



EC COMPETITION
POLICY NEWSLETTER

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Application of Article 21 of the Merger Regulation in the E.ON/Endesa case

Lucrezia BUSA and Elisa ZAERA CUADRADO ⁽¹⁾

On 21 February 2006, the German company E.ON publicly announced its intention to launch a bid for the entire share capital of the Spanish energy company Endesa. This bid was competing with a hostile bid made by Gas Natural, launched some months earlier ⁽²⁾. The acquisition of Endesa by E.ON was notified to the Commission on 16 March and cleared on 25 April 2006 ⁽³⁾.

On 24 February 2006, the Spanish Council of Ministers adopted a new legislative measure increasing the supervisory powers of the CNE (Comisión Nacional de Energía), the Spanish energy regulator. Under the new Royal Decree, E.ON's bid was subject to the CNE's prior approval. Previously, this authorisation was not required as E.ON did not carry out regulated activities in Spain ⁽⁴⁾. The Commission considers this Royal Decree as contrary to Community law and has brought an action against Spain before the Court of Justice under Article 226 EC. The case is still pending before the Court ⁽⁵⁾.

Pursuant to the new Royal Decree, on 23 March 2006 E.ON requested the CNE to authorise (unconditionally) the proposed acquisition of Endesa. On 27 July 2006, the CNE adopted a decision making this operation subject to nineteen conditions ('the CNE's decision').

Article 21 of the Merger Regulation

Under Article 21 of the Merger Regulation, the Commission has exclusive competence to assess the competitive impact of concentrations with a Community dimension. Member States cannot apply their national competition law to such operations, and they cannot adopt measures which

could prohibit, make subject to conditions or in any way prejudice (*de jure* or *de facto*) such concentrations, unless the measures in question (i) protect interests other than competition and (ii) are necessary and proportionate to protect interests which are compatible with all aspects of Community law.

Public security, plurality of the media and prudential rules are interests recognised as being legitimate ('recognised interests'). Measures genuinely aimed at protecting one of the recognised interests can be adopted without prior communication to (and approval by) the Commission, even if they are liable to hinder or prohibit a merger with a Community dimension, on condition that they are proportionate and non-discriminatory.

Any other interest pursued by way of national measures liable to prohibit, make subject to conditions or prejudice a merger with a Community dimension must be communicated to the Commission before being implemented. The same requirement to obtain the Commission's prior approval applies whenever there are serious doubts that national measures are genuinely aimed at protecting a 'recognised interest' and/or comply with the principles of proportionality and non-discrimination. The Commission must then decide, within 25 working days, whether the national measures are justified for the protection of an interest compatible with EC law.

The Commission's action against conditions imposed on E.ON's bid

The CNE's decision makes the proposed concentration between E.ON and Endesa subject to a number of conditions including: (i) the obligation to maintain Endesa's headquarters in Spain, (ii) the obligation to keep Endesa duly capitalised and to not exceed a certain debt ratio, and (iii) the obligation to divest Endesa's non-mainland assets. E.ON introduced an administrative appeal against the CNE's decision before the Spanish Minister of Industry, Tourism and Trade.

After examining these conditions and having invited the Spanish authorities to submit observations, on 26 September 2006 the Commission adopted a decision declaring that the Spanish authorities had breached Article 21 of the Merger Regulation through the adoption, without prior

⁽¹⁾ Directorate-General for Competition, units B-3 and 02. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ The Gas Natural/Endesa merger was subject to national merger control.

⁽³⁾ Case COMP M. 4197 E.ON/Endesa.

⁽⁴⁾ Pursuant to this Royal Decree, the acquisition by any company of more than 10% of the share capital, or any other participation conferring significant influence, in a company (directly or indirectly) active in a regulated sector or engaged in certain other activities has to be previously approved by the CNE. The CNE has to apply a legal test based on very general grounds.

⁽⁵⁾ OJ C 140, 23.6.2007, p. 15.

communication to and approval by the Commission, of the CNE's decision making E.ON's acquisition of control over Endesa subject to a number of conditions contrary to Community law (*inter alia*, Articles 43 and 56 EC). Article 2 of the decision also required Spain to withdraw without delay the conditions declared incompatible with Community law (**'the first Article 21 decision'**)⁽⁶⁾.

The Spanish authorities did not take any action in this respect and therefore, on 18 October 2006, the Commission sent Spain a **first letter of formal notice**⁽⁷⁾ pursuant to Article 226 EC for failure to comply with Article 2 of the first Article 21 decision.

As part of their reply to the letter of formal notice, the Spanish authorities referred to the decision of 3 November 2006 of the Spanish Minister of Industry, Tourism and Trade deciding on E.ON's administrative appeal against the CNE's decision. The Ministerial decision modified the CNE's decision by (i) withdrawing some of the conditions imposed by the CNE, (ii) reducing the duration or scope of some other conditions, (iii) clarifying the requirements of certain conditions, and (iv) modifying or replacing some other conditions through the imposition of 'new requirements' for E.ON's acquisition of control over Endesa⁽⁸⁾.

Regarding modifications (iv) above, on 20 December 2006, after having invited the Spanish authorities to submit observations, the Commission adopted a new decision pursuant to Article 21 of the Merger Regulation (**'the second Article 21 decision'**) concerning the 'new requirements' imposed on E.ON by the Minister's decision⁽⁹⁾. Article 1 of this decision stated that Spain had violated Article 21 of the Merger Regulation through the adoption, without prior communication to and approval by the Commission, of the Minister's decision, which makes E.ON's acquisition of control over Endesa subject to a number of modified conditions incompatible with Community law (*inter alia*, Articles 43 and 56 EC). Article 2 required Spain to withdraw by 19 January 2007 the modified conditions imposed by the Minister's decision which had been declared incompatible with Community law. The Spanish authorities did not, however, take any action to comply with this decision.

⁽⁶⁾ See IP/06/1265, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1265>.

⁽⁷⁾ See IP/06/1426, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1426>.

⁽⁸⁾ The new requirements imposed by the Minister's decision on E.ON include the obligations (i) to use Spanish domestic coal, (ii) not to divest Endesa's non-mainland assets, and (iii) to keep Endesa's brand.

⁽⁹⁾ See IP/06/1853, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1853>.

The Commission decided to send a **second letter of formal notice** to Spain on 31 January 2007 in which it concluded that the reduction of the duration and scope of some conditions and the clarifications introduced by the Ministerial decision (modifications (i) to (iii) above) were not sufficient to comply fully with the first Article 21 decision⁽¹⁰⁾. This letter of formal notice also concluded that Spain had failed to comply with the second Article 21 decision.

The Spanish authorities' reply to the Commission's additional letter of formal notice was not satisfactory and the Commission therefore decided on 7 March 2007 to issue a formal request to Spain to comply with its two Article 21 decisions. The request took the form of a **reasoned opinion**, the second stage of infringement proceedings under Article 226 EC⁽¹¹⁾.

The Spanish authorities replied to the reasoned opinion on 16 March 2007 without informing the Commission of any steps to withdraw the illegal measures. Since the Spanish Government did not withdraw the illegal measures, despite the reasoned opinion, the Commission decided on 28 March 2007 to refer Spain to the European Court of Justice for failure to comply with the first and second Article 21 decisions⁽¹²⁾. The application was lodged before the Court on 11 April 2007 (Case C-196/07 *Commission v Spain*)⁽¹³⁾.

The judgment of the ECJ

On 6 March 2008, the European Court of Justice found that Spain had failed to comply with the first and second Article 21 decisions requiring it to withdraw the conditions declared incompatible with EC law. This judgment is of material significance because it confirms the Commission's position that Member States cannot create unwarranted obstacles to mergers which fall under the Commission's exclusive jurisdiction. The judgment therefore clearly signals to all Member States that they must not violate EC law by adopting (without prior communication to and approval by the Commission) any State measures that restrict or have a negative impact on mergers with a Community dimension and are not necessary and proportionate for the protection of a public interest. It furthermore confirms that Member States must comply with the Commission's decisions requesting the withdrawal of illegal State measures.

⁽¹⁰⁾ See IP/07/116, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/116>.

⁽¹¹⁾ See IP/07/296, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/296>.

⁽¹²⁾ See IP/07/427, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/427>.

⁽¹³⁾ See OJ C 155, 7.7.2007, p. 10.

More generally, this judgment sends a strong signal that the Commission can and should continue to vigilantly ensure that Member States do not adopt unjustified restrictions on cross-border mergers, which the Commission considers vital for the proper functioning of the single market.

Furthermore, the Court clarified that, contrary to the Spanish authorities' arguments during the proceedings, the fact that E.ON abandoned the public offer on 10 April 2007, after the expiry of the deadline established in the reasoned opinion for the withdrawal of the illegal conditions, does not render the Commission proceedings devoid of purpose or interest. As the Court points out, the object of an action for failure to comply with Treaty obligations is established by the Commission's reasoned opinion and, even when the default has been remedied after the time-limit prescribed by that opinion, pursuit of the action still has an object. That object may consist, in particular, in establishing the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default.

Additionally, the Court concluded that Spain had not shown that it was absolutely impossible to implement the Commission's decisions. In this respect, the Court indicated that the fact that the bid had not produced effects did not necessarily imply an absolute impossibility of fulfilment

given that the formal elimination of the provisions contrary to the Commission's decisions was still possible.

Finally, this judgment is also of relevance for another infringement proceeding which the Commission has initiated against Spain likewise for failure to comply with a Commission decision adopted pursuant to Article 21 of the Merger Regulation. On 5 December 2007, the Commission adopted a decision declaring that Spain had breached Article 21 through the adoption (again without prior communication to and approval by the Commission) by the CNE of the decision of 4 July 2007 imposing on another merger with a Community dimension, the Enel/Acciona/Endesa transaction (COMP M. 4685), a number of conditions incompatible with Community law. Given that Spain had again failed to comply with the Commission decision of 5 December 2007, the Commission initiated infringement proceedings and on 31 January 2008 addressed a letter of formal notice to Spain.

The Spanish authorities filed an action for annulment of the 5 December 2007 Commission decision pursuant to Article 230 EC and requested interim measures, namely the suspension of the Commission's decision. On 30 April 2008, the Court of First Instance rejected the Spanish authorities' request for interim measures (see Case T-65/08 *Spain v Commission*).

The White Paper on damages actions for breach of the EC antitrust rules

Rainer BECKER, Nicolas BESSOT and Eddy DE SMIJTER ⁽¹⁾

1. Introduction

On 2 April 2008, the European Commission adopted a White Paper on damages actions for breach of the EC antitrust rules (hereinafter ‘the White Paper’) ⁽²⁾. It presents a set of recommendations to ensure that victims of competition law infringements have access to genuinely effective mechanisms for obtaining full compensation for the harm they have suffered.

The White Paper is the latest stage of a policy initiative, the premises of which were already laid down in Regulation 1/2003 that stressed the essential role of national courts in the application of the EC competition rules, for example by awarding damages to the victims of infringements ⁽³⁾. Given the importance of the right to damages in order to guarantee the effectiveness of the EC competition rules, as acknowledged by the European Court of Justice (ECJ) ⁽⁴⁾, and in view of the considerable hurdles faced by the victims wishing to exercise their rights in Europe ⁽⁵⁾, the Commission adopted in December 2005 a Green Paper ⁽⁶⁾ that identified potential ways forward.

a. From the 2005 Green Paper to the White Paper

The purpose of the Green Paper was to identify the main obstacles to a more effective system of damages claims, and to set out different options for further reflection to improve both follow-on and stand-alone actions. The Green Paper was met with broad interest in the antitrust community, and achieved its objective of **raising awareness on the right to compensation of victims of competition law infringements, and on the obstacles they face when attempting to enforce their rights.**

Encouraged by the comments on the Green Paper received from stakeholders, from the European Parliament, the European Economic and Social Committee and the Member States, and taking into account the recent case law of the ECJ, the Commission decided to publish a White Paper in order to encourage and further focus the ongoing discussions on actions for damages by setting out concrete measures aimed at creating an effective private enforcement system in Europe.

The Commission also made great efforts to assess the likely benefits and costs of various policy options that could address the current ineffectiveness of antitrust damages actions in the EU. In particular, it commissioned an extensive impact study by independent experts, who used existing scientific knowledge and data to conduct their own economic analysis of the likely effects of various measures to facilitate antitrust damages actions. Building on the findings of the study, the Commission analysed and compared the likely implications of the major policy options available ⁽⁷⁾. In its White Paper, the Commission further develops the specific policy recommendations which offer a balanced solution to the current, often inefficient and ineffective, compensation systems in place, while avoiding over-incentives that could lead to excessive or abusive litigation of the kind seen in some countries outside Europe.

⁽¹⁾ Directorate General for Competition, units A-4 and B-1. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165, 2.4.2008. The White Paper and the accompanying Staff Working Paper (SWP) are available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

⁽³⁾ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ L 1, 4.1.2003. See in particular recital 7.

⁽⁴⁾ Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, confirmed in joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

⁽⁵⁾ See the 2004 Comparative Study commissioned by the European Commission on the conditions of claims for damages in case of infringement of EC antitrust rules, at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

⁽⁶⁾ Green Paper on damages actions for breach of the EC antitrust rules (the ‘Green Paper’) COM(2005) 672 final. The Green Paper and the accompanying Staff Working Paper are available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

⁽⁷⁾ The external study and the impact assessment report are available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>.

b. The key objectives and underlying principles

Despite some recent signs of improvement in certain Member States, **the victims of EC antitrust infringements only rarely obtain reparation of the harm suffered**. In that regard, the impact study notes that successful damages actions are still rare, and that the majority of Member States have had no real experience of private antitrust damages actions to date. The ineffectiveness of the right to damages is largely due to various legal and procedural hurdles in the Member States' rules governing actions for damages. Indeed, traditional rules of civil liability and procedure are often inadequate for actions for damages in the field of competition law, due to the specificities of the actions in this field, namely: **complex factual and economic analysis, unavailability of crucial evidence and the often unfavourable risk/reward balance for claimants**.

The general objective of the White Paper is therefore to ensure that all victims of infringements of EC competition law have **access to truly effective mechanisms for obtaining full compensation** for the harm they have suffered. In designing the specific measures aimed at addressing the obstacles identified, the Commission followed three main guiding principles:

- **full compensation** is to be achieved for all victims. This necessarily entails consequences in terms of deterrence of future infringements and greater compliance with EC antitrust rules, particularly when the number of infringements detected increases;
- the legal framework for more effective antitrust damages actions is to be based on a **genuinely European approach**, with balanced measures rooted in European legal culture and traditions;
- the effective system of **private enforcement** by means of damages actions is meant to **complete, and not to replace** or jeopardise **public enforcement** of Articles 81 and 82 of the EC Treaty by the Commission and the national competition authorities (NCAs) of the Member States.

2. Compensating the victims of competition law infringements

The focus of the White Paper on compensating victims becomes clearest when considering the scope of the damages and the passing-on of overcharges.

a. The scope of the damages

(i) Full compensation

The ECJ confirmed in its *Manfredi* ruling that the principle of effectiveness requires Member States to **ensure that victims of competition law infringements are compensated for the actual loss** (which results from the illegal overcharge) **and the loss of profit** (which results from the reduced sales) caused to them ⁽⁸⁾. Moreover, in order to guarantee that this harm is compensated at real (rather than nominal) value, the ECJ requires that **(pre-judgment) interest shall also be paid**.

In its White Paper, the Commission fully endorses this broad definition of the harm caused by competition law infringements and the resulting obligation for the Member States (which is addressed both to the national legislator and to the national judge) to enable the victim to receive such full compensation. In its Staff Working Paper, the Commission expresses the hope that this clear instruction from the ECJ will suffice to have all the obstacles to full compensation that still exist in (some of) the Member States removed. However, if it were to appear that such is not the case, the Commission may want to re-examine what further measures are necessary to achieve that objective.

(ii) The calculation of damages

Even if it is clear under what heads of damage the victim of a competition law infringement may seek damages, the latter may still face difficulties in court because he cannot show (to the required standard) the extent of the harm suffered. For instance, under some circumstances it may be totally impossible for the victim to show the exact amount of the loss. In its White Paper and in the accompanying Staff Working Paper, the Commission formulates two suggestions to overcome these difficulties.

It first recalls that **the principle of effectiveness excludes calculation requirements**, as imposed by law or by the courts, **that make it excessively difficult for victims to obtain the damages to which they are entitled under Community law**. Legislators and, in the absence of their action, judges are thus obliged to mitigate these requirements to a more appropriate level. Naturally, the argument that such mitigation cannot be allowed because it risks deviating from the objective to compensate (the victim may obtain somewhat more, or less, than the actual damage suffered), cannot be accepted. Since compensation remains the objec-

⁽⁸⁾ See *Manfredi*, *supra* n. 4, paragraphs 60 and 95.

tive, judges must do their utmost to ensure that the damages awarded correspond as far as possible to the harm suffered. This approach is clearly reflected more by an approximation of that harm than by a refusal to award damages.

Secondly, the Commission is committed to produce **non-binding guidance on the calculation of damages**, in order to provide judges and parties with pragmatic solutions to these often complicated exercises. The challenge is to produce easily accessible economic calculation models and suitable approximate methods of calculation. In order to assist the Commission in the drafting of the guidance, a study has been tendered, the results of which should be ready in Spring 2009 ⁽⁹⁾.

b. The passing-on of overcharges

The compensation objective also determined the solution that was put forward in the White Paper for dealing with the passing-on of overcharges. That thorny issue, on which there is little clarity in the Member States' legislation and case-law, covers both the question (i) whether or not the infringer can invoke the passing-on defence and (ii) whether or not the one to which the overcharge has been passed on can claim damages for the resulting harm.

(i) The passing-on defence (shield)

Since the objective of the White Paper is to ensure that victims of competition law infringements receive compensation for the damage they have suffered, it goes without saying that, if ultimately there is no harm suffered, there should also be no compensation ⁽¹⁰⁾. **Purchasers of an overcharged product or service who have been able** (meaning that they have actually done so) **to pass on that overcharge to their own customers should therefore not be entitled to compensation** of that overcharge. However, the passing-on of the overcharge may well have led to a reduction in sales. Such loss of profits should obviously be compensated by the one who is responsible for the initial overcharge.

In order to avoid the infringer having to pay damages for an overcharge that has been passed on, the Commission feels that he should be able to invoke the passing-on as a defence. That defence, of course, needs to be proven according to the required standards. In order not to negate the right to compensation, those standards should not be

too low. For instance, the fact that a press release states that consumers are harmed by an infringement of competition law cannot constitute sufficient proof of the passing-on of the overcharges to the consumers.

(ii) The 'passing-on' claim (sword)

The compensation objective implies, as a corollary of the acceptance of the passing-on defence, that the one to whom the overcharge has been passed on, i.e. the ultimate victim, can claim compensation for the resulting harm. However, that ultimate victim, unlike those higher up in the distribution chain, may be less inclined to start an antitrust damages action. The reasons for that reluctance may be manifold, but issues of a low-value claim, an unattractive cost/reward balance, the difficulty of establishing causality with the initial infringement, remoteness, etc will certainly be among them.

To the extent that those ultimate victims have standing to claim damages ⁽¹¹⁾, the Commission makes **two types of suggestions** to enable these victims to bring their damages claims. First, it is suggested that they can **aggregate their claims via collective actions**. Secondly, their claims can be facilitated by a **presumption that the overcharge has been passed on in its entirety to their level**. That presumption can be rebutted by the infringer, for instance by referring to the fact that he has already paid compensation for that same overcharge to someone higher up in the distribution chain than the claimant. The latter example is evident when a joint action is brought by claimants from different levels in the distribution chain, but efforts should also be made to have it apply in the case of parallel or consecutive actions. Finally it should be noted that the said rebuttable presumption does not exempt the claimant from its duty to prove the initial infringement and the scope of the damage; the latter aspect is particularly relevant when the overcharge relates to an intermediate product.

⁽⁹⁾ The tender is published under COMP/2008/A5/10, and is available at: <http://ec.europa.eu/dgs/competition/proposals2/>.

⁽¹⁰⁾ Arguments of enforcement efficiency and deterrence are thus not accepted as autonomous arguments. They can only be accepted as secondary arguments to complement the compensation principle.

⁽¹¹⁾ Since the ECJ confirmed that "any individual can claim compensation for the harm suffered *where there is a causal relationship* between that harm and an agreement or practice prohibited under [EC competition law]" (see *Courage and Crehan*, *supra* n. 4, paragraph 26, and *Manfredi*, *supra* n. 4, paragraph 61, *our italics*), standing could be refused under national law due to the absence of sufficient causality, e.g. in cases of remoteness (see also *Manfredi*, paragraph 64: "in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed").

3. Access to justice

a. Collective redress mechanisms

It is clear that victims will rarely, if ever, bring a damages action individually when they have suffered scattered and relatively low-value damage. **In order to avoid these victims remaining uncompensated, it is necessary to provide for some form of collective redress.**

The issue of collective redress is a sensitive one and has attracted attention in the Member States and at EC level because of its importance for access to justice. This increased attention is also partly due to certain excesses that have been reported from other jurisdictions. This is therefore an area where the Commission has been careful to comply with its second guiding principle of adopting a balanced and genuine European approach, and has designed appropriate safeguards so as to avoid excesses.

The Commission suggests two types of collective redress mechanism. They offer alternative means of court action for the victims, such as final consumers or SMEs, that would otherwise be unable or unwilling to seek compensation given the costs, uncertainties, risks and burdens involved.

(i) *The first mechanism: opt-in collective actions*

An opt-in collective action combines in one single action the claims from those individuals or businesses who have expressed their intention to be included in the action. Such a system improves the situation of the claimants by making the cost/benefit analysis of the litigation more attractive, since it allows them *inter alia* to reduce the costs and share the evidence.

There has been much debate on whether the Commission should suggest an opt-in mechanism, which is closer to the Member States' legal traditions, or rather an opt-out mechanism, whereby the victims represented are all those who do not expressly opt out from the action. Opt-in collective actions are said to make the litigation more complex by requiring the identification of the claimants and the specification of the harm allegedly suffered, whereas an opt-out mechanism allows a wider representation of the victims and can therefore be seen as being more efficient in terms of corrective justice and deterrence. However, combined with other features, opt-out actions in other jurisdictions have been perceived to lead to excesses. On balance, the Commission considered it more appropriate to suggest opt-in collective actions.

(ii) *The second mechanism: representative actions brought by qualified entities*

A representative action for damages is an action brought on behalf of two or more individuals or businesses who are not themselves parties to the action. It is aimed at obtaining damages for the harm caused to the interests of all those represented. **The Commission suggests that a representative action can be brought by two different types of qualified entities.**

The first type of qualified entities covers entities **such as consumer organisations, trade associations or state bodies representing legitimate and defined interests, which are officially designated in advance by their Member State to bring representative actions for damages.** In order to be designated, i.e. 'endorsed' by their Member State, these qualified entities need to meet specific criteria set in the law. These criteria, together with the risk that the designation is withdrawn in case of excesses, will help prevent abusive litigation.

Given the nature of these qualified entities as well as the designation safeguard, the range of victims they can represent is not defined restrictively. Indeed, they are entitled to represent victims, not necessarily their members, which are identified or, in rather restricted cases, identifiable. While victims shall normally be identified either from the outset or at a later stage, the requirement of strict identification may sometimes be unnecessary, overly costly and burdensome. The possibility to represent 'identifiable' victims can be relevant particularly in a case where, in view of the minimal amount of damages to be awarded and the high costs of direct distribution, the court decides that distribution should be indirect, e.g. pursuant to the *cy-près* doctrine ⁽¹²⁾.

The second type of qualified entities covers **entities which are certified on an *ad hoc* basis by a Member State**, as regards a particular antitrust infringement, to bring an action on behalf of (all or some of) their members only. Eligibility is limited to entities whose primary task is to protect the defined interests of their members other than by pursuing damages claims (e.g. a trade association in a given industry). The various restrictions on standing (i.e. the ability to bring an action) are designed so as to avoid abusive actions, for

⁽¹²⁾ *Cy-près* distribution means that the damages awarded are not distributed directly to those injured to compensate for the harm they suffered but are rather used to achieve a result which is as near as may be (e.g. damages attributed to a fund protecting the interests of victims of antitrust infringements in general).

instance, when led by litigation vehicles specially constituted for the sole purpose of bringing damages actions.

One could assume that opt-in collective actions are likely to be used primarily by businesses or victims having suffered a non-insignificant individual harm, as they require at the outset a positive action from the victims. In contrast, the representative action mechanism is directly targeting the victims' traditional inertia when the harm suffered individually is very low. These two complementary collective redress mechanisms, together with the possibility for the victims to bring individual actions, constitute a set of solutions that will significantly improve the victims' ability to effectively enforce their right to damages.

b. Limitation periods

While acknowledging the importance of limitation periods for establishing 'legal peace', the Commission feels that these limitation periods should not be such that they bar claimants from bringing a damages claim when that is still legitimate. To achieve that balance, the White Paper contains suggestions both for stand-alone and for follow-on damages cases.

With regard to stand-alone cases, the main issue relates to the commencement of the limitation period, particularly in the event of a continuous or repeated infringement or when the victim cannot reasonably have been aware of the infringement, for instance because it remained covert for a long period of time. It would clearly be odd if a limitation period were to expire while the infringement is still ongoing or where the victim is simply not aware of the infringement. **The Commission has therefore suggested that the limitation period should not start to run before a continuous or repeated infringement ceases, or before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.**

To keep open the possibility of follow-on actions, the Commission considered a number of measures aimed at avoiding the limitation period expiring while public enforcement is still ongoing. One of those options was to suspend the limitation period during the public proceedings. The main drawback of that option, however, is that it may be impossible for parties to calculate the remaining period precisely, given that the opening and closure of proceedings by competition authorities are not always public knowledge. Moreover, if a suspension were to commence at a very late stage of the limitation period, there may not be enough time left to prepare a claim. **The Commission therefore suggests that a new limitation**

period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final. The Commission believes that such a rule would not unduly prolong the uncertainty for the infringer, while it would enable the claimant to bring a damages claim once the illegality of the behaviour has been finally established ⁽¹³⁾.

c. Costs of damages actions

Taking into account the predominant views expressed during the consultation on the Green Paper, as well as the beneficial effects of the 'loser pays' principle as the main costs allocation rule in terms of preventing abusive claims, the Commission decided not to suggest any specific changes to national cost regimes. However, **costs of damages actions represent a major disincentive for victims to exercise their right to damages**, particularly for claimants whose financial situation is significantly weaker than that of the defendant, and/or in situations where cost prevents meritorious claims being brought due to the uncertainty of the outcome. The Commission therefore felt it important to encourage Member States to reflect on their cost regimes, including the level of the court fees, the cost allocation rule and the ways of funding.

In its White Paper the Commission also highlights the **necessity for Member States to give due consideration to mechanisms fostering early resolution of cases**. It notes that the effectiveness of settlement mechanisms is directly related to the effectiveness of the mechanisms for seeking redress through court actions. Indeed, settlement mechanisms alone cannot guarantee the exercise of the victims' right to damages without there being an effective and credible judicial alternative. However, where the court alternative becomes credible — and this is the Commission's objective — early settlements are to be encouraged as they can significantly reduce or eliminate litigation costs for the parties and the costs to the judicial system.

4. Proving the case

Different sections in the White Paper address the specific difficulties that victims of antitrust infringements frequently encounter in proving their case, both in actions following a decision by a competition authority (follow-on actions) and in stand-alone actions ⁽¹⁴⁾. The measures proposed

⁽¹³⁾ This suggestion should thus be read in combination with the one on the probative value of NCA decisions (see point 4b below).

⁽¹⁴⁾ In the White Paper (see section 1.2 *in fine*), the Commis-

in this context concern, in particular, the disclosure *inter partes*, the effect of decisions of competition authorities and the issue of fault. The sections dealing with the passing-on issue, discussed above, contain a further proposal to facilitate proof for victims.

a. Access to evidence: disclosure inter partes

Victims of antitrust infringements find themselves in a dilemma: antitrust damages cases are very fact-intensive, as the finding of an infringement, the quantum of damage and the relevant causal links all require the often unusually complex assessment of economic interrelations and effects. Much of the corresponding evidence, however, often lies inaccessibly in the hands of the infringers, who sometimes go to considerable lengths to conceal this information. **The current systems of civil procedure in many Member States offer, in practice, no effective means to overcome the information asymmetry that is typical of anti-trust cases.** As a result, infringers are able to keep crucial evidence to themselves, which means that victims are discouraged from bringing a claim for compensation and, where they do, judges are not able to decide the case based on a full picture of the facts.

In the sections on disclosure of evidence, **the Commission's** desire to suggest balanced measures becomes particularly apparent. It **proposes a minimum standard** for more effective access to evidence across all EU Member States so as to avoid excesses in both directions. It is committed to avoid, on the one hand, overly wide-ranging, time-consuming and costly disclosure obligations that are prone to abuses (e.g. so-called 'discovery blackmail') and, on the other hand, major obstacles to revealing the truth simply because the relevant evidence happens to be under the control of the infringer. Moreover, the White Paper puts forward a solution that is capable of integration even in those systems of civil procedure of the continental legal tradition where obligations to disclose evidence to the court and the other party are less developed ⁽¹⁵⁾. To this end, the White Paper fur-

ther develops a mechanism that is already part of the Member States' legal orders, namely that underlying the Intellectual Property Directive 2004/48/EC. Under this approach, **obligations to disclose arise only once a court has adopted a disclosure order and they are subject to a strict control by this court.** This central role of the judge corresponds to the systems of civil procedure that applies in the vast majority of Member States. However, for a range of continental European countries, the proposal in the White Paper would mean a significant step forward towards more effective access to evidence.

Judges could order disclosure of information, documents or other means of evidence relevant to the claim once they are satisfied that a range of conditions are met. The first condition is that **the claimant (or the defendant ⁽¹⁶⁾) has asserted all the facts and offered all those means of evidence that are reasonably available to him**, provided that these are sufficient to make his claim a plausible one, i.e. he must show plausible grounds for suspecting that he suffered harm as a result of the antitrust infringement by the defendant. Member States which currently apply very strict requirements in terms of specification of facts and means of evidence would have to allow for an initial alleviation of these strict requirements in antitrust damages cases. The general standard of proof for ultimately winning a case would, however, remain unaffected ⁽¹⁷⁾.

The second condition is that **the claimant is unable, applying all reasonable efforts, to produce the means of evidence for which disclosure is envisaged.** The third and fourth conditions require that the claimant has specified sufficiently **precise categories of evidence to be disclosed**, and that the envisaged disclosure measure is **relevant to the case, as well as necessary and proportional in scope.** Specification of circumscribed categories of evidence is needed to allow the court to tailor the disclosure order to what is truly necessary in order to reveal the essential facts and proportionate in view of the nature and value of the claim, the seriousness of the alleged infringement and the addressee of the order. Courts must have some discretion to appreciate the specific circumstances of each individual case, and the Staff Working Paper mentions examples of how categories of

sion pursues the explicit policy choice to improve the effectiveness of damages actions regardless of whether or not they follow an infringement decision by a competition authority. Even where victims can rely on such an infringement decision, they still face particular difficulties in gathering the evidence required to demonstrate the quantum and the causation of the harm.

⁽¹⁵⁾ The reference to jurisdictions of the continental legal tradition is not meant to suggest homogeneity between these jurisdictions; indeed, particularly in relation to the rules on evidence, significant differences exist on the continent.

⁽¹⁶⁾ For reasons of equality of arms, this disclosure in antitrust damages cases should be available not only to support claims of claimants but also defences by defendants (where in the text above reference is made to 'the claimant', the same shall apply *mutatis mutandis* to defendants).

⁽¹⁷⁾ See SWP, paragraph 91.

evidence can be specified in a sufficiently precise manner while being comprehensive enough not to jeopardise effective access to evidence.

Further important issues addressed include the delicate question of how and to what extent **confidential information**, such as business secrets, can be protected in the proceedings before national courts without *de facto* precluding the exercise of the right to compensation, given the fact that much of the crucial evidence is likely to be commercially sensitive ⁽¹⁸⁾. Another important issue addressed is that **effective sanctions must be available in order to avoid a refusal to hand over evidence and the destruction of evidence** ⁽¹⁹⁾.

Among a number of measures aimed at **preserving the effectiveness of public enforcement** and, in particular, at maintaining the effectiveness of leniency programmes ⁽²⁰⁾, the White Paper contains an important exception to the disclosure obligations. 'Corporate statements', i.e. the voluntary presentations by a company of its knowledge of a cartel and role therein which are drawn up specially for submission under the leniency programme ⁽²¹⁾, should be protected against disclosure. This protection applies to all applications (successful or not) submitted under EC and national leniency programmes when the enforcement of Article 81 EC is at issue. A similar form of protection may be appropriate in the context of voluntary presentations as part of settlement submissions.

b. Probative value of NCA decisions

Where a breach of EC antitrust rules has been found in a decision by the European Commission, victims can rely on this decision as binding proof in civil proceedings for damages (see Article 16(1) of Regulation 1/2003). There is a range of compelling reasons for a similar rule in relation to decisions by national competition authorities when they find a breach of Article 81 or 82. At present, such a rule exists in the national law of only some Member States ⁽²²⁾. The Commission suggests that **a final decision by an NCA and a final judgment by a review court upholding the NCA decision or itself finding an infringement should be**

accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases.

Such a rule would not only increase legal certainty ⁽²³⁾, especially for victims of infringements, and enhance the consistency in the application of Articles 81 and 82 by different national bodies. It would also — and this is very important in terms of the effectiveness of antitrust damages actions — significantly increase the procedural efficiency of actions for antitrust damages and reduce the difficulties that the victims encounter when they have to prove their case. Without such a rule, infringers would be allowed to call into question their own breach of the law that has already been established in a binding decision by an NCA and, possibly, confirmed by a review court. Victims would have to formally prove, and courts in the civil proceedings would have to re-examine, all the facts and legal issues already investigated and assessed by a specialised public authority and often by a review court, the latter being the best placed body to ensure the legal and factual accuracy of NCA decisions. Such 're-litigation' would usually entail lengthy disputes between the parties and their legal and economic experts. This would not only add to the already considerable costs and duration of antitrust damages actions, but it would also be a factor which further increases the uncertainty of the victim's action for damages.

The rule suggested in the White Paper is (to some extent) modelled on Article 16(1) of Regulation 1/2003, i.e. based on a legal mechanism that is already part of the Member States' legal order and that is not, as further explained in the Staff Working Paper ⁽²⁴⁾, at odds with the principles of an independent judiciary and separation of powers.

The Commission does not limit the binding effect of an NCA decision to the domestic courts of the same Member State. This is not surprising given the cooperation and mutual consultation provided for in Regulation 1/2003, and given the objectives of legal certainty, consistency in the application of Articles 81 and 82 and enhancing the effectiveness of antitrust damages claims across the EU. Indeed, limiting the binding effect of NCA decisions to only one Member State would create a serious disincentive for victims of multi-state infringements (found by NCAs of several Member States) to concentrate their claims for compensation in one court. Such concentration of proceedings has

⁽¹⁸⁾ See SWP, paragraphs 112 *et seq.* On the need of balancing the right to judicial protection of victims of infringements of EC law and the right to privacy of the infringer see, in a different context, Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* (not yet reported).

⁽¹⁹⁾ See in more detail SWP, paragraphs 128 *et seq.*

⁽²⁰⁾ See in more detail SWP, chapter 10.

⁽²¹⁾ See points 6 and 31 of the EC Leniency Notice.

⁽²²⁾ See the references in footnote 65 of the SWP to the rules, for instance, in Germany, Hungary and the UK.

⁽²³⁾ See on this aspect in relation to civil proceedings following a Commission decision Case C-234/89 *Stergios Delimitis v Henninger-Bräu AG* ECR [1991] I-935 paragraph 47.

⁽²⁴⁾ See paragraphs 148 *et seq.*, see also footnote 64 of the SWP.

obvious advantages in terms of consistency and procedural efficiency for claimants, defendants and the judicial system alike. In the context of multi-jurisdictional cases, Article 6(1) of Regulation 44/2001 explicitly provides for tort victims to be able to cumulate their damages actions against all co-defendants before one court of the country where at least one of them is domiciled.

The Commission sees no need for an exception to the binding effect of NCA decisions from another Member State. All Member States are legally bound to fully respect the rights of defence and fair trial pursuant the European Convention on Human Rights and the EU Charter on Fundamental Rights ⁽²⁵⁾, and the corresponding possibilities of judicial review exist ⁽²⁶⁾.

c. *The fault requirement*

A final topic that is covered by the White Paper and which is relevant in the context of proving a case relates to the fault requirement. In some Member States it is sufficient to prove the infringement of the EC competition rules (and of course also the damage it has caused) in order to be awarded damages. Other Member States, however, require the claimant also to show that the infringer committed a fault, meaning that he acted intentionally or negligently. The idea behind this additional requirement is that infringers who did not know that they were breaking the law should not be held liable for the negative consequences of their behaviour. The Commission feels that the full application of this requirement to breaches of directly applicable EC public policy rules, such as the EC competition rules, cannot be reconciled with the principle of effectiveness of those rules ⁽²⁷⁾. That is not only the case because the burden of proving the fault lies with the claimant, who is often unlikely to have information that allows him to show intent or negligence. **The fault requirement in itself also introduces a difficulty to the acquisition of damages which can be disproportionate to the objective it seeks to achieve.**

The Commission understands, however, that **in some exceptional cases, it should be possible for the infringer to escape liability.** Such is the case when the infringer has taken every precaution that can be reasonably expected from him and nevertheless is found to have infringed the competition rules. That kind of **excusable error** on which the infringer can rely by way of defence may occur in novel and complex situations. Mere ignorance of the law, however, clearly cannot render an error excusable; one is bound by the law even if one has no knowledge of it. It will thus normally be irrelevant whether or not the undertaking actually realised that it was infringing Articles 81 or 82. Equally, reliance on wrong legal or other professional advice, as such, cannot exonerate an undertaking. Errors based on incorrect official statements by competent public entities, such as competition authorities and courts, should only be excusable where undertakings applying a high standard of care could reasonably rely on such statements.

