



EC COMPETITION
POLICY NEWSLETTER

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Introduction

Philip LOWE, Director-General, Directorate-General Competition

This is the first edition of the Competition Policy Newsletter to appear since I took up office on 1 September as Director General of DG Competition. Much has changed since I left the DG and my post as Director of the Merger Task Force in 1995, not least the name of the department itself. Under the firm guidance of my predecessor, Alex Schaub, and the able leadership of Mr Monti, DG COMP has achieved impressive results. However, the importance of the tasks entrusted to us remains constant, as does the challenge of adapting our competition policy to the changing economic and political environment of the times.

The Autumn ahead is bound to be a busy one for each of the three strands of EU competition policy — anti-trust, state aids and mergers — as the Commission has set itself ambitious aims.

In November, we hope that the Council will adopt the Modernization Regulation which will launch a revolution in the application of **anti-trust** law. This will be a tremendous achievement for DG Competition. It will demonstrate the commitment which we have to ensure a really effective enforcement of EU competition law in the framework in which the EU institutions, national competition authorities and national courts all play legitimate and crucial roles. But already, work is starting to move on to preparing for how the new régime will work in practice. On the one hand, the Commission will need to adopt ground rules clarifying its practice for the business and legal communities. We need to make clear what the rules should be on allocation of cases within the network of EU competition authorities. We also need to make clear where the Commission will place its enforcement priorities. Pragmatism and flexibility are essential. But we also need to guarantee a minimum of predictability and certainty in the procedures. On the other hand, we will have to decide on, and put in place an organizational structure within DG Competition which best meets enforcement needs post-modernization. Among the key requirements here will be to ensure an effective and on-going dialogue on cases and sectoral issues with corresponding departments in national authorities, to deepen our knowledge of developments in priority sectors, but at the same time maintain the visibility and integrity of our across-the-board action in areas such as merger control and the attack on cartels.

During the last two years, work on streamlining procedures in the **state aids** area has been intensified. This should culminate next year in Commission decisions on a wide range of improvements. Faced with some legitimate criticism, the Commission will have to redouble its efforts to further simplify, modernise and clarify State aid rules and procedures. It will also need to articulate and communicate state aid policies to a wider public in a more comprehensible and transparent way. A more effective enforcement of State aid policy in a significantly enlarged Union will also require new forms of collaboration with the Member States. A communication on substantive issues of state aid policy is therefore also on the agenda for the coming months.

A year ago we launched a review of EU **merger control**. We have had an encouraging response from governments, from the legal and business communities and from civil society. The comments we received remain overwhelmingly positive. We have the most transparent and expeditious merger control procedure in the world. But there is as always continuing room for improvement, whether in terms of substantive law, or due process or in terms of our internal organization. By the end of the year at the latest, we will submit detailed proposals for changes in the Merger Regulation and implementing regulations and rules. This will meet the deadline which the Commission set itself.

By the end of the year we will also know for certain which new candidate countries will join the EU in 2004. Impressive progress has been achieved in the legislative approximation and in the setting up of a competition discipline in all the candidate countries. The negotiations have been provisionally closed with Estonia, Latvia, Lithuania, Slovenia and Cyprus and they are continuing at an accelerated rhythm with the others countries. Further progresses need to be done in the enforcement record especially in the area of State aid. The Commission will have to pay close attention to the progress of negotiations on these issues and no doubt mobilize all efforts to provide the necessary technical assistance to the new partner countries.

Thanks in particular to Alex Schaub's personal commitment, the EU is now fully engaged in

efforts to promote **international convergence of competition policies**, within the OECD, the post-Doha negotiation, and most immediately in the framework of meetings of the International Competition Network, that will have its first gathering at the end of September in Naples (Italy). Given the scope and importance of EU jurisdiction, we are bound to play an important role in this international context. In increasingly globalized markets, the investment we are making in international cooperation can only serve to

make our own enforcement efforts more effective in the longer term.

These wider policy challenges of course represent only a small proportion of DG Competition's tasks in the coming months as our **enforcement work on individual cases** continues. And that work I am sure will provide food for thought in up-coming editions of this Newsletter as part of the on-going dialogue between DG Competition and its many external observers.

New rules for motor vehicle distribution and servicing

John CLARK, Directorate-General Competition, unit F-2 ⁽¹⁾

This article is essentially a follow-up to the fuller article that appeared in the June 2002 edition of the Competition Policy Newsletter. Rather than repeat the contents of the earlier piece, which covered the background to the adoption of the draft Regulation, and explained its main provisions, this article sets out the procedural steps that were taken following the publication of the draft new motor vehicle block exemption regulation ('the Regulation') on 16 March 2002 ⁽²⁾, and explains the main changes that were introduced prior to the adoption of the final text of what is now Regulation 1400/2002 on 17 July ⁽³⁾.

1. Procedural steps taken following publication of the initial proposals on 16 March

The publication of the proposal for a new sector-specific regulation on 16 March ushered in a public consultation period of one month. During the consultation, many meetings and conferences were held with various interested parties to explain the project. Numerous contributions were received from various commentators, including trade associations, car manufacturers, consumers, dealers, repairers, component manufacturers, lawyers and consultants. The large number of replies received reflected the wide publicity that the project attracted in the press, as well as its importance for the motor vehicle sector and for the European consumer.

After a full analysis of all of the comments received, and of the comments made by representatives of the Member States in the first advisory committee meeting on 7 March, an amended draft of the regulation was submitted to the Member States on 6 May in view of the second meeting of the advisory committee held on 6 June ⁽⁴⁾.

2. Amendments made to the initial text prior to the second advisory committee meeting on 6 June

While the revised draft retained most of the basic features of the original, in that it laid down a stricter regime using Regulation 2790/99 as a framework, and contained a longer list of black clauses better tailored to the specific competition problems identified in the sector ⁽⁵⁾, it nevertheless contained several important amendments as regards both vehicle retail and repair markets.

Vehicle Retail

The new text clarified that the Regulation also covers what are commonly referred to as 'two-tier' retail distribution systems; i.e. where a manufacturer supplies vehicles to main dealers who supply some of them on to sub-dealers.

Secondly, a new requirement was added to the effect that reasons given for terminating a dealer agreement of indefinite term have to be in writing and must be transparent and objective; this was done in order to help arbitrators and judges to decide on the merits of any claim.

In order to avoid the use of very short-term dealer agreements that might increase insecurity among dealers, the new text was amended to allow for fixed-term dealership agreements to have a minimum term of five years; in such circumstances the parties must give a minimum of six months' notice of their intention not to renew the agreement.

A new general condition was added to allow dealers and authorised repairers the freedom to sell their businesses to any other dealer or repairer already appointed by the manufacturer. This should give dealers and authorised repairers a greater degree of economic independence and

⁽¹⁾ Members of the Block Exemption Regulation team working under the supervision of the head of unit Eric van Ginderachter: John Clark, Christophe Dussart, Anne-Catherine Gallant, Hubert Gambs, Alberta Laschena, Richard Lewandowski, Manuel Martinez Lopez, Nieves Navarro Blanco, Konrad Schumm, and Lazaros Tsoraklidis.

⁽²⁾ Available on the Internet at http://europa.eu.int/comm/competition/car_sector/distribution/#reform_proposal and published in the OJ C 67 of 13 March 2002.

⁽³⁾ Published in the OJ L 203/30 of 1 August 2002 and on the Internet at: http://europa.eu.int/comm/competition/car_sector/distribution/

⁽⁴⁾ Available on the Internet at http://europa.eu.int/comm/competition/car_sector/

⁽⁵⁾ See page 31 of the June 2002 edition of the competition policy newsletter.

should encourage the emergence of cross-border dealerships.

The Regulation allows suppliers to choose between exclusive and selective distribution systems. In the second draft, text was added to the recitals to clarify the consequences of using exclusive systems in some markets and selective systems in others. This was done to ensure that suppliers could not protect the market in a high-price Member State by using a different type of distribution system in that country to that used elsewhere in the Common Market.

The second draft also gave some clarification with regard to the prohibition on the use of location clauses. New text was added to clarify that while the use of location clauses in selective distribution systems to prevent dealers from opening secondary outlets was prohibited in respect of the sale of cars and light commercial vehicles, this ban did not extend to dealers in heavier vehicles. The text was also modified so that location clauses could be granted for such vehicles for an unlimited period; in the draft adopted by the Commission in February, location clauses were only authorised for a maximum of five years. In addition, text was added to make it plain that suppliers would retain the ability to specify where a car dealer's initial outlet was located, and to prevent such a dealer from moving that outlet elsewhere.

In order to facilitate multi-brand sales, the threshold above which an obligation to purchase a given percentage of vehicles or spare parts will be considered as a non-compete obligation and will not be exempted was reduced from 50% to 30%.

Vehicle repair and distribution of spare parts

The new Regulation not only covers the distribution of new vehicles, but also repair and maintenance and the distribution of spare parts.

In response to calls for greater consumer information, a new clause was added requiring those dealers who sub-contracted repair and maintenance provision to an authorised repairer within the manufacturer's network to inform consumers of the distance to the repairer's premises. Moreover, clarification was added to the effect that a supplier could oblige a dealer who subcontracted repair and maintenance provision to maintain ultimate responsibility towards his customers for ensuring that warranties are honoured and free servicing and recall work is carried out. If the subcontractor repairer does not carry out such work satisfactorily, the consumer can return to the

dealer who sold him the vehicle, and the dealer will then have to carry out the work satisfactorily himself or ensure that a third party does so. This is in line with the principles of Directive 99/44.

The right of independent operators to obtain technical information from vehicle suppliers is a cornerstone of the new Regulation. The text submitted to the second advisory committee introduced an exception to this rule where access would enable a third party to bypass anti-theft devices, or re-calibrate or manipulate devices that limit vehicle speed. A supplier could, however, only rely on this exception where there was no other way of protecting the devices in question.

The definition of original spare parts was amended in the second draft of the Regulation to take account of the fact that while original spare parts are all made according to the same processes and standards as the vehicle components, not all of them are made on the same production line as those components. Following the change, the term 'original spare parts' now encompasses all spare parts which are of the same quality as the vehicle components and which are made according to the same specifications and production standards used with the manufacturer's consent to make those components. The new draft also created a presumption that all parts made according to these specifications and standards matched the quality of the original components.

Other technical changes

The way in which the Regulation was set out was re-structured, mainly to satisfy a general request from the Member States for more clarity, and various other technical changes were made to make the text clearer.

The recitals to the Regulation were clarified to explain that hardcore restrictions always appreciably affect competition and that even if a supplier has a market share of less than 5%, a vertical agreement containing such restrictions will not be considered to be De Minimis. A definition was added for light commercial vehicles. Finally, new text was added to clarify how market shares are to be calculated for the purposes of the Regulation.

3. Issues still in debate after the second advisory committee

The text submitted to the second advisory committee and published on the Internet was generally well received, particularly as regards the

improved format and the provisions governing the aftermarket. Three issues, however, still provoked considerable debate on all sides ⁽¹⁾: the operation of secondary outlets (ban on the location clause), the conditions that a supplier may impose on dealers taking on an additional brand (multi-branding) and the ability of dealers to sub-contract servicing to an authorised repairer within the manufacturer's network (re-organisation of the sales-service link).

Just prior to the advisory committee meeting, on 30 May the Parliament ⁽²⁾ voted in plenary session on a report by the MEP Dr Werner Konrad concerning the Commission's plans for the block exemption. The Parliament was generally supportive of the objectives pursued by the Commission, and of the necessity of a substantial reform. Opinion was diversified ⁽³⁾, however, regarding the ban on the location clause, although a majority voted to see the ban delayed for three years, and its introduction made conditional on the outcome of an evaluation by the Commission showing that the conditions of Article 81(3) would not be met unless location clauses were prohibited. The Parliament also wished to allow suppliers more leeway to agree extra conditions for the operation of multi-brand outlets, and also proposed that dealers should only be able to sub-contract servicing provision provided at least one of authorised repairer sub-contractors was in the vicinity of the sales outlet.

4. The final text

The text adopted by the Commission on 17 July 2002 took account of many of Parliament's concerns, and incorporated many of the proposed amendments, either entirely or in part. Since the prohibition on location clauses represented a major change, a special extended transition period of three years was provided for in respect of this provision ⁽⁴⁾. The Commission did not, however, see the need for a further evaluation of the need for such a ban, since this would create and prolong legal and economic uncertainty, and be bad for business.

The provisions on sub-contracting repair, and in particular the requirement to give information to consumers regarding the distance to the authorised repairer sub-contractor were further refined.

A new provision was introduced allowing a supplier to pay the additional cost where a dealer running a multi-brand dealership decided to have brand-specific sales personnel.

The list of operators to whom suppliers have to provide technical information was expanded to include spare part distributors, and further clarification was added to the definitions for original spare parts and spare parts of matching quality.

The definition for light commercial vehicles was amended to only include vehicles up to 3.5 tonnes ⁽⁵⁾.

5. The way forward

Block exemption 1400/2002 enters into force on 1 October 2002, although operators will have a year to amend pre-existing contracts ⁽⁶⁾ that comply with Regulation 1475/95. The ban on the use of location clauses in selective distribution systems will take effect on 1 October 2005.

The Commission will closely monitor the way that the new rules are applied, and will not hesitate to act, as it has in the past ⁽⁷⁾, should any breaches of the competition rules come to light.

As the new rules represent a major change compared to Regulation 1475/95, guidance needs to be provided as to the way they should be applied. The freeing of the sector from the strait-jacket effect associated with Regulation 1475/95 may also be expected to lead to a need for more direction. With this in mind, DG Competition will publish an explanatory brochure on the Internet in September before the entry into force of Regulation 1400/2002. The brochure will contain detailed explanations of the provisions of the Regulation, together with examples and answers to a series of questions of interest ⁽⁸⁾. Interested parties may refer to this in addition to the Commission's Guidelines on Vertical Restraints ⁽⁹⁾.

⁽¹⁾ These three issues are discussed in more length on page 32 of the June edition of this newsletter.

⁽²⁾ The Economic and Social Committee also adopted an opinion in plenary session on 29 May.

⁽³⁾ Article by Dr Konrad, Kangaroo group newsletter July 2002, page 5.

⁽⁴⁾ This corresponded to the period wished for by a majority of MEPs.

⁽⁵⁾ The second draft included vehicles up to six tonnes within the definition of LCVs.

⁽⁶⁾ i.e. agreements in force on 1 October 2002.

⁽⁷⁾ See, for example, the fines imposed on Volkswagen (twice), Opel, and DaimlerChrysler. Details available at http://europa.eu.int/comm/competition/car_sector/distribution/#fines

⁽⁸⁾ A similar, though less detailed brochure was published following the adoption of Regulation 1475/95.

⁽⁹⁾ Published in the OJ C291/1 of 30 October 2000, and available at http://europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#iii_1

In addition, DG Competition will continue to issue ⁽¹⁾ a twice-yearly report comparing the prices of vehicles in all of the EU Member States.

⁽¹⁾ Latest edition available at http://europa.eu.int/comm/competition/car_sector/price_diffs/

Judicial review and merger control: The CFI's expedited procedure

Kyriakos FOUNTOUKAKOS, Directorate-General Competition, unit B

1. Introduction

The recent introduction by the Court of First Instance (CFI) of an expedited ('fast-track') procedure for certain cases, including in particular merger cases, has been greeted positively by the business and legal community ⁽¹⁾. The European Commission has not only supported the adoption of the expedited procedure but has also indicated that it 'would welcome any further reform undertaken by the European Courts to expedite appeals' ⁽²⁾. Most commentators have, however, reserved their final 'judgment' on the efficacy of the expedited procedure until the CFI has delivered a number of judgments using the new rules. The first such judgments are expected to be delivered in October 2002 in the appeals brought by Tetra Laval and Schneider against the Commission's prohibition of their proposed mergers with Sidel and Legrand respectively ⁽³⁾.

This article looks at the application of the expedited procedure, in particular in the field of mergers, in the one and half years of its operation. It sets out the Rules of Procedure of the CFI on expedited procedures, it discusses the practical use of the expedited procedure in certain recent merger cases focusing in particular on the principles the Court uses to exercise its discretion on whether or not to grant expedited procedure treatment. The article concludes by looking at the potential effectiveness of the expedited procedure and its implications for EU merger control.

2. The CFI's Rules of Procedure on Expedited Proceedings

Adoption of the expedited procedure

On 6 December 2000, the Court of First Instance (CFI) modified its rules of procedure ⁽⁴⁾ in order to

allow for the introduction of a new expedited procedure ⁽⁵⁾. The expedited procedure came into force on 1 February 2001.

According to the CFI, this new type of expedited procedure was designed to deal with cases of a particularly urgent nature such as for example actions concerning public access to administrative documents held by the institutions or decisions regarding the control of mergers and takeovers ⁽⁶⁾.

How the procedure works — Article 76(a) of the Rules of Procedure

The modified Rules of Procedure now include a new Article, 76a, on 'Expedited Procedures'. Applications for a case to be decided under an expedited procedure have to be lodged by separate document at the same time as the application initiating the proceedings or the defence ⁽⁷⁾.

According to Article 76a, the CFI 'may, on application by the applicant or the defendant, after hearing the other parties and the Advocate General, decide, having regard to the particular urgency and the circumstances of the case to adjudicate under an expedited procedure' (emphasis added). The Court therefore exercises its discretion on whether to grant the expedited procedure on a case by case basis (see below on the exercise of the Court's discretion in recent merger cases).

Once the request for expedited treatment has been approved by the CFI, the written and oral procedure follow slightly modified rules.

- The case is automatically given priority in the court by way of derogation from Article 55 of the Rules of Procedure.

⁽¹⁾ See Summary of the Replies Received in Response to the Green Paper on the Review of Council Regulation (EEC) No 4064/89 of 11 December 2001, COM (2001) 745 final. The summary as well as the full text of most of the responses are published on DG Competition's website <http://europa.eu.int/comm/competition/mergers/review/comments.html>.

⁽²⁾ See Green Paper on the review of the Council Regulation (EEC) No 4064/89 of 11 December 2001, COM (2001) 745 final ('Green Paper on Merger Review'). See also Commissioner Monti's speech to the British Chamber of Commerce on 4 June 2002 (speech/02/252) published on DG Competition's website.

⁽³⁾ Cases T-5/02 and T-80/02, *Tetra Laval v Commission*; cases T-310/01 and T-77/02, *Schneider Electric v. Commission*.

⁽⁴⁾ Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991, OJ L 136 of 309 May 1991, corrigendum published in OJ L 317 of 19.11.1991, p.34, as amended.

⁽⁵⁾ OJ L 322, 19.12.2000, p. 4.

⁽⁶⁾ See Information Note published on the website of the Court (www.curia.eu.int) regarding the amendment of the Rules of Procedure of the CFI with a view to expediting proceedings ('the CFI Information Note').

⁽⁷⁾ Article 76a(1) of the CFI Rules of procedure.

- The written procedure is simplified. It is, in principle, limited to a single exchange of pleadings: application and defence. A written reply and rejoinder as well as interventions and replies to interventions will only be allowed exceptionally by way of measures of organisation of procedure in accordance with Article 64 of the Rules of Procedure ⁽¹⁾. The pleadings lodged must be brief and concise ⁽²⁾.
- It is intended that the CFI make greater use of pre-hearing measures of organisation of procedure. This is envisaged in Article 64 of the Rules of Procedure which states that the purpose of such measure ‘*shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions*’. Such measures can include the clarification of orders sought or of the pleas in law and arguments between the parties, amicable settlements of proceedings, taking of evidence, submission of written questions by the Court to the parties etc. The Court also intends to make greater use of informal pre-trial, case management meetings to discuss with the parties the scope and procedural aspects of the oral hearing ⁽³⁾.
- Emphasis is placed on the oral procedure. The Court will in principle devote more time to the oral procedure allowing all aspects of the case to be argued comprehensively and in depth. To facilitate the oral hearing, the parties should submit to the CFI and to the other parties an outline of the arguments which they intend to present at the oral hearing approximately two weeks in advance of the hearing. At the oral hearing, the parties may supplement their arguments and offer further evidence. They must, however, give reasons for the delay in offering such further evidence.
- It is estimated that the expedited procedure can lead to a judgment being rendered within a maximum period of less than 12 months. By contrast, in 2001, the average duration of a case before the CFI was approximately 20 months.

3. Application of the expedited procedure in recent merger cases

A significant number of appeals against Commission decisions on mergers are currently being dealt with under the expedited procedure

The following actions for annulment of Commission decisions on mergers are currently being dealt with under the accelerated procedure:

- *T-310/01 Schneider Electric SA v Commission (Article 8(3) decision ⁽⁴⁾); T-77/02 Schneider Electric SA v Commission (Article 8(4) decision ⁽⁵⁾)*
- *T-05/02 Tetra Laval BV v Commission (Article 8(3) decision ⁽⁶⁾); T-80/02 Tetra Laval BV v Commission (Article 8(4) decision ⁽⁷⁾)*
- *T-99/02 Ineos NV v Commission, T-100/02 EVC v Commission, (Article 8(2) decision with commitments) ⁽⁸⁾*
- *T-101/02 Ineos NV v Commission, T-102/02 EVC v Commission (Article 8(2) decision with commitments) ⁽⁹⁾*
- *T-114/02 Babyliiss v Commission, T-119/02 Royal Philips Electronics v Commission (Article 6(1)b decision with commitments and Article 9(4) decision on a partial referral of the case to France) ⁽¹⁰⁾*

The appeals in the Tetra Laval/Sidel and Schneider/Legrand cases have been brought by the notifying parties against Commission decisions prohibiting the proposed concentrations pursuant to Article 8(3) of the Merger Regulation and against subsequent Commission decisions ordering measures to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation.

The series of appeals by Ineos and EVC against the Commission's decisions pursuant to Article 8(2) clearing the mergers between Shell/DEA and

⁽¹⁾ Article 76a(2) of the Rules of Procedure.

⁽²⁾ CFI Information Note, p. 1.

⁽³⁾ See Article 64(3)(e) of the Rules of Procedure.

⁽⁴⁾ Commission Decision (Art. 8(3)) of 10 October 2001 in case M.2283 Schneider/Legrand.

⁽⁵⁾ Commission Decision (Art. 8(4)) of 30 January 2002 in case M.2283 Schneider/Legrand.

⁽⁶⁾ Commission Decision (Art.8(3)) of 30 October 2002 in case M.2416 Tetra Laval/Sidel.

⁽⁷⁾ Commission Decision (Art. 8(4)) of 30 January 2002 in case M.2416 Tetra Laval/Sidel.

⁽⁸⁾ Commission Decision (Art.8(2)) of 20 December 2001 in case M.2389 Shell/DEA.

⁽⁹⁾ Commission Decision (Art.8(2)) of 20 December 2001 in case M.2533 BP/E.ON.

⁽¹⁰⁾ Commission Decision of 8 January 2002 in case M.2621 SEB/Moulinex.

BP/E.ON are being brought by third parties challenging the clearance. Third parties have also brought the appeals against the Commission's decision to clear the merger between SEB/Moulinex subject to commitments and against the Commission's decision to refer partially the case to the French authorities pursuant to Article 9(4) of the Merger Regulation.

Exercise of the Court's discretion in granting expedited procedure treatment in merger cases

It is interesting to note that out of 22 pending appeals against Commission decisions in the field of mergers, almost half (10 cases) are being dealt with under the expedited procedure. Indeed, the Court has granted the benefit of the expedited procedure in almost all merger cases in which it was requested by the parties. As defendant, the Commission has supported the granting of the expedited procedure in the majority of those cases. In only one case so far, *T-103/02 Ineos Phenos v Commission*, has the Court refused to grant the benefit of the expedited procedure on grounds of lack of urgency and complexity of the pleadings.

The acceptance or refusal to treat a case under the expedited procedure rests on the discretion of the CFI. The small number of cases that have been dealt with under the expedited procedure so far makes it difficult to deduce concrete principles as to how the Court intends to exercise this discretion in the future. Some guiding principles, however, already exist in the form of an Information Note⁽¹⁾ by the CFI as well as by recent precedents.

The Information Note of the CFI emphasises that in deciding whether to grant a request for expedited procedure treatment, the Court will have regard to: (i) the urgency/circumstances of the case; and (ii) the question whether, in view of the complexity and the volume of the pleadings lodged, the case lends itself to essentially oral argument.

(i) Urgency

As regards urgency, it is to be expected that the circumstances surrounding the majority of merger cases will be deemed to satisfy this requirement. This is envisaged in the Court's Information Note where merger cases are proffered as a specific

example of cases amenable for expedited procedure treatment.

Indeed, in most merger cases which end up being appealed before the CFI, speedy adjudication will normally be required and time will be of the essence. In prohibition cases, the parties will be keen to obtain an annulment of the Commission's prohibition decision so that they can proceed with their deal. This will in principle be the case where the parties have been allowed to implement their deal either thanks to a derogation decision by the Commission pursuant to Article 7(4) of the Merger Regulation, or as a result of a decision by the Court granting a request for interim measures or in cases of public bids pursuant to the exception provided for in Article 7(3) of the Merger Regulation. The latter was the case in the recent prohibited mergers between Tetra Laval/Sidel and Schneider/Legrand. In both these cases, the acquiring companies had already purchased the shares of the target companies through unconditional public bids in the Paris Bourse⁽²⁾ pursuant to Article 7(3) of the Merger Regulation.

A second category of merger cases on appeal consists of clearance cases, where the application is brought by third parties not content with the Commission's decision to clear a merger or with the remedies accepted by the Commission in order to clear a merger. In such cases, time is also of the essence: third party applicants will usually be able to show that the negative effects of the merger are immediate; the merging parties will also require speedy adjudication to avoid a prolonged period of uncertainty hanging over a completed transaction. This was the case in the recent clearance decisions of the mergers between Shell/DEA, BP/E.ON and SEB/Moulinex which, as discussed above, have all been appealed before the CFI by third parties.

Urgency would, however, be more difficult to show in cases where the parties decide to abandon a deal in the wake of a Commission prohibition decision. An example, is the aborted GE/Honeywell merger where the parties decided not to proceed with the deal instead of requesting interim measures and/or the application of the expedited procedure to their actions for annulment. As a result, both the appeal brought by GE and that brought by Honeywell are being dealt with under the standard Court procedure, an expedited procedure not having been requested by the parties. Indeed, it is often the case that acquisition agree-

⁽¹⁾ See CFI Information Note, p. 1.

⁽²⁾ Both cases involved public bids in the Paris Stock Exchange. According to French rules, the companies bought the shares of their targets unconditionally. Following prohibition decisions pursuant to Article 8(3), the Commission also adopted decisions pursuant to Article 8(4) of the Merger Regulation ordering Tetra and Schneider respectively to divest their respective shareholding in the target companies.

ments are conditional upon Commission clearance and hence the parties are not obliged to continue with the transaction in case of a prohibition.

Urgency and Interim measures

The Court's *information note* states that the expedited procedure 'is designed to deal with cases of a particularly urgent nature which do not lend themselves to the adoption of interim measures of the kind which may be ordered in proceedings for interim relief'. This statement is puzzling and it is not envisaged that it will be adhered to in all cases.

The rationale of the statement may be that in cases where sufficient interim measures are ordered (for example, a suspension of the Commission's prohibition decision and/or an order allowing the parties to implement the concentration pending final judgment), the parties can in principle afford to wait for a longer period until final adjudication of their case. By contrast, in cases where interim measures are not possible, final judgment ought to be rendered more speedily under the expedited procedure to avoid irreparable damage to the parties.

However, in suitable merger cases, both interim measures and expedited procedure treatment may be necessary. As the American Bar Association points out in its response to the Commission's Green Paper on merger review, '*the possibility to obtain interim measures is important as there might be little point in giving a judgment quickly if, in the meantime, the parties have abandoned a prohibited transaction or have been obliged to carry out a divestiture which they believed was unnecessary and unjustifiable*' ⁽¹⁾.

Indeed, in the pending cases T-80/02, *Tetra Laval v. Commission*, and T-77/02, *Schneider v Commission*, which are being dealt with under the expedited procedure, both Tetra and Schneider lodged applications for interim measures seeking the suspension of the Commission's divestiture decision under Article 8(4) of the Merger Regulation. The companies claimed that, if they were forced to divest their holdings in the target companies in accordance with the Commission's 8(4) decisions prior to the Court's final judgment in the main case, they would have suffered irreparable damage. The companies argued that, even if they subsequently won the main case, they would have

divested the targets and they might not have the possibility to buy them back. In both cases, however, the Court's judgment was expected to be rendered prior to the expiry of the deadline for divestiture as the Commission, due to exceptional circumstances, was prepared to grant a short extension of the divestiture period. This meant that the application for interim measures became obsolete and, in both cases, the companies decided to withdraw their interim measures applications leading to orders by the CFI removing the cases from the register ⁽²⁾.

In the light of these recent precedents it could be argued that the Court would be willing to consider granting interim measures even in expedited procedure cases where appropriate.

(ii) Complexity of case/volume of pleadings

It is not clear how the Court will exercise its discretion when looking at the complexity of a case or the volume of pleadings lodged. On the one hand, the information note of the Court makes clear that the pleadings lodged must be brief and concise and that cases must not be so complex that they cannot lend themselves to essentially oral argument. On the other hand, merger cases are by their very nature complex cases frequently involving substantial economic analysis and significant procedural issues such as rights of defence.

In recent merger cases, the Court has shown that it would not be willing to accept excessively voluminous pleadings including any conceivable substantive or procedural ground for annulment. Through informal meetings organised by the Court, the parties were directed to focus their arguments and simplify their pleadings in order for their case to benefit from the expedited procedure. In one case, T-103/02, the Court refused to grant the expedited procedure on the basis that the nature and the extent of the pleas submitted by the Applicant did not permit a written procedure limited to a single exchange of pleadings.

Nonetheless, as was evident from the 2-day hearings in the cases of *Tetra Laval v Commission* and *Schneider v. Commission* ⁽³⁾, the cases involved a very significant amount of substantive and procedural issues with the Court having to assess almost the entirety of the Commission's analysis including complex points of econometric assessment.

⁽¹⁾ American Bar Association response to the Green Paper on Merger Review, see DG Competition website: http://europa.eu.int/comm/competition/mergers/review/comments/ref046_americanbarassociation.pdf.

⁽²⁾ As regards case T-77/02, *Schneider v. Commission*, see CFI press release 48/02 published at the Court's website at <http://www.curia.eu.int/fr/cp/aff/cp0248fr.htm>. No press release has been issued in T-80/02, *Tetra Laval v Commission*.

⁽³⁾ T-5/02 and T-80/02, *Tetra Laval v. Commission*; cases T-310/01 and T-77-02, *Schneider v Commission*.

It is therefore not clear yet how the Court will exercise this discretion regarding the complexity and volume of pleadings. It is perhaps to be expected that, provided the Court's resources allow it, urgent cases would be granted the benefit of the expedited procedure regardless of their complexity.

