 concrete measures they intend to take in order to make the guarantee system compatible and (ii) to submit by the end of 2001 the necessary legal measures to the relevant federal or *Länder* legislative bodies and to adopt them by the end of 2002. In case of non-compliance with the deadline for adoption by the Federal State or a *Land*, the State aid elements contained in the guarantees will be treated as new aid from beginning of 2003 for banks falling under the legislation of the respective *Land* or the Federal State. Consequently, the State aid element could be recovered from these banks with effect from 2003.

*i) Formal acceptance of the recommendation by the German authorities on 18.7.2001*

The German authorities unconditionally and unequivocally accepted the proposal for appropriate measures by letter of 18.7.2001.

*j) Discussions on implementation*

The German authorities submitted on 27.9.2001 concrete proposals for implementing the understanding, which were subsequently subject to further discussions between the Commission and the German authorities. Two issues could not be solved until the end of the year 2001: firstly, the elements to be put in the legal texts, recitals or separate engagements of the German authorities to

ensure the replacement of *Anstaltslast*, and, secondly, the exact content of the grandfathering of *Gewährträgerhaftung* concerning liabilities entered into during the transitional period (from 19 July 2001 to 18 July 2005).

The German authorities failed to submit the draft legal amendments to all respective legislative bodies by the deadline of 31.12.2001. Discussions between the Commission and the German authorities continued until the end of February 2002.

*k) Conclusions on Landesbanks and savings banks of 28.2.2002*

On 28 February 2002, Commissioner Mario Monti, State-Secretary Caio Koch-Weser, the Finance Ministers of Baden-Württemberg, Bavaria and Northrhine-Westphalia, Gerhard Strattmann, Kurt Faltlhauser and Peer Steinbrück, and the President of the German savings banks association, Dietrich Hoppenstedt reached conclusions on the two above issues and two other new issues, which were discovered after the conclusion of the understanding of 17.7.2001. These two new issues concern, firstly, a subsidiary obligation (*Nachschusspflicht*) in some *Länder* for owners of savings banks to provide institutional security funds (*Institutssicherungsfonds*) with financial means, and, secondly, State guarantees to so-called free savings banks. The conclusions constitute an agreement on the elements of the legal texts, the recitals and separate engagements to be made by the German authorities.

*l) Understanding on special credit institutions of 1.3.2002*

On 1<sup>st</sup> March 2002, Commissioner Mario Monti and State-Secretary Caio Koch-Weser reached understanding also on the German special credit institutions. They may continue to benefit from the State guarantees to the extent that they are entrusted with promotional tasks in compliance with the State aid rules of the Community. The fulfilment of promotional tasks shall be governed by the respect of the prohibition of discrimination under Community law. Another public task, which will also in the future be allowed under the umbrella of the State guarantees, is participation in financing of projects in the interests of the Community, which are co-financed by the European Investment Bank. In addition, special credit institutions can keep activities of purely social character, financing of the State and municipalities, and export financing outside the EU, the European Economic Area and candidate countries, which is in line with the WTO-rules and other relevant international obligations binding for the Community. The understanding is without prej-



udice to the examination of these activities under the Community State aid rules vis-à-vis the beneficiaries.

The understanding of 1<sup>st</sup> March 2002 provides that the German authorities will have to specify public tasks clearly in the relevant laws by the end of March 2004. Commercial activities will have to be discontinued or isolated from the State guarantees by a split into a legally independent undertaking without State support. This has to be implemented by the end of 2007.

*m) Amendment of the recommendation  
of appropriate measures of 27.3.2002 and  
formal acceptance by the German authorities  
on 11.4.2002*

The understandings of 17.7.2001 and 1.3.2002 and conclusions of 28.2.2002 were transformed into a Commission decision on 27 March 2002, which amended the Commission recommendation of 8 May 2001 with effect as of 31<sup>st</sup> March 2002, and which was accepted by the German government on 11 April 2002.

## The new Multisectoral Framework for large investment projects

*Adolfo BARBERÁ DEL ROSAL, Directorate-General Competition, unit H-2*

On 13 February 2002, the European Commission approved a major reform to establish a faster, simpler and more accountable control system of Government support to large investments in the EU. <sup>(1)</sup> The so-called 'Multisectoral Framework on regional aid for large investment projects' will create greater transparency and reduce the overall level of subsidies granted in the European Union, to the benefit of a healthy competition and taxpayers alike.

The new Framework will enter into force on 1 January 2004; for the motor vehicle and the synthetic fibres sector it will enter into force already on 1 January 2003. Both aspects, i.e. increased transparency and a significant aid reduction, are in line with the conclusions of the European Council in Stockholm, which requested Member States to reduce State aid. The reform will increase the responsibility of Member States in the implementation of State aid rules. At the same time, the rules will guarantee the effective control of State aid levels in a larger and more heterogeneous Community.

The main purpose of the new framework is to limit the subsidy race between European regions for attracting major projects. Such 'subsidy auctions' certainly are against the common European interest. The new Framework will apply in the same way all over the Community. For each region, it will introduce the same reduction scale in order to limit the distortive effects of considerable amounts of aid granted to large projects, while maintaining the differentiation between aid levels for regions with different regional disadvantages.

Compared to the present system, the notifications will be much simpler to prepare and fewer projects need to be submitted to the Commission. For notified projects, the assessment will be much more rapid than it is today. The Commission will only verify that the project is not likely to cause serious distortion of competition using much simpler criteria than the current ones. In addition, everybody will know from the outset how much aid the company can obtain. This will be an important improvement with respect to the present rules that

give no certainty as regards the final authorised aid amount.

The need for a restrictive approach on regional aid to large-scale and mobile investment projects (i.e. projects which the company concerned could carry out in various locations) is widely acknowledged. The completion of the single market makes it more important than ever to maintain tight controls on State aid for such projects:

- the distorting effect of aid is magnified as other government-induced distortions of competition are eliminated and markets become more open and integrated;
- large investments are less affected by region-specific problems of disadvantaged areas;
- moreover, companies making large investments usually possess a considerable bargaining power vis à vis the authorities granting aid, which may lead to a spiral of increasingly generous promises of aid, probably to a level much higher than what is necessary to compensate for the respective regional handicaps.

In order to address these specific concerns, the Commission introduced an instrument, the 'Multisectoral framework on regional aid for large investment projects' that has been applied since September 1998. The present reform is based on the experience in applying that framework over a period of more than three years.

### Remedies to the shortcomings of the rules laid down in the 1998 Framework

Firstly, the current framework did not, contrary to its intentions, have a significant impact on State aid levels for large investments. The new system will reduce aid levels according to a scale based on the size of the investment. Secondly, the different rules for specific sectors (like motor vehicles and synthetic fibres) are complex to apply and have led to a lack of homogeneity. Their integration into the new framework will radically simplify the existing legislation and increase the transparency of State aid control. Thirdly, the utilisation of a much simpler instrument will reduce the administrative

<sup>(1)</sup> Communication from the Commission — Multisectoral framework on regional aid for large investment projects (*notified under document No C(2002) 315*) and Communication from the Commission — Rescue and restructuring aid and closure aid for the steel sector (*notified under document No C(2002) 315*), published in OJ C 70 of 19 March 2002, pages 8 and 21, respectively.

burden for administrations at all levels (national, regional, local) and will enhance the predictability of decisions of allowable aid amounts for investors and administrations alike. And fourthly, in order to prevent serious distortions of competition, the new Framework provides for stricter rules for sectors suffering from structural problems.

## Time to prepare for the changes

In view of the substantial changes that the reform entails, the new Framework will only be applicable as from 1 January 2004. Member States will therefore dispose of sufficient time to prepare for it and to ensure that investment plans that were designed under the old rules can still be implemented as foreseen. The new framework will apply until 31 December 2009.

## Reduced aid levels ...

Under the new Framework, the starting point for determining the admissible aid level for a specific project remains the aid ceiling laid down in the Regional aid maps agreed between the Commission and the Member States. These aid maps, which are valid until the end of 2006 (end of 2003 in the case of Germany) identify the regions where investments are eligible for support from national or regional coffers, together with the maximum aid intensity (expressed in percentages of the investment) for each area.

According to the new framework, the actual aid intensity that a large project can receive will then be automatically reduced in accordance with the following reduction scale:

Size of the project	Adjusted Aid ceiling
Up to € 50 million	No reduction. 100% of regional State aid ceiling
For the part between € 50 million and € 100 million	50% of regional State aid ceiling
For the part exceeding € 100 million	34% of regional State aid ceiling

The reduction scale therefore operates like a progressive tax rate: the pre-defined top aid intensities are progressively reduced for each subsequent investment bracket. The first € 50 million bracket will be subject to a '0' reduction. The bracket € 50 million/€ 100 million will receive 50% of the top intensity. The bracket above € 100 million will receive 34% of the top intensity.

These are, of course, the maximum levels allowed. Governments may well choose and the Commission encourages them to do so to remain below these levels or not to grant any financial support at all.

## ... but no drying up support where it is needed and makes sense

This system is easier to apply, more transparent and more predictable than the rules it replaces. It also respects the differences in economic development between the regions or their particular structural problems, since these are already taken into account in the different regional aid ceilings which, once more, remain at the basis of the system. A big investment in a region suffering from serious problems will continue to be eligible for more aid than the same investment in a region with less serious disadvantages.

Large investments will still be able to receive large amounts of aid under the new system. For example, a large corporation investing € 100 million in one of the German New Länder could still get around € 25 million of tax-payers' money. Such large amounts of public money still constitute very powerful incentives. Moreover, the Commission's experience shows that large investments have often taken place with low aid levels.

The new Framework also recognises that large investments can effectively contribute to regional development. That is why it includes a cohesion bonus that will be granted to large projects co-financed by the EC structural funds. For such projects, the allowable aid intensity calculated under the above scale will be multiplied by a factor of 1.15. In so doing, the new system will take into consideration the value-added of these large co-financed projects for the economic and social cohesion of the Community. This approach strikes a good balance between the objective of reducing the most distorting types of State aid, on the one hand, and the cohesion objectives laid down in the Treaty, on the other.

## Some projects still to be notified and assessed individually

Below an investment amount of € 100 million, there will not be any notification requirement. However, the Commission will exercise an ex-post control, by way of reports to be submitted by the Member States, as to the respect of the new rules. Above € 100 million, the notification of individual cases will be compulsory only if the aid proposed is higher than what a € 100 million project could

obtain as a maximum amount by applying the above reduction scale.

Example: In an area with a regional aid ceiling of 20% and if the EU's structural funds do not intervene, a project with an investment totalling € 100 million could obtain € 15 million in State aid according to the above reduction scale. For a new factory costing € 250 million, aid up to the same amount of € 15 million could be granted without notification to the Commission. If the intended aid level was, for example, € 25 million, the project would have to be notified.

In its assessment of notified projects, the Commission will use competition considerations, i.e. it will look at the situation of the specific sector concerned. If such a project reinforces a high market share (>25%) of the company concerned, or increases capacity in a non-growing sector by more than 5%, no aid will be authorised. Conversely, if these conditions are not met, the amount of aid that can be authorised is calculated using the table above.

Example: In an area with a regional aid ceiling of 20%, a new project costing € 250 million that does not reinforce a high market share, and does not increase capacity in a non growing sector, can obtain up to € 25.2 million in aid (i.e. € 15 million for the first € 100 million of investment, plus € 10.2 million for the remaining € 150 million of investment).

## **Special rules for sectors suffering from structural problems**

A list of sectors suffering from structural problems (e.g. structural production overcapacities) will be established by 31 December 2003. No aid will be authorised for these sectors.

For the year 2003, *synthetic fibres and cars* will be subject to transitional rules that will maintain the strict approach of the current sector specific rules ending on 31 December 2002. In particular, projects in the synthetic fibres sector will not be eligible for investment aid. Projects in the motor vehicle sector will be allowed up to 30% of the respective regional ceiling for the year 2003.

While the rate of 30% of the regional ceiling for cars might seem rather low, it should be remembered that, in comparison to the current rules, a larger number of projects in the motor vehicle sector will be eligible for aid, and for the individual projects the eligible costs will in principle be higher than currently. So, in all, the reduction of aid for the motor vehicle industry will not be as substantial as might appear from the outset.

As from 2004, both cars and synthetic fibres will cease to have their own rules, and will be fully integrated in the new Multisectoral Framework.

Thus, an important feature of the new Framework is that it will, for the first time, integrate regional investment aid for all sectors under a common set of rules. This aim, which is clearly stated in the current Multisectoral Framework, will be achieved when the new Framework enters fully into force in 2004.



## The Commission's new notice on immunity and reduction of fines in cartel cases: building on success

*François ARBAULT, Directorate-General Competition, unit A-1*

*Francisco PEIRÓ, Directorate-General Competition, unit E-1*

*Special thanks to Stephen BLAKE (unit E-1), Carlota REYNERS FONTANA, John LONERGAN and Dirk VAN ERPS (unit F-3) for their valuable contribution.*

On 13 February 2002, the Commission adopted its new notice on immunity from fines and reduction of fines in cartel cases <sup>(1)</sup>. The notice entered into force the following day and replaced the 1996 notice for all cartel cases in which a company had not already applied for leniency pursuant to that notice.

Secret cartels between competitors are amongst the most damaging anti-competitive practices. Repeatedly denounced by Commissioner Monti as 'cancers' affecting the economy, they are so blatantly illegal that their participants deploy considerable efforts to maintain their secrecy. They are therefore particularly difficult to detect and prosecute successfully. The Commission is nevertheless aware that certain cartel members are willing to end their participation and inform it of the existence of such agreements. Their exposure to high fines can nevertheless strongly dissuade them from doing so.

The Commission is of the view that it is in the Community interest to grant lenient treatment to companies which contribute to the detection and prosecution of cartels through their co-operation. The interest of consumers and citizens in ensuring that these infringements are detected and punished outweighs the interest in fining those companies which provide such assistance.

The forerunner of leniency policies in anti-trust matters was the United States' Department of Justice. This approach proved extremely conducive to the unearthing of secret cartels. Despite a certain initial reticence in the EU, the Commission adopted its first notice setting out a leniency policy in 1996. This provided the Commission with an additional and effective tool to discover and punish a string of highly damaging illegal practices. Today an important consensus has emerged on the legitimacy and general effectiveness of leniency policies in anti-trust matters. This has seen the recent adoption of leniency programs in

several EU Member States and similar initiatives are being considered in others.

In its 1996 Leniency notice, the Commission stated that as soon as it had acquired sufficient experience in its application, it would examine whether its policy needed modifying. After almost six years since its adoption and its application in 16 cartel decisions, the Commission considered that it was in a position to examine possible modifications to improve the effectiveness and transparency of its policy. These changes have been incorporated in the new 2002 Leniency notice.

### 1. Application of the 1996 Leniency notice

#### 1.1. An indisputable success

Statistical data highlight the considerable level of success that the 1996 Leniency notice has had. To date, the Commission has applied the 1996 notice in 16 formal decisions with fines, out of a total of 18 cartel decisions adopted since 1998. This last figure in itself represents a very significant increase of the Commission's anti-cartel activity. Whilst a number of factors may explain this phenomenon, the existence of a leniency policy has doubtless been a major contributor to this success. Additional applications under the 1996 notice have been filed in cases which are still under investigation. Overall, more than 80 companies have filed leniency applications under the 1996 notice. Further formal decisions are therefore to be expected in which the 1996 notice continues to be applied. At the same time separate applications conforming to the criteria of the new 2002 Leniency notice have also been made.

The full list of the 16 formal decisions encompasses the following cases: *Alloy Surcharge* (January 1998), *British Sugar* (October 1998), *Pre-insulated pipes* (October 1998), *Greek Ferries*

<sup>(1)</sup> OJ C 45 of 19.2.2002, p. 3.

(December 1998), *Seamless Steel Tubes* (December 1999), *FETTCSA* (Maritime Transport, May 2000), *Amino acids* (June 2000), *Graphite Electrodes* (July 2001), *SAS-Maersk Air* (July 2001), *Sodium Gluconate* (October 2001), *Vitamins* (November 2001), *Belgian Brewers* (December 2001), *Luxembourg Brewers* (December 2001), *Citric acid* (December 2001), *Zinc Phosphate* (December 2001) and *Carbonless Paper* (December 2001).

The total amount of the fines imposed in all of these 16 cases is EUR 2 240 million. As to the 'value' of the overall reductions of fines granted, they represent almost EUR 1 400 million. This corresponds to an average reduction per case of approximately 38%, showing that the leniency policy provides tangible benefits to those companies that choose to co-operate with the Commission. Nevertheless, these statistics should not be misinterpreted. Individual reductions granted in the 16 cases mentioned above ranged from total immunity from fines (100% reduction) to small reductions (10%): whilst a handful of companies received very favourable treatment in view of the decisive importance of the elements provided and their early co-operation, many other applicants received only a 10% reduction of their fine, as their co-operation was limited to not substantially contesting the facts as set out in the statement of objections, rather than actively co-operating with the Commission.

Three companies benefited from full immunity under the 1996 notice: Rhône-Poulenc (now Aventis), with regard to two of the three *Vitamins* cartels in which it was found to be involved; Brasserie de Luxembourg (a subsidiary of Interbrew) in the *Luxembourg brewers* case, and Sappi, in the *Carbonless paper* case. In addition, two companies benefited from a very substantial reduction of their fine, in relation to their decisive co-operation under section B of the 1996 notice. This was the case of Fujisawa in the *Sodium Gluconate* case (80% reduction) and Cerestar Bioproducts in the *Citric Acid* case (90% reduction). These two companies did not qualify for total immunity since their co-operation with the Commission was not entirely of their own initiative. Indeed, they only approached the Commission after having received specific requests for information. As for Section C of the 1996 notice (allowing for 50-75% reductions of fines), it has only been applied so far in the *Graphite electrodes* case, in which Showa Denko received a 70% reduction of its fine.

Under section D of the 1996 notice, companies benefited from reductions ranging from a minimum of 10%, when their co-operation was limited to non-contestation of the facts, to a maximum of 50%. The percentage reduction obtained varied according to the usefulness of the company's co-operation to the Commission's investigation. The timing of the co-operation played a critical role in the level of reduction granted, as well as the nature and degree of detail of the information supplied.

## 1.2. Review by the Court of First Instance

So far the Court of First Instance has pronounced itself in three occasions on the application of the 1996 Leniency notice, in cases *Alloy Surcharge*, *British Sugar* and *Pre-insulated pipes*. Other appeals involving cases where the 1996 notice was applied are pending. The Court has consistently upheld the philosophy behind the notice and its application by the Commission. The Court has nevertheless clarified a number of important points.

In each of the above cases, the Court confirmed that the granting of different reductions under the same section of the 1996 notice does not constitute a breach of the principle of equal treatment. It is indeed settled case law that a reduction of the fine is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily. It follows that the Commission is perfectly entitled to grant leniency applicants different reduction of fines, in accordance with the difference in the value of their co-operation <sup>(1)</sup>.

If the Commission may legitimately take into account differences in the value of the co-operation, both in terms of the quality and timing of the evidence submitted, this however cannot depend on purely random factors, such as the order in which companies are questioned by, or answer to the Commission. In *Acerinox* and *Krupp Thyssen*, the Court found that the Commission had erred in law by granting lower reductions to the applicants on the grounds that the content of their submission disclosed nothing more than had previously been disclosed by other applicants: as the same questions had been put at the same time to the companies, the Court concluded that the extent of their co-operation had to be '*regarded as comparable, in so far as those undertakings provided the Commission, at the same stage of the administrative procedure and in similar circumstances, with*

<sup>(1)</sup> T-21/99 *Dansk Rørindustri*, para. 245.

*similar information concerning the conduct imputed to them*' <sup>(1)</sup>. Any differential treatment must therefore be clearly justified.

The Court has also confirmed that the mere fact that the Commission has in previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure <sup>(2)</sup>. Each case has to be assessed on its own merits.

The Court clarified a number of other points. In *Tate & Lyle*, the Commission had granted only a 50% reduction to the applicant under section D (and not section B) of the notice, in the light of what was alleged to be the retraction of its admission of certain facts or legal qualifications in the course of the proceedings. The Court found that a mere requalification of the facts set out under the Leniency notice may not be considered a retraction as long as the facts themselves are not contested. Also the Commission may not consider it a failure to co-operate if an undertaking contests an element of the infringement which the Commission has not been able to prove in the Decision even if, allegedly, it is a result of the retraction itself <sup>(3)</sup>.

The Court also confirmed that the Commission is entitled to take into account the fact that the co-operation was not entirely spontaneous when deciding the level of any reduction. In *ABB*, the Court stated that 'it was perfectly admissible for the Commission not to grant the maximum reduction envisaged by section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information' <sup>(4)</sup>.

Also, even if there has been a certain degree of helpful co-operation, the Commission is justified in refusing to grant a reduction if the undertaking has provided it with incomplete or inexact information <sup>(5)</sup>.

Finally, in *HFB*, the Court found that the Commission was right not to take account of the applicant's co-operation as a mitigating factor, as, in the case of cartels, such co-operation clearly falls to be treated under the Leniency notice. The 1998 Guidelines on fines <sup>(6)</sup> clearly set out that the effective co-operation of an undertaking may be taken

into account as a mitigating factor in proceedings '*outside the scope of the [Leniency] notice*' <sup>(7)</sup>.

## 2. Issues identified

The leniency policy proved to be particularly effective when combined with the Commission's other investigative powers, in particular on-the-spot investigations. Nevertheless, experience of its day to day implementation has revealed a number of factors which prevented it from fully developing its potential effectiveness, both in the detection of new cartels and the collection of the evidence required for the adoption of final decisions.

### 2.1. Difficulty of obtaining early information on undetected cartels

It is crucial that the Commission be in a position to detect a cartel as early as possible. The mere information of its existence has an intrinsic interest, particularly since the Commission has effective investigative tools at its disposal. It should also be in the interest of potential leniency applicants to co-operate as early as possible in order to be eligible to benefit from the notice in full, i.e. a 100% reduction.

In spite of this, there was only a limited number of cases in which a cartel was denounced before the Commission had started to investigate. Over 60% of the cases in which the 1996 notice has been applied were already under investigation in either the EU or in another jurisdiction when the first application was filed.

A seemingly wide-spread concern among companies that there was an excessive level of uncertainty with regard to their final treatment under the 1996 notice resulted in a certain reluctance to come forward spontaneously. Three causal factors may be identified as contributing to this impression.

Firstly, since the final decision is taken by the college of Commissioners and the relevant services (DG Competition) cannot, therefore, make a formal prior commitment to the leniency applicant, companies considered that they did not have sufficient guarantees that the Commission

<sup>(1)</sup> T-48/98 *Acerinox* para. 140; T-45/98 *Krupp Thyssen*, para. 246.

<sup>(2)</sup> T-31/99 *ABB*, para. 2390.

<sup>(3)</sup> T-202/98 *Tate & Lyle*, para. 161.

<sup>(4)</sup> *ABB*, para. 238; T-17/99 *Ke Kelit*, para. 181-182.

<sup>(5)</sup> T-9/99 *HFB*, para. 616-619.

<sup>(6)</sup> OJ C 9 of 14.1.1998, p. 3.

<sup>(7)</sup> *HFB*, 608-610.

would at the end of the process grant the total immunity foreseen in section B of the notice.

Secondly, there was an apparent ‘double’ requirement in section B of the 1996 notice since in order to qualify an applicant had to be (i) the *first* to supply (ii) *decisive* evidence. Thus, supplying evidence which was not decisive disqualified the applicant and providing this ‘decisive evidence’ after the Commission was in possession of this type of material equally did not permit the applicant to qualify. This seems to have been perceived as placing potential applicants in an ‘untenable’ quandary. The fact that under Section B the Commission retained a certain amount of discretion to determine the applicable reduction within a band of 25% (75% to 100% reduction) reinforced this level of uncertainty and may have fuelled some scepticism on the part of industry.

Finally, a third disincentive was the fact that the 1996 notice excluded from its section B any company which had played ‘*a determining role in the illegal activity*’. This provision, aimed at excluding ringleaders from full immunity, may have been perceived as being too far-ranging, discouraging spontaneous and early applications by companies which had had a significant role in the cartel and feared that they would ultimately be excluded from the benefit of this section of the notice.

## 2.2. *Limited contribution to the collection of valuable evidence*

The 1996 notice did not contribute in a fully satisfactory manner to the collection of decisive evidence of an infringement. This again resulted from a combination of several factors.

Firstly, as the applications were filed rather late in the course of the proceedings, the ‘surprise effect’ was often lost. When the Commission was given the evidence, most cartel participants were already aware of the investigation and had had time to place incriminating documents out of the reach of Commission inspectors if they so wished. The risk for the Commission was therefore that the positive contribution of the leniency policy would be offset by a lessened effectiveness of its classical investigative tools.

Secondly, as potential applicants were reluctant to come forward spontaneously in view of the alleged excessive uncertainty, an application was generally filed only once the company felt it had little choice. Experience showed that many companies filed an application once they discovered that the Commission was already aware of the main details

of a case (generally upon receipt of a very detailed request for information). Sometimes the applicants limited themselves to confirming what the Commission was already aware of, without bringing any significant added value to the Commission’s investigation. This defensive attitude was also reflected in the nature of the evidence provided to the Commission.

Indeed, as the prospect of a fine became increasingly likely, filing an application at a late stage of the procedure, whilst maintaining an ambiguous stance and providing the Commission with a minimum amount of ‘usable’ evidence may have become a strategy. Contrary to the situation characterising a ‘section B’ applicant, a late hour applicant had an objective interest in defending a case which was as fragile as possible, since any weakness (it was supposed) could result in a reduced scope of the infringement found, in lower fines and easier subsequent litigation. In this respect, it can be reasonably assumed that not all leniency applicants supplied the Commission with all the incriminating evidence available to them.

## 2.3. *Other issues*

Under certain circumstances there was also a tendency for companies to refuse to provide answers to direct requests for information, alleging, for example, that they contained self-incriminating questions, and at the same time providing the very same information requested under the guise of a leniency application. Once again, this illustrates the defensive approach to co-operation that was at times taken by companies.

Another tactic consisted of reluctantly acknowledging the facts, whilst sometimes going as far as contesting the finding of an infringement by the Commission. This approach contradicted and risked seriously undermining the spirit of co-operation envisaged by the 1996 notice. Indeed, the idea behind the notice was that it should reward companies explicitly acknowledging the commission of an infringement under Article 81 EC. By definition, applying for leniency implies recognition that an infringement has been committed.

## 3. *Rationale of the revision*

The revisions to the Commission’s notice are intended to tackle the above issues. Three main areas were identified. Firstly, it was thought necessary to grant a very significant reward to the first company enabling the Commission to take a decisive step in the prosecution of a cartel. As for the subsequent applicants, the objective was strictly to



align the level of their reduction of fines to the real added value given to the Commission's investigation. Thirdly, the Commission sought to introduce more legal certainty in the system, and to render it more transparent.

