

State aid: main developments between 1 May and 31 August 2010

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Policy developments

Public consultation on SGEI package

On 12 May the Commission has launched a public consultation on the application of its 2005 Package on Services of general economic interest (SGEI). The Package sets out guidance as to when State funding of SGEIs is compatible with the State aid rules. The package was adopted in July 2005, following the landmark *Altmark* ruling² of the European Court of Justice.

The "SGEI Package" adopted in July 2005 consists of:

- a Commission Decision (based on Article 106(3) TFEU) specifying the conditions under which compensation to companies for the provision of public services is compatible with state aid rules and does not have to be notified to the Commission in advance. The Decision applies to hospitals, and social housing irrespective of amount as well as other sectors where the compensation does not exceed €30 million euros per year and if the beneficiary's annual turnover does not exceed €100 million euros. Air and sea transport to islands within the EU as well as airports and ports below specific passenger volume thresholds are also covered by the Decision;
- a Framework specifying the conditions under which compensation not covered by the Decision can, nevertheless, be considered as compatible with State aid rules after having been notified to and examined by the Commission. Compensation that exceeds the costs of the public service, or is used by companies on other markets open to competition, is not justified, and is incompatible with the Treaty's state aid rules.

Both the Decision and the Framework foresee that the Commission will undertake an evaluation report based on its knowledge of the operation of the Package, together with the results of wide consultations conducted by the Commission on the basis in particular of data provided by the Member States in their reports on the implementation of the Decision.

The Commission has published both the reports received from Member States on the application of the rules as well as a questionnaire addressed to public service providers, public service users, stakeholders, citizens and all other interested parties. The results of this public consultation will serve as a basis for evaluating the 2005 Package and for eventually proposing improvements.

Coal regulation

Council Regulation (EC) N° 1407/2002 of 23 July 2002 on State aid to the coal industry expires on 31 December 2010.

¹ Directorate-General for Competition, unit 03. The views expressed are purely those of the writer. The content of this article does not necessarily reflect the official position of the Commission.

² Case C-280/00, *Altmark*, 2003 ECR I- 7747.

The Commission has adopted a proposal for a new Council Regulation which would allow Member States to continue granting operating aid to coal mines, but only in the context of a definitive closure plan, the implementation of which would be strictly monitored. Under the proposed Regulation, the operating subsidies would need to be clearly digressive over time, with a reduction of at least 33% per fifteen-month period and, in case the loss-making mine would not have been closed by 1st October 2014, the beneficiary would have to pay them back to the State. Any closure aid would be conditional on the presentation by the Member State a plan of appropriate measures, for example in the field of energy efficiency, renewable energy or carbon capture and storage, to mitigate the negative environmental impact of aid to coal.

The proposal, if adopted by the Council, will thus lead to a phasing out of operating aid.

Cases adopted³

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

UK pension scheme NEST

On 6 July 2010 the Commission approved the establishment of an occupational pension scheme, called NEST (National Employment Savings Trust)⁴, which will manage an occupational pension scheme.

The scheme was notified to the Commission because of a loan granted by the government to fill the funding gap faced during the early years of the operations of NEST.

The Commission found that the measure is in line with the 2005 framework for state aid as compensation for a service of general economic interest. The Commission found that the three criteria of the SGEI Framework are fulfilled: (i) NEST carries out a service of general economic interest; (ii) it is entrusted by an official act that details all the elements of the service; (iii) there is no overcompensation for the provision of the service.

NEST aims at serving low to moderate earners and those working for smaller employers to make sure they save enough for their retirement. The market currently fails to supply suitable products to such small firms and individuals at lower earnings levels.

NEST will be funded by pension contributions, managed commercially and operated on the principle of capitalization. It will operate at nil overall cost to taxpayers. However, in order to cover the start-up expenses until the scheme becomes self-financing, NEST will borrow funds from the government. The loans will be refunded and the payback period is estimated to be in the region of 20 years.