Other procedural issues in pending expedited procedure merger cases

In all recent merger appeals currently being dealt with under the expedited procedure, the Court has exercised effective case management as envisaged by its Information Note. The CFI effectively tried to focus the disputed issues and to settle unnecessary disputes such as premature interim measures applications. The CFI held informal pre-hearing meetings with the aim of narrowing down the issues between the parties and preparing the oral hearing effectively. The CFI also adopted organisational measures such as specific written questions to the parties prior to the hearing.

Given the great emphasis placed on the oral hearings in the context of the expedited procedure, such informal meetings and organisational measures aimed at making the oral hearing more effective should become systemic and the CFI ought to make greater use of them. For instance, a list of issues that the CFI considers of particular importance and on which it would like the hearing to focus could be systematically provided to the applicant and the defendant one week prior to the hearing. This would enrich the oral hearing by allowing the parties to be better prepared to answer detailed questions that the CFI might pose during the hearing.

As regards speed, the CFI appears to be ready to proceed very quickly in expedited procedure cases. The hearings in *Schneider* were held 7 months after the application for annulment of the Commission's Article 8(3) prohibition decision and 4 months after the application for annulment of the Commission's Article 8(4) divestiture decision. The hearings in *Tetra* took place 5.5 months and 3.5 months after the respective applications for annulment of the Commission's prohibition and divestiture decision in that case. It is note-

worthy that from the date the written procedure was closed in those cases, the Court took less than 2 months to hold the oral hearings. Judgment in both those cases is expected as early as October 2002.

4. Can the expedited procedure provide effective judicial control in the field of mergers?

The expedited procedure, in particular if it is further improved, may provide the kind of effective/thorough and speedy judicial review that many commentators in the business and legal community seek from the EU system of merger control ⁽¹⁾.

Effectiveness of the Court's scrutiny is guaranteed by the Court's rigorous standard of judicial review with a full analysis of the facts and legal arguments used in the Commission's decisions. Both the judgments of Court of Justice in *Kali und Salz* ⁽²⁾ and of the CFI in *Airtours* ⁽³⁾ (as well as the recent hearings in the cases of *Tetra Laval/Sidel* and *Schneider/Legrand*) fully demonstrate that the European Courts will not be shy in carrying out a thorough analysis of the merits of the case put to them no matter how complex the issues involved ⁽⁴⁾.

However, it is undoubted that speedy resolution of disputes is equally important to the thorough and fair resolution of disputes. Late resolution of disputes is frequently of no use to parties who might not be able to hold on to a deal pending final judgement. Speed is therefore of paramount importance.

Thanks to greater use of the expedited procedure the problems of speed that have affected the effectiveness of the current system of judicial review may eventually disappear. Critics of the expedited procedure point out that, whilst promising, the procedure is far from ideal. They claim that, first, the expedited procedure may not be adequate in complex cases where Applicants may be deprived of their right to challenge a Commission decision in all the dimensions they see fit by being forced to be selective as to their chosen grounds of annulment in order to secure the expedited procedure

⁽¹⁾ See summary of responses to the Green Paper on Merger Review at DG Competition's website at: <http://europa.eu.int/comm/competition/mergers/review/comments.html>

⁽²⁾ Judgment of the Court of Justice of 31 March 1998 in cases C-68/94 und C-30/95, *France et al. v. Kommission (Kali & Salz)*, [1998] ECR I-1375.

⁽³⁾ Judgment of the Court of First Instance of 6 June 2002 in case T-342/99, *Airtours v. Commission*.

⁽⁴⁾ It is not surprising that, giving evidence to the United Kingdom's House of Lords Committee on European Union, the Chairman of the Mytravel group (formerly Airtours) stated that he 'was pleased that the Court had performed a very thorough job'; see House of Lords Committee on European Union Report 'The review of the EC Merger Regulation' (23 July 2002), at para 244.

treatment. Secondly, critics claim that the expedited procedure would be satisfactory for the merging parties only in those cases where the transaction has already been implemented (as in *Tetra Laval/Sidel* and *Schneider/Legrand*) or when the buyer was willing to take the risk of having to enter into a deal without a condition of prior final authorisation and the seller was prepared to wait. It is pointed out that in most cases, an 8 to 9 month delay in Court might signal the end of most commercial deals. Indeed, most critics emphasise that for the expedited procedure to be really effective, the CFI would have to be able to deliver judgments in a very short period of time, say 4-5 months. This appears to be primarily an issue of adequate resources for the CFI and changes to some of the CFI's internal procedures, most notably the significant time lost due to translations.

It is therefore not surprising that most commentators are hesitant to predict any success in the use of the expedited procedure and state cautiously that *'it is too early to judge the expedited procedure. Before coming to a conclusion on the working of this new procedure, it would be better to wait and see how the cases currently before the CFI work out'* ⁽¹⁾.

It is true that the Court has delivered only two judgments under the expedited procedure: in case T-195/01, *Government of Gibraltar v. Commission*, a state aid case ⁽²⁾, and in case T-211/02, *Tideland Signal v. Commission* (a case for an annulment of a tendering procedure). Nonetheless, in these cases and in recent pending merger cases, the expedited procedure appears to be working effectively. In T-195/01, the time table was particularly effective with the CFI managing to

hold a hearing within 4 months and render a judgment within 8 months from the application for expedited procedure. In T-211/02 (according to the CFI, a relatively straight-forward case), judgment was delivered within only 11 weeks. Judgments in cases T-310/01 and T-77/02 involving *Schneider Electric* and T-05/02 and T-80/02 involving *Tetra Laval* are expected as early as October 2002, approximately 9-10 months after those companies' applications for annulment of the Commission's prohibition (Art. 8(3)) decisions and 7 months after the application for annulment of the Commission's divestiture (Art. 8(4)) decisions ⁽³⁾. The Court's recent exercise of discretion on whether to grant the benefit of the expedited procedure shows that it will be prepared to use it even in complex cases where real urgency can be shown. The recent hearings in *Tetra* and *Schneider* confirm that the Court is ready to deal with very complex issues in a short period of time.

In conclusion, greater use of the expedited procedure in the field of mergers coupled with an effective system of interim measures in appropriate cases which would allow the parties to keep a deal alive pending final judgment, is expected to provide an effective means of judicial review and hence to complement the administrative system of merger control under the Merger Regulation. The Commission has already expressed its wholehearted support for such enhancement of judicial review ⁽⁴⁾. The Commission has also already signalled that it will continue to support improvements to the expedited procedure including calls for increased resources or reform of structures (such as the created of a specialised chamber) that the CFI may need in order to fully exploit the expedited procedure ⁽⁵⁾.

⁽¹⁾ House of Lords Report on the review of the EC Merger Regulation, at para 248.

⁽²⁾ Judgement of the Court of First Instance in Joined Cases T-195/01 and T-207/01 of 30 April 2002 where the CFI used the accelerated procedure for the first time in the state aid field in connection with two fiscal regimes for Gibraltar. The Court annulled one of the Commission decisions.

⁽³⁾ It is worth noting that, taking out time devoted for translation, the Court may have reached its decision in both *Tetra* and *Schneider* in approximately 6 months from the applications for annulment.

⁽⁴⁾ See Commissioner Monti's speech to the British Chamber of Commerce on 4 June 2002.

⁽⁵⁾ See Commissioner Monti's speech to the British Chamber of Commerce on 4 June 2002.

The Council approves the commission's twin-track strategy against unfair Korean practices in the shipbuilding sector

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In line with the 1998 Shipbuilding Regulation ⁽¹⁾, decades of operating aid to Community shipyards came to an end in December 2000. The Community's attempts to increase efficiency in this sector by reducing and re-orientating State aid have, however, been temporarily undermined by the need to counter unfair practices at South Korean shipyards. In June 2002, the Council gave the Commission the green light for its twin-track strategy against unfair Korean practices, by adopting the temporary defensive mechanism to shipbuilding (TDM) ⁽²⁾.

Accordingly, should further negotiations between the Community and Korea fail to lead to a satisfactory solution, the Commission will commence WTO action against Korea and, in response to the exceptional conditions in the shipbuilding industry, introduce a temporary and limited authorisation of operating aid to Community shipyards.

The History of operating aid

Since the early 1970s, state aid to the shipbuilding industry has been subject to a specific Community regime. In contrast to other sectors, the shipbuilding industry has systematically been the recipient of operating aid. Yet, operating aid is widely perceived as the most distortive and damaging form of State aid: it is granted simply as a contribution towards the normal running costs faced by businesses, without providing any incentive to invest, for example, in measures that would lead to greater efficiency or to improved environmental standards.

Indeed, handouts of operating aid from national authorities to inefficient yards erode the advantages gained by efficient and competitive yards that do not receive the same level of support. The distortive effects of operating aid were particularly aggravated by the exceptionally high maximum aid ceilings (over 30% of contract value) that were authorised for many years. For these reasons, a

more restrictive approach was introduced in the 1987 Sixth directive on shipbuilding ⁽³⁾, the aim of which was to gradually phase out operating aid, through the progressive reduction of the maximum aid ceiling. Subsequently, the maximum aid ceiling for operating aid was gradually reduced from 28% of contract value in 1987 to 9% in 1992.

Although this progressive reduction encouraged moves towards greater competitiveness and structural change, the necessary impetus was not sustained, as the ceiling became static after 1992. In 1997 it was apparent that, despite the efforts made, many EU yards still lacked competitiveness, and were lagging behind their main Far Eastern competitors in terms of productivity. Against this background, the Commission put forward proposals for a new approach towards state aid for the sector: the abolition of operating aid; and a shift towards other forms of support, better geared towards helping industry achieve the necessary changes and overcome its weaknesses. The proposed new regime was adopted as the 1998 Shipbuilding Regulation, which extended the operating aid rules for two years, until end of 2000.

It should be noted that operating aid not only has damaging and distortive effects on the market, but comes at great cost to the European taxpayer. Since the beginning of the 1990s the average, annual amount of state aid awarded to shipbuilding has fluctuated between EUR 1.4 billion and EUR 1.7 billion. The largest share of the aid has been provided in the form of operating aid and restructuring aid. The amount of operating aid provided since 1990 has fluctuated between EUR 198 million and EUR 1.1 billion per year.

The 1998 Shipbuilding Regulation

In accordance with Article 3(1) of the 1998 Shipbuilding Regulation, operating aid was completely and permanently phased out at the end of 2000. Thus, a major part of the Commission's state aid objectives in this sector was achieved. As a

⁽¹⁾ Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, OJ L 202 18.7.98, p. 1.

⁽²⁾ Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding, OJ L 172 2.7.2002, p. 1.

⁽³⁾ Council Directive (EC) No 87/167/EEC of 26 January 1987 on aid to shipbuilding, OJ L 69, 12.3.1987, p. 55.

counterpart to the phasing out of operating aid, the 1998 Shipbuilding Regulation provides Member States with the possibilities to grant other forms of aid, providing an incentive effect to encourage EU shipyards to improve their competitive performance or to ease the process of structural adjustment and mitigate the social repercussions when yards have to close or reorganise their activities. Member States may continue to grant the following types of aid to the shipbuilding industry:

- Aids for environmental protection in line with the general Community guidelines for such aids;
- Aids for research and development in line with the general Community framework for such aids;
- Aids for innovation (maximum aid intensity 10% gross), which are not allowed in any other industrial sectors except (until the end of 2003) the automobile sector;
- Regional investment aid for upgrading and modernising existing yards (but not involving the creation of new capacity), subject to certain caps below the normal regional aid ceilings;
- Aids for rescue and restructuring in line with the general Community guidelines for such aids subject to certain stricter provisions (as regards effective counterparts in terms of genuine and irreversible reductions in capacity, strict monitoring etc);
- Aids for partial and total closures (contingent on genuine and irreversible reductions of capacity).

Unfair Korean competition

Following complaints in 2000 and 2001 from the Community shipbuilding industry about unfair practices carried out in South Korea, the Commission carried out investigations into the behaviour of South Korean yards and the financial support that they had received, directly and indirectly, from the public authorities. These investigations concluded that subsidies and export support had been granted, in contravention of WTO rules, to the benefit of certain South Korean shipyards⁽¹⁾.

The investigations concluded that the Community shipbuilding industry suffered adverse effects and serious prejudice as a result of these subsidies and export support. Specifically, it was found that Community industry had suffered material injury

in relation to two shiptypes: container ships and product/chemical tankers. For one further shiptype (Liquefied natural gas carriers — LNGs), it was concluded that further examination was necessary before reaching a conclusion.

In light of these practices by the South Korean government and industry, the Commission actively sought a mutually acceptable solution with the South Korean authorities. On 22 June 2000, negotiations between South Korea and the Community led to the signing of the 'Agreed Minutes', including the following commitments by the Korean side:

- not to provide bail-outs or public support for yards in difficulty;
- greater transparency in their yards' accounting systems;
- prices that reflect all factors of costs and include a margin of profit; and
- a consultative mechanism to settle disputes.

Since the signing of the Agreed Minutes, however, progress on their implementation by the Korean side has been wholly inadequate. Further negotiations have failed to lead to improvements, obliging the Community to take a more robust approach. This has resulted in the adoption of the Commission's twin-track strategy against unfair South Korean practices.

The Community's Twin-track strategy against South Korean practices

On 27 June 2002 the Council approved the twin-track strategy proposed by the European Commission to counter unfair Korean practices in the shipbuilding sector. The Council requested the Commission to continue negotiations with South Korea, in a final attempt to find a mutually satisfactory solution to this longstanding issue. Should no solution be found by the end of September 2002, the Commission will immediately launch its twin-track strategy, namely:

- the establishment of a WTO Panel and dispute settlement procedures against the South Korean authorities in relation to the subsidies granted; and
- the activation of the temporary defensive mechanism.

⁽¹⁾ The public versions of the Commission's investigations are available at the following address:
http://europa.eu.int/comm/trade/policy/traderegul/kor_ship.htm

WTO action against South Korea

If no solution is reached with Korea by 30 September 2002, the Commission will inform the Council accordingly and will initiate dispute settlement proceedings against South Korea, by requesting consultations in accordance with the WTO's Understanding on the Rules and Procedures for the Settlement of Disputes. As fully detailed in the two investigations (see above), the Commission will complain that the subsidies and export support provided to the South Korean industry contravenes the WTO's Agreement on Subsidies and Countervailing Measures.

It is anticipated that the dispute settlement proceedings will take approximately 18 months to conclude. If the Community's complaint is successful, South Korea will be obliged to restore normal trading practices in the shipbuilding industry. Failure to observe the WTO ruling would ultimately entitle the Community to take retaliatory measures against South Korea, in the form of countervailing duties against goods imported from South Korea.

The temporary defensive mechanism

The TDM, adopted by the Council on 27 June 2002, entered into force on 3 July 2002. However, in accordance with Article 4, no aid may be authorised under the TDM until the Commission gives notice in the Official Journal that it has initiated dispute settlement proceedings with South Korea. This is because the TDM is designed, primarily, as a tool to encourage South Korea to reach and adequately implement an agreement with the Community to restore normal trading conditions; and to support the WTO action.

This role of the TDM as a support mechanism to WTO action is clearly reflected in its substance:

- Operating aid up to a maximum of 6% of contract value may be authorised only for the two ship types in which Community industry is suffering *material injury* as a result of unfair Korean practices, namely container ships and product/chemical tankers (Article 2(1));
- LNGs will also be eligible for aid, should the Commission's further investigations conclude that Community industry is also suffering material injury in this segment
- Aid may only be authorised in relation to contracts for which there has been competition

from a Korean shipyard offering a lower price than that offered by the Community yard (Article 2(1));

- The TDM will expire on 31 March 2004, to coincide with the approximate conclusion of the WTO proceedings. Should the WTO proceedings be resolved or suspended before that date, no further aid will be authorised.

As for procedural questions, any aid that a Member State proposes to grant under the TDM must receive Commission approval, either in the form of a scheme, or as *ad hoc* aid. The State aid procedural regulation ⁽¹⁾ will apply in the normal way.

It is clear, therefore, that the TDM is strictly limited in time and scope. It is designed to cover only those ship types most seriously injured by unfair Korean practices and to accompany the Commission's action in the WTO against Korea. It does not represent the re-introduction of general operating aid and does not undermine the recent progress made in reforming the state aid regime in this industry.

Long-term prospects for the Community industry

In order to improve competitiveness and fair competition in this sector, the Commission, with the support of all the Member States, is taking an active role in negotiations for a new OECD agreement on the respect of normal competitive conditions in the shipbuilding industry. A mandate to create a Special Negotiating Group to bring about normal competitive conditions in the world commercial shipbuilding and repair industry is expected to be approved shortly by the OECD Council. The new agreement shall review and address market distorting factors, in particular government support measures, pricing and other practices which distort normal competitive conditions in the world shipbuilding industry, as well as mechanisms to deal with these.

Furthermore, the Community shipbuilding industry must help itself to become more competitive. It is clear that the long-term strategy for the Community shipbuilding industry should be to continue to improve efficiency and competitiveness, by focussing on, for example, research and development and training. It is now absolutely clear that shipyards can no longer rely on handouts of operating aid from public authorities for their survival.

⁽¹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

An example of the application of State aid rules in the utilities sector in Italy ⁽¹⁾

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Last June the Commission took a decision on a case concerning two Italian State aid schemes applicable to the sector of public utilities. This article focuses on the most interesting aspects of that decision and formulates some general remarks on each of them. These aspects are: the application of State aid rules in a sector with a limited degree of competition and trade, the notion of existing and new aid, the application of Article 86(2).

The facts of the case

In 1997 the Commission received a complaint alleging the existence of incompatible State aid granted by Italy to certain undertakings in the public utilities sector. In Italy Municipalities since long provide several local services in the field of transport, water, gas, electricity, waste and pharmaceutical products. These services can be provided directly by the municipality or by a separate municipal accounting entity or by a concessionaire.

In 1990 Law no. 142 laid down *inter alia* a reform of the legal arrangements a municipality may use to provide these services. Municipalities could then establish joint stock companies (*società per azioni*, 'SpA') with public majority shareholding (hereinafter "SpAs 142/90"). Eventually, in 1992 also the possibility of setting up a joint stock company with public minority shareholding was introduced.

The possibility to establish SpAs was an important reform allowing a greater participation of private capital in the utilities sector and the management of these activities in a more entrepreneurial way. Whilst, as a general rule, in the case of public service provided by the municipality or by a separate accounting entity the service provider cannot operate outside the territory of the municipality itself, SpAs are not limited by law as regard either the economic sector or the territory in which may operate.

SpAs 142/90 could benefit from a pre-existing law of 1986 allowing them to take loans from Cassa Depositi e Prestiti ("CDDPP"), an Italian administrative body.

Other measures concerning SpAs 142/90 were 'codified' in the paragraphs 69 and 70 of Article 3 of Law 28 December 1995 no. 549. Paragraph 69 provided for the exemption from all transfer taxes related to the transformation of *aziende speciali* and *aziende municipalizzate* into joint stock companies (hereinafter 'the transfer tax exemption'). Paragraph 70 set out a three-year income tax exemption (hereinafter 'the income tax exemption') not exceeding fiscal year 1999 ⁽²⁾. The complainant alleged that the fiscal treatment provided for by paragraph 69 and paragraph 70 as well as the possibility to take loans from CDDPP constituted illegal State aid.

The Commission started a formal investigation under Article 88(2) in 1999 and assessed those measures as aid schemes, i.e. it only looked at general functioning of the legal instruments whereby the State grants certain advantages to undertakings fulfilling the conditions laid down in those instruments. It did not assess the application of the measures in any specific case.

The Commission found that CDDPP loans and the income tax exemption granted to SpAs 142/90 a State aid. On the other hand the Commission concluded that the transfer tax exemption is not a State aid ⁽³⁾.

Affectation of competition and trade

The Italian Authorities ('IA') argued, *inter alia*, that the markets in which the SpAs 142/90 operated at the time of the adoption of the measures were not open to competition or trade between Member States. The IA maintained that SpAs 142/90 provide services in limited territories on the basis of exclusive rights, thus no competition is possible. If there is no competition to be distorted there cannot be any State aid.

⁽¹⁾ Thanks to Mr Karl Soukup without whom drafting this article would have been more difficult.

⁽²⁾ It is worthy to repeat that the expression 'SpA 142/90' in this article means joint stock company with public majority shareholding established following Law 142/90.

⁽³⁾ This article does not focus on the Commission conclusion that the transfer tax exemption is not an aid.

In line with the Philip Morris judgement ⁽¹⁾ the Commission concluded that the advantage was capable of distorting competition. First SpAs 142/90 could exploit this advantage when they compete with any other undertaking for the entrustment with the exclusive right to provide the service. Second these undertakings had already expanded their activities in markets other than the utilities sector; the additional financial resources could therefore affect those markets. Third, the Commission observed that, especially the income tax exemption would allow those undertaking to distribute higher dividend thereby making capital investments in these undertakings particularly interesting. This could have distortive effects in the capital market.

As for affectation of trade between Member States it is established case law that state aid decisions do not have to be based on a demonstration of the real effect of the aid on competition or on trade between Member States ⁽²⁾. In order to assess the affectation of trade the Commission should also take into account the foreseeable effects of the aid on competition and intra-community trade ⁽³⁾.

In the present case the Commission started observing that trade can be affected even if the beneficiary undertaking is itself not involved in exporting ⁽⁴⁾ especially in the case of aid to undertakings operating in the service and distribution industries ⁽⁵⁾. Then the Commission underlined that the grant of a concession is one of the legal options available to Municipalities and the concessions market is open to competition at community level ⁽⁶⁾. Those measures therefore could affect trade between Member States in making it more difficult for foreign companies to enter the concessions market in Italy ⁽⁷⁾. In addition, the scheme

would make it less attractive for foreign operators to invest in the utilities sector in Italy (e.g. acquiring majority holdings) as acquired companies would not be entitled to (or may lose) the aid as a consequence of their new shareholding structure. The Commission concluded that as a general principle aid to local service providers may create an obstacle for foreign companies willing to establish themselves or sell their services in Italy, and therefore affect trade between Member States ⁽⁸⁾.

Ad abundantiam, the Commission noted that in some of the main sectors of activity of SpAs 142/90 there was already an important trade between Italy and other Member States (for instance pharmaceutical products or waste). Finally, the Commission observed that some SpAs 142/90 were also involved in economic sectors (telecommunications, software productions and commercialisation) other than those indicated by the IA and that these economic sectors were characterised by intensive trade between Member States. Therefore affectation of trade was not merely potential.

The IA also argued that affectation of trade was not significant either because SpAs 142/90 provided local services or because over the period of application of the measures in issue there were very few cases of concessions awarded according to open selecting procedures. The Commission stressed the above jurisprudence showing that even if trade between Member States in a certain economic sector and at a given point in time is limited this does not exclude that a measure may qualify for State aid. To conclude otherwise would give Member States a reason for preventing trade in that sector in order to avoid the application of State aid rules. By giving to municipalities an incentive to

⁽¹⁾ See case 730/79 Philip Morris [1980] ECR page 2671, paragraph 11 and the AG Opinion page 2698. See, for instance, the AG opinion Case C-280/00 Altmark, not yet reported, point 103 where the AG notes that the requirement of distortion of competition is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition.

⁽²⁾ Judgement of the Court Case C-301/87 France v Commission [1990] ECR I-307 paragraphs 32 and 33; joined cases T-204/97 and T-270/97 EPAC - Empresa para a Agroalimentação e Cereais, SA v Commission [2000] ECR II-2267, paragraph 85 and joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, Alzetta Mauro and others v Commission, [2000] ECR II-2319, paragraph 76. As part of its assessment of notified aid the Commission is required to review whether that aid *might* affect trade between Member States. Hence the same standard has to apply when the Commission assesses non-notified aid. Were the Commission required to establish whether the aid has a real effect on trade and competition, such a requirement would favour MSs which grant aid in breach of the obligation to notify.

⁽³⁾ Joined cases T-447/93 to 449/93 AITEC and others v Commission [1995] ECR II-1971, paragraphs 139 and 141 and Joined cases T-132/96 and T-143/96 Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission, [1999] ECR II-3663, paragraph 21.

⁽⁴⁾ Case C-75/97 Maribel bis/ter ECR [1999] p, I-3671.

⁽⁵⁾ Case C-310/99 Italy v Commission, judgement of March 7, 2002, not yet reported.

⁽⁶⁾ See Commission interpretative communication on Concession under Community law (OJ C 121 of 29.04.2000, p. 2).

⁽⁷⁾ The Commission mentioned also that not all the services provided by SpAs 142/90 are provided on the basis of a concession implying exclusive rights. This is the case for instance for the distribution of pharmaceutical products where SpAs 142/90 compete with private operators in the same territory and for services related to waste. Moreover, some services are provided after public tenders and these companies can also participate in public tenders. Therefore the same reasoning could apply with regard to affectation of trade as regard the participation of foreign companies in the public tenders.

⁽⁸⁾ See Commission decision 14.10.98 Société Marseillaise de crédit (OJ L 198/1, 1999) and Case C-475/99 Ambulanz Glockner [2001] not yet reported, paragraph 49, and AG opinion in the same case, point 170.

entrust directly SpAs 142/90 with the service these measures affected trade between Member States by diminishing the potential number of selecting procedures for the grant of a concession and accordingly the possibilities for foreign operator to penetrate the Italian market.

Moreover the very fact that the IA entrust directly services to certain undertakings without any open selecting procedure is, according to the Commission, a violation of EC law ⁽¹⁾. Therefore the IA could not rely on the small number of selecting procedures for demonstrating that the effect on trade was not significant.

The substance of the Commission's reasoning is that the limited degree of intra-community trade is not a bar for the application of State aid rules. In fact that limited degree can also be the effect of the measures in question and not simply the factual situation prevailing at the moment of the grant of the aid. As any aid to local producers have the effect of diminishing operations of foreign companies such a situation cannot be considered as indicating that the aid does not affect trade between Member States.

Existing aid versus new aid

The Commission had to deal with two issues concerning the classification of the measures as existing or new aid. The first issue is linked to the same argument that at the time of the entry into force of the measures the economic sectors in which the SpAs 142/90 were operating were not open to competition. The IA invoked the judgement Alzetta ⁽²⁾ in which the Court of First Instance ('CFI') established that a measure applicable to undertakings operating in an economic sector in which there is no Community competition at the time when the measure is established is not a State aid. If later the sector is liberalised the

measure must then be classified as existing aid ⁽³⁾. When an economic sector is liberalised gradually the same system of aid may classify for new aid with respect to undertakings providing services that have been liberalised before the granting of the aid ⁽⁴⁾ and, as existing for undertakings exclusively providing the services that have been liberalised after the granting of the aid ⁽⁵⁾.

As the Court said, the jurisprudence Alzetta Mauro applies 'to undertakings *engaged solely* in markets' which were not open to Community competition ⁽⁶⁾. Therefore, if an undertaking receives an aid and it is active both in markets open to competition and in markets where there is no Community competition the classification of the measure will be made with reference to the markets open to competition ⁽⁷⁾.

The rule established by the CFI in Alzetta is identical to the rule contained in the first sentence of Article 1(b)(v) of Regulation 659/1999 ⁽⁸⁾ ('the Regulation'). This article sets out the rules according to which the evolution of the market may affect the classification of a measure as new or existing aid. On the other hand the second sentence of Article 1(b)(v) establishes that: "Where certain measures become aid following the liberalisation of an activity *by Community law*, such measures shall not be considered as existing after the date fixed for the liberalisation" This rule is stricter for Member States than the one of the first sentence. It tells Member States to review their legislation before the date fixed by EC law for the liberalisation of an economic activity. Member States should check whether there are measures that are likely to be classified as State aid once the activity is liberalised. After that date those measure will be considered as new aid, non-notified and thus unlawful ⁽⁹⁾.

In the case at hand the Commission found the aid in question not to fall within the Alzetta rule.

⁽¹⁾ This violation is currently the matter of an ongoing infringement procedure started by the Commission against Italy (no. 1999/2184, letter of formal notice dated November 8, 2000).

⁽²⁾ Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 Alzetta [ECR] 2000 II- 2319, paragraph 143.

⁽³⁾ The rule established in Alzetta has been confirmed later by the CFI in case T-288/97, Regione autonoma Friuli-Venezia Giulia v Commission [ECR] 2001 II-1169, paragraph 89.

⁽⁴⁾ Op. Cit. paragraph 145.

⁽⁵⁾ Op. cit., paragraph 146 and 147. This case law means that the same measure can be classified as existing aid, new aid or non-State aid depending on the situation of the individual undertaking to which the measure applies.

⁽⁶⁾ Paragraphs 147, 149 and 150 emphasis added.

⁽⁷⁾ In order to avoid this possibility the measure itself should provide for its application only to those undertakings that do not carry out competitive activities.

⁽⁸⁾ 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 129/43.

⁽⁹⁾ In Alzetta internal cabotage was liberalised by Community law. However the CFI considered the aid as existing. It would seem that there is some tension between the judgement of the CFI and the Regulation. However the Alzetta case and the liberalisation of internal cabotage predated the Regulation. Since nothing in the provision contained in the second sentence suggests that it should be of retroactive application, the CFI correctly considered that the stricter rule provided for by the Regulation did not apply in that case.

In some of the economic sectors in which SpAs 142/90 focused their activity there was already an important trade going on between Italy and other Member States at the time of the adoption of the measures. Therefore the IA claim that there was no competition was unfounded. Moreover the Commission noted that the two aid schemes under assessment were capable of granting advantages to any SpAs 142/90. The legal status of SpA gave these undertakings the possibility to operate in whatever economic sector. Finally nothing in those schemes ensured that the aid could only benefit those companies merely engaged in services not open to Community competition.

The Commission pointed out that this conclusion is without prejudice to the possibility that individual aid granted under the scheme may be considered as existing aid on the basis of the particular situation of the beneficiary ⁽¹⁾ referring implicitly to undertakings exclusively involved in activities not open to Community competition at the time the measure was put into effect.

As a general remark with regard to the requirement of affectation of trade and competition it can be observed that this requirement is interpreted in a slightly different way when the question is that of the existence of an aid measure and when the question is that of the classification of a State measure as existing or new.

In assessing the existence of an aid measure the Court has recognised to the Commission the possibility to carry out a perspective analysis. So even if there is no competition at the time of the grant of an aid, that aid can still be considered as State aid if it is likely that competition will develop in that sector. On the other hand it seems that in classifying a State measure as existing or new aid this perspective analysis cannot be made. Therefore if there is no Community competition at the time of the grant of the aid and even if it is likely that such competition will develop, the measure will at most qualify for existing aid, provided that Article 1(b)(v) second sentence of the Regulation does not apply ⁽²⁾.

The second issue the Commission had to deal with relates to the argument that the income tax exemption in favour of SpAs 142/90 is not a new aid because its content is identical to a pre-existing measure. Since the beginning of the century *aziende municipalizzate* and then *aziende speciali* ⁽³⁾ were assimilated to local authorities for fiscal purposes and as such they were not subject to income tax. SpAs 142/90 have taken the place of *aziende municipalizzate* and enjoy the same fiscal treatment.