### *3.1. Immunity: a major incentive for those companies enabling the Commission to take a decisive step in the prosecution of a cartel*

In order to maximise the incentive to co-operate at a very early stage, the Commission decided to provide conditional immunity in writing to the first company to come forward. Immunity can however only be justified if the evidence supplied enables the Commission to take a decisive step towards the successful prosecution of the cartel.

Information of the existence of a cartel the Commission is unaware of has an interest *per se*. Indeed the Commission has significant investigation tools at its disposal to follow suit. The Commission therefore concluded that being the first to give such information can justify the grant of full immunity. In view of the interest in swiftly obtaining the information and having regard to the importance of not deterring companies from coming forward, it was decided that the companies would only be required to supply the Commission with evidence enabling it to start an investigation by adopting a decision ordering a surprise inspection. The minimum threshold to qualify for immunity when the cartel is still undetected is thus significantly lowered.

There can however be situations where the Commission, for various reasons, has already started an investigation but has not yet gathered sufficient evidence to find an infringement of Article 81 EC. In such circumstances, the willingness of a company to communicate such information is of considerable interest to the Commission, in spite of its prior awareness of the cartel. It was therefore also concluded that the first company to provide evidence enabling the Commission to find an infringement of Article 81 EC could also legitimately qualify for a full immunity from fines.

The Commission is nevertheless confident that, on the basis of its existing powers of investigation, it will normally be able successfully to investigate cartels once it has obtained a minimum threshold of information. The Commission is also aware that granting immunity is a very important derogation from the Commission's role of imposing fines in the case of the most serious violations of competition law. It has therefore been concluded that only

one company may be granted immunity from fines in any given cartel case.

### *3.2. A strict alignment of the reductions to the real value of the co-operation*

Once the Commission has granted immunity to an applicant, or obtained sufficient evidence to find an infringement under Article 81 EC by itself, there may still be justification for reducing the fines imposed on subsequent leniency applicants willing to cooperate with the investigation. Such co-operation will indeed strengthen the Commission's case and speed up the proceedings.

It was nevertheless thought that the reductions granted should be strictly aligned to the real added value of the evidence given to the investigation. Therefore, in order to qualify for a reduction, leniency applicants should bring to the Commission evidence representing significant added value when compared with the evidence already in the Commission's possession at the time of the submission. Furthermore, the relative added value of any evidence submitted has an ineluctable tendency to diminish as time goes by. It was therefore decided that the band within which the reduction of fines would be determined would depend on whether the applicant was the first, second, third or later undertaking to meet the criterion of 'significant added value'.

The Commission was also concerned that potential leniency applicants might be discouraged from coming forward out of fear that some of the information they disclosed might have adverse consequences for the level of the fine to which they are exposed. For example, a leniency applicant could be deterred from supplying evidence of a cartel of longer duration or wider geographical scope than the Commission was aware of, in view of the mechanical increase of the 'pre-leniency' fine this would trigger. In order to tackle this issue, the Commission has adopted the principle that where an applicant provides evidence previously unknown to it, which has a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take those elements into account when setting the level of the fine to be imposed on that applicant.

### *3.3. More certainty and transparency*

Another important concern was to increase the legal certainty and transparency of the Commission's leniency policy. Consequently, the Commission decided to grant, at a very early stage and in writing, conditional immunity from fines to

the successful applicant. The immunity will be confirmed in the decision, on condition that a number of basic additional criteria are fulfilled. The Commission also decided to adopt a more restrictive definition of the criterion leading to the exclusion of an applicant from any immunity.

Another way to increase legal certainty was to provide immunity applicants with the possibility of negotiating with the Commission in hypothetical terms if they so wished. This enables companies to check, on an anonymous basis, whether they qualify, so that their position is not at risk of being irredeemably impaired. Also the procedure is more transparent, as the Commission will inform the company about its situation at each major step of the immunity application.

Not surprisingly, the Commission did not grant leniency applicants as much certainty as immunity applicants: in order to qualify for a reduction, they must provide the Commission with evidence representing significant added value to the investigation. Nevertheless, leniency applicants also benefit from increased transparency: no later than on the date on which the statement of objections is sent, they will be informed of the band within which the Commission will determine the applicable reduction.

## 4. The new 2002 Leniency notice

The 2002 Leniency notice is organised in two distinct sections. Section A deals with immunity from fines and section B with reductions of fines (leniency). Both sections explain in detail the applicable substantial test and the corresponding procedure.

### 4. 1. Immunity applications

#### 4.1.1. Substantive tests

Two alternative tests have to be satisfied in order to qualify for conditional immunity from fines. Both are set out in point 8 of the notice and are already known as ‘8(a)’ or ‘8(b)’ tests.

##### — ‘8(a)’ test

Pursuant to point 8(a) of the notice, an applicant may qualify for immunity if it is the first to ‘*submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation 17*’. The applicant must therefore provide the Commission with sufficiently concrete and reliable information to enable it to launch an on-the-spot investigation.

##### — ‘8(b)’ test

Alternatively, pursuant to point 8(b), an applicant may qualify for immunity if it is the first to ‘*submit evidence which in the Commission’s view may enable it to find an infringement of Article 81 EC*’. In this case, the fact that the Commission has already conducted investigations, or is in a position to do so without there being an “8(a)” type applicant, does not disqualify the applicant. The counterpart is nevertheless that the applicant supplies information enabling the Commission to find an infringement under Article 81 EC. This requirement is much more demanding: applicants are expected to give very concrete and direct evidence of the infringement in question.

There can only be one successful immunity applicant per cartel: if the Commission has already granted conditional immunity from fines under 8(a), no further applicant is eligible for immunity under 8(b), should the Commission still not be in the possession of evidence enabling it to find an infringement under Article 81 EC. However, should a company be willing to come forward and supply such evidence, it could naturally do so under the leniency procedure (section B) and receive a very significant reduction of its fine (see below). It also goes without saying that an immunity applicant in possession of evidence enabling the Commission to find an infringement under Article 81 EC should supply the entirety of this evidence, even in the case where the Commission was still totally unaware of the cartel in question.

Indeed, immunity applicants are under a general obligation to co-operate fully, on a continuous basis and expeditiously with the Commission throughout the Commission’s administrative procedure. Applicants must therefore disclose all evidence already in their possession or which subsequently comes into their possession (point 11(a)). The Commission would also expect to have full and immediate co-operation from those employees of the applicant who were involved in the facts in question. Immunity applicants must also end their involvement in the cartel no later than at the time they apply for immunity (point 11(b)). Finally, they may only qualify on the condition that they did not take steps to coerce other undertakings to participate in the infringement.

#### 4.1.2. Procedure

A company wishing to apply for immunity must immediately contact DG Competition, primarily through the following dedicated and secure fax number: +322 299 45 85. If immunity is no longer available for the infringement in question, the applicant will immediately be informed. Should

that be the case, the applicant may still request the Commission to consider its application under section B of the notice.

The company may choose to provide the Commission with all the evidence of the infringement available to it. Alternatively the applicant may prefer first to present the evidence in hypothetical terms. This new procedure will allow the company to form an idea of whether or not it will satisfy conditions 8(a) or 8(b), before disclosing its identity, together with the facts and evidence in question, to the Commission.

If the applicant chooses the hypothetical scenario, it must present to the Commission a descriptive list of the evidence it proposes to disclose at a later agreed date. This list should describe in a very detailed manner the nature of the content of the evidence in question (type of document, date, information contained, origin etc.). As far as feasible, expurgated copies of the relevant documents should be annexed. In order to be given a reliable answer by the Commission as to whether it will qualify, the company must enable the Commission to form a very clear idea of whether it will pass the test of 8(a) or 8(b), as appropriate. In this regard, the descriptive list alone should suffice to establish whether the applicable test is passed, the subsequent comparison with the actual evidence (when disclosed) being merely done by way of verification.

Immediately after the applicant has handed over the evidence or the descriptive list, as the case may be, the Commission will provide the applicant with an acknowledgement of receipt of the application, confirming its date and the content of the submission (evidence or descriptive list).

The Commission will then verify that the evidence disclosed meets the applicable criteria (as set out in points 8(a) or 8(b) of the notice), or that the evidence which the company proposes to disclose (as described in the list given to the Commission) will meet the applicable criteria. In such cases, it will inform the applicant, which, where it has not already done so, will then have to disclose the information.

The Commission will then grant the applicant conditional immunity from fines in writing, unless the applicant does not meet the criteria set out in 8(a) or 8(b). In such a case the applicant may withdraw the evidence disclosed, or request the Commission to consider this evidence under section B of the notice.

The Commission will not consider any application for immunity before it has taken a position on an

existing application in relation to the same suspected infringement.

At the end of the administrative procedure, if the applicant has met all applicable conditions, the Commission will grant it immunity from fines in the relevant decision.

## 4.2. Leniency applications

### 4.2.1. Substantive test

Companies which do not qualify for immunity may nevertheless qualify for a reduction of the fine. To this end, they must provide the Commission, as set out in point 21 of the Leniency notice, with evidence representing ‘significant added value’ with respect to the evidence already in the Commission’s possession in relation to the same case. The applicant must also terminate its involvement in the suspected infringement.

The evidence will represent added value if it strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the facts in question. In its assessment of this, the Commission will generally attribute greater value to written and contemporaneous evidence (e.g. handwritten notes of cartel meetings) than to evidence subsequently created (e.g. statements of facts, testimonies). Similarly, greater value will be attached to direct evidence (e.g. list of common ‘target’ prices) than to indirect ones (e.g. records of travel expenses pertaining to cartel meetings).

The notion of ‘significant’ (added value) has not been defined in the Leniency notice. This would indeed have been futile, as such significance can only be determined in the context of each particular case.

### 4.2.2. Available levels of reduction

In its final decision, the Commission will determine if the evidence provided by a leniency applicant represented significant added value with respect to the evidence in the Commission’s possession at the time.

For each company found to have provided evidence representing significant added value, the Commission will grant a reduction of the fine within a given band. The first company will receive a reduction of the fine of between 30 and 50% and the second a reduction of between 20 and 30%. Subsequent undertakings who have passed the significant added value (‘SAV’) test will receive a reduction up to 20%.

In order to determine the level of reduction within each band, the Commission will take into account

the time at which the submission of the evidence satisfying the SAV test was made (in relation to the stage of the Commission's proceedings) and the extent to which it provided added value. The extent and continuity of the co-operation provided will also be taken into account.

Finally, it should be recalled that if a leniency applicant provides evidence relating to facts previously unknown to the Commission and having a direct bearing on the gravity or duration of the suspected cartel, these facts will not be taken into account when setting any fine to be imposed on the leniency applicant.

#### *4.2.3. Procedure*

A company wishing to file a leniency application must provide the relevant evidence to the Commission, which will immediately deliver an acknowledgement of receipt recording the date and content of the submission. The Commission will not consider any submission of evidence by a leniency applicant before it has taken a position in respect of any existing application for immunity in the same case.

The Commission will inform leniency applicants of whether the evidence submitted at the time of

their application passed the SAV test, as well as the band within which any reduction will be determined, no later than the date on which the statement of objections is notified. The final reduction of fine will be determined in the final decision.

#### *4.2.4. Treatment of the information obtained under the Leniency notice.*

Information and documents communicated to the Commission under the Leniency notice are treated with utmost confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules governing access to file.

The Commission considers that normally disclosure (out of the scope of access to file), at any time, of documents received under the Leniency notice would undermine the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation No 1049/2001. Such documents will therefore be subject to the applicable restrictions.

Any written statement made vis-à-vis the Commission in relation to the Leniency notice forms part of the Commission's file and may not, as such, be disclosed or used for any other purpose than the enforcement of Article 81 EC.



## The Market Economy Investor Principle

*Ben SLOCOCK, Directorate-General Competition, unit A-3*

The Market Economy Investor Principle or MEIP has been a cornerstone of state aid control since at least 1984 when the Commission published its communication on Government Capital Injections<sup>(1)</sup>. It remains a key test of whether actions by public authorities represent state aid in the sense of Article 87(1) of the EC Treaty. Over the years further Commission texts, decisions and Court judgements have given the notion further precision in the various circumstances with which state aid control has been confronted. This article identifies some points which seem significant in these developments as well as other possible questions which can arise and which are arguably still open.

### The Principle

The essence of the MEIP is that when a public authority invests in an enterprise on terms and in conditions which would be acceptable to a private investor operating under normal market economy conditions, the investment is not a state aid. One first point to note is that the 1984 communication does not in fact identify, of the various criteria which a measure must meet in order to qualify as state aid, which is not met by a state investment respecting the MEIP. It seems clear, however, that the criterion which is not met is that of *advantage*: the enterprise gains no particular benefit since it could have obtained the same financing in the markets<sup>(2)</sup>. This is an important point to keep in mind in considering extensions of the MEIP to other situations, as discussed below.

The MEIP is a reasonable principle to follow, especially given that the Treaty does not allow differentiated treatment between public and private ownership. It can however be observed that whether an equity investment provides an advantage to an enterprise depends not only on the terms

on which it is made but also on how the shareholding is exercised over time: state shareholders are often suspected of being less demanding of dividends, efficiency etc (even if one can debate whether it is in an enterprise's long term interest to have such a 'lax' majority shareholder). The MEIP does not address this. But for the rest of this article the basic tenet is accepted.

### New or existing market economy investor?

Even accepting the principle, one question which arises concerns the situation which should be assumed of the comparator 'market economy investor' and the investor's relationship with the enterprise. In order to meet the MEIP, should an investment be acceptable to an investor with no existing stake in the enterprise? That is, should it be justified by reference only to the capital injection in question, or can the effect on a state investor's existing shareholding be taken into account?

This question is not specifically answered in the 1984 text. However, it obviously makes an important difference to the assessment. Even if there is a limit to how far any investor will 'throw good money after bad', most investors will look more favourably at a follow-up investment than at the same opportunity in an enterprise with which they have no connection. There are phrases in the 1984 communication which allude to such situations<sup>(3)</sup> but the point is only definitively addressed in the 1993 communication on the application of Articles 92 and 93 [now 87 and 88] of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector<sup>(4)</sup>: 'the Commission will take account of the nature of the public authorities' holding in comparing their behaviour with the benchmark of

<sup>(1)</sup> Bulletin EC 9-1984.

<sup>(2)</sup> This is an example of the fact that the presence of advantage in a state measure is assessed by reference to what would be the case in the measure's absence, not the position relative to e.g. competitors in other Member States. A selective tax reduction does not cease to be aid simply because the general tax rate in another Member State is lower even than the reduced level.

<sup>(3)</sup> 3.3.v: 'there is State aid ... where the injection of capital into companies whose capital is divided between private and public shareholders makes the public holding reach a significantly higher level than originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook'. But this only shows that when even the follow-up investment is unattractive then the MEIP does not apply. Conversely 3.2.iii: 'Nor is state aid involved ... where the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder'. This suggests that the acceptability of the injection as a follow-up investment suffices, but applies only to the specific case of a proportionate increase with another shareholder.

<sup>(4)</sup> OJ C 307, 13.11.1993, p. 3.

the **equivalent market economy investor**' (emphasis added).

This poses questions as well as answering them. What if a state owner has allowed an enterprise to develop in a way no market investor ever would? What sense in that situation can we give to the term 'equivalent market economy investor'? Is the test capable of application? The Commission has suggested that in some situations it may not be <sup>(1)</sup>, and the Court of First Instance has found that an injection following soon after earlier provisions of state aid could not be assessed separately and found to respect the MEIP independently of the first ones <sup>(2)</sup>. In that case the traditional criteria in the Treaty for the presence of state aid need to be assessed directly.

### Evidence for the MEIP to be met

The best possible evidence for the MEIP to be met is generally that the terms of the investment not only *would be* acceptable to a market economy investor, but that there *is actually* such an investor making the same investment on the same terms <sup>(3)</sup>. (The identity of conditions — including of timing — is of course crucial.) This has however led some public authorities and economic operators to regard such 'concomitance' as the key test and objective in order to comply with state aid rules, because they can thereby claim that there is no state aid present. In cases where the state, other investors or the beneficiary have other relationships outside the terms of the investment, there is at least room for doubt whether such concomitance in the mere investment terms suffices. These questions are discussed below.

Where there are other investors, identifying which are market economy investors can itself be a problem. Most EU economies have a range of economic operators, from the purely private and profit-seeking through co-operative and mutual organisations, some of which have non-commercial objectives, to state-owned but commercial ventures and the organs of the state. Determining at what point the definition of market economy investor ceases to apply is not always simple.

The presence of other investors provides at the least a benchmark for the Commission to make its assessment. There is a risk, however, that this

provides an incentive to Member States not to involve outside investors for fear that any difference in terms will be identified as evidence of the presence of State aid: if there is no benchmark, it is harder for the Commission to show that the state's intervention does not meet the MEIP and there may be a temptation to give the benefit of the doubt. Given that, as a general rule, state interventions alongside private capital are likely to be less distortive than those made without such co-investors, there is a danger of creating perverse incentives.

### Concomitance

The search for a construction which appears to assure concomitance, in order to obtain a no-aid finding, seems to have become a key preoccupation of certain authorities, enterprises and their advisers. Some constructions have been devised which the Commission's existing texts (1984 and 1993) simply do not envisage. Two in particular are as follows.

#### *Side-agreement between the state and other investors*

The Commission has instructed one case where although the state and a private investor were providing capital on equal terms and in the same proportions as their shareholdings, there was a separate agreement in existence that the state would cede its entire holding to the investor, for a price already determined. The state and the investor therefore had very different longer-term perspectives in respect of the business. The new injection would allow the state to preserve the sale agreement it had made; the investor, on the other hand, obtained an injection of capital into the business it had agreed to buy. In practice the bankruptcy of the business concerned intervened before a Commission decision. The presence of aid in such a situation is therefore still an open question.

#### *Investment by the state in the subsidiary of an enterprise*

In another scenario a state authority invests in the subsidiary of a company on equal terms with the parent. The subsidiary creates a new facility

<sup>(1)</sup> Decision of 7 May 2002 on the sale price of SBW to RAG (not yet published) : 'Given the inherent unprofitability and large potential liabilities of the black sector, whose survival is dependent entirely on state aid, it seems questionable whether a market economy investor would have allowed assets with a significant positive value to be unprotected in this way. The market economy investor principle is therefore not capable of straightforward application.'

<sup>(2)</sup> Case T-11/95 (Enichem). European Court reports 1998 Page II-03235.

<sup>(3)</sup> See for example [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie.htm](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie.htm), case N 705/99.

providing semi-finished products to the parent at cost price. The state's prospects of dividends is therefore poor. This is also true of the parent, but then it benefits from the industrial output of the subsidiary and makes its profits from the finished goods. Can this be construed as no aid? The Commission has opened the investigation procedure in such a case, expressing doubts over the Member State's claim that no aid is present. The outcome will follow during 2002 <sup>(1)</sup>.

## Extensions of the MEIP

### *Market Economy Lender Principle*

The first and most obvious extension of the MEIP is from the provision of investment capital to that of loan finance: a loan contains no aid if it is provided on terms which a commercial lender would accept. The Commission has developed reference interest rates for this purpose. Indeed, given that lenders generally have less control over enterprises than providers of equity finance, some of the observations on the MEIP in the preceding paragraphs do not apply. So a 'market economy lender principle' seems a sensible extension to the MEIP.

### *Market Economy Creditor Principle*

A more radical extension to the principle was provided by the Court's *Tubacex* judgement <sup>(2)</sup> of 1999. Effectively this created a 'market economy creditor principle'. The Court determined that the test of aid, when the state decided whether or not to waive or reschedule debts, was whether a market creditor would have acted in the same way.

This is plausible but also innovative. In the case of investing and lending, the state can choose whether or not to provide funds: the strongest argument that there is no state aid is that the enterprise could find the finance elsewhere. But an enterprise at a given moment does not choose its creditors: they are who they are. It will not always be the case that it has other creditors whose waiving or rescheduling of debts would give the same assistance to its liquidity situation. Thus the argument that there is no advantage depends on a hypothesis: if the enterprise had had the same level

of debts towards private (market) creditors, then they would have behaved in the same way and therefore the company derives no particular benefit.

Inevitably the same issues arise as for the MEIP. What if no private creditor would have allowed such debts to build up? What about the situation where the Government has subordinated its debt to that of other creditors <sup>(3)</sup>? Two judgements of the Court are significant here: *Magefesa* <sup>(4)</sup> found that 'the undertakings in question were able for several years to continue trading without complying with their tax and social security obligations.....In those circumstances, the Commission was justified in deciding that, in the particular circumstances of the case, the non-payment of taxes and social security contributions ... constituted illegal aid'. Thus in certain circumstances the allowing of such debts to build up can itself constitute an aid, even before any consideration by the state of whether to waive or reschedule them. And an often-overlooked sentence of *Tubacex* states that 'On the assumption that, as the Commission acknowledges, the fact that the sums advanced by Fogasa to pay the wages of Tubacex's employees **are not State aid** has been established...' (emphasis added). In other words *Tubacex* seems to suggest that a waiving or rescheduling can avoid constituting state aid only if the original granting of the loan or credit was not itself aid.

### *Market Economy Guarantor Principle?*

In its notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees <sup>(5)</sup> the Commission allows that certain guarantees do not constitute state aid, notably if the guarantee is adequately remunerated. Does this constitute a generalised 'MEGP'? I would argue not – at least to the extent that it cannot be assumed that just because a state acts as a private institution would in terms of receiving an adequate premium for the grant of the guarantee, the beneficiary thereby receives no advantage. At least for large and very large (and even unlimited) amounts, the guarantee of the state is worth more than that of anyone else. Applying the reasoning of the preceding paragraph, it should also be said that granting a loan or a further guarantee to prevent an

<sup>(1)</sup> Carsid. OJ C 95 of 19.04.2002, p. 2.

<sup>(2)</sup> Case C-342/96. European Court reports 1999, page I-02459.

<sup>(3)</sup> In many jurisdictions, certain forms of debt to the state have priority over other creditors. *Tubacex* would seem to suggest that the decision not to exercise that priority but to waive or reschedule debts on the same basis as the generality of creditors does not constitute an aid.

<sup>(4)</sup> Case C-480/98. European Court reports 2000 Page I-08717.

<sup>(5)</sup> OJ C 71 of 11.03.2000.

earlier guarantee from being called – thereby apparently saving the state money, and being therefore the rational economic course for the state to take – is nonetheless aid unless the earlier guarantee was itself non-aid. This issue has arisen in respect of a financial institution in the Community.

## Conclusion

The MEIP is a useful tool in state aid control. However no text can be exhaustive, and the existing Commission texts which explain the principle do not cover every eventuality. In applying the MEIP, and indeed in any future revision of the 1984 and 1993 texts, three related points stand out from the above analysis.

The first is that the MEIP is a construction and is not something mentioned directly in the Treaty. It is a test of what the Treaty means by ‘favour’ in

Article 87(1). To avoid errors in using the MEIP it can be useful to trace the concept back to its roots.

Second, it is ultimately the effect on the enterprise which is important not the behaviour of the state *per se*. Discussion of the MEIP in some cases tends to dwell on whether the state was or was not taking the most financial advantageous course for itself in the circumstances, or was or was not acting in concomitance with another investor. While in most cases this gives the right result, there are others where this is at least questionable.

Third, one of the situations where it is hardest to apply the MEIP is where the beneficiary is already in an ‘aid environment’. If an enterprise has already received aid then further provision of capital which depends for its remuneration on that aid cannot necessarily rely on the MEIP to lift it out of the definition in Article 87(1).



## Conférence «post-Doha» de la CNUCED sur la concurrence à Tunis, les 28 et 29 mars 2002

Jean-François PONS, Direction Générale Concurrence

- 1) Depuis l'adoption de la déclaration de Doha, la CNUCED a organisé plusieurs réunions sur la concurrence dans chaque partie du monde: Panama pour les Amériques et les Caraïbes, Tunis pour les pays africains et arabes, Hong-Kong pour l'Asie et l'Océanie.

La conférence de Tunis, organisée conjointement avec les autorités de concurrence tunisiennes (Ministère du Commerce, Conseil de la Concurrence), a réuni 26 pays africains et arabes, ainsi que l'Espagne, la France (M. Gallot), les Etats-Unis (M. Kovacic, FTC), la Commission Européenne (M. Pons), l'OCDE (MM. Jenny, Philips et Andrew) et l'OMC (M. Anderson).

La conférence a surtout permis:

- de faire un premier bilan de l'application du droit de la concurrence dans les pays africains et arabes;
- d'avoir un long débat sur l'après-Doha et en particulier sur l'intérêt d'un accord OMC sur la concurrence pour les pays du Sud et sur les modalités possibles d'un tel accord.

- 2) Dans la première partie de la conférence, M. Brusick (CNUCED) a situé celle-ci dans le contexte post-Doha et a estimé qu'un accord contraignant à l'OMC favorisait les petits pays par rapport aux grands.

M. Sioud, Ministre du Commerce tunisien, a souligné que:

- la politique de concurrence est un pilier pour les réformes; elle permet de s'inscrire dans le système économique mondial, en renforçant les exportations, encourageant l'initiative privée et les investissements étrangers;
- la Tunisie mène depuis une quinzaine d'années une politique de libéralisation et de privatisation progressive, notamment dans le cadre des accords euro-méditerranéens. Dans ce contexte la politique de la concurrence va être renforcée par un

4<sup>e</sup> amendement de la loi de 1991, mais surtout par un renforcement des autorités (Direction Générale du Ministère du Commerce et Conseil de la Concurrence);

- la Tunisie a bénéficié d'une coopération utile de la France, de la Belgique et de la CE; elle-même a aidé d'autres pays moins avancés (la Côte d'Ivoire par exemple);
- face aux difficultés pour développer une culture de concurrence dans les pays du Sud, la coopération et la mise en place de réseaux sont indispensables.

MM. Baina (Maroc) et Tounakti (Tunisie) ont ensuite dressé un premier bilan des expériences de politique de concurrence dans leur pays, en rappelant les objectifs et les règles en vigueur, ainsi que quelques exemples d'applications. M. Baina a fait état d'une montée des plaintes auprès du Conseil de la Concurrence, ce qui semble positif. M. Tounakti a décrit avec une grande franchise les difficultés d'application (en particulier, compte tenu du poids des PME et surtout du secteur informel) et a souligné le rôle dissuasif et incitatif de la politique de la concurrence.

M. Pons (Commission Européenne) a ensuite rappelé comment la politique de concurrence s'inscrivait dans les accords euro-méditerranéens. Il a aussi affirmé la disponibilité des pays de l'Union Européenne et de la Commission pour une coopération et une assistance technique renforcée à l'égard des autorités de concurrence dans le monde, à l'OMC suite à Doha, mais aussi dans le Réseau International de la Concurrence, dont la première réunion est prévue à Naples en septembre. <sup>(1)</sup>

- 3) La seconde partie de la conférence a permis des échanges nombreux et riches sur:

- l'intérêt, les difficultés et les modalités spécifiques de la politique de la concurrence dans les pays en développement, à la suite notamment des interventions de MM. Jenny (OCDE), Kovacic (USA) et Gallot (France);

<sup>(1)</sup> Cf. «Le rôle accru de la politique de la concurrence dans la relance du partenariat euro-méditerranéen et dans la coopération multilatérale» — Jean-François PONS — Séminaire régional sur la politique de concurrence et les négociations multilatérales — Tunis, Tunisie le 28.03.2002 sur «<http://europa.eu.int/comm/competition>».