The government will hand out the loan at a commercial interest rate. However, NEST will only have to pay the interest corresponding to the Government's cost of borrowing. Under the state aid rules, this difference is considered to be a soft loan and to constitute state aid. The amount of aid, depending on the number of members, will be in the range of £200-379 million (around

³ This is only a selection of the cases adopted in the period under review.

⁴ N 158/2009

€245-465 million). However, the Commission concluded that the aid would not overcompensate NEST for providing the public service and was therefore compatible.

Funding mechanism for France Télévisions

On 20 July 2010 the Commission approved the annual funding mechanism for France Télévisions⁵.

The French public service broadcasting reform involves the gradual elimination of advertising on public channels and the introduction of two taxes, one on advertisements and the other on electronic communications. The advertising tax will be paid by the television channels, and the tax on electronic communications by service providers, such as Internet portals and cable or satellite operators. The revenue from these taxes will go to state funds, without being formally earmarked. The law provides financial compensation for the removal of advertising, which accounted for 25% to 30% of France Télévisions' annual income before the reform.

In a decision of 1 September 2009, the Commission had already approved the award of an annual subsidy of up to €450 million for 2009 and launched a formal procedure to investigate certain aspects of the annual subsidy for subsequent years, which could add up to over €1.5 billion by 2012. The Commission was concerned about the possible use of the revenue from the new taxes to finance the annual subsidy and the danger of over-compensation for public service costs up to 2011-2012.

The Commission concluded that the definition of the public broadcasting mission vested in France Télévisions and the checks to which it is subject comply with the state aid rules and, in particular, with the Communication on state aid for the funding of public service broadcasters.

New funding system for the Spanish public broadcaster RTVE

On the same day (20 July 2010) the Commission also approved the new tax-based funding system for the Spanish public broadcaster RTVE⁶, on which it had opened a formal investigation in December 2009. Spain abolished advertising and other commercial activities of RTVE and replaced this source of income by new taxes on TV and telecommunications operators. The Commission had doubts concerning the compatibility of the new taxes with EU law, in particular the rules on electronic communications networks and services. However, the Commission has now concluded that the compatibility of the aid to RTVE is not affected by the legality of the new taxes and that the measure is in line with the state aid rules, because it ensures that RTVE will not be overcompensated for providing public broadcasting services.

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

Banking

Schemes

The Commission has extended until the end of 2010 bank guarantee schemes for credit institutions in Sweden, Ireland, Spain, Denmark, Slovenia, Portugal, Austria, Poland, Germany

⁵ C 27/2009

⁶ C 38/2009

and Latvia⁷. The extended schemes feature higher premiums to be paid by banks to the State for guaranteeing the loans they raise on the market. This is to encourage banks to finance themselves without state support and to limit distortions of competition.

The Commission has further extended liquidity scheme in Hungary, Slovenia and Poland, Lithuanian and Greek support schemes for financial institutions, and Portuguese and Spanish recapitalisation schemes⁸.

Ad hoc aid

BPP

On 20 July 2010 the Commission concluded that a guarantee granted by the Portuguese State to six banks in Portugal to lend €450 million to BPP at the height of the financial crisis, in December 2008, constituted illegal and incompatible State aid for the period 5/12/2008 – 15/4/2010, given the non-compliance with the obligation to present a restructuring and the low fee paid for the guarantee⁹.

On 15 April 2010, the Bank of Portugal revoked BPP's banking licence and initiated the process for its liquidation. Consequently, the six Portuguese banks called the state guarantee and were repaid the loan by the Portuguese government on 7 May.

BPP provided private banking, corporate advice and private equity services. The bank ran into severe financing difficulties after the collapse of Lehman Brothers and the ensuing severe crisis in the financial markets.

The Commission, in early 2009, temporarily approved the loan guarantee as emergency support on the condition that Portugal would submit a restructuring plan within six months. As the Commission did not receive the plan despite several reminders, in November 2009 it opened a formal investigation procedure. This is because it had concerns the bank was being kept alive artificially. Also it had concerns that the pricing of the guarantee was below the level required under the Communication on the application of the State aid rules to public support to banks during the crisis. Under the Communication, a financial institution must provide an adequate remuneration to the State for the guarantee it provides in order to ensure that the owners contribute their share of the rescue burden and the bank is not unduly advantaged compared to its competitors, who have to pay market rates for their funding.