To reply to this argument the Commission made reference to the case *Namur-Les assurances* ⁽⁴⁾ ('Namur'): in that case the question was 'whether a decision authorising the enlargement of the field of activity of a public undertaking (the OND) may imply that aid granted to such an undertaking becomes new aid. The Court noted that legislation *predating* the entry into force of the Treaty defined (i) the *purpose and areas of operation* of the OND in *very general terms* (provision of export guarantees), (ii) provided for *some advantages*, and (iii) contained *no restriction in terms of subject matter or geographical area* on OND's activity. OND, which for many years limited its activity to the insurance of certain export risks, decided to provide insurance also for export to western European Countries. The Court observed that the question of whether an aid is new or existing must be answered by reference to the provisions providing for it. It held that the decision to expand the export risks covered by OND (which did not go beyond the original description of the OND's task) did *not amend the legislation* granting those advantages either *in regard to the nature* of those advantages or *in regard to the activities* of the public establishment. Accordingly the aid was existing.'

The Commission observed that, unlike in *Namur*, the income tax exemption in favour of SpAs 142/90 was provided for by a new legislation. The new legislation laying down that exemption had the declared purpose ⁽⁵⁾ to extend the fiscal treatment provided for local authorities and *aziende municipalizzate* to a new category of undertakings, the SpAs 142/90, for a three years period.

⁽¹⁾ This conclusion is in line with the Court case law, see case C- 310/99 *Italy v. Commission* not yet reported, paragraphs 89 to 91. The Court explained that when the Commission is dealing with an aid scheme it can limit its assessment to the features of the scheme without having to examine the particular situation of any individual undertaking benefiting from the scheme. The situation of the individual beneficiaries may be considered in the phase of the recovery of the aid.

⁽²⁾ If liberalisation takes place after the entry into force of the Regulation 659/1999 on the basis of a community rule then the aid becomes new.

⁽³⁾ *Aziende municipalizzate* and *aziende speciali* are separate accounting entities fully owned by the local authorities subject to the control and supervision of the same authorities.

⁽⁴⁾ Case C-44/93 [ECR] 1994 I-3829.

⁽⁵⁾ The preparatory works confirmed that without the new legislation SpAs 142/90 would not have enjoyed any income tax exemption.

The notion of existing aid is based essentially on the principle of legal certainty. The aim of this notion is to avoid that some measures already in force become automatically illegal as from the entry into force of the Treaty ⁽¹⁾. After the entry into force of the Treaty when a Member State decides to modify the measure there is no logical reason for the Member State to invoke legal certainty any longer. That is why any substantial modification of the measure transforms an existing into a new aid. The Member State that modifies the measure should notify the alteration to the Commission otherwise the measure becomes a new and unlawful aid. Likewise, if a Member State extends the scope of an existing aid to a category of undertakings that originally were not entitled to receive the aid there is no issue of legal certainty at stake. The extension of the aid to the new category of undertakings constitutes a new aid.

This conclusion seems to accord with the recent Gibraltar judgement of the CFI ⁽²⁾. In that case the Commission qualified as new aid the 'exempt companies legislation' of Gibraltar dating 1967, because of two amendments of 1978 and 1983. It was common ground that the original exempt companies tax scheme of 1967 constituted an existing aid. The 1978 amendment extended the tax exemption to a category of additional operations and the 1983 amendment added a category of companies to the beneficiaries of the tax exemption. The Commission considered that those two amendments changed the tax system in its entirety and transformed it into a new aid.

The Court stressed that only the alteration and not necessarily the altered aid in its entirety is new aid. 'It is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme' ⁽³⁾. When it is severable from the initial scheme, like it was in that case, the alteration has to be assessed on its own merits. That means that the alteration can qualify for new aid while the original scheme remains an existing aid ⁽⁴⁾. By the same token, the income tax exemption may also be the alteration of an existing aid scheme. However the extension of that scheme to SpAs 142/90, a category of undertakings that like in the Gibraltar case initially were

not covered by the scheme, represents a severable alteration of the scheme. Having been established well after the entry into force of the Treaty this alteration constitutes a new aid.

In Namur the Court made also reference to the fact that the *purpose and areas of operation* of the OND had not been changed. This suggests that also the modification of the legal nature, or of the activity of the beneficiary of the aid might imply a modification of the classification of the measure from existing to new aid ⁽⁵⁾. In this case the Commission observed that the law restricts the *subject matter and geographical area of aziende municipalizzate's* activity. On the contrary SpAs 142/90 may get involved in any kind of economic activity and whatever territory. Hence, also in this respect there was an important difference between the present case and Namur.

Service of general interest and Article 86(2)

The original Commission position was that State funding of a SGEI is not State aid insofar as the funding does not exceed the net cost of providing that service. In case FFSA ⁽⁶⁾ and SIC ⁽⁷⁾ the CFI ruled that the State funding of a SGEI is a State aid within the meaning of Article 87. However, this aid is compatible with the common market by virtue of Article 86(2) insofar as it does not exceed the net cost of providing the SGEI, and provided that the other conditions set out in that article are met.

The legal classification of the funding of a SGEI as a State aid implies the application of all State aid rules. This means a greater involvement of the Commission. In particular Member States, according to Article 88(3), should notify to the Commission any such funding before the aid is granted. The Commission has the task of assessing the proportionality and compatibility of the funding to the net cost of the SGEI under Article 86(2) and contribute to clarify the rules and principle applicable to the funding of SGEI thereby fostering legal certainty. In this connection in 2001 the Commission issued its second Communication on SGEI ⁽⁸⁾. The Communication dealt extensively also with the question of the funding. It explained

⁽¹⁾ In substance the role of the notion of existing aid is similar to that of a Grandfather clause.

⁽²⁾ T-195/01 and T-207/01, not yet reported.

⁽³⁾ Op. cit. paragraph 111.

⁽⁴⁾ The Court did not reach this last conclusion with regard to the measures at issue in that case because it did not want to substitute its assessment to that of the Commission. However this seems to be the logical conclusion of the Court reasoning.

⁽⁵⁾ How important must be this modification for changing the classification of the aid the Court does not say.

⁽⁶⁾ Case T-106/95 FFSA, ECR[1997] II-229.

⁽⁷⁾ Case T-46/97 SIC, ECR [2000] II-2125.

⁽⁸⁾ OJ 2001/C 17/04. The first Communication on SGI in Europe is of September 1996.

that Article 86 is the provision on the basis of which the Commission would assess the legality of that funding and that three principles underlie the application of Article 86(2): neutrality, Member States' freedom to define what they consider to be public service, and proportionality.

In Nov, 2001 in case Ferring ⁽¹⁾ the Court of Justice by referring to a judgement of 1985 ⁽²⁾ concluded that the public funding of a SGEI is not a State aid but rather a compensation for the service that the undertaking provides in the general interest. And this insofar as the compensation does not exceed the net additional costs of the general service mission. In these circumstances the undertaking entrusted with that mission does not receive any real advantage.

The Court ruling implies that the notification requirement of Article 88 does not apply, and that in order to justify the State funding of a SGEI there is no need to look at Article 86(2). This article does not seem to apply to the funding of services of general economic interest. Indeed if the funding is proportionate then there is no State aid, if the funding is excessive there is an aid that cannot be considered as compatible on the basis of Article 86(2) ⁽³⁾. Any national authority may be asked to check the proportionality of the compensation at the same time of the Commission. Moreover national authorities within the same Member State and of different Member States may apply different criteria to calculate the proportionality of the compensation ⁽⁴⁾. Furthermore undertakings in different Member State may be compensated for essentially the same SGEI on the basis of different economic criteria thereby provoking distortion of competition ⁽⁵⁾. Finally because there is no need to notify the compensation to the Commission it is difficult for the Commission to learn of possible different approaches. On the basis of Article 86(2) the Commission could set out the economic criteria on which the compensation must be calculated and ensure coherence in the Community.

Following the Ferring construction the question arises: has the Commission any competence to set out the economic criteria on which the compensation must be calculated? Under Ferring this cannot be done on the basis of Article 86 since this article does not apply to the matter of the compensation of a SGEI. There might be different remedies but Ferring does not say which ones. In summary, while giving the impression of laying down a rule which is easy to apply Ferring could in fact be the source of more legal uncertainty and disputes.

Moreover, Article 86 last sentence gives the task to the Commission to check that the funding of a SGEI does not affect the development of trade to an extent contrary the interest of the Community. If Article 86 does not apply no one can check that the funding of a SFEI complies with the Community's interest.

It is not even clear whether this judgement represents a complete departure from the CFI jurisprudence. A few months after Ferring two Advocate Generals ('AG') dealt with the question of the compensation of a SGEI. AG Leger in his opinion in the Altmark case ⁽⁶⁾ interpreted Ferring as a complete departure from the CFI jurisprudence. He criticised this judgement and recommended the Court to adopt the construction of the CFI. AG Jacobs ⁽⁷⁾ proposed a compromise solution according to which the Ferring jurisprudence applies only in particular circumstances (i.e. 'where the financing measures are clearly intended as a *quid pro quo* for clearly defined general interest obligations') and for all other cases the CFI jurisprudence applies.

While the Community judiciary was, and still is, dealing with the question of how to classify the funding of a SGEI, the Commission had to decide the present case. The immediate issue was whether or not the three criteria of the 2001 Communication on SGEI could still be relied upon in order to deal with the IA claim that the aid in question was justified under Article 86(2). The Commission

⁽¹⁾ C-53/00 ECR [2001] I-9067.

⁽²⁾ Case 240/83 ADBHU ECR [1985] 531.

⁽³⁾ Paragraph 33.

⁽⁴⁾ Already in the determination of the additional cost of the service of general interest there can be different approaches to questions such as whether the quantification of the additional costs must be made on the basis of the incremental costs of providing the service of general interest in combination with other services provided by the same undertaking where this is the case, or whether the additional cost should be the stand-alone cost of providing the service of general interest. Another question that is susceptible of different approaches is the cost allocation of infrastructure that are used both for the public service and for other services. Also in the determination of the amount of "allowed" compensation there can be different approaches for instance how to deal with economies of scale and of scope, or with indirect advantages that could follow from the entrustment with a service of general economic interest such as reputation, ubiquity, etc.

⁽⁵⁾ For a more extensive analysis of the practical implications of the classification of the State funding of a SGEI see AG Leger C-280/00 opinion of 19/03/2002 not yet reported.

⁽⁶⁾ See previous note.

⁽⁷⁾ C-126/01 Opinion of 30.4.2002 not yet reported.

concluded that the principle of neutrality, entrustment and definition, and proportionality underlie the application of both Article 86(2) and the Ferring jurisprudence ⁽¹⁾. This is not surprising since the neutrality principle is a principle that finds application throughout the Treaty and is enshrined in Article 295, also under Ferring the compensation must be proportional to the net additional cost of the mission, and entrustment and definition are logical requirements of any meaningful assessment of proportionality.

The Commission acknowledges that the sectors in which the undertakings are mainly active have general interest relevance. However the measures are contrary to the neutrality principle. Indeed the aid was not linked to the entrustment of a general service mission, but merely to the legal status (i.e. SpA) and shareholding composition of the undertaking (i.e. majority public). There was no evidence of any general service obligation that applies exclusively to SpAs 142/90 because of their legal status or shareholding composition. In other words the public or private nature of an undertaking cannot be the criteria on the basis of which a Member State grants the compensation of the general service mission.

Also the principles of entrustment and definition, and of proportionality were not met. Law no.142/90 refers to the possibility for the Municipalities to provide public services by means of SpAs 142/90. However, this Law does not specify which services have to be considered as public services and to what extent, and it does not mention any specific public service obligation. Therefore it cannot be considered as an act clearly defining the public service mission and explicitly entrusting certain undertakings. Finally the Commission found that it was not possible for it to assess the proportionality of the funding because the IA did

not indicate the public service obligations, nor any net extra costs deriving from these obligations, and not even the amount of public funds granted to SpAs 142/90.

The Commission's conclusions as regard Article 86(2) demonstrate the intention of the Commission to stick to its policy with regard to SGEI announced in the 2001 Communication, even when the European Courts do not really help to clarify the legal rules that apply to this matter. This decision shows a rigorous application of that 2001 Communication.

Conclusion

This decision deals with quite a wide set of issues and with aid measures focusing on sectors that have seldom been investigated on the basis of State aid rules. The decision is based on the premises that even in the sectors of the public utilities respect of State aid rules must be ensured. The Commission has rigorously applied those rules and has ordered Italy to recover the aid.

The Commission did not exclude that because of the importance of public utilities Member States may impose obligations in the general interest to service providers and provide for the funding of those obligations. However in the light of the ever more competitive character of these sectors there is a need for transparency. It is important that these obligations are defined clearly and the amount of compensation determined with reference to the net extra cost generated by those obligations, if any. On the contrary measures whose effect is only to reinforce the competitive position of the undertakings controlled by local authorities cannot be considered as justified by a vague and ill-defined general interest mission.

⁽¹⁾ For another example of this approach see also Commission decision of 12 March 2002 State Aid to Poste Italiane S.p.A (C47/98 ex NN41/98).

Enhanced EU/Japan co-operation : the Commission proposes to conclude an agreement

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Introduction

On May 8, 2002, the Commission adopted a Proposal for a Council and Commission Decision concluding the Agreement between the European Communities and the Government of Japan concerning cooperation on anticompetitive activities ⁽¹⁾ Annexed to this proposal is a draft of the envisaged EU/Japan bilateral agreement. The draft agreement is the result of intensive negotiations between the Commission and the Government of Japan — in Tokyo and Brussels — from June 2000 till May 2002. It must be noted here that the Commission conducted the negotiation of the proposed draft text on the basis of directives approved by the Council on 8.6.2000. The envisaged agreement will usefully reinforce the expanding network of bilateral competition cooperation agreements, next to agreements such as the 1991 ⁽²⁾ and 1998 ⁽³⁾ EU/US agreements, the 1999 ⁽⁴⁾ EU/Canada agreement and the 1999 ⁽⁵⁾ US/Japan agreement.

Procedural aspects

Since the Commission's proposal to the Council, the institutional framework governing the conclusion of such bilateral competition cooperation agreements in the past has been slightly modified due to the expiration of the ECSC Treaty on July 23, 2002. Before that date, and to the extent that such international agreements applied to ECSC products, the legal basis for the Commission to conclude them was offered by Art. 65 and 66 of the ECSC Treaty. The subject matter covered by the ECSC Treaty has, upon its expiry, been covered by the EC Treaty. Consequently, and as far as interna-

tional agreements already concluded by the ECSC are concerned, the Commission proposed to the Council to adopt a decision transferring the rights and obligations flowing from these international agreements to the EC ⁽⁶⁾.

In the future, the conclusion of bilateral cooperation agreements on competition matters will be decided and carried out solely by the Council on the basis of Art. 83 and 308 of the EC Treaty in conjunction with the first subparagraph of Art. 300 paragraph 3 of the same Treaty. As needed for such agreements, before taking a decision on the text proposed by the Commission, the Council consulted the European Parliament which approved the text on July 3, 2002. The procedure for the adoption and the signature of the Agreement will now be continued in the Council.

Basic provisions

To a large extent the draft agreement is similar to the 1999 EU/Canada and US/Japan ones. All the usual clauses and tools of bilateral antitrust cooperation are present. Below is presented the content of the proposed agreement with emphasis on the most important provisions :

Objectives and definitions

The envisaged agreement aims at establishing a system of cooperation and coordination between the competition authorities of the two sides, essentially in order to promote the effectiveness of antitrust enforcement on each side and to reduce the likelihood of conflicting or overlapping

⁽¹⁾ COM(2002) 230 final, 8.5.2002, available on line at http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0230en01.pdf

⁽²⁾ Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, OJ L 95, 27.4.1995, pp. 47 – 52 as corrected by OJ L 131, 15.6.1995, pp. 38–39.

⁽³⁾ Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173, 18.6.1998.

⁽⁴⁾ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ L 175, 10.7.1999.

⁽⁵⁾ Available online at <http://www.usdoj.gov/atr/public/international/docs/3740.htm>

⁽⁶⁾ See the Proposal for a Council Decision on the consequences of the expiry of the ECSC Treaty on international agreements concluded by the ECSC, COM(2002) 330 final, 20.6.2002, available online at http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0330en01.pdf

decisions. The two competition authorities involved are the European Commission, on the EU side, and the Japanese Fair Trade Commission (the 'JFTC') on the Japanese side.

In addition to the usual terms, such as 'anticompetitive activities' or 'competition laws', the draft text defines the meaning - for the purposes of the agreement - of the term '*competent authority of a Member State*'. Pursuant to Art. I.2.(b) this term means one authority for each Member State mentioned in Art. 299(1) of the EC Treaty competent for the application of competition laws. After the conclusion of the agreement, the Commission will be expected to notify a list of such authorities to the Government of Japan, and to maintain this list up-to-date when necessary (mainly after an enlargement of the EU or the establishment of a new competition authority). This provision reflects on one hand the increasing cooperation regarding enforcement activities that takes place within the network of European Competition Authorities — and the need for relevant information to circulate between members of the network —, while, on the other, providing Japan with a guarantee that the information it will supply under the agreement will not end up with recipients that can not be precisely identified in advance. As far as the other definitions are concerned, it is also interesting to note that market research, studies and surveys are outside the scope of the term '*enforcement activities*', if — and for so long as — they are not linked to a suspected infringement of competition rules. Finally, the term '*territory of a Party*' means for the EU 'the territory to which the Treaty establishing the European Community [...] apply.'

Notifications

The two competition authorities will exchange notifications and inform each other each time one of them considers that its enforcement activities may affect 'important interests' of the other. According to Art. II.2, this would in principle be the case when investigations by one authority are related to investigations in the same case by the other authority, when they are directed against nationals of the other party to the agreement (the draft specifies that in the case of the EU this refers to nationals of the Member States of the EU) or against companies incorporated or organised under the applicable laws and regulations within the territory of the other party. Notifications will also be carried out in the case of investigations involving anticompetitive activities carried out in any substantial part within the territory of the other party, concerning a merger or acquisition in which

a company incorporated within the territory of the other party is involved, concerning conduct considered by the notifying competition authority to have been required, encouraged or approved by the other party, or when they are expected to lead to sanctions that would require or prohibit conduct within the territory of the other party.

Notifications and exchanges of information can be carried out at any point during the investigation of a case. However, specific provisions in the draft agreement specify a number of 'triggering' events which should provoke a notification, if the other conditions and circumstances are such that a notification is required in the particular case. As regards *merger* cases, the events that would trigger a notification would be i) for the EC the Decision to initiate proceedings with respect to the concentration, pursuant to Art. 6(1)(c) of Council Regulation (EEC) No. 4064/89 and the issuance of a Statement of Objections, and ii) for Japan the issuance of a request to submit documents, reports or other information concerning the proposed transaction pursuant to the Antimonopoly Law and the issuance of a Recommendation or the Decision to initiate a hearing in a merger case (Art. II.3). As regards *non-merger* cases, notifications are carried out as far in advance as practically possible before i) for the EC, the issuance of a Statement of Objections and the adoption of a Decision or settlement, and ii) for Japan, the filing of a criminal accusation, the filing of a complaint seeking an urgent injunction, the issuance of a Recommendation or the Decision to initiate a hearing and the issuance of a surcharge payment order when no prior recommendation with respect to the payer has been issued (Art. II.4). The general approach here is that the notification should take place at a stage in the proceedings early enough to allow the Party receiving the notification to react to it and the Party handling the case to take account of the other Party's opinion. Notifications are expected to be sufficiently detailed to permit an initial evaluation by the Party receiving the notification of the effects of the enforcement activities carried out by the other Party on its important interests.

Enforcement assistance and coordination

The two authorities are expected to *assist* one another whenever their laws, their important interests and their reasonably available resources allow them to do so. In particular, one competition authority will inform the other of certain enforcement activities it undertakes that involve infringements affecting competition conditions in the territory policed by the other authority, will provide

information that will assist the other authority to launch enforcement activities and will, subsequently, provide it with information relevant to such enforcement activities (Art. III).

In certain cases, the two authorities will be carrying out ‘related proceedings’ (proceedings open simultaneously on both sides and investigating one and the same conduct or closely related conduct, e.g. a multi-product international cartel active in both the EC and Japan or involving firms from both the EC and Japan). In such cases a specific anti-competitive conduct on the market of one Party may be associated with identical conduct on the market of the other and evidence on a specific illegal activity may be located on the territory of both parties. Under such circumstances, the two competition authorities can profitably coordinate their activities, including their respective investigations and provide each other with assistance, always to the extent compatible with their respective laws, important interests and reasonably available resources (Art. IV).

The draft contains the usual clauses detailing the factors to be taken into account in order to decide whether coordination should be envisaged on a specific related case (Art. IV.2) and urging each competition authority to will give careful consideration to the objectives pursued by the other authority in its enforcement activities (Art. IV.3). Interestingly, Art. IV.4 provides that when the two authorities cooperate on a related case, one authority – upon a specific request from the other — may seek to obtain a waiver from a person that has provided it with confidential information, in order to share this information with the authority that has emitted the specific request. Finally, either side may at any time notify the other of its intention to limit or terminate the coordination and pursue its enforcement activities independently (Art. IV.5).

Positive and Negative Comity

Art. V.1 of the draft is the usual ‘positive comity’ clause, which allows a Party whose interests are adversely affected by activities within the other Party’s jurisdiction to bring the matter to the other Party’s attention. The latter Party might have been unaware of the problem or might not have considered it a priority. Once it is aware of the situation and of the fact that it affects the important interests of the other Party, the requested Party may, at its own full discretion, take any appropriate measure to enforce its competition rules. Art. V.2 stipulates the contents of the ‘positive comity’ request. Art. V.3 states that the obligations of the Party

receiving a ‘positive comity’ request is to consider it carefully and to inform the requesting Party of its decision as soon as practically possible. However, if the requested Party decides to initiate enforcement activities, the requested Party’s competition authority shall inform the requesting Party of significant developments and the outcome of the activities. Finally, the requested Party’s competition authority has full discretion in its decision whether or not to undertake enforcement activities with respect to the anti-competitive activities identified in the request and that nothing in this article can preclude the requesting Party from withdrawing its request.

Art. VI.1 is otherwise known as the ‘negative’ or ‘traditional comity’ clause. It provides that each Party shall give careful consideration to the other Party’s important interests throughout all phases of competition enforcement activities. According to Art. VI.2, once a case has been earmarked for traditional comity, each Party shall endeavor to provide timely notice of significant developments in its enforcement activities. Art. VI.3 sets out several factors that the Parties will consider whenever their enforcement activities may adversely affect the important interests of the other Party. The concept of ‘important interests’ must be understood in terms of the purpose of the Agreement, which is the establishment of effective cooperation in the competition sphere. The interests referred to must therefore be important by reference to that objective.

Exchange, use and protection of confidential information

One of the key provisions in the proposed agreement (Art. IX) contains the rules governing the treatment of confidential information. Art. IX.1 provides that neither Party is required to communicate information to the other where communication is prohibited by its laws or incompatible with its interests. Art. IX.2a states that information exchanged may be used only for the purposes of the Agreement. Art. IX.2b states that information communicated in confidence between the Parties or their competition authorities must be maintained confidential. Art. IX.3 provides that information exchanged under the agreement must be used in accordance with the terms and conditions specified by the Party providing the information. Art. IX.4 provides that when uncertain on the capacity of the other side to provide all necessary guarantees and protections requested, a Party may limit the information it communicates.

Art. IX.5 provides for certain *exceptions* from the above rules of absolute protection of information exchanged under the agreement. This is the case when (a) the Party using the information has obtained the prior consent of the Party providing the information and (b) under certain conditions, when the receiving Party has a legal obligation to grant access to the information. In such cases the receiving Party i) shall not take any action which may result in a legal obligation to make information provided under this Agreement available to a third party, without the prior consent of the providing Party, ii) shall, when possible, give advance notice to the providing Party, upon request consult with it, and give due consideration to its important interests, and iii) shall use all available measures under its applicable laws and regulations to maintain the confidentiality of information as regards applications by a third party or other authorities for disclosure of the information concerned.

Finally, Art. IX.6 ensures that any EC Member State concerned by the enforcement activities of the Japanese competition authority is kept informed of all notifications received under the agreement. The competent authorities of the EC Member States concerned will also be informed of any cooperation and coordination of enforcement activities. In this regard, a request from the Japanese competition authority not to disclose confidential information should be respected.

Conclusion

The proposal of the Commission to the Council stresses the interest for the EU to reinforce its bilateral cooperation with Japan — one of our main trading partners — in the area of competition enforcement. Indeed, an important number of firms based in Japan are active in the European markets and European firms are increasingly interested in developing their activities in the Japanese markets and could benefit from the proposed cooperation agreement between the two sides regarding the application of their respective competition rules. The envisaged agreement, if concluded by the Council, will increase the ability of the Commission and the Fair Trade Commission of Japan to work together on competition cases of mutual interest and assist each other. This, in turn, will increase the effectiveness of enforcement and the likelihood that anti-competitive activities can be brought to an end as soon as possible. The envisaged agreement will also lead to a much closer relationship between the Commission and the JFTC and to a greater understanding of each other's competition policies. Co-ordination will also benefit companies by ensuring that they are not unnecessarily subjected to conflicting demands by the competition authorities. For these reasons, the Commission has proposed that the Council proceeds with the conclusion of such an agreement on the basis of the negotiated draft.

Sixth European Competition Day in Copenhagen

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

The sixth European Competition Day took place on 17.9.2002 in Copenhagen. It focused on two themes: 'Competition, consumers and globalisation' and 'Competition and consumers in the EU compared with other regions'. The audience of 250 participants was composed of lawyers, representatives of industry, public authorities, university teachers, consumer representatives and journalists.

The conference was opened by Danish Economic Affairs Minister Bendt Bendtsen who emphasised Denmark's undertaking to have the new rules for the implementation of Articles 81 and 82 adopted by the Competitiveness Council in November. Commissioner Mario Monti introduced the first topic with a speech on the need for a global competition policy. He underlined that in a global economy the benefits for consumers deriving from competition can be guaranteed by competition authorities only if international co-operation among them is stepped up. In this context he presented the initiative to create an International Competition Network. Subsequently Mrs Randzio-Plath, MEP, pleaded in favour of a structured link between competition and employment policy, notably for participation rights of employee representatives in merger proceedings. Jim Murray, Director of the Bureau of European Consumer Associations, acknowledged the need to create more consumer awareness of the value of competition and asked for closer involvement of consumers in competition proceedings as interested parties. He proposed to give consumers the possibility to seek redress in courts for damages caused by anticompetitive behaviour.

The ensuing panel debate focussed on these issues, in particular on the link to employment policy, but also on the Commission's reform proposals for antitrust and merger proceedings and the application of competition rules to cultural activities.

In the afternoon session Richard E. Hecklinger, Deputy Secretary General of the OECD, compared the different competition cultures in the EU and the USA. He suggested that 'keener' competition in the US may be caused by a much stronger pro-competition approach in legislation. Finn Lauritzen, Head of the Danish Competition Authority, presented competition benchmarks, indicating that Denmark would still rate below average in competition performance. Kjeld Johannesen, CEO of Danish Crown, the leading Danish meat processor, criticised competition authorities and their approach, claiming that the real world did not coincide with 'market ideals' of civil servants.

In the panel debate this last position was not supported. It was noted that, possibly due to the high concentration in food processing, prices in Denmark were be relatively high and product choice too low.

The Copenhagen European Competition Day offered interesting and sometimes entertaining presentations and stimulating debates to a diverse audience. It certainly contributed to the objective to raise public interest in competition policy, as was underlined by good extensive coverage in the Danish press.

The full text of the speeches is available under <http://www.ks.dk>.

EUROPEAN COMPETITION DAY IN ATHENS

The seventh European Competition Day takes place on 14 February 2003 in Athens.

The conference will be hosted and organised by the Greek Competition Authority in collaboration with DG Competition.

More information, notably on topics and registration will be published on DG Competition's website as soon as it is available.

Commission fines eight Austrian banks for participating in the 'Lombard Club' cartel

Alexander WINTERSTEIN, Directorate-General Competition, unit D-1 ⁽¹⁾

Introduction

On 11 June 2002 the Commission concluded its first full-blown cartel inquiry into the banking sector by imposing fines totalling € 124,26 million on eight Austrian banks for their participation in a wide-ranging price cartel dubbed the 'Lombard Club', covering the entire Austrian territory.

Prompted by press reports the Commission, supported by officials of the Austrian authorities, conducted simultaneous surprise investigations at several banks in June 1998. During those 'dawn raids' the Commission discovered hundreds of contemporaneous cartel documents — minutes of meetings, file notes, telephone notes, correspondence etc. On the basis of the vast amount of direct evidence about hundreds of cartel meetings since 1994, the Commission was able to reconstruct the highly sophisticated cartel network by using the banks' own very words: the factual part of the Decision consists almost entirely of *verbatim* quotes (marked in this article in *italics*). This article summarises the Decision's findings of fact and legal assessment ⁽²⁾.

The Lombard network

The cartel network was comprehensive: it covered essentially all banking products and services as well as advertising — or rather the absence thereof. It was highly institutionalised and closely interconnected, and covered the entire country — '*down to the smallest village*', as one bank aptly put it. For every banking product there was a separate committee on which the competent employees at the second or third level of management sat. The individual committees were part of an organisational whole.

Each month the CEOs of the largest Austrian banks got together as the top-level body ('Lombard Club'). One level down were the product-based specialist committees, most of which met in Vienna. These included the 'Lending Rates Committees' and the 'Deposit Rates Committees', which, as their names suggest, dealt

with lending and deposit interest rates. Both the Lombard Club and the Vienna-based committees had a guiding function for the numerous 'regional committees', which held regular meetings in every province of Austria.

Within the Lombard network, a constant flow of information took place in particular between the various committees as well as between them and the Lombard Club at the top. In controversial cases, the Lombard Club's guidance was awaited. Discussions in one committee were often suspended pending agreement in another. In addition, even outside this institutionalised network, numerous contacts took place between representatives of the banks concerned — sometimes at the highest level — on interest rates and charges/fees.

The cartel meetings

Often it was a change in the key lending rates by the Austrian Central Bank that prompted the banks to come together '*for the joint reflection of measures to be taken*'. Once all opinions and proposals were on the table, negotiations began on a joint manner of proceeding. The banks' internal documents show that the negotiations regularly produced concrete results, including the deadline(s) for implementing the agreed measures. From time to time, the banks did not immediately succeed in reaching a consensus, and the common decision-making process often went through several meetings of different committees. At times, even the subsequent information of the public was arranged by means of '*co-ordinated language*'.

There were instances where even such intensive contacts did not suffice. The banks then had to resort to additional '*various discussions and agreements*', '*further telephone conversations*', '*telephone contacts between the banks*', to '*the managing directors [phoning] each other and [discussing] a co-ordinated approach as soon as possible*' or to '*final negotiation*' outside the

⁽¹⁾ Currently seconded to the Task Force 'Future of the Union'.

⁽²⁾ The decision is under appeal to the CFI.

competent committees themselves. Occasionally, however, the banks were ultimately unable to agree.