- les caractéristiques et les modalités possibles du futur chapitre «concurrence» de l'OMC, à la suite notamment d'un exposé de M. Anderson (OMC). Les représentants des organisations internationales, ainsi que des pays du Nord, se sont déclarés très ouverts aux modalités que suggèreraient les pays du Sud.

En conclusion de ces discussions, M. Brusick a fait état d'une volonté commune du développement d'une culture de concurrence et de la nécessité de poursuivre ce genre de rencontres à Genève ou dans les pays du Sud, afin de bien préparer le rendez-vous de l'OMC en 2003.

## The European Competition Day in Madrid 26 February 2002

*Ansgar HELD, Directorate-General Competition, unit A-1*

The fifth European Competition Day took place on 26 February in Madrid. Main topics of the conference attended by about 250 participants were the application of competition rules in the area of telecommunication and sport broadcasting rights. The conference was opened by a series of speeches under the heading 'Competition and the consumer'. Minister of Economics Rodrigo Rato underlined the importance of further liberalisation. Commissioner Mario Monti focussed on the specific benefits of competition policy for consumers, using examples of recent activity. MEP José Manuel García-Margallo, vice-chairman of the European Parliament's Economic and Monetary Affairs Committee, pointed to the importance the Committee is attaching to competition policy in favour of the consumer. Mr Luis de Guindos, Head of the Spanish competition authority, referred to Spain's efforts to liberalise markets and to privatise.

Panel 1 on 'Competition and the New Economy' brought together telecommunication representatives of the incumbent Telefonica (CEO Julio Linares) and of a newcomer Retevisión (Josep Canós), of economic research (Chairman Jordi Gual and David Evans) and of DG Competition (Pierre Buigues). Mr Linares pointed out that Telefonica has cut prices during the last years by 33%. He was mainly concerned about slow growth in land line business. Focus of the other statements

and the discussion was on slow progress in unbundling of the local loop (ULL). Mr Buigues insisted that this would be an important market which can only be opened, to the benefit of all consumers, by imposing rules on the right of access and on transparent and non discriminatory pricing by the incumbent. Mr Evans suggested that, given the dynamics of e-commerce, market shares of companies would not be an appropriate parameter. Mr Buigues insisted the violation of competition rules would have the same effects as in 'traditional' business and had to be treated likewise.

Panel 2 addressed broadcasting rights in sport and was chaired by the President of the Spanish Consumers Council, Francisco Javier Angelina. Panel members were MEP Luis Berenguer, Giovanni Calabró of the Italian competition authority, and Alexander Schaub. MEP Luis Berenguer outlined the economic and legal aspects and suggested that the Commission adopts a block exemption for the marketing of broadcasting rights. Mr Calabró presented the Telepiu case. Mr Schaub gave an overview on the competition aspects of the issue and the effects of different constellations for the consumer.

The conference was closed with remarks by Mr Gonzalo Solana, President of the Court for Competition Defence.

## **EUROPEAN COMPETITION DAY IN COPENHAGEN**

The sixth European Competition Day takes place on 17 September in Copenhagen.

The main topics are

- Competition, consumers and globalisation
- Competition and consumers in the EU compared with other regions

The conference will be hosted and organised by the Danish competition authority (see [www.ks.dk](http://www.ks.dk) 'Sidste nyt') in collaboration with DG Competition.

Registration can be made under [www.cmscongress.com/ecd/regformecd.htm](http://www.cmscongress.com/ecd/regformecd.htm)



## Towards a new motor vehicle block exemption — Commission proposal for motor vehicle distribution, adopted on 5 February 2002 <sup>(1)</sup>

*Lazaros TSORAKLIDIS, Directorate-General Competition, unit F-2 <sup>(2)</sup>*

### 1. Why a new sector specific Block Exemption Regulation?

As evidenced in the Commission's evaluation report on Regulation 1475/95 (the current Block Exemption Regulation in force until 30 September 2002), the combination of exclusivity and selectivity led to rigidities in distribution, like rigidities to cross-border purchases -thereby maintaining unnatural geographical boundaries-, unsatisfactory level of intra-brand competition, and high dealer's dependence level vis-à-vis motor vehicle manufacturers, to the detriment of consumers' interests. Indeed, the evaluation report showed that the current system does not benefit to consumers, and therefore the conditions laid down in Article 81(3) are not fulfilled. The current Block Exemption Regulation failed to meet its objectives.

Although in 1995, date of adoption of current Block Exemption Regulation, no other economic sector was permitted to combine exclusive territories and quantitative selective distribution systems, major operators of the industry have not always respected these more advantageous rules <sup>(3)</sup>.

The current Block Exemption Regulation has a powerful straightjacket effect on distribution: all current motor vehicle distribution systems are modelled on Regulation 1475/95, thereby impeding the development of innovative distribution patterns. The Commission decided therefore to adopt for motor vehicle distribution the same approach as for Regulation 2790/99 on vertical restraints: no more indication of what is permitted (the 'white list approach'), but rather of what is prohibited.

The Commission also concluded that applying Regulation 2790/99 as it stands is not suitable for

the motor vehicle industry because it does not provide adequate remedies to the problems identified in the evaluation report. In addition, it would not take into account the cumulative effect of similar distribution agreements in the motor vehicle sector. In that respect, Regulation 2790/99 provides for the possibility to adopt stricter rules than the general exemption regime for vertical restraints.

For instance Regulation 2790/99 would not have secured access to technical information, repair and diagnostic equipment and tools, and training to independent repairers. Nor would it secure sufficient access to the market for original or matching quality spare parts manufactured by component manufacturers, leading therefore to market foreclosure for the supply of parts.

Applying Regulation 2790/99 would therefore lead to a lessening of competition in after-sales services <sup>(4)</sup>. It would not either enhance European market integration for motor vehicle sales, or the development of real in-store multibranding dealerships.

These are the reasons why the Commission is proposing a sector specific block exemption Regulation, but similar in its structure and more economic approach with Regulation 2790/99. The proposed sector Block Exemption Regulation injects more competition at all levels of the motor vehicle distribution: sales, after-sales and supply of parts <sup>(5)</sup>. Increased competition will eventually benefit to consumers.

The proposed Block Exemption Regulation was published in OJ C 67 of 16 March 2002. All interested parties were given a month to submit

<sup>(1)</sup> OJ C 67 of 13.3.2002, p. 2. This article refers to the draft regulation as adopted by the Commission and published in the OJ.

<sup>(2)</sup> Members of the Block Exemption Regulation team working under the supervision of the head of unit Eric van Ginderachter: Nieves Navarro Blanco, Konrad Schumm, Manuel Martinez Lopes, John Clark, Christophe Dussart, Hubert Gambs and Lazaros Tsoraklidis.

<sup>(3)</sup> VW I, VW II, Opel, DaimlerChrysler infringement decisions with fines, with VW II being the first case of *resale price maintenance* in the motor vehicle sector (see press releases at [http://europa.eu.int/comm/competition/car\\_sector/distribution/#fines](http://europa.eu.int/comm/competition/car_sector/distribution/#fines)); Regulation 2790/99 allows such combination under the express condition that active sales outside the territory are permitted.

<sup>(4)</sup> Repair and maintenance services account for 40% of the total cost of ownership of a motor vehicle. The purchase accounts also for 40%. The remaining 20% covers mainly financing and insurance fees.

<sup>(5)</sup> The proposed BER covers the sale, after-sales services and supply of parts for passenger cars, commercial vehicles (light/medium/heavy), and coaches and buses.

comments. The consultation period ended on 16 April 2002. On the basis of these comments, as well as those of the Member States (expressed during the first Advisory Committee held on 7 March 2002), the European Parliament's proposed amendments, and the ECOSOC opinion, the Commission will submit a revised version of the Block Exemption Regulation for the second consultation of the Member States, which takes place on 6 June 2002.

## 2. Most significant changes from current rules

Although stricter than the current Block Exemption Regulation, the proposed Block Exemption Regulation allows nevertheless for a greater flexibility not only for motor vehicle manufacturers but also for the authorised operators and the independent repairers.

The proposed Block Exemption Regulation does not allow the combination of advantages arising from the allocation of exclusive territories and the implementation of selective systems (either qualitative or quantitative). Motor vehicle manufacturers have to choose between the two distribution systems.

It does not allow either anymore the *mandatory* link between sales and after-sales, acknowledging therefore that both economic activities may be conducted separately, while currently they are tied. The proposed Block Exemption Regulation does not cut the link between sales and after-sales, it reorganises it: all sales dealers may conduct after-sales activities if they so wish or subcontract these services to an authorised repairer which fulfils the qualification criteria set out by the motor vehicle manufacturer. Consumers will always benefit from qualified repairs. This re-organisation has no negative effect on warranty either: the manufacturer's warranty applies notwithstanding the place of sale or repair of the motor vehicle and must be provided by all repairers belonging to the motor vehicle manufacturer's network.

### 2.1 Main changes regarding sales

*In store multi-branding*, which increases inter-brand competition and facilitates consumer's choice, will be permitted without any other possible restriction than a legitimate requirement on dealers to arrange for display the brands in dedi-

cated spaces within the show-room in order to avoid brand image confusion.

The re-organisation of the link between sales and after-sales represents an opportunity for new sales *entrants* which will not be requested to perform after-sales activity, and for existing authorised operators who may wish to focus their investment either on sales or after-sales.

*Sales targets*, and therefore bonus calculation, will now be set for the whole EU, instead of confined allocated territories. This change should have a major impact on car allocation to dealers, with a beneficial effect on motor vehicle delivery time in case of cross-border purchases which should be facilitated.

*Intermediaries* acting on behalf of consumers will be able to source more easily cars from authorised dealers as the latter will no more be required to limit their sales to intermediaries to a 10% share of their overall sales. This change represents a major facilitation of purchases through intermediaries. Intermediaries will of course always need a consumer's mandate to act on their behalf.

Under the current Block Exemption Regulation, dealers are not allowed to *sell actively* outside their allocated territory. With the Block Exemption Regulation, dealers operating within a selective distribution network will be free to actively advertise and sell wherever in the EU, set up their own internet sites and develop advertising and sales through internet. They would also be allowed to establish partnerships with internet referral sites.

Existing *car* dealers, operating within a *selective* distribution system and wishing to *grow* either in their region, country or another Member State of the EU, will also be free to establish an additional dealership or a delivery point wherever they think it suits best their business development <sup>(1)</sup>. The prohibition of the so-called 'location clause' should help reducing the constantly high price differentials between Member States. These price differentials are evidenced twice a year in the Commission report on car prices in the EU. <sup>(2)</sup>

Prohibiting the location clause for cars is also a prerequisite for sound development of multi-branding. With a right of motor vehicle manufacturers to decide where a new entrant or even an existing sales dealer will market their brand, a dealer wishing to sell an additional brand in a given area could be hindered to do so, even if he meets all the qualitative criteria. Moreover

<sup>(1)</sup> The location clause permits a supplier to decide where a dealer or repairer may conduct his business (Regulation 2790/99). It can be enforced though for commercial vehicles above 6 tonnes and coaches and buses.

<sup>(2)</sup> The reports can be consulted on [http://europa.eu.int/comm/competition/car\\_sector/](http://europa.eu.int/comm/competition/car_sector/).

existing dealers in the targeted area would invoke the territorial protection granted by the location clause in order to avoid the establishment of an 'intra-brand' competitor.

Dealers operating within an *exclusive* distribution system will be allowed to perform the so-called passive sales originating from orders outside their allocated territories, either on customer's initiative or mandated intermediary's initiative but also on non authorised resellers' initiative (independent motor vehicle dealers, also known as 'grey dealers', supermarkets or internet operators). These independent operators are a powerful arbitrage tool between Member States. Exclusive dealers could also establish partnerships with internet referral site, and develop sales through their own internet site (under the condition not to actively seek for customers outside their territory, like via personalised advertising).

## 2.2 Main changes regarding after-sales

The re-organisation of the link between sales and after-sales services enhances opportunities for authorised after-sales operators which can dedicate all their investment and expertise in this field of activity. It allows also for sales dealers whose contract is terminated to remain active in after-sales <sup>(1)</sup>.

Access to technical information, tools and diagnostic equipment and training is further strengthened <sup>(2)</sup> in order to allow independent repairers to keep the pace of innovation <sup>(3)</sup> and compete effectively with authorised after-sales networks. Most consumer studies acknowledge that repairs and maintenance services operated by independent repairers are generally of equivalent quality to those operated by the authorised networks, and often cheaper. This additional competitive pressure exerted by independent repairers has always been valued as indispensable.

The proposed Block Exemption Regulation increases also access to the market for original spare parts and parts of matching quality manufactured by components manufacturers <sup>(4)</sup>, either directly to the authorised repairers or to the independent after-market operators. These parts are generally cheaper than those supplied by the motor vehicle manufacturers. This additional competi-

tive pressure at the parts supply level will be beneficial both to all repairers, authorised and independent, and to consumers.

## 2.3 Market share thresholds

The market share thresholds in the proposed Block Exemption Regulation are in line with Regulation 2790/99, which takes more than previously into account the economic analysis of the agreements and which sets a general threshold at 30%.

### 2.3.1 Sales

If motor vehicle manufacturers opt for dealerships enjoying the territorial protection of an exclusive territory, the market share threshold for benefiting from the exemption is set to 30%. If they opt for a quantitative selective distribution system, for which the proposed Block Exemption Regulation is stricter than Regulation 2790/99, the market share threshold is set to 40%. The threshold for quantitative selective distribution systems has been raised to 40%, instead of 30%, as the proposed sector specific Block Exemption Regulation contains more hardcore restrictions than Regulation 2790/99. Since purely qualitative selective distribution system do not normally restrict competition there is no market threshold in this case.

### 2.3.2 After-sales

Quantitative selective systems and exclusive systems for motor vehicle servicing are covered up to 30% market share. Motor vehicle manufacturers' market share for repair and maintenance is generally higher than this threshold and it is expected that they will therefore set up qualitative systems for their after-sales services. The proposed Block Exemption Regulation does of course not provide for a market share threshold for qualitative selective systems.

## 3. Expected benefits

Whatever the system implemented by motor vehicle manufacturers, the Block Exemption Regulation contains safeguards enhancing the proper functioning of the internal market. In case of *exclusive distribution*, dealers would be free to sell to all non authorised resellers: this opportunity

<sup>(1)</sup> This is important: independent studies forecast an average reduction by 25% of the number of authorised sales dealers in the forthcoming years; it is said that this reduction will occur whatever the nature of regulatory framework after October 2002.

<sup>(2)</sup> Regulation 1475/95 covers only access to technical information.

<sup>(3)</sup> Motor vehicles incorporate increasingly sophisticated technology (like in engine and injection controls, electronically assisted braking systems, active suspension or radar-based adaptative cruise-controls).

<sup>(4)</sup> Today, parts manufactured by component manufacturers account for 80% of all motor vehicle parts and components.

triggers price competition and facilitates market integration. In case of *selective distribution* not only all dealers are free to sell actively wherever in the EU, but they can even expand ‘physically’ wherever they so decide.

These are measures increasing competition between dealers, and therefore between motor vehicle manufacturers. This additional competition should eventually benefit to the European consumer, not only in terms of distribution innovation and distribution efficiency, but ultimately in terms of increased price competition.

Real multi-branding, new method of setting sales targets <sup>(1)</sup> and freeing-up of intermediaries’ activity will not only benefit to consumers in terms of product choice, product availability and diversity of geographical sourcing, but will enhance and strengthen the efficient dealer’s position vis-à-vis motor vehicle manufacturers, not to mention the obligation of detailed motivation in case of contract termination.

The re-organisation of the link between sales and after-sales activities offers the opportunity to new type of entrants to develop alternative ways of distributing motor vehicles and to existing dealers to focus on the activity for which they are the most efficient.

Easier access of components and parts manufacturers to the authorised repairers networks and the independent after-market networks will enhance competition at the parts supply level. Independent

repairers are given the opportunity to effectively compete with the authorised repairers, especially by guaranteeing not only access to all kind of technical information, but also to tools, diagnostic equipment and software, and training.

To summarise, the proposed Block Exemption Regulation aims at neutralising the negative effects on distribution that are not induced by external factors such as different taxation levels.

#### 4. Duration and transitional period

The new Block Exemption Regulation should enter into force on 1 October 2002. The duration of the proposed Block Exemption Regulation (7 years and 10 months) is scheduled to coincide with the termination of Commission Regulation 2790/99, in order to allow an overall review of Commission’s policy regarding vertical restraints in 2010. The proposed Block Exemption Regulation provides for a one year transition period allowing adaptation of current contractual arrangements.

#### 5. Next procedural steps

Member States have submitted their final comments and proposals on the revised Commission’s proposal at the second Advisory Committee on restrictive practices, which took place on 6 June 2002. The Commission should normally adopt the Block Exemption Regulation during July 2002.

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<sup>(1)</sup> New method of setting sales targets may also give an additional impulse towards more lean production and distribution than today.



## Commission ends competition proceedings regarding German book price fixing agreements following acceptance of an undertaking on cross-border sales

*Hanns Peter NEHL and Jan NUIJTEN, Directorate-General Competition, unit C-2*

### Introduction

The Commission has been dealing with the system of fixed book prices in Germany and Austria since its first notification in 1993 because it was based on cross-border agreements between publishers and booksellers. The Commission had objected to these agreements because they infringed Article 81(1) of the EC Treaty and the conditions for an exemption under Article 81(3) were not fulfilled. As a compromise solution a new 're-nationalised' book price fixing agreement ('Sammelrevers') limited in its scope of application to Germany was notified in March 2000. However, before the Commission could definitively clear the amended 'Sammelrevers' it received complaints by foreign Internet book traders in summer 2000 alleging infringements of Article 81(1) of the EC Treaty on the part of the Börsenverein des Deutschen Buchhandels e.V. (the German publishers' and book traders' association), German publishers and booksellers. The investigation initiated by the Commission eventually led to an Undertaking given by the Börsenverein, the publisher Verlagsgruppe Random House GmbH and the German book wholesaler Koch, Neff & Oetinger GmbH. As a consequence, on 22 March 2002 the Commission announced that it would no longer pursue proceedings. <sup>(1)</sup> Finally, in April 2002 DG COMP issued a negative clearance comfort letter for the amended 'Sammelrevers' as interpreted in the light of the Undertaking.

Indeed, the Commission does not contest truly national book price fixing systems as long as they have no appreciable effect on trade between Member States. According to the text of the amended 'Sammelrevers', books can be sold by retailers directly to final consumers in other Member States at reduced prices. This means, in particular, that no fixed price applies to cross-border Internet sales. The fixed prices only apply to re-imports into Germany when the sole purpose

of the export and re-import is to circumvent the national price fixing system.

### Investigation

On 10 June 2000 the Commission published a Notice pursuant to Article 19(3) of Regulation No. 17 announcing its intention to clear the amended 'Sammelrevers' as it was presumed not to have an appreciable effect on trade between Member States. <sup>(2)</sup> However, clearance was not possible at the time because of two complaints submitted respectively by the Austrian bookseller Libro AG including its affiliated Internet branch Lion.cc, who sold German best-sellers to German final consumers via the Internet at prices far below the fixed prices, as well as from Belgian Internet bookseller Proxis who planned similar rebate sales on the German market.

The complaints implied the suspicion of a concerted embargo at the expense of foreign Internet booksellers that served to block cross-border Internet trade in books at reduced prices with German final consumers. These allegations indicated that the concerted embargo was ultimately based on an interpretation and application in practice of the 'Sammelrevers' by the German publishers and booksellers (with the participation of the Börsenverein) in a way that still affected trade between Member States. Prosecution of the concerted practice therefore necessarily implied the challenging of the new 'Sammelrevers', i.e. its anti-competitive interpretation and application.

The investigation resulted in July 2001 in the initiation of formal proceedings by issuing a Statement of Objections. <sup>(3)</sup> A Hearing was held in November 2001. In subsequent discussions with the Börsenverein, the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH agreement was reached on the text of an Undertaking that definitively and fully met the objections raised. In accepting the Undertakings

<sup>(1)</sup> IP/02/461 of 22 March 2002, 'Commission accepts undertaking in competition proceeding regarding German book price fixing'.

<sup>(2)</sup> O.J. No. C 162 of 10 June 2000, p. 25.

<sup>(3)</sup> IP/01/1035 of 19 July 2001.

given by the parties the Commission also showed its readiness to take into account the national interest in maintaining systems that are aimed at preserving cultural and linguistic diversity in Europe.

The full wording of the Undertaking is annexed to this article.

## Undertaking

The Undertaking guarantees the freedom of direct cross-border selling of German books to final consumers in Germany, in particular, via the Internet, including ancillary services, such as cross-border advertising.

At the same time, it establishes an exclusive list of conditions under which German booksellers and publishers can exceptionally stop cross-border selling to German final consumers if found to be a circumvention of the ‘Sammelrevers’. In that case, the Undertaking makes it clear that for circumvention to take place it would require a German bookseller bound by the fixed price to take the initiative of circumventing the price fixing possibly by means of or with the help of a foreign bookseller. The listed categories of circumvention behaviour are to be interpreted restrictively. Moreover, the burden of proof for the relevant ‘objective circumstances’ rests with the publishers and booksellers invoking circumvention.

The Undertaking and its defined list of circumvention behaviour merely concerns the issue of inapplicability of Article 81(1) of the EC Treaty. The ‘Sammelrevers’, as long as it is interpreted and applied in conformity with this Undertaking and the Commission Notice pursuant to Article 19(3) of Regulation No. 17 of 10 June 2000, does not

appreciably affect trade between Member States in the sense of Article 81(1) of the EC Treaty. The Undertaking’s content however has no bearing whatsoever on the assessment of issues related to the national book price fixing in the light of EC law as a whole, in particular, the free movement of goods and services as well as the freedom of establishment. Moreover, the Undertaking’s validity in time is limited until the entry into force of a German law on fixed book prices (currently in preparation) or comparable State measures that replace the contractual price fixing system. <sup>(1)</sup>

It should be noted that the detailed definition of the notion of circumvention in the Undertaking promotes legal certainty not only for the publishers participating in the ‘Sammelrevers’ and the booksellers bound by it, but also for foreign booksellers who aim at starting sales activity, in particular, via the Internet, with final consumers on the German market for books.

## End of proceedings

The Undertaking ensures that the Commission will intervene in case of concerted blocking of direct cross-border Internet book selling to German final consumers. Therefore, the complainant Libro agreed with both the Undertaking and the closure of the proceedings. <sup>(2)</sup>

As a consequence of the Undertaking and the agreement by the complainants, the Directorate General Competition of the Commission terminated the proceedings and granted a so-called negative clearance comfort letter for the ‘Sammelrevers’ based on the lack of appreciable effect on trade between Member States.

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<sup>(1)</sup> This mechanism not only takes account of the fact that the law on fixed book prices will replace the ‘Sammelrevers’ but also makes it clear that the Undertakings do not prejudice the Commission’s future assessment of such national laws in the light of EC law as a whole and, in particular, the market freedoms under the EC Treaty including secondary legislation, such as the e-commerce directive.

<sup>(2)</sup> Proxis had already withdrawn its complaint shortly before.

## Undertaking <sup>(1)</sup>

by the Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH given in the proceedings

*COMPIC-2/34.657 Sammelrevers*  
*COMPIC-2/37.906 Internetbuchhandel*

The Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH give the subsequent Undertaking with respect to the Commission Notice, in particular its paragraphs 7, 8 and 10, pursuant to Article 19(3) of Regulation No 17 on the granting of a negative clearance by reason of the inapplicability of Article 81(1) of the EC Treaty to the Sammelrevers (O.J. C No. 162 of 10 June 2000, p. 25). The Undertaking exclusively refers to the lack of applicability of Article 81(1) EC Treaty to the Sammelrevers and, in particular, has no effect on the assessment and interpretation of either its provisions or future State measures for the regulation of the price fixing of books and other printed products in the light of EC law as a whole, in particular, on the free movement of goods and services as well as the freedom of establishment:

### I.

1. The Sammelrevers does not apply to cross border activities, in particular, cross border sales of books and other printed products to end consumers in Germany including ancillary services, such as cross border advertising. This includes cross border activities in the above sense via the Internet.

2. As an exception to paragraph 1, the Sammelrevers is only applicable to cross border sales of books and other printed products to German end consumers if it is shown on the basis of objective circumstances that a bookseller bound by the Sammelrevers circumvents the retail price maintenance. Circumvention in this sense takes place only if

- a bookseller bound by the Sammelrevers colludes at the retail level with a book seller not bound by the Sammelrevers in order to sell, on the basis of a common plan, books and other printed products to end consumers in Germany at prices below the fixed price. Collusion in this sense takes place, in particular, where the bookseller bound by the Sammelrevers, on the basis of the common plan, makes available Internet access or other communication devices to the bookseller not bound by the Sammelrevers.
- a bookseller bound by the Sammelrevers exports books and other printed products in another Member State for the sole purpose of reselling them to end consumers in Germany, either unilaterally or by means of an affiliated undertaking or a third party not bound by the Sammelrevers.
- a bookseller bound by the Sammelrevers or an undertaking either controlled by or affiliated and intentionally co-operating with the former creates or gains control over an establishment in another Member State for the purpose of circumventing the retail price maintenance under the Sammelrevers.

### II.

3. The Sammelrevers applies to cross border sales of books and other printed products to booksellers only if it is shown on the basis of objective circumstances that they were exported for the sole purpose of re-importing them in order to circumvent the retail price maintenance under the Sammelrevers.

### III.

4. The clauses under paragraphs 2 and 3 constitute exceptions to be interpreted narrowly.

5. The burden of proof for the presence of objective circumstances establishing circumvention of the retail price maintenance in the sense of paragraphs 2 and 3 lies with the party invoking the exception. The further interpretation of the notion of circumvention is left to the national courts, however, subject to the competence of the European Court of Justice to give preliminary rulings and the Notice on the co-operation between the Commission and the national courts of 13 February 1993 (J.O. C No. 39 of 1993, p. 6).

6. The Sammelrevers is to be applied by the publishers in accordance with proportionality.

### IV.

7. This Undertaking is only valid during the maintenance in force of the Sammelrevers 2000 governing the retail price maintenance of books and other printed products in Germany. As soon as the Sammelrevers is repealed by State measures governing the retail price maintenance this Undertaking ceases its validity.

Date and signatures

<sup>(1)</sup> Unauthorised translation; only the German text – available under IP/02/461 of 22 March 2002 – is authentic.

## Air transport — The proposed British Airways-American Airlines alliance

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

In August 2001, the Commission, the UK Office of Fair Trading ('OFT') and the US Department of Transportation ('DoT') were informed of the intention of British Airways ('BA') and American Airlines ('AA') to deepen their bilateral alliance on transatlantic routes. This proposed alliance included profit-sharing, code-sharing, joint marketing and schedule co-ordination. As a result of these arrangements, BA and AA would have ceased to compete against each other.