Having received no restructuring plan, the Commission's decision concludes the aid is illegal (since the commitments on which the original temporary approval was based were not complied with and the renewal implemented without prior Commission approval) and incompatible. While the liquidation of the bank addresses the competition distortion stemming from the aid, the Portuguese government must file its claim as a creditor in the liquidation procedure and recover from BPP the difference between the price the bank should have paid for the guarantee and the lower fee actually paid, including accrued interest. Portugal has stated that it has already filed the necessary claims to enforce its privileged and priority rights over the collateral it holds over BPP

⁷ Sweden: N 207/2010; Ireland: 254/2010; Denmark: N 257/2010; Portugal: N 51/2010; Áustria: N 241/2010; Poland: N 236/2010; Germany: N 222/2010; Latvia: N 223/2010

⁸ Hungary: N 225/2010; Slovenia: N 113/2010; Poland: N 262/2010; Lithuania: N 47/2010; Greece: N 163/2010

⁹ C 33/2009 (ex NN 57/2009)

and that it will continue to do so until it has recovered the full loan which it had to pay to the creditor banks in execution of the guarantee.

Carnegie

On 12 May 2010 the Commission has granted final clearance to the Swedish aid for the restructuring of Carnegie Investment Bank¹⁰.

In October 2008, the Swedish government provided a rescue loan of SEK2.4 billion (€ 225 million) to Carnegie Investment Bank (an investment bank with its main focus on institutional investors and corporates) thereby taking ownership of the bank and its sister company, the insurance broker Max Matthiessen.

The state intervention in the form of a loan was approved as rescue aid on 15 December 2008 on the condition that a liquidation or restructuring plan be submitted by the end of April 2009. Sweden submitted a plan for the restructuring of Carnegie on 25 April 2009. Previously, the Swedish State launched a tender to find new owners for the bank, which was completed on 19 May 2009 with the sale of both companies to investment funds Altor and Bure.

The Commission's investigation found that the rescue of Carnegie contained state subsidies, which improved the capital position of the bank and allowed it to remain on the market as a going concern, which had the potential to distort competition. However, the Commission concluded that Sweden had swiftly initiated restructuring measures to address the causes of the bank's difficulties and to ensure its viability. In particular, the risk management was improved and losses were absorbed whilst providing adequate capital buffer. Moreover, the risk of moral hazard has been addressed through an adequate contribution of the former owners of the bank to the cost of restructuring. Finally, the Commission found, with particular regard to the swift sale of the Bank in a competitive tender, that the potential distortion of competition had been kept to a minimum.

Ethias

The Commission approved on 20 May 2010 a €1.5 billion recapitalisation provided by Belgium in the context of the restructuring of Ethias, a Belgian insurer that ran into severe difficulties in 2008¹¹.

Ethias historically operated as a group of mutual companies. It was the third insurer (by market share) on the Belgian insurance market and had a total balance sheet of €28.6 billion at the end of 2008. At the outbreak of the financial crisis Ethias was hit by a loss of customer confidence and was confronted with a severe liquidity crisis due to a sudden surge in withdrawals of funds by its clients. In October 2008, the Belgian State provided a capital injection of €1.5 billion to Ethias.

The recapitalisation was temporarily approved by the Commission as rescue aid on 12 February 2009 under the condition that Belgium submits a plan for the restructuring of Ethias. The amount of aid received by Ethias, which was very large compared to the size of the company, showed the need for an in-depth restructuring to restore the future viability of the group.

¹⁰ NN 18/2010

¹¹ N 256/2009

Under the restructuring plan, Ethias will completely discontinue its retail life business, which was the immediate cause of its difficulties in the past. Further measures to restore viability also include a reallocation of Ethias' investment portfolio towards less volatile asset classes. Ethias' new investment policy is based on a reviewed risk control and a diversification of risks.