Those banks that, from time to time, changed interest rates without prior co-ordination caused ‘turmoil’ in the relevant committee and were subjected to sharp criticism from their competitors. Such ‘completely surprising’ measures — since they had ‘*obviously been kept secret*’ — were ‘*regarded by all the other banks as not very appropriate*’ inasmuch as they ‘*contradicted the stated objective of all the relevant committee meetings*’. If, therefore, any bank really felt it had to undertake ‘*surprising interest rate changes*’, then at least ‘*immediate information should be provided to all members of the Lending rates committee*’.

Article 81

In the Commission’s analysis, the banks’ behaviour amounted to a single, complex infringement of Article 81 EC. Those aspects that do not qualify as agreements certainly constitute concerted practices, systematically eliminating uncertainty about the competitors’ next competitive moves. Given that most Austrian banks participated in the cartel to a certain degree the Commission has selected the addressees of the present decision on the basis of objective criteria, i.e., the intensity of their involvement in the most important committees.

In the view of the Commission, the sole purpose of this elaborate structure was to restrict competition with regard to its most important parameters in that sector. In their own internal documents the banks indeed expressed their desire to achieve, through their ‘*useful*’ and ‘*constructive*’ agreements, ‘*controlled*’, ‘*reasonable*’, ‘*standardised*’, ‘*disciplined*’, ‘*eased*’, ‘*sensible*’, ‘*limited*’, ‘*moderate*’ and ‘*orderly*’ competition.

Given the essentially national scope of the Lombard cartel, the decision sets out in particular detail the reasons why this comprehensive and all encompassing cartel was apt at least potentially to change cross-border trade patterns. Going beyond relying on the fact that the cartel covered the territory of an entire member state, the Commission assessed both the demand side (e.g., loans to and deposits from foreign customers, cross-border services, impact on exporting/importing businesses) and the supply side (e.g., influence of the cartel on entry decisions of foreign banks).

Addressing the banks’ arguments to the contrary, the Commission confirms that the cartel prohibition fully and without reservation applies to banks.

The admittedly important role played by banks in any national economy does not dispense them from respecting the EC competition rules.

Fines

The Commission considered that the present infringement was of a very serious nature given that the cartel covered the entire territory and essentially all banking products and services. In addition, on the basis of abundant evidence the Commission arrived at the conclusion that the cartel decisions were either implemented or taken into account by the banks when they took their commercial decisions after cartel meetings. Thus, there could not be any doubt that the cartel did have an impact on the market — to the detriment of banking customers.

When determining the basic amounts of the fines the Commission took due account of the fact that the Austrian banking market is organised, for historical reasons, by ‘sector’. Within each of those banking groups (comprising savings banks and two types of co-operative banks, respectively), so-called umbrella institutions — each of which are important commercial banks in their own right — assume the task of internal co-ordination and representation vis-à-vis the other sectors. Within the Lombard network, those institutions participated not only in their own commercial interest but also as representative of their respective group. The Decision sets out in detail how relevant information was forwarded within each group, thus establishing how the umbrella institutions significantly contributed to the pan-Austrian impact of the cartel.

The Commission considered that there was no room for taking into account any mitigating circumstances. For example, the Commission found that the banks’ claim to have been unaware of the illegality of their cartel behaviour was at odds with internal documents that record the banks’ reflections about how to avoid or destroy traces of their meetings. Neither could the Commission accept as mitigating the fact that Austria joined the EU relatively recently.

Finally, with regard to the application of the 1996 Leniency Notice the Commission granted a 10% reduction because the banks had not contested the facts set out in the Statement of Objections. In this context, the Commission confirmed its established position that replies to Article 11 requests can be considered as relevant ‘co-operation’ under the 1996 Notice only to the extent that such replies go beyond the scope of the request concerned.

Clarifying the application of the competition rules to card payment systems: the Commission's exemption decision on the Multilateral Interchange Fees of Visa International

Stephen RYAN, Directorate-General Competition, unit D-1

On 24 July 2002 the Commission adopted an exemption decision in its case concerning certain 'multilateral interchange fees' of Visa International, thus clarifying the analysis, under article 81 of the Treaty, of an important aspect of most common card payment systems, but one which is normally invisible to consumers.

A multilateral interchange fee, or 'MIF', is a payment made between the two banks involved in a payment operation with a payment card (the cardholder's bank, or 'issuing' bank, and the retailer's bank, or 'acquiring' bank) which is determined multilaterally by the banks within the payment system.

In the Visa system there is a rule stating that in the absence of a bilateral agreement between two banks on an interchange fee, a default MIF must be paid by the retailer's bank to the cardholder's bank at a level laid down in the Visa International payment card rules, which have been notified to the Commission. There are different MIF levels for different types of Visa cards (e.g. consumer cards and corporate cards) and for different types of transactions (e.g. paper based or electronic transactions). Different MIF levels usually also apply, depending on whether the payment is domestic (within a country), 'intra-regional' (that is, cross-border but within the same Visa 'region'⁽¹⁾), or 'inter-regional' (that is, between two Visa 'regions', such as a payment made in Europe by a US Visa cardholder). The levels of these fees are laid down by the relevant Visa board (national, 'regional' or worldwide) and effectively constitute agreements between the member banks in the Visa system.

Figure 1 illustrates the functioning of a MIF in a typical card payment operation in a system such as that of Visa, with hypothetical values inserted. For a card payment for a nominal value of € 100, if the MIF is defined as 1% of the value of the operation, then the cardholder's bank will deduct € 1 from the amount it reimburses to the retailer's bank, thus in this example only paying € 99 to the retailer's bank. The retailer's bank then deducts a further amount to cover its own costs and profit

margin; in this hypothetical example, that amount is € 0.50, giving an amount of € 98.50 actually received by the retailer for a purchase with a face value of € 100.

It can thus be seen that a MIF is effectively a device for shifting the burden of the costs of a card payment system between the two different users of the system, namely retailers and cardholders. These two users, both of whom are essential to enable a card payment to take place, have somewhat conflicting interests, in as much as each would prefer the costs of the system to be borne by the other. The MIF in the Visa system, as in the majority of card systems, shifts a significant proportion of the costs of the system onto retailers.

The Commission's exemption decision of 24 July 2002 only applies to cross-border payment transactions with Visa consumer cards (credit cards, deferred debit cards and debit cards) at retailer outlets within the European Economic Area, which represent about 10% of all Visa card transactions in the EEA. The decision does not apply to MIFs for domestic Visa payments within Member States, nor to MIFs for corporate Visa cards (that is, cards used by employees for business expenditure).

The exemption was only granted following major changes by Visa to the MIFs in question, which were made after the Commission issued a Statement of Objections in September 2000 on the former, unmodified, system. In that system the Visa Board had freedom to set the MIF at any level it wished, and the various MIF levels were treated by Visa as business secrets.

The reforms by Visa to the MIFs in question involve three main elements:

- First, Visa will progressively reduce the level of its MIFs for the different types of consumer cards (that is credit, deferred debit and direct debit cards). As concerns Visa deferred debit card and credit card payments, the MIF will be reduced to a weighted average of 0.7% of transaction value in 2007. For debit card transactions Visa will introduce immediately a flat-rate MIF

⁽¹⁾ The Visa 'EU Region' in fact includes 26 countries.

of € 0.28 for debit card transactions. The levels of MIFs prior to these reductions cannot be revealed as they are considered business secrets by Visa; however, Visa estimates that the effect of the modifications (debit, deferred debit and credit cards combined) on interchange revenues for issuing banks from cross-border transactions will be a reduction of more than 20% over the five year period 2002-2007.

- Secondly, the MIFs will be capped at the level of costs for three specific services provided by issuing banks, which in the Commission's view correspond to services provided to those retailers who ultimately pay the cross-border MIF. These services are: transaction processing, payment guarantee ⁽¹⁾ and free funding period ⁽²⁾. The costs of these services will be determined by a cost study, to be carried out by Visa and audited by an independent accountant. This cap will apply independently of the reductions in the level of the MIF offered by Visa (that is, if the cost cap is below 0.7%, then the MIF will have to be below 0.7%).
- Furthermore, Visa will allow member banks to reveal information about the MIF levels and the relative percentage of the three cost categories (currently considered business secrets) to retailers at their request. Retailers are to be made aware of this possibility.

These reforms by Visa were described in a notice in the Official Journal in August 2001 ⁽³⁾ and following comments from third parties, they were further amended by Visa on certain details. For example, Visa undertook to introduce a new MIF for transactions by telephone and mail order, where no payment guarantee against fraud is provided. This MIF will reflect the specific costs pertaining to such payments.

Visa has undertaken to implement all of the changes contained in its proposal. However, for technical reasons, it will only be able to introduce the new MIF rate for mail order and telephone payments in April 2003.

A complaint against *inter alia* the MIFs in the Visa International payment card rules was lodged with

the Commission in 1997 by EuroCommerce, a European organisation of retailers. EuroCommerce regards MIFs as a 'tax on retailers', considering that there are no services provided by issuing banks to the benefit of retailers, and therefore that the amount of interchange payable by acquiring banks to issuing banks should be zero.

In its decision the Commission rejects those arguments, concluding that, although the amended Visa MIF involves a price agreement between the Visa banks within the meaning of Article 81(1) of the EC Treaty, it meets the conditions for an exemption. In particular, the Commission accepts that some kind of default agreement on the terms of exchange between issuing banks and acquiring banks is necessary in practice in a large-scale international payment system, as without it bilateral negotiations between many thousands of banks would be highly inefficient and increase costs significantly. Nevertheless, a MIF has in practice the effect of dividing the costs of a payment system between the two different users — cardholders and retailers — and for that reason only a MIF set in a manner which is equitable vis-à-vis both of these can qualify for an exemption. The Commission considers the revised MIF of Visa to meet this condition, in particular as it only includes costs which Visa has satisfied the Commission to be to the benefit of those retailers by whom this MIF is ultimately paid — namely those retailers with whom cross-border payments with Visa cards are carried out — in the light of the specific circumstances pertaining to cross-border payments.

The EuroCommerce complaint is directed against all MIFs in all card systems within Europe, both for cross-border and domestic payments. Certain MIFs of other card systems (in particular the cross-border MIFs in the MasterCard system in Europe) have been notified to the Commission. The Commission will carry out a separate assessment of those other MIFs, and also of cross-border MIFs for corporate cards in the Visa system, which are not covered by the present decision. For domestic MIFs, the Commission will first of all have to consider whether it or national competition authorities are competent (that is, whether or not there is

⁽¹⁾ The term 'payment guarantee' is used to describe the promise of the issuing bank to honour payments to the acquiring bank, even those which turn out to be *inter alia* fraudulent or for which the cardholder ultimately defaults, on condition that the retailer undertakes all the security checks necessary to enable the issuing bank to promise payment. This promise is then extended by acquiring banks on to retailers, and effectively constitutes a kind of payment insurance for retailers.

⁽²⁾ The 'free funding period' corresponds to the cost of any time difference between payment by the cardholders' bank to the acquirer and the time when either payment must be made by the cardholder, or the balance of the credit card bill rolled over into the extended credit facility, to which a rate of interest is applied (that is, it does not include any costs arising from the granting of extended credit to cardholders). This 'free funding period' to cardholders is considered by the Commission to benefit retailers in a cross-border context by stimulating sales and increasing turnover.

⁽³⁾ OJ C 226/21 of 11.8.2001.

an appreciable effect on trade between Member States or not).

MIFs are currently the subject of investigation by various competition and regulatory authorities, both inside and outside the European Union. In particular:

- on 27 November 2001 the Bank of Italy adopted a decision exempting the MIF in a domestic Italian debit card payment scheme, PagoBancomat, after the level of the MIF was reduced to reflect relevant costs;
- on 25 September 2001 the UK Office of Fair Trading issued a statement indicating that it provisionally considered that the domestic MIF within the MasterCard system currently does not fulfil the conditions for exemption under the UK Competition Act. No final decision has been adopted in that case;
- on 27 August 2002 the Reserve Bank of Australia adopted reforms to credit card schemes in Australia. As concerns MIFs, the RBA, like the Commission, imposed the use of an objective, transparent and cost-based benchmark for determining interchange fees ⁽¹⁾.

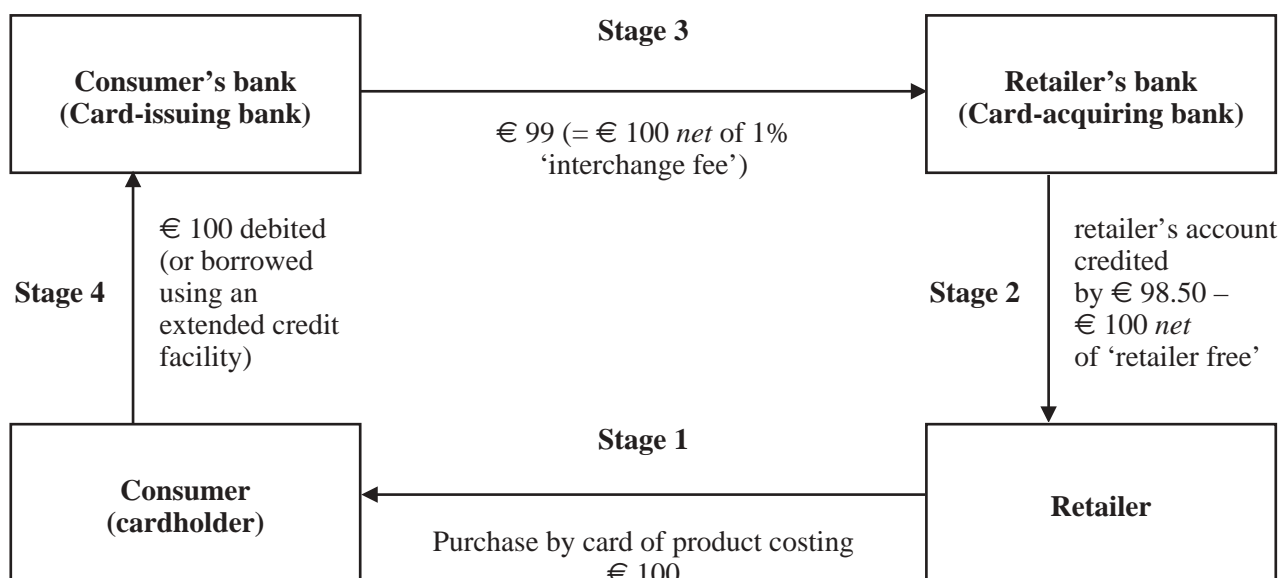
However, the Commission's case is different from the investigation by the US Department of Justice against MasterCard and Visa, which led to a US

District Court judgement on 9 October 2001. That investigation did not concern interchange fees in any way, but rather rules of Visa and MasterCard prohibiting member banks from issuing cards of competing brands, and the 'duality' issue, meaning the effects on competition of the cross-membership of banks in both systems.

The Commission's decision of 24 July 2002 confirms previous caselaw and Communications to the effect that MIFs constitute a restriction of competition under article 81 of the Treaty ⁽²⁾. However, it provides much greater detail than previous caselaw on the criteria for evaluating whether MIFs can benefit from an exemption or not, in particular, the principle that in order to be exempted, a MIF must be reasonable and equitable as between the two users of a card system, retailers and cardholders. However, it should be emphasised that the assessment of the exemptability of the reformed Visa MIF was carried out by the Commission in the context of cross-border payments within the Visa payment scheme only. An assessment of MIFs for domestic payments, or in different payment systems than Visa, would have to be made in the light of the different market conditions applicable to such cases. In particular, the question of what constitutes a reasonable and equitable MIF might be answered differently in different circumstances.

Figure 1

Illustration of a typical Visa card payment transaction, with a hypothetical MIF of 1% of transaction value, and a hypothetical retailer fee of € 1.50 per transaction



⁽¹⁾ For more details, see : <http://www.rba.gov.au/PaymentsSystem/PaymentsPolicy/CreditCardSchemes/FinalReforms/index.html>

⁽²⁾ See Commission decisions ABB (OJ L 7, p 27 of 9.1.1987), ABI (OJ L 43 p 51 of 13.2.1978.), NVB (OJ L 253 p 1, of 30.8.1989.) and NVB II (OJ L 271, p. 28 of 21.10.1999.). Compare also the Commission's 'Notice on the application of the EC Competition rules to cross-border credit transfers' (13.09.1995, SEC(95) 1403 final).

Commission publishes for comments a draft block exemption regulation for the insurance sector

Stephen RYAN

Introduction

Since 1992, there has been in force a Commission Regulation block exempting certain types of agreements and concerted practices between insurance undertakings ⁽¹⁾. That Regulation expires on 31 March 2003, and it has been decided to prepare a new insurance block exemption, building on the present Regulation, but with changes, based on the evolution of the sector, and the Commission's experience since 1992 in dealing with insurance cases ⁽²⁾. As part of the procedure for the adoption of a new Regulation, the Commission published, on 9 July 2002, a draft of a proposed new Regulation, with an invitation to interested third parties to submit their comments.

Background

The draft revised insurance block exemption Regulation covers the same four types of agreement in the insurance sector as the present Regulation, namely agreements on:

- the establishment of common risk premium tariffs;
- the establishment of common standard policy conditions;
- the joint coverage of certain types of risks;
- the testing and acceptance of safety devices.

It thus does not include two further categories of agreements between insurance undertakings, which the Commission is entitled to include in its block exemption Regulation, under the terms of the Council enabling Regulation ⁽³⁾, namely agreements on claims settlement, and on registers of aggravated risks. In these two areas, the Commission considers that it has not gained sufficient experience since 1992, nor has it encountered evidence of major competition issues which might necessitate a block exemption for such agreements.

The legal presentation of the draft new Regulation differs from that of the existing Regulation, to take account of developments in this field since 1992. Moreover, in keeping with a more economic and less 'clause-based' approach, it does not contain lists of approved ('white') clauses.

The four types of agreement covered by the draft new Regulation, with particular attention to the main changes as compared with Commission Regulation 3932/92, can be summarised as follows:

Indicative risk premiums

Risk premiums are an indicative estimation of the likely future cost of claims for a risk in any particular category. The risk premium breaks down into two components, the first of which is the 'pure premium'; this is a historical statistic on the number and cost of claims in the past for risks in a given category. The second element in the risk premium relates to the future; it is a correction, based on studies, to account for estimated future changes in the number and size of claims. National associations of insurers in the Member States normally produce statistics on pure premiums, based on information supplied by insurers, and carry out studies on likely future trends, and calculate an indicative risk premium on that basis. Regulation 3932/92 exempts this joint activity, on certain conditions.

None of the existing conditions for exemption has been removed in the new draft. However, one condition for exemption of joint calculation of indicative risk premiums implicit in the existing Regulation has been made explicit: as concerns pure premiums, statistics must be broken down into as much detail as is possible, while leaving a statistically useful sample. The reason for this condition is that the more statistics are broken down, the more freedom insurers have to differentiate their prices to end consumers. A further new condition for exemption is that the statistics on risk

⁽¹⁾ Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. Official Journal L 398, 31.12.1992.

⁽²⁾ This experience was described in a report of 1999: COM(1999) 192 final of 12/5/1999. Available on the internet at: <http://europa.eu.int/comm/competition/antitrust/others/>

⁽³⁾ Council Regulation N° 1534/91 of 31 May 1991.

premiums be made available on reasonable and non-discriminatory terms, to any insurance undertaking which requests access to them. This condition aims particularly at insurance companies considering entering the market in question, but which need access to the statistics before taking their decision.

Standard policy conditions

Standard insurance policy conditions for many types of insurance policy are produced by national associations of insurance undertakings. Regulation 3932/92 does not authorise any compulsory clauses comprising standard conditions; all standard conditions must be optional. Certain standard conditions ('black clauses') are prohibited even if they are optional. Other than such clauses, Regulation 3932/92 grants an exemption to all standard policy conditions, on condition that they be indicative and non-binding.

However, in the revised draft Regulation, standard policy conditions — even those which are non-binding and not defined as 'black clauses' — are only exempted if they are agreed in conjunction with the joint calculation of pure premiums and joint studies related to risk premiums, and only in so far they are both necessary and exclusively used for such calculations or studies. This is because, in the Commission's view, the insurance sector has not so far conclusively demonstrated that such standard policy conditions serve consumer interest, except insofar as they are necessary to calculate risk premiums ⁽¹⁾.

Common coverage of certain types of risks (pools)

Insurance pools involving a number of insurers are frequent for the coverage of large or exceptional risks, such as aviation, nuclear and environmental risks, for which individual insurance companies are reluctant to insure the entire risk alone. Regulation 3932/92 subjects the exemption of pools to market share thresholds: 10% for co-insurance pools and 15% for co-reinsurance pools. The revised draft Regulation increases these market shares, to 20% for co-insurance pools and to 25% for co-reinsurance pools.

In addition, in the revised draft, a new exemption with no market share threshold applicable, is intro-

duced for insurance pools which are newly-created in order to cover a new risk, for the first three years of their existence. This is based on the fact that for new risks, where no historical information on claims exists, it is not possible to know in advance what subscription capacity is necessary to cover the risk, and therefore it is considered appropriate to exempt a pooling arrangement for the insurance of new risks for a limited period of time — three years in the draft Regulation — until there is sufficient historical information on claims to assess the necessity or otherwise of one single pool.

Safety Equipment

In most Member States, there are lists, drawn up by the national association of insurers on the basis of technical specifications, of approved safety equipment (alarms, anti-theft and anti-fire devices) which meet certain criteria. Most insurers grant an insured party a reduction in premiums if an approved safety device is used. Regulation 3932/92 grants an exemption to the joint determination of these lists and the technical specifications (but not to any agreements concerning the use to which the lists are put, such as the granting of reduced premiums, as this is a matter for individual insurers). There are great differences from one Member State to another in the level of stringency of the technical specifications. Many safety devices are thus eligible to qualify insured parties for reductions in their premiums in certain Member States but not others.

In the revised draft Regulation, a new condition for exemption of agreements between insurers on technical specifications for security equipment has been introduced. Such agreements, in order to qualify for the block exemption, must explicitly provide for the recognition of security devices installers or maintenance undertakings approved by a similar such national agreement in another Member State. This is because currently differences between such national agreements constitute an obstacle to the free movement of goods. The new condition for exemption attempts to encourage the creation of a genuine single market in safety equipment, which does not currently exist. Furthermore, this condition is intended to act as a spur to the development of European-level standards and technical specifications.

⁽¹⁾ Standard clauses are closely linked to indicative risk premiums, since statistical databases on numbers and amounts of claims for certain categories of risks are of little use without clarification of the insurance policy conditions to which they relate.

Conclusion

The draft revised insurance block exemption Regulation is published in the Official Journal ⁽¹⁾ and is available on the internet at the following address: <http://europa.eu.int/comm/competition/antitrust/others>. The deadline for comments on the draft was

30 September 2002. The Commission will now carefully evaluate comments received, and consider whether any changes to the draft revised Regulation are appropriate. Then, following consultation of the Member States, the Commission will definitively adopt a new insurance block exemption Regulation, around the end of this year.

⁽¹⁾ OJ C 163 of 9.7.2002.

Aviation: Combining network synergies and competition — the Commission's approval of the LH-AuA Alliance

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1. Introduction

The liberalisation of the European air transport market during the 1990s has triggered a process of consolidation in the European airline industry. Apart from mergers, airline alliances play an important role in this consolidation process. They can produce benefits by extending networks and improving efficiency. However, they can also restrict competition on certain markets, in particular on routes between hubs of the alliance partners. When assessing such alliances under its competition rules, the Commission therefore has to weigh the benefits in terms of network synergies against the potential losses arising from the reduction in competition. In order to minimise the latter, often remedies are imposed on the alliance partners. This has been done, for instance, in the case of the co-operation between Lufthansa and SAS and in the case of the tripartite Joint Venture Agreement between bmi British Midland, Lufthansa and SAS ⁽¹⁾. Experience has shown, however, that for various reasons new entry is difficult to achieve.

In 1999, Austrian Airlines (AuA) decided to join the STAR alliance ⁽²⁾. As a key step in this regard, it concluded a co-operation agreement with Lufthansa which was notified to the European Commission on 10 December 1999 under Council Regulation 3975/87. AuA and Lufthansa (hereinafter 'The Parties') applied for an exemption under Article 81 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. As the co-operation agreement created a number of serious competition concerns, in May 2001 the European Commission sent the Parties a Statement-of-Objections in which it pointed out its intention to prohibit the agreement. The Commission was concerned that the Parties would eliminate competition on a large part of the

Austrian — German air passenger market. Subsequent negotiations with the Parties led to a significant remedy package. During a thorough 'market test' ⁽³⁾ the Commission could assure itself that on the basis of these undertakings a number of airlines are willing to enter the market concerned. On this basis, on 5 July 2002 the Commission granted the Parties a six year exemption ⁽⁴⁾.

2. The co-operation agreement

The Parties envisage to build a lasting alliance by creating an integrated air traffic system which is built on a close co-operation in commercial activities, marketing and operational activities ⁽⁵⁾. The aim is to improve the use of the Parties' respective hubs in Frankfurt, Munich and Vienna. A *framework agreement* sets out the main features of the co-operation. In addition, both companies have concluded a number of more concrete *implementation agreements*. A 'Special Pro Rate Agreement' (SPA) defines their joint pricing policy. The Parties establish an integrated transport system world-wide, with joint network planning, a joint pricing policy and joint budgeting. This includes reciprocal access to frequent-flyer programmes, code sharing, harmonisation of service levels, and integration of data processing. In information technology the Parties combine their systems in areas like flight data, reservation systems, ticketing, inventory, etc. By agreeing to joint use of airport facilities for passenger clearance, they hope to offer a smooth transfer to their customers.

The network arrangement, which started with the summer season in April 2000, comprises passenger transport, maintenance, airport facilities and ground handling. The most far-reaching co-operation has been established for the bilateral

⁽¹⁾ See in more detail: 'Commission approves British Midland International joining STAR alliance', Competition Newsletter No 3, October 2001, p. 44.

⁽²⁾ 'STAR' is a world-wide alliance of airlines, built on bilateral agreements between the various partners. Its members include United Airlines, All Nippon Airways, Lufthansa, LOT, SAS, Air Canada, AuA and bmi British Midland.

⁽³⁾ A Notice pursuant to Article 16 (3) of Regulation (EC) 3875/87, which contained a full description of the commitments made by the Parties, was published on 14 December 2001.

⁽⁴⁾ The full remedy package is published as an annex to the Commission decision. Commission decision of 5 July 2002, OJ L 242, 10.9.2002, p. 25.

⁽⁵⁾ A summary of the co-operation was published on 11 July 2000 in the Official Journal of the European Communities. Comments from interested parties were received from a large number of competitors, trade unions, travel agencies and ground handling service providers.

traffic between Austria and Germany with the conclusion of a so-called '*neighbourhood agreement*'. The latter creates a joint-venture for traffic between Germany and Austria, which includes the sharing of profit and losses.

3. The relevant market

In the passenger transport market, customers demand a transport service between a point-of-origin and a point-of-destination under certain conditions such as timing and quality of service. This transport service can be carried out by different transport modes (air, rail, road or sea) or a combination thereof. To establish the relevant market in air transport, the Commission has developed the so called point-of-origin / point-of-destination (O&D) pair approach. According to this approach, every O&D pair should be considered to be a separate market from the customer's point of view. The Commission further distinguishes 'time-sensitive' and 'non-time-sensitive' customers. The former wish to reach their destination in the shortest possible time, they are not flexible in terms of time of departure/arrival and they need to have the option of changing their reservation at short notice. Non-time-sensitive customers, on the other hand, are more price-sensitive and accept longer journey times.⁽¹⁾ Finally, a distinction can be drawn between O&D (point-to-point) passengers and transfer passengers, who take connecting flights.

For the purpose of assessing the Parties' co-operation, in its decision the Commission distinguished three categories of passenger air transport service within the EEA:

- (i) services between Austria and Germany;
- (ii) services between Austria or Germany and a third EEA country (e.g. Frankfurt-Rome);
- (iii) services between two third EEA countries (e.g. London-Rome).

As competition concerns arose in particular as regards the neighbourhood agreement, i.e. traffic between Austria and Germany, the following analysis focuses on the first category.

Based on the O&D approach, the Commission considered whether, apart from taking direct

flights between Austria and Germany, passengers would have alternatives due to indirect flights, other transport modes or overlapping catchment areas of different airports ⁽²⁾. Whether such alternatives exist depends on a number of factors. One important issue in this regard is the extra travelling time required. There exists a correlation between the extra time a traveller is willing to spend using an indirect flight or another transport means and the overall travelling time. Given the short distance, the travelling time of direct flights between Austria and Germany is very short. As a result, O&D (point-to-point) passengers are unlikely to accept significant extra time when using alternative transport means.

As set out in detail in the decision, the Commission comes to the conclusion that indirect flights offer an alternative to direct ones for only a few non-time-sensitive travellers. It is therefore concluded that the Parties' direct flights between the two countries are not put under competitive pressure from indirect flights offered by competitors. Similarly, it is found that overlapping catchment areas of two or more airports offer an alternative only to a very limited number of passengers ⁽³⁾. With regard to alternative transport modes, the Commission considers that road and rail only offer an alternative for non-time-sensitive passengers on a limited number of short-haul routes between Austria and Germany ⁽⁴⁾. This view is confirmed by a price comparison. A comparison of a business-class air ticket with a first-class rail ticket and an Air-PEX ticket with a second-class rail ticket reveals that on the routes in question air travel in general is more than twice as expensive as travelling by train or car. This indicates that passengers choose the transport mode on the basis of other criteria than the price (for instance travelling time). If these transport modes were in price competition, one would expect prices to converge or, if prices of alternative transport modes were too low for airlines to match, no air transport to be offered.

4. The Commission's assessment of the co-operation agreement

At the time of the notification in 1999, direct flights were offered on 33 routes between Austria and Germany. Only one route was not operated by

⁽¹⁾ Generally speaking, business travellers are more time-sensitive than leisure travellers and tend to book fully flexible tickets. The second group of passengers are not time-sensitive but pay more attention to the price. These passengers accept longer journey times and may choose indirect flights if they are less expensive than direct ones.

⁽²⁾ For instance, passengers from the Western region of 'Vorarlberg' live in the overlapping catchment areas of Zürich and Innsbruck. They therefore may have the choice between flights offered by the Parties and those offered by Swiss / Crossair.

⁽³⁾ According to data provided by the parties, only about 2-3% of the airline passengers who travel between Austria and Germany live in overlapping catchment areas.

⁽⁴⁾ For example, on the Munich-Salzburg, Munich-Linz and Munich-Vienna routes.

the Parties. ⁽¹⁾ In terms of both the number of total flights and total passenger numbers, the Parties had a combined market share of 100% on 27 of the 33 routes between Austria and Germany. These 27 routes accounted for more than 90% of total traffic between the two countries. Thus, the Parties are by far the strongest competitors on the Austrian-German air transport market.

Even though, with the conclusion of the co-operation agreement, the Parties together had a market share of 100% on all routes of importance in terms of passenger numbers, they continued to face competition in respect of the important category of transfer passengers. Unlike O&D passengers, transfer passengers have a wider choice of flights, with the result that there is greater competitive pressure on the Parties as regards such customers. Long-haul travellers have the choice of various European hubs and may therefore benefit from competition ⁽²⁾.