In February 2002, the parties eventually decided to terminate their alliance agreements in the light of the conditions imposed by DoT to clear the deal. At that time, the joint investigation launched by the Commission and the OFT had not been completed, although both competition authorities had reached a common understanding of the competition concerns raised by the alliance.

### Procedure

Council Regulation 3975/87 <sup>(1)</sup>, which lays down the procedure for the application of the rules on competition to undertakings in the air transport sector, only covers air transport between EEA airports. This means that the Commission does not enjoy its traditional investigation and enforcement powers in the competition field as regards air transport between the Community and third countries. <sup>(2)</sup>

In the absence of implementing regulations under Article 83 of the Treaty, both Member States and the Commission have a duty to ensure the application of Articles 81 and 82. In accordance with Article 85 of the Treaty, the Commission can propose appropriate measures to bring infringements to an end and authorise Member States to take the measures needed to remedy the situation, but it does not have powers to take measures, including granting an exemption, itself. Under a national regulation <sup>(3)</sup>, the OFT has full competence to investigate and rule upon airline alliances

on third country routes, including the power to grant a formal exemption. The continuation of the 'transitional' regime in this particular sector explains why DG Competition and OFT investigated the BA/AA alliance in parallel.

From the start, both authorities worked very closely together. Notices inviting comments on the alliance were published on the same day and identical questionnaires were sent out to competitors, travel agents and corporate customers. Joint meetings were also held with the notifying parties as well as with third parties. As a result of this close co-operation, both competition authorities were able to reach a common understanding of the benefits arising from the alliance, the possible competition concerns and the remedies that might have been needed to address these.

### Substance

Overall it appeared reasonable to conclude that the alliance would have led to improvements in service quality that would have been attractive to consumers and that there would have been benefits from reductions in fares for connecting passengers. However, these benefits were focussed on connecting passengers and the number of these was small relative to the number of passengers who would have been affected by the loss of competition on transatlantic routes. It would have been necessary to weigh these relatively small benefits against the significant loss of competition resulting from the alliance.

The main competition concerns in this case arose on five UK-US routes where both BA and AA offered direct services, i.e. London-New York, London-Chicago, London-Dallas, London-Miami and London-Boston. Most of these city-pairs are thick business routes, where competition would have been particularly restricted for time-sensitive passengers since BA and AA account for a large proportion of these customers. Concerns were also

<sup>(1)</sup> Council Regulation (EEC) No 3975/87 (OJ No L 374, 31.12.87, p.1) laying down the procedure for the application of the rules on competition to undertakings in the air transport, at last amended by Council Regulation (EEC) No 1284/91 of 14 May 1991 (OJ No L 122, 17.05.91, p. 2) and Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ No L 240, 24.08.92, p. 18).

<sup>(2)</sup> A proposal to bring air transport to and from the EU within the scope of Regulation 3975/87 has been pending before the Council since 1997.

<sup>(3)</sup> The EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (SI 2001/2916), as amended by the EC Competition Law (Articles 84 and 85) Enforcement (Amendment) Regulations 2002 (SI 2002/042).



raised regarding the possible impact on competition at a wider level, for example, for corporate clients.

The most appropriate remedy for these competition problems would have been for BA/AA to give up slots at London Heathrow, since access to these slots was the main barrier to entry or expansion by potential competitors. No final conclusion was reached on whether London Heathrow and London Gatwick were part of the same market. However, it was clear from the investigation that both carriers and consumers had a preference for Heathrow. In particular, services operated from Heathrow appeared to have a higher yield than those operated from Gatwick. Heathrow's competitive advantage over Gatwick would therefore certainly have been taken into account when considering remedies.

It is also likely that direct flights would have been favoured when designing remedies. In other airline cases, the Commission accepted that indirect

flights do compete on long-haul routes to some extent. On many UK-US routes, however, both competition authorities came to the conclusion that only a small number of passengers choose to fly indirect and that direct flights were therefore more competitive.

### **Termination of the alliance agreements**

On 25 January 2002, the US DoT tentatively granted BA/AA's application for antitrust immunity subject to the divestiture of 224 weekly slots at London Heathrow. This was considered too high a price by the parties, and they decided to abandon the proposed expansion to their alliance. On 21 February 2002, the parties officially confirmed that the agreements had been terminated and that they consequently wished to withdraw their notification under the UK Enforcement Regulations. As a consequence, DG Competition and OFT decided to close the procedures they had opened in this case.

## Commission accepts formal undertaking from Check Point regarding its distribution practices

*Nicholas BANASEVIC, Directorate-General Competition, unit C-3*

In June 2001, the Commission received a complaint from Stonesoft Corporation, a Finnish software company, against Check Point Software Technologies, an Israeli-based producer of firewall and virtual private network (VPN) software. Firewall/VPN software is key security software used to prevent unauthorised external access to internal computer networks, and to provide data encryption in public computer networks.

Stonesoft outlined to the Commission that in March 2001, it had launched its own firewall/VPN software product in competition with Check Point's firewall/VPN offering. Stonesoft alleged that as a result of this launch, Check Point had abused its dominant position in the worldwide market for firewall/VPN software by informing its resellers and distributors that if they sold or considered selling Stonesoft's rival firewall/VPN product, they would either have their distribution contract with Check Point terminated, or that discounts granted under this contract would be discontinued. According to Stonesoft, such conduct amounted to an exclusionary abuse under Article 82 of the Treaty.

As a result of Stonesoft's complaint, the Commission undertook an extensive market investigation. This comprised: (i) a market test in order to ascertain the precise nature of the market and Check Point's position within it; and (ii) official contacts with over 100 distributors and resellers in order to ascertain whether there was any substance to Stonesoft's conduct allegations.

On the basis of this market investigation, the Commission was concerned that Check Point had told some of its distributors and resellers that if they attempted to sell Stonesoft's competing firewall/VPN product, they would no longer be supplied with Check Point's own product. Given Check Point's market presence, the Commission was concerned that this was having a negative foreclosure effect in the market for firewall/VPN software in violation of Article 82 of the Treaty.

After the Commission had expressed these concerns to Check Point, and following negotiations between the Commission and Check Point,

Check Point offered the Commission a formal undertaking in March 2002. This undertaking covered the Commission's concerns. The terms of the undertaking are as follows:

- Check Point confirmed that it would not place undue or unacceptable pressure upon its distributors and resellers regarding their independent decision whether or not to sell competing products;
- in this respect, Check Point would confirm to its distributors and resellers their right independently to choose to handle products of other manufacturers which directly or indirectly compete with Check Point's own products. Therefore, Check Point would inform all its distributors and resellers by letter that it would not condition the supply of its products, or the terms and conditions of supply of its products, on whether or not its distributors and resellers stock, market and sell competing products. A copy of this letter would be provided to Stonesoft.
- Check Point would also ensure that its sales and other relevant personnel are informed about the EU competition rules and that they understand the requirement to comply with those laws in their business dealings.

The Commission reviewed and was satisfied with the letter that Check Point had proposed to send to its distributors and resellers, and this letter was sent by Check Point in the middle of April 2002. As a result of Check Point's undertaking, Stonesoft's complaint has been withdrawn and the Commission has closed the case file. Nevertheless, the Commission will continue to monitor developments in this market in order to ensure that the terms of the undertaking are respected. The Commission is of the view that by obtaining what is an extensive undertaking, a level playing field in the market for firewall/VPN software has been ensured in the most efficient manner. In light of the constructive attitude adopted by Check Point, the undertaking represents a pragmatic result in circumstances where formal proceedings would otherwise most likely have been initiated.

## Recent judgments in the liner shipping sector

Eric FITZGERALD, Directorate-General Competition, unit D-2

### 1. Introduction

On 28 February 2002, the European Court of First Instance (the CFI) delivered three judgments of great importance for EU maritime competition policy. Ruling on appeals brought against the 1994 *TAA* <sup>(1)</sup> and *FEFC* <sup>(2)</sup> decisions and 1996 *TACA Immunity* <sup>(3)</sup> decision, the CFI upheld the Commission's findings in all material respects. The parties have declared that they will not appeal the judgments to the European Court of Justice.

### 2. Background

All three cases concern the application of Council Regulation 4056/86, the main maritime competition regulation. The latter provides for a block exemption that is exceptionally generous. Article 3 of Regulation 4056/86 thus permits a liner conference not only to fix a common freight rate but also, *inter alia*, to regulate the capacity offered by each member of the conference. <sup>(4)</sup> This exemption of collective price-fixing and supply regulation is said to be necessary in order to 'assure shippers of reliable [scheduled] services'. <sup>(5)</sup>

In its 1994 *TAA* and *FEFC* decisions, and again in the 1998 *TACA* decision, <sup>(6)</sup> the Commission objected, *inter alia*, to the collective fixing of tariffs for the inland leg of intermodal transport operations. Relying on the wording of Article 1(2) of Regulation 4056/86, which provides that the Regulation 'shall apply only to international maritime transport services from or to one or more Community ports' the Commission argued that the scope of the exemption contained in Article 3 could not be wider than the scope of the Regulation itself.

By preliminary decision of 26 November 1996, the Commission removed the *TACA* parties' immunity from fines in respect of inland price-fixing (which the parties considered that they enjoyed by

virtue of having notified the *TACA* agreement to the Commission under Regulation 4056/86).

Also in dispute in the *TAA* case was the interpretation of the Regulation's reference to 'uniform' rates. The *TAA* applied a two-tier tariff structure that differentiated between former conference members and independents. The Commission interpreted the reference to 'uniform' rates as meaning that for the transport of a given article a shipper must be offered the same freight rate by all members of a conference. For that and other reasons, the Commission did not consider the *TAA* to be a conference within the meaning of Article 1(3)(b) of Regulation 4056/86.

The above points of dispute relate to *price-fixing*. Equally important however is the interpretation of the reference in Article 3(d) of Regulation 4056/86 to 'the regulation of the carrying capacity offered by each member [of the conference]'.

In the *TAA* case, the members of the *TAA* had agreed not to utilise a proportion of the capacity available on board their container vessels, with the obvious purpose of increasing freight rates by limiting supply. In its *TAA* decision the Commission objected to these capacity freezes on the grounds that they were not consonant with the aim of Article 3(d), which was the improvement of the scheduled transport service(s) provided by the members of the conference. A capacity freeze does not lead to an improvement in scheduling or to substantial cost savings; no tangible benefits of any significance therefore accrue to transport users. The Commission has taken the view that a capacity withdrawal – i.e. a withdrawal of entire vessels – is permissible in a situation where it is intended to address a short-term fluctuation and where it will generate substantial cost savings that can be passed on to transport users. The Commission has thus not objected to the collective withdrawal of capacity by members of the *TACA* conference over the Christmas and New Year low season, a period of some five weeks.

(1) Commission decision of 19 October 1994 in Case No IV/34.446 – *Trans-Atlantic Agreement* (OJ L 376, 31.12.1994).

(2) Commission decision of 21 December 1994 in Case No IV/33.218 – *Far Eastern Freight Conference* (OJ L 378, 31.12.1994).

(3) Commission decision of 26 November 1996 in Case No IV/35.134 – *Trans-Atlantic Conference Agreement*.

(4) The Commission has interpreted this provision as allowing capacity regulation only under certain strict conditions (see further below).

(5) Preamble to Regulation 4056/86, 8<sup>th</sup> recital.

(6) Commission decision of 16 September 1998 in Case No IV/35.134 – *Trans-Atlantic Conference Agreement* (OJ L 95, 9.4.1999).

### 3. The judgments

#### 3.1. The TAA judgment

The CFI's judgment in the TAA case <sup>(1)</sup> may be usefully summarised thus as far as the application of the EU liner conference **block** exemption is concerned:

- the TAA was not a liner conference because it did not operate under uniform or common freight rates (Article 1(3)(b) of Regulation 4056/86); <sup>(2)</sup>
- not being a liner conference it could not benefit from the EU liner conference block exemption (provided for by Article 3 of the Regulation); <sup>(3)</sup>
- that being the case, it was unnecessary for the CFI to examine whether the capacity management programme and inland price-fixing arrangements implemented by the TAA *would* have fallen within the scope of the liner conference block exemption *had* the TAA been a conference. <sup>(4)</sup>

On the issue of **individual** exemption, the CFI found:

- that the maritime price-fixing and capacity management aspects of the TAA would lead to the elimination of competition and could for that reason not qualify for exemption; <sup>(5)</sup>
- that it had not been shown that the inland price-fixing arrangements were apt to lead to any improvement in production and that they were indispensable to the achievement of the stated objective of preventing the undermining of maritime transport rates by below-cost pricing on the inland leg of an intermodal transport operation. They were therefore ineligible for exemption. <sup>(6)</sup>

The CFI annulled the Commission's decision insofar as it imposed an obligation on the TAA to inform its customers that they were entitled to renegotiate or terminate their contracts. The CFI considered that the Commission had failed to provide sufficient explanation of the need to impose such a novel obligation. Moreover, the statement of objections did not contain a sufficiently explicit warning that the obligation in question might be imposed.

In the course of reaching the above conclusions, the CFI made a number of important statements with regard to the interpretation of Regulation 4056/86 and the block exemption provisions contained therein.

Recalling that it is settled case-law that provisions derogating from Article 81(1) of the EC Treaty must be strictly interpreted, the Court considered that this conclusion must apply *a fortiori* to the block exemption provisions of Regulation 4056/86:

*'by virtue of its unlimited duration and the exceptional nature of restrictions on competition authorised (horizontal agreement having as its object the fixing of prices). It follows that the block exemption provided for by Article 3 of Regulation No 4056/86 cannot be interpreted broadly and progressively so as to cover all the agreements which shipping companies deem it useful, or even necessary, to adopt in order to adapt to market conditions'* (paragraph 146 of the judgment – emphasis added).

In response to the TAA parties' claim that the Commission should have granted individual exemption to the maritime aspects of the TAA because it contributed to stability, the Court recalled, first, that:

*'[r]egulation No 4056/86 clearly cannot derogate from Articles 85 and 86 of the Treaty; the fifth recital in the preamble to that regulation indeed states that it is necessary to provide for 'implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market. The 13th recital in the preamble to Regulation No 4056/86 states in addition that 'there can be no exemption if the conditions set out in Article 85(3) [of the Treaty] are not satisfied' (paragraph 260 – emphasis added).*

The Court then went on to address the stability argument:

*'As regards more specifically the concept of stability, the Council took the view that 'liner conferences have a stabilising effect, assuring shippers of reliable services and therefore provided for a block exemption for them. However, that does not mean that every agree-*

<sup>(1)</sup> Judgment of the Court of First Instance of 28.2.2002 in Case T-395/94 *Atlantic Container Line and others v Commission* [2002] ECR II-0000.

<sup>(2)</sup> Paragraphs 176 and 177 of the judgment.

<sup>(3)</sup> Paragraph 177.

<sup>(4)</sup> Paragraph 178.

<sup>(5)</sup> Paragraphs 365 and 366.

<sup>(6)</sup> Paragraphs 369 and 372.



ment between shipping companies which may promote a certain stability in the maritime transport sector must be granted an exemption, whether block or individual. First, the Council did not assert (and indeed **could not have asserted**) that stability is more important than competition, but it did make provision, in particular in Articles 4, 5 and 7 of Regulation No 4056/86, 'to prevent conferences from engaging in practices which are incompatible with Article 85(3) of the Treaty, in the words used in the ninth recital in the preamble to that regulation. Second, the Council expressly limited its positive assessment of stability **to liner conferences only**, excluding every other agreement of a different kind, stating that the beneficial results of stability 'cannot be obtained without the cooperation that shipping companies promote within conferences (eighth recital in the preamble to Regulation No 4056/86).

It follows that although stability, to the extent that it contributes to assuring shippers of reliable services, **may** be an advantage for the purposes of the first condition of Article 85(3) of the Treaty, the Commission cannot be **obliged** to grant individual exemption to every agreement which, in the opinion of the parties, may contribute to such stability. Within the limits imposed by Regulation No 4056/86, the Commission retains its discretion in applying Article 85(3) of the Treaty' (paragraphs 261 and 262 – emphasis added).

### 3.2. The FEFC judgment

In its judgment in the FEFC case, <sup>(1)</sup> the CFI unequivocally and comprehensively rejected the claim of the FEFC parties that provisions fixing inland transport rates in the context of intermodal transport services fall within the scope of the main maritime transport regulation, Regulation 4056/86, and the block exemption contained therein.

Having first established that the inland transport services at issue in the case were services distinct from maritime transport services (see, in particular, paragraphs 124 and 129 to 130 of the judgment), the Court then went on to define the scope of Regulation 4056/86.

Regulation 4056/86 applies, by its very terms, to maritime transport services (Article 1(1)). It was, in the Court's view, clear that 'maritime transport services' ordinarily refers to transport by sea and that:

*'if the Council had wanted to include within that term other services provided in conjunction with maritime transport, such as the inland on- or off-carriage of cargo, it would have said so expressly, as indeed the American legislature has done' (paragraph 235).*

Further:

*'it should be borne in mind that in Centro Servizi Spediporto the Court held, when asked whether Regulation No 4055/86 applies to the inland sections of an intermodal transport operation, that maritime transport services ceased on arrival at the port or offshore installation and do not therefore extend to the road transport of cargo unloaded from the vessel' (paragraph 239 – emphasis added).*

The Court rejected the applicants' argument that the conclusion in Centro Servizi Spediporto <sup>(2)</sup> was not applicable to the present case, recalling that Regulations 4055/86 and 4056/86 had been adopted as part of the same package of measures on the same day and considering that if the Council had wished to give a broader scope to Regulation 4056/86 than to Regulation 4055/86, it would have said so expressly.

The CFI concluded:

*'It is thus apparent that the scope of Regulation No 4056/86 is limited to maritime transport services properly so called, that is, to transport by sea from port to port, and does not cover the inland on- or off-carriage of cargo supplied in combination with other services as part of an intermodal transport operation' (paragraph 241).*

Regarding the possibility of individual exemption, the Court found, *inter alia*, that the applicants had not shown that collective inland price-fixing – a very serious restriction of competition – was indispensable to attain the alleged objective of stability. It did not therefore meet the third condition for exemption of Article 81(3). <sup>(3)</sup>

<sup>(1)</sup> Judgment of the Court of First Instance of 28.2.2002 in Case T-86/95 *Compagnie Générale Maritime and others v Commission* [2002] ECR II-0000.

<sup>(2)</sup> Judgment of the Court of Justice of 5.10.1995 in Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883, at paragraph 51.

<sup>(3)</sup> The Court had already found that the Commission had not manifestly erred in finding that neither of the first two conditions for exemption of Article 81(3) were met.

The Court noted that the Commission had identified a less restrictive measure that might contribute to stability: *'namely a provision included in an agreement stipulating that inland transport services may not be charged at less than cost'* (paragraph 398) and that a clause of this kind:

*'encourages companies to reduce their inland transport costs in such a way as to be competitive in the entire intermodal transport operation. Such a system enables maritime transport companies to compete on the basis of the specific quality of the inland transport service as part of an intermodal transport operation. Furthermore, the clause eliminates the possibility of implicitly granting discounts on the conference maritime transport tariff due to the absorption of part of the inland transport costs and, consequently, contributes to the stability of maritime transport'* (paragraph 400).

Notwithstanding the above findings on the substance of the case, the CFI annulled the symbolic fines imposed on the FEFC parties. It did so for reasons which included the long-established (for liner conferences) nature of the practice, the legal and economic complexity of the issues and the fact that no fines had been imposed on the TAA parties for the same practice.

### 3.3. The TACA Immunity judgment

In its judgment <sup>(1)</sup> the CFI found that as inland price-fixing fell within the scope of the inland transport regulation, <sup>(2)</sup> Regulation 1017/68, and as the latter did not contain any provision granting immunity from fines, the Commission's decision <sup>(3)</sup> purportedly withdrawing immunity from fines did not alter the TAA parties' legal position. The parties' appeal was therefore inadmissible.

In reaching the above conclusion, the CFI rejected the argument that even if Regulation 1017/68 does not expressly provide for immunity from fines, it must be regarded as a general principle of Community competition law that formal notification has that consequence.

## Conclusion

Although the liner shipping industry has since abandoned most of the practices that gave rise to the above decisions and Court cases, the CFI's judgments provide a welcome confirmation that the Commission's policy in this sector is soundly based in law. The judgments, which are very thoroughly reasoned, also provide a great deal of guidance on matters not directly in issue in the above cases, such as the not below cost clause agreed by the revised TACA parties and exempted by the Commission in 1999.

Above all, the Court of First Instance has provided a salutary reminder that Regulation 4056/86, as secondary legislation, must be interpreted in a way that is consistent with Articles 81 and 82 of the EC Treaty.

This conclusion is echoed indirectly in the framework of analysis adopted by the Final Report on competition policy in liner shipping, published by the OECD Secretariat in April 2002. <sup>(4)</sup> A previous article in the Competition Policy Newsletter issue of January 2002 <sup>(5)</sup> described the main conclusions of a draft version of that report and the Commission's reaction to those conclusions.

The Report has approached the issue of antitrust immunity and exemption for price-fixing and capacity agreements between shipping lines from the perspective of a cost/benefit analysis. It has thus examined whether the alleged benefits to transport users and to the shipping lines themselves of price-fixing and collective capacity regulation outweigh the economic inefficiencies and other disadvantages generated by these very serious restrictions of competition, and whether these alleged benefits could not have been achieved by other, less restrictive, means.

The above approach is of course very similar to that which would follow from applying Article 81(3) of the EC Treaty and which the Court of First Instance has confirmed is the correct framework within which to interpret the block and individual exemption provisions of Regulation 4056/86. The Final Report and the above judgments of the CFI will therefore both be of great assistance to the Commission in its coming review of Regulation 4056/86.

<sup>(1)</sup> Judgment of the Court of First Instance of 28.2.2002 in Case T-18/97 *Atlantic Container Line and others v Commission* [2002] ECR II-0000.

<sup>(2)</sup> The CFI referred to the FEFC judgment.

<sup>(3)</sup> The decision was taken as a precautionary measure only, to take account of the possibility that the CFI or ECJ might consider that the inland part of an intermodal transport operation fell within the scope of Regulation 4056/86, which does provide for immunity from fines if an agreement is formally notified.

<sup>(4)</sup> Available on the OECD website at <http://www.oecd.org/EN/home/0,,EN-home-25-nodirectorate-no-no—25,00.html>.

<sup>(5)</sup> *Competition in the maritime transport sector: a new era*, Jean-François Pons and Eric FitzGerald, Competition Policy Newsletter 1/2002. See also *Recent developments in EU competition policy in the maritime sector*, Joos Stragier, London (2002), which describes the coming review in greater detail. The speech is available at [http://europa.eu.int/comm/competition/speeches/index\\_2002.html](http://europa.eu.int/comm/competition/speeches/index_2002.html).

## New case law on market foreclosure

### Court of First Instance upholds three Commission decisions relating to beer ties

*Paul BRIDGELAND, Directorate-General Competition, unit F-3*

In its judgments in the *Roberts* <sup>(1)</sup>, *Shaw* <sup>(2)</sup> and *Joynson* <sup>(3)</sup> cases, the European Court of First Instance ('CFI') upheld three Commission decisions relating to exclusive purchasing agreements in the UK beer sector. The *Shaw* and *Joynson* judgments are of mainly historic interest in that they relate to decisions adopted before the entry into force of the Commission's new rules on vertical agreements <sup>(4)</sup>. On the other hand, the *Roberts* judgment expands the case law on foreclosure in a manner consistent with the economics-based approach of the new rules.

#### a) The *Roberts* case

In *Roberts v Commission*, the CFI confirmed the Commission's view that the exclusive purchasing agreements or 'beer ties' of a brewer with a very small market share were not capable of contributing significantly to the foreclosure of the market and therefore did not fall within Article 85(1) (now Article 81(1)).

The judgment related to the Commission's decision of 12 November 1998 <sup>(5)</sup> in which it rejected a complaint from Mr and Mrs Roberts, who were lessees of a pub belonging to the regional brewer Greene King. The Roberts complained that the obligation in their lease to buy all their beer from Greene King infringed Article 85(1). Greene King owned approximately 1100 pubs and had concluded loans associated with a beer purchasing obligation ('loan ties') with a further 1500 outlets.

First of all, the CFI held that the relevant product market was the supply of beer to all types of outlets which sell alcoholic drinks for consumption on the premises (the 'on-trade'). Referring to the judgment of the European Court of Justice ('ECJ') in

*Delimitis* <sup>(6)</sup>, the CFI held that in all such outlets the product is consumed on the premises; the sale of the product is associated with the provision of services; brewers use a specific distribution system and consumer prices are higher than in the food retail sector (the 'off-trade'). Therefore, pubs did not constitute a separate product market from other on-trade outlets such as clubs and restaurants.

Secondly, the CFI confirmed the Commission's finding that Greene King's share of the UK on-trade was too small to make a significant contribution to the foreclosure of the market. It should be recalled that in *Delimitis* the ECJ set a two-stage test for determining whether an exclusive purchasing agreement is compatible with Article 81(1): first, is access to the relevant market difficult, for example due to the presence of parallel networks of similar agreements (the foreclosure test), and, second, do the agreements of the party in question contribute significantly to that foreclosure? Greene King controlled less than 2% of on-trade outlets and its beer sales amounted to less than 2% of the on-trade total, i.e. much less than the market share of 5% or more held by each of the four national brewers.

This ruling is in line with the Commission's Guidelines on Vertical Restraints, which state that even where a market is foreclosed by parallel networks of non-compete agreements, suppliers whose tied market share is less than 5% are not generally considered to contribute significantly to the cumulative foreclosure effect <sup>(7)</sup>.

Finally, the CFI examined Greene King's role as a wholesaler of beer for other national and regional brewers. It considered whether, for the purposes of applying Article 85(1), Greene King's network of

<sup>(1)</sup> Judgment of 5 July 2001, Case T-25/99 Colin Arthur Roberts and Valerie Ann Roberts v. Commission [2001] ECR II-1881.

<sup>(2)</sup> Judgment of 21 March 2001, Case T-131/99, Michael Hamilton Shaw and Timothy John Falla v Commission.

<sup>(3)</sup> Judgment of 21 March 2001, Case T-231/99, Colin Joynson v Commission.

<sup>(4)</sup> Commission Regulation No. 2790/99 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices *OJ L 336 of 29.12.1999, p. 21* and Commission Notice 'Guidelines on Vertical Restraints', *OJ C 291 of 13.10.2000, p. 1*.

<sup>(5)</sup> Case IV/36.511/F3 – Roberts/Greene King, decision available on the DG Competition website.

<sup>(6)</sup> Judgment of 28 February 1991, Case C-234/89 Stergios Delimitis v Henninger Bräu AG [1991] ECR I-935.