5. Outlook

The analysis in the White Paper and its accompanying documents has shown that measures such as those discussed above are indispensable in order to address the obstacles faced by victims and to make the right to damages a realistic possibility for citizens and businesses across the EU. The Staff Working Paper concludes by recalling the Commission's view that some aspects of the issues listed in the White Paper may require EC legislative action to ensure the effectiveness of antitrust damages actions. In addition, it recommends the codification of the key aspects of the *acquis communautaire* and drawing up of non-binding guidance on the calculation of damages.

All of this will, of course, be reflected upon further in the light of the results of the consultation process. The period of public consultation ran until 15 July and more than 170 stakeholders submitted their comments on the White Paper and the accompanying documents, in particular the Staff Working Paper.

⁽²⁵⁾ See Article 6 of the Convention and Articles 47(2) and 48 of the Charter.

⁽²⁶⁾ The Commission, nonetheless, would not object if a Member State were to apply, as a further safeguard, an exception to the binding effect analogous to that contained in Article 34(1) of Regulation 44/2001 with respect to fair legal process; see SWP, paragraph 162.

⁽²⁷⁾ See, in this context, also the case law of the ECJ which only names the infringement and the damage caused as conditions for a right to damages (cf., the quote of *Manfredi* in footnote 11).

Helping to combat climate change: new State aid guidelines for environmental protection

Alexander WINTERSTEIN and Bente TRANHOLM SCHWARZ ⁽¹⁾

In a bid to meet the ambitious environmental targets the EU has set itself in its quest to combat climate change, on 23 January 2008, the Commission tabled a series of legislative proposals for policy measures addressing this issue. This 'energy and climate change package' ⁽²⁾ included a proposal amending the EU emissions trading Directive ⁽³⁾ and a proposal for a Directive promoting renewable energy ⁽⁴⁾. As part of that package, the Commission also adopted new State aid guidelines for environmental protection (hereinafter 'Guidelines').

This article provides a short presentation of the most important features of these Guidelines. It first sets the political and economic background and briefly recalls the role State aid can play in this context. The guiding principles and the main substantive provisions are then explained, followed by an overview of the four different types of assessment available for environmental State aid measures.

Political and economic background

In recent years, the issue of environmental protection and climate change has turned from a *niche* issue discussed by a closed circle of learned specialists into one of the most serious concerns of our times. The EU has not only been leading international efforts to combat climate change, it has also developed an integrated climate and energy

policy, including a number of headline political targets and a detailed action plan on how to achieve them ⁽⁵⁾. And finally, combating climate change has turned into a booming global market — defying the current economic slowdown — with almost €100 billion invested in renewables and other forms of low-carbon energy in 2007 ⁽⁶⁾.

Negative externalities...

One of the key features of environmental protection is the existence of 'negative externalities'. These occur when the private cost of an action, like driving a car or burning coal to produce energy, is lower than the cost of that action to society, e.g., in terms of pollution. Since under these circumstances the market fails to allocate costs correctly, private stakeholders lack the incentive to invest sufficiently in environmental protection. As a result, the market produces too much pollution.

... and the 'polluter pays' principle

This market failure can be remedied by ensuring that economic operators take the social costs of their action duly into account (i.e. 'internalise' those costs) and, consequently, reflect them in the final prices of their products. This is what the EC Treaty prescribes when it sets out, in Article 174(2) EC, that environmental policy should be based on the principle that 'the polluter should pay'. Indeed, if pollution becomes a real economic cost, companies will tend to maximise their profits by reducing this cost component and, therefore, reduce pollution at the same time. Also, if polluting goods are more expensive, demand will revert

⁽¹⁾ Directorate-General for Competition, unit A-3 State aid policy. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ 20 20 by 2020 — Europe's climate change opportunity, COM(2008)30 final of 23 January 2008.

⁽³⁾ For details, see 'Questions and answers on the Commission's proposal to revise the EU Emissions Trading System', MEMO/08/35 of 23 January 2008.

⁽⁴⁾ For details, see 'Memo on renewable energy and climate change package', MEMO/08/33 of 23 January 2007. Further components of this package are a proposal relating to the sharing of efforts to meet the Community's independent greenhouse gas reduction commitment in sectors not covered by the Emission Trading System (for details, see 'Questions and answers on the Commission's proposal for effort sharing', MEMO/08/34 of 23 January 2008) and a proposal for a legal framework on carbon capture and storage (for details, see 'Questions and answers on the proposal for a directive on the geological storage of carbon dioxide', MEMO/08/36 of 23 January 2008).

⁽⁵⁾ The 2007 Spring European Council agreed on an independent EU commitment to reduce greenhouse gases by at least 20% by 2020, compared to 1990 levels, plus a commitment to extend this reduction to 30% if other developed countries were to commit themselves to comparable emissions reductions and economically more advanced developing countries contribute adequately according to their responsibilities and respective capabilities. In addition, with regard to renewable energies, the Spring Council agreed on a binding target of 20% of total EU energy consumption by 2020, with a minimum of 10% for the share of biofuels in overall EU transport petrol and diesel consumption.

⁽⁶⁾ For more details, see the report from the United Nations Environment Programme quoted in *Financial Times*, 2 July 2008, page 2.

to less polluting sectors offering cheaper and more environmentally friendly goods, thus creating new markets for eco-industries.

Public intervention aimed at putting the 'polluter pays principle' into practice generally takes the form of either regulation — setting environmental standards at a level sufficiently high to eliminate negative externalities — or market-based instruments. In the EU, among the most favoured market-based instruments are taxes, charges and tradable permit schemes because they provide a flexible and cost-effective means of correcting this market failure ⁽⁷⁾. For the purposes of this article, two of these instruments warrant being mentioned.

The first is the EU Emissions Trading Scheme (hereinafter 'ETS'). Based on a Directive ⁽⁸⁾, the world's first and biggest international emissions trading scheme began operating on 1 January 2005. The ETS requires Member State governments to draw up national allocation plans (hereinafter 'NAPs') for each trading period. NAPs set the total amount of CO₂ that can be emitted by all the installations in each country covered by the scheme, as well as the number of emission allowances allocated to each individual installation. An installation that emits more CO₂ than it has allowances for would need to buy additional allowances on the market, while one that emits less has the possibility of selling its surplus allowances ('cap and trade') ⁽⁹⁾. Thus, in theory, those that can readily reduce emissions most cheaply will do so,

thereby reducing pollution at the lowest possible cost to society. The energy and climate change package of 23 January 2008, referred to above, includes a proposal to improve how the current system works ⁽¹⁰⁾.

The second instrument is the Energy Taxation Directive (hereinafter 'ETD') covering taxes levied on energy consumption ⁽¹¹⁾. Among other things, the Directive sets minimum levels of taxation for the energy products covered by it. Member States are free to set higher national rates, thus increasing the incentive to use energy more efficiently and thereby reduce levels of emissions still further. The Commission plans to review the Energy Taxation Directive in an effort to combine fiscal and environmental goals more effectively ⁽¹²⁾.

Complementing the polluter pays principle with State aid

There are a number of practical and political limitations to fully implementing the polluter pays principle. Internalising costs may not be feasible because their true value cannot be determined in money terms or because it conflicts with other policy objectives (e.g. social policy considerations). Similarly, it is not easy to set a tax at exactly the optimal level. Finally, there is the prisoner's dilemma faced by national regulators in the EU, who are all aware that higher environmental targets would be beneficial to the whole Union but none of them wants to be the first to move and thus create additional compliance costs for busi-

⁽⁷⁾ See the Green Paper on market-based instruments for environment and related policy purposes, COM(2007)140 final of 28 March 2007.

⁽⁸⁾ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10. 2003, p.32.

⁽⁹⁾ The Commission scrutinises NAPs against 12 allocation criteria listed in the Emissions Trading Directive. The criteria seek, among other things, to ensure that plans are consistent with reaching the EU's and Member States' Kyoto commitments, with actual verified emissions reported in the Commission's annual progress reports and with technological potential to reduce emissions. Criterion 5 provides that allocation must not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities, in accordance with the requirements of the Treaty, in particular Articles 87 and 88 EC thereof. The Commission decisions approving, in part or in full, the different NAPs can be found on the Environment DG's website: http://ec.europa.eu/environment/climat/2nd_phase_ep.htm. In this context, it is important to stress that those approval decisions contain only a *prima facie* State aid assessment and do not, therefore, constitute decisions pursuant to Article 88 EC, see CFI in case T-387/04, EN BW Energie Baden-Württemberg v. European Commission, ECR 2007, II-1197, point 133.

⁽¹⁰⁾ Under this proposal, there will be a single EU-wide cap on the number of emission allowances, instead of national caps, which decreases along a linear trend line, including beyond 2020; a much larger share of allowances will be auctioned instead of allocated for free; and harmonised rules governing free allocation will be introduced. The scope of the system will be widened to include a number of new industries. Finally, Member States will be allowed to exclude small installations from the scope of the system, provided that they are subject to equivalent emission reduction measures.

⁽¹¹⁾ The Directive provides that electricity and certain uses of certain energy products should be taxed. The main taxable energy products are mineral oils, natural gas, coal and other solid hydrocarbons. Energy products are only liable for tax when they are used as motor fuel and for heating. Taxation of energy products is not harmonised when they are used as raw materials in industrial processing. See Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003, p. 51.

⁽¹²⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions — Commission Legislative and Work Programme 2008, COM(2007)640 final of 23.10.2007.

nesses in their respective countries, whereas competitors from other jurisdictions do not have to contend with such costs.

One solution for this dilemma is for all Member States to agree on a common approach ⁽¹³⁾. This was achieved, for example, on minimum levels of energy taxation (i.e. ETD). In the same vein, the Commission has proposed legislation to reduce the average CO₂ emissions of new passenger cars by 2012 ⁽¹⁴⁾. The difficulty with a harmonised approach is that, because of the EU decision-making process, the final outcome tends to reflect the lowest common denominator and features a multitude of exceptions and derogations.

Therefore, from an environmental protection point of view, Member States should be encouraged to individually lead the way by adopting stricter standards on their respective territories. By the same token, companies should be encouraged to improve their level of environmental protection beyond what is mandatory or profitable. This is where State aid can play a useful role, in particular by assisting both companies whose economic situation is most affected by such stricter national standards and companies who voluntarily incur additional costs in order to increase environmental protection. Thus, State aid can be a useful complementary tool in cases where the polluter pays principle cannot be applied in full. At the same time, it must be stressed that State aid cannot be allowed in cases where it would directly counteract that principle, e.g. by actually relieving the polluter of the costs of its pollution. This kind of aid would only aggravate the market failure, not remedy it.

For these reasons, the Guidelines were an important part of the energy and climate change package, the aim being to provide the right incentives for Member States and industry to increase their efforts for the environment. They strive to strike the right balance between generous support mechanisms for well targeted environmental aid and the preservation of competition, which is necessary for the market-based instruments proposed by the package to work properly. The remainder of the article focuses on the principal features of the Guidelines, in particular the guiding principles, the main substantive provisions and the different types of assessment.

Guiding principles

Like the Risk Capital Guidelines ⁽¹⁵⁾ and the Framework for State aid for research and development and Innovation ⁽¹⁶⁾ of 2006, the new Guidelines put into practice the balancing test ⁽¹⁷⁾ set out in the State Aid Action Plan. Thus, the Commission focuses, *inter alia*, on the incentive effect and the proportionality of the aid.

Incentive effect

Like any other State aid measure, to be compatible with the Treaty State aid for environmental protection must result in the aid recipient changing its behaviour in pursuance of the defined Community objective — which, in this particular case, is to increase the level of environmental protection. For this purpose, it is crucial to correctly identify the counterfactual scenario, i.e. to determine what happens without the envisaged aid (for more details, see below under proportionality). For example, the incentive effect would be lacking where the investment concerned would also have been made without the aid, e.g. because it would have been economically attractive in its own right or because it is required by Community law ⁽¹⁸⁾.

In this context, it is interesting to note that for most major companies it has become *de rigueur* to stress their credentials in the area of environmental protection and combating climate change ⁽¹⁹⁾. Consequently, there is good reason to believe that a number of environmental investments may not only yield important image improvements but also

⁽¹⁵⁾ OJ C 194, 18.08.2006, p. 2.

⁽¹⁶⁾ OJ C 323, 30.12.2006, p. 1.

⁽¹⁷⁾ The balancing test operates in three steps: 1) Is State aid aimed at a well-defined objective of common interest? 2) Is the measure designed to address the market failure or another objective (appropriate instrument, incentive effect and proportionality)? and 3) Does it involve limited distortion of competition and effect on trade, thus making the overall balance is positive?

⁽¹⁸⁾ In general, aid may not be granted where Community standards are already adopted, even when these standards have not yet come into force. By way of exception, aid for the acquisition of new vehicles for road, railway, inland waterway and maritime transport complying with adopted Community standards is permissible where such acquisition occurs before they enter into force and where the new Community standards, once mandatory, will not apply retroactively to already purchased vehicles, see point 85. By derogation, aid for early adaptation to future Community standards may also be allowed, see points 87 ff.

⁽¹⁹⁾ A cursory look at major European newspapers and magazines during the month of June 2008 showed advertisements by, *inter alia*, petrol companies, steel companies, computer chip producers and even shampoo producers carrying this message. The same is true of many corporate web pages.

⁽¹³⁾ Incidentally, where the market is global this kind of EU-wide harmonised approach merely displaces the prisoner's dilemma to a global level.

⁽¹⁴⁾ See IP/07/1965 of 19 December 2007

that they have in fact become indispensable given the environmental awareness and preferences of today's consumers.

The level of detail when assessing the incentive effect depends on whether the assessment is made in the context of a standard or a detailed assessment (see below).

Proportionality and eligible costs: net extra cost approach

To ensure that the amount of aid is limited to the minimum, the Commission will consider only the extra investment costs to be eligible that are necessary to achieve a higher level of environmental protection. In addition, these extra investment costs must be net of any operating benefits and/or costs ⁽²⁰⁾.

The first step in calculating the extra investment cost is to determine the — credible — counterfactual situation, i.e. the level of investment that would have yielded a comparable performance but, at the same time, would have been environmentally less friendly — and thus cheaper. The difference between the costs of the two investments is the gross extra cost.²¹ The second step is to take account of the possible operating benefits and/or operating costs of the envisaged investment. Deducting the former and/or adding the latter gives the net extra investment cost.

Assuming that the above methodology adequately captures all the benefits that the company might derive from the extra investment, it could be argued that State aid covering the entirety of the net extra costs would be proportionate because the beneficiary would not receive more than the costs actually incurred in the environmental investment. However, this assumption does not hold, essentially for two reasons. First, the substantive rules set out in more detail below provide for operating benefits to be taken into account merely for a limited initial period following the investment (i.e. generally five years). Second, certain types of benefits which are not always easy to measure — such as the 'green image' enhanced by an environmental investment — are not taken into account in this context.

Consequently, for the aid to be proportionate the Commission decided not to allow 100% cover-

age of the extra cost — although the maximum intensities set out in the Guidelines come close to 100% in a number of instances (see the table in the annex to the Guidelines listing all aid intensities). The only exception to this principle is where investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria ⁽²²⁾. Such a process effectively ensures that all possible benefits that might flow from the additional investment have been factored into the respective bids and that, therefore, State aid amounting 100% of the eligible investment cost can be deemed to be limited to the minimum necessary.

As regards operating aid, proportionality is ensured by limiting compatible State aid to covering the net extra production costs for a limited period of time (in the case of energy-saving) or to the difference between production cost and the market price of the form of energy concerned (in the cases of renewable energy and cogeneration). Similarly, the Guidelines provide that support schemes using market mechanisms or tenders must not result in overcompensation. Finally, proportionality of aid in the form of environmental tax exemptions/reductions and tradable permit schemes is ensured through a number of conditions and safeguards designed to prevent the beneficiary from receiving undue advantages.

Principal rules of substance

Investment aid

With regard to the net extra investment cost, the Guidelines set out the permissible investment aid intensities for a number of categories of aid measures, most of the categories being carried over from the previous Guidelines. The Guidelines also kept the rule by which operating benefits and costs related to the extra investment are taken into account not over the whole lifetime of the investment, but usually only during the first five years.

Aid intensities — novelties

The main novelty is that the basic aid intensities have been significantly increased across the board.

In addition, the possibilities of adding various bonuses have changed. The previous regional bonus has been scrapped because the environmental market failure is not considered to depend on the characteristics of the region concerned. Similarly, the 10% bonus for renewable energy production serving an entire community is discontinued.

⁽²⁰⁾ The Commission did consider alternative methods of calculating eligible costs but came to the conclusion that the net extra costs approach is the best suited to ensuring necessity and proportionality.

⁽²¹⁾ There is no need to identify a reference investment in cases where the extra environmental protection-related cost can be readily and accurately established, e.g. where an existing production process is upgraded.

⁽²²⁾ It is important to note that it is the State aid that is subject to the bidding process, not the project itself.

On the other hand, as in the previous Guidelines, the intensities are higher for SMEs than for large enterprises, but the new Guidelines make a further distinction between small and medium-sized enterprises, to the effect that small enterprises are now eligible for a 20% bonus whereas medium-sized enterprises maintain a 10% bonus compared to large ones. In addition, a new 10% bonus for eco-innovation is introduced. This bonus applies to projects that address the dual market failure linked to the higher risks of innovation, coupled with the environmental aspect of the project. It is important to stress that the Guidelines cover only the acquisition of an eco-innovation asset or the launching of a project that enables the beneficiary to increase the level of environmental protection resulting from its activities. In contrast, the design and manufacture of environmentally friendly products, machinery or means of transport that use less in the way of natural resources are not covered by the Guidelines. For innovation in those cases, the rules set out in the Framework for State aid for research and development and innovation ⁽²³⁾ could be relevant.

Specific provisions for individual aid categories — novelties

Going beyond Community standards

A new section was introduced dealing with aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards. As a rule, State aid for investments made to comply with already adopted Community standards is not likely to change the beneficiary's behaviour and thus will be deemed not to have the required incentive effect. By derogation from that principle, the Guidelines allow aid for the acquisition of new transport vehicles complying with adopted Community standards where such acquisition occurs before they enter into force and, once mandatory, they will not apply retroactively to already purchased vehicles. Aid may also be granted for retrofitting operations that merely upgrade a transport vehicle to Community standards, where those standards were not in force when the vehicle was put into operation.

Another exception has been made to the principle that aid may not be granted for the purposes of complying with adopted Community standards. Whereas the previous Guidelines provided for aid for SMEs for a period of up to three years after adoption, this possibility has been replaced by a better targeted measure providing an incentive to

all companies to comply with adopted Community standards earlier than legally required. The aid intensity is graduated according to the size of the company concerned and according to how much earlier the adaptation occurs.

Environmental studies

Recognising that companies often fail to correctly gauge the actual possibilities and benefits of, for example, energy-saving measures — leading to overall underinvestment — the new Guidelines provide for aid for studies linked to possible investments enabling the company to go beyond Community standards, save energy or produce energy from renewable sources.

Energy-saving

The Guidelines provide for an additional incentive for SMEs to undertake energy-saving investments by shortening the generally applicable five-year period following the investment during which operating benefits related to the extra investment are deducted to three years. For large undertakings that are not part of the ETS, this period is four years and, finally, for large undertakings that are part of the ETS it is five years ⁽²⁴⁾. This period can be reduced to three years even for large undertakings where they can demonstrate that the depreciation time of the investment does not exceed three years.

Energy-efficient district heating

A new section deals with aid for energy-efficient district heating that leads to primary energy-saving. However, State aid for the financing of the necessary infrastructure only falls under the Guidelines to the extent that the provisions on energy-saving are applicable. If not, such aid will have to be assessed directly under Article 87(3)(c) EC.

Waste management

A section has also been introduced to deal with aid for waste management, i.e. the treatment of waste produced by other undertakings (as opposed to waste produced by the company itself). These provisions take their lead from the criteria set out in recent Commission decisions in this area.

Aid for relocation

Aid for relocation was previously confined to companies creating major pollution. The Guidelines

⁽²³⁾ See footnote 16 above.

⁽²⁴⁾ ETS companies have a longer period than non-ETS companies because ETS companies do not take into account their benefits from proceeds flowing from the sale of tradable permits issued under the European Trading System.

introduce a new possibility of granting aid also for the relocation of establishments posing a high risk to the environment in case of accident ⁽²⁵⁾.

Tradable permit schemes

As regards tradable permit schemes, the Guidelines first recall that these may involve State aid in a number of instances, in particular when allowances are granted for less than their market value ⁽²⁶⁾. The Guidelines contain two sets of assessment criteria. The first set is based on the approach used by the Commission when assessing the various NAPs under the ETS Directive ⁽²⁷⁾, while the second set is similar to the necessity and proportionality test applied for tax reductions/exemptions (see below). By derogation, the second set of criteria do not apply to the trading period ending on 31 December 2012.

Operating aid

The possibilities of granting operating aid for energy-saving, renewable energy sources and cogeneration have been maintained in principle. Therefore, operating aid for energy-saving can be granted for a maximum period of five years to cover the net extra production costs resulting from the investment. With regard to aid for renewable energy sources, Member States continue to be able to choose between compensating for the difference between the cost of producing energy from renewable sources and using market mechanisms such as green certificates or tenders ⁽²⁸⁾. Under certain conditions (see below), Member States may also grant operating aid to new plants producing renewable energy on the basis of the external costs avoided.

One novelty is that aid for investment and/or operating aid for the production of biofuels will henceforth only be permitted for sustainable biofuels. Indeed, the Commission takes the view that State aid is an appropriate instrument only for those uses of renewable energy sources where environmental benefit and sustainability are manifest. In particular, biofuels not fulfilling the sustainability criteria set out in the Commission's proposal for

a Directive promoting renewable energy ⁽²⁹⁾ will not be considered eligible for State aid.

Finally, aid in the form of reductions of or exemptions from environmental taxes — which makes up the bulk of all environmental State aid granted in the EU ⁽³⁰⁾ — is now subject to a specific set of rules (see below).

Four types of assessment of environmental State aid

Following the adoption of the General Block Exemption Regulation on 7 July 2008 ⁽³¹⁾ (hereinafter GBER), the 'three stream' model for assessing State aid measures is now in place: below a certain threshold, straightforward investment aid measures will fall under GBER while less straightforward and operating aid measures will be subject to standard assessment under the Guidelines. Above the thresholds, the investment or operating aid measure will fall under detailed assessment. Finally, exemptions/reductions from environmental taxes will either fall under the GBER or be subject to a self-standing set of provisions outside the usual standard/detailed assessment matrix.

General Block Exemption Regulation

A separate article in the following issue of the Newsletter will present the GBER in more detail. The following paragraphs focus on the parts that are of relevance to environmental protection.

Incentive effect

Aid granted to SMEs covered by the GBER is deemed to have an incentive effect if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned. With regard to aid granted to large companies, Member States must also, before granting the individual aid concerned, verify that the documentation prepared by the beneficiary meets one of several criteria set out in Article 8 of the GBER (e.g. material increase in the size of the project/activity due to the aid).

⁽²⁵⁾ Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances.

⁽²⁶⁾ The CFI has confirmed this approach in its ruling in Case T-233/04, Netherlands/Commission, 10 April 2008, not yet reported.

⁽²⁷⁾ As mentioned earlier, those assessments were made in the context of the NAP procedure and not on the basis of Article 88 EC, which is why they do not amount to State aid decisions.

⁽²⁸⁾ The same applies, *mutatis mutandis*, to cogeneration.

⁽²⁹⁾ See footnote 4 above. Once the Directive has been adopted by the European Parliament and the Council, the Commission will apply the sustainability criteria set out in the final text.

⁽³⁰⁾ For details and figures, see the Spring 2008 update of the Scoreboard, COM(2008)304 final of 21.05.2008, http://ec.europa.eu/competition/state_aid/studies_reports/2008_spring_en.pdf.

⁽³¹⁾ Not yet published in the OJ, see http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm

Eligible costs and aid intensities

As under the Guidelines, eligible costs are limited to the extra investment costs needed to achieve a higher level of environmental protection.

However, given the potential complexities regarding the deduction of benefits deriving from the extra investment (see above), the GBER introduces a simplified method of calculation whereby operating benefits and operating costs are not taken into account at all.³² At the same time, the maximum aid intensities provided for the different categories of environmental investment aid concerned have been reduced systematically compared to the Guidelines.

Individual notification thresholds and types of measures covered

With regard to environmental protection, the GBER only covers investment aid (whether granted ad hoc or on the basis of a scheme), the grant equivalent of which does not exceed EUR 7.5 million per undertaking per investment project. Incidentally, the same threshold also triggers a detailed assessment in the context of the Guidelines.

The GBER sets out the various types of environmental aid for which the Commission has sufficient experience and can define straightforward parameters and conditions for waiving the notification requirement. Thus, the GBER covers investment aid enabling undertakings to go beyond Community standards for environmental protection or to increase the level of environmental protection in the absence of Community standards; aid allowing SMEs to adapt early to future Community standards that increase the level of environmental protection; environmental investment aid enabling undertakings to achieve energy-saving; environmental investment aid for high-efficiency cogeneration; environmental investment aid for the promotion of energy from renewable energy sources (³³); and aid to undertakings for environmental studies.

(³²) As regards investment aid for energy-saving measures, Member States will be able to choose either the simplified method of calculation or the full cost calculation as set out in the Guidelines (see above in the main text). However, in view of the particular practical difficulties which may arise when applying the full cost calculation method, these cost calculations should be certified by an external auditor.

(³³) Note that, following the approach taken in the Guidelines, aid for the production of biofuels is exempted only to the extent that the aided investments are used exclusively for the production of sustainable biofuels.

Specific provisions apply to environmental aid schemes in the form of reductions from environmental taxes fulfilling the conditions of ETD (see below).

Guidelines: standard assessment

Measures not covered by the GBER but that are below the thresholds set out in the Guidelines — i.e. EUR 7.5 million for investment aid to one undertaking and a number of thresholds for operating aid — will be assessed under a standard assessment and will benefit from a number of legal presumptions:

For example, the incentive effect will be presumed to apply for all categories of aid granted to an SME (below the individual notification thresholds) on sole condition that the aided project has not started before the aid application. Therefore, only for aided projects of big companies will the incentive effect have to be demonstrated by means of reference to the credible counterfactual situation.

Similarly, the Commission presumes that measures subject to the standard assessment address a market failure hampering environmental protection, or improve on the level of environmental protection, and that they are proportionate and have a limited negative impact on competition and trade. In other words, if the conditions under the standard assessment set out in Chapter 3 — including, of course, the aid intensities — are met, the balancing test is presumed to be satisfied.

Guidelines: detailed assessment

These presumptions no longer hold when the aid amount reaches certain levels. In order to ensure a proper assessment of such big cases under the balancing test, the Commission will conduct a more detailed assessment of any individual case of investment or operating aid, granted under an authorised scheme or on an ad hoc basis, where the aid amount or the production capacity exceed the above-mentioned thresholds or where Member States want to grant operating aid to new plants producing renewable energy on the basis of the external costs avoided.

A detailed assessment is a proportionate assessment, depending on the potential distortion of the case. Accordingly, the fact that a detailed assessment is carried out does not necessarily mean that a formal investigation procedure needs to be opened, although this may be the case for certain measures. Indeed, recent experience in the area of research, development and innovation shows that the Commission is capable of concluding a detailed assessment without formally opening an investigation procedure in the usual timeframe.

In the course of a detailed assessment, the Commission will have a closer look at all the elements of the balancing test. In so doing, the Commission will take account of factual information and data provided by the notifying Member State, e.g. evaluations of past State aid schemes or measures, impact assessments made by the granting authority, other studies related to environmental protection and information about the beneficiary and the market in which the company operates.

Guidelines: a facts-based assessment of tax reductions/exemptions

The Guidelines provide a separate and self-standing set of criteria for the assessment of aid schemes in the form of reductions or exemptions from environmental taxes ⁽³⁴⁾.

The first condition that has to be met by any such reduction/exemption is that it contributes, at least indirectly, to an improvement in the level of environmental protection and that the reductions/exemptions do not undermine the general objective pursued ⁽³⁵⁾.

Another condition is that any reduction/exemption from harmonised taxes must be compatible with the relevant applicable Community legislation and comply with the limits and conditions set out therein ('two-window' requirement).

Under the GBER, environmental aid schemes in the form of reductions from environmental taxes fulfilling the conditions of the ETD are exempt for a period of 10 years where the beneficiaries pay at least the Community minimum tax level set by the ETD.

However, in cases where beneficiaries do not pay at least the Community minimum tax level or where no Community-wide harmonisation exists, aid in the form of reductions/exemptions will be considered compatible for a period of 10 years only if the Commission finds them to be both necessary and proportionate. This is a departure from the assessment of such exemptions/reductions under the previous Guidelines and aims at a more facts-based analysis of their justification and their impact on competition and trade.

The Commission will start its analysis by looking at the respective sector(s) or categories of beneficiaries covered by the exemptions/reductions, as well as at the situation of the main beneficiaries in

each sector concerned and how the taxation can contribute to environmental protection. In this context, the Commission will want the exempted sectors to be properly described and a list of the largest beneficiaries for each sector should be provided (considering notably turnover, market shares and size of the tax base). For each sector, information should be provided on the best performing techniques within the EEA in terms of the reduction of environmental harm targeted by the tax.

On that basis, the Commission will look at whether the notified reduction/exemption is necessary for introducing or maintaining a high level of taxation, which, in turn, contributes directly to improving the level of environmental protection. The Commission will accept the aid as being necessary where the following cumulative conditions are met: (a) beneficiaries must be selected according to objective and transparent criteria and the aid must be granted in a non-discriminatory way, (b) the beneficiaries would have to bear a substantial increase in production costs if they had to pay the full tax rate ⁽³⁶⁾ while (c) being unable to pass on this increase to customers without leading to significant sales reductions.

In practice, this means nothing more — but also nothing less — than requiring a facts-based justification, for each sector concerned, for granting derogations from the generally applicable tax rate. For example, with regard to the possibilities of passing on (or not) any cost increases to consumers, Member States may provide estimates of the product price elasticity of the sector concerned in the relevant geographic market together with estimates of lost sales and/or reduced profits for the companies in the sector/category concerned. Incidentally, the Commission has also suggested this facts-based approach in the context of the proposed ETS reform in order to determine, if this were to become at all appropriate, specific sectors or sub-sectors where it can be duly substantiated that the risk of carbon leakage exists.

Once the reduction/exemption has passed this necessity test, the Commission will check whether it is also proportionate. In so doing, the Commission will accept that a reduced rate of at least 20% of the generally applicable rate in the Member State concerned will be proportionate. Member States can grant bigger reductions as long as they can be justified in terms of limited distortion of competition. Another option for Member States is

⁽³⁴⁾ In other words, such schemes are not subject to a standard assessment and nor do thresholds for the detailed assessment apply.

⁽³⁵⁾ See the Commission decision in case N 643/2006, Germany, which confirms that this is a substantive criterion.

⁽³⁶⁾ With regard to energy products and electricity, 'energy-intensive businesses' as defined in Article 17(1)(a) of the ETD are deemed to fulfil this criterion as long as that provision remains in force.

to make such derogations conditional on the conclusion of agreements with the recipient undertakings or associations, whereby the latter commit themselves to achieving environmental protection objectives that have the same effect as the 20% rate mentioned above or the Community minimum tax level (if applicable). A third option is to lay down criteria ensuring that each individual beneficiary pays a proportion of the national tax level, which is broadly equivalent to their specific environmental performance compared to a performance based on the best performing technique in the EEA.

Final provisions and outlook

The Guidelines entered into force on 2 April 2008 and will remain applicable until 31 December 2014.

Together with the GBER, the major components of the new State aid architecture are now in place. On the one hand, aid measures that are unlikely to have a negative impact on competition are either exempt from the notification requirement (GBER) or they benefit from a standard assessment under the relevant horizontal rules, including a number of legal presumptions. On the other hand, measures that are more likely to raise competition concerns will be subject to a more detailed and facts-based review.

Over time, the Commission hopes that this overall approach will make life simpler for business and Member States and, at the same time, ensure that potentially harmful State aid is properly assessed.

The E.ON seals case — €38 million fine for tampering with Commission seals

Oliver KOCH and Dominik SCHNICHELS ⁽¹⁾

‘The team will be aware that a broken seal is a breach of the rules in itself’ ⁽²⁾

In January 2008, the Commission — making use of its new powers under Article 23(1) of Council Regulation (EC) No 1/2003 ⁽³⁾ for the first time — imposed a fine of EUR 38 million on the German energy company, E.ON Energie AG (E.ON), for a breach of the Commission’s procedural rules. The Commission had found a seal broken on a door of E.ON’s premises during an inspection in May 2006. The article summarises the facts and the legal assessment of the decision ⁽⁴⁾.

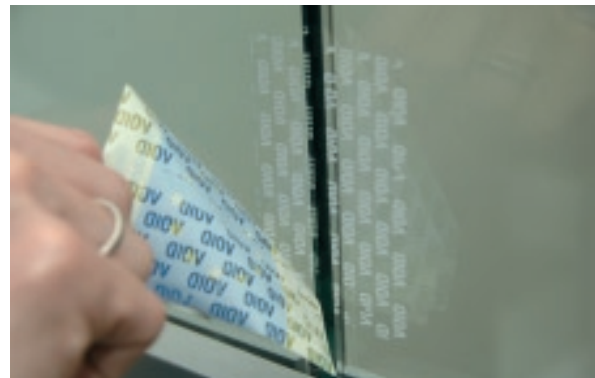
1. The events of the night of 29 May 2006

On 29 May 2006 the Commission carried out an unannounced inspection at E.ON’s premises, based on information that the E.ON Group was involved in anti-competitive practices in the field of energy ⁽⁵⁾. The inspection team collected a large number of documents, which could not be copied and fully registered during the first day of the inspection. In line with the Commission’s usual

practice in such a case ⁽⁶⁾, the inspection team stored the collected documents in a room made available to the Commission by E.ON. After the door was locked and a key handed over by E.ON, an official Commission security seal was affixed to the door in order to make any unauthorised access visible. E.ON was informed of the significance of the seal and the consequences of any breach of it.

The Commission’s seals are made of plastic film. If they are removed, they do not tear, but show ‘VOID’-signs which remain irreversibly visible on their surface (see picture 1).

Picture 1: Illustration of the functioning of a Commission security seal (simulation)



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When the inspection team returned the next morning, accompanied by E.ON representatives and external lawyers in order to open the door, it found that the seal, although still sticking on the door where it had been affixed, was no longer intact. Instead, the seal showed the typical indications of a seal breach, namely ‘VOID’-signs visible on the entire surface of the seal. Moreover, the team found traces of the adhesive on the door and on the door frame, indicating that someone had removed the seal and displaced it about 2 mm

⁽¹⁾ Directorate General for Competition, unit B-1 and Task Force Pharmaceuticals. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors. The authors want to thank in particular Mr Robert Klotz, who was in charge of the investigation until mid 2007.

⁽²⁾ BBC comment on the sanction imposed on the Formula One team McLaren by the automobile association FIA, after a seal was missing on the electronic box of the car of race driver Mikka Hakkinen in July 2000. McLaren, although contesting the breach of the seal, had ultimately to pay a \$ 50.000 fine and was taken off 10 points in the Constructors Championship (see: <http://news.bbc.co.uk/sport1/hi/motorsport/845149.stm>).

⁽³⁾ OJ L 1, 4.1.2003, p. 1 (in the following text referred to as ‘Regulation 1/2003’). Regulation 1/2003 as amended by Regulation (EC) No 411/2004 (OJ L 68, 8.3.2004, p. 1). The maximum amount of the fines was increased from EUR 5.000 under regulation 17/62 to 1% of the company’s turnover under regulation 1/2003 (see Art. 15 (1) of Regulation 17/62, OJ of 21.2.1962, p. 204-211, and Art. 23(1) of Regulation 1/2003).

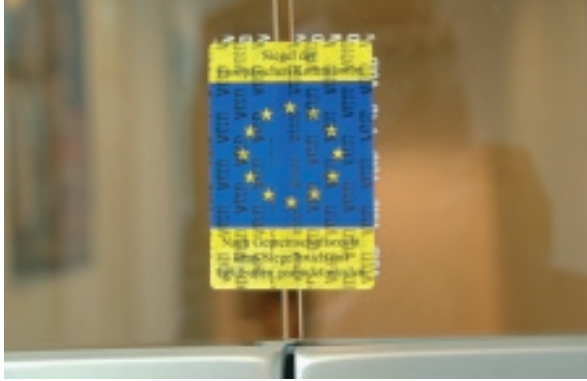
⁽⁴⁾ A non-confidential version of the decision is available under http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_326.

⁽⁵⁾ See MEMO/06/220, available under: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/220>.

⁽⁶⁾ It may be noted that the Commission, unlike many national competition authorities, has no powers to confiscate documents or whole computers, but is required to make copies of the relevant documents; see Article 20(2) of Regulation 1/2003.

upwards and sideways when re-affixing it ⁽⁷⁾. The inspection team also found traces of glue on the back of the seal, indicating that the seal had been tampered with.

Picture 2: Illustration of the state of the seal as found by the Commission (simulation)



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The state of the seal was documented in a protocol. When the door to the locked room was eventually opened to allow the team to continue their inspection, the team was unable to ascertain whether the documents stored in the room were still complete or whether any documents were missing.