This is not the case for O&D passengers and regional transfer passengers flying locally between Austria and Germany. For all major routes between Austria and Germany, the category of O&D passengers and regional transfer passengers forms a significant customer market. Given that indirect flights and alternative transport modes in most cases do not offer an alternative, after the establishing of the joint venture, this important customer group depended entirely on the Parties.

Example of the Vienna-Frankfurt route

As an illustration, one may consider the, in terms of passengers, most important route between Austria and Germany. It connects the most important hubs both of AuA and Lufthansa. In 1999, on the route Vienna — Frankfurt there were 560,000 passengers and the parties offered 10 daily flights. A large proportion of all passengers were either point-to-point passengers or regional transfer passengers. By creating the joint-venture, the Parties obtained a 100% market share for direct flights on this route. These passengers did not have a choice but to fly with the Parties.

While the joint-venture eliminated all actual competition on this market, the Commission concluded that considerable entry barriers also restrict severely potential competition. Such entry barriers arise due to:

- (a) At least the Frankfurt airport is very congested and new entrants find it almost impossible to obtain slots at peak times.
- (b) Together, the Parties operate a relatively high number of frequencies. This makes it more difficult for new entrants to establish themselves on the market with additional flights.
- (c) More than half of all passengers are transfer passengers. New entrants on routes between Austrian and German hubs must therefore attract regional and international transfer passengers in order to fill capacity. However, as the Parties develop a joint network, their flights fill most slots which feed flights from and to their hubs.
- (d) The pooling of frequent-flyer programmes strengthens the Parties' position on the market, in particular on the market segment for business customers. A joint frequent-flyer programme constitutes an important entry barrier for airlines which do not have comparable programmes.
- (e) A large proportion of total tickets sold on a specific route are tied to a specific airline because of corporate customer deals and other reasons. Thus, new entrants can actually compete on price for only a small proportion of customers ⁽³⁾.
- (f) The Parties operate with relatively low load factors on routes between Austria and Germany. They thus have sufficient capacity on these routes to react quickly to price changes which could result from a new competitor entering the market.

Other bilateral routes

As regards other routes between Austria and Germany, the reasoning is similar. On routes with fewer passengers, the above-mentioned entry barriers have even greater weight. As demand for flights on these routes is lower, an entrant is obliged to obtain a higher share of total passengers on the route in order to break even.

It was therefore concluded that by entering into the co-operation agreement, the Parties have eliminated competition as regards the market for time-sensitive and non-time-sensitive O&D passengers

⁽¹⁾ Rheintalflug operated 86 flights between Vienna and Friedrichshafen. However, Rheintalflug was taken over by AuA in 2001.

⁽²⁾ For example, to fly from Vienna to the United States, a passenger may fly direct, or indirect via Frankfurt, Amsterdam, Paris, London, etc. He or she would thus have the choice of several competing airlines.

⁽³⁾ Small carriers find it difficult to offer similar deals to potential large customers as they cannot offer a similar range of network services (high frequencies, well-connected flights at hub airports, etc.).

and regional transfer passengers on most routes between Austria and Germany.

5. The exemption decision

As this agreement affects passenger traffic between Member States, it has an impact on trade between Member States. The effect is appreciable. It was therefore concluded that the co-operation agreement is caught by Article 81 (1).

However, in its analysis under Article 81 (3) the Commission comes to the conclusion that the agreement generates efficiency gains. Apart from the bilateral traffic, the Parties' networks largely complement one another. While AuA has focused on medium-haul routes in Europe, especially central and eastern Europe, Lufthansa has focused much more on long-haul services. The merger of these complementary networks results in important synergistic effects and attractive connections for consumers. The co-ordination and extension of the Parties' scheduled networks creates a more efficient network and, in particular, improves connections with Eastern European cities ⁽¹⁾. Consumers benefit from a wider choice of air transport services to more destinations, better connections and convenient scheduling and seamless travel. Consumers also benefit from a wider choice of direct flights between the two countries ⁽²⁾ and connections to Eastern European destinations in particular.

However, the Commission was not convinced that the co-operation agreement allows consumers to share the benefits of the expected cost savings, e.g. through lower prices. Conditions therefore had to be imposed to ensure that competition is not eliminated. Moreover, given that the joint-venture actually eliminates competition on almost all routes between both Member States for O&D traffic, the Commission considered that the threat of potential competition would not be sufficient. It was willing to grant an exemption only after it could assure itself that, as a result of the commitments made by the Parties, there would be actual new entry in the market.

Remedies

The conditions imposed in the decision aim to reduce the above-mentioned entry barriers and to encourage inter-modal competition. Given the serious effects on competition, in comparison to previous decisions, the Commission imposed a number of new remedies on the Parties, in particular the price reduction mechanism, the obligation to enter into Special Prorate Agreements and inter-modal agreements. The market test has shown that the remedy package offers new competitors the possibility to enter the market and to compete effectively. In particular with regard to the envisaged divestiture of slots and the price reduction mechanism, the Parties were willing to make a significant effort to alleviate the Commission's competition concerns.

The Parties are required to make slots available to a new entrant for a route chosen by it up to a maximum of 40% of the slots the Parties operated on the route in question at the time of the notification ⁽³⁾. The number of slots offered exceeds significantly the number of slots which the new entrants have asked for. This remedy therefore allows entrants to expand services in the future and / or new competitors to enter the market.

The price reduction mechanism is a new remedy which has not been used in previous cases. It aims to protect the interests of consumers flying on lighter routes (in terms of passenger numbers). Many of these routes are of limited attraction to potential competitors. The Parties are thus required to apply any price cuts that they introduce on routes subject to competition to three other Austrian-German routes on which they do not face competition. The Parties have some discretion when it comes to choosing these three other routes. As a side effect, this condition affords new entrants some protection from predatory pricing by the Parties by making the costs of price dumping significantly higher for the Parties.

Predation is furthermore made difficult by the frequency freeze which, during the initial start-up period, prevents new entrants being squeezed out by the Parties putting additional capacity on the market. The Blocked Space offers entrants more

⁽¹⁾ The establishment of a more comprehensive European network produces cost savings for the Parties through an increase in traffic throughout the network, improved network connection, better planning of frequencies, a higher load factor and improved organisation of sales systems and ground-handling services. The Parties also expect to make cost savings by jointly developing new sales channels (e-ticketing).

⁽²⁾ As a result of the co-operation agreement, frequencies have increased in bilateral traffic on the routes Frankfurt-Klagenfurt, Munich-Graz, Frankfurt-Innsbruck and Vienna-Nürnberg and new connections have been added between Graz-Stuttgart and Vienna-Friedrichshafen.

⁽³⁾ In addition, they must make 'technical slots' available to a new entrant from a third country to position aircraft at the beginning or end of operations.

flexibility by creating the opportunity to increase the number of frequencies offered to their customers without operating additional aircraft themselves. This increases the attractiveness of their services for time-sensitive customers. The new competitors' participation in the Parties Frequent Flyer Programmes abolishes an incentive for (business) customers to choose the incumbent airline.

Given the high share of transfer passengers, it is also important for a new entrant to obtain access to the market of transfer passengers. To this end, it can conclude an interline agreement with Lufthansa/AuA that, at its request, includes a Special Prorate Agreement. The terms of such a SPA must correspond to the terms entered into by the Parties with their alliance partners or other carriers in connection with the route concerned.

The offer to enter into inter-modal agreements is also a new remedy. Fostering inter-modal competition is one of the priorities of the Community's transport policy. Such a remedy is important for short-haul routes between Germany and Austria where railway operators could compete with the Parties at least with regard to non-time sensitive customers.

Given the various conditions and the duration of the exemption, the Parties must provide the Commission with information on a regular basis to show that they are complying with the conditions.

6. Conclusions

Given that the joint venture establishes a monopoly for direct flights on most routes between Austria and Germany, competition can only prevail if newcomers enter the market. In the past, however, this has proven to be difficult to ensure. Also with respect to the Austrian-German market, the market test carried out by the Commission showed that other EEA airlines initially were not interested. Large airlines endeavour to develop their networks around their respective hubs. Consequently, other major European airlines would probably operate on the Austrian-German

routes only if they developed a second hub to which these routes could be connected. This, however, does not seem to be an option for the foreseeable future. On the other hand, the market is also not attractive to low-cost carriers which considered the numerous barriers to entry to be an insurmountable hurdle.

Nevertheless, and in spite of the dramatic downturn in the air transport market following the terror attacks of 11 September, the remedies seem to be sufficient to attract newcomers. In the meantime three airlines have already entered, as the Parties offered to apply the remedies even before the entry into force of the Commission's decision. On this basis, since 5 November 2001 Adria Airways operates twice a day on the most important route Vienna — Frankfurt. Air Alps flies daily on the route Vienna — Stuttgart and Welcome Air has entered the route Innsbruck — Hannover. Two other entrants from Eastern and Central European countries have confirmed their willingness to enter the market once demand in air transport picks up.

Most importantly, however, after the Commission published the remedies in detail in December 2001, an Austrian investment group has decided to create a new regional carrier. Styrian Airways has been set up to operate specifically on routes between Austria and Germany. It is envisaged that Styrian Airways starts operating on four routes between Graz and four German cities and on another four routes between other Austrian cities and Germany in the winter season 2002/2003.

On this basis the Commission was willing to exempt the co-operation agreement under Article 81 (3) until 31. December 2005. In its decision, the Commission points out explicitly that the fact that there are several new entrants is an important factor allowing the Commission to grant this exemption ⁽¹⁾. Should this situation change, the Commission might be obliged to revoke or amend the exemption pursuant to Article 6(3)(a) of Regulation (EEC) No 3975/87.

⁽¹⁾ The Commission took note that, as regards entrants from non-EEA countries, Austria and Germany agreed to grant traffic rights to such carriers if they wish to operate on routes between the two countries.

Aviation: Commission raises competition concerns about co-operation agreement between Air France and Alitalia

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In November 2001, Air France and Alitalia notified to the Commission a number of co-operation agreements and requested an exemption under Regulation 3975/87, the regulation which lays down the procedure for the application of the European Union's antitrust rules to the air transport sector.

The agreements pursue the double aim of integrating Alitalia into the world-wide SkyTeam alliance created by Air France and Delta Air Lines, the United States's third largest airline, and of building a far-reaching, long-term strategic bilateral alliance based on close co-operation between the parties. The agreements would also interconnect the two airlines' respective hubs at Paris-Charles de Gaulle, Rome Fiumicino and Milan Malpensa.

On 8 May 2002, the Commission published a summary of the co-operation agreements in the EU's Official Journal, giving third parties the opportunity to submit their views.

Under Regulation 3975/87, publication of the summary triggers a 90-day period within which the Commission must decide whether to raise serious doubts or not. If it does not raise serious doubts, the agreement is automatically exempted for a period of six years from the date of publication.

The current co-operation agreement risks to restrict significantly competition between Air France and Alitalia, because the parties will agree on passenger capacity, flight frequencies and prices to be charged on flights between France and Italy. The agreements also includes code-sharing, sharing of earnings and the pooling of frequent flyer programmes.

Air France and Alitalia put together will control the quasi-totality of the traffic on a number of

routes between the two countries, including Paris-Rome, Paris-Milan and Paris-Venice, where the two airlines have very high market shares. The pooling of forces between the two flag carriers will also make it difficult for third parties to enter the routes concerned in the future or, where third airlines operate, to maintain their operations. This is the case as regards both the 'overlap' routes (where the two parties operated independently prior to the conclusion of the agreement) and the non-overlap routes, where the non-operating party will now sell seats on the planes operated by its partner.

While the Commission services are satisfied that the alliance contributes to technical and economic progress, given the improvements in connectivity and the cost savings and synergies achieved by the parties, the agreement would significantly reduce competition on key routes between France and Italy, which would be against the interest of passengers on these routes. The Commission therefore decided to send the parties a letter of serious doubts before the expiry of the 90-day deadline, informing them that there are indeed competition concerns and that an antitrust exemption cannot be granted at this stage of the procedure. This does not prejudice the outcome of the procedure nor does it prejudice of the companies' right to defend themselves.

As illustrated by the recent Lufhansa/Austria case, reported above, the Commission's practice in this field shows that such restrictive agreements can only be allowed if conditions are created to preserve competition and therefore consumer choice. The Commission has therefore encouraged the parties to come forward with remedies that would allow it to consider that the problems identified have been solved.

Aviation: Renewal of block exemption Regulation 1617/93

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On 25 June 2002 the Commission adopted Regulation (EC) No 1105/2002 ⁽¹⁾, renewing the block exemption for passenger tariffs conferences for the purpose of interlining in Regulation EC No 1617/93 until 30 June 2005. The renewal is conditioned with an obligation for air carriers participating in the conferences to collect certain data on the relative importance of the consultations for interlining. Interlining occurs when a passenger travels with more than one airline or alliance on the same ticket.

The block exemption applies to just one organisation, the International Air Transport Association (IATA). Most EEA airlines (including all flag carriers) are members of IATA and take part in twice-yearly conferences where they agree fares for interline journeys. DG COMP has investigated whether the benefits of these tariff conferences outweigh their restrictive effects and therefore whether a continued exemption can be justified. To that end DG COMP issued a Consultation Paper, inviting interested parties to submit their views on how serious the restrictive effects of the price-fixing were and to what extent any restriction of competition could be justified by the benefits of the IATA system. It also asked for views on a number of options to limit the scope of the block exemption and possible less restrictive alternatives.

DG COMP received a large number of responses to our consultation paper from Member States, airlines, travel agents and consumer groups. The overwhelming majority of those responding

argued that the IATA tariff conferences secure an important benefit in the form of passenger interlining, and that this benefit was unlikely to be replicated by any alternative, less restrictive system. In the consultation there was wide-spread support for an extension in time of the block exemption. The small number of respondents who argued against a continued exemption included a Member State government, a non-European travel agents group and EU freight forwarders. In particular, it was advanced that the conferences are likely to have wider restrictive effects as carriers might use IATA fares as a reference price and the benefits of interlining might be exaggerated, in particular in thick markets.

Having considered the arguments made by the various respondents the Commission has concluded that the block exemption should be extended for a further three years. The tariff conferences secure a benefit in the form of fully flexible interlining and this benefit is unlikely to be completely duplicated at this moment by less restrictive means. While prohibiting the tariff conferences would not mean the end of interlining altogether, it would reduce the fare products available for a significant number of consumers and, in the short term at least, could make it harder for small airlines to compete.

However, as alliances develop it might be argued that in the longer term the need for tariff conferences becomes less obvious, in particular on thick routes.

⁽¹⁾ OJ L 167/6 of 26.6.2002.

Deux nouvelles décisions clarifiant les règles sportives qui échappent aux règles de concurrence

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Introduction

La Commission européenne vient d'adopter deux décisions qui contribuent à clarifier les conditions dans lesquelles les règles sportives échappent aux interdictions énoncées aux articles 81 et 82 du traité CE ⁽¹⁾. Les affaires concernent la multipropriété des clubs de football et les règles antidopage du Comité International Olympique et de la Fédération Internationale de Natation Amateur ⁽²⁾. Ces deux cas s'inscrivent dans la lignée des décisions de la Commission par lesquelles elle a développé sa politique de concurrence dans le domaine du sport.

La spécificité du sport

Malgré son importance économique indéniable, le sport n'est pas un secteur économique comme les autres. La Commission dans son Rapport sur le sport au Conseil d'Helsinki ⁽³⁾ a exprimé sa position sur la manière de concilier les différentes fonctions du sport. Le Conseil de l'Union européenne dans sa déclaration annexée aux conclusions du Conseil de Nice ⁽⁴⁾ a souligné la nécessité de prendre en compte dans toutes les actions de la Communauté «les fonctions sociales, éducatives et culturelles du sport, qui fondent sa spécificité, afin de respecter et de promouvoir l'éthique et les solidarités nécessaires à la préservation de son rôle social».

La Déclaration consacre l'attachement du Conseil à l'autonomie des organisations sportives et à leur droit à l'auto-organisation au moyen de structures associatives appropriées. C'est ainsi que les organisations sportives ont la mission d'organiser et de promouvoir leur discipline et en particulier les règles spécifiquement sportives et la constitution

des équipes nationales. Le Conseil a tout particulièrement mis en avant le rôle central des fédérations sportives dans la nécessaire solidarité entre le sport loisir et le sport de haut niveau en soulignant les principes qui doivent les guider: accès d'un large public au spectacle sportif, soutien au sport amateur, non discrimination, égalité des chances, formation, protection de la santé, lutte contre le dopage. Cette mission doit bien évidemment se réaliser dans le respect des législations nationales et communautaires, notamment des règles de concurrence.

L'arrêt Wouters: le parallèle entre profession libérale et le sport

Une clarification importante a récemment été apportée à l'application des règles de concurrence par la Cour de justice des Communautés européennes ⁽⁵⁾ dans l'affaire Wouters ⁽⁶⁾. La Cour a énoncé des critères permettant d'évaluer quels accords ou décisions d'une association d'entreprises étaient susceptibles d'échapper aux interdictions énoncées aux articles 81 et 82 du traité.

Le Nederlandse Raad van State (Pays-Bas) a présenté une demande de décision préjudicielle qui pose la question de l'application du droit communautaire de la concurrence aux professions libérales. Le Raad van State est saisi d'une contestation portant sur la légalité d'un règlement adopté par l'ordre néerlandais des avocats. Le règlement litigieux interdit aux avocats exerçant aux Pays-Bas de nouer une collaboration «intégrée» avec des membres de la catégorie professionnelle des experts-comptables. La Cour était interrogée sur le fait de savoir si les dispositions du traité en matière de concurrence

(1) Ci-après «le traité».

(2) Décisions du 25 juin 2002 dans l'affaire 37806 ENIC/UEFA et du 1^{er} août 2002 dans l'affaire 38158 Meca Medina, Majcen/C10 (publiées sur <http://europa.eu.int/comm/competition/antitrust/cases>).

(3) Rapport de la Commission au Conseil européen dans l'optique de la sauvegarde des structures sportives actuelles et du maintien de la fonction sociale du sport dans le cadre communautaire. COM(1999) 644 final du 10 décembre 1999, <http://europa.eu.int/eur-lex/fr/com/rtp/199/com1992-0644from.pdf>

(4) Déclaration relative aux caractéristiques spécifiques du sport et à ses fonctions sociales en Europe devant être prises en compte dans la mise en œuvre des politiques communes. <http://europa.eu.int/comm/sport/ecom/decl-nice-2000-fr.pdf>

(5) Ci-après «la Cour».

(6) Arrêt du 19 février 2002, Wouters, C-309/99, Rec. p. I-01577.

s'appliquaient et, le cas échéant, s'opposaient à une telle interdiction de collaboration ⁽¹⁾.

Comme l'a jugé la Cour, «tout accord entre entreprises ou toute décision d'une association d'entreprises qui restreignent la liberté d'action des parties ou l'une d'elles ne tombent pas nécessairement sous le coup de l'interdiction édictée à l'article [81 paragraphe 1,] du traité. En effet, aux fins de l'application de cette disposition à un cas d'espèce, il y a lieu tout d'abord de tenir compte du contexte global dans lequel la décision de l'association d'entreprises en cause a été prise ou déployée ces effets, et plus particulièrement de ses objectifs, liés en l'occurrence à la nécessité de concevoir des règles d'organisation, de qualification, de déontologie, de contrôle et de responsabilité qui procurent la nécessaire garantie d'intégrité et d'expérience aux consommateurs finaux des services juridiques et à la bonne administration de la justice (voir, en ce sens, arrêt du 12 décembre 1996, *Reisebüro Broede*, C-3/95, Rec. p. I-6511, point 38). Il convient ensuite d'examiner si les effets restrictifs de la concurrence qui en découlent sont inhérents à la poursuite desdits objectifs. (...) une réglementation nationale telle que *Samenwerkingsverodening* 1993 adoptée par un organisme tel que l'ordre néerlandais des avocats n'enfreint pas l'article [81, paragraphe 1,] du traité, étant donné que cet organisme a pu raisonnablement considérer que ladite réglementation, nonobstant des effets restrictifs de la concurrence qui lui sont inhérents, s'avère nécessaire au bon exercice de la profession d'avocat telle qu'elle est organisée dans l'Etat membre concerné.» ⁽²⁾.

Bien que cet arrêt porte sur l'application des règles de concurrence à une mesure spécifique concernant une profession libérale dans un Etat membre, un parallèle peut être établi entre ce secteur et celui du sport. Le sport en tant que tel remplit des fonctions sociales, éducatives, culturelles qui relèvent également de l'intérêt public (voir *supra*). L'organisation du sport doit aussi tenir compte de ces différentes composantes.

Dans le contexte des deux affaires qu'elle instruisait l'une relative à la multipropriété des clubs de football et l'autre aux règles antidopage du Comité International Olympique et de la Fédération Internationale de Natation, la Commission a utilisé les critères définis par la Cour dans l'arrêt *Wouters*.

Activité économique

La première étape du raisonnement a été de vérifier si les activités en question pouvaient être qualifiées d'activités économiques au sens de l'article 81 du traité ⁽³⁾.

Même si l'activité sportive ne constitue pas nécessairement une activité économique, elle donne lieu notamment à des événements sportifs qui sont commercialisés sur plusieurs marchés et génèrent donc des activités économiques au sens de l'article 81 du traité.

La Cour a eu l'occasion d'affirmer que «dans le contexte du droit de la concurrence, (...) la notion d'entreprise comprend toute entité exerçant une activité économique, indépendamment du statut juridique de cette entité et de son mode de financement» ⁽⁴⁾.

En ce qui concerne les Fédérations ou associations internationales de sport, celles-ci pourraient être considérées comme des associations d'entreprises ou formant des associations d'associations d'entreprises au sens de l'article 81 du traité du fait qu'elles regroupent des fédérations nationales représentatives de clubs sportifs et que ces derniers peuvent être qualifiés d'entreprises.

Quant aux athlètes, la Cour a constaté que «les activités sportives et, notamment, la participation d'un athlète de haut niveau à une compétition internationale sont susceptibles d'impliquer la prestation de plusieurs services distincts, mais étroitement imbriqués, qui peuvent relever de l'article 59 du traité même si certains de ces services ne sont pas payés par ceux qui en bénéficient (voir arrêt du 26 avril 1988, *Bond van Adverteerders e.a.*, 352/85, Rec. p. 2085, point 16) ⁽⁵⁾» La Cour a donné l'exemple de l'organisateur d'une telle compétition qui «offre à l'athlète la possibilité d'exercer son activité sportive en se mesurant à d'autres compétiteurs et, corrélativement, les athlètes, par leur participation à la compétition, permettent à l'organisateur de produire un spectacle sportif auquel le public peut assister, que des émetteurs de programmes télévisés peuvent retransmettre et qui peut intéresser des annonceurs publicitaires et des sponsors. En outre, l'athlète fournit à ses propres sponsors une prestation publicitaire qui trouve son support dans l'activité sportive elle-même ⁽⁶⁾.

⁽¹⁾ Voir conclusions de l'avocat général Léger dans l'affaire *Wouters* présentées le 10 juillet 2001, point 2, Rec. p. I-01577.

⁽²⁾ Voir points 97 et 110 de l'arrêt précité.

⁽³⁾ Les circonstances de ces deux affaires n'ont pas permis d'aborder en détail l'application de l'article 82 du traité.

⁽⁴⁾ Arrêt du 23 avril 1991, *Höfner et Elser / Macrotron*, C-41/90, Rec. p. I-1979.

⁽⁵⁾ Arrêt du 11 avril 2000, dans les affaires jointes C-51/96 et C-191/97, *Deliège*, Rec. p. I-2549, point 56.

⁽⁶⁾ Voir arrêt précité, point 57.

La règle «purement sportive»

Ensuite il convient de cerner la nature et l'objectif d'une règle: si elle vise également à réglementer l'activité économique telle que les droits de télévision ou le système des transferts des joueurs de foot, une telle règle ne pourrait pas être considérée comme «purement sportive» et elle devrait être évaluée à la lumière des articles 81 et 82 du traité comme toute autre mesure de nature économique. Par contre si elle fait partie des réglementations des organisations sportives établissant des règles sans lesquelles un sport ne pourrait pas exister ou des règles qui sont nécessaires à son organisation ou à l'organisation des compétitions, une telle règle pourrait échapper aux règles de concurrence. Les règles inhérentes au sport sont, en premier lieu, les «règles du jeu». L'objet de ces règles n'est pas de restreindre ou de fausser la concurrence.

Les effets restrictifs

Même une règle qui a uniquement pour objectif de réglementer le sport, le jeu, la compétition en tant que tels et non de restreindre ou de fausser la concurrence peut avoir des effets restrictifs sur la liberté d'action des athlètes, des clubs ou d'autres tiers, comme les investisseurs dans l'affaire ENIC. Toutefois, ceci ne constitue pas nécessairement une restriction de la concurrence au sens de l'article 81 du traité.

La Cour distingue dans l'arrêt Wouters précité les accords (ou règles) de nature économique de celles qui sont nécessaires au bon fonctionnement d'un secteur ou d'une organisation, même si ceux-ci (ou celles-ci) pourraient limiter la liberté d'action des entreprises. Le contexte global dans lequel une décision a été prise et déploie ses effets doit être pris en compte. Dans les affaires présentées ci-dessus, la Commission a estimé que la règle sur la multipropriété des clubs et la mise en place de règles antidopage étaient nécessaires pour garantir l'intégrité et l'objectivité des compétitions dans l'intérêt du public en général, des athlètes et des supporters.

Proportionnalité

Toutefois, pour autant qu'il y ait un effet limitant la liberté d'action des athlètes, des clubs ou d'autres tiers, il convient d'examiner en plus de savoir si les règles font partie de cet ensemble de règles qui sont intimement liées au bon déroulement de la compétition sportive, si elles peuvent

être considérées comme nécessaires pour garantir ce bon déroulement et si elle ne vont pas au-delà de ce qui est nécessaire pour atteindre leur but.

La multipropriété des clubs de football (affaire ENIC)

Le 18 février 2000, ENIC qui possède des participations dans 6 clubs en Europe a déposé plainte contre l'UEFA ⁽¹⁾, organe dirigeant du football européen, concernant sa règle intitulée «Intégrité des compétitions interclubs de l'UEFA: indépendance des clubs». Cette règle, adoptée par le comité exécutif de l'UEFA en 1998, dispose que plusieurs clubs participant à une compétition interclubs de l'UEFA (Champions league et coupe UEFA) ne peuvent être directement ou indirectement contrôlés par la même entité ou dirigés ou gérés par la même personne.

ENIC considérait que cette règle faussait la concurrence en limitant les possibilités d'investissement dans les clubs européens.

Après une analyse approfondie, la Commission est arrivée à la conclusion que, bien que la règle de l'UEFA soit une décision prise par une association d'entreprises et puisse donc théoriquement tomber sous le coup de l'interdiction de principe énoncée à l'article 81, paragraphe 1, du traité, elle peut être justifiée par la nécessité de protéger l'incertitude des résultats dans l'intérêt du public et ainsi de garantir l'intégrité des compétitions.

En effet, le fait que deux clubs appartenant à la même entité joue l'un contre l'autre dans une même compétition risquerait d'entacher la compétition d'une suspicion à l'égard des résultats et de provoquer le désintérêt du public. Les autres moyens proposés par ENIC comme le respect d'un code de conduite volontaire ne permettent pas un degré équivalent de protection des compétitions.

En tout état de cause, la restriction de la liberté d'action des clubs et des investisseurs imposée par la règle ne va pas au-delà de ce qui est nécessaire pour en garantir l'objectif légitime, qui consiste à protéger l'intégrité des compétitions et l'incertitude des résultats dans l'intérêt du public. La Commission a donc rejeté la plainte d'ENIC.

Les règles contre le dopage

La Commission a rejeté une plainte de nageurs exclus des compétitions pour dopage contre le Comité International Olympique (CIO).

⁽¹⁾ UEFA: Union européenne de Football Association.

Les deux athlètes qui ont introduit la plainte sont deux nageurs de longue distance. Le contrôle de dopage effectué lors d'une compétition s'est révélé positif chez les deux nageurs. Les analyses réalisées ont démontré la présence de métabolites de nandrolone, la norandrostérone et la norétiocholanolone, dans leurs organismes au-delà des seuils autorisés.

Le 8 août 1999 le Comité de dopage («Doping Panel») de la Fédération Internationale de Natation Amateur (FINA) les a suspendus pour une période de 4 ans pour premier dopage. Cette décision a fait l'objet d'un appel auprès du Tribunal Arbitral du Sport, établi à Lausanne (Suisse), et a été confirmée par cette même instance dans une sentence arbitrale rendue le 29 février 2000. Elle a été modifiée par la suite par une sentence du même tribunal du 23 mai 2001 réduisant la suspension à une période de deux ans.

Les nageurs considèrent que les règles adoptées par le CIO et la FINA pour la définition du dopage, le seuil à partir duquel la présence d'une substance interdite est qualifiée de dopage et les recours au Tribunal Arbitral du Sport, constituent des pratiques restrictives de la concurrence, au sens des articles 81 et 82 du traité et une limitation non justifiée de la liberté des nageurs de prester des services au sens de l'article 49 du traité.

La Commission constate que la plainte n'apporte pas suffisamment d'éléments précis laissant présumer l'existence d'une entente entre le CIO et des tiers au sens de l'article 81 du traité ou d'un abus de position dominante du CIO au sens de l'article 82 du traité. La plainte ne contient pas non plus de faits permettant de parvenir à la conclusion qu'il pourrait y avoir une violation de l'article 49 du traité par un état membre ou un état associé.

Même à supposer que les règles contestées résultent d'une entente, ces règles antidopage n'ont pas pour objet de restreindre la concurrence d'acteurs économiques, mais de combattre le dopage. L'objet de la fixation d'un seuil qui tient compte

d'une possible production endogène de substances interdites est en faveur des athlètes. La sanction pour dopage, la suspension, a un effet sur la liberté d'action de l'athlète. Cependant, une telle limitation de la liberté d'action n'est pas nécessairement une restriction de concurrence au sens de l'article 81, car les effets restrictifs qui en découlent sont inhérents à la poursuite de l'objectif légitime de lutter contre le dopage en vue d'un déroulement loyal de la compétition. Cet objectif est reconnu comme positif dans le contexte du sport et il inclut la nécessité d'assurer l'égalité des chances des athlètes, leur santé, l'intégrité et l'objectivité de la compétition ainsi que les valeurs éthiques sportives.

La Commission considère donc que les règles antidopage en question sont intimement liées au bon déroulement de la compétition sportive, qu'elles sont nécessaires pour lutter efficacement contre le dopage et que leurs effets restrictifs ne vont pas au-delà de ce qui est nécessaire pour atteindre cet objectif. Par conséquent, elles ne tombent pas sous le coup de l'interdiction édictée aux articles 81 et 82 du traité CE.

Conclusions

Après l'arrêt Bosman ⁽¹⁾, de nombreuses fédérations sportives européennes ou internationales ont revendiqué pour le sport une exception aux règles du traité.