To allow the state capital injection to take place, Ethias had to change its corporate structure from a mutual to a limited liability company. Under the new structure, most of the former owners (the policyholders of the mutual companies) have lost their collective control of the company as well as their share in future profits. The historical owners have thereby shouldered a significant part of the burden of restructuring. To further contribute to the costs of restructuring, Ethias will divest its reinsurance subsidiary BelRé and cut costs.

Finally the plan adequately addresses the distortions of competition created by the State intervention, through the divestment of Nateus, an insurance subsidiary in Belgium, and through behavioural commitments related to the pricing of its insurance products.

Caja Castilla-La Mancha

On 29 June 2010 the Commission has authorised aid for the restructuring of Caja Castilla-La Mancha¹².

The Commission's investigation found that the orderly break-up of Caja Castilla-La Mancha, followed by the sale of the banking business to a competitor ensured that the sold business became viable without continued state support. The Commission further concluded that the distortion of competition caused by the significant state support was limited by the in-depth restructuring, the sale of the viable part of the business through an auction, the liquidation of the non-banking assets, and the continuation of Caja Castilla-La Mancha only as a charitable foundation. The bank also had a limited market presence in the Spanish market, only around 1% in mid 2009.

The bank received a State guarantee of €3 billion in March 2009 followed by a capital injection of €1.3 billion by the Deposit Guarantee Fund for Saving Banks, a liquidity contribution of €350 million and an impaired asset measure consisting in a guarantee of approximately €2.5 billion. The significant amount of aid compared to its size - in June 2009 it had a total balance sheet of €27 billion - required in-depth restructuring to restore its viability and to address the distortion of competition.

The non-banking (mostly participation in other companies) assets of Castilla-La Mancha were transferred to the Deposit Guarantee Fund in exchange for the reimbursement of the capital injection of €1.3 billion and for the liquidity contribution of €350 million. The Deposit Guarantee Fund for Saving Banks will sell these assets over the next seven years.

Caja Castilla-La Mancha will give up its banking licence and be transformed into a foundation aimed at continuing only existing commitments on charitable, cultural and social services. These services will be funded through dividends from the foundation's shares in Banco Liberta.

BAWAG

¹² NN 61/2009

The Commission has authorised on 30 June 2010 a €550 million capital injection provided by Austria in favour of the BAWAG bank and approved a new restructuring plan of the bank¹³.

In 2007 already, the Commission had approved a €900 million State guarantee for BAWAG and a restructuring plan, but the bank again got State support in 2009 because of the global financial crisis. On 22 December 2009, the Commission authorised for a period of six months a €400 million asset guarantee and a €550 million capital injection in favour of BAWAG P.S.K., subject to the submission of a modified restructuring plan. The asset guarantee was withdrawn on 22 June 2010.

A new restructuring plan containing additional restructuring measures in view of the additional aid was submitted in March 2010. The Commission concluded that the new plan should ensure the restoration of the viability of the bank.

The bank must honour several commitments, such as divestments, a temporary dividend and acquisition ban, limitations regarding investments in certain business fields and a premature redemption of certain P.S.K. liabilities covered by a State guarantee. This is to ensure a sufficient contribution by the bank and its shareholders to the cost of restructuring and to limit the distortions of competition brought about by the aid.

AEGON

On 17 August 2010 the Commission approved the recapitalisation of the Dutch insurance company AEGON¹⁴.

In November 2008, the Dutch State made available €3 billion in new capital for AEGON, in the form of convertible core capital securities. The coupon of these instruments is set to be the highest of either 8.5% or an increasing percentage of the dividend paid on ordinary shares. The repurchase price of the securities is fixed at 150% of the issue price. One third of the securities could be repaid within 12 months at more favourable terms. Alternatively the securities can be converted into ordinary shares after three years from issuance.

The Commission temporarily approved the capital AEGON received on 27 November 2008. The approval was conditional upon the submission of a plan demonstrating how AEGON would secure long term viability and how distortions of competition would be limited to the strict minimum within six months from the rescue decision.