2. The course of the proceedings

E.ON denied that it had broken the Commission seal. It argued that the Commission was in possession of the only key to the room, which would exclude any possibility of someone entering the room. However, it eventually emerged that around 20 keys were circulating among E.ON employees ⁽⁸⁾. Later in the proceedings, E.ON called into question the functional capability of the seal and suggested various possible explanations for the state of the seal. It claimed *inter alia* that (i) a cleaning lady might have wiped over the seal with a cleaning product, thereby displacing the seal; (ii) vibrations caused by people walking around, opening and closing doors in the vicinity of the seal might have made the seal move or (iii) the seal had not adhered properly to the door from

the very beginning (e.g. because of moisture in the air, the age of the seal ⁽⁹⁾ or the fact that the door had not been cleaned beforehand). According to E.ON, the state of the seal as it was found on the morning of 30 May 2006 (hereinafter referred to as ‘false positive’, *i.e.* void signs on the entire surface of the seal and glue traces around it, occurring without a seal breach) could have been due at least to a combination of all these factors.

The Commission undertook a thorough investigation in order to determine whether there was any possibility of a malfunction of the seal, including calling on an outside expert to test the seals. The Commission concluded that the arguments put forward by E.ON were not valid and that no explanation other than a breach of the seal can be found for the state of the seal. All the tests carried out by the Commission and the independent expert who had tested a large number of original Commission seals under all possible (even the most unlikely) hypothetical situations, confirmed that the only explanation for the state of the seal as found on the morning of 30 May 2006 was that there had been a breach of the seal.

As far as the ‘cleaning lady’ hypothesis is concerned, the Commission found that wiping over the seal with the cleaning product used by E.ON does not affect the functioning of the seal at all. It should be noted that the adhesive of the seal (which is 54 cm² in area) is extremely powerful, and it takes a lot of force even to loosen it. Small traces of an aggressive cleaning product could only enter at the edges of the seal (which is in principle water-proof) and, as the tests proved, could under no circumstances result in a ‘false positive’.

Also the possible impact of ‘vibrations’ on the seal proved to be negligible. The Commission’s tests showed that a vibrating door would not result in a ‘false positive’. Even if strong vibrations might loosen the seal under certain circumstances within a very narrow area at the gap between door and doorframe, they would not be capable of moving the entire seal with its extremely powerful adhesive ⁽¹⁰⁾. It was also confirmed that even

⁽⁷⁾ Due to the large number of VOID-signs, it is indeed extremely difficult to re-affix the seal in exactly the same position as before. In any event, the VOID-signs remain visible in such a case.

⁽⁸⁾ One and a half years after the incident, E.ON submitted affidavits from the key holders in order to argue that none of them had (personally) opened the sealed door. However, these affidavits were couched in rather general terms; for example, they did not exclude the possibility that the keys had been passed on to third parties. It should also be noted that the very purpose of a seal is to avoid the need to demonstrate that a sealed door was actually opened. This is why a broken seal as such is sufficient to give rise to a fine pursuant to Article 23(1)(e) of Regulation 1/2003.

⁽⁹⁾ The manufacturer of the seal explicitly gives the seal a ‘guarantee period’ of only two years. This period had expired when the Commission seal was used. However, regardless of this legal guarantee, the seal remains functional for a much longer period. Indeed, some printers who sell security seals on the basis of the manufacturer’s promotional material give a guarantee of up to 10 years.

⁽¹⁰⁾ Even a film prepared by E.ON to demonstrate the effect of vibrations during the Hearing showed that the vibrations had only a minimal effect on the gap between door and frame, while the seal as such remained intact and no VOID-signs appeared.

strong vibrations would not result in a ‘creeping’ of the seal and would certainly not cause ‘VOID’ signs to appear over the entire surface of the seal.

Finally, the Commission also examined whether other factors, such as the age of the seal, the characteristics of the surface or moisture in the air, might have resulted in a malfunction of the seal, for example by preventing the seal from sticking to the door from the very beginning. Tests confirmed that the Commission seals worked properly, even many years after their manufacture, whether the surface had been previously cleaned or not ⁽¹¹⁾ and whether the level of moisture in the air was high or low ⁽¹²⁾. It may be noted that if the seal had, hypothetically, failed to stick properly on the door, it would not have shown any VOID-signs ⁽¹³⁾, but would have peeled off without any change in its appearance (‘false negative’).

The Commission has also investigated whether any similar incident with material used for the security seals had occurred in the past. In fact, similar security seals have been in use world-wide since 1985, when the manufacturer of the seals started using the material for high security applications (transport of medical substances, sealing of ‘black boxes’ etc.). It turned out that not a single comparable malfunction (‘false positive’) has been reported to the seal manufacturer since 1985. The manufacturer also confirmed the Commission’s finding that none of the factors adduced by E.ON can have caused the state of the seals as found on 30 May 2006.

3. Legal consequences — determining the appropriate fine

Having discarded the hypothesis of a technical malfunction of the seal, the Commission concluded that E.ON or persons within E.ON’s sphere of influence had broken the seal, in breach of Article 23(1)(e) of Regulation 1/2003. Although the Commission was not in a position to prove an

intentional breach of the seal and could not ascertain whether any documents were missing ⁽¹⁴⁾, the Commission assumed that the breach of the seal occurred, at the very least, as a *result of negligence*, since it was E.ON’s responsibility to organise its own business sphere in such a way as to ensure that the instruction not to break the seal was complied with ⁽¹⁵⁾.

As for the *appropriate level* of the fine, there are no guidelines in place setting out the specific criteria and mechanisms to be taken into account in cases of violations of procedure ⁽¹⁶⁾. The Commission therefore enjoyed wide discretion in determining the amount of the fine and was, in principle, free to set a fine of up to a maximum of 1% of annual turnover. This discretionary power was, however, limited by Article 23(3) of Regulation 1/2003, which provides that fines must in general take into account the *gravity* and the *duration* of the infringement ⁽¹⁷⁾ and by the general principles of Community law which the Courts have established for the setting of administrative fines, among them the principles of *non-discrimination* and *proportionality* ⁽¹⁸⁾.

⁽¹⁴⁾ The Commission did not consider the fact that it could not prove an intentional breach of the seal as a mitigating factor. This is not only in line with the approach in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210 p. 2-5 of 1.09.2006, “Fines Guidelines”), according to which negligence should only be taken into account as a mitigating factor when the company has provided evidence that the infringement has been committed negligently (see Fines Guidelines, at paragraph 29). Fines Guidelines, at paragraph 29). Given that it will be practically impossible to prove an *intentional* breach of a seal and that breaches of seals will by nature occur secretly and normally require a deliberate act, it does not appear to be justified to grant a ‘rebate’ in cases where the Commission cannot prove intention.

⁽¹⁵⁾ In this respect the Commission also noted that E.ON had not informed all personnel authorised to enter the E.ON building, e.g. the cleaning lady, about the existence of the seal and the need to respect it.

⁽¹⁶⁾ The Fines Guidelines only apply to breaches of Article 23(2) of Regulation 1/2003, i.e. breaches of *substantive* rules.

⁽¹⁷⁾ It may be noted that, according to an opinion, Article 23(3) does not directly apply to procedural fines pursuant to Article 23(1), cf. *de Bronnet*, Kommentar zum europäischen Kartellverfahrensrecht, Article 23, paragraph 21. Even in this case the Commission would, however, be bound in an equal manner by the principle of proportionality.

⁽¹⁸⁾ See e.g. Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, at paragraph 209; *Böse*, Strafen und Sanktionen im Gemeinschaftsrecht, p. 368; *Koch*, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Europäischen Gemeinschaftsrechts, p. 327 et seq.

⁽¹¹⁾ Due to the strength of the adhesive used for the seals, they usually stick without prior cleaning of the surface, with the possible exception of surfaces such as Teflon or Silicone or surfaces covered with a thick layer of oil or grease. In such cases, it might be possible to remove the seal without any VOID-signs appearing (‘false negative’), while a ‘false positive’ can only occur if the seal sticks to the substrate and would therefore be ruled out.

⁽¹²⁾ It may be noted the seal material is used world-wide, i.e. under much more difficult climatic conditions than in Western Europe, without any reported malfunctions.

⁽¹³⁾ The VOID-signs are caused by traces of glue which remain on the surface when the seal is peeled off. To show VOID-signs, it is therefore essential that the glue sticks to the surface. Even if such a seal which did not stick to the surface were to be re-affixed, it would not show VOID-signs.

When setting the fine for E.ON, the Commission took into account, among others, that breaches of seals must, as a matter of principle, be regarded as a *serious infringement* ⁽¹⁹⁾. Accordingly, the level of the fine had to ensure that it had a sufficient deterrent effect for E.ON, which is a large subsidiary of a major European energy company with a turnover of around € 28 billion, and all other potentially affected companies ⁽²⁰⁾. As Competition Commissioner, Neelie Kroes, put it: *‘The Commission cannot and will not tolerate attempts by companies to undermine the Commission’s fight against cartels and other anti-competitive practices. Companies know very well that high fines are at stake in competition cases, and some may consider illegal measures to avoid a fine. This decision sends a clear*

message to all companies that it does not pay off to obstruct the Commission’s investigations.’

On the other hand, the Commission took into consideration the fact that the new provision in Regulation No 1/2003, which provides for a fine of up to 1% in the case of a procedural violation, was applied for the first time in this case ⁽²¹⁾; this means that, in subsequent cases, the Commission might even impose higher fines in absolute and relative terms.

In the light of these considerations, the Commission decided to impose a fine of € 38 million on E.ON. The decision is currently the subject of an appeal by E.ON ⁽²²⁾.

⁽¹⁹⁾ In this context it may be noted that the International Competition Network (ICN) recently concluded that problems with obstruction have increased and that measures against obstruction in cartel investigations should be a priority for enforcers. See report of the ICN Working Group ‘Obstruction of Justice in Cartel Investigations’, available under: http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ObstructionPaper-with-cover.pdf.

⁽²⁰⁾ See, on the legitimacy of deterrence as an aim of fines in Community law, e.g. Joined Cases 100/80 to 103/80, *Musique Diffusion française and others v Commission* [1983] ECR 1825, at paragraph 106. In general, a fine can only have a deterrent effect if it ensures that it is not more profitable for a company to obstruct the investigation (e.g. by destroying incriminating documents) and to accept a ‘mild’ procedural sanction than to risk a very high fine for a substantive infringement. See in more details e.g. Calviño, Deterrent Effect and Proportionality of Fines, pages 2-6, in: Ehlermann/Atanasiu (ed.): *European Competition Law Annual 2006*, available under: [http://www.iue.it/RSCAS/research/Competition/2006\(pdf\)/200610-COMPed-Calvino.pdf](http://www.iue.it/RSCAS/research/Competition/2006(pdf)/200610-COMPed-Calvino.pdf).

⁽²¹⁾ Given E.ON’s turnover of around € 28 billion, the Commission could theoretically have imposed a fine of up to € 280 million in this case.

⁽²²⁾ Registered as case T-141/08.

Revolution or evolution in telecoms? Sub-national markets in sector-specific regulation when competition develops unevenly

Olivier BRINGER and Konrad SCHUMM ⁽¹⁾

The Commission has to monitor the implementation of the Regulatory Framework for Telecommunications ⁽²⁾ by National Regulatory Authorities (NRAs). To this end Article 7 of the Framework Directive requires NRAs to notify to the Commission and other NRAs any draft regulatory measure they plan to adopt with a view to regulating a particular telecommunications market.

In this context, the UK telecoms regulator, Ofcom, notified on 15 November 2007 a draft review of the UK wholesale broadband access market ⁽³⁾. This notification marks a potentially significant change in European regulatory practice.

When reviewing the market, Ofcom found a more advanced roll-out of telecoms networks in densely populated areas by competitors of BT relying on local loop unbundling (LLU) ⁽⁴⁾. Most of these areas are also covered by the UK cable TV network, which also offers broadband connections. The LLU operators offer broadband connections at lower retail prices than BT, which maintains a nationwide pricing policy. In the light of these factors, Ofcom considered that there are significant regional differences as regards the level of competition in the UK. As a consequence, Ofcom proposed for the first time to move from the definition of a national wholesale broadband access market to the definition of sub-national markets

and proposed to deregulate wholesale broadband access to approximately 65% of all UK homes and businesses.

The methodology applied by Ofcom to arrive at the definition of sub-national markets differs to a certain extent from the Commission guidelines. While not raising objections to the new approach chosen by Ofcom (as the first NRA to apply such an approach), the Commission, in its comments letter of 14 February 2008, underlined the need for NRAs to demonstrate that their approach leads to an outcome that is consistent with competition law principles and restated the criteria to be used for the definition of different geographic markets ⁽⁵⁾.

Before going into the details of Ofcom's notification and setting out the Commission's views, the article briefly introduces the issue of broadband regulation in the context of the uneven development of broadband networks.

Regulation of broadband networks

One of the main characteristics of the economics of networks is the high level of sunk costs that are required for the establishment of network infrastructures. Sunk costs create the need to achieve economies of scale and scope, which largely drive the development strategy of network undertakings. In telecoms, the competitive roll-out of networks thus usually starts in the most densely populated areas, where economies of scale are easier to achieve. As a result, more competitors are present in certain geographic areas whereas only the incumbent (whose roll-out was funded under public monopoly) may be present in other areas. Depending on the commercial behaviour of the market players, such an uneven geographic distribution of operators may give rise to different conditions of competition across the territory of the Member States.

Regulation, which aims to open up electronic communications markets, is based on competition law principles and methodology. NRAs are required to conduct forward-looking market analyses (i.e. market definition and dominance assessment) and to impose transitional *ex ante* obligations (or remedies) on those undertakings which are found to have Significant Market Power (SMP).

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

⁽²⁾ See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

⁽³⁾ The wholesale broadband access market is one of the markets listed in the Commission Recommendation on relevant markets susceptible to *ex ante* regulation which NRAs are required to analyse. See the revised Recommendation of 17 December 2007, OJ L 344, 28.12.2007, p. 65. This market comprises non-physical or virtual network access including 'bitstream' access at a fixed location to end users allowing the transfer of broadband data. This market is situated downstream from the local loop access market, i.e. the physical access market.

⁽⁴⁾ The local loop is the physical, mostly copper wire, connection between the customer premises and the local exchange, the facility which concentrates all local loops in a given area. In general, it is owned by the incumbent operator. Local loop unbundling is the regulatory process allowing alternative telecom operators to use the local loop.

⁽⁵⁾ See the Commission's comments letter at: http://circa.europa.eu/Public/irc/info/ecctf/library?l=/commissionsdecisions/uk-2007-0733_actepdf/_EN_1.0_&a=d.

Regional variations of competition are therefore to be factored into the market analyses carried out by NRAs.

Up to now NRAs used to consider that geographic markets are equal to the footprint of the incumbent operator and therefore usually national, *inter alia* because of the nationwide unique pricing strategy applied by the incumbent operator. Accordingly, any finding that such operators had SMP extended to the whole national territory. However, NRAs also acknowledged that the level of competition in electronic communications markets may vary. In order to take account of competition differences between different geographic areas, such as densely populated areas and rural areas, they had recourse to the general principle that remedies have to be tailored and proportionate in order to remove an identified competition problem. In this case, NRAs used to impose remedies on an SMP operator which took account of the locally/regionally different competitive conditions throughout a geographic market ⁽⁶⁾.

However, the market analysis that NRAs are required to carry out on a periodic basis is by no means a mechanical or abstract process. It requires an analysis of the real market conditions. Therefore when market development and undertakings' behaviour point towards manifest differences of competition between different areas, it is not possible for NRAs to stick to national market definitions or definitions based on the footprint of the incumbent operator ⁽⁷⁾.

This is currently a particular challenge in the case of broadband markets. Thanks to regulated access to the facilities of the incumbent operators, and in particular to local loop unbundling, alternative operators have progressively rolled out their own infrastructures, allowing them to provide competitive retail broadband services, in particular multiple-play offers ⁽⁸⁾. Due to economies of density, LLU roll-outs have taken place and continue to take place mainly in urban and suburban areas, where cable operators are also present and provide

their own broadband services over upgraded cable TV networks. The result of this evolution is that in the Member States where LLU is developed and/or where cable has a strong presence, the conditions of competition between urban and rural areas tend to diverge.

This has an impact in particular on the regulation of the wholesale broadband access market. Bitstream access provides access to the local loop of the incumbent at an upper level than LLU. It allows alternative operators to enter the retail broadband market while incurring lower up-front investments and, by acquiring customers and revenues, to further roll out their own competing infrastructure ('ladder of investment' principle). However, the uneven development of infrastructure competition (LLU and cable-based) raises in a number of Member States the issue whether or not the conditions of competition are appreciably different to support the definition of sub-national markets. Such a definition may in turn lead to the finding that the incumbent operator is sufficiently constrained in certain areas such that regulation may be reduced or completely removed ⁽⁹⁾.

This is the issue addressed by Ofcom in its 2007 market review of the wholesale broadband access market in the UK.

Review of the wholesale broadband access market in the UK

In this review, Ofcom considers that since the first review in 2003 of the market for wholesale broadband access ⁽¹⁰⁾, which was considered at the time to be national in scope ⁽¹¹⁾, there have been a number of developments suggesting that this may no longer be the case. In particular, BT has introduced geographically de-averaged prices for its wholesale broadband products in about 20% of its local exchanges ⁽¹²⁾. In addition, providers offering broadband services relying on LLU have increased

⁽⁶⁾ See also Case AT/2008/757 at: http://circa.europa.eu/Public/irc/info/ecctf/library?l=/commissionsdecisions/at-2008-0757_enpdf/_DE_1.0_&a=d.

⁽⁷⁾ See in particular para. 56 of the Commission guidelines on market analysis and the assessment of significant market power under the regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p. 6.

⁽⁸⁾ Multiple-play offers consist of bundles of services, including broadband, voice, video and television services, provided by telecoms or cable operators over the same access infrastructure. In addition to being the product over which retail competition currently takes place in most Member States, multiple-play allows operators to achieve economies of scope.

⁽⁹⁾ The underlying principle of the Regulatory Framework is that regulation becomes redundant if and where single or joint dominance can no longer be demonstrated. At this point access regulation can be withdrawn and competition law applied *ex post*.

⁽¹⁰⁾ The Commission's comments letter on the first market review can be found at: http://circa.europa.eu/Public/irc/info/ecctf/library?l=/commissionsdecisions/commission_decisions_1/sgrsgraffes2004sds200485p/_EN_1.0_&a=d.

⁽¹¹⁾ Excluding the specific case of the Hull area, where BT had and has no network, and where a local operator, Kingston Ltd., had its own broadband network, was found to have SMP and was regulated.

⁽¹²⁾ The local exchange is the incumbent's facility to which all local loops in a given area are connected. The alternative operators install their DSL equipment in the local exchange in order to connect to the local loop. BT manages 5 587 local exchanges in the UK.

competitive pressure by offering retail prices and products that vary by geography. As a result of this competitive constraint, BT's retail prices have fallen even more sharply than its wholesale prices. Driven largely by these behavioural examples, Ofcom concludes that competitive conditions are no longer homogeneous throughout the UK and that geographic variations of competition need to be addressed in its market analysis.

Ofcom starts its market analysis by considering the extent to which self-supply over alternative infrastructures, i.e. cable and LLU, is included in the wholesale broadband access market. Due to a high wholesale/retail price ratio and the level of retail broadband competition in the UK (as witnessed by the high retail demand elasticity), Ofcom considers that the indirect pricing constraint stemming from the retail level is sufficiently strong to include self-supply over alternative infrastructures in the market⁽¹³⁾. With regard to LLU, Ofcom, in addition to the indirect pricing constraint, also refers to the existence of demand from Internet Service Providers (ISPs) for access to third-party networks, as well as actual supply by LLU operators of wholesale broadband access products, such as bitstream, to ISPs.

Based on the presence of alternative infrastructure competition, Ofcom determines that the competitive conditions in the wholesale broadband market are mostly driven by the sustainability of market entry at the level of each exchange and thus in large part by the cost conditions of LLU: once an operator has entered an exchange which it has connected to its own backbone network, it has a strong incentive to reach a maximum of end-users via the local loops connected to this exchange in order to amortise its investment. In view of the high fixed costs, the decision of an LLU opera-

tor to roll out to a particular exchange is mainly driven by the size of the exchange and the possibilities for the operator to achieve economies of scale, scope and density.

Accordingly, Ofcom considers that a BT local exchange area constitutes the smallest appropriate geographic unit for analysing variations in competitive conditions over the territory covered by BT's network and that the number of operators present in an exchange and the exchange size constitute a good proxy for reflecting the competitive conditions in a given area.

Based on the number of Principal Operators⁽¹⁴⁾ present in the footprint of each of the 5 587 local exchanges operated by BT and the size of the exchange, Ofcom thus defines three different geographic markets in the UK excluding the Hull area⁽¹⁵⁾. These geographic markets encompass exchange areas which are not necessarily contiguous, but which Ofcom considers on a forward-looking basis to exhibit similar competitive conditions:

- Market 1: local exchanges where only BT is present⁽¹⁶⁾;
- Market 2: local exchanges with two or three Principal Operators and exchanges where there are forecast to be four or more Principal Operators but where the exchange serves less than 10 000 premises⁽¹⁷⁾; and
- Market 3: local exchanges with four or more Principal Operators and exchanges where there are forecast to be four or more Principal Operators but where the exchange serves more than 10 000 premises⁽¹⁸⁾. This market covers 65% of all UK households.

While the number of Principal Operators is a variable that indicates that market participants believe market entry to be sustainable, the exchange size variable identifies those exchanges which in view of their size appear to support sustainable entry.

⁽¹³⁾ The Commission did not object to Ofcom's assessment of indirect constraints exercised by vertically integrated competitors, such as cable and LLU operators, at the retail level, which according to Ofcom had sufficiently strong impact at the wholesale level. However, it invited Ofcom to be cautious when interpreting market shares of operators who exercise an indirect constraint. Furthermore, it pointed out in its comments letter that when assessing the effect of indirect substitution through a SSNIP test the following three conditions have to be met:

- (i) ISPs would be forced to pass a hypothetical wholesale price increase on to their consumers at the retail level based on the wholesale/retail price ratio;
- (ii) there would be sufficient demand substitution at the retail level to retail services based on indirect constraints such as to render the wholesale price increase unprofitable; and
- (iii) the customers of the ISPs would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices.

⁽¹⁴⁾ Principal Operators are BT, the cable operator and the six main LLU operators. The term excludes niche or local LLU operators. In addition, Ofcom has considered the cable operator as being present within an exchange footprint if it is able to supply at least 65% of the homes and businesses within the footprint.

⁽¹⁵⁾ Ofcom maintains a distinct geographic market for the Hull area, where only Kingston, the local incumbent, is present.

⁽¹⁶⁾ 3 874 exchanges covering 19.2% of UK premises fall within this market category.

⁽¹⁷⁾ 643 exchanges covering 15.7% of UK premises fall within this market category.

⁽¹⁸⁾ 1 070 exchanges covering 64.4% of UK premises fall within this market category.

Following its market analysis, Ofcom concludes that BT remains dominant in markets 1 and 2 while market 3 is found to be competitive. The SMP assessment is based on market growth and market shares taking into account self-supply by cable and LLU operators; future potential market shares; barriers to entry and expansion including sunk costs and economies of scale, scope and density; and countervailing buying power. In volume terms, BT accounts for 44.8% of market 3. Virgin Media, the cable operator, accounts for 30.2% and the LLU operators account for 25.1%. In markets 1 and 2, BT is considered to have market shares of 99% and 78% respectively.

Accordingly, Ofcom proposes to lift access obligations on BT in market 3, while they are maintained in markets 1 and 2.

Assessment of the notification by the Commission as regards the definition of sub-national markets

The Commission's guidelines on market definition and the assessment of SMP note that the relevant geographic market comprises an area in which *'the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different'* ⁽¹⁹⁾. The Commission's notice on the definition of the relevant market for the purposes of Community competition law ⁽²⁰⁾ further outlines the Commission's approach to geographic market definition where it states that the Commission *'will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purpose of arriving at a precise geographic market definition'*.

As regards the definition of sub-national markets, the Commission considers that a geographic delineation which is primarily based on the number of operators present in a local exchange is not by itself sufficiently detailed or robust to identify real differences in competitive conditions for the pur-

poses of market definition. More generally, a mere analysis of structural market conditions is not sufficient. Although it may help identifying the areas where the conditions of competition are *similar* or *sufficiently homogeneous*, structural evidence needs to be corroborated by the actual behaviour of the market players and their effect on the market in terms of both prices and market shares. Relevant evidence for the definition of sub-national markets will therefore include information on the distribution of market shares and the evolution of shares over time. In addition, evidence of differentiated retail or wholesale pricing which might apply can help indicate different regional or local competitive pressure. It is also considered appropriate to look at the pricing of both the incumbent and alternative operators as well as its evolution over time in the relevant areas.

The Commission therefore asked Ofcom to supply further information on the behaviour observed on the broadband access markets in the UK. In response to the Commission's request, Ofcom supplied information which provides insight into the similarity of competitive conditions across local exchange areas in the UK. In particular, it provided information on market shares and their development over time within individual exchange areas which it grouped together in markets 2 and 3 respectively. Notwithstanding certain variations, this information demonstrates a different pattern in the distribution of BT's local wholesale market shares between markets 2 and 3 and also indicates that BT's wholesale market share appears to be declining at a faster rate in response to competitive entry in exchanges allocated to market 3 than in the exchanges allocated to market 2. This information points to the existence of appreciably different conditions of competition between the two markets.

Ofcom has further provided information on pricing which indicates that the majority of local exchanges where BT has introduced a de-averaged wholesale price correspond to market 3. According to Ofcom, lower wholesale broadband access prices offered by BT allow ISPs to better compete with LLU operators and the cable operator present in this market and may be considered as a reaction of BT to the higher competitive pressure in this market. In addition, due to the different geographic commercial strategies of operators in the areas where they provide services relying on LLU, there is an indication that average retail prices are lower and that more service choice exists in market 3 than in markets 2 or 1. Also, the Commission noted that retail broadband prices have fallen since Ofcom's first review of the wholesale broadband access market in 2003 and that these

⁽¹⁹⁾ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, para. 56.

⁽²⁰⁾ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, paras 28-31.

retail prices have fallen more sharply than wholesale prices. This also seems to indicate that BT's behaviour is constrained to a certain extent by alternative suppliers of broadband services.

Furthermore, it appears that LLU roll-out is continuing and some LLU operators have significantly increased their coverage of market 3 exchanges between 2006 and 2007, thereby suggesting broad similarities in the entry and cost conditions present across the areas covered by these exchanges.

On the basis of the above information, it would appear that, while some ambiguity in competitive conditions may arise at the margins of Ofcom's identified markets 2 and 3, Ofcom's analysis rests on a sufficiently robust evidential basis across the range of exchanges in market 3. In reaching this conclusion, the Commission also bears in mind that Ofcom is constrained by the need to establish a workable approach in carrying out its market review.

Therefore, the Commission has invited Ofcom to further substantiate in its final measure its aggregation of geographic 'units' in its proposed 'markets', in particular with reference to the distribution and evolution of market shares and pricing within different geographic areas in accordance with competition law principles.

Conclusion

Although NRAs are accorded discretionary powers for the market analysis process in the light of the complex character of the economic, factual and legal situations they have to assess, it is important that they can show that the criteria used to define markets and to assess SMP lead to an outcome that is consistent with competition law principles.

Ofcom's market review seems to be a revolutionary step as it departs from the tradition of considering that the relevant geographic market is equal to the territory covered by the network of an

operator. However, based on a proper level of evidence, the regulatory move towards sub-national market definition may well expand in future to other electronic communications markets and to other Member States. This has wide-ranging consequences: in some of these markets, where competition is stronger, it will no longer be possible to find that the incumbent has SMP and to maintain access obligations. Because the economies of networks may lead to different regional developments, the generalisation of sub-national market definitions appears therefore to be one of the paths leading to further deregulation of the telecommunications sector. Paradoxically though, this approach also entails a risk of perpetuation of regulation. In a number of regions (e.g. rural areas), only one operator offers telecommunication services and will remain regulated. It is however to be expected that thanks to proper pro-competitive regulation, investment by alternative operators will continue and lead to the coverage of entrants being extended into areas where they are currently not present. Also, thanks to technological progress such as wireless broadband access (e.g. Wimax and mobile broadband), alternative operators may be able to cover remote areas with considerably lower investment than for the roll-out of a wireline network infrastructure.

All in all, although a sub-national market approach requires NRAs to analyse the competitive conditions in a large number of geographic areas and may prove to be cumbersome, it appears to reflect the presence of alternative supply channels and the corresponding regional differences in market conditions in a number of telecommunications markets. Provided it is based on sufficient evidence as requested by the Commission in the case of the wholesale broadband access market in the UK, the evolution towards the definition of sub-national markets may allow better targeted regulation.

State aid: Commission orders reimbursement of loans for 17 R&D projects in the aeronautical sector in Italy

Almorò RUBIN DE CERVIN ⁽¹⁾

The Commission took on 11 March 2008 a first conditional decision ⁽²⁾ on aid to the aeronautical sector in Italy. The decision formally requests Italy, under EC Treaty state aid rules, to ensure that loans granted under Law 808/85 in favour of R&D activities in the aeronautical sector are fully reimbursed. These loans, worth more than €450 million and granted to 17 individual research and development (R&D) projects, are not in line with the applicable EU rules on state aid to research and development and need to be modified. The conditions imposed by the Commission and accepted by Italy will ensure that most of the loans are fully reimbursed within two months of the decision date. The main beneficiaries of the loans are the Finmeccanica group and the Italian company Avio.

The investigation

In 2003, following a complaint, the Commission opened a formal investigation into six Italian R&D projects in the aeronautical sector because of doubts as to their compatibility with the applicable EU rules on state aid for research and development (R&D). In particular, the Commission had concerns about the nature of the activities and the incentive effect of the aid. In December 2004, the Commission issued an information injunction to receive the full text of the granting decisions. Subsequently, in June 2005, the Commission extended ⁽³⁾ the scope of the investigation to the entire application of Law 808/85 to individual projects of significant size. The June 2005 decision covered three aspects: the existence of individual projects which Italy allegedly failed to notify, the instrument used to grant the aid and the nature of two helicopters, considered by Italy as important for national security.

During the entire procedure, a third party, who requested to remain anonymous, submitted information and comments. Moreover, after the 2003 decision, France intervened in the proceedings. It is unusual for a Member State to intervene in a case against another Member State. Finally, among the beneficiaries, only Finmeccanica submitted observations after the 2003 decision.

Scope of the decision

Law 808/85 is an Italian scheme to promote R&D in the aeronautical sector. It had been approved in 1987 by the Commission under the condition that support for projects of a certain size would be individually notified to the Commission to verify their conformity with the applicable R&D rules (depending on the date of granting of the aid, the 1986 or 1996 R&D Frameworks apply to the projects). These rules allow fixed percentages of aid for certain research and development activities where and inasmuch as such aid is necessary to undertake a project.

The Commission's investigation established that under Law 808/85, Italy had granted a total of more than €450 million to 17 individual R&D projects, none of which had been notified. The investigation also established that the aid instrument used by Italy was soft loans with a zero interest rate and a fixed reimbursement schedule, the aid element being the price of such a loan on the financial markets. In line with normal practice in the aeronautical sector, the loans have a very long duration, on average almost twenty years.

Projects involved

The projects covered by the decision concern:

- Helicopters: A109DEF, A109X and A119 Koala, beneficiary Agusta;
- Airframes: DO328, DO328 Panels and DO328 EC, beneficiary Aermacchi; ATR72, ATR42-500, MD11 (2 projects), MD 95, Pressurised cabins and Falcon 2000, beneficiary Alenia; and Falcon 2000, beneficiary PiaggioAero;
- Engines: GE90B, GE90 Growth and LPTPW308, beneficiary Avio.

⁽¹⁾ Directorate-General for Competition, unit H-2. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ State aid case C 61/03, '*Legge aeronautica N. 808/1985 — casi individuali*'. The public version of the decision will be published in the Official Journal in all the EU languages. Documents will also be available via the State aid Register on the Internet: http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_c2003_0060.html#61.

⁽³⁾ The public version of the decision is available following the link mentioned in footnote 2.

Conditions imposed

For the six projects on which the Commission raised doubts in its 2003 decision (A109X, A109DEF, MD11, MD95, DO328 Panels and DO328 EC), the information submitted by Italy alleviated the Commission's initial concerns about the nature of the activity and the incentive effect of the aid.

In cooperation with the Italian authorities, the Commission devised a methodology to measure the aid with regard to the applicable EU R&D Framework. The Commission concluded that in ten cases, in order to respect the maximum allowable aid intensity, Italy had to ensure immediate reimbursement of the entire outstanding amount of the loans (more than €170 million) plus compound interest (more than €100 million).

Six other projects are still within the allowed aid intensities and the loans will be reimbursed according to a fixed schedule, with full reimbursement by 2010 in most cases and by 2018 for the last. One loan was found to meet all the conditions

of the Framework and had already been paid back by the beneficiary.

The decision of 11 March 2008 closes the investigation as regards the 17 R&D projects listed above and is conditional on observance of the above conditions. The Commission will monitor closely all reimbursements until the loans have been completely repaid ⁽⁴⁾.

Investigation continues

The Commission's investigation will continue for the two helicopter projects A139 and BA609 (beneficiary Agusta) on which the Commission in its 2005 decision raised doubts as to their military nature. These projects raise the issue of the application of Article 296 of the EC Treaty (concerning the arms industry).

Finally, the March 2008 decision does not cover a recent decree approved by the Italian Parliament involving ENEA and Finmeccanica. The Commission will examine these transactions separately.

⁽⁴⁾ In May 2008, Italy has provided to the Commission proofs that the loans have been reimbursed by the beneficiaries, including interests when necessary, within the sixty days prescribed by the decision, for a total amount over € 350 million.

The Commission's sector inquiry into business insurance: outcome and next steps

Sean GREENAWAY ⁽¹⁾

On 25 September 2007, the Commission published the Final Report of the sector inquiry into business insurance, following the Interim Report which was published in January of the same year (see *CPN 2007 No 1*, p. 63 ff.).

Whilst it contains a wealth of other information, the Final Report focuses in substance on two main issues. These are competition in the wholesale subscription markets, and conflicts of interest on the part of brokers.

Subscription markets

Subscription markets are those whereby an *ad hoc* syndication arrangement is set up by a broker or client in order to cover a given risk. The process characterises direct insurance for large commercial risks as well as reinsurance (both treaty and facultative) ⁽²⁾. Typically, it involves a restricted number of specialist insurers being approached to quote terms and conditions and to act as 'lead insurer' on the contract (we call this the 'lead market'). The lead insurer, which manages the contract and any claims associated with it, offers to cover a certain quota of the risk, and, once selected, its terms and conditions are then communicated to a selection of insurers which may include those approached in the first round as well as other specialist and generalist insurers. These are invited to take a share of the risk, usually on identical terms, including premium (we call this the 'following market'). It is usually the case that the share and terms of the lead insurer are guaranteed once it is selected at the end of the first stage. In certain national markets, however, this may not apply. Other variations that characterise certain markets are the use of a 'lead provision' which remunerates the specific role of the lead insurer, and the fixing of broker commission levels for all participating insurers already at the lead stage.

⁽¹⁾ Directorate-General for Competition, unit D-4. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Facultative reinsurance is on an individual piece of business and may often be placed with a single reinsurer. Treaty reinsurance covers an insurer's whole book of business for a given class of risk.

Although it is not the sole way of placing a risk with multiple (re)insurers, the subscription approach is probably economically the most important. Alternatives include *ad hoc* arrangements led by an insurer and standing arrangements (pools); these alternatives are not discussed in the Report but fall under general principles of competition law (including, potentially, the specific exemption for pools in the insurance Block Exemption Regulation).

In respect of subscription markets, the Report discusses the use of 'Best Terms and Conditions' (BTC) clauses whereby an insurer or reinsurer makes an offer conditional upon no other participant chosen by the broker or client to cover the same risk receiving better terms, in respect of either a higher price or more restrictive policy conditions. The Report notes that this type of conditionality may lead to upward alignment of premiums and/or contract uncertainty and appears scarcely justifiable from an economic standpoint. To the extent it does not constitute purely unilateral behaviour on the part of the insurer, the use of such a conditionality may be caught by, or be associated with a broader pattern of conduct caught by, Article 81(1) of the Treaty. Where this is the case, since the predominant if not exclusive effect of the practice is to increase prices, it is difficult to imagine efficiencies sufficient to exempt the behaviour under Article 81(3).

The Report goes on to note, however, that premium alignment almost always characterises the subscription markets, both in co- and re-insurance, independently of the use or otherwise of (explicit) BTC conditionalities. Such alignment is not, however, a necessary feature of the process; certain markets exhibit premium variation, with or without variation in other terms.

Such price alignment inevitably attracts the attention of antitrust authorities. The Report suggests that premium alignment may result from behaviour caught by Article 81(1), and, whilst it recognises that transaction costs may be a defence in certain cases, questions whether this applies across the board and, therefore, whether the conditions of Article 81(3), including indispensability, are met in respect of such price alignment. The possibility is raised that broker commission arrangements may, in part, explain this outcome and that this may not be in the best interests of

customers or final consumers. It also notes that arrangements in the following market might facilitate collusion in the lead market, although it finds no direct evidence of such collusion. Market participants were actively invited to comment on these observations.

In follow-up to the Report, Commission staff have engaged proactively in a dialogue with industry and it appears to us that the case for change has been generally acknowledged by customers, brokers and insurers alike. The specificities of some national markets, however, may affect the analysis of the efficiency of the process and do need to be borne in mind.