Les décisions récentes en matière de sport qu'il s'agisse du système des transferts de joueurs de football, des règles pour exercer l'activité d'agents de joueurs ou des deux affaires qui font l'objet du présent article montrent bien que les règles de concurrence existantes et telles qu'interprétées par la pratique de la Commission et la jurisprudence de la Cour sont en mesure de respecter pleinement les objectifs déjà énoncés par le Conseil dans la Déclaration de Nice et de tenir compte des spécificités du sport.

⁽¹⁾ Arrêt du 15 décembre 1995, C-415/93, Rec. p. I-4921.

Liberalisation of European Gas Markets - Commission settles GFU case with Norwegian gas producers

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1. Introduction

The European Commission has recently intensified its efforts to liberalise European gas markets. Whilst originally only internal market rules were used to push for market opening ⁽¹⁾, over the last years the important role of European competition law has become ever more visible.

In the gas sector, DG Competition's antitrust activities currently focus on two issues: (1) anti-competitive barriers for competition between suppliers and (2) anti-competitive obstacles for effective and non-discriminatory third party access. This article provides a short overview of the latest developments with respect to the first issue, most prominently the settlement of the GFU case relating to joint marketing arrangements for Norwegian gas.

2. The GFU case

2.1. Facts and Procedure

The GFU case concerns joint sales of Norwegian natural gas through a single seller, the so-called GFU (Gas Negotiation Committee), since at least 1989. The GFU was comprised of two permanent members, Statoil and Norsk Hydro, Norway's largest gas producers, and was occasionally extended to certain other Norwegian gas producers. The main task of the GFU was to negotiate the terms of all supply contracts with buyers located in the EU — inter alia — on behalf of all natural gas producers in Norway. Norway is the third largest Non-EU country supplying gas to the EU, accounting for approximately 10% of all gas consumed in the EU.

In June and July 2001 the Commission initiated formal proceedings against approximately 30 Norwegian gas companies arguing that the GFU

scheme was incompatible with European competition law ⁽²⁾. At a hearing in December 2001 the gas companies concerned as well as the Norwegian Government claimed that European competition law should not be applied, since the GFU scheme had been discontinued for sales to the European Economic Area (EEA) as of June 2001 following the issuing of a Royal decree by the Norwegian Government. They also argued that European competition law could not be applied, since the Norwegian gas producers had been compelled by the Norwegian Government to sell gas through the GFU system established by the Norwegian Government itself.

2.2. Settlement of the GFU Case

Following the hearing and whilst reserving their respective legal positions, the Norwegian gas producers and the European Commission explored the possibilities for a settlement. A distinction was made between (1) the permanent members of the GFU (Statoil and Norsk Hydro), (2) six groups of companies actually selling Norwegian gas through contracts negotiated by the GFU (ExxonMobil, Shell, TotalFinaElf, Conoco, Fortum and Agip) and (3) all other Norwegian gas producers, for which formal proceedings had been opened. All these companies, apart from those listed under (3), submitted commitments to the Commission to settle the GFU case. Based on these commitments, the Commission decided to close the case ⁽³⁾.

a) Statoil and Norsk Hydro

As regards Statoil and Norsk Hydro, the settlement consists of two main elements, namely (1) the discontinuation of all joint marketing and sales activities unless these are compatible with European competition law (for existing supply relationships this requires individual negotiations when contracts come up for review) and (2) the

⁽¹⁾ For gas: Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ No L 204, 21.7.1998, p. 1). See also Amended proposal for a Directive of the European Parliament and of the Council amending Directive (...) 98/30/EC concerning rules for the internal markets in (...) natural gas, COM(2002) 304 final.

⁽²⁾ IP/01/830 of 13/06/2001: Commission objects to GFU joint gas sales in Norway.

⁽³⁾ IP/02/1084 of 17/07/2002: Commission successfully settles GFU case with Norwegian gas producers.

reservation of certain gas volumes for new customers, who in the past have not bought gas from Norwegian gas producers. In the latter respect Statoil has undertaken to make available 13 BCM of gas to new customers on commercially competitive terms and Norsk Hydro has undertaken the same for 2.2 BCM. This gas has to be offered for sale during the commitment period running from June 2001 to September 2005. Since the commitment period had already started in 2001 and certain volumes have already been sold during the last 12 months, the volumes which are currently still available to new customers are lower than the total volume of 15.2 BCM. External auditors will monitor whether Statoil and Norsk Hydro respect their commitment to the Commission.

When accepting the commitments on the volumes for new customers, the Commission noted that a significant number of European customers (most prominently large industrial users, electricity producers and new trading houses) are known to have actively looked for alternative sources of supply in the past and continue to do so today. The commitment will thus facilitate the establishment of new supply relationships. This should also have a positive impact on the European market structure, which is still characterised by dominant suppliers in almost all national markets. Most of these dominant suppliers are already customers of the Norwegian gas companies and bought significant gas volumes under contracts, which will still run for many years and which in general contain price review clauses.

Finally and although not being part of the GFU case, Statoil and Norsk Hydro confirmed that they would not introduce territorial sales restrictions and/or use restrictions in their gas supply contracts. Both types of clauses are considered incompatible with European competition law as they prevent the creation of a single market, but are however considered necessary by certain market operators. The Commission welcomed Statoil's and Norsk Hydro's position as it demonstrates that gas can indeed be marketed in the Community without these anti-competitive clauses.

b) Other Norwegian Gas Producers

As regards the other Norwegian companies concerned by the GFU case, the Commission received commitments from six groups of Norwegian gas companies. These companies were sellers of Norwegian gas negotiated under the GFU

scheme, namely ExxonMobil, Shell, TotalFinaElf, Conoco, Fortum and Agip. For these companies the settlement consists of written commitments similar to those given by Statoil and Norsk Hydro to discontinue all joint marketing and sales activities. For the remaining Norwegian gas producers the Commission decided to close the case under the assumption that they will sell Norwegian gas individually in the future.

2.3. The consequences of the GFU Case

The consequences of the GFU case are very far reaching. The commitments submitted by the Norwegian producers will contribute to the creation of a single market for gas, since European gas purchasers will have a wider choice between gas suppliers from Norway. This – as well as the commitment to make available certain volumes for new customers – will facilitate the establishment of new supply relationships, which should assist to improve the market structure on a lasting basis.

In order for European customers to effectively benefit from the new choices, it must now be ensured that Norwegian gas can be transported through European gas pipelines without any artificial obstacles. When closing the GFU case the Commission therefore underlined once again ⁽¹⁾ that it will pursue with vigour any and all refusals to grant access to European pipelines. In this respect the speedy adoption of the so called Acceleration Directive ⁽²⁾ will also be of importance.

Finally, the GFU case underlines the importance of competition in the upstream sector for the successful creation of a common gas market in Europe. It demonstrates that competition issues between non-EU gas producers and the Commission can be tackled successfully. It also shows that the Commission is capable of taking account of the commercial interests of the parties whilst ensuring that European competition law is respected.

3. Other Important Gas Cases Concerning Supply Competition

The GFU case is not the only antitrust case in which the Commission aims at improving the supply structure in European gas markets. Two types of cases can be distinguished: (1) restrictions in vertical supply agreements either preventing the buyer from using the gas for other purposes than agreed upon (use restrictions) or from selling the

⁽¹⁾ IP/01/1170 of 02/08/2001: Commission insists on effective access to European pipelines for Norwegian gas.

⁽²⁾ Amended proposal for a Directive of the European Parliament and of the Council amending Directive (...) 98/30/EC concerning rules for the internal markets in (...) natural gas, COM(2002) 304 final.

gas outside an agreed supply area (territorial sales restrictions) ⁽¹⁾ and (2) joint marketing arrangements of gas producers.

As regards the first category the leading case so far has been *GasNatural/Endesa* ⁽²⁾. In this case the Commission successfully opposed — amongst other things — the introduction of a use restriction in a gas supply contract between the Spanish gas wholesaler *GasNatural* and the Spanish electricity producer *Endesa*.

As regards the second category — joint marketing of gas producers — the Commission's interest is not limited to joint marketing arrangements for one country (e.g. Norway in the case of *GFU*), but also relates to joint marketing arrangements of gas producers that concern a single gas field. It is worth noting that joint production and joint marketing are still common features in the upstream gas sector, where gas producers cooperate closely with each other in order to minimise risks and to ensure maximum sales revenues. Thus the Commission recently carried out an enquiry into the Irish gas field *Corrib*, for which three Irish gas producers had requested an exemption for their project to market the gas jointly for five years. The Commission could however close the case following the decision of the gas producers to withdraw their application for an exemption and their declaration that they would market the gas on an individual basis ⁽³⁾.

In a similar case, which is not yet concluded, the gas producers concerned argued that their joint production and marketing arrangements would be covered by 'Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of specialisation agreements' (subsequently 'spe-

cialisation block exemption'). They argued in particular that — whilst article 5 (1) of the specialisation block exemption prohibits joint price fixing — article 3 lit. b of the specialisation block exemption explicitly foresees the possibility of 'joint distribution'. They claimed that their joint marketing arrangements would amount to such joint distribution.

The Commission services did not agree with this interpretation. They explained — amongst others — that 'joint distribution' in the sense of article 3 lit. b of the specialisation block exemption requires more than the mere coordination of sales between independent gas producers relating to the conclusion of a few long term gas supply contracts covering essentially all the gas available to the gas producers. The Competition services also took into account that the coordination of sales between independent producers generally does not improve the production or distribution of goods within the meaning of Article 81 (3) EC ⁽⁴⁾. A different analysis is only warranted if the gas products form a full-franchise joint venture.

4. Conclusion

Competition policy significantly contributes to the liberalisation process in the European gas sector. In the antitrust area, apart from cases relating to third party access, the Commission currently focuses on restrictions to competition between suppliers. In this respect it is considered that the settlement of the *GFU* will lead to a lasting improvement of the supply structure for the European gas market. Similar cases will follow reinforcing this approach and increasing the choice of customers between suppliers.

⁽¹⁾ Territorial Restrictions and Use restrictions are hard core restrictions of EC competition law, cf. Article 4 of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21). Profit pass over schemes (also referred to as profit splitting mechanisms), which oblige the buyer to pass over a certain part of the profit to the supplier if the gas is sold for a different purpose than agreed upon or outside the agreed territory, amount to the same, cf. Commission Notice — Guidelines on vertical restraints, recital 49 (OJ C 291, 13.10.2000, p. 1).

⁽²⁾ IP/00/297 of 27/03/2000: Commission closes investigation on Spanish company *GAS NATURAL*. See also M. Fernández Salas, *Long-term supply agreements in the context of gas market liberalisation: Commission closes investigation of Gas Natural*, Competition Policy Newsletter 2000, issue 2, 55 *et seq.*

⁽³⁾ IP/01/578 of 20/04/2001: *Enterprise Oil*, *Statoil* and *Marathon* to market Irish *Corrib* gas separately.

⁽⁴⁾ Cf. also 8th recital of the specialisation block exemption, which reads: 'Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Agreements on specialisation in the provision of services can also be said to generally give rise to similar improvements. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.'

Commission fines participants in the industrial gases cartel

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On 24 July 2002, the Commission fined AGA AB, Air Liquide BV, Air Products Nederland BV, BOC Group plc, Messer Nederland BV, NV Hoek Loos and Westfalen Gassen Nederland NV a total of € 25.72 for participating in a secret cartel in the industrial and medical gases sector in the Netherlands.

The industrial and medical gases concerned in this case include oxygen, nitrogen, carbon dioxide, argon and argon mix supplied in cylinder and liquid form. They are used in several industrial sectors and manufacturing processes. The largest volumes of industrial gases are used for producing, cutting and welding metals and in the chemical industry. In the case of oxygen and carbon dioxide they can also be used for medical purposes, especially in hospitals.

Following an investigation which started in 1997, the Commission established that AGA AB (AGA), Air Liquide BV (Air Liquide), Air Products Nederland BV (Air Products), BOC Group plc (BOC), Messer Nederland BV (Messer), NV Hoek Loos (Hoek Loos) and Westfalen Gassen Nederland NV (Westfalen) participated in a cartel in the Netherlands from 1989 until 1991 and from 1993 until 1997. These companies held regular meetings to discuss and fix price increases and other trading conditions for cylinder and liquid gases supplied to their customers. They agreed not to deal with each other's customers for a period of 2-5 months every year in order to implement the price increases and to respect minimum prices and other trading conditions when offering gases to new customers. These trading conditions concerned in particular the rent of cylinders, a safety and environment charge for supplies in cylinders, transportation costs and a delivery charge for liquid gases.

Although the Commission collected evidence for both periods mentioned above, it only took into consideration the period after September 1993 for the purposes of calculating the fine, since prescription applied for the first infringement which ended more than five years before the investigation began.

The market for industrial and medical gases in cylinder and liquid form in the Netherlands was worth about € 180 million in 1996. At the material time, Hoek Loos and AGA were the largest under-

takings on that market, followed by Air Products and Air Liquide. AGA subsequently sold its operations in the Netherlands to Hoek Loos and Air Products in 2001.

The Commission characterised the companies' behaviour as a 'serious' infringement of the Community competition rules. Even though by its nature the infringement was considered 'very serious', the Commission had to consider in its evaluation that the infringement took place in a sector of medium economic importance -in terms of the overall value of the market- and that the geographic scope of the market was limited to the Netherlands.

The Commission adopted a Decision under Article 81(1) of the Treaty, imposing fines. Hoek Loos was fined € 12.6 million, AGA € 4.15 million, Air Liquide € 3.64 million, Air Products € 2.73 million, BOC € 1.17 million, Messer € 1 million and Westfalen € 0.43 million.

Calculation of fines and application of the Leniency Notice

In calculating the amount of the fines, the Commission took into account the gravity and duration of the infringement as well as the existence as appropriate of aggravating and/or mitigating circumstances. The Leniency Notice was applied.

All companies concerned were found to have committed a serious infringement. Within this category, the undertakings were divided into four groups according to their relative importance on the market concerned. Hoek Loos and AGA were considered to be the leading suppliers of industrial gases in cylinder and liquid form during the period concerned. Air Products and Air Liquide were considered large suppliers whereas Messer and BOC were considered medium size suppliers. Westfalen was considered a small supplier.

All companies concerned were found to have committed an infringement of medium duration (one to five years). The Commission recognised that BOC and Westfalen had played an exclusively passive role in the infringement and had not participated in all aspects of the infringement.

Pursuant to Section D of the Leniency Notice, AGA, Air Products, Hoek Loos and Messer were granted reductions of the fine that would otherwise have been imposed.

Before the Commission adopted its Statement of Objections, AGA and Air Products provided the Commission with information which materially contributed to establishing the existence of an infringement. Furthermore, neither of them

substantially contested the facts on which the Commission based its Statement of Objections. These companies as a consequence were granted a 25% reduction in their respective fines.

Hoek Loos and Messer were also granted a reduction of 10% in their respective fines as they did not substantially contest the facts on which the Commission based its Statement of Objections.

Commission adopts cartel decision imposing fines in methionine (animal feed) cartel

Sam PIETERS, Directorate-General Competition, unit E-I

On 2 July 2002, the Commission fined Degussa AG and Nippon Soda Company Ltd respectively € 118 million and € 9 million for participating in a price-fixing cartel in methionine together with Aventis SA. Aventis SA (formerly Rhône-Poulenc) was granted full immunity from fines because it revealed the cartel's existence to the Commission and provided decisive evidence on its operation.

Methionine is one of the most important amino acids used to compound animal feeds and premixes for all animal species. The principal application is in poultry feed, but methionine is increasingly being added to pig feed and speciality animal feeds. In 1998, the EU market for methionine was worth around € 260 million.

Following an investigation which started in 1999, the Commission established that Degussa AG, Nippon Soda Company Ltd and Aventis SA (formerly Rhône-Poulenc), together with its wholly-owned subsidiary Aventis Animal Nutrition SA (formerly Rhône-poulenc Animal Nutrition SA), participated in a cartel between February 1986 until February 1999, through which they agreed on price targets, implemented price increases and exchanged information on sales volumes and market shares for methionine.

The cartel was implemented through the holding of regular meetings at both top level — the so-called 'Summit' meetings — and at a more technical level — the 'Managerial' or 'Staff' level meetings. During these meetings, the participants exchanged sales volumes, which would then be compiled and used in the discussions to determine the target prices to be fixed.

The Commission characterised the companies' behaviour as a 'very serious' infringement of the Community and EEA competition rules, and adopted a Decision under Article 81(1) and Article 53(1) of the EEA Agreement, imposing fines: Degussa AG and Nippon Soda were fined respectively € 118.12 million and € 9 million. Aventis SA and Aventis Animal Nutrition were granted full immunity from fines.

Calculation of fines and application of the Leniency Notice

In fixing the amount of the fines, the Commission took into account the gravity and duration of the

infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The 1996 Leniency Notice was applied.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into two groups according to their relative importance in the market concerned. Further upward adjustments were made in the case of two companies, with regard to their very large size and thus of their overall resources. All participants committed an infringement of long duration (exceeding five years).

Application of the Leniency Notice

The Commission's policy with respect to immunity in cartel cases was modified in February this year to make it easier to grant full immunity and provide legal certainty that immunity will indeed be granted, thus making policy more effective. However, as the investigation into the methionine cartel started in 1999, the 1996 Leniency Notice was applied in this case.

Aventis SA was the first undertaking to provide the Commission with decisive information and it was granted a 100% reduction of the fine which would otherwise have been imposed. Otherwise, it would have received a fine similar to the one imposed on Degussa.

The difference in the fines reflects the disproportion in the market shares of Degussa, the world's biggest producer of methionine, and Nippon Soda, almost five times smaller in terms of 1998 market shares figures.

Nippon Soda and Degussa co-operated in one way or another with the Commission and were granted appropriate reductions. Nippon Soda provided detailed information, which together with that obtained from Degussa was used in the Decision. Nippon Soda was able to provide the Commission with documents contemporaneous to the infringement, including inter alia hand-written notes taken during cartel meetings and valuable information to confirm the existence of the cartel prior to 1990. On these grounds, Nippon Soda was granted a 50 percent reduction.

Most of the information provided by Degussa was not provided voluntarily and Degussa also contested its participation in the cartel prior to mid-1992 and after 1997 despite the fact

that evidence in the Commission's file clearly demonstrates otherwise. On these grounds, the Commission granted Degussa a reduction of only 25 percent of its respective fine.

Commission closes probe into IBM's licensing terms for speech recognition engines

Magdalena BRENNING, Directorate-General Competition, unit D-1

In June 2002, the European Commission decided to close an investigation triggered by a complaint from UK voice recognition software company, AllVoice Computing plc, against IBM Corp., after the latter agreed to modify its licensing terms.

AllVoice Computing plc ('AllVoice'), a British firm that develops and sells voice recognition software, filed a complaint against International Business Machines Corporation ('IBM') alleging that IBM had a dominant position on the market for the licensing of general-purpose dictation speech recognition engines and was abusing that position in a number of ways, particularly through unfair licensing terms.

Voice recognition software is a technology which enables a computer to recognise spoken words and transcribe them into a written text. The technology includes a dictation speech recognition engine ('the engine') and a speech application program ('the application program') which together form a speech recognition end product ('the end product').

Both IBM and AllVoice sell end products, but AllVoice only makes application programs, meaning that it needs a licence for a speech recognition engine. Besides IBM, other suppliers of speech recognition engines included until recently Dragon, and Lernout & Hauspie, which filed for bankruptcy at the end of 2001.

Following a careful analysis of the complaint, in a warning letter of June 2001, the Commission's services expressed concerns to IBM that it may be dominant on the engine licensing market and therefore some of its licensing terms might be abusive within the meaning of Article 82 of the EC Treaty.

The Commission's concerns were based on the fact that IBM retained the right to terminate the speech recognition licence if AllVoice were to initiate proceedings against IBM or any of its customers for infringement of AllVoice's speech recognition patents ('the termination for challenge

clause'). IBM also imposed on AllVoice a requirement to add value to the licensed technology at least equivalent to the value of that licensed technology ('the value-add provision'), with the possible consequence that such a requirement might result in retail price maintenance.

The effect of the termination for challenge clause, which was included only in the contract offered to AllVoice, appeared to be that as long as AllVoice wished to sell a product that required the relevant licence for IBM speech recognition technology, it would be unable to take action to prevent IBM from infringing any of AllVoice's speech recognition patents, whether or not they were linked to the licensed technology.

In addition, the value-add provision suggested that AllVoice would be required to charge a price for those of its products incorporating an IBM speech engine that was at least twice the price per unit it paid for the IBM speech engine. This could have reduced AllVoice's ability to compete on price in the end product market, whereas IBM was under no such pricing restraint.

In its reply, IBM maintained that it was not dominant on the relevant product market and that, in any event, these clauses were not anti-competitive. However, following negotiations between the Commission and IBM, IBM proposed to modify the relevant clauses.

IBM has now limited the termination for challenge clause to challenges to the licensed technology. Thus, after modification, the termination is limited to the situation where AllVoice challenges IBM's engine, i.e., the '*licensed* program', as offered by IBM and/or its customers on the basis that it infringes AllVoice's products. This is in fact a more narrowly tailored clause than the Technology Transfer Block Exemption Regulation ('TTBE')⁽¹⁾ ⁽²⁾ would allow.

The TTBE block-exempts a termination clause based on challenges on any ground, e.g., on the ground that the licensed technology is invalid, has

⁽¹⁾ Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 81 (3) of the Treaty to certain categories of technology transfer agreements, OJ L 31, 9.2.1996, p. 2.

⁽²⁾ Article 2.1(15) TTBE exempts: '[a] reservation by the licensor of the right to terminate the agreement if the licensee contests the secret or substantial nature of the licensed know-how or challenges the validity of licensed patents within the common market belonging to the licensor or undertakings connected with him'.

expired and/or infringes third parties' patents and/or the licensee's. The revised termination for challenge clause would allow termination of the contract only if AllVoice were to allege an infringement of its own intellectual property: AllVoice could nevertheless challenge IBM's intellectual property on any other ground without fearing termination of its contract. It is not abusive that IBM can terminate AllVoice's contract if AllVoice tries to use its IP rights against IBM's licensed technology. Otherwise AllVoice could potentially, by using its IP rights, prevent IBM or any of IBM's licensees from using IBM's own technology while AllVoice maintains the right to use IBM's own technology itself.

According to IBM, the purpose of the value-add provision is not to set prices but to ensure that the application program meets a certain quality and that it adds 'usefulness' to the end package. IBM however agreed to express the value-add provision without using the term 'value', to avoid the risk of

'value' being interpreted as cost and/or price. Instead, the clause now refers to functionality, product differentiation, creation of new marketing opportunities, or integration in other products.

The modified clauses do not infringe the EC's competition rules, and there would appear to be no ongoing anti-competitive effects.

In its complaint, AllVoice also made a wide range of allegations about IBM's past behaviour. In relation to these alleged abuses of a dominant position in the past, the Commission has rejected the complaint on the grounds that there is a lack of Community interest and furthermore, that there is at present no infringement of the EC's competition rules. The Commission's limited resources should be concentrated on those practices that have the most significant impact on the market and on consumers. As a result of IBM's modifications and a settlement between the parties for the past, AllVoice has withdrawn its complaint following the Commission's rejection letter.

Merger Control: Main developments between 1st May 2002 and 31st August 2002

Mary LOUGHRAN, Kay PARPLIES and Roosmarijn SCHADE, Directorate General Competition, Directorate B

Recent cases — Introductory remark

Between 1 May and 31 August 2002, 96 cases were notified to the Commission. This is more than in the previous four-month period (79) but it marks a significant decline compared to the same period in 2001 (118). The Commission took 92 final decisions, 3 of which followed in depth investigations (no prohibitions, 1 clearance and 2 conditional clearances) and 4 of which were conditional clearances at the end of an initial investigation ('Phase 1'). In total the Commission cleared 80 cases in Phase 1. In this period, 34% of the clearance decisions taken by the Commission were taken in accordance to the simplified procedures introduced in September 2000. In addition, the Commission took two referral decisions pursuant to Article 9 of the Merger Regulation. No new in-depth investigation was opened (Art. 6(1)(c) decision) during May to August 2002.

During this period the Court of First Instance made an important judgment in the Airtours case.

CFI Judgment on Airtours vs. Commission

On 6 June 2002 the European Court of First Instance (CFI) annulled the Commission's decision to prohibit a merger between Airtours and First Choice, two UK based holiday tour operators ⁽¹⁾. Though the Commission had previously lost cases in antitrust matters, this was the first time in the 12 years of EU merger regulation that the CFI had overruled a prohibition of a merger.

The Commission had received the notification of Airtours bid to take over First Choice on 29 April 1999. After the merger there would have been three major tour operators left in the market: the merged entity (with $19.4 + 15.0 = 34.4\%$ market share), Thomas Cook (20.4%) and Thomson (30.7%). All other players would have less than 3%. After an in-depth (phase II) investigation, the Commission decided on 22 September 1999 to prohibit the merger based on the assessment that it

would create a situation of collective dominance in the market for short-haul foreign package holidays in the UK ⁽²⁾. The Commission's view was that the three remaining operators would be able to co-ordinate behaviour by restricting capacity put on sale, and thereby raising prices for British consumers. The decision was appealed by Airtours on 2 December 1999.

The CFI did not disagree with the market definition applied by the Commission, nor with the analytical framework used to evaluate whether the transaction would lead to a collective dominant position with co-ordinated behaviour. But the CFI found that the Commission had not proven that:

- 1) the three remaining operators would have an incentive to cease competing with each other;
- 2) there were adequate deterrents to secure unity within the alleged dominant oligopoly; and
- 3) the smaller tour operators, potential competitors and consumers would not be in a position to destabilise the alleged dominant oligopoly.

The CFI concluded that the Commission had prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as to significantly impede effective competition in the relevant market.

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

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

Carnival/ P&O Princess

The European Commission granted clearance under the European Union's Merger Regulation to

⁽¹⁾ Case T-342/99 Airtours plc v. Commission of the European Communities.

⁽²⁾ Case No IV/M.1524-Airtours/First Choice.

the proposed acquisition of British cruise operator P&O Princess Plc by US-based cruise operator Carnival Corp. The Commission was initially concerned about the parties' strong position in the cruise market in the UK and in Germany. But after an in-depth analysis it concluded that the strong growth enjoyed in the market, the absence of substantial barriers to entry and the ability for rivals in the market to shift capacity, for example from the US to the UK, would exert a sufficient competitive pressure on Carnival.

On 16 December 2001, Carnival announced a unilateral pre-conditional offer to acquire all the shares of P&O Princess, a UK-based worldwide cruise company which operates the brands Princess Cruises, P&O Cruises, Swan Hellenic, Aida Cruises, Seetours, and A'Rosa. Carnival is also a cruise company active worldwide. Its brands include Carnival Cruise Lines, Holland America Line, Costa Cruises, Cunard Line, Seabourn Cruise Lines and Windstar Cruises.

The takeover bid was notified to the Commission for regulatory clearance in February 2002. The UK competition authorities had requested referral of the case pursuant to Article 9 of the Merger Regulation citing their own concerns about the deal's impact in the United Kingdom's cruise market. However, the Commission decided to continue with the review as the deal originally raised concerns also in other Member States, particularly in Germany.

Together, Carnival and P&O Princess accounted for around a third of cruise passengers in 2000 in the European Economic Area the 15 EU states plus Norway, Iceland and Liechtenstein with the main overlap being felt in the UK and Germany. Market shares are also high in Italy and Spain, but in this case the addition of P&O's cruise operations was minimal.

In the course of its investigation of the Carnival bid, the Commission had fruitful contacts with the UK's Competition Commission, which was assessing and has now cleared a rival bid by Royal Caribbean, as well as with the Federal Trade Commission of the United States, which is still examining both bids for P&O Princess.

The Commission's in-depth investigation of the Carnival bid revealed, in the meantime, that the initial concerns were unjustified.

Although by acquiring P&O Princess, the UK's largest player, Carnival would have had around a third of the UK cruise market in terms of passengers, barriers to entry are not significant as illustrated by the rapid and successful arrival of tour operators in the last five years who now carry

around one third of all UK cruise passengers. Existing operators have also experienced significant growth.

Moreover, Carnival's position in the UK market is expected to come under pressure from international competitors capable of modifying the proportion of British customers on their ships, for example by increasing the proportion of British passengers on cruises organised primarily for the US market, which have a significant presence in UK. The Commission found that, while cruises carrying mainly UK passengers are preferred by a section of UK customers, a bigger proportion is not sensitive to this distinction. Moreover, ships can be and indeed are re-allocated on an ongoing basis between different geographic markets, from the US to the UK for example.

As regards the German market, the acquisition resulted in a 25% market share by Carnival in terms of passenger cruise days. But Mediterranean companies, such as MSC and Festival, have successfully entered the market in last five to ten years.

It was also concluded that the merger would not have any significant impact on the cruise markets in Spain, Italy, France or other European countries, all countries which so far have had a lesser cruise tradition than the UK and Germany, but which present a significant potential for growth and market entry.

Finally, it was concluded that the high recent and projected growth rate in cruise markets would, in itself, constitute a significant competitive constraint on the incumbent cruise operators as high growth rates provide an incentive for new operators to enter the market.

Moreover, the additional cruise ship capacity which will come on-stream for Carnival and P&O in the next two or three years may lead to some increase in the parties' market shares but it will also constrain their ability to raise prices as they will need to continue to persuade a sufficient number of holidaymakers to take up cruising to ensure high utilisation rates of this new capacity.

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

Haniel /Cementbouw/ JV

The European Commission granted retroactive clearance to the 1999 acquisition of the Dutch sand-lime joint venture CVK by the Haniel group

of Germany and Dutch firm Cementbouw after the companies undertook to terminate their joint venture agreement. The agreement, which came to the Commission's knowledge only this year, brought about a dominant position in the Dutch market for wall building materials for load bearing walls, which is against the consumer interest. Earlier this year, the Commission cleared Haniel's consecutive purchases of Fels and Ytong. In the course of these proceedings the Commission found out about the CVK deal.

Haniel is a German conglomerate which includes Haniel Bau-Industrie GmbH, a producer of wall-building materials such as sand-lime wall building products, aerated concrete products and ready-mixed concrete which operates mainly in Germany. In the Netherlands, Haniel is primarily active in the building materials sector through its indirect 50% stake in CVK, a Dutch co-operative which groups together all the Dutch sand-lime producers, including Van Herwaarden, Anker and Vogelenzang. The other members of CVK are owned either by Haniel or by Cementbouw.

Cementbouw Handel & Industrie B.V. is a Dutch producer of building materials, which is also active in the building materials trade. It owns the other 50% stake in CVK.

Haniel and Cementbouw took control of CVK and its members in 1999 through a series of agreements (see background below), but did not notify it to the Commission. The Commission became aware of this during its review of Haniel's acquisition of Fels-Werke GmbH and Haniel's purchase of Ytong Holding AG, two other deals in the building materials sector. Both acquisitions received regulatory approval by the Commission insofar as the Dutch market is concerned (see IP/02/288 and IP/02/530). The impact in Germany was assessed by the German cartel office.