In August 2009 AEGON successfully conducted a capital increase allowing it to repay a first tranche of €1 billion in November 2009.

Under the plan submitted by the Netherlands, AEGON will implement further changes to its activities to rebalance its business model. The businesses affected by the plan are mainly those that were at the origin of AEGON's difficulties: the institutional spread-based business will be closed down and exposure to equity risk stemming from variable annuities is being hedged. The overall size of AEGON USA's general account will be reduced by USD 25 billion (EUR 19 billion). The plan includes financial projections in a stress scenario and a sensitivity analysis demonstrating AEGON's capacity to withstand adverse developments in the future.

¹³ N 261/2010

¹⁴ N 372/2009

The plan also provides for a repayment schedule for the remaining State capital. AEGON will repay €500 million State aid as soon as possible and prior to 1 December 2010 and the remaining €1.5 billion before the end of June 2011.

Until full repayment of the aid, AEGON will be subject to a price leadership ban in specific segments of the Dutch market and to a rating withdrawal of its main life subsidiary in the Netherlands, in order to limit competitive distortions in the Dutch mortgage and savings and pensions markets. Furthermore, AEGON is subject to an acquisition ban during the same period.

Real economy cases adopted under the Temporary Framework

Short-term export credit insurance (N 84/2010)

The Commission has authorised on 10 June 2010 a measure adopted by Latvia to limit the adverse impact of the current financial crisis on exporting firms. The Commission found the measure to be in line with its Temporary Framework. In particular, the measure requires a market-oriented remuneration and tackles the problem of the current unavailability of the short-term export credit insurance cover in the private market. The Commission authorised the measure until 31 December 2010.

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

Regional aid & regeneration

FIAT Powertrain

The Commission has authorised on 9 June 2010 €16 million of regional investment aid, which the Italian authorities intend to grant to Fiat Powertrain Technologies S.p.A. (FPT), a subsidiary of the Fiat Group, for the production of car transmissions in Verrone (Piemonte), Italy¹⁵. FPT's existing plant will be equipped with new machinery, heat treatment and assembly lines to produce an innovative transmission unit intended for mid-range vehicles.

The public support is granted under an existing aid scheme but, due to the amount and investment costs involved, the measure had to be notified to the Commission for individual assessment and clearance.

The assessment of regional aid to large investment projects requires that the Commission checks the market share of the beneficiary and the production capacity created by the investment remain below certain thresholds set by the Regional Aid Guidelines. When the thresholds are not exceeded, the effect of the aid on competition is deemed to be outweighed by its positive contribution to regional development.

The Commission assessed FPT's position on the relevant transmission and car market segments and found that FPT's market share and capacity increase for this project would remain below the thresholds.

Liebherr-MCCtex Rostock

¹⁵ N 27/2010

On 6 July 2010 the Commission authorised €28.7 million of regional investment aid that Germany intends to grant in favour of Liebherr-MCCtec Rostock GmbH for the extension of its production facility for ship and offshore cranes in Mecklenburg-Vorpommern, Germany¹⁶. The project involves a total investment of €163.5 million and will create 500 new jobs in a region facing high structural unemployment.

The Commission found that the project meets the requirements of the Regional Aid guidelines. In particular, the applicable regional aid ceiling for large investment projects is not exceeded, and the market shares of Liebherr on the global market for ship and offshore cranes remains below the 25% threshold after the implementation of the investment. As the growth of the sector is faster than the GDP growth in the European Economic Area, the Commission concluded that the additional production capacity created by the project does not raise concerns in this case.

Solibro

On 20 July 2010 the Commission has authorised €17 million of regional investment aid for the German company Solibro GmbH for the production of solar modules in Bitterfeld-Wolfen (Sachsen-Anhalt), Germany¹⁷. The project involves an investment of €142 million and is expected to create at least 260 new jobs in the region.