The most visible sign of a momentum for change has been the adoption by the EU brokers' federation BIPAR of a set of placement principles designed to guide their members on how to comply with competition law in the placement of subscription business. These principles have also been endorsed by the insurers' association, the CEA. To the extent they are implemented in practice, they should remove the essential part of the Report's concerns. However, the practical implementation of the principles will clearly need to be monitored and the Commission will need to remain vigilant in this regard. It is also to be hoped that pressure from customers will result in brokers giving more systematic attention to alternative ways of placing the risk and discussing these with their clients.

Broker conflicts of interest

The Report contains an extensive description of the types of conflict of interest to which brokers may be subject. These arise from both conventional and contingent commission arrangements ⁽³⁾, and from additional remunerated services provided to insurers.

Although the prevalence of such conflicts is widely accepted, no simple analysis of them is possible since efficiency justifications can be and have been advanced in their support. The Report

does not conclude that such practices, as a general matter, are likely to be caught by Article 81 but does express concern that they may undermine market efficiency, and particularly competition on the price of the intermediation service. In this regard, there is evidence that SMEs underestimate what they are paying. These issues are, of course, not specific to Europe — indeed, the information brought to light by the Spitzer inquiry in the US was one of the factors prompting the Commission's investigation.

It has been suggested that disclosure and transparency may help alleviate these concerns but there are many questions as to how to design an effective regime. In many cases, smaller brokers also resist transparency, arguing, for instance, that the imposition of mandatory net quoting by insurers in a number of Scandinavian countries has restricted new market entry. Whilst there are calls from some quarters for prohibition of contingent commissions, there are reasons to believe that classical *ad valorem* commissions create greater conflicts of interest. Moreover, whilst brokers might compete on price by rebating commissions to clients, this does not appear to be a widespread practice, and is even forbidden by law in Germany. The extent to which broker switching may incur indirect costs in terms of premiums due to information asymmetries also remains unexplored.

In the final Communication which accompanied the Report, the Commission undertook to look at these issues in the framework of the review of the Insurance Mediation Directive, without prejudice to whether a regulatory solution was needed or what form it might take. The issue will therefore be in the forefront of the debate at European level, as it already is in a number of Member States. Whilst no 'quick fix' is to be expected, the credibility of brokers and overall confidence in the insurance market require clear and transparent arrangements to be in place and this is in the interests of the market as a whole. Input from, and initiative by, all stakeholders are therefore called for.

⁽³⁾ In the case of contingent commissions, the amount payable by an insurer to a broker is based on the achievement of agreed targets relating to the business placed by the broker with that insurer.

The synthetic rubber cartel cases

Bjarke LIST and Petr SOCHMAN ⁽¹⁾

The Nitrile Butadiene Rubber Case

On 23 January, the Commission adopted a prohibition decision and imposed fines totalling €34 million on the Bayer and Zeon groups for operating a cartel in the Nitrile Butadiene Rubber ('NBR') sector ⁽²⁾. The addressees of the decision participated in a single and continuous infringement of Article 81 of the EC Treaty from October 2000 to September 2002.

The product

NBR is a type of synthetic rubber and consists of a complex family of unsaturated copolymers of acrylonitrile and butadiene. The term NBR covers a wide variety of compositions depending on acrylonitrile content and polymerisation. Resistance to petroleum fluids, good physical properties and useful temperature range make NBR a widely used rubber. NBR is used mainly in the automotive industry for fuel and oil handling hoses, seals, o-rings and water handling applications. Other industrial uses are rolling covers, hydraulic hoses, conveyor belting, and seals for all kinds of plumbing. NBR can also be mixed with PVC for manufacturing NBR/PVC compounds. The estimated EEA market value of NBR in 2001 was approximately €145 million. At that time, the two undertakings involved in the infringement had an estimated market share of just over half of the European market.

The cartel

The anticompetitive practices consisted of price fixing, exchange of commercially sensitive information and monitoring and implementation of the illicit arrangements. In particular, the cartel started as a concerted practice in which the parties wanted to maximise their chances for successful price increases by reassuring both of them that they would effectively carry out the price increases they had already announced. Both parties considered the attitude of the other as a key factor for the success of a price increase. If one of the parties did

not stick to its announced increases the increase would run a serious risk of failure. The arrangements culminated in an agreement on prices in the last period of the cartel. All in all, the undertakings involved organised a number of rounds of price increases which, although not always completely successful, were generally implemented and whose implementation was reviewed. The cartel covered the whole EEA territory.

Fines

Following the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ⁽³⁾ ('2006 Guidelines on fines'), the Commission, in fixing the amount of the fine, had regard to all relevant circumstances and particularly the gravity and duration of the infringement. On the basis of the principles laid down in the Guidelines, the basic amount of the fine was determined as a proportion of the value of the sales of the relevant product made by each undertaking in the relevant geographic area during the last full business year of the infringement, multiplied by the number of years of infringement, plus an additional amount, also calculated as a proportion of the value of sales, which is meant to enhance deterrence in respect of horizontal price-fixing agreements.

In determining the fine, the Commission also considered the fact that at the time of the infringement, Bayer had already been the addressee of a previous Commission decision concerning cartel activities. It concluded that this justified an increase in the basic amount imposed on Bayer for repeated infringement.

The Commission also took into account the need to ensure that fines have a sufficiently deterrent effect, and in consideration of the large size of Bayer's turnover beyond the sales of goods or services to which the infringement relates, the decision increased the fine to be imposed on this undertaking by 10%.

In its decision, the Commission granted a reduction in the fine of 30% for Bayer and 20% for Zeon under the Leniency Notice. These reductions took into account the extent to which the evidence submitted by each company represented added value, as well as the time at which this evidence was submitted. Furthermore, Zeon's application

⁽¹⁾ Directorate-General for Competition, unit G-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Case COMP/38.628. *Nitrile Butadiene Rubber*. Documents available at: <http://ec.europa.eu/comm/competition/antitrust/cases/index.html>.

⁽³⁾ OJ C 210, 1.9.2006, p. 2.

contained contemporaneous evidence relating to contacts between Zeon and Bayer that took place during the initial period of the cartel about which the Commission did not previously have sufficiently specific information. This evidence allowed the Commission to extend the duration of the infringement to the period 2000–2001 and to prove, to the requisite legal standard, the facts in question. Given that Zeon was the first to have disclosed the cartel period from October 2000 to April 2002, this period was not taken in consideration in the calculation of the fine for Zeon.

The earlier rubber chemicals cases

Since the NBR case is the fourth and most recent in a series of Commission decisions in the synthetic rubber sector, it provides an opportunity to give an overview of all the cases.

The Rubber Chemicals Case ⁽⁴⁾

Rubber chemicals are synthetic or organic chemicals that act as productivity and quality enhancers in the manufacture of rubber. They are used by the rubber industry to make a wide range of rubber parts for use in many different applications. The automotive industry is the largest user of rubber parts, mainly in tyres but also in hoses, seals, belts, etc. On 21 December 2005, the Commission adopted a decision addressed to four groups of undertakings, which it found to have participated in the cartel at various periods between 1 January 1996 and 31 December 2001. The undertakings involved agreed to exchange information about prices and/or raise prices of certain rubber chemicals (antioxidants, antiozonants and primary accelerators) in the EEA and world-wide markets. Competitors usually had, or at least attempted to have, contacts before, during and after every price increase for rubber chemicals. While Fleksys enjoyed full immunity, Crompton was given a fine of €13.6 million (€12.75 million jointly and severally with Chemtura), Bayer was given a fine of €58.88 million and General Quimica was fined €3.38 million (jointly and severally with Repsol Quimica and Repsol YPF).

The Butadiene Rubber and Emulsion Styrene Butadiene Rubber Case ⁽⁵⁾

Butadiene Rubber and Emulsion Styrene Butadiene Rubber ('BR/ESBR') are synthetic rubbers also used particularly in tyre production. The decision concluded that six groups of undertakings had participated in a cartel on ESBR, while four of the groups of undertakings had participated in a cartel on BR, at various periods between 20 May 1996 and 28 November 2002. The participants agreed prices and exchanged information on key customers and the amounts of synthetic rubber supplied to them; cartel agreements were made before or after the official meetings concerning BR and ESBR of the European Synthetic Rubber Association (ESRA). In terms of the size of the fines levied, BR/ESBR is the largest of the synthetic rubber cases. While Bayer enjoyed full immunity from fines, Enichem was given a fine of €272.25 million, Dow €64.575 million, Shell €160.875 million, Kaucuk €17.55 million and Stomil €3.8 million.

The Chloroprene Rubber Case ⁽⁶⁾

Chloroprene rubber ('CR') is a synthetic rubber which is used in many different applications (cables, hoses, automotive industry, shoes, furniture, and diving equipment). On 5 December 2007, the Commission adopted a decision finding that five groups of undertakings had participated in a cartel at various periods between 13 May 1993 and 13 May 2002. The producers of CR agreed each other's market shares and set prices and the companies further held regular meetings to discuss prices, exchange sensitive commercial information, discuss specific clients and follow up the implementation of their illegal agreements. Bayer again enjoyed full immunity from fines, DuPont was given a fine of €59.25 million (of which €48.675 million jointly and severally with Dow), Denka €47 million, ENI/Polimeri €132.16 million and Tosoh €4.8 million.

Altogether, four cartels in the synthetic rubber sector have been uncovered, resulting in fines of €872.35 million.

⁽⁴⁾ Case COMP/38.443 *Rubber chemicals*.

⁽⁵⁾ Case COMP/38.638 *Butadiene Rubber/Emulsion Styrene Butadiene Rubber*.

⁽⁶⁾ Case COMP/38.629 *Chloroprene Rubber*.

Mergers: Main developments between 1 January and 30 April 2008

Mary LOUGHRAN and John GATTI ⁽¹⁾

Introduction

The number of notifications received in the first four months of the year reached 114, slightly higher than the total for the previous four-month period of 110. The number of decisions adopted was, however, slightly lower at 105. Of these 96 were decisions adopted after a first-phase investigation. The Commission adopted 58 decisions according to the simplified procedure during the period. The Commission also adopted 4 conditional clearances in phase I (under Article 6(2)). Three cases were cleared unconditionally under Article 8(1) after a Phase II investigation and one other was cleared subject to conditions (Article 8(2)). Finally, the Commission initiated 4 second-phase proceedings during the period (Article 6(1)(c)).

A — Summaries of decisions taken under Article 6(2)

Rexel/Hagemeyer

On 22 February the Commission adopted a conditional clearance decision in relation to Rexel's proposed acquisition of the Dutch company Hagemeyer's subsidiaries in several EEA countries and in Russia. Hagemeyer and Rexel are mainly active in the wholesale distribution of electrical products and installation material, the wholesale of heating, ventilation and air-conditioning products and — in some Member States — household products and consumer electronics.

Rexel intended to acquire Hagemeyer's business in Belgium, the Czech Republic, Germany (except for six branches), Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands, Norway, Poland, Spain, the UK and Russia. The Commission's investigation showed that the proposed transaction would not significantly weaken competition in most of the national EEA markets where the parties' activities overlap, because a number of credible alternative competitors would continue to exercise competitive constraint on the merged entity. However, the Commission found that the proposed transaction would have given rise to competition concerns in Ireland as it would have

strengthened the current leading position of Rexel in a very fragmented market where competitors would not have had the size and the geographic coverage to exercise competitive constraint on the merged entity.

To address the Commission's concerns, the parties agreed to divest the entire wholesale distribution of electrical products of Hagemeyer in Ireland, thereby entirely removing the overlaps brought about by the proposed transaction in this Member State. After market testing these remedies the Commission concluded that they would be suitable to address the competition concerns.

This case was linked to the Sonepar/Hagemeyer and Sonepar/Rexel Germany mergers approved by the Commission on 8 February 2008. The French company Sonepar and Rexel had entered into an agreement pursuant to which Rexel was to launch a public takeover bid over Hagemeyer. Subject to the successful outcome of this takeover bid and the Commission's clearance, Rexel would transfer parts of Hagemeyer to Sonepar (the Sonepar/Hagemeyer case). Moreover, by a side-letter to this agreement, Sonepar and Rexel agreed that all of Rexel's activities in Germany and Luxembourg would be transferred to Sonepar, subject to the successful outcome of the takeover bid (the Sonepar/Rexel Germany case).

Saint-Gobain/Maxit

In March the Commission gave its approval to the proposed acquisition of Maxit Holding AB of Sweden by Compagnie de Saint-Gobain of France. The approval was granted subject to the fulfilment of commitments to divest two Maxit subsidiaries active in the production and sale of gypsum-related products.

Saint-Gobain is a producer of glass, ceramics, plastics and building materials, such as mortars and gypsum products. It also distributes building materials. Maxit is also a manufacturer of mortars and gypsum products. At the time of the notification Maxit was wholly owned by HeidelbergCement Group, a German cement producer.

Maxit and Saint-Gobain are both producers of premix mortars and gypsum products. Premix mortars are construction products commonly employed for masonry, tile fixing and façade rendering. Gypsum is a raw material used in the production of cement, ceramics and plasters.

⁽¹⁾ Directorate-General for Competition, units F-4 and B-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

With regard to premix mortars, the Commission's investigation confirmed that Saint-Gobain and Maxit had a complementary product range, with Maxit — contrary to Saint-Gobain — focusing on low-value, high-volume mortars, and a different geographic focus, with Saint-Gobain being mostly present in France, Italy and Spain and Maxit in the Benelux, Germany and Scandinavia. The Commission's investigation showed that the horizontal overlaps in mortar markets, whether at national or local level, were generally limited and that the combined firm would continue to face numerous competitors, in fragmented and competitive markets characterised by low barriers to entry.

The Commission also assessed the vertical relationship due to Saint-Gobain's presence in the distribution of building materials. The Commission concluded that the addition of Maxit's mortar activities to Saint-Gobain's would not lead to a risk of closing off competing distributors' access to premix mortars supply or competing mortar suppliers' access to distribution channels, due to the absence of market power of the combined entity in both markets.

However, the Commission identified serious competition concerns in several markets related to gypsum, namely natural gypsum in Germany, natural anhydrite in Austria, gypsum-based semi-finished products in Austria, Belgium, Germany and the Netherlands and gypsum-based plasters for ceramics in the EEA. The proposed transaction would have led to the creation of monopolies or near-monopolies, depriving customers of alternative suppliers.

To address the Commission's concerns, Saint-Gobain offered to divest two Maxit subsidiaries, Südharzer Gipswerk GmbH and Maxit Baustoffe GmbH & Co KG, which would remove the entire overlap between Saint-Gobain and Maxit on these markets.

Finally, the Commission investigated the potential impact of the transaction on the market for External Thermal Insulation Composite Systems (ETICS), an external wall insulation technique primarily used in northern and central Europe. Maxit and Saint-Gobain are both producers of ETICS and Saint-Gobain is also active in the manufacturing of some ETICS components (insulation materials and glass fibre mesh). The Commission concluded that the parties would have a limited market share for ETICS and that there would be no risk that the new entity would close off rival ETICS producers from access to ETICS components.

Cookson/Foseco

On 4 March the Commission gave its conditional approval to the proposed acquisition of Foseco by Cookson, both located in the UK. This approval was granted subject to the fulfilment of the parties' undertaking to sell certain of their businesses.

Cookson is, through its wholly-owned subsidiary Vesuvius, a supplier of advanced refractories (non-metallic ceramics which resist extremely high temperatures) to the iron and steel industry. Foseco is active in the supply of consumable products, in particular filters (technical ceramics used during the casting of molten metal to reduce impurities and inclusions in castings) mainly for use in the foundry industries.

During its investigation, the Commission identified competition concerns relating to the markets for IPP (isostatically pressed products) and foam filters. As regards IPP Cookson would have become by far the market leader after the merger, and the limited number of remaining competitors would not have been able to counter the new entity's market power. Concerning filters, an area where Foseco has a strong market position, the merger would have combined the existing market leaders and closest competitors in terms of quality, service and innovation. Due to insufficient pressure from competitors, the Commission concluded that the transaction, as initially notified, would have threatened to impede effective competition on this market.

To address the Commission's concerns Cookson made the commitment to divest its filter business and, with the exception of a small plant in Asia, Foseco's IPP business. The commitments entirely remove the overlaps in the parties' activities in both areas of concern. After further investigation the Commission concluded that these commitments once fulfilled would remove its competition concerns.

Randstad/Vedior

Randstad's proposed acquisition of Vedior was also cleared subject to conditions in April. Both parties provide manpower or employment services and are based in the Netherlands. The Commission's approval was granted subject to Randstad's commitment to divest its entire business activities in Portugal.

Randstad is an international provider of temporary employment services, permanent placement services and other human resources-related services. It is active in several European countries as well as in the US, Canada and Asia. Vedior is an international provider of temporary employment

services, permanent placement services and other human resources-related services with a focus on professionals, executives and specialists in the information technology, healthcare, accounting, engineering and educational sectors. Vedior is active in numerous European countries under different brands as well as in the US, Canada, Australia, Asia, Latin America and Africa.

The Commission's initial market investigation found that the proposed transaction might raise competition concerns in the Dutch, Belgian and Portuguese markets for temporary employment services. Further investigation showed that on the Dutch and Belgian markets the parties had relatively modest combined market shares, credible alternative competitors existed, and the switching costs and barriers to market entry were low.

However, the Commission came to a different conclusion with respect to the Portuguese market, where the transaction, as initially notified, gave rise to serious doubts. The proposed concentration would have combined a market leader and one of the two credible competitors remaining on the market. Moreover, it would have created a market structure consisting of a clear market leader with substantial market share, one substantially smaller competitor and numerous very small competitors. Taking account of the significant gap between the market leader and other very fragmented competitors, this market structure could have given rise to a certain degree of market power for the merged entity, leading to less choice and higher fees for customers.

To remove the Commission's concerns, Randstad offered to divest its entire business activities in Portugal, including a licence of its brands, all tangible and intangible assets and all personnel. After further investigation the Commission concluded that these divestments would address the competition concerns initially identified in its market investigation.

B — Summaries of decisions taken under Article 8(1)

Norddeutsche Affinerie/Cumerio

On 23 January the Commission approved the proposed acquisition of sole control of Cumerio SA of Belgium by Norddeutsche Affinerie AG (NA) of Germany. Both companies are active at several stages of the copper processing chain, in particular producing copper cathodes, copper rod and copper shapes.

NA is a public limited company with several production facilities in Germany. NA produces copper

cathodes which are further processed into copper rod and copper shapes. NA, through its subsidiary Prymetall and other shareholdings, is also active in downstream markets such as the production of copper shaped wires, pre-rolled strips and semi-finished copper products.

Cumerio is a public limited company with production facilities in Belgium, Bulgaria, Italy and Switzerland. Cumerio produces copper cathodes, copper rod and copper shapes, and further downstream, copper wires and profiles. Unlike NA, Cumerio is not active in the production of semi-finished copper products.

As a result of the transaction NA together with Cumerio would become the main supplier of copper shapes to other firms in the EEA (the merchant market), with Montanwerke Brixlegg AG as its main competitor. Montanwerke Brixlegg AG is a wholly-owned subsidiary of the Austrian industrial group A-TEC Industries AG (A-TEC), which also holds minority shares in NA and Cumerio. The German Bundeskartellamt is currently investigating A-TEC's acquisition of the minority shareholding in NA.

In September of the previous year the Commission had opened an in-depth investigation with a view to verifying whether the proposed acquisition would significantly impede competition, in particular with regard to the European market for copper shapes. Copper shapes are formats cast from pure copper, which are called cakes when they have a rectangular section and billets when they have a circular section. However, the in-depth inquiry showed that factors such as overcapacity on the market, very substantial in-house production of shapes by other firms, ease of entry and competition on the downstream markets for semi-finished copper products made it unlikely that the transaction would have harmful effects on consumers.

The Commission also found that the production and use of copper shapes in the EEA is driven by competitive factors both upstream (development of the copper price) and downstream of the production of copper shapes. The fact that a number of firms are active at various stages of the processing chain was of particular importance. The Commission found that the main characteristic of the consumption of copper shapes in the EEA is the high proportion of in-house consumption, nearly five times higher than merchant sales. It was considered that this fact would act as a considerable competitive constraint on the merchant market.

The market investigation also confirmed that the availability of considerable spare capacity for the production of shapes would continue to exert a

competitive constraint on the new entity and prevent it from increasing prices of copper shapes. Even if prices on the merchant market for copper shapes increased, non-integrated users of copper shapes could integrate upstream and thus become active as producers of copper shapes. Finally, the market investigation confirmed that the downstream markets for semi-finished copper products are competitive and that this also exercises competitive pressure on the upstream market for copper shapes.

Ineos/Kerling

On 30 January the Commission approved the proposed acquisition of Kerling, the polymer division of the Norwegian company Norsk Hydro group, by the UK-based company Ineos. Both companies are active, *inter alia*, in the production of PVC.

Ineos is a leading global manufacturer of petrochemicals, specialty chemicals and oil products. It comprises eighteen businesses and, although present worldwide, its activities are mainly focused in Europe. Kerling is a subsidiary of Norsk Hydro ASA and comprises the polymer division of the Norsk Hydro group. It is mainly active in the production, marketing and sale of polyvinyl chloride (PVC) and caustic soda.

On 7 September 2007 the Commission had concluded after a first-phase investigation that the notified operation raised serious doubts as to its compatibility with the single market and the EEA Agreement and decided to open an in-depth enquiry. These concerns related in particular to the impact that the transaction could have had on the commodity Suspension PVC market (S PVC) in the UK, Norway and Sweden, as the Commission believed the geographic scope of the S PVC market might be national.

During the in-depth investigation, the Commission carefully examined the above-mentioned markets and concluded that their geographic dimension is wider than national and comprises at least north-western Europe. The Commission's investigation showed that commodity PVC producers located in continental north-western Europe exert sufficient competitive pressure in the UK, Norway and Sweden and constitute a credible alternative source of supply for customers in these areas.

The Commission also investigated the impact of the concentration in other markets, including the markets for caustic soda and PVC compounds and concluded that the proposed transaction was not likely to give rise to any competition concerns in these markets either.

Google/DoubleClick

On 11 March the Commission decided to clear the proposed acquisition of the online advertising technology company DoubleClick by Google, both based in the US.

Google operates an internet search engine that offers search capabilities for end-users free of charge and provides online advertising space on its own websites. It also provides intermediation services to publishers and advertisers for the sale of online advertising space on partner websites through its network AdSense. DoubleClick mainly sells ad serving, management and reporting technology worldwide to website publishers and to advertisers and agencies. Such technology allows internet publishers and advertisers to ensure that advertisements are posted on the relevant websites and to report on the performance of such advertisements.

The Commission's in-depth investigation, opened in November 2007, concluded that the transaction would be unlikely to have harmful effects on consumers, either in ad serving or in intermediation in online advertising markets. The Commission found that Google and DoubleClick were not exerting major competitive constraints on each other's activities and therefore could not be considered as competitors. Even if DoubleClick could become an effective competitor in online intermediation services, it was likely that other competitors would continue to exert sufficient competitive pressure after the merger. The Commission therefore concluded that the elimination of DoubleClick as a potential competitor would not have an adverse impact on competition in the online intermediation advertising services market.

The Commission also analysed the potential effects of non-horizontal relationships between Google and DoubleClick following concerns raised by third parties in the course of the market investigation. These relationships concerned DoubleClick's market position in ad serving, where Google, by controlling DoubleClick's tools, could allegedly raise the cost of ad serving for rival intermediaries, and Google's market position in search advertising and/or online ad intermediation services, where Google could allegedly have required purchasers of search ad space or intermediation to also purchase DoubleClick's tools.

The Commission found that the merged entity would not have the ability to engage in strategies aimed at marginalising Google's competitors, mainly because of the presence of credible ad serving alternatives to which customers (publishers/advertisers/ad networks) can switch, in particular vertically integrated companies such as Microsoft,

Yahoo! and AOL. The market investigation also found that the merged entity would not have the incentive to close off access for competitors in the ad serving market, mainly because such strategies would be unlikely to be profitable.

The Commission's decision to clear the proposed merger was based exclusively on its appraisal under the Merger Regulation. It was adopted without prejudice to the merged entity's obligations under EU legislation on the protection of individuals and the protection of privacy with regard to the processing of personal data and the Member States' implementing legislation.

C — Summaries of decisions taken under Article 8(2)

Thompson/Reuters

On 18 February the Commission approved the proposed acquisition of the UK-based Reuters Group by Thomson Corporation of Canada, subject to conditions and obligations. The Commission's in-depth investigation, opened in October 2007, had indicated that the concentration, as originally notified, could have led to a substantial impediment of effective competition in several markets of the financial information sector.

Both Thomson and Reuters are leading financial information providers. The companies source, aggregate and disseminate real-time and historical market data and other types of financial content to respond to the needs of financial professionals, such as traders and sell-side people in the on-trading floor space, of investors on the buy-side and of analysts in the off-trading floor space within banks, investment funds and corporations. In addition, Thomson is active in legal, fiscal, accounting and scientific research markets, whereas Reuters is best known as one of the largest international news agencies.

The investigation assessed Thomson's and Reuters' respective positions in the various markets in the financial services sector. The main areas of overlap related to off-trading floor space (i.e. the research and asset management area), given Thomson's marginal presence in the on-trading floor area. The in-depth investigation showed that the concentration, as originally notified, would have raised competition concerns in the markets for the distribution of aftermarket broker research reports, of earning estimates, of fundamental financial data of enterprises and of time series of economic data.

Aftermarket broker research reports analyse securities, industries or markets. This market comprises

the sale of the reports after an initial 'embargo' period of around two weeks, during which they are only accessible to selected customers. Earning estimates are predictions by analysts about future earnings of companies. Fundamentals databases contain company-specific data, such as financial statement data, financial ratios or earnings per share data. Time series of economic data comprise data on macroeconomic variables, such as GDP or unemployment rates, collected over long periods of time to allow an analysis of trends. These databases are predominantly used in off-trading floor activities of financial institutions.

The proposed transaction would have eliminated rivalry between the two main suppliers of such databases in the marketplace, at both the world-wide and EEA level, leaving financial institutions and customers of such products with a reduced choice, the likelihood of price increases and a severe risk of discontinuation of overlapping products.

The proposed transaction would also have had a negative impact on providers of desktop products which obtain the types of content described above and integrate it into their own offerings to customers. The merged entity would have had the ability and the incentive to close off such competitors, thereby adversely affecting competition at the downstream level.

To remove the Commission's competition concerns, the parties gave undertakings to divest copies of the databases containing the content sets of such financial information products, together with relevant assets, personnel and customer base as appropriate to allow purchasers of the databases and assets to quickly establish themselves as a credible competitive force in the marketplace in competition with the merged entity, re-establishing the pre-merger rivalry in the respective fields. The parties could also continue to use these databases in the future to commercialise the respective data to their own customers. With the remedies, customers of such financial information products therefore would continue to have sufficient alternatives post-merger.

The Commission's investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case by the US Department of Justice. The process involved close cooperation between the two authorities, including exchanges of views on analytical methods and of detailed information, plus joint meetings and negotiations with the parties.

D — Summaries of decisions taken under Article 9

Heineken/Scottish & Newcastle

On 3 April the Commission approved the proposed acquisition by the Dutch company Heineken of the businesses of UK-based brewer Scottish & Newcastle in Belgium, Finland, Portugal and the United Kingdom as it found that the transaction would not significantly impede effective competition on these markets. At the same time, the Commission referred Heineken's proposed acquisition of Scottish & Newcastle's business in Ireland to the Irish Competition Authority following the latter's request. After a preliminary investigation, the Commission found that the proposed transaction threatened to significantly affect competition in the beer markets in Ireland. The Commission therefore referred those aspects of the transaction for examination by the Irish Competition Authority under national law.

Scottish & Newcastle (S&N) is a public company with interests in the production and distribution of beer, soft drinks and mineral water in a number of countries around the world. Its beer brands include Foster's, Kronenbourg and Grimbergen. Heineken is active worldwide in the production and distribution of beer and other beverages. Its principal international beer brands are Heineken and Amstel.

On 25 January 2008 a consortium formed by Carlsberg and Heineken announced a public bid for the entire share capital of S&N. If the bid were successful, it would lead to the division of S&N between Carlsberg and Heineken. The consorti-

um's bid was considered to give rise to two distinct concentrations: one in respect of those S&N assets to be acquired by Carlsberg and a second covering those assets to be acquired by Heineken. The first concentration was cleared by the Commission on 7 March 2008.

In its request for referral, the Irish Competition Authority claimed that the transaction threatened to significantly affect competition in the Irish beer markets, in particular with regard to lager. This was confirmed by the Commission's preliminary market investigation. The Commission found indications that the beer markets in Ireland are currently characterised by two strong players, Heineken and Diageo, and that S&N, via its Irish subsidiary Beamish & Crawford, constitutes an important challenger. The removal of S&N as a competitor in Ireland risks eliminating competitive pressure on Heineken and Diageo and potentially harming consumers. Furthermore, based on its preliminary investigation, the Commission could not rule out the existence of competition problems for stout on a regional level.

Against this background the Commission took the view that the Irish Competition Authority was best placed to investigate the effect of the transaction on the Irish market. The Commission therefore referred the assessment of the Irish part of the transaction to the Irish Competition Authority.

With regard to other national markets, it was found that the transaction would not bring about any sizeable overlap of activities. Consequently, the Commission concluded that the proposed transaction would not give rise to any significant reduction of competition on these markets.

Bargaining and two-sided markets: the case of Global Distribution Systems (GDS) in Travelport's acquisition of Worldspan

Stefano VANNINI ⁽¹⁾

As emphasised in a series of recent articles ⁽²⁾, the two- (or multi-)sided nature of a market should explicitly be considered in evaluating the existence and magnitude of possible anti-competitive effects. However, the relevance of the two-sided nature of markets depends on at least two elements: (i) indirect network externalities and (ii) pattern of subscription ('homing') to the platform. Under specific circumstances, in particular when indirect network effects are negligible, the standard 'one-sided' analysis of each side of the platform in isolation provides a simpler analytical framework and a reliable proxy.

Indirect network externalities (or cross-group externalities) arise when the value of a platform for users on one side is affected by the size of the users' network on the other side ⁽³⁾. The willingness of customers on one side of the platform to pay in order to subscribe to a specific platform's provider then depends on the size of the network of users covered by that same provider on the other side of the platform ⁽⁴⁾. For example, (i) the number of readers of a newspaper or magazine (or the audience of a TV broadcast) tends to attract advertisers, (ii) the number of customers of a supermarket chain (or shopping mall) tends to attract suppliers of products to be sold there, (iii) the number of holders of a given credit card increases the incentive for shops to accept the card.

Concerning the *subscription pattern*, whenever there are several providers of the same type of platform, customers on each side of the platform may choose to subscribe to one provider only ('single-homing') or to several providers ('multi-homing'). The concept of multi-homing covers both subscribers to all available platform providers ('full'

multi-homing) and to more than one (but not all) of them. A platform's customers also may pursue different subscription approaches both within and across sides, depending on preferences and possible differentiation among providers' offers.

Multi-homing, single-homing and 'competitive bottlenecks'

As a general rule, multi-homing on one side of the market (say A) decreases incentives for multi-homing on the other side (say B). Assuming for a moment that users of group A choose full multi-homing, they are accessible by users of group B no matter what platform provider these users adopt. The marginal value, in terms of network externalities, for B users of subscribing to an additional provider is then limited or non-existent. Therefore, the incentive to multi-home on side B of the platform is correspondingly limited or non-existent. Reversing this reasoning, if single-homing is prevalent among B users, this represents an incentive for A users to multi-home, because network externalities would be positive and significant.

In other words, multi-homing prevailing on one side of the platform and single-homing on the other corresponds to a situation where indirect network effects are asymmetric and mostly arise on the single-homing side. This is the situation identified in economic literature as '*competitive bottlenecks*' ⁽⁵⁾, which, in its most stylised version, boils down to full multi-homing on one side and single-homing with no exceptions on the other. In this case, as soon as platform providers manage to get enough of both sides on board ⁽⁶⁾, they will be able to 'tip' the market in a way to allow them to extract rents from multi-homing A users. In this way, a platform provider can subsidise

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⁽²⁾ See Durand (2008), Evans (2008) and Rosati (2008).

⁽³⁾ In contrast, 'direct' network externalities refer to the utility derived by a potential owner of a good (or user of a service) from the number of other owners of the same good (or users of the same service). In other words, it depends from the current size of the network of owners (or users).

⁽⁴⁾ Nevertheless, a negligible (or even zero) number of additional users may still justify subscription in the case of a very low (or zero) price or collateral services provided only by that platform provider.

⁽⁵⁾ See, for example, Armstrong (2006). It should be stressed that the literature tends to consider a pre-determined homing configuration (either explicitly or by adopting a specific set of assumptions inevitably leading to that pattern) and seldom derives the homing configuration as an equilibrium structure. A notable exception is Gabszewicz and Wauthy (2004).

⁽⁶⁾ Evans (2003) discusses the 'chicken-and-egg problem' deriving from the fact that without demand from users on one side of the platform, no demand arises on the other side either. In some cases, this results in the need to even subsidise one group of users in order to get enough of the other group of users on board and trigger network effects.

single-homing B users willing to join its platform, for whom providers have to compete fiercely. Single-homing on side B supports rent extraction on side A because providers appear to A users as gatekeepers to a number of B users.

This extreme homing configuration (and related rent distribution pattern) is based on a series of assumptions: (i) that there is no differentiation among different platform providers, (ii) that customer preferences on the same side of the platform are sufficiently homogeneous and (iii) that customers on the multi-homing side have no bargaining power allowing them to limit rent extraction by the platform provider.

As soon as *differentiation* enters into play, in e.g. the functionalities and content provided by the platform provider, simultaneous multi-homing on both sides of the platform becomes possible in equilibrium. If, say, B customers have access to the same content no matter which platform provider is chosen, subscribing to an additional platform provider does not give access to additional content and the marginal benefit does not justify the additional subscription, unless the price is very low (or zero). But if different platforms give access to significantly different and complementary content (or functionalities), multi-homing may arise on side B of the platform even in the absence of indirect network externalities.

As to customers' preferences, there may well be some degree of *heterogeneity* within the same group, not only among customers belonging to different groups, so that single-homing and (different degrees of) multi-homing may coexist within the same group. For instance, some large customers need to have a backup solution in the event of technical failure of the default platform provider. Therefore, heterogeneity can also be a driver of multi-homing in the absence of indirect network externalities and differentiation.

Last but not least, customers on the multi-homing side A, for whom the platform's provider represents a gatekeeper to single-homing customers on side B, may have some countervailing *bargaining power*. For instance, they can divert some of their traffic and circumvent the platform, thereby decreasing the total rent available for extraction by the platform provider. While remaining able to extract the same rent in relative terms, as compared to the total rent available, the platform provider will still see its rent decrease in absolute terms because of the diversion. Faced with this possibility, the platform provider may well decide to make concessions to multi-homing customers in order to limit diversion (and the related erosion

of the total rent available for extraction). This is precisely the issue arising in the case examined in the next section.

The case of a merger in the GDS market

A recent merger case provides an interesting illustration of this analytical framework ⁽⁷⁾. In December 2006, the US firm Travelport, a subsidiary of the Blackstone Group (a US private equity and asset management firm), agreed to acquire Worldspan Technologies Inc. (another US company). This transaction was authorised on 21 August 2007 after a 'Phase II' investigation. Both merging parties provide travel distribution services, in particular through their respective 'global distribution systems' Worldspan and Galileo (Travelport's brand). These technical platforms match travel content provided by airlines, hotel chains, car rental services, etc. on one side, and the demand for such content as conveyed by travel agents on the other side ⁽⁸⁾. In what follows 'GDS' (or more simply 'the platform') refers to a global distribution system, 'airlines' to the broader category of travel content providers ⁽⁹⁾ and 'agents' to travel agents.

As summarised in Figure 1, a GDS is a platform between two distinct groups of customers, airlines and agents ⁽¹⁰⁾.

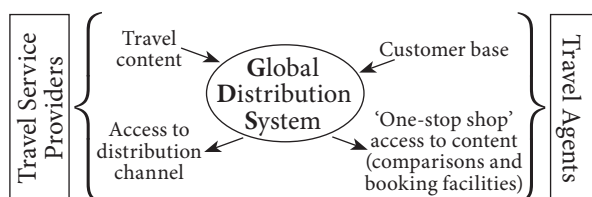
- On the one side of the platform, airlines provide travel content (namely prices and availabilities) to be included in the GDS offer to agents. Through the platform, airlines obtain access to a distribution channel, namely the network of agents using that GDS.
- On the other side of the platform, each agent subscribing to a GDS provides its customer base to airlines via the GDS. Through the platform, agents obtain efficient access to travel content, with facilities for price/content comparisons as well as an interface for centralised bookings from different sources.

⁽⁷⁾ Rosati (2008) also discusses this merger case.

⁽⁸⁾ While it combined EEA number 2 (Galileo) and 4 (Worldspan), the merged company did not unseat Amadeus from its number one position in the EEA.

⁽⁹⁾ The reasoning referring, for ease of exposition, to airlines applies *mutatis mutandis* to other travel content providers as well, as explained in footnote 22.

⁽¹⁰⁾ More generally, following Evans (2003), *n*-sided platforms may be (i) 'coincident' platforms when they offer substitutable products or services on the same sides, (ii) 'intersecting' platforms when this is the case only for some ($m < n$) sides, or (iii) 'monopoly' platforms when they have no competing providers on any side. GDS platforms are coincident, two-sided platforms.

Figure 1 — The two-sided GDS market

In other words, the existence of the GDS is justified by the value it creates in terms of (i) lower transaction costs (or higher efficiency) especially for agents and (ii) positive network externalities especially for airlines.

Reduced transaction costs mainly benefit agents by making their searches more effective and less time-consuming, as compared to searches using a number of airline-specific sources.