After a careful analysis of the 1999 CVK deal, notified to the Commission in January this year, the Commission has come to the conclusion that in taking control over CVK and its members, Haniel and Cementbouw obtained a dominant position on the Dutch market for wall building materials for load-bearing walls, with a market share in excess of 50%.

Haniel and Cementbouw are, through CVK, the only suppliers of sand-lime products, the wall building materials most demanded by construction companies in the Netherlands. This put building materials traders and construction companies, an important sector for the economy, under a dependence vis à vis CVK, a situation which is not in the consumer's interest.

The Commission believed that the consolidation of the sand-lime industry under the single control of CVK and its parent companies constituted a structural change in the market, which should have been notified for clearance. Whereas before CVK was a joint sales organisation, after 1999 it acquired control over its members and became a fully-fledged company with a strategic business plan and the ability to decide on production capacity levels, R&D and marketing. In addition, as the 1999 operation conferred control over CVK to Haniel and Cementbouw, it effectively constituted a link-up between the second largest player in the industry, Cementbouw, and the largest player, CVK.

Commitments given

In order to meet the Commission's competition concerns, Haniel and Cementbouw undertook to terminate their joint control over CVK and its members. Furthermore, the joint sales and marketing activities through CVK will be terminated.

This will create two strong and competing groups of sand-lime companies in the Dutch building materials sector each owned separately by Haniel and Cementbouw. This will result in price competition in the market to the benefit of house buyers in the Netherlands.

The Commission recognised that the companies involved will need time to comply with the commitment given, with a view in particular to safeguarding the interests of the affected CVK staff, and agreed to grant an appropriate deadline.

Since the proposed dissolution of CVK in the Netherlands removed all competition concerns, the Commission was able to approve the 1999 acquisition retroactively.

Background

Haniel and Cementbouw jointly control CVK and its members since 1999. This control was brought about through a set of agreements that were entered into and implemented in 1999. At the time, Haniel and Cementbouw acquired joint control over CVK through their 50/50% indirect shareholdings, following their purchase of three sand-lime producers (Van Herwaarden, Anker and Vogelenzang) from a third shareholder. At the same time, CVK acquired control over its members, the combined sand lime producers in the Netherlands, thereby transforming CVK into one single, fully-fledged company. Before 1999, the sand-lime producers were independent companies,

with joint sales and marketing activities carried out by the co-operative CVK.

Promatech/ Sulzer Textil

Following referral of the case by a group of member states according to Article 22 (3) of the Merger Regulation, the European Commission cleared the acquisition of Sulzer Textil, the textile machinery division of Swiss company Sulzer Ltd, by Italy's Promatech SpA, another maker of weaving machinery. An in-depth investigation showed that the deal would have led to a dominant position on the Western European market for rapier weaving machines. But Promatech addressed this concern by offering the divestiture of the rapier weaving machines operations in Verona (Italy) and Solothurn (Switzerland).

Promatech is a subsidiary of the Italian group Radici, which is the leading European manufacturer of rapier weaving machines. Last year, it agreed to buy Sulzer Textil from Swiss industrial group Sulzer, a deal which did not meet the turnover thresholds (1) set in the European Union's Merger Regulation and, therefore, did not qualify for regulatory review by the Commission. Instead, it was to be reviewed by the competition authorities of seven EU countries.

The competition authorities of Austria, France, Germany, Italy, Portugal, Spain and the United Kingdom had referred the examination of the case to the Commission in application of Article 22 (3) of the Merger Regulation.

The Commission launched an in-depth investigation into the acquisition in April over concerns that the deal would significantly reduce competition in the market for rapier weaving machines given the leading position of Promatech which was reinforced by the addition of Sulzer Textil, also a manufacturer of weaving machinery and particularly of rapier weaving machines.

Weaving machines make fabrics for the clothing industry but also for technical and industrial applications, such as coated fabrics, airbags, as well as home products and decoration (sheeting, curtains, towels).

A careful analysis indicated that Promatech would have dominated the Western European market for rapier weaving machines with a very high market share. The other competitors in the European Union, Picanol of Belgium and Dornier of Germany, would have had very small market shares in comparison.

To address the Commission's concerns, Promatech offered to divest Sulzer Textil's rapier weaving

machine business in Schio, near Verona (Italy), and Zuchwil, near Solothurn (Switzerland). These commitments eliminated the overlap created by the acquisition and fully removed the Commission's objections to the deal.

First joint referral

This was the first time a group of Member States decided to refer a merger case jointly to the Commission since the Merger Regulation came into force on 21 September 1990. It shows how the Commission and the national competition authorities can co-operate successfully to the benefit of European companies.

For the companies involved, it meant that instead of going through seven different national merger review procedures they only had to obtain clearance from the European Commission.

Following the Promatech/Sulzer case, another transaction, involving General Electric and Unison of the United, was referred jointly by Member States and granted unconditional approval by the Commission in April.

B – Summaries of decisions taken under Article 6

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

Imperial Tobacco/ Reemtsma Cigarettenfabriken

The European Commission gave conditional approval to the proposed acquisition of German cigarette manufacturer Reemtsma Cigarettenfabriken GmbH by Imperial Tobacco Group Plc of the United Kingdom. The acquisition, which propelled Imperial Tobacco to the fifth place in the world cigarette market and third in the European Union, raised competition concerns in the UK market for low priced cigarettes, but the undertakings offered fully addressed these concerns.

Imperial Tobacco is the world's ninth biggest cigarette manufacturer with a leading position in Britain. Imperial Tobacco manufactures and sells a range of tobacco products, including Superkings, Lambert and Butler, Embassy, John Player Special, Regal and Richmond cigarette brands, Drum 'roll-your-own' tobacco and Rizla cigarette

papers. Reemtsma is currently the world's fifth largest cigarette manufacturer and a leading supplier in Germany and in several Eastern European countries. It supplies the leading West and Davidoff cigarette brands.

Whilst the acquisition will result in substantial additions of market shares in several product markets in Germany, Italy and the United Kingdom, the activities of the parties are mostly complementary and the investigation did not reveal any substantial competition concerns, with the exception of the UK cigarette market.

The competition analysis showed that Imperial Tobacco and Gallaher are the clear leaders in the UK cigarette market with Gallaher being particularly strong in the premium brand segment whereas Imperial Tobacco's strength is more in the low priced sector. Competitors Philip Morris, BAT and Reemtsma have comparatively small market shares despite the first two being world leaders in the sector.

However, Reemtsma's UK business occupies an interesting place in the market, as it is mostly focused on the supply of own-label cigarettes to the UK supermarket and cash-and-carry chains, for which it is the only significant supplier at present.

Own-labels are usually exclusive trademarks of the distributor who owns them. Contrary to this usual situation, Reemtsma owns many of the own-label cigarette trademarks, such as Red Band, in the United Kingdom. This is because supermarkets, although willing to sell cigarettes, are reluctant to see their name associated with the product.

Imperial Tobacco's acquisition of Reemtsma would have put these distributors in a weak negotiating position *vis-à-vis* Imperial Tobacco, as changing to another supplier could be difficult without the ownership of the trademark. The acquisition of Reemtsma would have therefore given Imperial Tobacco not only a strong position in the low priced cigarette sector but would also have established it as the only supplier of own-label cigarettes. As "own-label" cigarettes are a significant source of competition in the UK market and particularly in the lower priced sector, this situation would have given rise to serious competition concerns.

To alleviate these concerns Imperial Tobacco has undertaken not to develop the trademarks in question for its own account and to maintain the exclusivity distributors currently enjoy. It also undertook that in the event that 'own-label' distributors were to find alternative suppliers in the future, Imperial Tobacco would assign the relevant trade-

marks for a nominal sum at the request of the distributor. These undertakings eliminate any dependency on Imperial Tobacco by allowing the distributors to change supplier easily and ensure that 'own-label' cigarettes continue to be an effective source of competition in the UK market.

Barilla/ BPL/ Kamps

The European Commission approved, subject to conditions, the proposed take-over bid by Barilla Group of Italy for German bakeries group Kamps AG. The Commission feared that the deal might reinforce Barilla's leading position in Germany for crispbread. Barilla already owns the Wasa brand, the uncontested market leader in Germany, and the addition of Kamps' Lieken Urkorn would have strengthened this position. To address the Commission's concerns, Barilla undertook to divest Lieken Urkorn's crispbread business to a viable competitor with experience in the food sector.

Barilla and Italian bank Banca Popolare di Lodi S.c.a.r.l. (BPL) launched a public take-over offer for all Kamps' listed shares. After the acquisition, Barilla and BPL will have joint control over Kamps.

Barilla is active in the production and sale of pasta and pasta sauce products, bakery products (bread, bread substitutes and cakes) and ice cream. While most of the company's bakery operations are centred in Italy, Barilla's Wasa subsidiary is a leading crispbread manufacturer in several European countries, including Germany. Barilla acquired the Wasa brand in 1999, a deal which was examined by the German cartel office.

Kamps makes bakery products (bread, bread substitutes and cakes) in a number of European countries, including Germany, the Netherlands and France. Among the brands it owns are Lieken Urkorn and Golden Toast. The Lieken Urkorn brand comprises a range of bread, bread substitute and cake products, including a number of crispbreads.

The Commission's market investigation showed that the activities of Barilla and Kamps are largely complementary. However, competition concerns arose in the German market for crispbread, where Lieken Urkorn is one of a few challengers to the market-leading Wasa brand. The only other significant competitor with branded products is Brandt's 'Burger' division, a leading former East German crispbread brand which is, however, virtually unknown in western Germany.

The Commission considered that the divestiture of Kamps' crispbread business, which accounts for only a small fraction of Kamps' total turnover, removed the overlap between the parties' activities in the German bread substitutes market and thus resolved the competition concerns.

BP/ Veba Oel

The European Commission authorised BP Plc's proposed acquisition of the whole of German oil and petrochemicals producer Veba Oel, currently a joint venture between BP and E.ON. The Commission concluded that the change from joint to sole control does not give rise to competition concerns.

Veba Oel AG was a 100-percent subsidiary of German energy group E.ON until 2001 when BP bought a 51-percent stake therefore acquiring joint control with E.ON in the oil and petrochemicals company active mainly in Germany through the Veba and Aral brands. Under the joint venture agreement, E.ON had a put option to sell the remaining shares to BP at a later stage.

The creation of the Veba Oel joint venture was cleared with conditions by the Commission in December 2001 (see IP/01/1893) and by the German Cartel Office. The latter examined the deal's impact in the fuels markets after a referral request whereas the Commission examined the petrochemicals sector.

The Commission examined whether the acquisition by BP of full control of Veba Oel would give rise to competition problems, but considered that it would not alter the competitive situation in the market since the put option was already contained in the 2001 agreement, that BP already had joint control and that the JV was no longer acting as an independent competitor of BP.

However, in view that some of the deadlines for complying with the conditions imposed in the BP/ E.ON joint venture by both the Commission and the Bundeskartellamt were still running, the Commission considered that the competition concerns resulting from the combination of BP's and Veba Oel's petroleum activities were not yet fully eliminated. To address these concerns, BP committed to fully comply, also with regard to the present transaction, with the undertakings submitted to the Commission and to the Bundeskartellamt in the BP/E.ON case. The Commission cleared the present transaction subject to full compliance with this commitment.

Telia/ Sonera

The European Commission gave the go ahead to the proposed acquisition of Finnish-based telecommunications group Sonera Corp. by Sweden's Telia AB, another telecoms firm. The Commission feared that the deal — the first between two incumbent telecoms companies in Europe which moreover are neighbours — could act against consumers' interests by reducing competition in Finland and in Sweden. But the companies addressed these concerns by offering to sell Telia's mobile operations in Finland, Telia's cable TV network in Sweden and by creating a legal separation between their fixed and mobile networks and services businesses in Finland and Sweden.

'The regulatory clearance of the proposed merger between Telia and Sonera provides a good example of how the Commission's overriding concern to ensure sufficient choice, vibrant innovation and competitive prices can be resolved successfully and speedily. Today's decision will enable the new entity which will arise from the merger of Telia and Sonera to be more competitive on the European scene and, at the same time, takes care to guarantee that business customers and households in Finland and Sweden will not lose out as a result', said Competition Commissioner Mario Monti.

According to the terms of the deal notified to the Commission on 28 May 2002, the Swedish incumbent telecoms company Telia will merge with the Finnish telecoms company Sonera by way of an exchange offer by Telia to Sonera's shareholders. On completion, current Telia shareholders will account for 64% of the combined company and Sonera shareholders for 36%.

Both Telia and Sonera are partly state-owned and are the leading telecommunications operators in their respective countries.

Telia provides a wide range of retail communications services to residential and corporate customers, primarily in Sweden. It is also a significant provider of international carrier services and domestic wholesale services in the Nordic and Baltic region.

Sonera is the leading provider of mobile communications services, data communications services and international voice services in Finland. Its main activities outside Finland are in the Baltic States.

Horizontal overlaps

The Commission's investigation showed that the proposed transaction would lead to direct overlaps in the parties' activities in Finland for mobile communications services to retail customers, wholesale international roaming and wireless local area network (WLAN) services. The concerns raised by these overlaps were, however, remedied by the parties' commitment to divest Telia's mobile communications business in Finland, including its WLAN business.

Potential competition

The analysis of the merger also showed that the loss of competitive pressure brought about by the merger would be higher than the market shares of Telia in Finland might indicate. The loss of Telia as an actual and potential powerful competitor for a wide range of telecommunications services in Finland would strengthen the dominant position of Sonera in its home market, in particular as regards fixed and mobile communications services.

Likelihood of foreclosure due to strong vertical links

In addition to this, the Commission was concerned by the strong vertical links between, on the one hand, the parties' strong position in certain retail markets such as mobile communications services and corporate communications services in Sweden and Finland and, on the other hand, the parties' monopoly positions for wholesale call termination on their fixed and mobile telephony networks and leading positions for the provision of wholesale international roaming in Sweden and Finland.

This vertical integration of powerful positions would give the merged entity the incentive and ability to foreclose competitors from the retail services markets in both countries. This would probably result in the strengthening of already strong positions for mobile communications services and bundled voice and data communications solutions (corporate communications services), in particular for services directed to corporate customers with pan-Nordic needs.

In order to remedy to the foreclosure concerns, the companies offered to create a legal separation between their fixed and mobile networks as well as services in Finland and in Sweden. They also undertook to grant non-discriminatory access to their networks.

Finally, the parties offered to divest Telia's nationwide cable TV business in Sweden. Cable TV

networks, when they exist and especially when they have a wide coverage, are considered to be the most credible substitute to the infrastructure of incumbent telecoms firms in that they can be used, if sufficiently upgraded, to provide broadband Internet services, data transmission and voice telephony.

The package of undertakings fully resolved the Commission's concerns. Therefore regulatory clearance was possible after only an extended first-phase (six weeks) review.

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

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

Nehlsen/ Rethmann/ SWB/ Bremerhavener Entsorgungsgesellschaft

The European Commission referred the proposed acquisition of joint control of the Bremerhavener Entsorgungsgesellschaft mbH (BEG) by Karl Nehlsen GmbH & Co KG (Nehlsen), Rethmann Entsorgungswirtschaft GmbH & Co KG (Rethmann) and swb AG (swb) to the German competition authority (Federal Cartel Office). The Federal Cartel Office requested this referral as the merger threatened to create dominant positions on the regional markets for the incineration of municipal and commercial wastes in Lower Saxony, Bremen and Hamburg.

Nehlsen is part of a group with the same name that operates in the German waste disposal industry.

Rethmann is majority-owned by the international Rethmann Group, whose core business is waste disposal. Its other activities include the removal and processing of slaughterhouse wastes and animal carcasses, and logistical services.

Swb is controlled by Dutch company Essent N.V, a multi-utility corporation that supplies gas and electricity, and telecommunications and waste disposal services.

BEG is active in waste and sewage disposal, including the construction and operation of the necessary plant and installations. It operates a refuse incineration plant, a central waste water treatment plant and a second water treatment plant in Bremerhaven. It is currently under the sole control of the City of Bremerhaven.

The Federal Cartel Office asked for the case to be referred over concerns about the parties' large combined share of the markets for the thermal processing of municipal and commercial wastes in the Lower Saxony/Bremen/Hamburg area.

The Commission believed that the conditions for a referral were met and that the Federal Cartel Office were in a better position to examine the effects of the merger on the regional markets concerned.

Sogecable/ Canalsatélite Digital/ Via Digital

The Commission decided to grant the referral requested by the Spanish Competition Authorities with regard to the integration of the two satellite digital television platforms operating in Spain. The operation, which threatens to bring about anti-competitive effects in a number of markets within Spain, will therefore be assessed by the Spanish authorities according to this State's national competition law.

On July 3, the Commission received a notification under the Merger Regulation requesting clearance for the integration of DTS Distribuidora de Televisión Digital S.A. (Vía Digital), the second pay TV operator in Spain, in Sogecable S.A., the dominant pay TV operator in Spain, by way of exchange of shares. The former is controlled by the Spanish undertaking Grupo Admira Media S.A., belonging to the Telefónica group. The latter is controlled jointly by the Spanish media group Promotora de Informaciones S.A. (Prisa) and Groupe Canal + S.A., belonging to Vivendi Universal. According to the notification, after the merger Sogecable will continue to be controlled by Prisa and Canal+, while Telefónica will hold a significant participation in the merged entity.

On 12 July, the Spanish government requested the Commission, according to article 9.2 (a) of the Merger Regulation, to refer the case to its competition authorities on the basis that the merger threatened to create a dominant position impeding competition in distinct markets within Spain.

The Commission's review of the case confirmed that the concentration would threaten to create or strengthen a dominant position in the following markets geographically limited to Spain: pay TV, where the two parties are currently the two largest competitors and have combined market shares of around 80% (in terms of number of subscribers) and 80-95% in terms of sales; acquisition of exclusive rights for premium films and acquisition and exploitation of football matches in which Spanish teams participate (these TV contents are the main drivers for customers that decide to subscribe to a pay TV), other sports and sale of TV channels.

The Commission also investigated the effects of the transaction on several telecommunication markets, such as the provision of services of Internet access, services of fixed telephony or provision of infrastructures, and took also into consideration Telefónica's developing activities in pay TV (in particular, its project Imagenio, which will provide pay TV services, Internet access and fixed telephony through ADSL). The investigation showed that the creation of a structural link between the dominant operators in pay TV (and audio-visual content) and telecommunications in Spain risked to strengthen Telefónica's dominant position in a number of telecommunication markets.

The Commission came to the conclusion that in this case, given the national scope of the markets affected by the transaction, the Spanish Authorities are particularly well placed to carry out a thorough investigation of the operation, and that it was therefore appropriate to refer the case to Spain. The Spanish authorities will assess the transaction under their national competition law. According to the Merger Regulation, the publication of any report or the announcement of the findings of the examination of the concentration by the Spanish Authorities shall take place not more than four months after the Commission's referral.

Sogecable is a Spanish company whose principal areas of business are the operation of terrestrial television (Canal+ analogue) and direct-to-home satellite pay television services (Canal Satélite Digital), the production and distribution of films, the acquisition and sale of sports rights and the provision of technology services. Sogecable is controlled by Prisa (Promotora de Informaciones S.A., the Spanish media group that publishes 'El País' and 'Cinco Días'), and by Canal + S.A.

Vía Digital offers pay TV via satellite in Spain and is controlled by Telefónica through Admira Media. The remaining capital is divided among institutional shareholders, mainly TV operators (Televisa, Canal 9, Direct TV, TVG, TVC, Telemadrid).

Commission raises no objections to German feed-in laws for electricity from renewable energy sources and combined heat and power

Brigitta RENNER-LOQUENZ and Volker ZULEGER, DG COMP, Unit G-2

On 22 May 2002 the Commission decided that the German laws on the promotion of electricity from renewable energy sources and from combined heat and power (CHP) do not constitute State aid in the meaning of Article 87 of the EC Treaty.

Description of the measures

In order to promote sustainable energy supply, Germany introduced two laws to support electricity from renewable energy sources and from combined heat and power (CHP) production. The two laws — the ‘Erneuerbare-Energien-Gesetz (EEG)’ ⁽¹⁾, in force since April 2000, and the ‘Kraft-Wärme-Kopplungs-Gesetz (KWKG)’ ⁽²⁾, from May 2000 — oblige net operators to connect ‘green’ power generation installations to the grid, to purchase their electricity as a priority and to pay for the electricity at a minimum price above the market price for electricity. Thus, these laws clearly give an economic advantage to specific undertakings, namely the operators of ‘green’ electricity installations and have the potential to distort competition in a liberalised electricity market.

Assessment

The Commission decisions clarify that the two laws do not fall under European State aid rules as they do not fulfil the definition of State aid in the meaning of Article 87(1) of the EC Treaty. This is because the Treaty establishes that such an advantage constitutes State aid only if granted ‘by the Member State or through State resources’. In March 2001, the European Court of Justice had

ruled on a similar purchase obligation that it did not imply State resources, insofar as any transfers under examination occurred directly between private companies without State involvement ⁽³⁾. This ruling on the German ‘Stromeinspeisungsgesetz’, which preceded the EEG, was decisive also for the present Commission decisions.

The Commission noted that the measures in question apply without distinction to private and public net operators and suppliers. However, the Commission considered that in the current cases, the Court’s conclusions could be extended to all companies subject to the purchase and compensation obligation, irrespective of their ownership structure. This seemed justified as the laws treat the public and private companies in exactly the same way, and as there is no indication that State resources are transferred via the public companies to the beneficiaries. This indicates that the measures are not aiming to use specifically the resources of public undertakings in order to support electricity from renewable sources and CHP-electricity. This view was supported by the fact that the electricity transmission network is currently almost entirely owned by private operators.

The Commission had received numerous comments on the economic and ecological effects of the laws. In particular, the question of EEG’s potential to overcompensate beneficiaries was raised, especially windpower generation. As the laws do not constitute State aid, they therefore are within the jurisdiction of Germany as regards competition law and it is not the Commission’s competence to take position on this question.

⁽¹⁾ Gesetz über den Vorrang Erneuerbarer Energien (Eneuerbare-Energien-Gesetz – EEG) vom 29. März 2000 (BGBl. I S. 305).

⁽²⁾ Gesetz zum Schutz der Stromerzeugung aus Kraft-Wärme-Kopplung (Kraft-Wärme-Kopplungsgesetz — KWKG) vom 12. Mai 2000 (BGBl. I S. 703).

⁽³⁾ Judgement of the European Court of Justice of 13.3.2001 in Case C-379/98 *PreussenElektra AG vs. Schleswig AG*, [2001] ECR I-2159.

La Commission autorise des aides en faveur de deux projets énergétiques basques

Fernando CASTILLO BADAL, Direction générale de la concurrence, unité G-2

La Commission européenne a décidé le 19 juin 2002 de clore par une décision positive la procédure formelle d'examen prévue à l'article 88 paragraphe 2 du traité CE qu'elle avait ouvert le 6 juin 2001 à l'égard d'un projet d'aides du Gouvernement basque notifié par les autorités espagnoles le 26 janvier 2001. Le projet d'investissement vise la construction d'une centrale de cycle combiné («Bahía de Bizcaia Electricidad», BBE) et d'une usine de regazéification («Bahía de Bizcaia Gas», BBG) dans les environs du port de Bilbao. L'aide consiste en une subvention de 30 millions d'euros pour la partie BBE et de 23,2 millions d'euros pour la partie BBG, à verser entre 2000 et 2003, soit une intensité nette de 7,88 % pour le projet BBE et de 7,80 % pour le projet BBG. Les bénéficiaires de l'aide sont respectivement les sociétés BBE et BBG, dont les sociétés BP-Amoco, Repsol, Iberdrola et EVE détiennent chacune 25 % du capital.

La Commission a levé ainsi les doutes qu'elle avait émis à l'égard de ce projet lors de sa décision d'ouvrir la procédure formelle d'examen. A cet égard, elle avait constaté que ce projet ne s'inscrivait dans le cadre d'aucun régime d'aides en vigueur autorisé par la Commission, et qu'il s'agissait donc d'une aide ad hoc. Dans ces conditions, et conformément aux Lignes directrices concernant les aides à finalité régionale, la Commission est tenue de vérifier que les distorsions de concurrence qu'une telle aide peut entraîner sont compensées par les avantages que la région concernée peut tirer du projet. Dans le cas d'espèce, elle a considéré que le projet contribuera à améliorer la production et la distribution d'énergie dans la zone. En particulier, la Commission a considéré que la centrale de regazéification contribuera de façon décisive à améliorer le système de distribution de gaz dans la région, compte tenu de ce que le Pays Basque est éloigné des différents points d'entrée du gaz naturel dans la péninsule ibérique. Elle a également tenu compte de l'envergure des projets, dont l'apport au PIB de la région sera significatif.

D'autre part, la Commission a examiné le projet à la lumière de l'encadrement multisectoriel des

aides à finalité régionale en faveur de grands projets d'investissement. En application de cet encadrement, l'intensité maximale admise pour un projet donné est conditionnée par une série de facteurs tels que l'évolution du marché géographique pertinent pour le produit en cause, le ratio capital/emplois ainsi que l'impact régional, c'est à dire le ratio emplois directs/emplois indirects. De même, la Commission a examiné les coûts éligibles du projet.

En ce qui concerne l'évolution du marché de produit, et pour ce qui est du projet BBE, la Commission a confirmé les doutes qu'elle avait émis sur la situation du marché électrique (marché de produit) en Espagne (marché géographique), puisqu'il résulte des données disponibles sur l'évolution de la consommation apparente en valeur que le marché est en déclin relatif au sens du point 7.8 de l'encadrement multisectoriel. Par conséquent, un facteur de 0,75 a été appliqué au projet BBE, au lieu du facteur 1,00, comme demandé par les autorités espagnoles. En ce qui concerne le marché du gaz (projet BBG), il a été constaté qu'il n'est pas en déclin, et par conséquent un facteur de 1,00 lui a été appliqué.

La Commission a également examiné la justification de certains emplois indirects présentés par les autorités espagnoles afin d'établir le facteur relatif à l'impact régional. La Commission a considéré qu'une partie de ces emplois ne pouvait pas être prise en considération.

Enfin, la Commission a également considéré que certains des coûts éligibles présentés par les autorités espagnoles ne pouvaient être admis.

Suite à cet examen, la Commission a établi conformément à l'encadrement multisectoriel l'intensité maximale possible pour ces projets, qui a été fixée à 9,9 % net pour le projet BBE et à 13,2 % net pour le projet BBG. Compte tenu du fait que les intensités prévues (7,88 % pour le projet BBE et 7,80 % pour le projet BBG) ne dépassent pas les intensités maximales ainsi établies, la Commission a conclu que l'aide envisagée par le Gouvernement basque est compatible avec le traité CE.

Clarification on the interpretation of the de minimis rule in State aid — the European Court of Justice upholds the Commission's Dutch service station decision

Magdalena BRENNING, Directorate-General Competition, unit D-1

Introduction

On 13 June 2002 ⁽¹⁾, the European Court of Justice ('the Court' or 'the ECJ') upheld ('the Judgment') the Commission's partially negative decision on the State aid implemented by the Netherlands for 633 Dutch service stations located near the German border ('the Decision') ⁽²⁾. With this judgment the Court provides an important clarification on the interpretation of the rule on State aid of minor importance, the de minimis rule.

Background

The judgment relates to the Commission's decision in which it declared incompatible the State aid implemented by the Netherlands for certain categories of Dutch service stations located near the German border. The decision concerned a notified aid, intended to compensate the Dutch operators of 633 service stations located close to the German border for the alleged decline in turnover resulting from the increased Dutch excise duty on light oil since July 1st, 1997.

The aid consisted of a subsidy, which was calculated on the basis of the quantity of light oil supplied. It decreased in proportion to the distance of the service stations from the German border and was to be abolished in the event of an increase in German excise duties. In order to comply with the conditions of the Commission notice on the de minimis rule for State aid ('the Notice') ⁽³⁾, the ceiling of the subsidy was set at ECU 100 000 per service station over a period of three years.

The Notice sets a ceiling of ECU 100 000 (now Euro 100 000) over a three-year period ⁽⁴⁾, below which an aid is considered not to have an appreciable effect on trade and competition between

Member States ⁽⁵⁾. An aid only falls under Article 87(1) in so far as it affects trade between Member States. As this condition is not met, Article 87(1) is deemed not to apply to de minimis aid with the result that it does not need to be notified ⁽⁶⁾.

After having examined the aid more closely, and in particular all the exclusive purchasing agreements, the Commission found that there was a risk of a cumulation of aid in excess of the de minimis threshold for 450 of the eligible 633 service stations and, therefore, that the de minimis rule was not applicable for these 450 service stations. These 450 service stations can be divided into three groups.

The aid granted to the service stations in the first group was declared incompatible as the Netherlands authorities had provided no or insufficient information, although the Commission had enjoined them to do so. Without this information, the Commission was not in a position to determine who was the real beneficiary of the aid and thereby to rule out a prohibited cumulation of aid. As concerns the aid granted to the service stations in the second group, the Commission considered that there was a risk of cumulation of aid exceeding the de minimis ceiling per recipient in cases where the same company owned and operated several service stations, as the aid is granted per service station.

Lastly, the service stations in the third group concluded contracts including a price management system ('PMS'). According to this system, the supplier shall bear part of the losses that a dealer suffers due to specific market conditions. Therefore, by granting the aid to service stations with a PMS clause, the Netherlands Government could be seen as compensating fully or in part the

⁽¹⁾ Judgment of 13 June 2002, Case C-382/99 *Kingdom of the Netherlands v Commission*, not yet published.

⁽²⁾ Commission Decision 1999/705/EC of 20 July 1999, OJ L 280, 30.10.1999, p. 87.

⁽³⁾ Commission Notice 96/C68/06 on the de minimis rule for State aid, OJ C 68, 6.3.1996, p. 9. The Notice has subsequently been replaced by Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid ('the de minimis block exemption regulation'), which entered into force on 2 February 2001. However, as the content of the de minimis notice has almost completely been included in the new regulation, the Court's interpretation of de minimis rule is still valid.

⁽⁴⁾ Second paragraph of the Notice.

⁽⁵⁾ First paragraph of the Notice.

⁽⁶⁾ Second paragraph of the Notice.

supplier for its obligations under this clause. This created a risk of cumulation of aid to the oil companies concerned.

The Commission's decision was subsequently appealed by some 70 service stations to the Court of First Instance ('CFI') and by the Netherlands Government to the ECJ. In March 2000, the CFI decided to stay the proceedings before it pending the outcome of the proceedings before the ECJ. On 14 March 2002, Advocate General Philippe Léger ('the Advocate General') delivered his opinion ('the Opinion') on the case ⁽¹⁾.

The Judgment

The Court has upheld the Commission's findings in all material and procedural respects. Although the Court has still not taken a position on the legality of the de minimis rule in relation to the Treaties ⁽²⁾, some important procedural and material clarifications on the interpretation of the de minimis rule may be deduced from the judgment and the opinion of the Advocate General.