<sup>(7)</sup> Paragraph 142 of the Guidelines on Vertical Restraints.



beer ties, which on their own did not contribute significantly to foreclosure, should be attributed to the networks of the national brewers which supplied it and which did contribute significantly to foreclosure. It held that such an attribution was possible if two conditions were met.

First, the ‘upstream’ agreement between the supplying brewer and the wholesaling brewer should only be regarded as part of the tied network of the supplying brewer if it contains some form of purchasing obligation (minimum purchase volumes, non-compete clause, etc.). Second, in order for the ‘downstream’ agreements between the wholesaling brewer and its on-trade outlets also to be attributed to the supplying brewer’s network, the upstream agreements must be so restrictive that they make it impossible, or at least very difficult, for other brewers to gain access to the wholesaling brewer’s network of downstream agreements. On the other hand, if the restrictive effect of the upstream agreements is limited, other brewers can gain access to the wholesaling brewer’s tied network via a single supply agreement, in which case the downstream network may promote market penetration.

In the case of Greene King, the CFI confirmed the Commission’s view that Greene King’s beer ties could not be attributed to the networks of agreements of the national brewers from whom it purchased, because less than 20% of Greene King’s purchases from other brewers were subject to a restrictive purchasing obligation.

## b) The *Shaw* and *Joynson* cases

In *Shaw and Falla v Commission* and *Joynson v Commission*, the CFI upheld the Commission’s 1999 decisions <sup>(1)</sup> granting an individual exemption under Article 81(3) to the standard leases of the UK brewers Whitbread and Bass respectively. Each brewer owned over 4000 pubs and leased a large number of these on long-term leases containing exclusive purchasing and non-compete obligations. The Commission concluded that the tied market share of each brewer contributed significantly to the foreclosure of the UK on-trade market and therefore the leases fell within Article 81(1). The leases did not comply with the exclusive purchasing block exemption then in force <sup>(2)</sup> for the technical reason that the exclusive purchasing obligation was by reference to types of

beer (e.g. ales, lagers, etc.), rather than brands of beer specified in the lease. It was therefore necessary to assess their eligibility for individual exemption under Article 81(3).

In line with the rationale of the exclusive purchasing block exemption then in force, the two decisions began from the assumption that exclusive beer supply agreements generally lead to an improvement in distribution, but stated that such improvements might not arise where the purchaser (the pub lessee) faced unjustified price discrimination. The Commission therefore investigated whether the tied lessees of Whitbread and Bass did face such discrimination. It concluded that the two brewers charged higher beer prices to their tied lessees than to equivalent free trade customers, but that the price differential was compensated by certain countervailing benefits granted to the tied lessees, including lower rents, professional services, procurement services and capital expenditure.

First of all, the CFI upheld in both judgments the method used by the Commission to calculate the price differential, even referring in the *Shaw* judgment to the Commission’s ‘painstaking investigation’. The Commission had compared the average prices charged by the brewer to its tied lessees with those it charged to individual free house operators. The CFI confirmed that the Commission had been correct to exclude from the comparison prices charged to customers at other levels of the distribution chain, such as wholesalers or pub chains.

Second, it upheld the Commission’s evaluation of the above-mentioned countervailing benefits. It held that the Commission was entitled to rely on Whitbread’s internal figures relating to beer sales, pub rents, etc. when evaluating the benefits, the correctness of such figures not being *prima facie* open to challenge, absent any allegation of fraud.

Third, the CFI held that the Commission was right to assess the situation of Whitbread’s tied lessees as a whole rather than that of each individual lessee. It was immaterial that the countervailing benefits might not entirely compensate for the price differential in the case of particular Whitbread lessees, provided that the average lessee did enjoy such compensation. This was because the starting point for the Article 81(3) assessment was the finding that Whitbread’s network of leases, taken as a whole, made a

<sup>(1)</sup> Commission decision 1999/230/EC of 24 February 1999 (Case No. IV/35.079/F3 - Whitbread), *OJ L* 88, 1999, p. 26 and Commission decision 1999/473/EC of 16 June 1999 (Case IV/36.081/F3 - Bass), *OJ L* 186, 1999, p. 1.

<sup>(2)</sup> Commission Regulation No. 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements *OJ L* 173 of 30.6.1983, p.5. This Regulation was superseded on 1 June 2000 by Commission Regulation No. 2790/99.



substantial contribution to foreclosure of the market.

Fourth, it held that the Commission had correctly focussed on whether Bass's tied lessees faced significant, long-term price discrimination and not whether the profitability of Bass tied pubs was equivalent to that of their competitors.

Finally, the CFI held that the Commission was entitled to exempt Whitbread's leases for their entire duration, despite the fact that the counter-vailing benefits did not completely compensate for

the price differential during the first three years of the majority of the leases. In this respect, it endorsed the Commission's conclusion that price discrimination by a brewer would only affect the competitiveness of its tied lessees appreciably if it were significant and long-lasting. This was not the case where the remaining price differential in the first three years amounted to only 1% to 3% of the beer price and where Whitbread's tied lessees enjoyed other 'unquantifiable' benefits, including different commercial risks compared to independent operators.



## **Merger Control: Main developments between 1<sup>st</sup> January 2002 and 30th April 2002**

*Carina JOERGENSEN, Neil MARSHALL and Kay PARPLIES, Directorate-General Competition, Directorate B – Merger Task Force*

### **Recent cases – Introductory remark**

Between 1 January and 30 April 2002, 79 cases were notified to the Commission. This is fewer than the number notified in the previous four-month period (90) and the number notified in the same period in 2001 (127). The Commission took 84 final decisions, 3 of which followed in depth investigations (no prohibitions, 1 clearance and 2 conditional clearances) and 4 of which were conditional clearances at the end of an initial investigation ('Phase 1'). In total the Commission cleared 79 cases in Phase 1. In this period, 38% of the clearance decisions taken by the Commission were taken in accordance to the simplified procedures introduced in September 2000. In addition, the Commission took a record high number of referral decisions (5) pursuant to Article 9 of the Merger Regulation and one pursuant to Article 6 of Protocol 24 of the EEA Agreement; it also opened in-depth investigations in 3 cases. As at 30 April 2002, these 3 investigations were ongoing.

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

#### *1. Summaries of cases declared compatible with the common market under Article 8(2) of the ECMR without commitments*

##### **Haniel/Fels**

The Commission cleared the proposed acquisition by Haniel Baustoff-Industrie Zuschlagstoffe GmbH of Fels-Werke GmbH, two German companies active in the building materials sector. The Commission examined carefully the deal's impact in the Dutch market for wall building materials, but concluded that the deal raised no serious competition concerns. At the same time that the Commission had started its in-depth investigation with regard to the Dutch building materials market it referred the review of the transaction's impact in the relevant German markets to the Bundeskartellamt. The Bundeskartellamt subsequently

cleared the transaction with commitments as regards those German markets.

In the Netherlands, Haniel's activities in the building materials sector consist in its indirect 50% stake in CVK, a co-operative comprising all existing production facilities of sand-lime products in that country. The other 50% of CVK is indirectly owned by Cementbouw, a Dutch building materials group. The Commission concluded that Haniel, through CVK, already holds a dominant position in the market for wall building materials for load-bearing walls, with a market share in excess of 50%.

However, the Commission found that the acquisition of Fels would not further strengthen this position of dominance as Haniel's share of the market would increase only to a very small extent. Furthermore, while Haniel would broaden its product range and would also be able to offer cellular concrete and gypsum products sold by Fels, this would not give it additional power to raise prices above competitive level to the detriment of its customers.

The Commission also cleared the proposed acquisition of the German construction company Ytong by Haniel on the Dutch market (see below) and opened an in-depth investigation of Haniel's and Cementbouw's ownership of CVK.

#### *2. Summaries of cases declared compatible with the common market under Article 8(2) of the ECMR with commitments*

##### **Haniel/Ytong**

The Commission cleared the proposed acquisition by Haniel of Ytong Holding AG, two German companies active in the building materials sector. As in the Haniel/Fels case, the Commission examined the deal's impact in the Dutch market for wall building materials, while that part of the deal relating to the relevant German markets was referred to the Bundeskartellamt for investigation. The Commission found that subject to the sale of Ytong's business in the Netherlands to another

company, as proposed by Haniel, no competition concerns would arise. The Bundeskartellamt subsequently cleared the transaction with commitments.

As mentioned above, the Commission's investigation revealed that Haniel, through CVK, already holds a dominant position in the market for sand-lime wall building materials for load-bearing walls. These products are the most frequently demanded by construction companies in the Netherlands.

In this case, the Commission found that the acquisition of Ytong would further strengthen this position of dominance. Haniel was already the only supplier of sand-lime products in the Netherlands. By acquiring Ytong, Haniel would also become the leading supplier of cellular concrete. Therefore, building materials traders and construction companies likewise would depend even more on the products offered by Haniel, thereby giving Haniel additional power to raise prices above competitive level to the detriment of its customers.

As the proposed divestiture of Ytong's business in the Netherlands will eliminate the overlap in the Netherlands, the Commission was able to approve the operation.

## **Bayer/Aventis**

The Commission decided to clear Bayer's acquisition of Aventis Crop Science (ACS), subject to substantial divestitures. As initially notified, the operation would have led to the creation or strengthening of dominant positions on about 130 markets for crop protection, professional pest control and animal health products. But Bayer has offered a comprehensive set of commitments, including the sale, in one single package, of best-selling insecticide Fipronil and a number of fungicides, which together constitute ACS' entire European seed treatment business. The commitments fully resolve the Commission's competition concerns.

The Commission's in-depth investigation revealed that the transaction would have led to many competition problems within agricultural insecticides, herbicides, fungicides as well as in seed treatment, molluscicides, professional pest control products and certain animal health products (antifleas for cats and dogs).

Bayer offered a complex set of commitments, which allowed the Commission to conclude that no dominant position will be created or strengthened on any of these markets. The most important of these is an 'en-bloc' sale to a single purchaser of

a group of ACS' insecticides and fungicides businesses (namely Fipronil, Ethiprole, Iprodione, Prochloraz, Pyrimethanil, Triconazole and Fluquinconazole). Bayer will also give a number of exclusive licences for various products in one or more Member States as well as discontinue several third party distribution agreements.

On the basis of the bilateral agreement on antitrust co-operation between the European Commission and the United States of America, the Commission and the Federal Trade Commission have co-operated closely in their analysis of the acquisition of ACS by Bayer. The investigation is still going on in the US.

## **3. Summaries of cases on divestiture or demerger under Article 8(4) of the ECMR**

Since the Merger Regulation was introduced in 1990 the Commission has only prohibited mergers in a very limited number of notified cases. (18 prohibitions in 11 years out of a total of 1987 notified cases). In only four cases these decisions concerned transactions which had already been implemented before the Commission had adopted the prohibition decisions. The application of Article 8(4) to two of these cases is described below.

## **Tetra Laval/Sidel**

On 30 January 2002 the Commission adopted a decision setting measures for the separation of the Swiss-based Tetra Laval from the French company Sidel through the divestiture of Tetra's shareholding in Sidel. This followed the prohibition of Tetra's acquisition of Sidel, described in the previous edition of the Competition Policy Newsletter (01/2002, page 75). The Commission took account of the principle of proportionality by allowing Tetra flexibility in choosing an appropriate buyer(s) and a suitable method of divestiture within the time limit fixed by the Commission.

Tetra's acquisition of Sidel was prohibited by the Commission on 30 October 2001 because it would significantly impede competition in the European Economic Area in distinct markets for liquid food packaging equipment to the detriment of innovation, choice and competitive prices for consumers.

Tetra's bid for Sidel was unconditional in accordance with French stock exchange rules. Tetra has already acquired around 95% of Sidel's shares. The Merger Regulation, exceptionally in the case of public bids, allows such acquisitions even prior



to the Commission's final decision. As a result, Tetra had already implemented a concentration which the Commission subsequently prohibited. The Commission therefore considered it necessary to adopt a decision pursuant to Article 8(4) of the Merger Regulation, which provides that the Commission may require the undertakings or assets brought together to be separated (...) or any other action that may be appropriate in order to restore conditions of effective competition.

The Commission concluded that, under the particular circumstances of this case, a continued participation of Tetra in Sidel would impede the restoration of effective competition. Without an effective separation of the two companies, the competitive behaviour of Tetra and Sidel would be influenced and conditions of competition between the two companies and on the markets on which they are active would not be effective. A final and permanent divestiture of Tetra's shareholding in Sidel would ensure that conditions of effective competition would be restored by removing the direct structural/financial link between Tetra and Sidel.

Having regard to Tetra's interest to preserve the value of its investment in Sidel, the Commission allowed Tetra flexibility to choose the method of divestiture. Tetra could choose in principle to sell the shares in any way it sees fit including, for example, a sale to a third party(ies) or refloating the shares. The Commission will have to review and approve the final divestiture structure as well as the identity of the buyer or buyers to ensure the restoration of conditions of effective competition on the markets in question.

The Commission fixed an appropriate time limit for the divestiture which, in its view, enabled Tetra to explore various divestiture options and to maximise as much as possible the value of its investment in Sidel. This time limit was confidential.

Finally, as long as Tetra retains its shareholding in Sidel, the Commission has considered it necessary for Tetra to appoint an independent Trustee to monitor the divestiture process.

## Schneider/Legrand

On 30 January 2002 the Commission decided on the arrangements for demerging Schneider Electric and Legrand, two French electrical equipment manufacturers whose merger was prohibited in 2001 on the grounds that it created or strengthened dominant positions. The prohibition decision was described in the previous edition of the Competition Policy Newsletter (01/2002, page 73). When the Commission adopted its decision, Schneider

had already acquired, by way of a public exchange offer, some 98% of Legrand shares.

Under Article 8(4) of the Merger Regulation, the Commission had to order Schneider to separate from Legrand in accordance with a timetable and arrangements that would restore conditions of effective competition while affording the best protection to the interests of the two companies.

The Commission considers that restoring effective competition required Schneider not to keep a share higher than 5% in the capital of Legrand. A higher stake would reduce the incentive for Schneider to compete actively with Legrand. Schneider and Legrand are the two main players on the French electrical equipment markets, where their rivalry is the main driving force of competition, and they already have individual dominant positions on some of the markets concerned.

The Commission therefore decided that Schneider must withdraw almost completely from the capital of Legrand so that competition can be restored beyond any doubt.

Restoring effective competition also requires Legrand to be preserved in its entirety and not to be dismantled, which would weaken it.

As for the Tetra Laval/Sidel case, the Commission has left Schneider free to choose the form and legal arrangements for the separation. In practice, Schneider could sell its stake to a third party or refloat its Legrand shares on the stock market.

## *B – Summaries of decisions taken under Article 6*

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

### SEB/Moulinex

The Commission authorised SEB to acquire sole control of Moulinex. Both are French companies manufacturing small electrical household appliances. The Commission has imposed the condition that SEB must not use the Moulinex brand name for a substantial period in nine European countries, where it will be used by one or more other parties. The condition was proposed by SEB and its objective is to eliminate the risk of higher prices for such appliances. Higher prices could have been the effect as the undertakings account for a high combined market share.

SEB owns brands known throughout the world such as Tefal and Rowenta, and other local brands such as Calor and SEB in France and Belgium, Arno in Brazil and the Mercosur countries, and Samurai in the countries of the Andean Pact. Moulinex is a direct competitor to SEB, and owns the world brands Moulinex and Krups and also the Swan brand in the UK. Under these brand names the two companies manufacture deep-fryers, toasters, coffee machines, kettles, food processors, irons and many other appliances.

Moulinex has been the subject of legal proceedings in which the company is being reorganised under court supervision. In the course of these proceedings SEB was selected to take over some of Moulinex's small electrical household appliances business, consisting mainly of the rights to the use of the Moulinex, Krups and Swan brand names, part of the manufacturing plant, and some marketing companies.

The effects of the transaction on competition will be felt primarily in France, where it will considerably strengthen the position of the market leader, currently SEB for some products and Moulinex for others, and will eliminate a competitor. The Commission has referred the question of the impact of the merger in France to the French authorities (see below).

However the purchase by SEB of Moulinex's brand names also raised difficulties regarding the prices of a number of household appliances (such as deep-fryers, toasters, coffee makers and espresso machines, kettles, tabletop ovens, sandwich, waffle and snack toasters, barbecues and grills, food processors and irons) in Portugal, Greece, Belgium and the Netherlands. Regarding these products, one or other of the two companies had large market shares in the countries mentioned above even before this transaction.

In Germany, Austria, Denmark, Sweden and Norway the transaction would appreciably alter the terms of competition on some product markets, especially that in deep-fryers.

In order to meet the Commission's concerns, SEB proposed to grant exclusive licences to use the Moulinex brand for a period of five years for the sale of small electric household appliances in nine countries (Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway). SEB would not reintroduce the Moulinex brand in those countries for a further period of three years from the expiry of the exclusive licence, so as to allow the licensee time for the gradual introduction of a brand name of its own.

## **Masterfoods/Royal Canin**

The Commission cleared the proposed acquisition of the French pet food company Royal Canin S.A. by Masterfoods Holding, a French subsidiary of Mars Inc. of the United States. Mars undertook to divest its businesses connected to five of the merged group's petfood brands for the whole of Europe, i.e. Advance, Premium, Royal Chien, Playdog and Brekkies. In addition Mars undertook to divest two major manufacturing plants in La Chappelle and Moulin, respectively in the centre (Loir-et-Cher) and south-east of France, as well as all other assets relating to the divested business. The merger cannot be implemented before the conditions have been fulfilled.

The Commission's investigation confirmed that markets for dry prepared food products for cats and dogs are still national in scope, due to appreciable differences among Member States as concerns purchasing patterns, market structures, and marketing strategies.

The investigation identified competition concerns in the French dog food market as well as in Germany for both dog and cat food, regarding in particular the fast growing markets for dry food products. These markets are characterised by several large players, including Nestlé, Procter and Gamble and Colgate Palmolive, a number of smaller niche players, as well as own-label products. The products are distributed through traditional grocery shops as well as a wider group of specialist outlets, including pet shops, garden centers, Do-It-Yourself shops, breeders and veterinarians.

In France, Royal Canin is the clear market leader and accounted for about a third of all sales of dry prepared dog food products in the year 2000. Without remedies, the merger would have significantly strengthened this leading position and would have led to very high market shares in specialist outlets. The commitment to divest the business connected to the brands Advance, Premium, Royal Chien, and Playdog will reduce market presence to below the original level of Royal Canin in France. Three of these brands were among the top-ten best selling products in the year 2000.

In Germany, the overlap between these two strong operators would have occurred in specialist outlets and would have led to very high overall market shares in particular for dry cat food products. For these, the divestment of Brekkies, the third largest individual dry cat food brand in the year 2000, together with the other divested assets will offer the acquirer broad opportunities to compete with the merged entity. For dry dog food, the divest-

ment of the brands Advance, Premium and Playdog will reduce the overall market shares to below levels raising competition concerns.

The divested businesses included brands that covered the whole of the quality spectrum and offer a critical mass for a purchaser. Given that strict conditions ensured that a sufficiently strong purchaser would be able to integrate these assets into its own brand strategy and develop them, the Commission concluded that the remedies are appropriate to remove the competition concerns raised during the investigation.

The Commission examined the impact of the acquisition only for the European Union, as pet food products are excluded from the application of the EEA-Agreement between the EU, Norway, Iceland and Liechtenstein.

### EnBW/EDP/Cajastur/Hidrocantabrico

The Commission cleared, subject to conditions, an agreement giving Energie Baden-Württemberg (EnBW), Electricidade de Portugal S.A. (EDP) and Caja de Ahorros de Asturias (Cajastur) joint control over Spain's fourth largest utility company Hidroeléctrica del Cantábrico (Hidrocantábrico). As in the recent bid for the Spanish company by EnBW and Grupo Villar Mir, the operation would have led to the strengthening of the existing collective dominant position on the Spanish wholesale market for electricity. To eliminate these concerns, EDF, which jointly controls EnBW, and the operator of the French electricity grid, EDF-RTE, undertook to increase the commercial capacity on the interconnector between France and Spain to about 4,000 MW. This undertaking will create the conditions for greater electricity trade volumes to and from Spain to the benefit of Spanish customers, who will benefit from lower prices.

In the course of 2001, Hidrocantábrico was the target of different acquisition bids. The company is Spain's fourth-largest electricity company after Endesa, Iberdrola and Unión Fenosa. As with the previous examination of the Villar Mir/EnBW bid, the Commission established that the main competition concern lay in the scarce commercial capacity on the French-Spanish interconnector which creates a barrier to electricity imports into Spain and results in the isolation of the market to the detriment of customers.

The Commission's fear was that once it would have gained a foothold in Spain and with access to

Hidrocantabrico's electricity generation capacity, EDF would likely resist any substantial increase in the capacity of the interconnector.

In order to solve these concerns, EDF and the French grid operator, EDF/RTE <sup>(1)</sup> have resubmitted the same commitments proposed in the EnBW/Villar Mir case, namely that they would take all the necessary steps in order to increase the commercial capacity on the interconnector which transmits electricity across the Pyrenean chain to about 4 000 MW from an existing 1 100 MW. The capacity increase will take place gradually over a short-/mid-term period. The remedies accepted will create the conditions to foster electricity imports into the Spanish wholesale market from other European producers.

### Solvay/Ausimont

The Commission conditionally approved the proposed acquisition of the Italian chemicals company Ausimont SpA by Solvay SA of Belgium from Montedison SpA. Solvay has committed itself to sell a state of the art plant in Alabama, in the United States, which makes non-coatings PVDF, a high performance fluoropolymer, as well as Ausimont's stake in MedAvox, a joint venture with Degussa which produces a bleaching agent used in detergents. The undertakings offered by Solvay fully address the Commission's competition concerns and cleared the way for regulatory approval in Europe of Solvay's largest acquisition to date. The Commission's assessment of this case was made in close co-operation with the United States' Federal Trade Commission.

The Commission's review showed that the operation posed no competition problems in most of the chemical markets concerned, including products derived from oxygen and chlorine as well as a number of fluor-based chemicals.

However, serious concerns were identified in two product markets: persalts, a raw material with a bleaching agent used in the production of detergents, for which Solvay is the leading producer in Europe; and non-coatings polyvinylidene fluoride (PVDF), a high performance fluoropolymer which boasts a number of specific characteristics such as thermal stability, mechanical resistance as well as resistance to fire and harsh chemical environments. Non-coatings PVDF is easily melt-processible, enabling it to be used in a variety of injection and compression moulding and extrusion processes.

<sup>(1)</sup> EDF/RTE, the French Electricity Transport System Operator (Gestionnaire du Réseau de Transport d'Electricité), is a division within EDF which operates the national electricity grid and interconnectors with France's neighbouring countries.



In the persalts markets, the Commission was particularly concerned that Solvay would no longer compete actively with Degussa, its largest competitor, because of the link between Ausimont and Degussa through their MedAvox joint venture based in Bussi, in central Italy. These three companies between them hold over 75% of the EEA persalts market. The only other competitors to Solvay/Ausimont and Degussa in this market are FMC Foret of Spain and Finland's Kemira, and they are considerably smaller.

In order to solve the Commission's preliminary concerns, Solvay offered to divest Ausimont's 50% stake in MedAvox. This divestment will include Ausimont's persalts production facilities at Bussi, which also produce hydrogen peroxide – the key raw material for the production of persalts. These divestments will effectively sever the structural links between Solvay and Degussa, and will fully resolve the Commission's competition concerns in persalts.

The other market where the Commission had serious doubts about the effects of the deal was that for non-coatings PVDF, a market already highly concentrated with only four players: Solvay, Ausimont, Atofina of France and Japanese company Kureha. Solvay and Atofina are by far the largest players with over 90% of the market.

The Commission's preliminary investigation showed that the removal of Ausimont as an independent player coupled with the specificities of the market could bring about a situation of joint dominance by Solvay and Atofina. Prior to the acquisition, Ausimont had been developing its non-coatings PVDF business and its acquisition by Solvay will alter the competitive environment in the market.

To address these concerns, Solvay committed itself to divest its non-coatings PVDF plant based at Decatur, Alabama, in the United States. This facility, one of only six production facilities for non-coatings PVDF in the world, is an extremely modern plant, which started production in December 2000. The Decatur plant represents around 20% of worldwide capacity and accounts for between 5% to 10% of worldwide sales. Its sale will replace Ausimont as an independent competitor comparable in size or possibly bigger given the spare capacity at Decatur which should provide strong incentives for the buyer to grow the business.

Solvay also committed itself to divest its shares in Alventia, a production only joint venture company with Dyneon, a subsidiary of 3M of the United States, which produces vinylidene difluoride (VF2) at Decatur. VF2 is the key raw material for the PVDF Decatur business to be divested.

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

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

### **SEB/Moulinex**

As mentioned above, the examination of the SEB/Moulinex deal's effect on the French market was referred to the French authorities at their request.

### **Danish Crown/Steff-Houlberg**

The Commission's own preliminary review of the case showed that the competition concerns were limited to the Danish market where Danish Crown and Steff-Houlberg are currently the two largest competitors. The effects will be particularly felt in the market for the purchase of live pigs; the sale of fresh pork for direct human consumption; the supply of fresh pork for further processing; the supply of processed pork products and the collection of abattoir by-products in Denmark. The examination of the deal's effect on the Danish market was referred to the Danish Competition Authority at Denmark's request as the merger threatened to create severe competition concerns on these five markets in Denmark. The Danish Authority subsequently opened an in-depth investigation and approved the deal subject to conditions. It is the first time Denmark has requested a merger referral since it introduced its own merger control rules in October 2000.

The Commission approved the merger between Denmark's two largest slaughterhouses Danish Crown and Steff-Houlberg insofar as its impact outside Denmark is concerned, as the review of the merger's impact outside Denmark failed to highlight any competition concerns.



## Cargill/Cerestar

The proposed acquisition of the French undertaking Cerestar by US company Cargill Inc. was cleared by the Commission with the exception of the deal's impact in the UK market for sweeteners. The examination of these aspects was referred to the UK authorities.

Cargill is a leading international player in a variety of agricultural businesses, such as commodities trading and the processing of grains. Cerestar is Europe's leading producer of starch and starch derivatives.

The Commission's assessment of the acquisition showed that there would remain effective competition in the markets for starch and vital wheat gluten. In the starch market, the Commission found that Cargill would continue to face strong competition from smaller but dynamic rivals, which have increased capacity in a growing market. Such players include Roquette of France, Tate & Lyle of the UK and Agrana of Italy. Cargill has a limited presence in vital wheat gluten.

The operation also presented overlaps in the sweeteners market, in particular in glucose syrups and blends, but the Commission found competition concerns only in the UK with regard to these products.

In conclusion, the Commission cleared the operation for the whole of the European Economic Area with the exception of the UK glucose syrups and blends market which was referred for assessment to the UK competition authorities.

## Compass/Restorama/Rail Gourmet/Gourmet Nova

The European Commission referred the acquisition by Compass of Rail Gourmet UK to the competition authorities of the United Kingdom, which had expressed concerns about reduction of competition in the UK on-train catering market. The Commission at the same time approved the rest of the acquisition insofar as it affects markets outside the UK.