Solibro already has a solar module production plant in Bitterfeld-Wolfen, for which it received regional aid in 2007. The new investment comprises the extension of this first plant and the construction of a second plant on an adjacent site. The project started in October 2008 and will be finalised by end 2010. The investment costs are €142 million, while the aid amounts to €17 million. Q-Cells also invested in several other projects for the production of solar modules based on different technologies, undertaken by its related companies Calyxo, Sovello and Sunfilm in Bitterfeld-Wolfen within the same three year period as the Solibro projects.

If the new project formed a single investment project with the other investments in geographic proximity, the scaling down mechanism would have to be applied to the combined investments. The German authorities limited the aid amount to the maximum that would be allowable in a 'single investment project' scenario taking account of aid granted to the previous investment project by Solibro. The Commission also verified whether the Solibro projects would form a single investment project with the other investments by Calyxo, Sovello and Sunfilm, and came to the conclusion that this was not the case.

The Commission calculated that Q-Cells' market shares on the world market for solar modules and on the EEA and world market for large solar systems are below 25% before and after the investment. As the photovoltaic market has a double-digit growth rate, which is above the EEA growth rate, the Commission also concluded that the additional production capacity created by the project would not raise concerns. As these thresholds are not exceeded, the Commission concluded that the positive impact of the investment on regional development outweighs the potential distortions of competition.

Silico Solar

¹⁶ N 261/2009

¹⁷ N 641/2009

On the same day, the Commission has also authorised €8.5 million of regional investment aid to the Spanish company Silicio Solar SAU for the production of solar wafers in Puertollano, Ciudad Real (Castilla-La-Mancha)¹⁸. The project involves investments of €219 million for the construction of a new plant next to an already existing one.

Silicio is extending its existing site in Puertollano by building a second solar wafer plant. Solar wafers are used to produce solar cells out of which solar modules are made. Solar modules convert sunlight into electricity. The Pillar group does not produce solar cells or modules, only wafers.

The Spanish authorities already granted a €20.9 million aid for the same investment under an approved aid scheme. The second aid, also based on an existing aid scheme, had to be notified to the Commission for individual assessment and clearance, because the aid amount exceeded the individual notification threshold.

The aid package is in line with the applicable regional aid rules: in particular, the applicable regional aid ceiling for large investment projects is not exceeded, and Silicio Solar's market shares on the world market for solar wafers are below 25% before and after the investment. As the photovoltaic market has a double-digit growth rate, which is above the EEA growth rate, the Commission also concluded that the additional production capacity created by the project would not raise concerns. As these thresholds are not exceeded, the effect of the aid on competition is deemed to be outweighed by its positive contribution to regional development.

Energy & environment

Nuon

The Commission has authorised The Netherlands to provide a grant of €10 million to Nuon Energy Sourcing NV for a CO₂ capture demonstration project¹⁹.

The project concerns the deployment of a CO₂ capture demonstration facility at Nuon's Integrated Gasification Combined Cycle (IGCC) power plant in Buggenum. It aims at optimising the energy efficiency of CO₂ capture (pre-combustion technology) for large scale applications in the electricity sector. The Buggenum project will be conducted by Nuon, but also involves academic partners and knowledge-based companies such as Delft University, ECN, KEMA and TNO. Nuon will share the results of the project with the Dutch authorities and through academic partnerships and conferences and professional fora such as CATO2 in The Netherlands.

The development of carbon capture and storage (CCS), which includes the capture of CO₂, is encouraged by the Commission as part of the 2008 climate and energy package for reaching the EU 2020 environmental objectives. The Commission concluded that the state aid measure is an appropriate and proportionate measure necessary to achieve an objective of common interest.

MOL

¹⁸ N 285/2009

¹⁹ N 190/2009

On 9 June 2010 the Commission adopted a final negative decision concerning an aid granted by Hungary to the national oil and gas company MOL²⁰.