First of all, the Court confirms that the Commission's duty and power to verify that Member States are not granting incompatible aid also apply in the context of the de minimis rule. In terms of the Notice ⁽³⁾, and in accordance with the opinion of the Advocate General ⁽⁴⁾, the Court recognises the obligation on Member States to facilitate the achievement of this task ⁽⁵⁾. However, the Court does not expressly confirm the Commission's view, as outlined in the defence of the appeal and in terms of the Notice, that it was for the Netherlands Government to establish an appropriate control mechanism which would have enabled the

Commission to satisfy itself that the de minimis ceiling on aid would never be exceeded ⁽⁶⁾. The Court ⁽⁷⁾, like the Advocate General ⁽⁸⁾, establishes further that the requested information is relevant, without taking a position on whether, as maintained by the Commission, it falls within the Commission's discretion to decide if requested information is relevant or not ⁽⁹⁾.

Secondly, the Court stresses the importance for Member States and the Commission to co-operate in good faith during the administrative phase of the State aid procedure as well as in the event of difficulties in implementing an order for recovery ⁽¹⁰⁾. As concerns the former, the Court rejects the view of the Netherlands Government that the obligation on Member States to provide information in respect of de minimis aid is necessarily less rigorous than the obligation imposed on them by Articles 87 and 88 of the EC Treaty ⁽¹¹⁾.

The Court holds that '*it remains necessary for the Member State intending to grant such aid to provide the Commission with all the information which would justify the application of the de minimis rule in precisely those cases where the Commission has doubts as to the compatibility of the aid with the common market and thus also as to whether the conditions laid down in the Notice have been met*' ⁽¹²⁾. According to the Court, that duty to provide information follows from the general duty of Member States to co-operate with the Commission in good faith, within the meaning of Article 5 of the Treaty ⁽¹³⁾. The Advocate General goes further by considering that the obligation to provide information must be even greater under the de minimis rule as the Commission

⁽¹⁾ Opinion of Advocate General Philippe Léger of 14 March 2002, Case C-382/99 *Kingdom of the Netherlands v Commission*, not yet translated into English, not yet published.

⁽²⁾ In his opinion (paragraph 45), Advocate General Léger raises the question of the legality of the de minimis rule in relation to the EC Treaty, in particular in light of the recent jurisprudence of the Court that appears to reject a purely quantitative approach. However, as the Court cannot examine *ex officio* the legality of an act adopted by an institution, he does not consider the question further. With the adoption of the enabling Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of EC Treaty on certain categories of horizontal State aid, in particular Article 2 (OJ 1998 L 142, p. 1), and the de minimis block exemption regulation, the de minimis rule subsequently has a more solid legal basis.

⁽³⁾ Last paragraph of the Notice.

⁽⁴⁾ Paragraph 57 of the Opinion.

⁽⁵⁾ Paragraph 26 of the Judgment.

⁽⁶⁾ Paragraph 59 of the Judgment and last paragraph of the Notice. The question whether Member States must establish a control system may have been solved with the new de minimis block exemption regulation. According to Article 3(3), Member States shall record and compile all the information regarding the application of the Regulation. It stipulates further that such records shall contain all information necessary to demonstrate that the conditions of the Regulation have been respected.

⁽⁷⁾ Paragraph 79 of the Judgment.

⁽⁸⁾ Paragraph 145 of the Opinion.

⁽⁹⁾ Paragraph 75 of the Judgment.

⁽¹⁰⁾ In this context, it should be noted that the Advocate General asserts that any possible difficulties encountered in implementing a recovery order may not put into question the legality of the decision (paragraph 160 of the Opinion).

⁽¹¹⁾ Paragraphs 45 and 48 of the Judgment.

⁽¹²⁾ Paragraph 48 of the Judgment.

⁽¹³⁾ *Idem*.

would otherwise not be in a position to satisfy its control obligation ⁽¹⁾.

The Court also refers to the general obligation to co-operate with regard to alleged difficulties to calculate the sum to be recovered (where the calculation is dependent on information which the Member State has not provided to the Commission), and/or to identify the addressees of the orders for recovery ⁽²⁾. As concerns the latter, the Court recalls that the Netherlands Government may submit the relevant issues to the Commission for its consideration ⁽³⁾.

Thirdly, the Advocate General upholds ⁽⁴⁾ the Commission's view that the de minimis rule, as an exemption to the main rule, should be interpreted strictly ⁽⁵⁾. The Court indirectly confirms this through accepting a lower burden of proof for the Commission. Indeed, according to the Court, it suffices for the Commission to demonstrate that there was a '*risk for cumulation of aid*' for a measure not to be covered by the de minimis rule ⁽⁶⁾. Similarly, the Court accepts that the Commission '*assumed*' that the scheme provided indirect aid to oil companies linked to service stations by exclusive purchasing agreements containing a PMS clause, solely on the ground that the contracts contained such clauses ⁽⁷⁾.

Finally, the Court confirms the Commission's view that the real recipient of the aid must be identified in order to verify that there is no cumulation of aid ⁽⁸⁾. This question arose in several contexts in the judgment:

Firstly, the Court rejects the view of the Netherlands Government that there can never be cumulation of aid as a single service station can never receive the de minimis aid more than once ⁽⁹⁾. According to the Court, supported by the

Advocate General ⁽¹⁰⁾ and the Commission ⁽¹¹⁾, aid to be granted per service station, by definition provides for the owner of several service stations to receive as many grants of aid as he/she owns service stations ⁽¹²⁾. Thus, the owner of the service stations is the real recipient of aid.

Similarly, the Court finds that the real recipients of the aid are the oil companies, as the purpose and the effects of the aid and the PMS are the same, and therefore the aid renders it unnecessary for the service stations to invoke the PMS clause ⁽¹³⁾. The Advocate General comes to the same conclusion by analysing in detail the causality between the aid and the PMS ⁽¹⁴⁾. Finally, the Court holds that the Commission was right to ask, *inter alia*, for the exclusive purchasing agreements, as they were essential in order to determine the real recipients of the aid ⁽¹⁵⁾.

Conclusion

With this judgment, the Court confirms that Member States cannot use the de minimis rule as a '*carte blanche*' to circumvent the State aid rules of the Treaties, in particular Articles 87 and 88 of the EC Treaty. It does so by establishing that the de minimis rule should be interpreted strictly and that the real beneficiary of the aid must be identified in order to verify whether the condition of non-cumulation of aid is met. The judgment also ensures the correct application of, and compliance with, the de minimis rule by confirming the control duty and powers of the Commission. At the same time, it stresses the importance for Member States and the Commission to co-operate in good faith during the administrative phase of the State aid procedure as well as in the event of difficulties in implementing an order for recovery.

⁽¹⁾ Paragraphs 100-101 of the Opinion.

⁽²⁾ Paragraphs 50 and 92 of the Judgment.

⁽³⁾ *Idem*.

⁽⁴⁾ Paragraph 55 of the Opinion.

⁽⁵⁾ Paragraph 23 of the Judgment.

⁽⁶⁾ Paragraphs 37-39 of the Judgment.

⁽⁷⁾ Paragraph 67 of the Judgment.

⁽⁸⁾ Paragraph 32 of the Judgment. See also paragraph 119 of the Opinion.

⁽⁹⁾ Paragraph 30 of the Judgment.

⁽¹⁰⁾ Paragraph 84-85 of the Opinion.

⁽¹¹⁾ Paragraph 32 of the Judgment.

⁽¹²⁾ Paragraph 37 of the Judgment.

⁽¹³⁾ Paragraphs 62-68 of the Judgment.

⁽¹⁴⁾ Paragraphs 120-130 of the Opinion.

⁽¹⁵⁾ Paragraph 79 of the Judgment.

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Chef adjoint d'unité	Kris DEKEYSER	02 2954206
2. Projets législatifs et réglementaires; relations avec les Etats membres	Emil PAULIS	02 2965033/02 2995470
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Télécopieur du Greffe Concentrations		02 2964301/02 2967244
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2. Unité opérationnelle II	Francisco Enrique GONZALEZ DIAZ	02 2965044/02 2965390
3. Unité opérationnelle III	Dietrich KLEEMAN	02 2965031/02 2999392
4. Unité opérationnelle IV	Paul MALRIC SMITH	02 2959675/02 2964903
5. Unité chargée du suivi de l'exécution	Wolfgang MEDERER	02 2953584/02 2955169
DIRECTION C		
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1. Télécommunications et Postes, Coordination Société d'information — Cas relevant de l'Article 81/82 — Directives de libéralisation, cas article 86	Pierre BUIGUES	02 2994387/02 2954732
	Suzanna SCHIFF	02 2957657/02 2996288
	Christian HOCEPIED	02 2960427/02 2958316
2. Médias, éditions musicales Chef adjoint d'unité	Herbert UNGERER	02 2968623
	Paolo CESARINI	02 2951286
3. Industries de l'information, électronique de divertissement	Cecilio MADERO VILLAREJO	02 2960949/02 2965303

DIRECTION D
Services

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2. Transports	<i>Bernhard FRIESS</i>	02 2956038/02 2954610
Chef adjoint d'unité	<i>Joos STRAGIER</i>	02 2952482/02 2995894
3. Commerce et autres services	<i>Maria José BICHO</i>	02 2962665
	<i>Corinne DUSSART-LEFRET (f.f.)</i>	02 2961223

DIRECTION E
Cartels, industries de base et énergie

1. Cartels — Unité I	<i>Angel TRADACETE</i>	02 2952462/02 2950900
Chef adjoint d'unité	<i>Georg DE BRONETT</i>	02 2959268
2. Cartels — Unité II	<i>Olivier GUERSENT</i>	02 2965414
3. Industries de base	<i>Nicola ANNECCHINO</i>	02 2961870/02 2956422
4. Énergie, eau et acier	<i>Yves DEVELLENES</i>	02 2951590/02 2995406
	<i>Michael ALBERS</i>	02 2961874/02 2960614

DIRECTION F
Industries des biens de consommation et d'équipement

1. Textiles, produits cosmétiques et autres biens de consommation; industries mécaniques et électriques et industries diverses	<i>Sven NORBERG</i>	02 2952178/02 2954592
Chef adjoint d'unité	<i>Fin LOMHOLT</i>	02 2955619/02 2957439
2. Automobiles et autres moyens de transport	<i>Carmelo MORELLO</i>	02 2955132
3. Produits agricoles et alimentaires, produits pharmaceutiques	<i>Eric VAN GINDERACHTER</i>	02 2954427/02 2998634
	<i>Luc GYSELEN</i>	02 2961523/02 2963781

DIRECTION G
Aides d'Etat I

1. Aides à finalité régionale	<i>Loretta DORMAL-MARINO</i>	02 2958603/02 2958440
Chef adjoint d'unité	<i>Wouter PIEKE</i>	02 2959824/02 2967267
2. Aides horizontales	<i>Klaus-Otto JUNGINGER-DITTEL</i>	02 2960376/02 2965071
3. Fiscalité des entreprises, coordination de la Task Force	<i>Jean-Louis COLSON</i>	02 2960995/02 2962526
Élargissement, suivi des décisions	<i>Reinhard WALTHER</i>	02 2958434/02 2956661

DIRECTION H
Aides d'Etat II

1. Acier, métaux non ferreux, mines, construction navale, automobiles et fibres synthétiques	<i>Humbert DRABBE</i>	02 2950060/02 2952701
2. Textiles, papier, industrie chimique, pharmaceutique et électronique, construction mécanique et autres secteurs manufacturiers	<i>Maria REHBINDER</i>	02 2990007/02 2963603
3. Entreprises publiques et services	<i>Jorma PIHLATIE</i>	02 2953607/02 2955900
	<i>Ronald FELTKAMP</i>	02 2954283/02 2960009

Rattachés directement à M. Monti

Conseiller auditeur	<i>Serge DURANDE</i>	02 2957243
Conseiller auditeur	<i>Karen WILLIAMS</i>	02 2965575

New documentation

European Commission Directorate General Competition

This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: http://europa.eu.int/comm/competition/speeches/index_2002.html

Speeches by the Commissioner 7 May 2002–31 August 2002

Getting competition in local access – Mario MONTI – Brussels, Belgium – 08.07.2002

Competition Policy in the Candidate Countries – the accession negotiations and beyond – Mario MONTI – 8th Annual Competition Conference between the Candidate Countries and the European Commission – Vilnius, Lithuania – 16.06.2002

Review of the EC Merger Regulation – Roadmap for the reform project – Mario MONTI – Conference on Reform of European Merger Control, British Chamber of Commerce – Brussels, Belgium – 04.06.2002

Effective competition in the railway sector : a big challenge – Mario MONTI – UNIFE Annual Reception – Brussels, Belgium – 21.05.2002

Speeches and articles, Directorate-General Competition staff, 2 May 2002 — 31 August 2001

The interaction of officials of the European institutions and officials from the Member States – Alexander SCHAUB – the Dutch Permanent Representation – Brussels, Belgium – 09.07.2002

A new standard of predatory pricing – Tilman LÜDER – IBC Conference on Postal Services – Brussels, Belgium – 18.06.2002

Legislation and Regulation in the Transatlantic Framework Telecoms and Media – Herbert UNGERER – Executive Forum on the Telecommunications Industry, European Union Centre of

the University System of Georgia – Atlanta, USA – 17.06.2002

Review of the EC Merger Regulation – Roadmap for the reform project – Mario MONTI – Conference on Reform of European Merger Control, British Chamber of Commerce – Brussels, Belgium – 04.06.2002

Is it time for an International Agreement on Anti-trust ? – Jean-François PONS – Frauenchiemsee, Germany – 03.06.2002

The new EU regulatory Framework for Electronic communications: From sector specific regulation to Competition Law – Christian HOCEPIED – IBA/ABA Communications and Competition: Developments at the Crossroad – Washington DC, USA – 20.05.2002

Overview of major developments in European competition policy affecting the communications industry – Jean-François PONS – IBA/ABA, Communications and Competition: Developments at the crossroads – Washington D.C., USA – 20.05.2002

Podiumsdiskussion: Wie national müssen Medien sein – Herbert UNGERER – Medientreffpunkt Mitteldeutschland – Leipzig, Germany – 06.05.2002

Community Publications on Competition

New publications and publications coming up shortly

- *XXXI report on Competition policy — 2001*
- *Competition policy in Europe — The competition rules for supply and distribution agreements*
- *Glossary of terms used in EU competition policy — Antitrust and control of concentrations*
- *Competition policy newsletter, 2003, Number 1 — February 2003*

Information about our other publications can be found on the on the DG Competition web site:

The annual report is available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for

free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Most publications, including this newsletter, are available in PDF format on the web site.

Press releases

2 May 2002 — 31 August 2002

All texts are available from the Commission's press release database RAPID at: <http://europa.eu.int/rapid/start/> Enter the reference (e.g. IP/02/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.

ANTITRUST

IP/02/1211 – 09/08/2002 – Commission rejects complaint against International Olympic Committee by swimmers banned from competitions for doping

IP/02/1139 – 24/07/2002 – Commission fines seven companies in Dutch industrial gases cartel

IP/02/1138 – 24/07/2002 – Commission exempts multilateral interchange fees for cross-border Visa card payments

IP/02/1109 – 22/07/2002 – Car prices in the European Union: still substantial price differences, especially in the mass market segments

IP/02/1084 – 17/07/2002 – Commission successfully settles GFU case with Norwegian gas producers

IP/02/1073 – 17/07/2002 – Commission adopts comprehensive reform of competition rules for car sales and servicing

IP/02/1071 – 17/07/2002 – Commission approves privatisation and restructuring plan for Société Française de Production

IP/02/1028 – 10/07/2002 – Competition Policy: Commission invites comments on draft revised insurance block exemption Regulation

IP/02/1016 – 09/07/2002 – Commission issues market power assessment Guidelines for electronic communications

IP/02/976 – 02/07/2002 – Commission fines Degussa and Nippon Soda in animal feed (methionine) cartel

IP/02/966 – 01/07/2002 – Commission raises competition concerns about co-operation agreement between Air France and Alitalia

IP/02/945 – 27/06/2002 – EU agrees strategy to counter unfair Korean shipbuilding practices

IP/02/944 – 27/06/2002 – Commission pursues infringement proceedings against six countries over separation of accounts Directive

IP/02/942 – 27/06/2002 – Commission closes investigation into UEFA rule on multiple ownership of football clubs

IP/02/925 – 25/06/2002 – Commission outlines application of competition rules to steel and coal sectors in changeover from ECSC to EC Treaty

IP/02/924 – 25/06/2002 – Commission renews block exemption for the IATA passenger tariff conferences

IP/02/860 – 13/06/2002 – Commission and Candidate Countries take stock of progress in competition negotiations in Vilnius, and look to the future

IP/02/849 – 12/06/2002 – Unbundling of the local loop: Commission calls public hearing

IP/02/844 – 11/06/2002 – Commission fines eight Austrian banks in « Lombard Club » cartel case

IP/02/842 – 11/06/2002 – 'Fair Trading' for consumers and business in the internal market: Commission consults on legislation

IP/02/824 – 05/06/2002 – Commission closes investigations into FIFA regulations on international football transfers

IP/02/806 – 03/06/2002 – Commission welcomes UEFA's new policy for selling the media rights to the Champions League

IP/02/686 – 08/05/2002 – Commission suspects Deutsche Telekom of charging anti-competitive tariffs for access to its local network

IP/02/671 – 07/05/2002 – Postal services: Commission welcomes adoption of a new Directive fostering competition

STATE AID

IP/02/1236 – 26/08/2002 – Commission rules against special tax regime for the coordination centres based in the Basque province of Biscaye

IP/02/1231 – 23/08/2002 – Special fiscal treatment of banking foundations which do not carry out an economic activity is not state aid

IP/02/1226 – 21/08/2002 – The Commission initiates a procedure against restructuring aid to SNCM

IP/02/1210 – 09/08/2002 – Commission sees State aid to tyre manufacturer Continental's Portuguese subsidiary in compliance with EU rules

IP/02/1195 – 05/08/2002 – The Commission closes its formal investigation into alleged aid to the 'Terra Mítica' theme park (Benidorm, Spain)

IP/02/1144 – 24/07/2002 – The Commission takes a final decision on the State aid paid by France to its coal industry for 1998 to 2001

IP/02/1143 – 24/07/2002 – Italy/Trento: Commission approves part of planned aid to take the transport of goods off the roads

IP/02/1131 – 24/07/2002 – Commission declares State aid to BAE Berliner Batteriefabrik and MODAC compatible with the EC Treaty

IP/02/1081 – 17/07/2002 – Commission rules that subsidies for the construction of service areas in Tenerife are not State aid

IP/02/1080 – 17/07/2002 – Dutch aid to Alkmaar container terminal: Commission initiates an investigation procedure

IP/02/1079 – 17/07/2002 – Commission approves Euro 9 million aid to UK coal industry

IP/02/1078 – 17/07/2002 – Maritime transport: Commission approves the rescue of SNCM

IP/02/1077 – 17/07/2002 – Scrapping of single hull oil tankers : Commission authorises the Italian State aid

IP/02/1076 – 17/07/2002 – British rail network: Commission clears the Euro 37.5 billion financial package in favour of Network Rail

IP/02/1072 – 17/07/2002 – Commission sends Belgium a reasoned opinion for failing to comply with the judgment ordering it to recover 'Maribel' aid

IP/02/1071 – 17/07/2002 – Commission approves privatisation and restructuring plan for Société Française de Production

IP/02/1070 – 17/07/2002 – Commission approves aid to develop Northern Irish gas infrastructure

IP/02/1029 – 10/07/2002 – Tax breaks – Commission finds Åland preferential tax scheme incompatible

IP/02/983 – 02/07/2002 – Commission initiates investigation in Landesbank Berlin case

IP/02/982 – 02/07/2002 – Commission gives go ahead to the Swedish Government's annual compensation to Posten AB, the universal postal operator, for delivering the universal cash service conferred to it by the Swedish State

IP/02/981 – 02/07/2002 – Costs suffered by airlines following the attacks of 11 September 2001 – The European Commission authorises the aid proposed by Germany

IP/02/980 – 02/07/2002 – Commission approves aid to the Spanish coal industry for 1 January – 23 July 2002

IP/02/979 – 02/07/2002 – Commission approves aid to the Spanish coal industry for 2001 but calls for the reimbursement of aid granted in 1998, 2000 and 2001

IP/02/890 – 19/06/2002 – Deutsche Post must repay Euro 572 million used to subsidise price undercutting in commercial parcel services

IP/02/889 – 19/06/2002 – Commission approves loan guarantee for German aircraft manufacturer Fairchild Dornier

IP/02/888 – 19/06/2002 – Commission approves investment aid to new Zellstoff Stendal pulp mill

IP/02/887 – 19/06/2002 – Commission proposes measures to reform the German grain brandy (Kornbranntwein) monopoly

IP/02/886 – 19/06/2002 – Commission authorises aid for two Basque energy projects

IP/02/885 – 19/06/2002 – Air transport: Commission gives go-ahead for measures to restructure Alitalia, entailing in particular significant private sector investment

IP/02/883 – 19/06/2002 – The Netherlands shall recover aid to port and inland waterway towage

IP/02/835 – 07/06/2002 – Coal: Loyola de Palacio welcomes agreement on new rules on State aid

IP/02/819 – 05/06/2002 – Commission authorises aid to Renault for investment in Spain

IP/02/818 – 05/06/2002 – Commission approves major part of restructuring aid in favour of mixed shipyard KSG in the Netherlands

IP/02/817 – 05/06/2002 – Commission closes investigation regarding Italian State aid schemes favouring certain public undertakings Illegal aid awarded must be recovered while the exemption from asset transfer tax does not constitute State aid

IP/02/816 – 05/06/2002 – Commission approves part of Greek aid to Hellenic Shipyards but investigates other measures more in detail

IP/02/815 – 05/06/2002 – Commission approves extension of delivery limit for cruise ship being built at Meyer Shipyard (Germany) State aid may therefore still be paid

IP/02/812 – 05/06/2002 – Commission approves German financial contributions reducing social charges for maritime shipping companies

IP/02/811 – 05/06/2002 – The Commission authorises the United Kingdom to grant Euro 14 million to its coal industry

IP/02/810 – 05/06/2002 – Compensation following the attacks of 11 September: the European Commission expresses doubts about the planned extension of France's aid scheme

IP/02/767 – 28/05/2002 – Air transport insurance after 11 september: the Commission authorizes an extra month of emergency state aid

IP/02/754 – 23/05/2002 – Commission publishes latest EU Scoreboard on State aid

IP/02/746 – 22/05/2002 – The Commission authorises aid to the Spanish coal industry for 2001 but orders a refund of aid granted between 1998 and 2000

IP/02/741 – 22/05/2002 – Commission opens inquiry into Spanish aid planned for Volkswagen's Pamplona plant

IP/02/740 – 22/05/2002 – Commission orders Spain to recover aid to porcelain manufacturer GEA

IP/02/739 – 22/05/2002 – Commission raises no objections to German feed-in laws for electricity from renewable sources and combined heat and power

IP/02/737 – 22/05/2002 – Commission approves state funding to BBC digital television and radio channels

IP/02/674 – 07/05/2002 – Commission clears RAG's acquisition of Saarbergwerke and Preussag Anthrazit Separate decision finds that no State Aid was involved

IP/02/668 – 07/05/2002 – Commission does not object to Public Private Partnership for QinetiQ

IP/02/666 – 07/05/2002 – Commission partially approves regional aid for Ford España in Valencia

IP/02/665 – 07/05/2002 – Azores: the Commission authorises Portuguese aid for scheduled public passenger transport services

IP/02/664 – 07/05/2002 – Commission closes State aid procedure concerning German freight forwarding company BahnTrans GmbH

IP/02/663 – 07/05/2002 – Italian regional aid: the Commission authorises transport investment aid

IP/02/662 – 07/05/2002 – Commission approves German on-board training aid to seafarers

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IP/02/1253 – 30/08/2002 – Commission authorises joint ventures between Morgan Stanley and Olivetti/Telecom Italia in the field of real estate

IP/02/1252 – 30/08/2002 – Commission clears flexible packaging joint venture between Denmark's Danapak and Teich of Austria

IP/02/1242 – 27/08/2002 – Commission clears joint venture between Carlsberg and Brauholding International

IP/02/1241 – 27/08/2002 – Commission clears merger between Ernst & Young, Andersen Germany and Menold & Aulinger

IP/02/1237 – 26/08/2002 – Commission clears TUI's acquisition of Nouvelles Frontières International

IP/02/1233 – 23/08/2002 – Commission approves acquisition of TRW's aerospace components activities by Goodrich.

IP/02/1224 – 20/08/2002 – Commission clears Terex acquisition of Demag Mobile Cranes

IP/02/1219 – 16/08/2002 – Commission clears the acquisition of BauMineral Herten by Alsen and E.ON

IP/02/1216 – 16/08/2002 – Commission refers the assessment of Vía Digital's merger with Sogecable to the Spanish Competition Authorities.

IP/02/1204 – 08/08/2002 – Commission clears joint venture for gas related logistic services between RWE Gas and Lattice International

IP/02/1203 – 08/08/2002 – Commission clears demerger of cross-Channel ferry operator P&O Stena Line

IP/02/1183 – 06/08/2002 – Commission clears separate sale of Blu's business assets subject to commitments

IP/02/1194 – 05/08/2002 – Commission clears take-over of IBM's hard-disk drive business by Hitachi

IP/02/1174 – 29/07/2002 – Commission clears joint venture for food products with cosmetic purposes between L'Oréal and Nestlé

IP/02/1166 – 26/07/2002 – Commission clears acquisition of Seeboard by London Electricity Group.

IP/02/1132 – 25/07/2002 – Commission clears the acquisition of Brake Bros by private equity firm CD&R

IP/02/1141 – 24/07/2002 – Commission clears Carnival's takeover bid for P&O Princess

IP/02/1140 – 24/07/2002 – Commission clears takeover of Sulzer Textil by Promatech subject to divestments

IP/02/1122 – 23/07/2002 – Commission clears acquisition of parts of Daewoo by General Motors.

IP/02/1091 -18/07/2002 – Commission launches discussion on best practice guidelines for divestiture commitments in merger cases

IP/02/1056 – 15/07/2002 – Commission clears Deutsche Bahn JV with Contship in the field of intermodal transportation of containers

IP/02/1032 – 10/07/2002 – Commission clears merger between Telia and Sonera subject to conditions

IP/02/1025 – 09/07/2002 – Commission clears acquisition of Bernheim-Comofi by Fortis

IP/02/1008 – 05/07/2002 – Commission clears partnership between Austrian Airlines and Lufthansa

IP/02/988 – 03/07/2002 – Commission clears acquisition by Italy's Saipem of Bouygues Offshore

IP/02/978 – 02/07/2002 – Commission gives go-ahead for takeover of Coface by Natexis Banques Populaires

IP/02/975 – 02/07/2002 – Commission clears EPC stake in SAARMontan

IP/02/974 – 02/07/2002 – Commission clears BP acquisition of sole control of Germany's Veba Oel

IP/02/972 – 02/07/2002 – Commission clears purchase by Australian firm Amcor of the plastic packaging (PET) and closure businesses of Schmalbach-Lubeca

IP/02/968 – 01/07/2002 – Commission clears the take-over of Andersen UK's business by Deloitte & Touche

IP/02/957 – 28/06/2002 – Commission clears TNT Logistics stake in two transport logistics service providers

IP/02/956 – 28/06/2002 – Commission approves creation of water Internet portal by Ondeo and Thames Water

IP/02/943 – 27/06/2002 – Commission clears electronic multi-bank trading platform for foreign exchange products

IP/02/933 – 26/06/2002 – Commission grants retroactive approval to CVK joint venture between

Haniel and Cementbouw, subject to substantial commitments

IP/02/914 – 26/06/2002 – Commission clears Barilla take-over of German bakeries group Kamps subject to divestitures

IP/02/918 – 24/06/2002 – Commission clears acquisition of Alcatel's microelectronics unit by STMicroelectronics

IP/02/916 – 24/06/2002 – Commission clears B&W Loudspeakers distribution system after company deletes hard-core violations

IP/02/915 -24/06/2002 – Commission clears joint acquisition by Carlton and Thomson in the cinema screen advertising sector.

IP/02/910 – 21/06/2002 – Commission clears Metronet buy of two London Tube infrastructure companies

IP/02/900 – 19/06/2002 – Commission clears Vendex acquisition of Brico Belgium

IP/02/897 – 19/06/2002 – Commission fines Deutsche BP for supplying incorrect information in notification of Erdölchemie purchase

IP/02/892 – 19/06/2002 – Commission clears the acquisition of DSM Petrochemicals by Saudi firm SABIC

IP/02/891 – 19/06/2002 – Commission clears acquisition of US advertising agency Bcom3 by Publicis of France

IP/02/880 – 18/06/2002 – Commission clears Alchemy's take-over of CompAir, the compressor business of Invensys.

IP/02/870 – 17/06/2002 – Commission clears joint venture between Canal de Isabel II and Hidroeléctrica del Cantábrico.

IP/02/845 – 12/06/2002 – Commission clears acquisition of a Siemens stake in German air bearings producer AeroLas

IP/02/834 – 07/06/2002 – Commission clears acquisition of joint control of Gaz de France and Ruhrgas over Slovakian gas supplier

IP/02/829 – 06/06/2002 – Statement by Competition Commissioner Mario Monti on Court judgement on Airtours

IP/02/792 – 31/05/2002 – Commission clears Irish Synergen venture between ESB and Statoil following strict commitments

IP/02/785 – 31/05/2002 – Commission refers BEG waste disposal joint venture to the German Cartel Office

IP/02/784 – 31/05/2002 – Commission clears take-over of German shipbuilder HDW by US's Bank One Corporation

IP/02/773 – 29/05/2002 – Commission clears takeover by Sanmina-SCI of Hewlett-Packard's manufacturing operations in Lyon, France

IP/02/761 – 24/05/2002 – Commission approves the creation of the inreon online reinsurance exchange

IP/02/745 – 22/05/2002 – Commission clears online travel agency between Amadeus and French department store Galeries Lafayette

IP/02/744 – 22/05/2002 – Commission approves acquisition of joint control of VG Media by RTL and ProSiebenSat.1

IP/02/735 – 21/05/2002 – Commission clears RWE's purchase of UK power company Innogy

IP/02/695 – 08/05/2002 – Commission clears acquisition of UK pub companies by Cinven

IP/02/692 – 08/05/2002 – Commission gives conditional clearance to Imperial Tobacco's acquisition of Reemtsma

IP/02/676 – 07/05/2002 – Commission clears take-over of Enterprise Oil by Shell

IP/02/674 – 07/05/2002 – Commission clears RAG's acquisition of Saarbergwerke and Preussag Anthrazit Separate decision finds that no State Aid was involved

IP/02/656 – 03/05/2002 – Commission clears Edison's purchase of Italian power generation company

IP/02/655 – 03/05/2002 – Commission clears purchase by Vivendi of Liberty's stake in Multithématiques (thematic channels)

IP/02/645 – 02/05/2002 – Commission authorises the purchase by TF1 of 25% of the capital of TPS, currently held by France Télévision and France Télécom.

GENERAL

IP/02/893 – 19/06/2002 – Commission and Candidate Countries make further progress towards a European 'Competition Community' at Vilnius Conference

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