As regards network externalities, 'indirect' (i.e. cross-group) externalities for airlines make the two-sided nature of the market relevant for its analysis. In this specific case, indirect network externalities arise from the fact that the wider the network of agent outlets (and the related end-customer base) reached by airlines using a given GDS, the larger the value for airlines in using that platform.

The two sides of the GDS market exhibit some distinctive features. Firstly, airlines whose content is offered via GDSs tend to have a broader (pan-European or even global) coverage than agents using GDS services (only very few having a broader than national coverage)⁽¹¹⁾. Secondly, virtually all airlines subscribe to all GDS providers⁽¹²⁾, whereas agents generally tend to use only one GDS⁽¹³⁾.

It should also be stressed at this point that the GDS is only one of different channels through which travel-related content can be distributed to end-consumers. However, these different channels may have different groups of customers on their respective sides. For instance, 'supplier.coms'

(i.e. booking facilities available on some individual airline websites⁽¹⁴⁾) address end-consumers instead of agents. Also, even when addressing the same customers as GDSs (i.e. agents), the functionalities provided by web-booking facilities may be limited. For instance, an agent may have a 'direct link' to the booking inventory of an airline, thereby bypassing GDS providers and the related fees, but at the cost of losing the price-comparison functionalities or of having to create in-house solutions to reproduce similar functionalities.

The limited substitutability between GDS platforms and alternative channels suggests considering a narrow product market for GDS, rather than a broader market including those other distribution channels as well.

Multi-homing and single-homing in the GDS market

The two-sided GDS market contains a number of elements characteristic of the multi-homing / single-homing configuration (or 'competitive bottlenecks') described in economic literature. These elements are:

- (i) A limited degree of product differentiation;
- (ii) Asymmetries in indirect network effects, with indirect network externalities generated mainly if not exclusively on the agent side and GDS providers competing to attract agents in order to generate demand on the airline side;
- (iii) A distribution of prices and revenues skewed towards one side of the platform, with GDS providers obtaining profits on the airline side and partially using those profits to offset net losses on the agent side.

The number of 'reachable' agents (and the related customer base) is extremely important for airlines, because indirect network externalities generated on the agent side (e.g. in terms of booking volumes) depend on it and airlines may take advantage of this by multi-homing. For this reason virtually all airlines subscribe to all GDS providers⁽¹⁵⁾.

⁽¹¹⁾ American Express and Carlson Wagonlit represent examples of agents with pan-European or even global coverage.

⁽¹²⁾ This pattern has some exceptions. Namely, among airlines, some low-cost carriers (such as Ryanair) and charter carriers do not distribute inventory via GDS at all. Also, some regional carriers subscribe to only some GDS providers to distribute their inventory.

⁽¹³⁾ There are exceptions on this side of the market as well. Some agents do not use GDS services at all, a minority of agents subscribe to more than one GDS and only very few (but very important) agents subscribe to all GDSs. However, even agents subscribing to more than one GDS as a group tend to use only one at the level of individual outlets.

⁽¹⁴⁾ Whereas a supplier.com is usually designed for end-consumers making their own bookings, certain airlines also offer specific web-booking facilities for agents, called Business to Trade ('B2T') sites.

⁽¹⁵⁾ This is also the case for many car rental firms and hotel chains that tend to do the same. Concerning airlines, there are a few notable exceptions represented by low-cost carriers such as Ryanair and certain charter carriers that do not use GDS services at all. Also, certain regional carriers do not distribute their travel inventories through all GDS providers. More precisely, given that contracts between GDS providers and airlines are normally concluded on a global basis, an airline will tend to subscribe to all GDS providers relevant as distri-

If a sufficient number of airlines use multi-homing and all of them provide their full inventory, each GDS ends up providing a broadly similar content, which reduces (or removes altogether) the indirect network externalities generated on the airline side and the related added value for agents of subscribing to an additional GDS. Therefore, disregarding possible different functionalities made available by the GDS provider, agents will only need to subscribe to one GDS, especially where any additional subscription would incur significant additional costs. In fact, single-homing is the prevalent configuration observed on the agent side ⁽¹⁶⁾.

A GDS provider must be in a position to offer a sufficiently broad network of agents (and related customer base) to airlines, and offer at least as good a content as competing GDS providers to agents, for which it will compete mainly through incentives, possibly complemented by some slight differentiation in terms of sophisticated functionalities.

The asymmetry in network effects and, correspondingly, in subscription policies between the two sides of the platform explains the skewed pricing policy applied by GDS providers and the related financial flows, namely the fact that agents tend to be net receivers and airlines net payers ⁽¹⁷⁾. The larger the number of agents reachable via a given GDS, the higher the positive network externalities that are generated by that GDS and, correspondingly, the higher the price the airline will be willing to pay to distribute content via that GDS.

bution channels to reach end consumers in the geographical markets of interest for the airline.

⁽¹⁶⁾ Although additional operational costs may arise, multi-homing (or at least dual-homing) may become interesting above a certain scale of operation in order to provide a backup solution and reduce the risk of service disruption in the event of temporary system failure of the default GDS. It should be noted that (i) some agents do not use the services of a GDS at all, (ii) a minority of agents use multi-homing and (iii) only in exceptional cases will a travel agent's group subscribe to all GDS providers. However, even the few agent groups using multi-homing generally use single-homing at the level of individual outlets (that is to say, each outlet only uses one GDS).

⁽¹⁷⁾ There are two types of financial flows between airlines, GDSs and agents. The first concerns the fees paid by the airline to the GDS for the distribution of its travel content and the net payments by the GDSs to the agents for their use of that particular GDS, for example incentive payments minus subscription fees and other fees such as the 'opt-in' fees discussed below. The second financial flow concerns payments made directly by the agents to the airlines for the travel service being purchased (for example, the flight, the hotel accommodation or the rental car) and any other fees due by the agents to the airlines (for example, possible surcharges for 'opting out', as discussed below).

But GDS providers have to compete for agents, so that they have to share with them, in the form of incentives, part of (and in extreme cases all) the rents that can be extracted from airlines ⁽¹⁸⁾. Agents become net receivers as soon as the subscription fees charged to agents by the GDS provider are more than offset by incentive payments paid to them by the GDS provider ⁽¹⁹⁾.

In this relatively simplified situation, airlines are clear contributors, while the GDS and agents share in some way the rents extracted from airlines. All this is driven by the limited product differentiation and by asymmetries in network effects, generating the skewed distribution of prices and related revenue flows.

Recent market developments

The situation in the GDS market has recently evolved and is no longer so clear-cut. Until now, it has been implicitly assumed that (i) the provision of content by an airline is a discrete choice, i.e. whether or not to make an airline's entire inventory available, resulting in limited differentiation between GDS interface/providers (in terms of functionalities or technical assistance, as discussed below) and (ii) GDSs are the only distribution channel available for travel-related content.

On the first issue, airlines do have the capability to withhold specific content and even to discriminate between GDS providers in terms of the content made available to each of them. For customers, this introduces an element of differentiation between one GDS and another, which may be of great relevance to agents. The lowest fares of an airline may be available on one GDS and not on another, which would be very important in terms of sales for a given agent. In such cases, agents may decide to switch to another GDS providing all fares (including the lowest fares) or even opt

⁽¹⁸⁾ As long as agents use single-homing, GDS providers have exclusive access to agents belonging to their respective agent networks. Each GDS provider therefore has a certain degree of monopoly power in relation to airlines that need to reach those agents exclusively connected to one GDS. This sort of 'monopoly power' where the GDS provider is a 'gatekeeper' for those agents, allows it to charge higher prices to airlines, thereby extracting from them something that could be compared to 'monopoly rents'. These are to a large extent used to cover the financial incentives granted to agents to secure their subscription.

⁽¹⁹⁾ Agents are in general net cash receivers, as they receive more financial incentives from GDSs than they pay as fees to the GDSs. Their incentives have consistently increased over the last five years, even in the Member States where the merging companies have high market shares (above 40%).

for multi-homing. This scenario — albeit simplified — illustrates how a GDS that is not able to secure ‘premium’ travel content may lose market share on the agent side. Apart from this dimension of differentiation generated by airlines (possibly through bargaining with GDS providers, as discussed below), and apart from the size of the agent network (which depends on how successful a GDS provider is in securing agent subscriptions), other elements of differentiation among different GDS can be introduced by the providers themselves, namely in terms of optional services (such as additional functionalities for users on both sides of the platform) and the quality of technical support. Still, the crucial issue remains the travel-related content available, such as access to low-fare inventory, geographical coverage and types of ‘non-airline’ content included.

On the second point, as already mentioned above, alternative technological platforms (and more generally, alternative distribution channels) are already available or at least their implementation is technically and economically feasible within a relatively short term. Those platforms may allow airlines to bypass the GDS and directly access agents (‘direct link’) or even end-consumers (‘supplier.coms’) ⁽²⁰⁾. This has the potential to weaken considerably the position of GDS providers as gatekeepers controlling access to their network of subscribing agents (which could then be reached directly by airlines) and the related customer base (which could make use of supplier.coms set up by airlines).

A major implication of this evolution in the GDS market is the change in the relative bargaining power of airlines, GDS providers and agents. In recent years, GDS providers have been faced with bargaining not only on the agent side (where they have to grant incentives in order to secure subscriptions and the agents’ customer base) but also, and increasingly, on the airline side. This results from the substantial efforts made

by airlines to reduce costs ⁽²¹⁾ also by exploiting alternative distribution channels to GDSs, notably those available via the internet ⁽²²⁾.

Representative of this evolution are two new types of agreements characterising the interaction between airlines, GDS providers and agents: ‘full content’ agreements and ‘opt-in’ agreements.

Full content (and related discounts)

In order to make supplier.coms a viable alternative distribution channel for travel content, airlines may need to withhold some premium content, such as their lowest fares, from GDS providers and make it available only via the web. A first point is therefore that once supplier.coms exist and are viable, an element of differentiation may exist in terms of content made available selectively on one platform (supplier.com) and not on another (GDS). As a matter of fact, the number of bookings via supplier.coms has increased substantially in recent years.

This market evolution, as well as the possibility (or even the simple threat) that airlines could selectively withhold content (i.e. from one GDS provider but not from another ⁽²³⁾), with a possible impact on each GDS’s market shares, has obliged GDS providers to revise their strategy towards airlines. GDS providers have started to grant discounts in exchange for airlines’ commitment to

⁽²⁰⁾ Supplier.coms are in part accessible to agents as well. Moreover, certain airlines operate specific Business to Trade (‘B2T’) websites. However, the use of supplier.com websites by agents is limited by the time and costs necessary for multi-channel search, as compared to one-stop-shop searches via the GDS platform. This tends to limit the use of supplier.coms (or B2T) by agents to a simple complement to GDS (or a temporary solution to system failure for single-homing agents). Supplier.com websites mainly target end-consumers.

⁽²¹⁾ This is in particular the case for full-service airline carriers facing competition from low-cost carriers.

⁽²²⁾ This is increasingly also the case for travel content providers other than airlines, such as hotel chains and car rental services. As said at the beginning, airlines are used here as a cover-all term for ease of exposition, but a similar reasoning also applies to other travel content providers such as rental car companies and hotel chains. However, their dependency on GDSs for the distribution of their travel content is much lower than in the case of airlines. This implies that any potential negative effect deriving from such transactions can only affect a limited part of their business. Most of the rental car companies and hotel chains have supplier.coms even more developed than those of airlines. Some of them have also established direct links with major agents (as well as with airlines), which allows them to bypass GDSs.

⁽²³⁾ GDS providers must be able to provide full content (in particular the lowest fares) to agents. If a GDS provider is unable to offer full content to agents, these may decide to switch to a competing GDS providing that content. The risk of losing customers intrinsically weakens the GDS provider’s bargaining position with respect to airlines.

provide ‘full content’, i.e. their whole inventory, or at least the same content made available on the airline’s website ⁽²⁴⁾.

In other words, content has become the crucial element in determining the relative bargaining position between airlines and GDS providers. The development by airlines of their supplier.com websites with the ensuing possibility to withhold (or threaten to withhold) content from the GDS providers has improved the bargaining position of airlines vis-à-vis GDS providers and destabilised the pattern of rent extraction derived from the standard single-homing / multi-homing framework previously described, where GDS providers were able to extract rents on the airline side to be partially used to finance the acquisition of a customer base on the agent side.

Opt in / opt out (and related surcharges)

The fact that an airline grants full access to its inventory and fares via a given GDS does not necessarily mean that the inventory and fares are actually fully accessible to agents on the other side of the platform. Access to the full content via the GDS may be granted to agents as an additional option. In fact, some airlines have negotiated rebate schemes (‘opt in’ agreements) with their GDS providers, on top of existing full content agreements. Under these schemes, rebates (R) are granted by the GDS provider to the airline in addition to the discounts provided under the full content agreement, but are triggered only when a pre-defined threshold of ‘opting-in’ agents is attained. Agents opting in will have to pay a variable opt-in fee (F) to the GDS provider, allowing it to partially recoup the cost of the rebates granted to airlines. Agents can subscribe to the GDS without opting in, in which case they can still make bookings via the GDS but have to pay a surcharge (S) — which the GDS will transfer to the airline — which would not be incurred by making the same booking directly with the airline on its supplier.com or any other airline-specific B2T platform.

Therefore, the incentive to opt in stems primarily from the system of surcharges imposed by the airline on bookings made via the GDS (as opposed to direct, non-GDS alternative platforms) when an agent has not opted in. The choice by agents depends on the relative magnitude of the variable ‘opt-in’ fee as compared to the surcharge paid for the GDS booking if opting out or to other financial and non-financial ⁽²⁵⁾ costs (C) related to booking directly.

In a stylised example, agents will tend to opt in when $F < S$, in which case the GDS provider obtains F and, assuming that the threshold is attained, pays R to the airline. If for any reason the agent decides to opt out, it will either book via the GDS, paying the airline a price including S , or book directly with the airline (e.g. via the supplier.com or another airline-specific B2T platform) possibly incurring the cost C .

Whereas the application of ‘opt-in’ agreements in the EEA appears to be still rather limited (confined mainly, if not exclusively, to the UK and Irish markets at the time of the investigation), their mere possibility represents a further element destabilising the bargaining power previously enjoyed by GDS providers vis-à-vis airlines. In fact, as with withholding (or threatening to withhold) travel content by applying (or threatening to apply) surcharges to agents, airlines may influence the use of a specific GDS and make it lose sales in favour of either supplier.coms (where no surcharges are imposed) or another GDS (which may have lower surcharges).

Interaction of content withholding and surcharges: summing up

Both withholding content and imposing surcharges (once full GDS access to content has been granted) have a steering function in stimulating direct bookings to the detriment of the GDS channel, thereby weakening the position of GDS providers. Although a given GDS provider may preserve intact its share of the rent represented by the traffic generated by the network of agents single-homing with it, while it remains the gatekeeper

⁽²⁴⁾ As regards airlines in the strict sense, the so-called ‘Participating Carrier Agreements’ (PCAs) originally concluded between GDS providers and airlines have been complemented by a series of Full Content Agreements (FCAs). Galileo and Worldspan as well as other GDS providers have entered into FCAs with a number of airlines. These agreements provide for significant discounts on GDS booking fees in return for a commitment from the airlines to distribute all public fares and associated inventories through that specific GDS, in particular fares that until then were available only through the airlines’ supplier.com websites.

⁽²⁵⁾ An example of non-financial costs is the cost of multi-channel searches (and related comparisons) on different supplier.com / B2T platforms, both in terms of time and, where applicable, for setting up an appropriate in-house interface. This may be very low if the agent already has an appropriate interface for multi-channel searches or if the booking does not require any searching across different channels because of precise instructions given by the customer.

to that network, the behaviour of the airlines can reduce the size of that rent, or at least reduce its growth, to the extent that they are able to deviate part of the traffic (including that of potential new customers) out of the reach of the GDS ⁽²⁶⁾.

The fact that airlines are able to divert (existing and new) booking traffic out of the reach of GDS providers has an impact on the bargaining between airlines and GDS providers, but not on the homing strategy, which will remain one of multi-homing (although, possibly, without full content being provided to the GDS). This has the potential to induce GDS providers to grant direct cost reductions (i.e. lower booking fees) to airlines, thereby modifying the rent-extraction pattern (and related size / direction of the financial flows) as compared to the extremely skewed (and detrimental to airlines) pattern following from the standard multi-homing / single-homing model which previously characterised the GDS market.

The evolution of the market, independently from the merger under consideration, has thus given rise to additional financial flows depending in practice on the relative magnitude of surcharges (applied by airlines to GDS bookings made by agents that have not opted in), opt-in fees (charged by the GDS provider to agents opting in), rebates (granted by GDS providers to airlines and partially financed by the opt-in fees) and other discounts (also granted by GDS providers to airlines for full content agreements). In addition, direct sales via supplier.coms (and other airline-specific platforms) have increased and airlines keep on developing bargaining tools that are very likely to maintain the pressure on GDS providers even after the merger ⁽²⁷⁾.

⁽²⁶⁾ Where low fares are set in order to reach occasional low-budget travellers, which represent an important factor in the overall growth of the industry, the fact that those low fares are made available only on the supplier.com website of an airline precludes GDS providers from appropriating part of the related revenues.

⁽²⁷⁾ Airlines could possibly develop 'joint' supplier.coms (for example, as part of airline alliances) that could compete with GDSs. Such solutions would have the advantage, as compared to mono-brand supplier.coms, of decreasing the costs of multi-channel searches and become more competitive with the centralised solutions represented by GDS platforms. Another possibility, mainly used in North America for the time being, would be to unbundle the fares (i.e. separating the fare for the travel itself from charges for ancillary elements such as, for example, luggage, catering, web ticketing/check-in, etc). Such fare unbundling makes comparison via GDSs more difficult and therefore decreases the value for agents of the GDS as a search and booking tool.

... and travel agents

The evolution described above is strictly independent of the merger. GDS providers now do not appear to be in a position to simply recoup the reduction in rents extracted on the airline side by correspondingly limiting rent-sharing with agents. However, consolidation (as in the merger under review) might increase their power vis-à-vis agents. On the other hand, recent consolidation on the agent side has in the meanwhile reinforced the bargaining position of agents as well ⁽²⁸⁾.

Even the issue of surcharges, which could appear *prima facie* as a price increase directly imposed by airlines on agents, is not an element in possible rent extraction by GDS providers on the agent side. It appears that average net prices have not noticeably increased for agents, indicating that agents have actually managed to pass on the increased costs generated by the airlines' surcharge strategy to GDS providers. In fact, the market evolution just described has not weakened the need for GDS providers to compete for agents, and the related ability of agents to play one GDS against the other ⁽²⁹⁾ and obtain more financial incentives.

Conclusion (on the merger)

The reduction in the number of GDS providers was found not to lead to price increases on the airline side of the market even in the presence of single-homing (and a relatively high market share of the merged company) on the agent side.

In fact, recent market developments, in particular the number of countervailing bargaining tools at the disposal of airlines, allow airlines to force GDS providers to lower their prices in exchange for (i) full content and/or (ii) limiting the (actual or potential) diversion of bookings towards other platforms or competing GDS providers (via surcharges and, again, the retention of premium content). Nevertheless, the improved bargaining position of airlines is not conducive to a revision of their homing policy, so that the existing

⁽²⁸⁾ Some recent examples are Carlson Wagonlit Travel's acquisitions of Navigant and of ProTravel, American Express/Rosenbluth, and BCD's acquisitions of TQ3 and of the Travel Company, Thomas Cook/My Travel and TUI/First Choice. One could even see this consolidation on the agent side (and the related considerable increases observed in the financial incentives given by GDS providers to agents) as one reason for consolidation at the level of GDS providers.

⁽²⁹⁾ In view of the fact that switching costs are quite limited and in any case not an insurmountable obstacle to switching GDS providers.

configuration involving multi-homing (airline side) vs single-homing (agent side) will continue to prevail.

On the agent side, a sufficient number of GDS platforms will remain available to agents, with relatively limited costs for switching GDS provider. In addition, as just stated, single-homing is sufficient for most agents to guarantee an efficient one-stop-shop access to most travel-related content (occasionally complemented by recourse to alternative channels). The fact that GDS providers need to create and maintain a sufficiently broad network of agents in order to generate demand on the airline side leaves agents in a favourable bargaining position vis-à-vis GDS providers even after the elimination of one of these providers.

Conclusion (on the theory)

Under some conditions (mainly the existence of significant indirect effects) the two-sided nature of a market is an important element in the assessment of a merger. Failure to take it into account may lead to enforcement errors, both overstating and understating possible competition concerns.

In situations where a ‘competitive bottleneck’ is identified, it has to be considered whether platform users have any countervailing bargaining power. If that is the case, the theoretical result of the ‘competitive bottleneck’ theory, stating that the platform provider can extract all rents to the detriment of multi-homing users, has to be adjusted.

Travelport’s acquisition of Worldspan provides an interesting example in this regard, as it features (i) preliminary indications of possible unilateral effects on the basis of high market shares in a number of markets, (ii) a pattern of subscription to the platform broadly corresponding to the competitive bottleneck scenario and (iii) a dynamic aspect consisting of users on the multi-homing side developing bargaining tools to counteract the rent extraction predicted by theory in that scenario.

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Cookson/Foseco: merger of foundry industry suppliers reviewed in parallel by the EU and the US

Thomas MEHLER and Patrick D'SOUZA ⁽¹⁾

On 4 March the Commission approved the proposed acquisition of Foseco by Cookson ⁽²⁾. Both companies are based in the UK. The Commission's decision was conditional on the divestiture of Foseco's isostatically pressed products ('IPPs') business and Cookson's foam filter business.

Both Cookson and Foseco are suppliers of refractories to the iron and steel industry and produce consumable products, in particular filters for use in the foundry industries. While Cookson, through its wholly-owned subsidiary Vesuvius, is mainly active in the refractories business, Foseco is to a large extent focused on the foundry segment.

Refractories are non-metallic ceramics which can resist temperatures of up to 1800°C and are primarily used as a heat buffer or lining in industrial devices such as furnaces, kilns and ovens. They may serve as a protection for the outer shell of the furnace, but can also be used to control the flow of molten metal.

Foundries produce metal castings from either ferrous or non-ferrous alloys. The main manufacturing process used in the industry is traditional casting, where molten metal is introduced into a sand or metal mould and allowed to solidify within the mould. For certain castings where a high degree of finish is required a more specialised process — investment casting — is used. Here refractory shell moulds are used to define the outer shape and surface of the casting and a removable wax or foam core defines the inner shape and surface.

The Commission examined the competitive effects of the proposed merger on refractories and filters, where both parties are active.

Refractories can be classified according to shape and raw material. Unshaped refractories include all monolithic (powder-based) products used for linings and are usually processed and applied in the equipment itself. Shaped refractories are supplied in a form which is immediately useable by the customer (bricks, ladles, tubes) and gener-

ally have a denser structure than unshaped products. Refractories made from magnesium oxide or calcium oxide are classified as basic, whereas products based on bauxite and alusite or silica are known as non-basic. On the basis of this categorisation refractories could be sub-divided into four segments: shaped basic refractories, shaped non-basic refractories, unshaped basic refractories, and unshaped non-basic refractories. In addition, within the segment of shaped non-basic refractories a further subdivision is possible into isostatically pressed products ('IPPs') and other products such as bricks. IPPs are refractories used in the continuous casting of steel and are produced using a special ('isostatic') pressing and manufacturing process yielding certain qualities as to homogeneity and thermal shock resistance. The manufacturing process involves the use of a special technology. The Commission identified three markets where the parties' activities overlap: (i) IPPs; (ii) unshaped non-basic refractories, and (iii) unshaped basic refractories. The geographic markets were considered to be EEA-wide.

Filters are a type of technical ceramics. Two main types are used: porous foam-like structures with interconnected pores that vary in direction or cross-section ('foam filters'), and cellular or honeycomb structures with cells of various sizes and consistent cross-sections ('strainers'). Filters can also be differentiated according to their chemical composition. Filters are largely tailored to the metals and the casting operations. From a supply-side point of view, different technical skills are required for producing strainers or foam filters. Within foam filters products have to be differentiated according to their application. In steel casting only Zirconia foam filters can be used. In iron casting only silicon carbide ('SiC') foam filters are used. Technically it would be possible to use Zirconia foam filters too. But as Zirconia foam filters are 5-10 times more expensive than SiC foam filters no foundry can afford to switch to this alternative. The use of alumina foam filters is limited to non-ferrous applications. Supply-side substitutability is also limited. Alumina foam filters on the one hand and Zirconia filters/SiC filters on the other hand are manufactured in different production facilities. Manufacturers consider it difficult to switch production, in particular to start the production of Zirconia foam filters. Zirconia

⁽¹⁾ Directorate-General for Competition, unit E-4. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Case COMP/M.4961 http://ec.europa.eu/competition/mergers/cases/index/m99.html#m_4961.

filters are more sophisticated than SiC filters and require special know-how and experience. Typically producers enter the more basic SiC foam filter segment and only after several years of experience consider producing Zirconia foam filters. The Commission therefore drew the conclusion that alumina foam filters on the one hand and SiC and Zirconia filters on the other hand constitute different product markets. The question whether Zirconia and SiC foam filters should be considered as distinct product markets could finally be left open as even under a broad market definition the merger raised serious doubts as to its compatibility with the common market. The geographic market definition was also left open as even under the assumption of a world-wide market the transaction was likely to have negative effects on competition in the relevant filter markets.

Competition concerns were identified in two markets: (i) IPPs and (ii) SiC/Zirconia foam filters.

As regards IPPs Cookson would have become by far the market leader after the merger, and the limited number of remaining competitors would not have been able to counter the new entity's market power. In addition to the large market shares the market investigation indicated that the products of Cookson and Foseco are marketed under brands which are widely recognised as the industry leaders, and their products are considered as close substitutes in terms of quality and specifications. The merger would have eliminated the closest competitor of the current market leader Cookson.

Concerning SiC and Zirconia filters, an area where Foseco has a strong market position, the merger would have combined the existing mar-

ket leader and its closest competitor in terms of quality, service and innovation. A number of customers who source filters from both customers pre-merger would have lost an alternative supplier. Furthermore, there are significant hurdles regarding the switching of filter suppliers. A switch would require testing and adjustment of the foundry process, which would take up to half a year or longer. In typical small foundries test runs would disrupt production and therefore lead to significant costs. There would also be the high risk of producing scrap for several production cycles owing to adjustment problems, which further increased the cost risk. At the same time, the filter price is only a fairly small proportion of the overall production cost. Instead of switching to an alternative supplier with unknown quality and limited technical support, thereby risking potential scrap and a loss of reputation and customers, customers would rather accept a price increase.

To address these concerns Cookson made the commitment to divest its filter business and, with the exception of a small plant in Asia, Foseco's IPP business. The commitments entirely remove the overlaps in the parties' activities in both areas of concern. After market testing these commitments, the Commission concluded that they would be suitable to eliminate its concerns.

The transaction was reviewed by the US Department of Justice (DoJ) in parallel. Both the DoJ and the Commission had close contacts during their investigation and, on the basis of a waiver provided by the parties, shared their information. The DoJ required the divestiture of Foseco's entire US IPP (or carbon bonded ceramic — CBC) business. The cooperation continues for the implementation of the remedies.

Google/DoubleClick: The first test for the Commission's non-horizontal merger guidelines

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I. Introduction

The *Google/DoubleClick* merger ⁽²⁾ generated considerable interest as it concerned the ubiquitous search engine that most Europeans use in their daily lives. From a competition policy perspective, the case raised a number of interesting issues and, in particular, it was the first major concentration for which the Commission had to assess non-horizontal effects following its adoption of the Non-Horizontal Merger Guidelines ⁽³⁾. This case was notable in that it covered horizontal, vertical as well as conglomerate aspects.

During the investigation, the Commission received a significant number of complaints and a wide range of different theories of harm were put forward by competitors and, to a lesser extent, by some customers of the parties. The Commission assessed these complaints and theories of harm carefully. In doing so, it took into account that the *Google/DoubleClick* case concerned a transaction in a relatively new industry, which is constantly evolving at a fast pace and in which reliable market data are extremely difficult to obtain. Furthermore, in its competitive assessment of this case the Commission was conscious that, following the public announcement of the acquisition of DoubleClick by Google, a number of similar transactions had taken place, demonstrating a general tendency in the industry towards vertical integration.

Another aspect to be considered by the Commission in its investigation was the interaction between competition law and privacy concerns.

Finally, this case was also interesting in that it was assessed in both the United States of America and in Europe, with very similar results.

II. The transaction, the parties and the industry

The proposed transaction lacked a Community dimension within the meaning of Article 1(2) and (3) of Council Regulation (EC) No 139/2004 ⁽⁴⁾ ('the Merger Regulation'). However, following a referral request under Article 4(5) of the Merger Regulation, the concentration was deemed to have a Community dimension and was notified to the European Commission.

Google is a major provider of online advertising space on its own website (Google.com) and intermediation services for online advertisements through its ad network AdSense ⁽⁵⁾.

DoubleClick is a leading provider of 'ad serving' technology. Online publishers sell advertising space on their websites in order to generate revenues. Advertisers purchase such advertising space to place their advertisements. Once online advertising space has been sold by a publisher to an advertiser, either directly or through an intermediary, both parties need to ensure that the correct advertisement actually appears on (i.e. is served to) the publisher's website space at the right place at the right time. This step is performed by the ad serving tools, which also measure the performance of the ad placement (by recording events and in some situations by 'tracking' the behaviour of users ⁽⁶⁾). DoubleClick provides such ad serving tools to both publishers and advertisers.

⁽¹⁾ Directorate-General for Competition, units C-5, C-3 and 02, and the Chief Economist's Team respectively. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Case COMP/M.4731 *Google/DoubleClick*.

⁽³⁾ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, adopted on 28 November 2007.

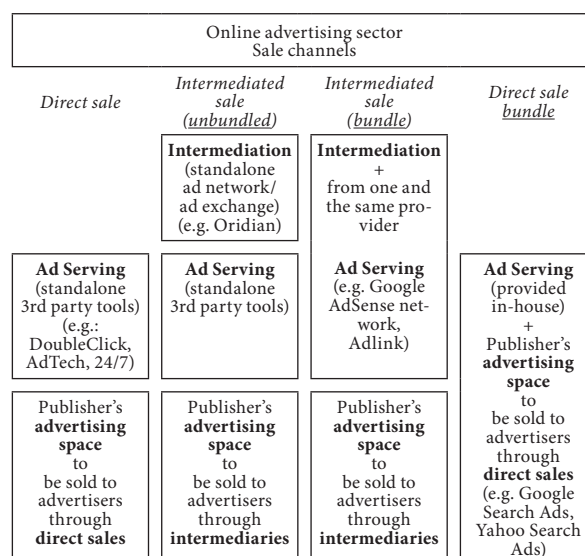
⁽⁴⁾ OJ L 24, 29.1.2004, p. 1.

⁽⁵⁾ Ad networks pool online space obtained from publishers and allocate it among advertisers that have submitted their ads to the network for placement. A different form of intermediation for the sale of online advertising space is offered by so-called ad exchanges, which provide a marketplace where advertisers and publishers buy and sell ad space on a real-time basis.

⁽⁶⁾ Performance metrics include the number of impression deliveries and clicks, click-through rates, view-through rates, rates of conversion (of web users into actual customers), type of user interactions with advertisements, and various reach/frequency measurements. These metrics can be viewed in many different ways, including breakdowns by site, site placement, advertisement and advertisement type.

Through its online activities, Google mainly offers advertising space for search (text) and contextual (text) ads while DoubleClick's ad serving technology is mainly used for (non-search) display ads ⁽⁷⁾.

The diagram below illustrates the various distribution channels that publishers and advertisers can choose to serve online ads. Publishers can sell their online space directly to advertisers (through their own sales forces) or through intermediation platforms such as AdSense. Valuable online space (also called premium inventory, such as the homepages of large publishers) is usually sold directly while less valuable online advertising space (also called remnant inventory) is often sold through intermediaries to maximise the monetisation prospects of the space for sale. Large publishers tend to use both direct and intermediated sales while smaller publishers tend to rely to a great extent on intermediated sales. Intermediation can be bundled with ad serving (this is Google's current AdSense model for the sale of search (text) and contextual (text) ads) or sold independently (this non-integrated solution is used by ad networks such as AdLink). As the diagram shows, while the parties are not direct competitors, DoubleClick provides an input (ad serving) to distribution channels (direct and non-integrated) that compete with Google's integrated AdSense.



III. Market definition

1. Provision of online advertising space

Google is active mainly in the provision of online advertising space. As in previous cases, the market investigation confirmed that the provision of online advertising space constitutes a separate market, which is distinct from the provision of advertising space in other types of media. The Commission's market investigation revealed among other things that pricing mechanisms for online and offline advertising are different and, most importantly, that online advertising is used for particular purposes and is capable of reaching a more targeted audience in a more effective way than offline advertising.

Search ads vs non-search ads

The Commission also assessed whether the overall market for online advertising space had to be further subdivided on the basis of the various forms of online advertising, leading to possible distinctions between text and display ads or search and non-search ads ⁽⁸⁾. While there are differences in the targeting characteristics and the pricing mechanisms of search and non-search ads, which can influence the choices of advertisers, some respondents to the Commission's market investigation indicated that they considered the different types of online ads as substitutable from an advertiser's point of view. From a publisher's perspective, however, the Commission considered that there are strong indications that search ads and

⁽⁷⁾ Search ads are served to search result pages (such as those returned by the Google search engine) and their selection depends on the query terms put to the search engine. Search ads are currently almost exclusively text ads. Display ads include information other than text such as a static graphical banner, a video or other dynamic graphics. Display ads are served on a web page either depending on the content of the page (a contextual ad would for example advertise an online book store on a website with content related to literature) and/or as a result of parameters determined by the advertiser (e.g. geographic location of the user visiting the web page, time of day and so on). A growing number of ads are behaviourally targeted, i.e. information on the web user's surfing activity is used to select an ad. Such information is generally collected through so-called 'cookies', i.e. a technology that allows websites to 'recognise' a returning visitor. Information provided by the user, such as personal details provided on social networks such as Facebook, are often even more valuable for targeting ads. Display ads are almost exclusively non-search ads.

⁽⁸⁾ See footnote 7 for an explanation of the different forms of online advertisements.

non-search ads are complements rather than substitutes. Indeed, publishers can add a search tool on their webpage (i.e. a small search box appearing on the homepage of a publisher) and generate additional revenues by sharing the revenues of advertising appearing next to the search results. Yet these search results generally appear on a new web page (i.e. one that is not part of the publisher's content inventory). Therefore, there is limited substitution possible between selling ad space for search and selling ad space for non-search. Ultimately, the Commission left the exact definition of the relevant product market open, as even where separate markets for search ads and non-search ads were to be defined, the transaction would not give rise to competition concerns.

Geographically, the Commission defined both the overall online advertising market and the hypothetical narrower markets for search and non-search advertising as divided by national or linguistic borders within the EEA. The market investigation had demonstrated that the supply and the purchasing of advertising space depend to a large extent on national preferences, languages and cultural specificities.

2. Intermediation in online advertising

The Commission also investigated whether the overall online advertising market or its two segments (search and non-search ads) would have to be subdivided into direct sales on the one hand and intermediated sales on the other. As explained above, online advertising space can be sold directly by publishers to advertisers through their sales forces or via intermediation through ad networks and ad exchanges. Intermediation can take place both for search and for non-search advertising. Intermediaries that provide search intermediation either own or outsource a third-party search 'tool'. In such cases, therefore, intermediation is specifically for the sale of ad space generated on the search result pages of publishers who have this search tool on their website.

Several respondents to the Commission's market investigation supported the distinction between separate product markets for direct sales and intermediated sales, noting that direct sales through a publisher's own sales force involve high fixed costs that could be difficult to sustain for small publishers. On the other hand, the majority of the replies from intermediaries indicated that direct sales were perceived as exerting competitive pressure on intermediated sales. Ultimately, however, it was not necessary for the Commission to arrive at an exact definition of the relevant product market in this respect, as the transaction would not give rise

to competition concerns whether direct sales and intermediated sales belonged to the same market or not.

The Commission concluded that the hypothetical market for intermediation is at least EEA-wide in scope. First of all, from a technical point of view, intermediation services can be provided online on a cross-border basis. Second, country or language specificities are of much smaller significance for online ad intermediation than for online advertising in general. Intermediation frequently aims to reach and attract publishers and advertisers in several countries, since intermediaries have an interest in increasing the number of customers belonging to their ad networks or ad exchanges. Such geographic expansion to various Member States can succeed because the intermediation service does not depend on the culturally different 'contents' of the intermediated advertisements.

3. Provision of display ad serving technology

Ad serving tools such as DoubleClick's DART for advertisers (DFA) and DART for publishers (DFP and DE) enable publishers to manage their inventory (i.e. to choose the advertisements to be placed on their ad space) as well as to monitor the financial performance of the ad space sold. Publishers can either build their own in-house technology to serve ads on their sites or purchase 'publisher ad serving tools' from third parties. Several ad networks have also developed their own ad serving tools and use them to serve ads for their clients. Ad serving tools also allow advertisers to select the ads to be served to the appropriate web pages, as well as to monitor the effectiveness of their advertising campaigns. Advertisers can either build their own in-house technology for this purpose (e.g. eBay) or purchase 'advertising ad serving tools' from third parties. Therefore, ad serving for publishers and ad serving for advertisers are used for different purposes and thus require different functionalities.

The Commission's market investigation also revealed that display ad serving technology as provided by DoubleClick constitutes a separate market from ad serving technology for text ads due to significant differences in the functionalities available to customers ⁽⁹⁾.

⁽⁹⁾ For example, display ad serving technology provides detailed metrics (reach, frequency, conversion) which are not typically required for search or context-based text ads. For the latter, even simple click-through rates may go a long way in measuring the effectiveness of ads.