In January 2009 the Commission had opened an in-depth investigation²¹. The measure under assessment was an agreement between MOL and the Hungarian government dating back to 2005, according to which MOL's mining royalty payments on extracted hydrocarbons remained fixed for the majority of its hydrocarbon mining fields until 2020. An amendment of the Hungarian Mining Act in early 2008 significantly raised the fee, whereas MOL's mining fee obligation remained at the lower levels stipulated in the 2005 agreement.

The Commission concluded that the financial advantage conferred on MOL could not be approved as it represents an operating aid. The Hungarian authorities have calculated the aid thus granted to MOL at HUF 30.3 billion (€112 million), which needs to be reimbursed to the State, with interests.

Transport

The Commission has authorised on 26 May 2010 SNCB's plans to restructure its freight activities and convert its freight division into a subsidiary²².

In December 2009 Belgium notified a project to restructure SNCB's freight activities, which are concentrated in SNCB Logistics. To address the problems affecting these activities, the Belgian authorities are planning a series of industrial and commercial restructuring measures, together with financial support from the SNCB group, in which the Belgian State is the key shareholder.

The 2008 Community guidelines on State aid for railway undertakings²³ spell out the conditions under which the freight division of such an undertaking may receive restructuring aid. This detailed approach applies for a transitional period, i.e. only to restructuring operations notified before 1 January 2010.

The main purpose of the financial support measures is to fund the additional costs of employing permanent staff and to cover losses made in the past. Since the granting of such aid is linked to the legal separation of the freight division, SNCB's freight activities will be carried out by a commercial company operating under ordinary commercial law. This separation is intended to rule out any cross-subsidisation between freight activities and the rest of the undertaking and to ensure that the financial relations between freight and passenger transport activities are sustainable and kept on a commercial basis.

In this context the Commission is satisfied that the restructuring plan will enable freight activities to become viable. In order to guarantee healthy competition in the market for rail freight transport, compensatory measures will also be taken, including a substantial reduction in the new subsidiary's capacity. The Commission will check regularly that the restructuring plan is being properly implemented and that the Belgian authorities are honouring their commitments. Detailed reports on this will be sent to the Commission.

²⁰ C 1/2009

²¹ OJ C74, 28.3.2009, p. 63

²² N 726/2009

²³ OJ C 184 of 22.7.2008, p. 13

Broadband

The Commission has approved the rollout of a public open network (Xarxa Oberta) in the Spanish region of Catalonia²⁴. The network will serve the connectivity needs of the regional administrative centres in the region and will be open at wholesale level to electronic communications operators seeking access to it. After a detailed examination, the Commission found the scheme to be in line with its Broadband Guidelines²⁵. The measure will contribute significantly to achieving the objectives of the Digital Agenda and will enhance the possibilities for infrastructure based competition in Catalonia without unduly distorting competition.

Other

Swedish press aid

The Swedish press aid scheme has been in place since 1971, before Sweden's accession to the European Union. It is therefore considered as existing aid and its assessment is subject to a specific cooperation procedure between Sweden and the Commission. The scheme provides, amongst others, for aid to the second largest (and smaller) newspapers in each city/county, with the aim of contributing to media pluralism.

In November 2008, following complaints, the Commission started an investigation and found that the press aid scheme constitutes state aid within the meaning of Article 87(1) of the EC Treaty. Such aid can be compatible with the Single Market if it pursues a goal of common interest, is proportionate and does not give beneficiaries an undue advantage over their competitors.

The promotion of media pluralism and diversity of views is an objective of common interest, and the press aid scheme targets this objective. However, the Commission's investigation found that the Swedish press aid scheme, in its current form, does not meet the proportionality test because it gives an excessive amount of aid to large press groups that publish wide circulation metropolitan newspapers, without fixing a threshold in relation to the total operating costs for publishing the newspapers.

In June 2009, the Commission made suggestions to Sweden, on how the press aid scheme could be brought in line with EU state aid rules. Having assessed Sweden's subsequent proposals, the Commission found on 20 July 2010 that they adequately reflect the essence of the measures suggested by the Commission²⁶. In particular, the reduced aid intensity for metropolitan newspapers will ensure that the aid is proportionate.