The transaction concerned the proposed acquisition by Compass Group Plc, one of the UK's largest foodservice companies, of Rail Gourmet, Restorama and Gourmet Nova, three food catering businesses. Compass' acquisition of Rail Gourmet UK gave rise to competition concerns in the on-train catering market in the UK where Compass already has a strong presence. The UK therefore requested the Commission to refer the case to its competition authorities. The Commission's review of the case revealed that the competition

concerns were indeed limited to the UK. In the on-train catering market the two parties are currently the two largest competitors and have combined market shares of 85-95%. The Commission therefore decided to refer the case to the UK's Office of Fair Trading, which will examine the transaction according to UK competition law.

The Commission's review also revealed that the Compass acquisitions would have an impact in Germany and Austria, in respect to contract food service, as well as Belgium and the UK for what concerns the markets for concession food service. As this impact was very limited the Commission decided to grant regulatory approval to all markets, both in terms of products and geography, with the exception of the UK on-train catering services market.

## Connex/DNVG

The European Commission referred to the German competition authorities (Bundeskartellamt) a joint venture by which Connex Verkehr GmbH, a subsidiary of the French Vivendi group, and Deutsche Nahverkehrsgesellschaft mbH (DNVG) plan to offer local public transport services in the Riesa area (Saxony, Germany). The referral had been requested by the Bundeskartellamt because the competitive impact of the transaction is limited to local markets within Germany.

The Bundeskartellamt requested the referral because the joint venture would create structural links between the operator of public transport in Hanover and Connex who, from its established base in the adjacent Schaumburg market, would be best placed to act as a competitor in Hanover.

The Commission decided that a full referral of the case was appropriate in order for the German competition authorities to examine these potential implications. The EU Merger Regulation (Article 9(2)(b)) stipulates that concentrations which affect competition on a local or regional market within a Member State must under certain conditions be referred to the Member State.

## *D – Summary of referral decision taken under Article 6 of Protocol 24 of the EEA Agreement*

### Aker Maritime/Kvaerner (II)

The Commission referred to the Norwegian Competition Authority the examination of the

impact on the oil and gas markets of the proposed acquisition of the Anglo-Norwegian firm Kvaerner by Aker Maritime of Norway. At the same time, it concluded that as far as the deal's impact in the shipbuilding sector, it could grant clearance to the transaction.

Through the proposed transaction Aker Maritime (AMA) acquired sole control over Kvaerner, and subsequently merged its oil and gas businesses with those of Kvaerner in Kvaerner Oil & Gas. Kvaerner is an Anglo-Norwegian engineering and construction group with significant activities in the same areas as AMA.

The Norwegian Government asked the Commission to refer the examination of the deal's impact in the oil and gas sectors, arguing that competition issues related mainly to Norway, more precisely to the markets for new oil and gas installations (EPC contracts) and for maintenance and modifications of platforms (MMO).

Norway is not a European Union member but is part of the European Economic Area (EEA), which links the EU to all EFTA countries except Switzerland. Article 6 of Protocol 24 of the EEA Agreement allows the Commission to refer a case to an EFTA state if the deal has its main impact in that country. The provisions reflect to some extent

Article 9 of the Merger Regulation which allow the Commission to refer cases to an EU Member State.

In its request, the Norwegian Government made reference to a transaction in 2000 involving the same companies into which the Commission had opened an in-depth investigation. At the time, the Commission reached the preliminary conclusion that the transaction could create or strengthen a dominant position in the two markets mentioned above, which were geographically confined to the Norwegian Continental Shelf. AMA, however, withdrew the transaction.

The Norwegian Government, which had not requested a referral of the previous deal, argued that there had not been any significant market developments in the past year that might suggest a different conclusion of the assessment of geographic scope of the relevant markets and defended that it was best placed to handle the competition problems.

The Commission accepted the request to refer the aspects regarding the impact of the deal on the oil and gas markets on the Norwegian Continental Shelf to the Norwegian national authorities. This was the first time the Commission has referred part of a case to an EFTA state. The Norwegian Authorities subsequently cleared the transaction without commitments.

## Internet Joint Ventures and the Quest for Exclusive Content:

### The T-Online Cases

*Hanns Peter NEHL, Directorate-General Competition, unit C-2,  
and Kay PARPLIES, Directorate-General Competition, unit B-1*

#### Introduction

EC and national competition law issues arising from the marketing of 'premium' content, such as travel services and sports news, via the Internet were at the centre of several recent competition cases in Germany. The German Bundeskartellamt (BKartA) on 7 March 2002 cleared, after obtaining amendments to the notified agreements, a joint-venture by T-Online, Deutsche Telekom's internet subsidiary, and Bild.de, the online edition of Germany's largest tabloid newspaper. <sup>(1)</sup> This decision is the latest in a series of investigations into T-Online's Internet businesses by both the BKartA and the European Commission. The BKartA's decision follows two separate investigations by the Merger Task Force (MTF) and DG Competition's media unit (C-2), respectively, into T-Online Travel, an online travel agency, which was initially structured as a joint venture between T-Online and the two largest German tour operators, TUI Group and C&N Touristic. The proposed concentration triggered the Commission's first and so far only in-depth (Phase II) merger investigation into an Internet joint venture. <sup>(2)</sup> Following the changing of the shareholder structure – T-Online now having sole control – and the withdrawal of the merger notification by the parties, C-2 opened an *ex-officio* investigation pursuant to Articles 81 and 82 of the EC Treaty. <sup>(3)</sup>

Taken together, the above cases provide a good example of how complex the market delineation with respect to the online sector is. The cases give a good overview of the various competition issues that may arise when companies holding strong positions in their respective (traditional) core markets combine their resources in online joint ventures. Possible foreclosure effects created by vertical integration in the rapidly evolving e-businesses are of particular interest in this context. Finally, the cases reveal the differences between the *ex-ante* competition control under the relevant

merger provisions on the one hand and the mainly *ex-post* control mechanism provided by the anti-trust rules of the EC Treaty on the other hand.

#### Case COMP/M.2149 – T-Online International/TUI/C&N Touristic

T-Online Travel was notified on 19 March 2001 as a joint venture between T-Online International AG (T-Online), TUI Group GmbH (TUI) and C&N Touristic AG (Neckermann, now renamed Thomas Cook). Although T-Online was to hold 51% shares in the venture with the remaining shares split equally between the two tour operators, provisions in the shareholder agreement provided for joint control.

T-Online – controlled by Deutsche Telekom AG – is the leading Internet service provider (ISP) in Germany. It also operates the country's most visited Internet portal by a wide margin. Both TUI and C&N are vertically integrated tour operators with activities in several EU countries. Their activities include tour operating, travel agency services, charter airlines, hotels, cruises and other travel-related services. In Germany, TUI and C&N are number one and two, respectively, in most of the relevant travel markets, with only one major competitor, REWE, holding a similar market share. The Commission's market investigation found that TUI and C&N had by far the strongest brands in the tour operator market to an extent that (independent) travel agencies considered them as 'must-carry' products, at least one of which they had to be able to offer to their customers. T-Online Travel, the joint venture, was to operate an online travel agency linked to T-Online's Internet portal, 't-online.de'. It was intended to offer (and does so in its restructured form) a range of travel services, including package holidays, last minute holidays, flights and hotel accommodation. The travel 'content' offered is supplied by TUI and C&N, as well

<sup>(1)</sup> Case B6-144/01 – Bild.de/T-Online.

<sup>(2)</sup> See however also the Internet joint venture in Case No. IV/JV.1 – Telia/Telenor/Schibsted cleared within Phase I on 27 May 1998.

<sup>(3)</sup> See also the parallel investigation in Case COMP/38.006 – Online Travel Portal (OPODO) dealing with a joint Internet agency marketing *inter alia* airline seats of the participating airlines.

as other operators and can be booked online by the consumer.

The operation affected a number of vertically related markets. Whereas the Commission had previously investigated most of the travel markets involved, notably as part of the Phase II investigation in Airtours/First Choice <sup>(1)</sup>, only very limited precedents existed for Internet-related markets. A key question for the outcome of the investigation was whether a separate market existed for online travel agency services or whether online travel agencies operated in the same market as traditional 'bricks and mortar' travel agencies. The initial (Phase I) market investigation confirmed that such a market may exist ('serious doubts' level). This conclusion was based on the following findings:

First, and in contrast to earlier Phase I investigations, Internet penetration among the German population approximately tripled between January 1991 and January 2001 to 29%. The Internet is thus accessible for a significant part of the German population. Compared with the penetration rates of the most advanced markets, such as Sweden and the United States (56% and 59%, respectively), further growth was to be expected. Market participants including the parties themselves anticipated that a significant share of package tours would be sold online by 2005.

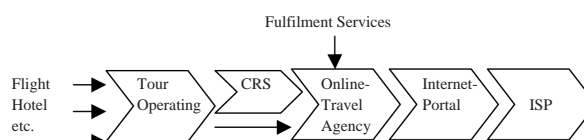
Secondly, the characteristics of the online and the traditional travel agency services differ significantly. 'Bricks and mortar' travel agencies offer individual advice on complex travel products (e.g. combination of flight, hotel and rental car services, open-jaw flight tickets, etc.). Price comparisons, availability checks and, finally, bookings are effected by agency staff on behalf of the customer. By contrast, online travel sites enable the consumer to operate these services from his own home, seven days a week, 24 hours a day. However, the parties and the vast majority of respondents to the market investigation agreed that online booking engines were less powerful and offered less functionality than the Computer Reservation Systems (CRS) used by traditional agencies. Online travel services, thus, tend to be more suitable for relatively standardised travel products, such as last minute holidays or flight-hotel packages to short haul destinations ('warm water destinations').

Third and importantly, online and traditional travel agencies are characterised by fundamentally

different cost structures. Although significant sunk investment is necessary to set up an online travel agency, particularly in advertising and the technical infrastructure, the variable costs of an online agency operating at efficient scale are likely to be significantly lower than in the traditional sector. This systematic cost advantage would in a competitive market be passed on to the consumer. Conversely, a hypothetical monopolist could capture the cost advantage. Such an online monopolist would be constrained in its pricing power by the traditional travel agency sector only at supra-competitive price levels.

Further industry-specific considerations supported the preliminary (Phase I) conclusion that a separate online market exists. The investigation was complicated by the fact that the development of the online market is still in its early stages. The volume of holidays actually booked online is presently still small, and few, if any, competitors currently operate at the scale necessary to realise the potential unit cost savings.

The second internet-related product markets affected by the operation were the ISP and the Internet portal market, respectively. <sup>(2)</sup> Whether ISP and portal services constitute separate, vertically related product markets was left open for the purposes of the Article 6(1)(c) decision. However, there were indications that the various markets involved in the operation are linked vertically through the following value chain:



Consequently, the operation raised serious concerns that competing online travel agencies would be foreclosed from the 'must-carry' content provided by the two leading package holiday brands. Such foreclosure could have occurred not primarily through exclusive supply agreements with T-Online Travel, but through preferential access for the joint venture to promotions, price reductions, capacity during peak demand periods, supporting documentation, such as digital pictures and logos, and similar measures. T-Online's position as the by far most visited portal in Germany combined with the network economies inherent to the ISP/portal market would have made a strategy of using T-Online Travel, the joint venture, as a

<sup>(1)</sup> Case No. COMP/M.1524 – Airtours/ First Choice.

<sup>(2)</sup> Previous decisions in these markets include JV.48 – Vodafone/Vivendi/Canal+, M.1982 – Telia/Oracle/Druitt and M.2050 – Vivendi/Canal+/Seagram.



preferred, if not exclusive, distribution channel viable for the two tour operators.

In response to the Commission's competition concerns, the parties offered a behavioural remedy whereby TUI and C&N would commit to supply competing online travel agencies with travel content at non-discriminatory conditions. However, given the various forms by which discrimination can occur, internal transfer pricing problems, the complex agent compensation structure used in the travel industry and other factors, these commitments were found to be too general and too complex to implement in order to provide a 'clear-cut' solution to the identified competition problem.

Following the opening of Phase II proceedings, the parties restructured the venture, resulting in sole control of T-Online Travel by T-Online, with TUI and C&N holding minority shares of less than 12.5% each. The operation, hence, no longer constituted a concentration under the Merger Regulation and the parties, consequently, withdrew their merger notification. DG COMP's media unit C-2, subsequently, opened an *ex-officio* investigation into the restructured venture which the parties had decided not to notify pursuant to Regulation No. 17.

### Case COMP/C-2/38.161 – T-Online International/TUI/Thomas Cook

C-2 investigated the amended agreements underlying the creation of T-Online Travel on the basis of Articles 81 and 82 of the EC Treaty in order to uncover any possible restrictions of competition, in particular in the (online) travel agency services market and the ISP/portal markets. With respect to the latter, a distinction was made between the portal market <sup>(1)</sup> on the one hand, mainly being an advertising market (roughly comparable to the free TV advertising market), and the ISP market on the other hand, as the market covering the commercial relationship between the ISP and the subscribers/Internet users (roughly comparable to the pay-TV market).

As regards the (online) travel agency market, the investigation was mainly directed at uncovering possible 'e-commerce' competition problems based on the market definition preliminarily adopted by the MTF. Although the market test undertaken by C-2 brought about additional indications for the emergence of a separate online travel agency services market no appreciable

restriction of competition on that market, within the meaning of Article 81(1) of the EC Treaty could be detected and proven.

This was equally true for the German portal (advertising) market because of its currently rather competitive structure with a range of important competitors to T-Online as a portal provider. Moreover, as the participating tour operators continued to market their 'must carry' travel content not only via their own websites (direct selling) but also via third portals and/or online travel agents, no exclusivity possibly contrary to Article 81 of the EC Treaty was at issue. In addition, neither the agreements nor T-Online's presumed dominant position on the ISP market gave rise to competition concerns within the meaning of Articles 81 and 82 of the EC Treaty. In particular, in contrast to the initial structure of the joint venture notified in the BKartA's 'bild.de/T-Online' case (see below), there was no exclusivity of access to the travel content offered via T-Online Travel in favour of T-Online ISP subscribers.

Finally, C-2's investigation highlighted the existing differences in the functioning of the competition supervision provided by the *ex-ante* control mechanism under the Merger Regulation on the one hand and the mainly *ex-post* control possible under the EC anti-trust provisions on the other hand. Although the foreclosure concerns raised by the MTF had not been completely resolved by the new shareholder structure, the Merger Regulation was no longer applicable because of the lack of joint control. On the other hand, under Articles 81 and/or 82 of the EC Treaty similar anti-competitive consequences of the parties' future commercial co-operation were difficult to grasp unless clear-cut restrictions of competition in the underlying agreements, such as exclusivity or non-compete clauses, were present. Nonetheless, monitoring of cases like the one at issue under EC anti-trust provisions may prove helpful in order to prevent restrictions of competition resulting from the economic incentive structures created by co-operative joint ventures.

### BKartA Case B-6 – 144/01 – Bild.de/T-Online

In its recent clearance of the Internet joint venture Bild.de/T-Online the BKartA did not make a distinction between the ISP market and the portal market. According to the BKartA, competition

<sup>(1)</sup> According to the decision in Case No. COMP/M.2050 - Vivendi/Canal+/Seagram, para. 22, 'a portal serves as a gateway through which consumers and businesses can have access to a range of online services and the wider Internet. A portal aggregates a large number of recurring Internet users and/or subscribers around specific types of services.'

concerns arose from the impact of the joint venture on the German ISP market, on which T-Online was presumed to be dominant, <sup>(1)</sup> as well as on the upstream market for paid-for content <sup>(2)</sup> including the neighbouring 'micro-billing' market.

The joint venture was initially intended to offer, *inter alia*, attractive paid-for content, such as sports news, PC-games, video streams etc., to be provided via the 'bild.t-online' portal to T-Online subscribers but not to customers of competing ISPs, such as AOL. The exclusivity of access resulted from the fact that T-Online subscribers benefited from the invoicing facilities offered by the Deutsche Telekom AG for both the Internet access subscription to T-Online and the purchases of content offered by 'bild.t-online'. Subscribers to another ISP would thus have been faced with a strong incentive to switch to the ISP services of T-Online in order to be able to access the payable content, unless an alternative payment mechanism was made available to them. In addition, the joint venture was to market directly T-Online Internet access subscriptions. As a result, T-Online's dominant position on the German ISP-market would have been strengthened at the expense of competing ISPs. Most interestingly, the BKartA also referred to the 'walled garden' doctrine established in Case COMP/M.1845 – AOL/Time Warner according to which Internet subscribers to a powerful ISP providing a large number of services and attractive content would feel a strong incentive to remain on the ISP's portals. <sup>(3)</sup>

The parties to the joint venture accommodated the competition concerns raised by the BKartA and committed themselves to offer the paid-for content on a non-exclusive basis and to provide for an alternative 'micro-billing' system accessible for everybody without a structural link to T-Online and Deutsche Telekom. Moreover, the parties renounced marketing T-Online Internet access subscriptions via 'bild.t-online' directly. As a consequence, the BKartA approved the concentration. However, the BKartA did not raise competition concerns with respect to the various upstream markets for the acquisition of content (wholesale

level) with a view to T-Online's possibly exclusive access to Bild's content portfolio at the expense of other ISPs and portal providers.

## Conclusions

The three market investigations by the Commission and the BKartA highlight the variety of competition issues that can arise from vertical joint ventures in Internet-related markets. In T-Online Travel, the competition concerns resulted primarily from the strong combined market position of the two tour operators as content providers (upstream market) that would have foreclosed rival online travel agencies from access to attractive travel content. However, the rationality of such a foreclosure strategy depended crucially on T-Online's strong market position in the ISP/portal markets and the resulting network effects.

In Bild.de/T-Online, T-Online's high market share in the ISP market combined with its exclusive access to Deutsche Telekom's billing system led to a presumption of dominance under German competition law, which would have been strengthened if access to 'bild.t-online.de's paid-for content had been made conditional on a subscription to T-Online's ISP service.

Finally, the T-Online cases demonstrate a certain difference in the enforcement instruments provided by the Merger Regulation and Articles 81 and 82 of the EC Treaty, respectively. The *ex ante* investigation of transactions in dynamically evolving markets, such as the Internet, under the Merger Regulation requires an economic assessment not only of the likely impact of a transaction on competition in a given market, but also of the development, if not the very existence, of this market post-transaction. However, the *ex ante* control possible under Articles 81 and 82 of the EC Treaty, while also focusing on economically determined anti-competitive consequences, requires in principle the detection of restrictions of competition directly supported by the relevant agreements.

<sup>(1)</sup> 12 out of 23 million Internet users in Germany have subscribed to T-Online's ISP services. This corresponds to a market share of 52%. T-Online's biggest competitor AOL has a 20% market share followed by Freenet, Tiscali and Arcor with more or less 10% respectively.

<sup>(2)</sup> See on this Case No. IV/JV.1 – Telia/Telenor/Schibsted, para. 15.

<sup>(3)</sup> Case COMP/M.1845 – AOL/Time Warner, paras. 66 et seq. See also Case No. COMP/M.2050 – Vivendi/Canal+/Seagram, paras. 51 et seq.

## Business taxation distorting the Common market – An important ruling on State aid by the Court of First Instance

Adolfo BARBERÁ DEL ROSAL <sup>(1)</sup> and Jan KLEINHEISTERKAMP <sup>(2)</sup>,  
Directorate-General Competition, unit H-2

### 1. Introduction

The question of state aids in form of tax measures has never been as pressing as in the present. After the completion of the single market and the liberalisation of capital movements, followed by the consolidation of national budgets, the economic and monetary union has finally culminated in the single currency. This high degree of harmonisation, however, makes the European market all the more vulnerable to the distortive effects of state aids. Together with the enterprises they host, Member States and regions and other local entities find themselves exposed to an unprecedented degree of competition, affecting both profits and revenue incomes. While the levelling of the European market's playing field through legal harmonisation has significantly limited the means of manipulating these new conditions on the one hand, unlawful interventions have much more direct and unbuffered repercussion across the national borders on the other hand.

It is therefore not surprising that one of the last areas that has so far escaped from significant harmonisation, the taxation system, becomes an increasingly attractive tool for public authorities to give their local economies a competitive edge and attracting investment for the sake of local development and, most of all, employment. The strict control of State aids in form of tax measures thus becomes even more essential, especially in view of the fact that not only free competition is easily distorted by such selective measures but also the revenues of other Member States or regions may be severely affected due to companies 'shopping' for aids. <sup>(3)</sup>

An especially striking example for such aggressive competition among regions within the European Union is that of the Ebro valley, where the Autonomous Community of Rioja, the famous wine

producing region of Spain, and the adjacent Province of Álava of the Basque Country are separated by that river.

### 2. The facts of the 'Ramondín' case

Ramondín S.A., the world leader in manufacture of tin capsules for sealing bottles of still and sparkling wines and other quality beverages, <sup>(4)</sup> established in Logroño (Rioja) since 1971, decided in 1997 to move its headquarter and all its local production about 5 km across the river, to Laguardia (Álava). For this purpose, Ramondín S.A. set up a new company, Ramondín Cápsulas S.A., which was to take over all activities by 1999, involving a planned investment of roughly EUR 25 million and the creation of 30 jobs.

Concomitant with Ramondín's decision was the fact that the new undertaking could count with substantive financial support from the Basque regional authorities. In the course of the 88(2) procedure, the Spanish authorities confirmed that Ramondín had received a tax credit equivalent to 45% of an investment totalling EUR 23.18 million in Álava. Ramondín could use this tax credit for an indefinite period.

Ramondín also set up a new company, Ramondín Cápsulas, which would in turn benefit from a deduction in its taxable amount equal to 99%, 75%, 50% and 25% respectively for four consecutive years, starting in the first year when the new company achieves taxable results.

The case was brought to the Commission's attention through a complaint from the neighbouring Autonomous Community of Rioja: Ramondín had 'informed' the Rioja authorities that it was likely to leave and set up operations at Laguardia owing to said economic and tax incentives offered by Álava, *unless Rioja would make a more attractive offer.*

<sup>(1)</sup> Commission official in DG Competition, unit H-2.

<sup>(2)</sup> Trainee at DG Competition, unit H-2, and research associate at the Max-Planck-Institute for Private International Law, Hamburg/Germany.

<sup>(3)</sup> See generally the Commission notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384 of 10.12.1998, p. 3 ¶ 3.

<sup>(4)</sup> 40% market share, 480 million tin capsules yearly output, employing 300 people and generated turnover of EUR 24 million (1997); primary production centers Logroño, Burdens and Mexico and subsidiaries in the Unites States, Scotland, Chile, Australia and China.



In its final decision <sup>(1)</sup> the Commission took the view that the tax concessions granted to Ramondín (tax credit) and Ramondín Cápsulas (deduction in taxable amount) must be classified as state aid because they are selective in nature. This finding resulted not only from the discretionary power enjoyed by the Álava Provincial Government to grant tax credits but also from the fact that those tax concessions are available solely to certain types of investor (new firms investing EUR 500 000 (ESP 80 million) and creating at least 10 jobs in the case of deductions in the taxable amount, or large industrial investors with a sound financial base in the case of tax credits). In the Commission's view, these measures are not justified by the nature or general disposition of the tax system.

The Commission concluded that the deduction in the taxable amount is operating aid since it was designed to relieve Ramondín Cápsulas of the costs it would have had to bear under normal circumstances in connection with its day-to-day operation. With this reduction in current expenditure, Ramondín Cápsulas became more profitable on the back of the improvement in its net results (profits after tax). In its final decision the Commission recalled that aid to reduce a firm's current expenditure (operating aid) is admissible only exceptionally in the case of regions benefiting from the derogation under Article 87(3)(a) of the Treaty. The Basque Country though was (and is) not one of those regions.

As regards the tax credit for Ramondín, the Commission considered that it can be likened to investment aid. It concluded therefore that the part of the tax credit which, while complying with the rules on the combination of aid, did not exceed the ceiling of 25% in net grant equivalent (nge) for regional aid in the Basque Country had to be regarded as being compatible with the common market since it did not adversely affect trading conditions to an extent contrary to the common interest. However, the part of the tax credit exceeding the 25% nge ceiling was incompatible with the common market.

The final decision, which required Spain to recover the unlawful aid immediately, was challenged by the Álava Provincial Council as well as Ramondín S.A. together with Ramondín Cápsulas S.A. before the Court of First Instance (CFI) in April 2000.

On 6 March 2002, the CFI rejected the claim. <sup>(2)</sup>

### 3. General vs. selective measures?

There are little doubts that such measures easily qualify as state aid as regards the first two criteria laid down in Article 87 of the Treaty: the reduction of the tax burden afford the beneficiaries an advantage that reduces the costs they normally have to bear in the course of their business; the resulting loss of tax revenues is equivalent to the use of State resources in the form of tax expenditure. <sup>(3)</sup> Equally clear was in the present case that the measures may affect competition and trade between the Member States since Ramondín carried out an economic activity which is the subject of trade – especially in a highly competitive sector – between Member States, taking into consideration Ramondín's high world market share and the fact that about 24% of its production is directed exports to countries to the European Union. <sup>(4)</sup>

The key problem with tax measures regularly lies in the criterion of specificity or selectivity of the measure, which can only qualify as State aid when it favours 'certain undertaking or the production of certain goods.' <sup>(5)</sup> Measures of purely general reach do not fall under the prohibition of said provision. Seemingly general measures, however, are prohibited where they are still characterised by an element of selectivity.

#### a. Regional selectivity

Although the claimants alleged that the Commission had based the measures' selectivity on their regional scope, the CFI has clearly recognised that the Commission had not based its assessment on

<sup>(1)</sup> Commission Decision 2000/795/CE of 22.12.1999; OJ L 318 of 16.12.2000, p. 36 (in the following: Decision *Ramondín*).

<sup>(2)</sup> Combined cases T-92/00 and T-103/00 *Territorio Histórico de Álava - Diputación Foral and Ramondín S.A. and Ramondín Cápsulas S.A. vs. Commission* (in the following: Judgment *Ramondín*), not yet reported but available in some language versions on the website of the Court of Justice of the European Communities (<http://curia.eu.int/en/juris/index.htm>).

<sup>(3)</sup> For the applicability to aid granted by regional or local bodies of Member States see C-248/84 *Germany vs. Commission*, [1987] ECR I 4013. For the concept of 'tax expenditures' see the study by the OECD (ed.), *Tax Expenditures. Recent Experiences*, Paris 1996; also S. Surrey, 'Tax incentives as a device for implementing government policy: A comparison with direct government expenditures', 83 *Harvard Law Review* 705-738.

<sup>(4)</sup> As accepted by the Court of First Instance in *Ramondín* ¶ 66-79, rejecting the allegation of the claimants that the Commission would have to demonstrate the real effect on competition of the measures and that the distortion or the threat of such distortion has to be sensitive or substantial (with numerous references to case law).