As regards the geographic scope of the relevant market, the Commission concluded that the markets for the provision of display ad serving technology for advertisers and publishers are at least EEA-wide in scope given that ad serving is bought on a cross-border basis, without the need for the relevant ad serving providers to have servers or staff in each country where they sell their services.

IV. Competitive situation in the relevant markets

Online advertising

Google is currently active in the online advertising market (i) as a publisher, with its own search web page Google.com (and its national web pages such as google.fr, google.it, etc.), and (ii) as an intermediary with its ad network (AdSense). Through these direct and intermediated channels, Google is the leading provider of online advertising, in particular of search ad space in the EEA.

Google's main competitors in search advertising are Yahoo! and Microsoft, both worldwide and in the EEA.

Companies active in non-search intermediation in the EEA include TradeDoubler, ZanoX (belonging to Axel Springer), AdLink, Interactive Media (belonging to Deutsche Telekom), Advertising.com and Lightningcast (both AOL/TimeWarner) and Tomorrow Focus.

Ad serving

DoubleClick is a provider of ad serving technology. On the advertiser side, DoubleClick is the leading player in the EEA ad serving market, together with aQuantive/Atlas (recently acquired by Microsoft). On the publisher side, the market investigation points to DoubleClick leading in the EEA, followed by 24/7 Real Media/OpenAdStream (recently acquired by the advertising agency WPP) and AdTech/AOL.

Despite DoubleClick's leading market position, the Commission found that DoubleClick's market power is limited because it faces significant competition from rival suppliers of ad serving tools, to which customers could switch in the event of price increases. While the market investigation provided mixed answers regarding the theoretical level of switching costs, there was evidence that a large number of publishers and advertisers have actually switched from DoubleClick to other service providers (and vice-versa) in the past years. The fact that the ad serving market is currently competitive was also evidenced by the significant

decline in the price of DoubleClick's product for advertisers and publishers, during a period of increasing demand.

V. Horizontal effects

Actual competition

As DoubleClick is currently not present in the market for the provision of online advertising space and Google is not providing ad serving tools on a stand-alone basis, there is no direct competition between the two companies. Nevertheless, the Commission assessed the possible horizontal effects of the concentration to the extent that there could be competition between different channels for the provision of online advertising space, in particular insofar as intermediation and ad serving tools can be sold either independently or as a 'bundle' (i.e. an ad network offering both intermediation services and ad serving tools). Several elements pointed to the absence of any significant constraint imposed by either Google or DoubleClick on each other.

First of all, ad serving represents a very small part of the total cost of online advertising, typically only 2%-5% ⁽¹⁰⁾. A 5-10% price increase for stand-alone ad serving tools would therefore lead at most to a 0.5% increase in the total cost of advertising. As confirmed by the Commission's market investigation, such a small increase is unlikely to cause advertisers or publishers to switch from an unbundled solution to a bundled solution such as Google AdSense.

Second, the Commission's market investigation confirmed that a number of viable providers of stand-alone display ad serving tools are today present in the market and exert a competitive constraint on DoubleClick. As noted above, the Commission had evidence that, in recent years, a substantial number of customers had actually switched ad serving technology providers within a reasonable timeframe and that the prices of DoubleClick's products for advertisers and publishers had declined significantly and systematically.

Finally, the Commission found that Google's bundled solution and the unbundled solutions, including DoubleClick's ad serving, were not close alternatives. Google is a direct provider of space for search ads and also acts as an intermediary for the sale of search and contextual ads with its ad network AdSense. These features make it a distant competitor of unbundled solutions using Double-

⁽¹⁰⁾ As regards ad networks and ad exchanges, the market investigation indicated that ad serving costs broadly account for about 10-15% of total intermediation revenues.

Click's ad serving tools, given that DoubleClick is mainly a provider of serving tools for display ads, while Google's presence in intermediation for display ads is minimal.

Potential competition

Both parties could be considered as potential competitors from two different perspectives. Firstly, DoubleClick was in the early stages of developing an intermediation platform, the DoubleClick Ad Exchange, which would have competed with Google AdSense. Secondly, Google was in the early stages of developing ad serving tools for advertisers and publishers, which would have competed with DoubleClick's ad serving technology. While DoubleClick's intermediation platform might well have become an additional effective competitor of AdSense in the future, the Commission found that competition would not be impeded as a result of the concentration because the merged entity would continue to face strong competitive pressure from a number of other competing ad networks and ad exchanges. Similarly, the Commission could not exclude the possibility that Google would have successfully developed ad serving tools in the future, but it would have become one of many suppliers competing with DoubleClick, so competition in ad serving would not be negatively affected by the disappearance of Google as a future supplier of such tools.

VI. Non-horizontal effects

The Commission investigated three main scenarios for possible non-horizontal effects, namely (i) foreclosure effects based on DoubleClick's market position in ad serving, (ii) foreclosure effects based on Google's market position in the provision of search advertising space and ad intermediation services, and (iii) foreclosure effects based on the combination of Google's and DoubleClick's assets.

Foreclosure based on DoubleClick's market position in ad serving

The main concern expressed by complainants (and some respondents to the market investigation) was that, post-merger, Google would be able to leverage DoubleClick's leading position in ad serving on the market for online ad intermediation services: Google would be able to engage in a number of strategies, including mixed and pure bundling, manipulation or tweaking of the ad serving software to its benefit, price increases and quality degradation, all of which would be aimed at raising costs for customers using DoubleClick's products and for ad networks competing

with AdSense⁽¹¹⁾. By engaging in such strategies, Google would attract more publishers and advertisers to AdSense, ultimately leading to a 'tipping' effect that would marginalise rival networks. In the long run, Google's AdSense would become the dominant platform, which would be able to exercise market power and increase intermediation fees.

The likelihood of anti-competitive effects based on these theories hinged on a number of assumptions such as (a) the degree of DoubleClick's market power (depending in particular on the extent of switching costs for ad serving), (b) the extent to which intermediation is characterised by direct and indirect network externalities, and (c) the impact of price changes for ad serving on the choice of ad network by publishers/advertisers. The Commission's investigation focused on gathering evidence to validate or refute these assumptions. Eventually, the evidence gathered led the Commission to dismiss all of them.

Indeed, market characteristics appeared to be such that anti-competitive foreclosure was unlikely to arise. As noted before, the evidence gathered by the Commission called into question DoubleClick's ability to exercise market power. Indeed, the majority of ad serving contracts appeared to have relatively short durations. Renegotiations of contract terms and switching appeared to occur frequently. Switching data provided by the parties indicated that DoubleClick's customer churn rate in 2006 represented a non-insignificant share of DoubleClick's revenues. Moreover, ad serving prices appeared to have been considerably and consistently declining over the last few years in terms of cost per ad served.

Regarding indirect network effects, such as the larger the number of publishers using a platform, the more attractive it is to advertisers and vice versa, the Commission reviewed the evidence on entry and competition in online ad intermediation as well as evidence on the prevalence of multi-homing (i.e. customers using more than one intermediation platform) and the ability of ad networks to compete even with a relatively small number of partners on the publisher side. The prevalence of multi-homing suggests that participation by a publisher or an advertiser in an ad network (e.g. AdSense) does not imply that they are unable or unwilling to participate in another ad network, that is to say their participation to an ad network

⁽¹¹⁾ The price increase could affect publishers or advertisers purchasing ad serving tools and intermediation services (in a conglomerate effect sense) as well as ad networks competing with AdSense that also use third-party ad serving tools (in a vertical effect sense).

is not exclusive. These facts cast doubt on the concern that AdSense would unavoidably become the dominant intermediation platform at the expense of rivals as a result of the concentration.

There was also insufficient support for the view that the merged entity would benefit from a direct network effect, for example that the quality of the matching that it could undertake between publishers' space and advertisers' ads would be affected by the scope and quality of its publisher customer base. Such a network effect could possibly have occurred as a result of the merged entity's ability to use information about users across different publishers. However, at the time of the investigation of this concentration, DoubleClick was contractually prohibited from using the data of individual publishers or advertisers to improve targeting for other publishers or advertisers and there was no indication that the merged entity would be able to impose contractual changes on its customers to allow such 'cross-use' of their data in the future. Moreover, the type of behavioural targeting that lies at the core of these direct network effects is an emerging technology which neither DoubleClick nor Google have developed, unlike a number of competing firms (such as Yahoo!'s ad network BlueLithium or AOL's Tacoda network) ⁽¹²⁾.

With respect to the cost of ad serving, the investigation indicated that ad serving represents a small fraction of the publisher's net profits (and the advertiser's cost of purchasing online space). The price of ad serving on competing ad networks would therefore have had to increase significantly to induce switching towards AdSense on a scale that might lead to the tipping effect envisaged by complainants. This seemed highly unlikely given the competitive constraints to which DoubleClick is subject.

In any event, the merged entity would continue to face a number of vertically integrated rivals such as Microsoft, Yahoo!, AOL as well as WPP (an ad agency) and Axel Springer (a major online and offline publisher). Indeed, like the merged entity, these companies were able to offer both ad serving tools and intermediation services. In particular, these companies had reached a high degree of vertical integration through acquisitions undertaken after the announcement of the Google/DoubleClick transaction.

⁽¹²⁾ As indicated in footnote 6, behavioural targeting involves serving ads to specific users based on the web surfing behaviour of the user. A crucial requirement for the improved sophistication and effectiveness of behavioural targeting is the availability of information on the web surfing of a given user as well as the capability to process, clean and organise this information so that it can be used in an optimal way.

Having concluded that the main assumptions on which the theories of harm relied were not factually confirmed, the Commission considered it was highly unlikely that any anti-competitive foreclosure would arise from the acquisition of DoubleClick by Google.

Foreclosure based on Google's market position in search advertising and (search) ad intermediation services

In view of Google's strong position in the provision of search ads, the Commission also investigated whether Google might leverage this position on the market for display ad serving by requiring users of its search ad services to use DoubleClick's products for serving all or part of their inventory. Practically, this would mean that advertisers wanting to place search ads via Google or via Google's search ad intermediation (AdWords) would be required to make a certain minimum use of DFA if they use display ads at all. Equally, publishers wanting to use Google's search ad intermediation (AdSense) could be obliged to use DFP. Ultimately, the merged entity could try to use its strengthened position in the ad serving market to impose an even wider bundle, which would also include Google's non-search intermediation services.

The ability to foreclose rivals by engaging in such strategy seemed to be limited because there was a very limited pool of common customers using both search ads or search ad intermediation services and display ad serving technology. Apart from that, for all bundling scenarios on the advertiser side, the Commission found that there may be practical difficulties with the described bundling strategy because the two relevant parts of the bundle are not sold or priced simultaneously. Search advertising is priced on a cost-per-click basis and determined by auctions, so that contract terms may be set with an individual advertiser on a daily basis. On the other hand, the terms under which DoubleClick provides display ad serving are set by contracts that typically have a longer duration. On the publisher side, the practical difficulties in bundling Google's (search) ad intermediation with DFP appeared to be less of an issue because contractual arrangements of a similar nature and duration apply for the provision of both display ad serving and (search) ad intermediation for (larger) publishers.

In any event, however, the Commission's market investigation showed that the merged entity would not have an incentive to adopt the described bundling strategy because that strategy would most likely not be profitable. By requiring users of search ad services to use DoubleClick's ad serving products, the merged entity would run the risk of

volume losses in its search advertising services, which would most likely not be offset by additional (bundled) sales of DoubleClick's ad serving products, because the margins on those products are low compared to margins on search advertising. Indeed, DoubleClick's 2006 average revenues from those advertiser customers which used DFA and also purchased search ads from Google (either directly or through intermediation) corresponded to less than 5% of Google's average revenues from these customers in 2006. On the publisher side, the percentage was even lower, with DoubleClick's 2006 average revenues from overlapping customers representing less than 3% of Google's 2006 average revenues from such customers.

As regards the possible extension of the bundle to include non-search intermediation as well, the Commission considered that the incentives may be different as the revenues from non-search intermediation are much more significant than the revenues that DoubleClick achieves through the sale of its ad serving technology. In this respect, however, the proposed concentration did not bring about any significant change in incentives because Google could already engage in this type of bundling pre-merger, if necessary by making use of the required ad serving technology under a contractual arrangement with DoubleClick or any of DoubleClick's competitors. Therefore, the merger did not change Google's incentive to engage in this wider form of bundling to any significant extent.

Finally, the Commission found that even if, despite the obstacles and disincentives described above, (i) the merged entity in the present case decided to bundle Google's search ad services with DoubleClick's ad serving and (ii) this foreclosure strategy caused most or all smaller non-integrated competitors in the ad serving market to exit the market, this would not result in a significant impediment to competition because the implementation of this strategy would still be very unlikely to stop competitors such as Microsoft, Yahoo!, AOL and others from offering ad serving or search ad services. Each of these competitors is vertically integrated and has access to considerable financial resources, which will enable them to continue to exert significant competitive pressure on the merged entity.

Foreclosure based on combination of Google's and DoubleClick's assets

Finally, the Commission analysed whether the mere combination of DoubleClick's assets with Google's assets, in particular the databases that both companies have or could develop on customer online behaviour, could allow the merged

entity to achieve a position that could not be replicated by its integrated competitors or 'point' product competitors.

As noted before, however, DoubleClick's current contracts with advertisers forbid it to use data on the web pages visited by users to better target ads from advertisers other than those that were instrumental in bringing about these data (i.e. those whose ads were seen by the tracked users). Similar contractual restrictions apply to such cross-use of data on the publisher side. On the basis of the Commission's market investigation, there was no indication that the merged entity would be able to impose contractual changes on its customers in this respect. The main reason for this finding was that advertisers and publishers would have no interest in other advertisers or publishers having access to their data and thus gaining insight into competitively important information such as information about the pricing of ads across different websites.

Moreover, the combination of data on searches with data on users' web surfing behaviour is already available to a number of Google's competitors today (for example Microsoft and Yahoo!). These and other competitors may also purchase data or targeting services from third parties such as comScore, which can track all of the online behaviour of their users, following them to every website they visit. The Commission found that some of the data available from these third parties is potentially much broader and richer than data collected by DoubleClick (or even the merged entity) or any of its rivals.

For these reasons, the Commission concluded that the possible combination of Google and DoubleClick data post-merger would not contribute additional traffic to AdSense to the extent that competitors would be driven out of the market, thus enabling the merged entity to ultimately charge higher prices for its intermediation services.

VII. A few words on privacy

Throughout the investigation, a significant number of market participants and civil society groups voiced concerns about the proposed concentration not only from a competition law perspective but also in relation to privacy issues. Such concerns focused in particular on the combination of the databases held by Google and DoubleClick and the enhanced possibilities this might offer the merged entity to track customer online behaviour and to use it for targeting purposes. In the merger control procedure, the Commission took account of these concerns only to the extent described in the previous section, that is to say it looked at

whether a combination of the parties' databases could significantly impede effective competition in the common market. The Commission thus assessed the concentration solely under the Community rules on competition. Consequently, the Commission's decision is without prejudice to the obligations of the parties under Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data ⁽¹³⁾.

VIII. Cooperation with the US authorities

Finally, this case was interesting because it was subject to merger control in both the United States of America and in Europe. While the Commission made its independent assessment of the transaction under European competition law, it cooperated closely with the Federal Trade Commission (FTC) throughout its investigation of the case. Eventually, both authorities assessed the transaction in a very similar manner and reached the same conclusion, namely that the proposed acquisition would not raise competition concerns under the respective merger control rules in the United States and Europe ⁽¹⁴⁾.

The relatively small differences between the conclusions reached by the FTC and the European Commission mainly concern market definition. While the FTC clearly distinguishes separate markets for search ads and non-search ads and for

direct sales and intermediated sales, the Commission considered such subdivisions of the online advertising market, but ultimately left the exact definition of the relevant product markets open. Both the FTC and the Commission extensively analysed possible non-horizontal effects of the transaction. Whereas the FTC focused primarily on non-horizontal effects based on DoubleClick's market position in ad serving, the Commission also made a detailed assessment of any non-horizontal effects that may result from Google's market position in search advertising and (search) ad intermediation ⁽¹⁵⁾. In assessing the non-horizontal effects based on DoubleClick's market position in ad serving, the two authorities carried out a similar analysis and reached the same conclusion, in particular regarding the extent to which DoubleClick possessed significant market power and the presence of network externalities.

IX. Conclusion

The Commission took the view that the proposed acquisition of DoubleClick by Google would be unlikely to have harmful effects on competition, either in the market for display ad serving technology or in the market for online advertising, or any of its possible sub-segments, and cleared the transaction on 11 March 2008. This case illustrates how the Non-Horizontal Merger Guidelines can be applied, grounded on sound economic principles and supported by quantitative and qualitative information on the market at hand.

⁽¹³⁾ In particular: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ C 364, 12.12.2000, p. 1; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communication), OJ L 281, 23.11.1995, p. 31; and the Member States' implementing legislation.

⁽¹⁴⁾ The Federal Trade Commission cleared the transaction under the US merger control rules and published a statement setting out the reasons for this decision on 20 December 2007.

⁽¹⁵⁾ In its majority statement, the FTC only briefly addresses non-horizontal effects based on Google's market position in search ads and (search) ad intermediation.

The Thomson/Reuters merger investigation: a search for the relevant markets in the world of financial data

Vincenzo BACCARO ⁽¹⁾

I. Introduction

On 19 February 2008, after an in-depth investigation, the Commission cleared the Thomson/Reuters merger transaction subject to commitments ⁽²⁾. The case concerns the acquisition by Thomson of sole control over Reuters within a dual-listed company structure. Thomson and Reuters are both global providers of financial information, integrated with software tools and applications, to financial professionals (banks, investment funds, wealth managers, corporations, etc.).

This decision is significant in several respects: First, it is the first in-depth investigation by the Commission in the financial information and market data business ⁽³⁾. Second, this case presented particular issues not only in the identification of relevant markets, but also for the assessment of the market position of the parties and their main competitors in those markets. Indeed, the resolution of both aspects was key to the outcome of the investigation and could be achieved only through massive use of internal documents from both parties. Third, this case was resolved by early remedies submitted by the parties during phase two of the Commission's investigation. Fourth, the Commission's investigation, together with the negotiation of remedies, was undertaken in parallel with the examination of the case by the US Department of Justice. The process involved close cooperation between the two authorities, including exchanges of detailed information and views on analytical methods, as well as joint meetings and the negotiation of remedies with the parties.

Features of the financial information sector

The transaction concerns the financial information industry. Financial information products include real-time information on market data, i.e. prices and quotes for various types of financial instruments needed by traders, historical and reference data, and news, as well as analysis, decision support tools and trading platforms. The main users of these products are customers in the financial service industry, such as banks, traders, brokers, funds, or corporate customers, which are often very large global institutions. These customers may consume a range of items on the market for financial information products and tend to be sophisticated organisations.

II.A. On trading/off trading floor; sell-side/buy-side

Two important distinctions are common in the industry and highly relevant for the assessment of the case. The first is between 'on-trading-floor' and 'off-trading-floor' activities. On-trading-floor users are those involved in the sale and trading of financial instruments and trade execution (*sales & trading*). Off-trading-floor users are those involved in research, providing advice, and asset management (*research & asset management*). Many large financial institutions have both types of users in different parts of the organisation. This differentiation is intertwined with the distinction between the 'sell-side' (i.e. customers whose primary business is selling or trading financial products) and the 'buy-side' (customers whose primary business is investing in financial products).

On-trading-floor users focus on extensive real-time data and information, as traders often have to decide on their investments within a few instants. Off-trading-floor users include investment or portfolio managers, wealth managers, investment bankers, and research analysts. Given their longer-range perspective, they tend to focus more on historical and reference data and analytics than on extensive real-time data and information.

II.B. Datafeeds and desktops; compilers and redistributors

Suppliers of financial information and market data reach customers via two main channels: (i) *direct*

⁽¹⁾ Directorate-General for Competition, unit C-2. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies with the author.

⁽²⁾ Case COMP/M.4726 Thompson Corporation / Reuters Group.

⁽³⁾ In a previous investigation in this sector, concerning case COMP/M.3692 Reuters/Telerate in 2005, the Commission focused — due to the areas of overlap between the parties — mainly on the market for market data platforms, a middleware software, rather than the financial information and content markets.

datafeeds, containing one or more specific content sets (e.g. equities, fixed income data, broker research reports, fundamentals, estimates, news, etc.); or (ii) *desktop solutions* (also called ‘workstations’), where several content sets are generally packaged together with a number of software applications and analytical tools in a standalone bundled solution.

Content sets — supplied via direct data feeds — are further delivered either directly to end users by the *compilers* of such content sets or to *redistributors*, which then re-distribute the content sets together with their own desktop to end users ⁽⁴⁾. The market for desktop solutions can therefore be considered a *downstream market* relative to the market for the individual content sets, since (depending on the level of vertical integration of the suppliers) some of the competitors active in this desktop market have to procure some key content used by their desktop customers (or let their customers procure that content directly) from upstream compilers of the relevant content sets. On this downstream market, vertically integrated companies like Thomson and Reuters (being both compilers and desktop suppliers) compete with re-distributors offering their own desktop solutions that incorporate content sets compiled by Thomson and Reuters (and by other compilers).

III. The relevant markets

The parties proposed to delineate the relevant product markets along the lines of the two broad customer groups mentioned above: (a) *sales & trading* and (b) *research & asset management*, broadly corresponding to customers engaged in, respectively, ‘on-trading-floor’ and in ‘off-trading-floor’ activities. These two categories were further broken down into smaller customer groups according to their specific needs ⁽⁵⁾. Under such an approach, the market shares of the parties in such customer-driven segments would have been quite limited.

⁽⁴⁾ Redistribution can take the form of ‘royalty-based’ or ‘sell-through’ re-distribution. In the case of sell-through redistribution, the compiler of the content sets enters into a direct contractual relationship with the end customer, even though the re-distributor distributes the content set together with its desktop solution. In the case of ‘royalty-based’ redistribution, the re-distributor enters into a direct contractual relationship with the final customer as regards the content set. The re-distributor in both cases uses the content set in order to integrate it with its desktop offering for final customers.

⁽⁵⁾ Sales & trading: fixed income; institutional equities; foreign exchange; commodities & energy. Research and asset management: investment management, wealth management, investment banking, corporates.

The Commission’s market investigation confirmed the broad distinction between *sales & trading* and *research & asset management* and showed that its central feature is whether users need real-time information or non-real-time/archival information. Real-time information is required in particular by on-trading-floor users whereas non-real-time/archival information is primarily needed by off-trading-floor users. For non-real-time information, timing is not as important as the completeness and reliability of the information.

However, contrary to the approach adopted by the parties, the investigation suggested that, from a market definition standpoint, the value of the products in this industry is determined by their functionalities and content rather than the activities of the end user. For the off-trading-floor area in particular, the investigation revealed the existence of *discrete markets* for individual content sets, such as news, research provided by brokers, fundamental data on companies, earning estimates and macro-economic data, as these content sets are not substitutable from the customer’s viewpoint. Such content sets may be needed by various customer groups (e.g. by investment bankers as well as investment managers), but all such groups may require several of these *content sets* (e.g. news and fundamental data on companies). Likewise a number of content sets are often traded separately from one another and, in any event, distinct structures of supply and demand (in particular different types of suppliers) are clearly identifiable for each content set. Following the same approach, but looking at functionalities and content sets in the on-trading-floor area, *transaction platform services* and *market data platforms* are also to be considered as distinct markets.

At the *downstream level*, the Commission found that different bundles of content sets, data and functionalities/analytics are traded in packaged form as *desktop products* or workstations. At this level, products are often customised according to the needs and requirements of various categories of customers, so that there may be different packages offered for e.g. investment managers & bankers, wealth managers and corporates.

On the basis of the market investigation, the main relevant markets defined by the Commission in the area of *sales & trading* were: i) real-time market data sold through desktop products/workstations; ii) real-time datafeeds (direct and consolidated datafeeds); iii) market data platforms; iv) transaction platforms for fixed-income securities; v) news. The main relevant markets found by the Commission in the area of *research & asset management* were: vi) broker research reports; vii) earning estimates; viii) fundamentals; ix) time series of eco-

conomic data; x) ownership data; xi) deals data; xii) other content sets (profiles of managers, public filings, other time series). The Commission's market definition findings were confirmed by some internal documents from the parties.

The Commission also investigated the *vertical effects* of the merger, given the interplay between vertically integrated and less vertically integrated suppliers (which is of particular importance especially in research & asset management), bearing in mind the existence of a degree of customisation of desktop products at the downstream level across the segments within the off-trading-floor field (investment management, investment banking, wealth management, corporates).

As regards the geographical dimension of the various product markets in question, the Commission found that these markets would appear to be at least EEA-wide and may probably be worldwide in scope, but also noted that differences may exist between the very large investment (tier-1) banks, which normally source on a global scale, and the smaller (tier-2 or tier-3) financial institutions, which would source at EEA-wide or even national level. This element nevertheless had no material impact on the assessment of the case.

IV. The competition analysis

For most of their activities, Thomson and Reuters have a fairly complementary focus. Reuters has a particularly strong presence in sales & trading (on-trading-floor), whereas Thomson is particularly active in research & asset management (off-trading-floor), where Reuters also has a significant presence. The Commission thus found very significant overlaps in a number of areas within research & asset management (off-trading floor), raising competition concerns.

It is worth noting that the investigation of these (as well as other) markets was conducted throughout in close cooperation with the US Department of Justice, through detailed information and exchanges of views on methodologies of analysis as well as through conference calls and joint meetings (also with the parties, especially for the negotiation of remedies). This close cooperation resulted in a broad consensus between the two agencies on the main issues and the main remedies for the case.

IV.A. Markets in sales & trading

The Commission found that the merger did not raise competition concerns in the sales and trading area with respect to the relevant markets as set

out above. Generally, the reason for the absence of concerns was the very limited presence of Thomson in this area.

For real-time market data sold through desktop products, Reuters and Bloomberg were already pre-merger by far the leading players on the worldwide and EEA market, with competitors such as IDC/Comstock and Telekurs/Fininfo being distant fringe players. Thomson's presence in this market was even more limited and the market structure was not altered by the merger to any significant extent. As regards real-time datafeeds, where Bloomberg's presence is relatively small while Reuters is the clear market leader, the merger did not entail any significant change in the market structure. Thomson was a very small provider in this field, far behind other players such as Telekurs and IDC-Comstock. Similarly, no change in market structure was to be expected for market data platforms, given the absence of horizontal overlap in this market. As regards transaction platforms for fixed-income securities, where Thomson is an active player (with its *Tradeweb* platform), the merger would not have had any significant effect due to Reuters' fairly marginal activities in this field.

Both Thomson and Reuters were present in the news market, with Reuters being a powerful global player in the market alongside Bloomberg and Dow Jones. Thomson had recently entered the market through the creation of its own branded news service, Thomson Financial News (TFN), following TFN's acquisition of AFX (Agence France Press). The Commission found that Thomson's role in the market was limited, as it had not yet gained much traction and could not be seen as a 'maverick' whose elimination would have adversely affected competition in the marketplace. In addition, after the merger, Dow Jones remained in the market as a much stronger competitor than TFN, alongside a number of news agencies providing news on a regional basis, such as the FT Group (Financial Times) and Nikkei. Therefore, the Commission concluded that the disappearance of TFN as an independent news provider would not raise competition concerns.

IV.B. Markets in research & asset management

The Commission found that the merger raised competition concerns in the following areas of research and asset management: aftermarket broker research reports, earning estimates, fundamentals, and time series of economic data. For these four content sets, both Thomson and Reuters were found to be the main suppliers on the

market, with other competitors generally unable to provide equivalent data in terms of depth (history) and breadth (geographical coverage). This would have put the merged entity in a position to profitably increase the prices of such content sets for customers and redistributors. The Commission found that these adverse horizontal effects of the merger would be further aggravated by the vertical effects on the downstream market for desktop solutions, where the desktop solution offerings of several competitors include these content sets as a key input. Post-merger, Thomson/Reuters would have had the ability and the incentive to foreclose those downstream competitors by raising prices for the delivery of such content or by restricting its supply to Thomson/Reuters' own customers, in order to induce customers to opt for Thomson/Reuters desktop products (bundling content and application tools) instead of those of competitors.

In this case, the Commission found that entry would be unlikely. Due to the time and investment needed for a competitor to come up with a comparable offer (several years and huge investment), entry could not have been on a sufficient scale to provide the same depth and breadth of data in any of the four content sets considered, among other things because some financial information is no longer publicly available several years after its first publication.

IV.B.1. Broker research reports

The Commission found competition concerns regarding the distribution of aftermarket broker research. Broker research reports are produced by broker companies wishing to secure commissions on transactions and include financial information on firms and markets. The industry distinguishes between (i) real-time research reports (distribution of research within the first 7-30 days after its publication), when reports are distributed to customers in order to solicit trading transactions, and (ii) aftermarket research reports, also called 'embargoed research reports' (distribution of research after this initial period), where reports are used by e.g. investment bankers to gain a business insight into a firm or a sector prior to longer-term investment decisions.

While several competitors are emerging in real-time research — Factset, Bloomberg, Capital IQ (belonging to Standard & Poor's) — and brokers themselves actively distribute their individual reports with a view to generating commission fees for trading order execution, in aftermarket research, the combined market share of the merged entity would have been dominant. This was confirmed by the analysis of internal documents from the parties. All other competitors are essentially

redistributors of either Thomson or Reuters aftermarket research offerings. Direct distribution of aftermarket research reports by individual brokers is limited to their individual research and was not considered capable of constraining the merged entity's offerings and behaviour post-merger.

Entry into this market would not be immediate, as the entrant must sign a sufficiently high number of agreements with well-reputed broker companies in order to render its offering attractive to sophisticated financial customers. The Commission found that this is a long and costly process, which is rendered more difficult by the existence of exclusive agreements secured by the merging parties. The Commission therefore concluded that merger would have led to a near monopoly for the distribution of brokers' aftermarket research.

IV.B.2. Earning estimates

The Commission found that Reuters (with its 'FirstCall' and 'IBES' products) and Thomson (with its 'Reuters estimates' and 'Reuters estimates forecast pro' products) are the main suppliers of earning estimates in the marketplace. Earning estimates are forecasts by brokerage firms of the future earnings of companies, which are the most important determinants of equity prices. Thomson and Reuters also supply estimates to redistributors or for incorporation in other products. There is no other close substitute, since no other company offers the breadth and depth of Reuters and Thomson products. FactSet/JCF was found to be a third player, with weaker market coverage outside Europe. Indeed, internal documents from the parties also pointed to very high market shares for Thomson in particular, to which Reuters' significant share would have been added post-merger.

Building an estimates database requires contracting with a large number of brokers in order to incorporate their earning estimates in a credible database. The Commission found that this would be a very costly and lengthy process, so the barriers to entry in this market are significant.

Based on the above, the Commission found that the merger would have removed Reuters as the most viable alternative to Thomson, thereby eliminating rivalry between the most credible suppliers. The only other significant supplier of estimates would have been Factset/JCF as a weaker substitute.

IV.B.3. Fundamentals

Both Thomson and Reuters compile databases of fundamentals and supply fundamentals data to redistributors or for incorporation in other products. Fundamentals consist of various company-

specific data, such as reportable pro forma financial statement data (including balance sheet, cash flow and income statements), calculated financial ratios, etc. Such information is publicly available on an individual basis (e.g. from company websites), but end-users prefer to have access to the full range of company data in a database (preferably containing both 'as reported' and standardised/normalised data).

The Commission found that there are three main providers of fundamentals in the marketplace: Thomson, Reuters and Compustat (belonging to Standard & Poor's). They also provide the three main fundamentals databases supplied by third parties (redistributors): Thomson's Worldscope, Reuters Fundamentals and Compustat. Compustat's database was not found to be comparable to that of Thomson and Reuters, since it is principally US-focused and would not be suitable for buy-side customers in particular, such as hedge funds and investment managers, who require 'global' fundamentals with a breadth of global data and a depth of history. Other competitors such as Capital IQ (also belonging to Standard & Poor's) and Bloomberg were found to offer fundamentals with more limited depth and breadth and not necessarily offered for redistribution. Accordingly, the merger would have eliminated rivalry between the two main suppliers of fundamentals with global coverage in breadth (Asia, US and EEA-wide) and a comparable depth of history. This analysis was corroborated by internal documents from the parties. Customers and redistributors would then be left with no products comparable to those offered by the parties.

The Commission found that barriers to entry are significant in this market. A number of years and substantial investment are needed to construct a database comparable to those offered by Thomson and/or Reuters and to be able to offer a credible product acceptable to the market. Apart from the sheer collection of (active and inactive) company data from around the world with sufficient history, the added value of a fundamentals database also lies in the fact that the financial information is standardised/normalised. This processing requires a large number of qualified employees, several years and considerable investment.

The merger would therefore have reduced from three to two the providers of fundamentals, which also supply re-distributors. Taking into account that the focus of Compustat's offering is the US, it would have meant that the merged entity would be the only supplier of fundamentals with a global coverage.

IV.B.4. *Time series of economic data*

The Commission found that the merger would raise competition concerns in the market for economic data. Economic data consist of data on macroeconomic variables, such as GDP, unemployment, money supply, balance of trade figures and inflation rates. The ultimate sources of such data are typically governmental bodies (national and supranational statistical offices or central banks), but such series also include the proprietary data of research institutes. The parties' products Datastream (Thomson) and Ecowin (Reuters) were in close competition, so the other main player in this market, Global Insight, would have been left as the only large competitor to Thomson/Reuters post-merger. However, the Thomson/Reuters combination would have had the most complete offer, notably with the largest depth and breadth of data in terms of geographical reach and history covered. Therefore, the merger would have eliminated rivalry between the parties' products. Global Insight is smaller in general terms, and all other competitors lacked both breadth and depth of data in order to be considered comparable to Thomson or Reuters. This analysis was corroborated by internal documents from the parties.

Barriers to entry in this market are also considerable. Compiling a content set from raw data requires a number of years of effort along with significant resources and substantial investment in personnel and infrastructure in order to collect raw data of sufficient scope and to normalise them into meaningful compiled data. Furthermore, a reputation for high-quality data delivery is vital for any vendor wishing to gain a sufficient footprint in the market.

The Commission found that the merger gave rise to competition concerns in this market. It considered in general that the merger would have reduced the providers of economic data from three to two and eliminated rivalry between the closest competitors. The Commission concluded that for professional customers especially interested in time series of economic data covering non-US and EEA countries, the merger would have removed competition between the two most important databases available in the marketplace, most likely leading to the discontinuation of one of the two products. EEA customers would have been particularly harmed.

IV.B.5. *Ownership data; deals; other content sets (profiles, public filings, other time series)*

The Commission did not find any competition concerns in other relevant markets for research & asset management. Reuters is a marginal player

(unlike Thomson) in ownership data and in deals, so the merger did not change the competitive situation to any significant extent. In addition, no overlap resulted from the merger as regards profiles and public filings, while no concerns (either of a horizontal or vertical nature) emerged in the course of the market investigation for other time series.

IV.C. Vertical effects

In addition to the horizontal effects, the Commission found that the merger would also have had adverse vertical effects as an aggravating factor, in that it would have given the merging parties the ability and incentive to foreclose competitors on the downstream market for desktop products including the four above-mentioned content sets sold to users in the research & asset management area (mainly for investment management, investment banking and corporates).

Following the merger, the parties would have had the ability to foreclose their downstream competitors from the four content sets. They could have done this either by increasing the price for a content set distributed via redistributors or by simply no longer providing its competitors with such data. Competitors selling desktop products for those segment/markets heavily depend on Thomson/Reuters for the data. The incentive to foreclose would have been that Thomson and Reuters themselves offer desktop products downstream. Internal documents confirmed that the parties intended to reduce their dependence on redistributors to reach some downstream customers. This incentive would have been amplified post-merger, given the lack of any sufficient competition constraint for the content sets in question. Given the level of pre-merger revenues from redistribution, the Commission came to the conclusion that the revenue lost due to the foreclosure of redistributors could have been offset by capturing even a fairly limited proportion of these redistributors' ex-customers. A foreclosure strategy therefore appeared to be likely and profitable.

V. Remedies

In order to remove the concerns identified by the Commission, the parties proposed satisfactory commitments after the commencement of phase II of the investigation, still at the stage of 'serious doubts', before the Commission issued a statement of objections.

As the relevant content sets take the form of databases and can be copied and transferred, the parties offered to transfer copies of the databases

together with tangible and intangible assets used in connection with the relevant databases. These four content sets are not produced and supplied by distinct business entities that could simply be divested. However, the tangible and intangible assets are included in the commitments in order to enable the purchaser(s) of the assets to establish its operations quickly in the relevant market and to compete effectively in selling aftermarket research, earning estimates, fundamentals and time series of economic data.

In addition to selling a copy of the databases for each of the four content areas where competition concerns had been identified (aftermarket research, estimates, fundamentals and time series of economic data), the commitments allow the purchaser of the fundamentals and estimates databases to recruit key personnel and other personnel currently operating the databases on a daily basis, in particular for carrying out the standardisation/normalisation needed for these databases. Customer contracts for direct datafeeds from the Thomson Fundamentals and Reuters Estimates databases would have to be assigned to the purchaser(s) of such databases. To the extent that such contracts are not assignable, the merging parties undertook to allow such customers to terminate their contracts early to enter into negotiations with the purchaser.

Further, the merging parties engaged to make reasonable best efforts to assist the purchaser(s) in obtaining the necessary content owner (brokers') consents (particularly relevant for aftermarket research and earning estimates). The parties also undertook to provide transitional technical support services for a certain period of time.

In the course of the investigation, market players acknowledged that facilitating the timely entry of a new competitor in the relevant fields would be an adequate remedy to the competition concerns raised by the transaction. Key issues for ensuring the viability and effectiveness of the remedy were that the databases should be divested with all assets required to operate the business (software, intellectual property rights, etc), that the purchaser would have the possibility to hire all necessary personnel from Thomson and Reuters, and that some customers for fundamentals and earnings estimates would be transferred in order to give the purchaser a basis for amortising its investment costs.