No aid decisions

REITS

The Commission has authorised on 12 May 2010 the introduction of "Real Estate Investment Trusts" (REITs) in Finland that will be exempted from corporate income tax in order to

²⁴ N 407/2009

²⁵ OJ C 235, 30.9.2009, p.7

²⁶ E 4/2008

encourage investment in affordable rental housing²⁷. The proposed measure is modelled on the widespread model of "Real Estate Investment Trusts". According to the scheme notified by the Finnish authorities, to benefit from corporate tax exemption REITs will be publicly-listed, no single shareholder will own, directly or indirectly, more than 9,99 %. REITs will only operate in the field of rental accommodation with at least 80 % of their gross income coming from rents. Moreover, REITs will distribute at least 90% of their annual profits to shareholders as dividends.

The Commission's investigation found that the scheme contained no state aid, because the exemption from corporate income tax is linked to the requirement of immediate distribution of annual profits to shareholders, who are then taxed on these profits. Thus, this mechanism puts the tax treatment of an investment in a REIT on the same footing as the tax treatment that individuals would have had if they had invested directly in real estate.

However, the Commission considered that a provision allowing REITs to use up to 30% of their annual profits to create tax exempt re-investment reserves would constitute incompatible aid. Following the Commission's concerns, the Finnish authorities made the commitment not to put in force this provision.

PLZ Hydral

The Commission has closed on 4 August 2010 the formal investigation procedure on state aid to PZL Hydral, a company which was specialised in civil and military aviation hydraulics²⁸. The Commission had concerns that the original restructuring plan, which was based on PLN 150 million of state aid (€36 million) would have infringed state aid rules. Subsequently, Poland substantially modified the plan as a result of the intervention of a private investor who will acquire the remaining business activity (PZL Wroclaw). The investor will provide additional PLN 65 million (€16 million) of investments. This will ensure the future industrial development of this company.

In view of the amended restructuring plan, the Commission finds that the financing provided by the state bodies in support of the restructuring plan does not constitute state aid as it is granted on market terms. Interventions of public authorities relative to companies do not involve state aid if they are granted under conditions which a private investor or creditor would have accepted.

Decisions under Article 108 TFEU

The Commission has formally requested France to implement a 2008 judgment of the European Court of Justice declaring that France had failed to recover incompatible State aid awarded in the form of exemptions from corporate tax for takeovers of ailing companies²⁹. The Commission's request takes the form of a letter of formal notice, the first step in infringement proceedings for failure to respect a Court judgment (Article 260 TFEU).

On 16 December 2003, the Commission concluded that tax exemptions foreseen under Article 44 septies of the French General Tax Code were incompatible because they procured selective advantages to certain companies, without objective justification. This provision exempted from

²⁷ N 131/2009

²⁸ C 40/2008

²⁹ Case C-214/07, *Commission v. France*

corporate tax for a period of two years companies purchased in the course of an insolvency procedure. As the scheme was implemented without receiving EU clearance, France must recover the subsidies thus granted, with the exception of those amounts that could be exempted under the de minimis, SME or regional aid rules.

On 13 November 2008, the Court of Justice ruled that France had failed to fulfil the recovery obligations stemming from this decision.

The Commission acknowledges the difficulties encountered by the French authorities in calculating the aid to be recovered and ensuring repayment from over 200 companies. It also acknowledges the efforts made by the French authorities since September 2009 to take concrete steps towards an effective recovery.

However, only 27 companies have reimbursed the aid. In nine others subject to bankruptcy proceedings, France has fulfilled its recovery obligation by duly registering a creditor's claim. But, up to now, France has still not provided the Commission with the necessary evidence to definitively conclude that the main beneficiary of the scheme, FagorBrandt SAS, has effectively reimbursed the aid, even though the repayment of that aid was an explicit pre-condition in the Commission's decision authorising France to grant new restructuring aid to the FagorBrandt group.

For this reason, the Commission has formally requested France to comply with the judgment of the ECJ of 13 November 2008 by sending a letter of formal notice.