<sup>(5)</sup> For this criterion see also C-200/97 *Ecotrade*, [1998] ECR I-7907 ¶ 40, as well as T-55/99 *CETM vs. Commission*, [2000] ECR II-3207 ¶ 39.



this ground. <sup>(1)</sup> Moreover, the CFI clarified that, in any case, internal fiscal autonomy does not exempt a region from the obligations arising from the Treaty; especially Art. 87 (1) comprises all kinds of public measures, no matter at which intrastate level they are taken. <sup>(2)</sup>

### *b. Selectivity based on the discretion in application*

As confirmed by the case law of the Court of Justice, the selectivity of general measures may become manifest especially where the public administration disposes of discretion in the application of the general tax rules to the specific case on the basis of criteria such as the choice of beneficiaries, the amount of the financial assistance or the timelimits. <sup>(3)</sup> On this basis the Commission primarily founded its conclusion that the tax credit of 45% was a selective measure within the meaning of Art. 87 (1): the underlying legal provision bluntly empowered the Ávala authorities to ‘determine the amount of the investment’ which would qualify as the basis for calculating the 45% tax credit, as well as to ‘lay down the timelimits and restrictions applicable in each individual case.’ In view of this wording, the CFI also rejected the claimants’ allegation that the authorities would merely have the faculty to check whether the law’s requirements have been met or not: the provided faculties still ‘*permit the [authority], at the same time, to modulate the amount of the financial intervention ... [thus] allowing to put certain undertakings in a more favourable situation than others.*’ <sup>(4)</sup>

### *c. Selectivity based on the norm’s scope of application*

The CFI also confirmed the Commission’s decision that the minimum investment required to qualify for the tax credit (approx. EUR 15 million) ‘*de facto limits the tax advantage to undertakings which dispose of considerable economic recourses*’, which suffices for being selective in

the sense of Art. 87 (1). The claimants’ argument that the minimum requirement would only constitute a ‘quantitative criterion of objective character’ to allow designing specific measures for large investments as opposed to other measures for SMEs was rejected by the CFI on the grounds that precisely those measures in favour of SMEs do not escape from constituting state aid either. <sup>(5)</sup>

The threshold established by the second tax measure, the reduction in the tax base, was much lower (newly created undertaking, approx. EUR 500.000 initial investment, and the creation of 10 jobs). Nevertheless, the CFI fully agreed with the Commission’s conclusion that this is still sufficient to fulfil the selectivity criterion. The underlying message sent out by the Commission and fully backed by the CFI is that not the degree to which the measure’s scope of application is limited is decisive: the relevant question is whether such exception to the rule of undifferentiated applicability of tax measures can be justified. <sup>(6)</sup>

## **4. Justification by the nature or general scheme of the system**

As established by the case law and the Commission’s practice, specific tax measures may be justified and thus escape the prohibition of Art. 87 (1) when they are coherent with the nature of general scheme of the tax system concerned: <sup>(7)</sup> the internal objective of the measure and the differentiated treatment has to be optimising the collection of revenues for State expenditure. <sup>(8)</sup> Following the principle *exceptio strictissima applicationis*, such justification of the differentiated treatment has to be demonstrated specifically – and most of all convincingly – by the authorities invoking it. Consequently, the CFI rejected the claimants’ allegation that the underlying purpose of both measures was to raise tax collection from the beneficiaries in the long run without providing any evidence for this argumentation. On the one hand, the focus on the external objectives of boosting economic growth was too evident and explicit, as

<sup>(1)</sup> Judgment *Ramondín* ¶ 26-27, 44-45, 56-57.

<sup>(2)</sup> *Ibid.* ¶ 57 (relying on C-248/84 Germany vs. Commission, [1987] ECR 4013 ¶ 17).

<sup>(3)</sup> Cf. C-241/94 *Kimberly Clark Sopalin*, [1996] ECR I-4551 ¶ 23-24; C-200/97 *Ecotrade* (*supra* note 5, p. 62) ¶ 40; C-295/97 *Piaggio*, [1999] ECR I-3735 ¶ 39. See also the conclusions by the Advocate General La Pergola for C-342/96 *Spain vs. Commission*, [1999] ECR I-2459 (2641) ¶ 8.

<sup>(4)</sup> Judgment *Ramondín* ¶ 32-33.

<sup>(5)</sup> Judgment *Ramondín* ¶ 38-40, relying on the Community Guidelines on State Aid for SME, OJ C 213 of 23.7.1996, p. 4.

<sup>(6)</sup> See Decision *Ramondín* ¶ 111 and 112; Judgment *Ramondín* ¶ 49, 50 and 59.

<sup>(7)</sup> See C-173/73 *Italy vs. Commission*, [1974] ECR 709 ¶ 15; C-75/97 *Belgium vs. Commission*, [1999] ECR I-3671 ¶ 34 and 39, as well as the conclusions by the Advocate General La Pergola at 3675 ¶ 8, following the line of Advocate General Ruiz-Jarabo Colomer in C-6/97 *Italy vs. Commission*, [1999] ECR I-2981 ¶ 27.

<sup>(8)</sup> Cf. Commission notice (*supra* note 3, p. 61) ¶ 23-27 (pointing out that any other kind of objective will trigger the [rebuttable] presumption of aid).

shown by the Commission; <sup>(1)</sup> on the other hand the CFI succinctly pointed out that the augmentation of revenues ‘*can hardly be conciliated with the concession of tax reductions*’ and – even if accepted – could also be achieved by measures of general nature. <sup>(2)</sup>

## 5. Conclusions

The CFI judgement in the Ramondín case has brought about clear guidance for the assessment of

tax measures. The benchmark for the required selectivity is low: any substantive limitation of scope of application will suffice for qualifying *a priori* as selective measures, allowing the Commission’s to further scrutinise tax measures. Decisive is the consistency of the limitation as well as the measure itself with the nature or general scheme of the tax system concerned. The burden of proof for such coherence lies with the authorities that want to make use of such limitations.

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<sup>(1)</sup> See Decision *Ramondín* ¶ 86-87.

<sup>(2)</sup> Judgment *Ramondín* ¶ 62.

## The rehabilitation of polluted industrial sites in the Netherlands

Melvin KÖNINGS, Directorate-General Competition, unit G-2

### Introduction

The Commission has set specific provisions for rehabilitation of polluted industrial sites in the *Community guidelines on State aid for environmental protection* <sup>(1)</sup>, hereafter the environmental guidelines. On 27 February 2002 the Commission decided not to raise objections to a State aid program by the Netherlands on soil rehabilitation. This Dutch program is providing subsidies for the rehabilitation of the polluted industrial sites for which no private individual is financially responsible for the rehabilitation costs. The budget of the arrangement is 1.13 billion euros. This was the first State aid scheme to be approved under these provisions of the new environmental guidelines. In this article you can find a concise description of the measure and a summary of the assessment by the Commission.

### Description of the measure

In The Netherlands it is estimated that 15.000 industrial sites are seriously polluted. In June 2001 the Dutch national authorities, the provincial municipal executives and the confederations of employers signed a joint covenant on soil rehabilitation. The participating parties agreed on a scheme to partly support rehabilitation of Dutch polluted industrial sites, but only in those cases where there is no private party liable for the costs of the rehabilitation.

Under Dutch national law undertakings can not be held liable for the cost of rehabilitation for polluted industrial sites, when the pollution took place before 1-1-1975, even if the undertakings had polluted the site themselves. The Dutch Supreme Court has decided in various cases that undertakings causing pollution of industrial sites were not able to judge the economic and environmental consequences of that pollution prior to 1-1-1975. However, it is not always obvious what part of the pollution was caused before 1-1-1975. Therefore the Dutch authorities introduced a protocol with the purpose to avoid complicated and long lasting legal litigation on every individual case. This protocol went into force 11 June 2001 and includes a calculation method which results in a percentage of pollution dated before 1-1-1975. The protocol

sets out a minimal limit of 80% of pollution dated before 1-1-1975 in order to consider the undertaking not liable for the pollution. The protocol constitutes therefore nowadays the applicable Dutch law as regards the liability for pollution of industrial sites.

The measure only aims at compensating the cost of rehabilitation of severely contaminated industrial sites in continuing use which were in totality polluted prior to 1-1-1975, or for which at least 80% of the pollution dates prior to 1-1-1975. It thus aims at compensating the costs of rehabilitation of contaminated sites where nobody is liable for the costs of rehabilitation according to Dutch law. The Dutch Authorities have classified the possible beneficiaries of the measure into several categories, in order to distinguish various aid intensities. The Dutch Authorities will thus compensate the undertakings by 15% to 70% of the eligible costs. Cumulation of State aid for the rehabilitation is explicitly prohibited in the notified measure.

### Application of point 38 of the environmental guidelines

The Commission has assessed the notified scheme under the conditions laid down in the environmental guidelines. As regards the rehabilitation of polluted industrial sites point 38, second paragraph of the environmental guidelines state that where the person responsible for the pollution is clearly identified, that person must finance the rehabilitation in accordance with the 'polluter pays principle' and no State aid may be given. By 'person responsible for the pollution' is meant the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter. According to the third paragraph of point 38 of the environmental guidelines the person responsible for the work may receive aid, where the person responsible for the pollution is not identified or cannot be held liable to bear the cost.

The polluter pays principle is the leading principle in Community environmental legislation. However, there is no specific Community legislation that defines responsibilities for past pollution

<sup>(1)</sup> OJ C 37 of 3.2.2001, p. 3

in this context. Therefore, the national law and jurisprudence is the relevant legal framework. As already mentioned above, the protocol of 11 June 2001 is the current applicable Dutch law as regards liability for pollution of industrial sites. The protocol is therefore considered as the law applicable in the Member State, as referred to in the second sentence of the second paragraph of point 38 of the environmental guidelines. It is according to the rules laid down in the protocol that the Dutch authorities will decide if the person responsible for the pollution is or is not identified and can or can not be held liable to bear the costs.

The eligible costs in the notified measure are defined as the gross costs of the rehabilitation project minus the overlapping costs. The overlapping costs are costs incurred for other reasons, such as site preparation or infrastructure costs, but which nevertheless reduce the costs of rehabilitation. This definition is in accordance with footnote 35 of the environmental guidelines, which states that all expenditure incurred by a firm in rehabilitating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, ranks as eligible investment in the case of the rehabilitation of polluted sites.

The fourth paragraph of point 38 of the environmental guidelines states that aid for the rehabilitation of polluted industrial sites may amount to up to 100 % of the eligible costs, plus 15 % of the cost of the work. The eligible costs are equal to the cost of the work less the increase in the value of the

land. The total amount of aid may under no circumstances exceed the actual expenditure incurred by the undertaking. <sup>(1)</sup>

The aid intensity of the Dutch scheme is between 15% to 70% of the eligible costs. These are aid intensities determined without taking into account the increase in the value of the land. Based on substantial experience the Dutch authorities expect the increase in the value of the land always to be lower than 28% of the rehabilitation costs. The Dutch authorities have proposed a general integration of the possible benefits of an increase in the value of the land in the aid intensities.

Until now, the Dutch Authorities have chosen to use an average value by lowering the maximum aid intensity of the eligible cost to the level of 15% to 70%. On average the aid intensity is estimated at 25%. Point 38, paragraph 4 of the environmental guidelines allow aid percentages up to 100% of the eligible costs, plus 15% of the costs of the work. The eligible costs are equal to the cost of the work less the increase in the value of the land. When the increase in the value of the land is expected to be 28% maximum, the maximum aid intensity allowed would be: 100% of the cost of the work – 28% = 72 % + 15% = 87% of the cost of the work. The maximum aid intensity of the Dutch scheme is 70% of the cost of the work, which is well below the maximum aid intensity allowed. Hence the Commission has concluded that this scheme is in line with point 38 of the environmental guidelines.

<sup>(1)</sup> To clarify the calculation of the aid intensity, a maximum aid intensity is calculated in the following (theoretical) example:

Value of the site before rehabilitation:	500 000 euros
Value of the site after rehabilitation:	600 000 euros
Cost of the rehabilitation works:	300 000 euros
Eligible costs: 300 000 – {600 000 – 500 000}:	200 000 euros
15% of the costs of the work {15% of 300 000}:	<u>45 000 euros +</u>
Possible aid allowed (200 000 + 45 000):	245 000 euros (= 82% of the cost of the work)

When there is no increase in the value of the land after rehabilitation, the eligible costs will be equal to the cost of the work (aid intensity: 100%). The provision to add 15% of the cost of the work can then not be applied, as the total amount of aid may under no circumstances exceed the actual expenditure incurred by the undertaking.



## La Commission approuve trois cas d'aides d'Etat à la recherche et au développement en France en application de l'article 87(3)b du Traité CE

*Brice ALLIBERT, Direction Générale Concurrence, unité G-2*

La Commission a autorisé le 12 mars 2002 trois cas individuels d'aides d'Etat à la recherche et au développement dans le domaine de la microélectronique notifiés par la France.

Les trois projets concernés se placent dans le cadre du programme MEDEA+. MEDEA+ est un vaste programme européen, labellisé EUREKA, dont l'objectif est d'accroître le niveau de développement technologique de l'industrie européenne de la microélectronique et, corrélativement, des industries utilisatrices, notamment les systèmes électroniques, en incitant les acteurs de cette filière à entreprendre des travaux de R&D ambitieux impliquant une coopération étroite entre les laboratoires publics ou universitaires et les centres de recherche industriels de plusieurs Etats membres.

La participation de l'Etat français au financement du programme MEDEA+ a été autorisée par la Commission le 11 avril 2001 comme régime d'aide à la recherche et au développement. Cette autorisation ne couvrait cependant pas les cas d'application du régime impliquant des coûts éligibles particulièrement élevés et un grand montant d'aide.

Les trois cas individuels de grand montant autorisés le 12 mars 2002 portent les numéros T 201, T 301 et T 304.

Le projet T 201 vise la réalisation de travaux de R&D en vue de développer une nouvelle génération de technologies CMOS qui permettra d'accroître la compétitivité de l'industrie microélectronique européenne. L'objectif des travaux est de déterminer si une réduction des dimensions des circuits en deçà de 130 nm nécessite un changement d'architecture et l'utilisation de nouveaux matériaux.

Le projet T 301 correspond à des travaux de R&D sur les matériaux et les équipements associés dédiés à l'infrastructure des salles blanches qui produiront les circuits intégrés de nouvelle génération sur des plaquettes de silicium de 300 mm dans des dimensions critiques de gravure inférieures à 100 nm.

Le projet T 304 vise la réalisation de travaux de R&D en vue de développer une source européenne innovante d'équipements de métrologie et de

caractérisation intégrés et répondant aux exigences de contrôle des fabricants de semi-conducteurs pour les technologies CMOS 100 nm.

Chacun des projets fait appel à une vaste coopération aussi bien entre industrie et centres de recherche qu'entre Etats membres. 19 entreprises françaises sont concernées par ces projets, ainsi que 29 organismes d'autres Etats membres, dont l'Allemagne, la Belgique, l'Italie, les Pays-Bas et le Royaume-Uni.

En France, les aides représenteront au maximum 50% des coûts éligibles, pour un montant maximal de 76 M€.

La Commission a analysé l'aide à la lumière de l'encadrement communautaire des aides d'Etat à la recherche et au développement.

Elle a noté en particulier que chacun des travaux visés formait un projet clairement identifié et déterminé, que l'aide était nécessaire pour l'exécution du projet, que le projet était important tant quantitativement que qualitativement, et que le projet était d'intérêt européen commun.

Elle a de plus noté que les travaux visés par l'aide formaient des activités de développement préconcurrentiel au sens de l'encadrement et que l'intensité de l'aide par rapport aux coûts éligibles était compatible avec les plafonds prévus par l'encadrement pour ce type d'activité.

Au vu de ces éléments, la Commission a décidé de considérer l'aide comme compatible avec le Traité CE sur la base de son article 87(3)b, qui prévoit une exemption au principe général d'interdiction des aides d'Etat pour les aides destinées à promouvoir la réalisation d'un projet important d'intérêt européen commun. Si cet article du traité avait déjà été utilisé dans le passé pour approuver des projets d'aides à la recherche et au développement (comme par exemple le projet JESSI), elle n'avait cependant pas été utilisée dans ce cadre depuis plusieurs années.

La Commission a également noté que le projet d'aide remplissait les conditions qui lui auraient permis d'être autorisé en application de l'article 87(3)c du Traité s'il n'avait pas pu bénéficier de la dérogation de l'article 87(3)b.

## Application of the Multisectoral Framework to State aid in the semiconductor industry

*Anne Theo SEINEN and Sabine CROME, Directorate-General Competition, unit H-2*

The semiconductor industry is regarded as an important industry for the economic welfare of countries. Semiconductors have changed daily life fundamentally and applications are multiplying still. Over a period of less than 20 years demand and production has increased enormously. Because the average size of an investment project is huge, it may not come as a surprise that aid to such projects is substantial as well. Indeed, since the entry into force of the Multisectoral Framework on regional aid for large investment projects (MSF) in 1998 the Commission has assessed four projects in the semiconductor industry falling under these rules. In all the four cases the Commission has finally authorised the total amount of the State aid proposed by the national authorities. However aid intensities were below the maximum ceilings that were applicable in the regions concerned. Moreover, they differed significantly among the projects.

The first investment in this industry that the Commission assessed under the MSF rules concerned a project of *Motorola*, a global manufacturer of cellular and radio communications products and electronic devices <sup>(1)</sup>. Motorola planned to set up a new plant in Dumferline, Scotland, for the production of so-called BicMos, which are used as an intermediate product in the manufacture of cellular telephones and other wireless applications. The project costs amounted to £ 1 200 million, the aid covered 5.8% of the investment costs.

The project of *ATMEL Rousset*, the French daughter of the US-based company ATMEL Corp., concerned the extension of an already existing semiconductor factory in Rousset, France <sup>(2)</sup>. ATMEL Rousset produced various types of semiconductors, in particular flash memories, integrated circuits for chip cards and specific circuits (ASIC and ASSP). The extension would increase capacity in all segments. This project had a quite moderate size with project costs amounting to € 373 million. Aid was granted with an intensity of 11.8% net.

The project of *ST Microelectronics* (STM) was one of the biggest industrial projects that have ever been assessed by the Commission in the field of State aid. Investment costs will reach € 2.07 billion <sup>(3)</sup>. Aid will be awarded amounting to € 542.3 million, which results in an intensity of 26.25% net. The French-Italian company intends to set up a new plant in Catania, Sicily (Italy) for the production of flash memories. Flash memories are used for digital cellular handsets, PC and hard disk drivers, but they are also expected to capture new markets such as digital cameras, DVD and other digital equipment.

The investment project of *Infineon Technologies* in Dresden, Saxony (Germany), was the only project where the Commission initiated the formal investigation procedure as it was faced with difficulties in assessing the market and was lacking information on indirect job creation <sup>(4)</sup>. The project concerned the construction of a new plant producing DRAMs. DRAMs are the most common type of semiconductor memory. The largest use for DRAMs is made in PCs and low-cost manufactured products. Investment costs amounted to € 1 106 million, the gross aid intensity was 19.8%.

### Relevant market

The MSF foresees that – in order to minimise distortion of competition – the situation of the relevant market is taken into account for the assessment of the compatibility of the aid. The semiconductor industry is a world-wide industry. Transport costs compared to prices are low, the products are homogenous and few trade barriers exist. Competition is fierce. The semiconductor industry is a rapidly changing industry with fast technological development.

The semiconductor market is highly cyclical as well. Rapid growth has been alternated by deep

<sup>(1)</sup> State aid No. N 480/2000 decision of 26.7.2000. The text of decisions not to raise objections in their original language can be found on: [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industry/htm](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industry/htm).

<sup>(2)</sup> State aid No. N 434/2001, decision of 25 July 2001.

<sup>(3)</sup> State aid No. N 844/2001, decision of 9 April 2002.

<sup>(4)</sup> State aid No. C 86/2001, decision of 9 April 2002. The decision to initiate the procedure of Article 88(2) has been published in the OJ C 368 of 22 December 2001, p. 2. The final decision has not been published yet.

recessions. Moreover, increases of volume of sales have to a large extent been offset by decrease of unit prices. For the application of the MSF the Commission compares growth of apparent consumption in the relevant market to the growth rate of the EEA manufacturing industry as a whole (if reliable data on capacity utilisation is absent).

In three cases (all except *Infineon*) the Commission came to a favourable result concerning the market situation and set the competition factor, which reflects the market assessment, at its highest possible level. The Commission identified various categories of semiconductors as separated market because of low substitutability on the demand side and high costs for switching production on the production side. In fact, these three cases concerned the fastest growing market segments in the semiconductor industry at the moment. The figures for 2000 show a steep decline, but the decline was not enough to offset the growth in the preceding four years. In any case, the decision on *ATMEL* was made in the midst of the recession, but before figures on 2000 were available. The decision on *Motorola* stems even from an earlier date. In this case, forecasts for semiconductors for wireless telephones were very positive. However the market did not develop as expected by *Motorola* and until now production in the new factory has not started!

The Commission was faced with special difficulties in the assessment of the market in the *Infineon* case. The relevant market for DRAMs is the most cyclical market segment within semiconductors. An analysis of the market data in value terms would have led - according to the provisions of the MSF - to the conclusion of a market in absolute decline. This would have resulted in a reduction of the aid by 75%. However, the market measured in volume terms, i.e. units sold, had been significantly growing over the last years. The decline in the market in value terms was a result of continuously falling prices, which was driven by increases in productivity reducing manufacturing costs. Due to the specific characteristics of the DRAM market the Commission therefore came to the conclusion that it should be regarded in relative and not in absolute decline, which led to a reduction of the allowable aid level by 25%.

### Direct jobs and indirect jobs

The number of direct jobs created and safeguarded varied between 530 and 1700 jobs. The capital-labour factor (investment costs per job created or safeguarded) differed significantly among the projects ranging from € 650 588 per job to

€ 1 796 521 per job. This resulted in a multiplication factor for the allowable aid intensity of 0.6, 0.7 or 0.8. Differences are partially explained by different degrees of outsourcing. To some extent the degree of outsourcing can positively influence the outcome of the Commission's assessment: more outsourcing may imply fewer direct jobs and therefore a lower capital-labour ratio, but it also implies higher indirect job creation, which may more easily surpass the threshold of 50% or 100% of indirect jobs compared to direct job creation. The lower capital-labour factor (if reduced at all) may be outweighed by the regional impact bonus. Of course it has not been the Commission's intention to affect corporate strategies on outsourcing. In any event, probably *any* rule may give rise to 'anticipating behaviour'.

One of the most difficult parts of the assessment concerns the indirect job creation in the same or adjacent assisted regions. The Commission has had to base its assessment on different types of evidence. In the case of *Motorola* and *Atmel*, the Member States supplied a detailed overview of first tier suppliers and estimated job creation with these suppliers. The Commission could evaluate this information directly. In both these cases, the authorities did not claim a higher aid on basis of indirect job creation anyway and the regional impact factor was set at 1, consequently not having an impact on the allowable aid intensity.

In the *STM* case, the Italian authorities supplied studies carried out by the University of Catania and by Dataquest, indicating a medium degree of indirect job creation on basis of similar investments. However, these studies were very general and were not considered being a sufficient basis for the Commission's decision. Italy then supplied further information based on a comparison with the already existing unit at the same location. The Commission could exceptionally accept such evidence since the new unit will operate in a similar way and under similar conditions as the existing unit and both units are located in the same area and are part of the same undertaking.

In the case of *Infineon*, the German authorities initially did not provide any data that allowed a reliable estimate of indirect job creation. Only later and within the formal investigation procedure they send a more detailed overview and copies of 'letters of intent' from the suppliers, indicating the expected increase of jobs. The Commission verified this information and could then, taking all the information into account, conclude on a regional impact factor that increased the allowable aid intensity by 25%.

At this stage it may be relevant to note two provisions of the procedural regulation <sup>(1)</sup>. Firstly, the national authorities should provide convincing evidence since, pursuant to Article 4(4) of the Regulation, the Commission has to initiate the procedure of Article 88(2) EC Treaty when doubts remain as to the compatibility of the aid. Secondly, Article 9 of the Regulation specifies that the Commission may revoke a decision when it is based on incorrect information provided during the procedure when this information was a determining factor for the decision. The Commission carries out a systematic ex-post monitoring of the decisions taken under the MSF.

In all cases except for the *Motorola* project the aid intensity proposed by the national authorities was close to the maximum allowable aid intensity calculated on basis of the MSF. Only in the *Motorola* case the Commission would have authorised aid up to a net aid intensity of 12 %, while the UK only intended to grant 5.8%. More important, the allowable aid intensity under the MSF was on average 7.4%-points below the applicable regional aid ceiling. This suggests that the MSF has had a significant reducing effect on aid levels granted by the Member States.

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<sup>(1)</sup> Council Regulation (EC) No. 659/1999 of 22.3.1999, OJ L 83 of 27 March 1999, p. 1.



## Crédit Mutuel – Livret Bleu: Making sure that public services benefit consumers and not intermediaries

Rosalind BUFTON, Directorate-General Competition, unit H-3 <sup>(1)</sup>

### Introduction

On 15 January 2002, the Commission decided that Crédit Mutuel had benefited from an overcompensation by the French State, of the costs for operating the Livret Bleu system.

Although this case concerned a company in the financial sector this was not the decisive factor in the issue under investigation. This case confirms in fact a series of decisions which underline that companies in the financial sector are to be treated as those in any other industry sector from the point of view of competition.

Nor was the case an investigation of the appropriateness of a public service. Article 86.1 of the EC Treaty specifically foresees that public or private companies may be entrusted with a public service mission. As the report to the Laeken European Council on Services of General Interest (COM 2001 598) recognises, *'these services contribute to the quality of life of citizens and are a prerequisite for fully enjoying many of their fundamental rights'*. Indeed, it is important to stress that the Commission was not in any way criticising or compromising a financial product devised by the French state, the Livret Bleu savings account, which it recognised in its decision as delivering a benefit to consumers by providing a defiscalised savings product at the disposal of a very wide public.

### The Commission decided that Crédit Mutuel had been overcompensated for operating the Livret Bleu system

The issue at stake here was to identify if a company which was entrusted with delivering a public service was not making an undue financial gain for itself which created conditions where competition and cross-border trade were distorted. The means by which this distortion may arise is where a company is reimbursed for more than the extra net costs which the provision of the public service incurs. This is referred to as overcompensation and is forbidden.

The decision taken by the Commission respects the principle of equal treatment of all Member States with regard to the application of European Competition rules regarding state aid rules.

In the case of Crédit Mutuel, the overcompensation for the period 1991-1998 was calculated at EUR 164 million plus interest. To this will be added the appropriate sums for the years 1999-2000, which will be calculated by the French authorities using the same rules as those applied by the Commission and the latest available data.. Overcompensation must be returned to the Member state, thus benefiting the economic agents, such as tax payers, who contribute to the budget from which public services are funded.

### What is overcompensation?

A public service mission has both obligations and compensations. Whereas conducting a public service mission can in itself create an advantage for an undertaking, this is considered as not contravening the rules on state aid if the compensations exactly match the extra costs of this mission. However, Article 86.2 of the EC Treaty states that

*'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, shall be subject to the rules contained in this Treaty, in particular to the rules on competition'*.