Furthermore, the commitments set out strict criteria for the candidate purchaser(s). They have to be existing providers of financial information, with an incentive to distribute the relevant

databases via third parties, and have the necessary financial resources to bring the product to the marketplace and restore competition with the merged entity. This ensures that the purchasers will already enjoy a strong reputation on the market and that redistributors will not be foreclosed as regards these content sets. Such purchaser criteria ensure that the remedy entirely removes the competition concerns and that it will be viable and effective.

This comprehensive package of remedies removed both the horizontal and vertical concerns. Therefore, the Commission reached the conclusion that the concentration could be considered compatible with the common market, subject to full compliance with the undertakings.

VI. Conclusion

In this case, the Commission carried out a thorough analysis of the financial information and market data industry. The complex nature of the business, the bundling of data content and software, and the differentiation of the products rendered it difficult to arrive at undisputed estimates of the shares of sales held by the various players in the various markets. The Commission overcame this hurdle through extensive analysis and use of internal documents from the merging parties and thanks to close cooperation with the US Department of Justice. This case will set a precedent for the financial and market data industry, and is also an example of the extensive cooperation between the Commission and the US antitrust agencies.

State aid to IBIDEN Hungary: Assessing the relevant market in the context of a large investment project

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Introduction

As defined in the Commission's 2002 Multisectoral Framework on regional aid for large investment projects ⁽²⁾ (MSF), a large investment project is an initial investment with an eligible expenditure above EUR 50 million. Such projects are considered to be relatively less affected by regional handicaps, because the companies investing in those projects generally benefit from economies of scale, easier access to capital and credit, a geographically wider pool of labour and considerable bargaining power vis-à-vis the aid granting authorities, which can create 'subsidy auctions' between Member States to attract those investments ⁽³⁾. Therefore, while the Commission recognises the benefits of large investment projects in terms of regional development in the assisted regions, the MSF provides for the automatic, progressive scaling-down of regional aid ceilings for these large investment projects so as to limit distortions of competition ⁽⁴⁾.

Moreover, the Member States must notify individually any aid for investment projects above certain notification thresholds, whether the aid is being based on an existing regional aid scheme or not. In such cases, aid exceeding the notification threshold is only allowed if the market share of the beneficiary does not exceed 25 % and the capacity created by the project does not go above 5 % of an underperforming market.

On 30 April 2008, the European Commission prohibited, under EC Treaty state aid rules, a regional investment aid of EUR 9.56 million in present

value which Hungary planned to implement in favour of IBIDEN Hungary Gyártó Kft. (IBIDEN Hungary) ⁽⁵⁾. The Commission's formal investigation procedure, launched in July 2007, revealed that the project was not in line with the requirements of the EU rules on regional investment aid and, more particularly, not in line with the MSF. Specifically, IBIDEN's market share in the relevant market of ceramic substrates for diesel particulate filters, to be fitted in the exhaust systems of diesel passenger cars and light duty trucks, was found to exceed the relevant 25 % threshold in Europe. As the Hungarian authorities had not yet granted the aid, it was not necessary to order its recovery from the beneficiary.

In its decisions concerning regional investment aid to IBIDEN Hungary, the Commission has for the first time initiated and closed an in-depth investigation procedure under the MSF, after having received comments from several interested parties, with regard to the definition of the relevant market in the context of regional aid for a large investment project. The issue of the delineation of the relevant market was a key aspect to be addressed in assessing this case.

The Commission's assessment in the present case will set a precedent as regards the extent of the information the Commission may take into consideration when assessing the issue of the relevant product market in the context of regional aid for a large investment project. The decision also illustrates the Commission's determination to take a restrictive line on regional aid for large investment projects which distorts competition in favour of a significant market player and is liable to cause considerable distortion of trade between Member States. This approach is in line with the European Council's repeated requests for less and better targeted state aid, and also with the Commission's State Aid Action Plan ⁽⁶⁾. The Action Plan advocates a more refined economic approach, which is particularly relevant in assessing the impact of the aid measure on competition and in checking the market position of the beneficiary and delineating the relevant market in which it operates.

⁽¹⁾ Directorate-General for Competition, units H-1 and D-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Communication from the Commission — Multisectoral framework on regional aid for large investment projects, OJ C 70, 19.3.2002, p. 8, as modified by the Commission communication on the modification of the Multisectoral Framework on regional aid for large investment projects (2002) with regard to the establishment of a list of sectors facing structural problems and on a proposal of appropriate measures pursuant to Article 88 paragraph 1 of the EC Treaty, concerning the motor vehicle sector and the synthetic fibres sector, OJ C 263, 1.11.2003, p. 3.

⁽³⁾ Cf. points 13 and 15 of the 2002 Multisectoral framework on regional aid for large investment projects.

⁽⁴⁾ Cf. paragraph 21 of the MSF.

⁽⁵⁾ Commission decision of 30 April 2008 in state aid case No C 21/2007 (ex No N 578/2006) — Hungary — MSF 2002 — 'Individual aid to IBIDEN Hungary Gyártó Kft.', not yet published.

⁽⁶⁾ COM(2005) 107 final of 7.6.2005.

Facts of the case

IBIDEN Hungary, a Hungarian subsidiary of IBIDEN Co. Ltd., which has its headquarters in Japan, decided to set up its second production plant in the EU for the manufacturing of ceramic substrates for diesel particulate filters (DPF) in the Dunavarsány Industrial Park (Central Hungary region). Its first production plant in the EU was set up in France in 2001.

In order to undertake an assessment of the compatibility of aid for a large investment project in view of the potentially significant effects on competition, the MSF requires an individual notification of regional aid for large-scale investment projects⁽⁷⁾. In August 2006, pursuant to this requirement, the Hungarian authorities notified the aid package to the Commission: it consisted of a direct grant and a corporate income tax allowance for IBIDEN Hungary's investment project. The total eligible investment costs of the two phases of the investment project amount to EUR 168.30 million in present value and the total amount of aid which was planned to be granted to the beneficiary is EUR 39.29 million in present value. The aid was meant to promote the regional development of the Central Hungary region, which at the time of the notification was an assisted area, pursuant to the derogation in Article 87(3)(a) of the EC Treaty for the period 2004-2006⁽⁸⁾.

The aid to IBIDEN Hungary was to be granted on the basis of existing regional aid schemes⁽⁹⁾. In line with the rules on regional aid, IBIDEN Hungary had already been granted aid under existing schemes worth EUR 29.73 million for the same investment project, i.e. up to the individual notification threshold established in paragraph 24 of the MSF. Thus, the Commission's decision concerned only the remaining amount of EUR 9.56 million.

The Commission's initial doubts concerning the relevant product market

On 10 July 2007, the Commission, pursuant to Article 6(1) of Council Regulation No 659/1999⁽¹⁰⁾, took a decision to initiate the formal investigation procedure (hereinafter: 'opening decision') into the aid for the investment project of IBIDEN Hungary⁽¹¹⁾.

In its compatibility assessment, the Commission considered, among other things, the conformity of the aid measure with the MSF rules. First, it confirmed that the proposed aid intensity of the overall aid package (22.44% net) was in compliance with the adjusted regional aid ceiling pursuant to MSF rules. Second, compliance of the notified aid with paragraph 24(a) (*i.e.* market share of the beneficiary at group level) and 24(b) (*i.e.* the capacity created by the investment) of the MSF had to be assessed.

⁽⁷⁾ This notification requirement is laid down in paragraph 24 of the MSF. The notification threshold is fixed at the maximum amount of aid which an investment project with eligible costs of EUR 100 million could receive in the region concerned. This means that in the case of the Central Hungary region, where in accordance with the Hungarian regional aid map for 2004-2006 the regional aid ceiling was set at 40%, the notification threshold is fixed at EUR 30 million. Because the aid was notified by the Hungarian authorities before 1 January 2007, in line with paragraph 63 and footnote 58 of the Guidelines on national regional aid for 2007-2013, the Commission assessed the state aid measure under the provisions of the Guidelines on national regional aid 1998 (RAG) and the MSF.

⁽⁸⁾ Commission letter of 9 July 2004, C(2004) 2773/5 concerning HU 12/2003 — Regional aid map of Hungary for the period from 1 May 2004 until 31 December 2006.

⁽⁹⁾ HU 1/2003 'Earmarked Scheme for Investment Promotion' (which was submitted under the interim procedure and accepted by the Commission as existing aid within the meaning of Annex IV, Chapter 3, paragraph (1)(c) (under Article 22) of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union) and HU 3/2004 'Development Tax Benefit Scheme' (which was submitted under the interim procedure and accepted by the Commission as existing aid within the meaning of Annex IV, Chapter 3, paragraph (1)(c) (under Article 22) of the Treaty of Accession; the amendment of this scheme was notified to the Commission (No N 504/2004) and approved by the Commission on 23 December 2004, ref. C(2004)5652).

⁽¹⁰⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

⁽¹¹⁾ Commission decision of 10 July 2007 in state aid case No C 21/2007 (ex No N 578/2006) — Hungary — MSF 2002 — 'Individual aid to IBIDEN Hungary Gyártó Kft.', OJ C 224, 25.9.2007, p. 2. The working language of the Commission decision is available at DG Competition website http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-21-2007-WLWL-en-10-07-2007.pdf.

Because the Commission's decision to allow regional aid to large investment projects falling under paragraph 24 of the MSF depends on the market share of the beneficiary at a group level before and after the investment ⁽¹²⁾ and on the capacity created by the investment, the Commission had first to identify i) the product(s) concerned by the investment, and to define ii) the relevant product and iii) geographic market for the purpose of carrying out the relevant tests under paragraph 24(a) and (b) of the MSF.

In the present case, the product concerned by the investment project is 'ceramic substrates for diesel particulate filters', which are installed in diesel passenger cars and light duty trucks. IBIDEN Hungary produces a ceramic part, *i.e.* an inner-solid substrate, which is an intermediate product (TIER 3). IBIDEN's product is then sold under market conditions to independent companies, which in turn perform the coating of the substrate with precious metal to form a coated DPF (TIER 2). The coated DPF is then sold to exhaust manifold producers (TIER 1), which are the direct suppliers of car assembly plants.

Having established which product is concerned by the investment, the Commission proceeded to define the relevant market. In this regard, the MSF provisions are similar to those contained in the Commission notice on the definition of the relevant market for the purposes of Community competition law ⁽¹³⁾ — *i.e.* the document which is used by the Commission in its analysis of antitrust cases. For the purposes of competition law analysis, the relevant product market comprises all those products which are considered to be substitutes, either by the consumer (by reason of the product's characteristics, prices and intended use — *i.e.* so-called 'demand-side substitution') or by the producer (through flexibility of the production installations — 'supply-side substitution') ⁽¹⁴⁾.

The Commission in its opening decision identified and analysed two products which were regarded by the Hungarian authorities as key parts of the exhaust gas treatment system of diesel engine vehicles, namely diesel oxidation catalysts (DOC), which treat gases (*i.e.* carbon oxides (CO) and hydrocarbons (HC)) and to a certain extent the soluble organic fraction of particulate matter (PM)); and diesel particulate filters, which are effective in treating the insoluble fraction of particulate matter, *i.e.* soot. In its decision the Com-

mission provided a brief overview of both key parts of the exhaust gas system, identifying their characteristics, functions and uses ⁽¹⁵⁾.

The next step was to assess whether a DOC can be considered as a (demand and/or supply-side) substitute for a DPF. If so, what is the extent of such substitution? In other words, the Commission assessed whether or not the DOC and DPF belong to the same product market. In this regard the Commission looked at the evidence available to it to reach a conclusion on the relevant product market. It is normal Commission's practice to check all available public data, and in particular independent market studies and previous decisions in the field of competition, in order to check the definition of the relevant market as well as other data. When the information is contradictory, the Commission is likely to open a formal investigation procedure in order to give all interested parties, including competitors who would be affected by the state aid, the possibility to submit their observations.

In order to identify the relevant market, the Commission first looked at the arguments provided by the Hungarian authorities and the aid beneficiary, who argued for a broad definition of the relevant product market, which would cover all devices in the exhaust gas treatment system of diesel engine vehicles (*i.e.* both DOC and DPF). They argued that these devices were very similar to each other, since the purpose of both devices was to reduce harmful substances from emissions. In support of their view, the Hungarian authorities and IBIDEN Hungary stressed the fact that IBIDEN Hungary's product should be considered as a technologically more advanced version of a DOC. In this regard, they presented the consequential stages in the development of the product. In their view, the DOC should be regarded as the first generation filter, which was installed in diesel cars in 1996 and which was meant to clean gases and soluble fractions of PM. The second generation filter, which is currently being produced by IBIDEN France, is known as an uncoated DPF and it only filters the insoluble fraction of PM. IBIDEN Hungary's product, however, should be regarded as the third generation DPF, which is a multi-functional device, because it is able to filter HC and CO in addition to its main function of filtering soot (particulate matter). Furthermore, the Hungarian authorities and the aid beneficiary also argued that the production processes and technologies to manufacture the two components were very similar: the only major difference is that, in the case

⁽¹²⁾ In this case the respective years are 2003 and 2008.

⁽¹³⁾ OJ C 372, 9.12.1997, p. 5.

⁽¹⁴⁾ Cf. paragraph 52 of the MSF and section II of the Commission notice on the definition of relevant market.

⁽¹⁵⁾ Paragraphs 62-67 of the Commission decision of 10 July 2007 in state aid case No C 21/2007.

of DPFs, the plugging process is added to that of DOCs. Thus, according to the Hungarian authorities and IBIDEN Hungary, DOC and DPF should be regarded as substitutes on the supply-side too.

The Commission, as a second step in order to establish the extent of the relevant product market, verified the information available from public sources. The Commission checked in particular the market research studies (by Frost & Sullivan Ltd. (F&S) ⁽¹⁶⁾ and by AVL List GmbH (AVL) ⁽¹⁷⁾), which are mentioned in the decision. The Commission observed that the two market studies did not appear to support the approach of the Hungarian authorities and the aid beneficiary with regard to the relevant product market.

In particular, the Commission expressed reservations as to whether DOC and DPF can be considered as substitutes belonging to a single product market of after-treatment devices. First, the Commission looked at the characteristics and intended use of the products and noted that the DPF's main function was to treat solid inorganic and insoluble particulate matter (*i.e.* soot), while the purpose of the DOC was to clean hazardous gases and the soluble organic fraction (SOF) contained in particulate matter, without being able to collect soot. While it is true that there is some functional inter-changeability, inasmuch as the coated DPF also treats harmful gases to a certain extent, this does not remove the need for a separate DOC in the exhaust gas treatment system. The Commission stressed that both components will continue to co-exist and have to be installed together in the period under consideration (*i.e.* until 2008). For future Euro 5-6 technologies ⁽¹⁸⁾ DOCs will continue to be used for oxidation of CO, HC and SOF. Thus, the Commission noted that there appeared to be no possibility of substitution on the demand-side, as these are two separate and complementary devices.

⁽¹⁶⁾ «Strategic analysis of the European market for Diesel Particulate Filters», October 2006. The firm Frost & Sullivan is active in market/industry consulting and research.

⁽¹⁷⁾ «Market survey on PM reduction after-treatment devices», March 2007. AVL List is closely involved with the design and development of internal combustion engines. According to the Commission decision of 10 July 2007, the AVL study, which was commissioned by IBIDEN Hungary *ad hoc* for the present case, argues that both DOC and DPF belong to the same relevant product market, however, the data and analysis presented in the AVL study do not confirm this argument.

⁽¹⁸⁾ Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ L 171, 9.6.2007, p. 1.

Moreover, the Commission noted that substitutability on the supply-side was also questionable. It emphasised that the Hungarian authorities and IBIDEN Hungary had not provided any hard evidence of DOC substrate producers who were also capable of producing substrates for DPFs with the same equipment without major additional investment costs, or vice versa. Substitutability was also doubtful because the price of the DPF appeared to be some four times higher than the price of the DOC.

Faced with such conflicting information, the Commission decided to initiate the formal investigation procedure in this case. In the decision, the Commission expressed doubts whether DOCs and DPFs can be considered as belonging to the same product market of after-treatment devices to be fitted in diesel exhaust systems of passenger cars and light duty trucks.

It has to be noted that, in the opening decision, the Commission did not express doubts with regard to the relevant geographical market, which is normally defined as 'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in this area' ⁽¹⁹⁾. The Commission, in the absence of objections from the side of the Hungarian authorities and the aid beneficiary, defined the relevant geographical market as the European Economic Area (EEA) due to the differences in emission regulation and fuel quality standards compared to third countries and the lower share of diesel vehicles in other major automotive markets.

On the basis of the market research studies, the Commission found that IBIDEN's share of the DPF market (which was the narrowest definition, and thus the worst case scenario in the present case) both before and after the investment substantially exceeded the 25 % threshold in volume terms ⁽²⁰⁾. However, in the combined market of

⁽¹⁹⁾ Paragraph 8 of the Commission notice on the definition of relevant market for the purposes of Community competition law.

⁽²⁰⁾ Ibidem Hungary's ceramic substrate is an intermediary product, which is subject to further processing (*i.e.* coating, canning) at subsequent levels of the value chain (carried out by independent companies). Since data in value terms contained in the submitted studies refer only to the ready made DPF whose price is substantially higher than that of Ibidem's product, and since no reliable data have been submitted as regards the price of the intermediary product, the Commission considered that the analysis in volume terms reflected better the market position of the beneficiary.

the DPF and DOC, IBIDEN's market share would be below 25 % in Europe both before and after the investment.

Consequently, the Commission had sound arguments, based on the above-mentioned two market research studies, to open the formal investigation procedure in the present case, as the compatibility of the aid of EUR 9.56 million depended on the delineation of the relevant product market. If it were confirmed by the investigation that the DPF market alone had to be considered as the relevant product market for assessing the proposed aid, the aid of EUR 9.56 million which was subject to the individual notification could not be approved under the MSF. It should be noted that the opening of a formal investigation procedure is simply a procedural stage in the Community monitoring of state aid and is without prejudice to the conclusions the Commission will draw from the investigation. Thus, quality of argument and additional information, which would be provided by interested parties and experts in the sector on the relevant product market, were essential in the present case, because they could remove or reinforce the Commission's doubts and therefore could lead to a final decision that was positive, conditional or negative ⁽²¹⁾.

Comments received from interested parties during the investigation

In response to the publication in the Official Journal of the European Union of the decision to open the formal investigation procedure, the Commission received observations from the four interested parties; they were: the aid beneficiary IBIDEN Hungary; Aerosol & Particle Technology Laboratory, a centre for research and technology based in Greece; Saint-Gobain Industrie Keramik Rödental GmbH, a competitor (Saint-Gobain); and an interested party which, pursuant to Article 6(2) of Council Regulation No 659/1999, requested the Commission to withhold its identity. In accordance with this Regulation, the Commission forwarded the comments to the Hungarian authorities who gave their opinion on these observations.

As stipulated in the Commission's final decision of 30 April 2008, the aid beneficiary and the Hungarian authorities maintained their position that it was necessary, in the present case, to adopt a broad market definition, which would cover all components (mainly DOC and DPF) in the exhaust gas treatment system of diesel engine vehicles. Aerosol & Particle Technology Laboratory also supported their arguments. According

to this opinion, both DOC and DPF would be regarded as PM removal components, although IBIDEN Hungary acknowledges that DOC is not effective in treating the insoluble part of PM (*i.e.* soot). These parties argued that, as IBIDEN Hungary's product is able to filter HC and CO in addition to its main function of filtering soot, it belongs to the same market as the DOC. It is up to car manufacturers to decide whether to construct the exhaust gas treatment line from independent components for detoxifying gaseous harmful substances and for treating the particle substances, or to use the multifunctional component.

The comments received from the other two interested parties — Saint-Gobain and the party whose identity is withheld — deserve a particular mention as they presented well-founded arguments which, in the end, served as a main basis of the Commission's final decision not to approve the aid measure. According to them, the DOC and DPF cannot be considered as substitutes and thus do not belong to the same relevant product market. These parties proved that there is neither demand-side nor supply-side substitution between the DPF and DOC.

With regard to demand-side substitution, in particular, the interested parties focused, first, on the differences in the use of a DOC and a DPF ⁽²²⁾: the primary purpose of a DOC is to oxidise certain gases by way of chemical reaction, while the primary function of a DPF is to filter out soot by means of a mechanical process. While, under certain circumstances, a DPF performs some of the functionalities of the DOC, the full oxidation effect cannot be achieved without the both parts being installed. They also indicated that, in keeping with the expectations of many car manufacturers, the DOC and the DPF will continue to be separate devices installed next to each other in the exhaust gas treatment system.

Second, the interested parties argued that the main (thermal) characteristics of the substrates for a DOC and a DPF are not the same: the DOC substrate is usually made from non-porous cordierite which has to resist temperatures of 400°C, while the DPF substrate is in general made of porous silicon carbide which has to withstand 1000°C. Third, these interested parties emphasised the price differences between the two components: a substrate (without the cost of catalyst coating and canning) of a DPF costs EUR 120 on average, while a substrate of a DOC costs on average between EUR 12 — EUR 20 (also without the cost of cata-

⁽²¹⁾ Article 7 of Council Regulation No 659/1999.

⁽²²⁾ Differences in the intended use between the end products, DPF and DOC, are a reflection of the different uses of their respective substrates.

lyst coating and canning). Therefore, for technical reasons DPF manufacturers cannot switch to a DOC substrate (which they would otherwise do, given the price difference) and a DOC producer would not substitute a DOC substrate with a DPF substrate as s/he would get a much more expensive product without an oxidation function.

Regarding the issue of supply-side substitution, Saint-Gobain and the party which withheld its identity also claimed that, contrary to the arguments provided by IBIDEN Hungary and the Hungarian authorities, the processes for producing the DOC and DPF substrates are very different: the non-porous cordierite used for the DOC substrate is air-sintered at 400°C temperature, while the silicon carbide used for the DPF substrate has to be prepared at very high temperatures (above 2000°C) in an oxygen-free atmosphere. This difference of temperature alone is vital and means that one of the most essential and costly production elements cannot be used to produce both types of product. Further, for the manufacture of DPF substrates a non-oxide high temperature sintering furnace, glueing and plugging equipment are needed, which is not the case in the production of substrates for DOC. Thus, the interested parties argued that DPF could not be produced on the DOC's production lines, and vice versa.

Commission conclusions regarding the relevant product market and final negative decision

In the assessment part of the decision of 30 April 2008, the Commission considered that the arguments put forward by IBIDEN Hungary, the interested party Aerosol & Particle Technology Laboratory and by the Hungarian authorities did not dispel the Commission's initial doubts, which were confirmed by the comments of Saint-Gobain and the interested party whose identity is withheld.

In its assessment, the Commission concluded that from the demand-side perspective there are significant differences in product characteristics, intended use and prices between substrates for DPF and substrates for DOC. In addition to the comments provided by Saint-Gobain, the Commission observed that, although the belief expressed by IBIDEN Hungary and the Hungarian authorities concerning the tendency to use a multifunctional product, which integrates on one ceramic monolith the functions of both the DOC and DPF, might reflect the future trend in the development of emission control technologies, it did not reflect the current situation. In the period to be considered (from 2003 to 2008 *i.e.* one year

before the start and one year after full completion of the investment project) for the Commission's state aid analysis, both DPFs and DOCs continue to co-exist and are installed together because for future Euro 5 and Euro 6 technologies DOCs will continue to be used for oxidation of CO, HC and SOF.

Further, as far as the supply-side substitutability is concerned, the Commission noted the differences in the production processes of the DOC and DPF substrates and emphasised in particular that the relevant issue here was whether the same equipment could be used for the production of both substrates (for DOCs and DPFs) without significant additional costs. As no concrete evidence had been forthcoming from DOC substrate producers, who were going to be producing substrates for DPFs with the same equipment without major additional investment costs, or vice versa, the Commission considered that there was no substitutability between DOC substrates and DPF substrates on the supply-side.

The Commission therefore concluded that the relevant product market only covers substrates for DPF to be fitted in the exhaust systems of diesel passenger cars and light duty trucks. On the basis of the definition of the relevant product market that was established following the in-depth investigation, the Commission confirmed that the market share of IBIDEN in the DPF market in Europe substantially exceeded the 25 % threshold, both before and after the investment. The Commission also underlined that IBIDEN's high market share reflected the prevailing position of the company in the DPF market: it is one of the two major filter substrate manufacturers in the world. The aid would have even further strengthened IBIDEN's leading position in this market, making it more difficult for new competitors to enter the market and for smaller incumbents to consolidate their position on this market.

Thus, the Commission concluded that the aid that was the subject of the notification of EUR 9.56 million was not compatible with the common market as it was not in line with the requirements of the EC rules on regional aid and, in particular, with the MSF.

Particular features of the definition of the relevant market in a state aid case

The definition of the relevant market is a standard practice in the application of the EC competition rules. For example, in the context of the implementation of Article 81 and Article 82 of the EC Treaty, in order to establish whether agreements between firms have a significant effect on compe-

tion, or whether or not a firm holds a dominant position, it is necessary to define the relevant market correctly.

There are several advantages to precise market definition. The more accurately markets are defined, the more meaningful competition analysis and calculation of market share can be. Thus, the determination of the relevant market provides the basis for assessing market shares, dominant position and concentrations.

In the state aid context, the issue of market definition is also central to the analysis of the effects of a state aid measure on competition within the common market. Article 87 of the EC Treaty requires an assessment of whether state aids distort competition. Distortion of competition arises when competitors are affected. Thus, the market has to be correctly defined in order to delineate the firms and goods that are affected by the state aid measure and to track the effects of state intervention across markets. The motivation of such an analysis in state aid cases is different from that in antitrust cases, as 'the focus of assessment in state aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient' ⁽²³⁾. However, as outlined above, the essential elements in the definition of the relevant product and geographical markets are similar.

As demonstrated by the Commission's decisions in the IBIDEN case, the relevant market in the state aid context incorporates both the product and geographical dimensions, which are defined simultaneously. However, one of the essential differences is that, in the state aid analysis, there is no benchmark comparable to the SSNIP (Small but Significant and Non-transitory Increase in Price) test ⁽²⁴⁾, which is of crucial importance in antitrust and merger cases. In particular, this is because in state aid analysis the Commission has fewer investigative powers and, hence, has less data to be used in its assessment.

Indeed, as can be observed from the Commission's decisions in the IBIDEN case, the Commission did not perform the SSNIP test to determine whether substrates for DOCs and DPFs belong to the same relevant product market. The Commission did not examine whether, for example, there were any

recent changes in the relative prices of the products concerned, which could have led to changes in demand. Nor did the Commission carry out an evaluation of cross-price elasticity for the demand of a product or the trend in the dynamics of prices in different geographical areas and the reasons for that. In other words, the Commission did not use the quantitative tests which would normally be used in antitrust and merger control to determine the relevant product market.

The fact that there is no such benchmark, for example, comparable to the SSNIP stipulated in the EC state aid legislation on regional aid is not the main reason why the Commission did not perform such an analysis. The Commission's notice on the definition of relevant market states that 'when consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of state aid cases' ⁽²⁵⁾. Thus, the Commission could in theory also apply the sophisticated tools, which have been developed over time in antitrust and merger control, in the field of state aid.

However, there are some important technical procedural differences between state aid on the one hand and antitrust and merger control on the other hand: the state aid procedure is, first of all, a formal dialogue between the Commission and a Member State, and thus there is always a stronger political dimension in state aid control, even though in the case of aid for large investment projects it is often the aid beneficiary and not the Member State concerned that is the source of essential information necessary for the delineation of the relevant market. However, this information is — by definition — limited and incomplete because it comes from a single enterprise only, *i.e.* the aid beneficiary, and thus there is a risk of a conflict of interests when providing the information needed for the assessment of the state aid measure. Therefore, in the case at hand, the Commission placed a great deal of emphasis on the studies compiled by independent market consultants in the field.

In antitrust cases, on the other hand, the process of collecting information is different and goes beyond the undertakings concerned. The Commission normally establishes contacts with main consumers and undertakings in the industry in order to obtain information about the boundaries of the relevant product and geographical markets. The Commission, at its discretion, may also request the opinion of the respective professional unions. It may send written questionnaires

⁽²³⁾ Cf. footnote 1 of the Commission notice on the definition of relevant market.

⁽²⁴⁾ Cf. paragraph 15 of the Commission notice on the definition of relevant market: '[...] The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets'.

⁽²⁵⁾ Cf. footnote 1 of the Commission notice on the definition of relevant market.

to the participants in the market for the purpose of obtaining opinions and information about, for example, the substitutability of products, relations with suppliers, and pricing policies of undertakings. The Commission also has powers to oblige market players to reply. The Commission officials may also carry out on-the-spot inspections in business and non-business premises in order to obtain the necessary information about the market.

At present, in the state aid context, the opening of a formal investigation procedure is the principal information gathering tool in case of doubts about the delineation of the relevant market; it was also the tool which was used in the IBIDEN case. However, the opening of the formal investigation procedure may not always help in gathering relevant information from interested parties, as some of them might have no incentive to reply or might not be aware of such a procedure being initiated in sufficient time to submit their observations. Moreover, as this case has demonstrated, the information submitted by interested parties may be conflicting, and the Commission needs to perform an in-depth assessment to establish which information is relevant for the purpose of delineating the relevant market. However, as can be seen in the IBIDEN case, the Commission received useful information (in particular, from competitors) and was able to judge the relevance of different submissions, which allowed the Commission to confirm its doubts about the narrower

market definition (covering only substrates for DPFs) being used in the present case.

Conclusion

In the decision on aid for IBIDEN's large investment project in Hungary, the Commission has, for the first time, opened the formal investigation procedure under the rules of the MSF to delineate the relevant product market. It should be noted that this is also the first negative decision concerning regional aid for a large investment project in one of the new Member States, where maximum allowable regional aid intensities are the highest in order to compensate for the handicaps of disadvantaged regions.

The decision sets a precedent with regard to the key factors the Commission may take into consideration when delineating relevant (product) markets in the context of regional aid for large investment projects. This case also provides an example of the importance of strong factual evidence and economic reasoning, which need to be supported by independent market studies in the Commission's assessment of the relevant market. This decision should also dispel the criticisms that there is little or no market analysis in the Commission's state aid decisions. It also shows the Commission's determination, as announced in the State Aid Action Plan, to move away from a form-based analysis towards a more effects-based analysis.

State aid issues in the privatisation of public undertakings — Some recent decisions

Loredana VON BUTTLAR, Zsófia WAGNER and Salim MEDGHOUL ⁽¹⁾

1. Introduction

The general definition of State aid is set out in Article 87(1) of the EC Treaty, which prohibits ‘...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods... insofar as it affects trade between Member States’, save as otherwise provided in the same Treaty.

This provision can be broken down into a set of criteria which must all be met in order for a measure to qualify as State aid: it must i) be financed from State resources, ii) grant an advantage in a selective way, i.e. to ‘certain undertakings...’ but not to others, and iii) have an effect on trade between Member States and threaten to distort competition.

As the words ‘in any form whatsoever’ of Article 87(1) suggest, State aid comes in all shapes and sizes. The obvious example is a straightforward grant from the public sector to an individual operator. A perhaps less obvious but equally effective transfer of resources occurs when the State foregoes revenue to the benefit of a particular undertaking. This latter form of aid is particularly relevant when the State sells an asset; unless the consideration it receives corresponds to the full value of the asset, the State will forego revenue to the benefit of the buyer, who gets more than he is paying for.

However, the transfer of State resources to an individual beneficiary does not qualify as State aid within the meaning of Article 87(1) EC unless it also provides an advantage to the recipient, i.e. a benefit that could not be obtained under normal market conditions (and which consequently may distort competition) ⁽²⁾. Although one might think that getting some ‘resources’ for free is always an advantage, it is established case law that a transfer

of State resources does not provide an advantage to the recipient where the State acts in the same way as a private operator acting under normal market economy conditions would have done in similar circumstances.

Commonly referred to as the Market Economy Investor Principle, or ‘MEIP’, this doctrine is based on the principle that the Treaty is neutral towards private or public ownership (Article 295 EC) and that consequently its State aid rules must not preclude the State from engaging in business (for instance, by investing in State-owned undertakings) provided, however, that the State acts in the same way as its private competitors. In comparing the behaviour of the State to that of a private investor, the basic premise is that a private investor will seek to maximise the return on his investments, at least in the longer term, and that the State should do the same ⁽³⁾. Applied to situations where the State acts as a seller, this principle — in a nutshell — requires the State to seek the highest possible price for its assets, as a private seller would.

2. Privatisations

The above principles apply to all sales of assets by the State ⁽⁴⁾. A situation which has attracted particular attention in the Commission’s State aid practice is privatisation, i.e. the sale in whole or in parts of State-owned undertakings ⁽⁵⁾.

The Commission outlined its position on privatisation procedures in the 23rd Competition Policy

⁽³⁾ As examples of the numerous rulings involving the MEIP, see case C-305/89 *Alfa Romeo* (ECR 1991 p. I-1603), paragraphs 18-20 and case T-152/99 *Hamsa* (ECR 2002 p. II-3049), paragraphs 125-128.

⁽⁴⁾ The notion of «State» is taken in the very wide sense given to it within State aid rules. A State-owned company is thus a company in which all equity, or a controlling share thereof, is held by a public authority or body at any level of government.

⁽⁵⁾ Specific rules apply to the sale of land and buildings by public authorities; see the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3). This Communication does not, however, apply as such to privatisations, and its underlying considerations are not necessarily transferable to the more complex reality of privatisations.

⁽¹⁾ Directorate-General for Competition, unit E-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Cf the judgment in case C-39/94 *SFEI v La Poste* (ECR 1996 p. I-3547), paragraph 60.

Report of 1993 ⁽⁶⁾, which is a restatement of the law as outlined over the years through decisions on individual cases. A Member State has the choice as to how it wants to privatise a State-owned company, as long as the chosen method does not entail State aid, i.e. provided that the State sells its shares for the highest price it can get on the market.

- Where a privatisation is carried out through a share sale on the stock exchange, it is generally assumed to be on market conditions and not to involve aid.
- However, if a company is privatised not by stock exchange flotation but through a trade sale (meaning by the sale of the company as a whole or in parts to other companies), certain cumulative conditions must be observed if it is to be assumed, without further examination, that no aid is involved:
 - a) a competitive tender must be held that is open to all comers, transparent and not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain businesses ⁽⁷⁾;
 - b) the company must be sold to the highest bidder; and
 - c) bidders must be given enough time and information to carry out a proper valuation of the assets as the basis for their bid.

If the privatisation meets these conditions the Commission will assume that the sale price was the fair market price and that no State aid is involved. To put it differently, the Member State can enjoy a presumption that the Commission, should it have to assess the case, will consider that the sale did not entail State aid. Conversely, the Commission is likely to presume State aid where these conditions are not met, because then the privatisation procedure is not likely to produce the highest possible price for the asset, meaning that the State may forego revenue it could otherwise have obtained.

The 23rd Competition Policy Report gives some examples of sales conditions that are typically liable to compromise the competitive effect of the tender and to lead to a sale price below the mar-

ket price: sales after negotiation with a single prospective purchaser or a number of selected bidders; sales preceded by the writing-off of debt by the State, those preceded by the conversion of debt into equity or capital increases; and — in a more general way — sales on conditions that are not customary in comparable transactions between private parties.

This fairly straightforward guidance has been upheld in consistent Commission practice ⁽⁸⁾.

Three recent Commission decisions provide interesting illustrations of the application of the market economy vendor principle to privatisations.

3. Privatisation of Automobile Craiova (C-46/2007) ⁽⁹⁾

In this case, the Commission adopted a final negative decision finding incompatible State aid in the privatisation process and ordering the recovery of this aid. The decision followed the established Commission practice and applied the principles of previous case-practice to a privatisation where the tender for selling the State shares included a number of awarding criteria motivated by industrial policy concerns.

Automobile Craiova was an automotive company controlled by the Romanian State, which held 72.4% of shares. In May 2007 Romania published a tender for privatisation of the company. The Commission opened the formal investigation procedure on 10 October 2007 after Romania had signed a sales agreement with the only bidder. At the same time, the Commission issued a suspension injunction, enjoining Romania to suspend the privatisation procedure pending the Commission's decision on the State aid issues. In the formal investigation procedure the Commission had

⁽⁶⁾ Paragraphs 402 to 404. The report confirms and elaborates on the comments in the Competition Policy Reports of 1991 (paragraphs 248 et seq) and 1992 (paragraphs 434 et seq) which in turn rest on Commission practice in privatisation cases.

⁽⁷⁾ Guidance as to what constitutes an open and unconditional tender can be sought by analogy in the above-mentioned Communication on sales of land and buildings by public authorities.

⁽⁸⁾ The following Commission decisions provide some examples of the Commission's practice on privatisations: 92/321/EEC of 25 March 1992 *Intelhorce SA* (OJ L 176, 22.6.1992, p. 62); 2002/896/EC of 30 January 2002 *Gothaer Fahrzeugtechnik* (OJ L 314, 18.11.2002, p. 62); 2001/1/EC of 15 February 2001, *Dessauer Geräteindustrie GmbH* (OJ L 1, 4.1.2001, p. 10); 1999/720/EC, ECSC of 8 July 1999 *Gröditzer Stahlwerke* (OJ L 292, 13.11.1999, p. 27); 2001/120/EC of 13.6.2000 *Kali und Salz* (OJ L 44, 15.2.2001, p. 39); 2001/798/EC of 13.12.2000 *SKET Walzwerkstechnik* (OJ L 301, 17.11.2001); 1999/338/EC of 16.12.1998 *Società Italiana per Condotte d'Acqua SpA* (OJ L 129, 22.5.1999, p. 30); Decision of 20.6.2001 in State aid N 804/2000, *Sale of shares of the GSG by Land Berlin* (OJ C 67, 16.3.2002, p. 33); 2006/900/EC of 20.10.2005 *Componenta* (OJ L 353, 13.12.2006, p. 36); 97/81/EC of 30.7.1996 *Head Tyrolia Mares* (OJ L 25, 28.1.1997, p. 26); 2000/628/EC of 11.4.2000 *Centrale del Latte di Roma* (OJ L 265, 19.10.2000, p. 15).

⁽⁹⁾ Commission decision of 27 February 2008, not yet published.

to assess whether the tender's awarding criteria and the conditions attached to the privatisation were liable to reduce the sale price and provide an advantage to the buyer or the privatised undertaking.

The privatisation took place through a tender in which the Romanian privatisation agency announced its intention to sell its stake in Automobile Craiova. The presentation file, which provided potential investors with information on the company and on the criteria that Romania would apply in selecting the winning bid, contained a scoring grid. The price offered by potential bidders represented 35% of the total scoring while the remaining 65% related to investments to be made by the new owner in the company, the achievement of a production integration level (i.e. a requirement that 60% of the parts must be produced in Romania) and the commitment to reach a certain level of production of cars per year. Moreover, the documents stipulated that if a certain minimum level was not achieved for integration and production levels, the bidder would get zero in that part of the scoring.

In the final negative decision, the Commission first restated its established practice with regard to privatisations: no aid is involved if the cumulative conditions set out in the 1993 Competition Policy Report are fulfilled (open, transparent, non-discriminatory tender, no conditions capable of potentially reducing the sale price, company sold to the highest bidder and sufficient time and information available for the bidders to make a proper valuation of the assets). In all other cases the sale of public companies is to be notified to the Commission and needs to be examined for possible State aid implications. Non-economic considerations, which a private seller would not make (such as industrial policy reasons, employment requirements or regional development objectives) point to the existence of State aid since they are liable to reduce the sale price and provide an advantage to the buyer or the privatised undertaking. The fact that such conditions do not result in State aid needs to be demonstrated on a case-by-case basis.

The Commission went on to analyse the awarding criteria included in the scoring grid for Automobile Craiova. It first concluded that the chosen criteria made it practically impossible for a potential investor intending to follow a different industrial strategy for the plant to win the bid simply by offering a higher price but without meeting the required production and integration levels. Therefore, these factors, which had to be taken into account by all potential investors, influenced their decision whether to bid or not, and if so at which

price. Some investors may consequently have been deterred from showing an interest in the company already at this stage.

The Commission also found that, although the tender announcement did not refer to any express conditions, the scoring of the production and the integration level amounted to *de facto* conditions attached to the privatisation. As a result the competitive environment of the tender was disturbed, with the effect that the highest bid would not necessarily represent the actual market price of the company but rather the price at which an investor would be willing to buy the company together with the conditions. The Commission concluded that the conditions attached to the privatisation of Automobile Craiova lowered the sale price and deterred potential investors from submitting a bid, as a result of which the State lost privatisation revenue. Put differently, without conditions, competition for the purchase of Automobile Craiova would have been stronger and the State would have obtained a higher sale price.

As the price-reducing conditions were attached to the privatised entity, which resulted in extra costs for the buyer (which in turn offered a lower price), the Commission concluded that it was the privatised economic entity, i.e. Automobile Craiova itself (rather than the buyer), which benefited from an economic advantage through the use of State resources. These conditions ensured a certain production, investment and employment level of the privatised entity which could not have been reached on market terms alone. The State aid to be recovered was calculated as the difference between the market value and the price received. In the absence of an open, unconditional, non-discriminatory tender, the market value was based on the net asset value of the company.

4. Privatisation of Tractorul (C 41/2007)

Another recent Romanian case concerned the asset sale of Tractorul, a tractor producer in which the State held an 80% stake. In its final decision of 2 April 2008 ⁽¹⁰⁾, the Commission found that there was no State aid involved in the sale.

The main difference from the Automobile Craiova decision lies in the nature and the effect of the considerations which were laid down in the tender documents. In the formal investigation procedure Romania was able to demonstrate that — contrary to the Automobile Craiova case — these were merely formal requirements which did not impose onerous obligations on the potential buyer. They were simply best-effort clauses of a non-binding

⁽¹⁰⁾ Not yet published.

nature: maintaining Tractorul's *object* of activity in the company register (but not requiring any actual production to be carried out), giving preference to former employees in the event of hiring staff (but no obligations to actually hire or to maintain staffing levels). Romania also demonstrated that the non-binding nature of these considerations was apparent to all potential bidders from the tender documents, so that the competitive character of the tender was unimpaired, and the price was the only award criterion.

On this basis the Commission concluded that the requirements did not deter potential bidders and they did not lower the sale price.

5. Privatisation of Bank Burgenland (C 56/06)

The most recent privatisation decision is the Bank Burgenland case in which the Commission found incompatible State aid and ordered its recovery⁽¹¹⁾. In this case the Austrian *Land* of Burgenland privatised the publicly owned HYPO Bank Burgenland AG through a tender but sold the bank to the second-best bidder despite the fact that this offer was significantly lower than the highest bid (€100.3 million against €155 million).

The tender contained a number of conditions which the Commission assessed for a potential effect on the sale price. However, contrary to the Automobile Craiova case, the Commission found no grounds to consider that the conditions contained in the tender restricted the number of bidders or influenced the sale price. Therefore in this case the tender was considered to have produced a fair market price for the bank in the form of the highest bid made.

Instead, the Commission's concerns were linked to the fact that Austria passed over the highest bidder ('the Consortium') and sold the bank to the second bidder, i.e. below market value. To justify this choice, Austria cited a number of reasons which, in its view, meant that the highest bid was not the most attractive one. In particular, Austria doubted whether the Consortium would have been able to secure the required approval of the Austrian Financial Market Authority (or was at least concerned that obtaining the approval process would have taken much longer than for the bidder that was eventually selected, which would have considerably endangered the bank's viability). Furthermore, Austria stressed that selling the bank to the Consortium would have carried a higher risk that the bank would have drawn on

the public guarantee (*Ausfallhaftung*) which covered most of its liabilities at the time of the sale, amounting to more than €3 billion, and which would continue to exist after the sale for those liabilities⁽¹²⁾. These considerations, Austria argued, were all relevant to the market economy seller test and in the same situation a market economy operator would have made the same decision as the Austrian authorities.

The Commission did not accept Austria's claim to have acted consistently with the MEIP. In particular, there was no evidence to suggest that the Consortium would necessarily have been unable to secure the necessary approval from the banking authorities. As to the claim that this approval would have delayed the sale, the Commission found that considerations of time were already in principle not acceptable, as this would potentially discriminate against bidders outside of Austria (inside or outside the EU), as the approval procedure for any bidder unknown to the Financial Market Authority would by definition take longer. Furthermore, in the case at hand, the bank was not in financial difficulties and the sales procedure had been ongoing since 2003, indicating that there was no particular urgency which would have motivated a private operator to choose the lower price over the Consortium's bid. As regards the *Ausfallhaftung*, which was the core issue of the case, the Commission explained that — for the purposes of the MEIP — account can be taken only of those factors which would have been taken into consideration by a market economy seller. This excludes risks stemming from a potential liability to pay out a public guarantee that would never have been incurred by a market economy investor⁽¹³⁾. In conclusion, Austria was unable to demonstrate that a market economy vendor would have taken these considerations into account in view of the significant price difference between the two bids.

In this case the Commission concluded that it was the selected bidder and not the privatised entity which received an advantage due to the fact that it paid less for the company than its market value. Since no conditions were attached to ensure a certain investment or employment level which under normal market conditions could not have been reached, the Commission considered that no advantage was conferred on the privatised entity. The market value in this case was considered to be the highest bid and the amount of State aid to

⁽¹¹⁾ Commission decision of 30 April 2008, not yet published.

⁽¹²⁾ For details on *Ausfallhaftung* see OJ C 175, 24.7.2003, p. 8.

⁽¹³⁾ Cf the ECJ's judgment of 14.9.1994 in joined cases C-278/92, C-279/92 and C-280/92 *Hytasa* (ECR 1994 p. I-4103), paragraph 22.

be recovered from the selected bidder is the difference between what was paid and the highest offer ⁽¹⁴⁾.

6. Conclusions

The three above-mentioned decisions confirmed the principles set out in the 23rd Competition Policy Report of 1993 and previous constant Commission practice as regards aid-free privatisations.

When the privatisation is carried out through a trade sale, the Commission presumes that no aid is involved only if, amongst other things, no conditions are attached which are not customary in comparable transactions between private parties and which are capable of reducing the sale price. Such conditions are presumed to entail State aid and the Member State, in order to demonstrate the opposite, has to prove that the conditions did not lower the sale price.

Conditions which merely duplicate legal obligations that are mandatory for *any* new owner and

are directly enforceable under domestic law (for instance obligations relating to taxes, environmental and employment protection and working conditions) do not affect the sale price. Also, 'best endeavour' clauses which do not create any effective obligations for the bidder or which are normal between private operators are not normally deemed liable to lower the sale price.

As seen in the three cases above, the economic advantage can be granted either to the undertaking being privatised or to the buyer. If the tender contained conditions intended to maintain production where a private operator would not have done so, the State aid is liable to benefit the privatised undertaking. Where no such conditions applied but the company was sold for less than the highest price available on the market, the State aid benefited the buyer.

In conclusion, Member States should notify privatisations which do not qualify for the 'no aid' presumption laid down in the 1993 Competition Policy Report.

⁽¹⁴⁾ The Commission did not calculate the exact amount to be recovered, as adjustments for different elements on the final draft contracts are needed and will have to be provided by Austria.

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Notices and news in brief

European Competition and Consumer Day

22 May 2008, Brdo (Slovenia)

The European Competition and Consumer Day event, traditionally organised by the country holding the Presidency of the Council, was this time hosted by Slovenia. The theme of the day was energy, in particular consumer protection and the establishment of efficient competition in the sector.

In his opening address, the Slovenian Minister of Economic Affairs, Mr Andrej Vizjak, underlined that an effective and competitive internal energy market is key to achieving a sustainable, competitive, reliable and high-quality energy supply. To protect consumers in exercising their rights to basic services and choices, he said, there needs to be a transparent market, more effective mechanisms for appeals and legal remedies.

Ms Neelie Kroes, European Commissioner for Competition, stressed the need for the right market structure and incentives to bring more competition into the energy markets, but warned that liberalisation will not always bring lower prices given the complex factors affecting energy prices (such as costs of infrastructure maintenance, limited supply and the need to internalise environmental costs). She also called for more investment in renewable energy sources.

Ms Megleva Kuneva, European Commissioner for Consumers, called for confident consumers who demand the best out of the market and thereby promote competition. To achieve this, she explained, 'we must put forward practical measures to effectively implement consumer rights, we must inform consumers about their rights, and we must enforce these rights'. She encouraged consumer organisations to participate in the first Citizen's Energy Forum that will take place in London this autumn.

Mr Allan Asher, Chief Executive of Energywatch (United Kingdom), built on the issue of consumer rights and proposed a European Charter on the rights of energy consumers to define the fundamental standards by which governments, suppliers and individuals would interact with each other. The Charter, he added, could set out the key goals by which the success of liberalised energy markets could be measured.

Ms Pervenche Berès, Member of the European Parliament, argued that competition rules have to be applied to the energy market, and made a plea for the balance to be kept between competition, sustainable development and security of supply. She maintained that cross-border exchanges are still very difficult because there is no real incentive to build new interconnectors between the Member States. She acknowledged the existing controversy around ownership unbundling, which was evident in the discussions taking place in both the Council and the European Parliament. In her view, unbundling would worsen the position and the capacity of the EU to negotiate on an equal footing with its main energy suppliers, particularly Russia.

Ms Eluned Morgan, Member of the European Parliament (rapporteur on the electricity directive of the 3rd energy package), stated that the ultimate goal of the (energy) package should be to benefit consumers in a common European energy market. She called for regulation, competition and consumer protection to go hand in hand. National regulators, she continued, should be given the tools to enforce energy consumer rights and competition, and to impose sanctions on companies not complying.

Mr Herbert Ungerer, Deputy Director-General for Competition in the European Commission, emphasised his wish to develop the right strategy under State aid rules to evolve from regulated tariffs towards a competitive market environment. He also reminded the audience that customers must be confident about the fairness of energy prices.

Mr Markus Lange, Head of International Section, Bundeskartellamt (Germany), spoke of the German model. He warned that while it might be more promising to proceed with more stringent legal unbundling, this alone would not solve the issue of high market concentration. The problem would only be resolved with a combination of effective incentive regulation, more cross-border transport capacities to strengthen European energy supply, facilitating the establishment of new power plants, ensuring non-discriminatory network access for new power plants and, finally, mobilising the competitive potential of municipal utilities.

Mr Thierry Dayan, Rapporteur General of the Conseil de la Concurrence (France), spoke of the French situation, where 78% of national demand is met by nuclear power plants, all of which are controlled by the monopoly EDF. Short-term electricity prices are currently set by the marginal plant (the most expensive plant used to satisfy demand). Mr Dayan affirmed that efficient competition would be possible when real supply exceeds demand and there is a fairly homogeneous stock of power plants, in terms of marginal costs. This not being the case, the French government and legislator had chosen a model based on low regulated tariffs that prevented producer profits. This was detrimental to potential competitors of EDF, but allowed lower retail prices for consumers. The alternative, he explained, would have been allowing new entrants to generate profit through high retail prices.

Mr Jan-Erik Ljusberg, Deputy Director General of the Konkurrensverket (Sweden), outlined the main features of the Nordic electricity market (Sweden, Norway, Finland and Denmark) and the factors that have contributed to its success, such as: the existence of a good legal basis that established competition in the sector, non-discriminatory open access to the transmission system, consistent national political support, independence and neutrality of system operators, and the fact that spot prices reflect the physical situation in the market (therefore giving market players relevant price signals).

The next Competition and Consumer Days will be hosted by the French *Conseil de la Concurrence* and will take place on 18 and 19 November 2008 in Paris.

Directorate-General for Competition — Organigramme (16 September 2008)

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Deputy Director-General Mergers and Antitrust	Nadia CALVIÑO	02 29 55067
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03. State aid case support	Nicola PESARESI	02 29 92906
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3. State aids policy and scrutiny	Alain ALEXIS	02 29 55303
4. European Competition Network	Ales MUSIL	02 29 92204
5. International Relations	Dominique VAN DER WEE	02 29 60216
6. Consumer Liaison	Zsuzsanna JAMBOR	02 29 87436
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Markets and cases I – Energy and environment	Eric VAN GINDERACHTER acting	02 29 54427
1. Antitrust — energy, environment	Céline GAUER	02 29 63919
2. State aids	Eric VAN GINDERACHTER	02 29 54427
3. Mergers	Dan SJOBLOM	02 29 67964
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Markets and cases II – Information, communication and media	Cecilio MADERO VILLAREJO	02 29 60949
1. Antitrust — telecoms	Joachim LUECKING	02 29 66545
2. Antitrust — media	Gerald MIERSCH acting	02 29 96504
3. Antitrust — IT, internet and consumer electronics	Per HELLSTROEM	02 29 66935
4. State aids	Wouter PIEKE	02 29 59824/02 29 67267
5. Mergers	Carles ESTEVA MOSSO	02 29 69721
DIRECTORATE D		
Markets and cases III – Financial services and health-related markets	Irmfried SCHWIMANN acting	02 29 67002
Task Force Pharmaceuticals Sector Inquiry	Dominik SCHNICHEL	02 29 66937
1. Antitrust – Payment systems	Irmfried SCHWIMANN	02 29 67002
2. Financial services	Tatjana VERRIER	02 29 92535
3. State aids	Blanca RODRIGUEZ GALINDO	02 29 52920
4. Mergers	Johannes LUEBKING	02 29 59851

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Adviser

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02 29 84669

Yves DEVELLENES

02 29 51590/02 29 52814

2. Antitrust – Consumer goods, basic industries, agriculture and manufacturing

Paolo CESARINI

02 29 51286/02 29 66495

3. State aids – Industrial restructuring

Karl SOUKUP

02 29 67442

4. Mergers

Maria REHBINDER

02 29 90007

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1. Antitrust – Transport and post

Linsey Mc CALLUM

02 29 90122

2. Antitrust – Other services

Georg DE BRONETT

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3. State aids

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3. Cartels III

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4. Cartels IV

Ewoud SAKKERS

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5. Cartels V

Malgorzata JOUVE-MAKOWSKA

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6. Cartels Settlements

...

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Robert HANKIN

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2. R&D, innovation and risk capital

Jorma PIHLATIE

02 29 53607/02 29 69193

3. State aid network and transparency

Wolfgang MEDERER

02 29 53584/02 29 65424

4. Enforcement and procedural reform

Barbara BRANDTNER

02 29 51563

DIRECTORATE R**Registry and Resources****Isabelle BENOLIEL**

02 29 56199/02 29 60198

1. Document management

Corinne DUSSART-LEFRET

02 29 61223/02 29 90797

2. Resources

Caroline DE GRAEF acting

02 29 68518

3. Information technology

Manuel PEREZ ESPIN

02 29 61691

Reporting directly to the Commissioner

Hearing officer

Michael ALBERS

02 29 61874

Hearing officer

Karen WILLIAMS

02 29 65575

New documentation

European Commission Directorate-General Competition

This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition website at <http://ec.europa.eu/competition/speeches/>

Speeches by the Commissioner, 1 January 2008 — 30 April 2008

29 April: Audition devant le Sénat Français — Neelie KROES — Paris, France (Sénat Français)

22 April: Consumers at the heart of EU Competition Policy — Neelie KROES — Strasbourg, France (The European Consumers' Association)

18 April: Competitiveness — the common goal of competition and industrial policies — Neelie KROES — Paris, France (Aspen Institute)

3 April: Policy paper on compensating victims of competition breaches — Neelie KROES — Brussels (European Commission)

28 March: EU & US antitrust policies — our shared belief in competitive markets — Neelie KROES — Washington D.C., USA (The American Bar Association Section of Antitrust Law)

26 March: Competition policy objectives — Neelie KROES — Brussels (European Parliament)

27 February: Decision to impose € 899 million penalty on Microsoft for non-compliance — Neelie KROES — Brussels (European Commission)

27 February: Structural Reforms to the Energy Market — Neelie KROES — Brussels (European Commission)

20 February: Competition Policy challenges in 2008 — Neelie KROES — Paris, France (OECD Competition Committee)

7 February: European Competition Policy in the age of globalisation — towards a global competition order? — Neelie KROES — Innsbruck, Austria (First Symposium of the Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb (FIW))

23 January: Introductory remarks at joint press conference on Climate Action and Renewable Energy Package — Neelie KROES — Brussels (European Commission)

16 January: Commission launches sector inquiry into pharmaceuticals — Neelie KROES — Brussels (European Commission)

14 January: Europe's Payment systems after the MasterCard decision — Neelie KROES — Brussels (ERRT Conference (European Retail Round Table))

Speeches by Directorate-General staff, 1 January 2008 — 30 April 2008

8 April: Fairer Wettbewerb in den Netzmärkten aus europäischer Sicht — Regulierungskonferenz — Herbert UNGERER — Berlin (Bund der Deutschen Industrie)

31 January: The Commission's current thinking on Article 82 — Philip LOWE — Brussels (Conference on 'Pricing and the Dominant Company')

Community Publications on Competition

New publications

Provisions on international relations in EU competition policy — Situation as of 1 January 2008

Globalisation presents major challenges for competition authorities around the world, requiring close cooperation between them in order to best tackle cross-border competition issues. The Commission has therefore concluded numerous international agreements in recent years, both bilaterally and in the framework of international forums. This book provides a comprehensive overview of competition agreements and rules in the international field and serves as a useful reference for market operators and law enforcers.

ISBN: 978-92-79-06339-8, 343 pages. (Price: 25 EUR)

All publications can be ordered or downloaded from the EU bookshop: <http://bookshop.europa.eu/>

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Further information about our publications as well as PDF versions of them can be found on the DG Competition web site: <http://ec.europa.eu/competition/publications/index.html>

Press releases and memos

1 January 2008 — 30 April 2008

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

Antitrust

IP/08/596 — 17/04/2008 — Antitrust: Commission examines use of Insurance Block Exemption Regulation

MEMO/08/232 — 10/04/2008 — Competition: Commission welcomes Court judgment wholly upholding margin squeeze decision against Deutsche Telekom

IP/08/515 — 03/04/2008 — Antitrust: Commission presents policy paper on compensating consumer and business victims of competition breaches

MEMO/08/216 — 03/04/2008 — Antitrust: policy paper on compensating consumer and business victims of competition breaches— frequently asked questions

MEMO/08/170 — 26/03/2008 — Antitrust: Commission initiates formal proceedings against Visa Europe Limited

IP/08/415 — 11/03/2008 — Antitrust: Commission fines providers of international removal services in Belgium over €32.7 million for complex cartel

MEMO/08/158 — 11/03/2008 — Antitrust: Commission carries out inspections in the international airline passenger sector

MEMO/08/154 — 11/03/2008 — Competition: Commission action against cartels — Questions and answers

IP/08/386 — 05/03/2008 — Antitrust: Commission calls on Greece to grant fairer access to lignite so as to improve competition in the electricity sector

MEMO/08/132 — 28/02/2008 — Antitrust: Commission welcomes E.ON proposals for structural remedies to increase competition in German electricity market

IP/08/318 — 27/02/2008 — Antitrust: Commission imposes € 899 million penalty on Microsoft for non-compliance with March 2004 Decision

MEMO/08/111 — 22/02/2008 — Antitrust: Commission confirms sending a Statement of Objections to Alcan

MEMO/08/106 — 21/02/2008 — Antitrust: Commission takes note of Microsoft's announcement on interoperability principles

IP/08/232 — 14/02/2008 — Telecoms: Commission approves OFCOM proposal to de-regulate part of UK broadband market

MEMO/08/83 — 12/02/2008 — Antitrust: Commission carries out inspections in the Central Processing Unit (CPU) and PC sector

IP/08/169 — 01/02/2008 — Competition: Commission welcomes implementation of EU framework for broadcasting services in Greece

IP/08/108 — 30/01/2008 — Antitrust: Commission imposes € 38 million fine on E.ON for breach of a seal during an inspection

MEMO/08/65 — 30/01/2008 — Antitrust: Commission has carried out inspections in the ship classification sector

MEMO/08/61 — 30/01/2008 — Antitrust: Commission imposes fine on E.ON for the breach of a seal during inspection — frequently asked questions

IP/08/101 — 29/01/2008 — Competition: Commission publishes study on EU conveyancing services market

IP/08/78 — 23/01/2008 — Antitrust: Commission fines synthetic rubber producers € 34.2 million for price fixing cartel

MEMO/08/30 — 23/01/2008 — Competition: Commission action against cartels — Questions and answers

IP/08/49 — 16/01/2008 — Antitrust: Commission launches sector inquiry into pharmaceuticals with unannounced inspections

MEMO/08/20 — 16/01/2008 — Antitrust — sector inquiry into pharmaceuticals — frequently asked questions (see also IP/08/49)

MEMO/08/19 — 14/01/2008 — Antitrust: Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position

IP/08/22 — 09/01/2008 — Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe

Merger control

IP/08/658 — 29/04/2008 — Mergers: the Commission clears acquisition of sole control of Compagnie Nationale du Rhône by Electrabel

IP/08/657 — 29/04/2008 — Mergers: Commission approves proposed acquisition of BEA by Oracle

IP/08/655 — 29/04/2008 — Mergers: Commission approves proposed acquisition of Scribona by Tech Data

IP/08/616 — 22/04/2008 — Mergers: Commission approves proposed acquisition of Protac by Roxel

IP/08/606 — 21/04/2008 — Mergers: Commission approves proposed acquisition of Stork Food Systems by Marel

IP/08/601 — 17/04/2008 — Mergers: Commission clears proposed acquisition of Vedor by Randstad, subject to conditions

IP/08/591 — 17/04/2008 — Mergers: Commission opens in-depth investigation into proposed acquisition of parts of GBI by Associated British Foods

IP/08/590 — 16/04/2008 — Mergers: Commission approves proposed acquisition of Activision by Vivendi

IP/08/576 — 16/04/2008 — Mergers: Commission clears acquisition of OTP Garancia by Groupama

IP/08/571 — 14/04/2008 — Mergers: Commission opens in-depth investigation into proposed acquisition of BarcoVision by Iteima

IP/08/560 — 10/04/2008 — Mergers: Commission approves proposed acquisition of Trane by Ingersoll-Rand

IP/08/559 — 10/04/2008 — Mergers: Commission clears proposed joint venture between ArcelorMittal and BE Sverige

IP/08/547 — 09/04/2008 — Mergers: Commission approves proposed acquisition of AvtoVaz by Renault and Russian Technology

IP/08/528 — 03/04/2008 — Mergers: Commission approves Heineken's acquisition of Scottish & Newcastle assets in Belgium, Finland, Portugal and UK; refers acquisition of Irish assets to Irish Competition Authority

IP/08/488 — 02/04/2008 — Mergers: Commission clears proposed acquisition of Moeller by Eaton

IP/08/479 — 28/03/2008 — Mergers: Commission approves proposed acquisition of Aearo by 3M

IP/08/478 — 28/03/2008 — Mergers: Commission opens in-depth investigation into Nokia's proposed acquisition of Navteq

IP/08/469 — 27/03/2008 — Mergers: Commission approves proposed acquisition of Getränke Essmann by Radeberger

IP/08/461 — 19/03/2008 — Mergers: Commission approves proposed acquisition of Transfesa by Deutsche Bahn

IP/08/430 — 11/03/2008 — Mergers: Commission approves proposed acquisition of CICA by ACE

IP/08/428 — 11/03/2008 — Mergers: Commission approves proposed acquisition of UBI Vita by Aviva Italia

IP/08/426 — 11/03/2008 — Mergers: Commission clears proposed acquisition of DoubleClick by Google

IP/08/412 — 10/03/2008 — Mergers: Commission clears proposed acquisition of Galvex by ArcelorMittal

IP/08/408 — 10/03/2008 — Mergers: Commission approves proposed acquisition of Continental's cooling fans and electric motor drives business by Brose

IP/08/403 — 07/03/2008 — Mergers: Commission approves proposed acquisition of Scottish & Newcastle assets by Carlsberg

IP/08/402 — 07/03/2008 — Mergers: Commission approves proposed acquisition of Emap by Apax Partners Worldwide and Guardian Media Group

IP/08/397 — 06/03/2008 — Mergers: Commission opens in-depth investigation into OMV's planned takeover of MOL

MEMO/08/147 — 06/03/2008 — Mergers: Commission welcomes Court judgment on Spain's failure to withdraw illegal conditions imposed on E.ON / Endesa merger

IP/08/389 — 05/03/2008 — Mergers: Commission approves proposed acquisition of joint control of Prisma and OeKB-V by Euler Hermes and OeKB

IP/08/388 — 05/03/2008 — Mergers: Commission clears proposed acquisition of Respirex by Philips

IP/08/387 — 05/03/2008 — Mergers: Commission clears proposed acquisition of Telelogic by IBM

IP/08/380 — 04/03/2008 — Mergers: Commission clears acquisition of Maxit by Saint-Gobain subject to conditions

IP/08/379 — 04/03/2008 — Mergers: Commission approves proposed acquisition of Foseco by Cookson subject to conditions

IP/08/353 — 28/02/2008 — Mergers: Commission clears proposed joint control of Spanish online travel agency Rumbo by Telefónica and Orizonia

IP/08/325 — 27/02/2008 — Mergers: Commission clears proposed acquisition of Packard Bell by Acer

IP/08/301 — 25/02/2008 — Mergers: Commission approves proposed acquisition of Arysta by Permira

IP/08/279 — 21/02/2008 — Mergers: Commission approves proposed acquisition of Eiffage by Sacyr Vallehermoso

IP/08/260 — 19/02/2008 — Mergers: Commission clears acquisition of Reuters by Thomson subject to conditions

IP/08/248 — 15/02/2008 — Mergers: Commission approves proposed acquisition of former ICI's adhesives and electronic materials businesses by Henkel

IP/08/231 — 13/02/2008 — Mergers: Commission approves acquisition of SAG by EQT

IP/08/196 — 08/02/2008 — Mergers: Commission approves proposed acquisition of Katopé by De Weide Blik

IP/08/195 — 08/02/2008 — Mergers: Commission approves proposed acquisition of various Hagemeyer and Rexel assets by Sonepar

IP/08/187 — 05/02/2008 — Mergers: Commission clears joint ventures between Aviva and Bank Zachodni in Polish insurance sector

IP/08/180 — 04/02/2008 — Mergers: Commission approves proposed acquisition of Berre Refinery by Basell

IP/08/167 — 31/01/2008 — Mergers: Commission approves acquisition of Securitas Direct by EQT

IP/08/164 — 31/01/2008 — Mergers: Commission opens infringement procedure against Spain for not lifting conditions imposed by CNE on acquisition of Endesa by Enel and Acciona

IP/08/109 — 30/01/2008 — Mergers: Commission approves proposed acquisition of Kerling by Ineos

IP/08/86 — 24/01/2008 — Mergers: Commission approves proposed acquisition of Cognos by IBM

IP/08/77 — 23/01/2008 — Mergers: Commission clears proposed acquisition of Cumerio by Norddeutsche Affinerie

IP/08/33 — 11/01/2008 — Mergers: Commission clears proposed joint venture for payment card services between First Data Corporation and Allied Irish Banks

IP/08/28 — 10/01/2008 — Mergers: Commission approves acquisition of Solvay's caprolactones business by Perstorp

State aid control

IP/08/674 — 30/04/2008 — Rail transport: Commission adopts guidelines for State aid to rail undertakings

IP/08/673 — 30/04/2008 — Commission authorises a research and development aid scheme for public transport in Germany

IP/08/670 — 30/04/2008 — State aid: Commission prohibits planned €9.56 million aid to IBIDEN Hungary

IP/08/669 — 30/04/2008 — State aid: Commission endorses € 1.1 billion public service compensation for 'Poste Italiane' for 2006-2008

IP/08/668 — 30/04/2008 — State aid: Commission approves £ 3.4 million public funding for broadband in Scotland

IP/08/667 — 30/04/2008 — State aid: Commission requests Austria to recover around €55 million from buyer of Bank Burgenland

IP/08/666 — 30/04/2008 — State aid: Commission endorses € 143 million aid to Ford for two large investment projects in Craiova, Romania

IP/08/665 — 30/04/2008 — State aid: Commission approves rescue aid for WestLB

MEMO/08/282 — 30/04/2008 — State aid: Commission requests Austria to recover around € 55 million from the buyer of Bank Burgenland

IP/08/595 — 17/04/2008 — State aid: Commission opens investigation into tax benefits for Hungarian steel producer Dunaferr

IP/08/594 — 17/04/2008 — State aid: Commission prohibits Hungarian export-credit guarantee scheme

IP/08/588 — 16/04/2008 — State aid: Commission opens formal procedure on aid payments to Scottish ferry operators

IP/08/587 — 16/04/2008 — Clean transport: Commission approves aid to investment into clean buses carrying out public services in the Czech Republic

IP/08/586 — 16/04/2008 — Commission approves Greek public financing of a motorway concession

IP/08/585 — 16/04/2008 — State aid: Commission opens formal investigation procedure into compensations granted to Czech bus operators in the Usti nad Labem Region

IP/08/581 — 16/04/2008 — State aid: Commission endorses € 11 million (£ 8.7 million) training aid to Vauxhall Motors on Merseyside

IP/08/580 — 16/04/2008 — State aid: Commission endorses €180 million aid to Digital Display Devices (DDD) for large investment project in Campania, Italy

IP/08/579 — 16/04/2008 — State aid: Commission opens investigation into misuse of rescue aid to Italian press manufacturer Sandretto

IP/08/578 — 16/04/2008 — State aid: Commission orders recovery of € 2.75 million illegal aid from Italian furniture producer New Interline

IP/08/532 — 04/04/2008 — State aid: Commission endorses proposed € 83 million aid to Progroup for large investment project in Germany

IP/08/531 — 04/04/2008 — State aid: Commission requests France to recover unlawful aid from Arbel Fauvet Rail

IP/08/499 — 02/04/2008 — European Commission authorises Polish State Aid for coal industry

IP/08/496 — 02/04/2008 — Clean Transport: Commission authorises Slovakia to grant fiscal aid to railway and inland waterways transport

IP/08/495 — 02/04/2008 — Regional airport infrastructure: Commission approves Polish aid to Łódź airport

IP/08/494 — 02/04/2008 — State aid: Commission authorises restructuring loan for C. Hartwig Warszawa S.A.

IP/08/490 — 02/04/2008 — State aid: Commission opens inquiry into UK state financing of capital costs of digital switchover of Channel 4

IP/08/489 — 02/04/2008 — State aid: Commission launches in-depth investigation into UK restructuring aid package for Northern Rock

MEMO/08/202 — 02/04/2008 — State aid: Commission launches in-depth investigation into UK restructuring aid package for Northern Rock — frequently asked questions

IP/08/447 — 14/03/2008 — State aid: Commission endorses aid to Rolls-Royce Germany

IP/08/444 — 13/03/2008 — State aid: Commission opens in-depth investigation into €47 million aid to BVG in Poland

IP/08/436 — 12/03/2008 — State aid: Commission authorises Italian aid scheme to promote biodiesel

IP/08/435 — 12/03/2008 — State aid: Commission refers Italy to Court of Justice for failure to recover illegal state aid

IP/08/434 — 12/03/2008 — State aid: Commission authorises French tax scheme reducing solidarity tax on wealth with a view to promoting investment in SMEs

IP/08/433 — 12/03/2008 — State aid: Commission requests Italy to recover € 123 million of unlawful fiscal aid from nine privatised banks

IP/08/429 — 11/03/2008 — Commission opens formal investigation procedure following a complaint on potential State aid to Ryanair by Bratislava airport

IP/08/418 — 11/03/2008 — State aid: Commission authorises aid of € 99 million to France for QUAERO R&D programme

IP/08/417 — 11/03/2008 — State aid: Commission orders reimbursement of loans for 17 R&D projects in the aeronautical sector in Italy

IP/08/416 — 11/03/2008 — State aid: Commission endorses € 3.5 million training aid to Volvo Cars Gent

MEMO/08/155 — 11/03/2008 — State aid: Commission orders reimbursement of loans for 17 R&D projects in the aeronautical sector in Italy — frequently asked questions

IP/08/322 — 27/02/2008 — Seaport services — the European Commission allows Germany to lower taxes on diesel fuel used for port handling activities

IP/08/317 — 27/02/2008 — State aid: Commission welcomes proposed changes to financing of Irish public service broadcasters and closes investigation

IP/08/316 — 27/02/2008 — State aid: Commission closes investigation into financing of Flemish public service broadcaster VRT

IP/08/315 — 27/02/2008 — State aid: Commission requests Romania to recover €27 million unlawful aid from Automobile Craiova

IP/08/314 — 27/02/2008 — State aid: Commission launches probe into state bail-outs of IKB and Sachsen LB

MEMO/08/124 — 27/02/2008 — State aid: Commission investigation into German banks IKB and Sachsen LB — frequently asked questions

IP/08/239 — 14/02/2008 — State aid: Commission concludes that € 170 million support for Lithuanian gas-fired power plant does not constitute state aid

IP/08/237 — 14/02/2008 — State aid: Commission opens in-depth investigation into guarantee scheme of the German Land Saxony

IP/08/218 — 13/02/2008 — State aid: Commission refers Italy to Court of Justice for failure to recover illegal aid from Nuova Mineraria Silius and circumvention of the Commission decision

IP/08/217 — 13/02/2008 — State aid: Commission investigates funding of major Spanish film studio complex

IP/08/216 — 13/02/2008 — State aid: Commission approves Spanish corporate tax credit to promote R&D

IP/08/140 — 31/01/2008 — State aid: Commission authorises € 70 million in aid from French Industrial Innovation Agency for “MINImage” R&D programme

IP/08/137 — 31/01/2008 — State aid: Commission endorses € 165.6 million regional aid to Qimonda for DRAM wafer project in Dresden, Germany

IP/08/136 — 31/01/2008 — State aid: Commission authorises € 5.2 million restructuring aid for Spanish catering company Vanyera 3

IP/08/134 — 31/01/2008 — State aid: Commission opens in-depth inquiry into financial measures granted to Finnish property company Ålands Industrihus

IP/08/133 — 31/01/2008 — State aid: Commission requests Italy to respect Court rulings on recovery of incompatible state aid

IP/08/130 — 31/01/2008 — State aid: Commission requests Austria to clarify financing of public service broadcaster ORF

IP/08/116 — 30/01/2008 — Commission approves Greek public financing of three motorways concessions

IP/08/114 — 30/01/2008 — Commission authorises Czech State aid to support purchase of new railway rolling stock

IP/08/111 — 30/01/2008 — State aid: Commission opens investigation into municipality of Rotterdam’s investment in Ahoy’ complex

IP/08/110 — 30/01/2008 — State aid: the Commission authorises a reform of the Belgian tax on the turnover of pharmaceutical companies

MEMO/08/31 — 23/01/2008 — State aid: guidelines on state aid for the environment — frequently asked questions

IP/08/47 — 15/01/2008 — Commission opens a formal investigation procedure into complaints of illegal State aid to certain Czech bus operators

IP/08/46 — 15/01/2008 — Commission approves Italian State aid to invest in clean lorries

IP/08/45 — 15/01/2008 — State aid: Commission opens an investigation procedure into changes planned by Ireland to its flat-rate tax regime based on the tonnage of ships

IP/08/24 — 10/01/2008 — State aid: Commission launches public consultation on the future framework for State funding of public service broadcasting

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