This means that if the net compensation exceeds the net costs, the beneficiary is considered as receiving an aid. Article 87.1 of the EC Treaty qualifies such a benefit as state aid if state resources are involved in the calculation of the net compensation, and considers that it is incompatible with the common market if it

*'distorts or threatens to distort competition by favouring certain undertakings ... in so far as it affects trade between Member States'*.

In the liberalised banking market of the European Union, overcompensation for a public service creates an advantage for one institution to the detriment of another and cannot be permitted. In

<sup>(1)</sup> The author wishes to thank Daniel Grenouilleau (ECFIN) for his helpful comments in preparing this article. The main substance of the text is derived from the Decision which he wrote.

addition, the integration of financial markets has had the effect of greatly increasing the sensitivity of intra-Community trade to distortions of competition.

### How were these principles applied to the Crédit Mutuel case?

To the general public, the Livret Bleu is an attractive savings product which has the advantage of providing a tax-free interest income. It is easily accessible, as Crédit Mutuel, which was chosen in 1975 to operate this service, had and still has, a large network of branches throughout France. Many savers may however totally ignore that an integral part of the system is that, initially part of the funds collected through this savings product, and since 1999, all the funds collected, are earmarked by the state for investment in selected projects of general economic interest such as social housing.

Consequently, the obligations in this case included the distribution of the savings product, Livret Bleu, to the general public without cost to the consumers who benefit directly from the tax exemption, and the use of part of the funds, either by the state owned Caisse des Depots et Consignations (CDC) or by Crédit Mutuel itself in projects selected by the state. The compensations included the exclusive right for collecting and managing the system as well as a remuneration for this service on behalf of the state.

As the correct level of compensation for a public service is obtained where there is financial equilibrium, all the extra costs which arise only because the company is entrusted with the public service must be deducted from all the revenues, in any form which the company draws from of this service. In the case of Crédit Mutuel, as costs, the Commission took into account the portion of branch operating costs resulting from the distribution of the Livret Bleu, the payment of tax-free interest to Livret Bleu account holders as well as other overheads related to the management of the system such as the transfer of funds to the CDC or to the selected investment projects.

As revenues, the Commission took into account and qualified as state resources, the commission paid by the state-owned CDC on the state's instructions, of 1.3% of the funds deposited at the

CDC and the reimbursement of the fiscal advantage. As Crédit Mutuel also managed part of the Livret Bleu funds itself, either investing in projects as directed by the state or making its own investment decisions, the margins which it derived from these operations were of course part of the Livret Bleu system. Considering that all funds which were collected through a Livret Bleu savings account belonged to the Livret Bleu system and incurred a cost in the form of the mandatory interest rate paid to the depositors, the Commission included the corresponding revenues generated by these funds in the form of margins on all these funds, including those where Crédit Mutuel itself could decide on their application. This was to the net advantage of the Crédit Mutuel because losses had been incurred in this area which in the end reduced the net sum of overcompensation which resulted from this calculation. Objectively, this is the correct and balanced approach, and is in-keeping with the spirit of the Transparency Directive <sup>(1)</sup>. Article 3(a) of the Transparency Directive 2000/52/EC, requires that in the separated accounts:

*'all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles'*

Full cost accounting principles require that cost allocation takes account of direct and indirect costs, including the mutualisation or sharing of costs and revenues arising from one activity which in reality benefit or penalise another.

### When do exclusive rights generate other benefits?

The complainants which originated this case <sup>(2)</sup>, pointed out that, the fact that Crédit Mutuel had the exclusive distribution right for this attractive product <sup>(3)</sup>, created in itself an advantage. It is true that a company, which keeps a customer database, will be able to enrich its database with the list of customers which use this savings product. It will then be able to use this information to reduce its costs or target its marketing campaigns to specific customer segments. Such a database is a normal management and customer relationship management tool in the banking profession. Also, banks are required to have such databases to comply with anti-money laundering control regulations. Crédit

<sup>(1)</sup> Commission Directive 2000/52/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.

<sup>(2)</sup> The investigation into this case was initiated by a complaint in 1991 by the French Banking Association, AFB, the Credit Agricole and the Groupe des Banques Populaires.

<sup>(3)</sup> Although strictly speaking the Livret Bleu is a savings account, it has the flexibility of a current account, yet it has the advantage of receiving credit interest.

Mutuel certainly has a data base which contains information on the 5 million Livret Bleu customers and which could be used for the targeted marketing of other products sold by the banking group (including life insurance for example). Such benefit should be taken into account for the calculation of the net cost of the public service, as it originates in a state funded instrument.

The Court has recently confirmed <sup>(1)</sup> (December 2001) that the Telecommunications Directives 90/388/EC, 96/19/EC and 97/33/EC obliges a member state to take into account the market benefit, if any, which accrues to an organisation that offers a universal service. In this case, the Court considered that the creation (and sale of services related to) an ex-directory list, clearly falls in the scope of the company's commercial services. Nevertheless as it would not have existed if the company had not received a public service right, the revenue derived from this service should be deducted from the costs of providing the public service. <sup>(2)</sup>

The Commission has already decided in other areas also that where such externalities are created they must be taken into account. <sup>(3)</sup> This principle was accepted by the Commission and the Member states in adopting the Communication on the application of State Aid rules to public service broadcasting. The sale of advertising space is a commercial activity of broadcasters that is not part of the public service remit. This activity, however, can profit from the presence of an audience generated for public service purposes. In this sense, the public service activity of showing programmes exerts a positive externality on the commercial activity of selling advertising space.

The above reasoning indicates that if, in the course of carrying out any public service mission, there

are indirect benefits to the undertaking, (but only if there are such indirect benefits or externalities), these should be taken in reduction of the cost which the State should pay to the undertaking for conducting the public service.

### Were these taken into account in the case of Crédit Mutuel?

The short answer to this question is, no. In some situations the quantification of the indirect benefit is complex and use has to be made of very costly market research technologies and studies.

In the case of Crédit Mutuel, whereas the over-compensation for the livret Bleu could be calculated from the management accounts, no such mechanism was available to calculate the spill-over effect that the exclusive right of operating the Livret Bleu system may have had on their other Crédit Mutuel activities (eg increase of market share, profitability of insurance activity). In addition, although this topic was at the centre of the complainants grievances, despite several invitations, they did not provide the Commission with the relevant quantitative data for an objective assessment to be made.

### Conclusion

The Decision taken by the Commission closed a long and complex procedure which confirmed both its support of Member State's providing services which they consider to be of public interest and its role of ensuring that intermediaries in the procedure do not take unjustified financial or commercial profit at the expense of tax payers and other market competitors.

<sup>(1)</sup> C 146/00 of 6 December 2001, paragraph 76 of the decision.

<sup>(2)</sup> 'France ought to have taken into account revenue derived from 'comfort services' and from ex-directory listing in calculating the net cost of the universal service provision in order to identify unprofitable areas'.

<sup>(3)</sup> In its Communication (2001/c320/04) on the application of state aid rules to public service broadcasting, Article 57 states: 'In carrying out the proportionality test, the Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy this test, it is necessary that the state aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality.'





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**DIRECTION H****Aides d'Etat II**

1. Acier, métaux non ferreux, mines, construction navale, automobiles et fibres synthétiques	<i>Humbert DRABBE</i>	02 2950060/02 2952701
2. Textiles, papier, industrie chimique, pharmaceutique et électronique, construction mécanique et autres secteurs manufacturiers	<i>Maria REHBINDER</i>	02 2990007/02 2963603
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**Rattachés directement à M. Monti**

Conseiller auditeur	<i>Serge DURANDE</i>	02 2957243
Conseiller auditeur	<i>Karen WILLIAMS</i>	02 2965575



## New documentation

### European Commission Directorate General Competition

*This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: [http://europa.eu.int/comm/competition/speeches/index\\_2002.html](http://europa.eu.int/comm/competition/speeches/index_2002.html)*

#### Speeches by the Commissioner 1 January 2002–6 May 2002

***La Governance Europea*** – Mario MONTI – Convegno dell'Associazione Giovani Classi Dirigenti delle Pubbliche Amministrazioni – Rome – 06.05.2002

***The single energy market: the relationship between competition policy and regulation*** – Mario MONTI – House of Deputies 10th Commission on Productive Activities, Commerce and Tourism – Rome, Italy – 07.03.2002

***What are the aims of European Competition Policy*** – Mario MONTI – European Competition Day – Madrid, Spain – 26.02.2002

***EU Policy towards fiscal state aid*** – Mario MONTI – Seminar on 'State Aid and Tax' – Universiteit Nyenrode – The Netherlands – 22.01.2002

***The Commission notice on merger remedies – one year after*** – Mario MONTI – CERNA (Centre d'économie industrielle, Ecole des Mines de Paris) – Paris – 18.01.2002

***Does EC competition policy help or hinder the European audiovisual industry?*** – Mario MONTI – British Screen Advisory Council – London – 26.11.2001

***Antitrust in the US and Europe: a History of convergence*** – Mario MONTI – General Counsel Roundtable – American Bar Association – Washington DC – 14.11.2001

***Competition and Consumer: the case of Pharmaceutical Products – Opening Speech*** – Mario MONTI – European Competition Day – Antwerp – 11.10.2001

***Market definition as a cornerstone of EU Competition Policy*** – Mario MONTI – Workshop on Market Definition – Helsinki Fair Centre – Helsinki – 05.10.2001

#### Speeches and articles, Directorate-General Competition staff, 1 January 2002–30 April 2001

***Recent developments in EU competition policy in the maritime sector*** – Joos STRAGIER – The Shipping Forecast Conference – London – 25.04.2002

***EU competition law, convergence, and the media industry*** – Miguel MENDES PEREIRA – Law Society of England and Wales – London – 23.04.2002

***Developments of competition law and policy – European and National perspective*** – Alexander SCHAUB – Hellenic Competition Commission – Athens, Greece – 19.04.2002

***The Commission's position within the network*** – Alexander SCHAUB – Robert Schuman Centre for Advanced Studies – Florence, Italy – 11.04.2002

***Co-operation in competition policy enforcement between the EU and the US and new concepts evolving at the World Trade Organisation and the International Competition Network*** – Alexander SCHAUB – Mentor Group – Brussels, Belgium – 04.04.2002

***Le rôle accru de la politique de la concurrence dans la relance du partenariat euro-méditerranéen et dans la coopération multilatérale*** – Jean-François PONS – Séminaire régional sur la politique de concurrence et les négociations multilatérales – Tunis, Tunisie – 28.03.2002

***EC Competition Policy in the Aviation Sector: State of Play and Outlook*** – Joos STRAGIER – Guild of European Business Travel Agents (GEBTA) – Lisbon, Portugal – 22.03.2002

***Competition in the financial services in Europe today*** – Jean-François PONS – 3rd annual conference of Retail Banking in Europe – Paris, France – 04.03.2002

***Sports and Competition: Broadcasting rights for sports events*** – Alexander SCHAUB – European Competition Day – Madrid, Spain – 26.02.2002

***Emerging competition in European energy markets*** – Alexander SCHAUB – Institute of European Studies, Centre for Competition policy – Madrid – 26.02.2002

***Benefits for consumers from competition in the 'New Economy'; the case of access to the internet and the local loop.*** – Pierre-André BUIGUES – European Competition Day – Madrid – 26.02.2002

***Die internationale Zusammenarbeit der EU und der USA – Austausch von Informationen*** – Bernhard FRIESS – FIW-Symposium – Innsbruck, Austria – 15.02.2002

***Media in Europe: Media and EU competition law*** – Herbert UNGERER – Conference on Media in Poland, Polish Confederation of Private Employers – Warsaw, Poland - 13.02.2002

***Politique européenne de la concurrence en 2002: maturité et modernisation.*** – Jean-François PONS – ENA MENSUEL – FEVRIER – N° 318 – France – 01.02.2002

***Antitrust law enforcement – a shared trans-Atlantic vision*** – Alexander SCHAUB – Bi-Annual Conference of the Council for the United States and Italy – New York – 25.01.2002

***Postal Liberalisation and Regulation – The European Union's Perspective*** – Jean-François PONS – IPC Shareholders' Conference – Brussels – 25.01.2002

## **Community Publications on Competition**

**New publications and publications coming up shortly**

- ***European Union competition policy, 2001***
- ***Competition policy in Europe and the citizen – in the languages of the candidate countries*** (Bulgarian, Czech, Estonian, Hungarian, Lithuanian, Latvian, Polish, Romanian, Slovak, Slovenian, Turkish)
- ***Competition policy newsletter, 2002, Number 3 – October***

Information about our other publications can be found on the on the DG Competition web site:

<http://europa.eu.int/comm/competition/publications>

Except if otherwise indicated, these publications are available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Some publications, including this newsletter, are available in PDF format on the web site.

## Press releases

15 January 2002 - 30 April 2002

*All texts are available from the Commission's press release database RAPID at: <http://europa.eu.int/rapid/start/> Enter the reference (e.g. IP/02/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.*

### ANTITRUST

**IP/02/595 – 19/04/2002** – Commission brings its case against presumed cartel between Christie's and Sotheby's

**IP/02/585 – 18/04/2002** – Commission closes investigations into FIFA rules on players' agents

**IP/02/521 – 09-04-2002** – Commission closes probe into Check Point after receiving formal undertaking regarding its distribution practices

**IP/02/491 – 03-04-2002** – Commission approves the UK Climate Change Levy's Dual-Use Exemption

**IP/02/483 – 27-03-2002** – Commission suspects KPN of abusing its dominant position for the termination of calls on its mobile network

**IP/02/461 – 22-03-2002** – Commission accepts undertaking in competition proceedings regarding German book price fixing

**IP/02/440 – 20-03-2002** – Commission rejects complaint over plans to build a second passenger terminal at Dublin Airport

**IP/02/401 – 13-03-2002** – Commission closes investigation into UK/Belgium gas interconnector

**IP/02/380 – 11-03-2002** – Commission publishes its draft of a new regulation for the motor vehicle sector, invites comments from all concerned

**IP/02/357 – 04-03-2002** – Commission clears acquisition of industrial cleaning products manufacturer DiverseyLever by Johnson Wax

**IP/02/356 – 04-03-2002** – Commission clears acquisition by Merloni of a 50% stake in UK white goods maker GDA.

**IP/02/350 – 01-03-2002** – The Commission issues statements of objections to Carlsberg and Heineken

**IP/02/348 – 01-03-2002** – Slow progress in unbundling of the local loop: Commission publishes report on sector enquiry

**IP/02/312 – 25-02-2002** – Commission clears inland tanker joint venture in mineral oils shipping sector

**IP/02/305 – 25-02-2002** – Car price differentials in the European Union remain high, especially in the mass market segments

**IP/02/296 – 22-02-2002** – Telecoms liberalisation and sports rights: the benefits of competition law brought to light at the European Competition Day

**IP/02/196 – 05-02-2002** – Putting the consumer in the driver's seat - the Commission proposes a bold reform of car sales rules

**IP/02/142 – 25-01-2002** – Commission clears joint venture between Meneta and TDM in the field of anti-vibration devices for automobile disc brakes

**IP/02/62 – 15-01-2002** – Commission clears hydro power production joint venture between E.ON and Verbund.

### STATE AID

**IP/02/634 – 26-04-2002** – Commissioner Monti welcomes formal acceptance by Germany of the abolition of State aid to public banks

**IP/02/616 – 24/04/2002** – No objections to State aid measures in favour of the Channel Tunnel Rail Link project

**IP/02/615 – 24/04/2002** – The Commission authorises the United Kingdom to grant EUR 6.5 million to its coal industry

**IP/02/608 – 24/04/2002** – Verlipack case: Commission finds aid granted by the Walloon authorities to the Beaulieu group incompatible with the common market

**IP/02/607 – 24/04/2002** – Commission approves Northern Ireland exemption from the Aggregates Levy

**IP/02/606 – 24/04/2002** – Commission decides to prolong current State Aid framework for Research and Development

**IP/02/605 – 24-04-2002** – Commission gives partial go-ahead to compensation for the Belgian electricity sector

**IP/02/556 – 12/04/2002** – Commission launches consultation process on state aid for employment

**IP/02/529 – 09/04/2002** – Commission approves Spanish scheme of aid to cinema production

**IP/02/523 – 09/04/2002** – Coal: Euro 20 million in French aid between 1994 and 1997 not compatible

**IP/02/522 – 09/04/2002** – Air transport : refinancing measures contemplated by TAP are not state aid

**IP/02/520 – 09/04/2002** – Commission orders recovery of State aid from SKL-M and MTU

**IP/02/519 – 09/04/2002** – Tax aid: Commission looks at Belgian tax aid scheme applying to US Foreign Sales Corporations

**IP/02/518 – 09/04/2002** – Commission to carry out detailed investigation of aid to Bankgesellschaft Berlin

**IP/02/517 – 09/04/2002** – Commission authorises proposed State aid in favour of Infineon Technologies

**IP/02/516 – 09/04/2002** – Commission approves three quarters of the proposed aid in favour of paper company Hamburger AG

**IP/02/515 – 09/04/2002** – Commission clears aid for a new important semiconductor investment by STMicroelectronics in Catania, Sicily

**IP/02/514 – 09/04/2002** – Commission examines EUR 450 million cash advance granted by France to Bull

**IP/02/505 – 05/04/2002** – Commission notifies Austria of its position on guarantees for public banks

**IP/02/493 – 03/04/2002** – Commission approves 14.4 million of aid for restructuring of ILKA MAFA Kältemaschinenbau GmbH

**IP/02/492 – 03/04/2002** – Commission launches investigation into planned aid to BMW for a new car plant in Leipzig, Germany

**IP/02/490 – 03/04/2002** – Commission opens inquiry into Portuguese aid planned for Opel's plant in Azambuja

**IP/02/397 – 12/03/2002** – Commission approves Finnish subsidy to passenger vessels

**IP/02/394 – 12/03/2002** – European Commission proposes legal means to react against unfair competition from subsidised third country airlines

**IP/02/392 – 12/03/2002** – Commission orders recovery of more incompatible aid from German textile manufacturer Neue Erba Lautex GmbH

**IP/02/391 – 12/03/2002** – Commission closes State aid investigation concerning Poste Italiane with a positive decision

**IP/02/390 – 12/03/2002** – Commission gives go ahead to the Irish Government Euro 12.7M equity injection to An Post

**IP/02/370 – 06/03/2002** – Airlines left without insurance following the attacks in the USA: Commission authorises aid measures introduced by Finland

**IP/02/369 – 06/03/2002** – Olympic Airways: opening of state aid investigation procedure against Greece

**IP/02/354 – 04-03-2002** – Common press statement on the understanding on Anstaltslast and Gewährträgerhaftung for special credit institutions

**IP/02/343 – 01-03-2002** – Germany agrees on the implementation of the understanding with the Commission on State guarantees for Landesbanken and Savings Banks

**IP/02/333 – 27/02/2002** – Airlines left without insurance following the attacks in the USA: Commission authorises aid measures introduced by Ireland and the Netherlands

**IP/02/331 – 27/02/2002** – Combined transport between Germany and Italy: Commission approves start-up aid for a new private rail service

**IP/02/330 – 27/02/2002** – Combined transport by rail: Commission authorises Italian aid

**IP/02/329 – 27/02/2002** – State aid: Commission approves Danish cancelling of loans to local railway undertakings

**IP/02/326 – 27/02/2002** – Commission approves State aid to cableway installations in Italy and Austria and clarifies the application of State aid rules to the sector

**IP/02/325 – 27/02/2002** – Tax aid: Commission opens formal proceedings regarding Belgian coordination centres and Trieste Financial Services and Insurance centre.

**IP/02/323 – 27/02/2002** – State aid: Commission authorises repayable advance by the French Government to SNECMA

**IP/02/322 – 27/02/2002** – United Kingdom: Compensation to Northern Ireland Electricity (NIE) for stranded costs constitutes no State aid



**IP/02/248 – 13/02/2002** – Commission approves aid to Railtrack Plc in Administration

**IP/02/242 – 13/02/2002** – Commission approves overhaul of rules on large investment aid, including in automobile and synthetic fibres sectors

**IP/02/241 – 13/02/2002** – Strict State aid rules for the steel industry to continue after the expiry of the ECSC Treaty

**IP/02/240 – 13/02/2002** – Commission approves prolongation of tax reductions from the German Ecotax after 31 March 2002

**IP/02/239 – 13/02/2002** – Commission opens enquiry into UK aid planned for Ford's Bridgend plant

**IP/02/237 – 13/02/2002** – Commission takes a close look at certain aspects of investment aid scheme in less-favoured regions of Italy

**IP/02/188 – 04/02/2002** – Loyola de Palacio raises new possibilities for aviation insurance.

**IP/02/172 – 30/01/2002** – Commission terminates State aid investigation into restructuring aid to Gothaer Fahrzeugtechnik GmbH

**IP/02/168 – 30/01/2002** – Airlines – European Commission authorises French compensation scheme following the attacks of 11 September 2001

**IP/02/166 – 30/01/2002** – Short sea shipping – Commission authorises French aid

**IP/02/125 – 23/01/2002** – Commission launches investigation into planned aid to Vauxhall in Ellesmere Port (United Kingdom)

**IP/02/67 – 15/01/2002** – Commission finds Credit Mutuel benefited from overcompensation for Livret Bleu

**IP/02/66 – 15/01/2002** – The Commission takes a final partially negative decision with regard to aid granted to Klausner Nordic Timber GmbH & Co. KG

**IP/02/65 – 15/01/2002** – Commission starts formal investigation on aid proposed by Germany in favour of Capro Schwedt GmbH, a new caprolactam producer

## MERGER

**IP/02/644 – 30/04/2002** – Commission approves acquisition of Enron's Wind Turbine Business by a General Electric subsidiary

**IP/02/628 – 25-04-2002** – Commission clears acquisition of Hellenic Shipyards by the HDW/Ferrostaal consortium

**IP/02/627 – 25-04-2002** – Commission refers local public transport joint venture to German Bundeskartellamt

**IP/02/591 – 19-04-2002** – Commission authorises creation of Photovoltech solar joint venture

**IP/02/589 – 18-04-2002** – Commission clears Wienerberger's acquisition of the brick activities of Hanson in Continental Europe

**IP/02/587 – 18-04-2002** – Commission approves acquisition of sole control of TotalFinaElf Deutschland over three German traders in refined mineral products

**IP/02/578 – 18-04-2002** – Commission approves acquisition of Unison Industries by a General Electric subsidiary

**IP/02/575 – 17-04-2002** – Commission renews clearance of rail shuttle joint venture between Maersk and P&O Nedlloyd

**IP/02/570 – 17-04-2002** – Commission clears Bayer's acquisition of Aventis Crop Science, subject to substantial divestitures

**IP/02/569 – 17-04-2002** – Commission deepens probe into Promatech's acquisition of Sulzer

**IP/02/552 – 11-04-2002** – Commission launches detailed investigation into the takeover of P&O Princess by Carnival Corporation

**IP/02/536 – 10-04-2002** – Commission clears acquisition of HBG by Dragados in the provision of construction and dredging services

**IP/02/532 – 09-04-2002** – Commission gives conditional clearance to Solvay's acquisition of Ausimont

**IP/02/530 – 09-04-2002** – Commission clears Haniel's purchase of Ytong subject to divestiture, Germany still investigating

**IP/02/528 – 09-04-2002** – Commission approves the Community Development Venture Fund providing risk capital for enterprises in the most deprived areas in the UK

**IP/02/506 – 05-04-2002** – Commission clears take-over by Scottish & Newcastle of Hartwall

**IP/02/460 – 22-03-2002** – Commission clears acquisition by SCA of Italian tissue company CartoInvest.

**IP/02/451 – 21-03-2002** – Commission clears steel processing Dutch joint venture in hot-rolled flat products sector

**IP/02/439 – 20-03-2002** – Commission gives ‘green light’ to take over of Brambles European Rail Division by VTG Lehnkering and Warburg

**IP/02/438 – 20-03-2002** – Commission clears with conditions joint control of Hidrocantábrico by EnBW, EDP and Cajastur

**IP/02/415 – 14-03-2002** – Competition, consumers: two words, one battle

**IP/02/408 – 14-03-2002** – Commission clears bricks joint venture between Royal Bank Private Equity and Cinven

**IP/02/376 – 07-03-2002** – Commission clears KPN’s acquisition of sole control over E-Plus

**IP/02/372 – 06-03-2002** – Commission clears merger of Conoco and Phillips Petroleum

**IP/02/365 – 05-03-2002** – Commission clears SAS majority stake in Spanair

**IP/02/364 – 05-03-2002** – Commission clears acquisition by Cofathec of a 50% stake in Climespace

**IP/02/360 – 05-03-2002** – Commission approves Norsk Hydro’s acquisition of German aluminium producer VAW

**IP/02/359 – 05-03-2002** – Commission clears acquisition by EnerSys of the Invensys Energy Storage Business

**IP/02/319 – 26-02-2002** – Commission refers Compass purchase of Rail Gourmet UK to United Kingdom, clears rest of Compass purchases from SAirlines

**IP/02/313 – 25-02-2002** – Commission initiates formal investigation into the takeover of Dutch sand-lime brick producers

**IP/02/311 – 25-02-2002** – Commission approves takeover of Schöller by Nestlé

**IP/02/310 – 25-02-2002** – Commission clears new ownership structure of CAT joint venture

**IP/02/288 – 21-02-2002** – Commission clears Haniel’s purchase of Fels, Germany still investigating

**IP/02/263 – 15-02-2002** – Commission gives conditional clearance to the acquisition of Royal Canin by Masterfoods

**IP/02/260 – 15-02-2002** – Commission refers Danish Crown/Steff-Houlberg merger to Denmark after clearing markets outside Denmark

**IP/02/238 – 13-02-2002** – Commission gives go ahead to Universal Banking Services in the UK, including the establishment of the UK Post Office Card Account bank.

**IP/02/223 – 12-02-2002** – Commission clears JV between Deutsche Bahn, ECT and United Depots to operate container terminals at the German inland port of Duisburg

**IP/02/222 – 11-02-2002** – Commission clears ADM’s acquisition of sole control of German grain trader Toepfer

**IP/02/194 – 05-02-2002** – Commission authorises acquisition of the German Bewag by the Swedish energy group Vattenfall

**IP/02/181 – 01-02-2002** – Commission clears the acquisition of Compaq by HP

**IP/02/174 – 30-01-2002** – Commission adopts decision for the divestiture of Tetra Laval’s shareholding in Sidel

**IP/02/173 – 30-01-2002** – Commission adopts decision on the demerger of Schneider and Legrand

**IP/02/123 – 23-01-2002** – Commission refers review of oil and gas aspects of Aker Maritime/Kvaerner deal to Norway, clears shipbuilding aspects

**IP/02/97 – 21-01-2002** – Commission clears most of Cargill takeover of Cerestar, refers part to UK

**IP/02/71 – 16-01-2002** – Commission clears purchase of European units of US telecoms company Global TeleSystems by KPNQwest

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## **Competition DG's address on the world wide web:**

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