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Restructuring banks in crisis — overview of applicable State aid rules

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1. A complete set of State aid rules for financial institutions in the current crisis

The Communication of 22 July 2009 on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, ([2]) ('the Restructuring Communication') provides the framework for the use of State aid for bank restructuring. Together with the three previous Communications on banking ([3]), recapitalisation ([4]) and impaired assets ([5]), these rules form a body of guidance for assessing various support measures in favour of banks during the present systemic crisis.

The Restructuring Communication to banks which are under an obligation to restructure, sets out the conditions that will have to fulfil to comply with the State aid rules with a view to ensuring that they return to long-term viability without State support, contribute to the restructuring costs (burden-sharing) and adopt measures to limit competition distortions.

The Commission's guidance has pursued two linked objectives: i) supporting financial stability, by giving legal certainty to rescue measures taken by the Member States and promoting long term viability, and ii) safeguarding the internal market and a level playing field across banks. This is achieved in two steps: first, by setting the parameters for access to rescue aid in a coordinated manner, and then through a more thorough and forward-looking assessment of the banks' restructuring needs to ensure their return to viability without State support and the return of the financial sector to normal market functioning through mechanisms that minimise competition distortions.

The rules on banks' restructuring aim to strike a balance between short-term financial stability and long-term concerns for the preservation of normal market functioning, the single market in financial services and an undistorted competitive process. This balance reflects the development and evolution of the crisis. At the beginning of the financial turmoil, safeguarding financial stability was an overarching objective. Therefore a wide array of rescue measures, including loans, guarantees and recapitalisations, were temporarily allowed. However, conditions for access to these measures were laid down to ensure a coordinated response and a level playing field, among other things by setting a price that banks were required to pay for the State support. The extraordinary action and amount of money put into the banking system in the first months of the crisis ([6]) was effective in halting the panic and restoring trust. The price, set chiefly in relation to the banks' risk profile ([7]), kept in relative check the size of the aid for individual institutions while allowing the amounts necessary to maintain financial stability. The length of temporary approval of rescue measures (6 months) was set to give time to stabilise the situation of individual beneficiaries and propose lasting solutions adapted to their specific circumstances. The restructuring process, conducted in the framework set in the Restructuring Communication, supplements the rescue policy actions

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

([2]) *Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules,* Official Journal C 195, 19.8.2009, pp. 9-20. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:195:0009:0020:EN:PDF.

([3]) *Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis,* Official Journal C 270, 25.10.2008, pp. 8-14. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:270:0008:0014:EN:PDF.

([4]) *Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition,* Official Journal C 10, 15.1.2009, pp. 2-10. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:010:0002:0010:EN:PDF.

([5]) *Communication from the Commission on the treatment of impaired assets in the Community banking sector,* Official Journal C 72, 26.3.2009, pp. 1-22. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:072:0001:0022:EN:PDF.

([6]) 'In the period from October 2008 until mid-July 2009 the … total volume of the approved guarantee measures amounts to € 2.9 trillion and the recapitalisation measures amount to € 313 billion.' (DG Competition's Review *of guarantee and recapitalisation schemes in the financial sector in the current crisis*, 7 August 2009, p. 2. Available at: http://ec.europa.eu/competition/state_aid/legislation/review_of_schemes_en.pdf).

([7]) See the Recapitalisation Communication, and also ECB, Recommendations of the Governing Council of the European Central Bank on government guarantees for bank debt, 20 October 2008. Available at: http://www.ecb.int/pub/pdf/other/recommendations_on_guaranteesen.pdf.

with structural changes leading to the beneficiaries' return to long-term viability without State support, addressing moral hazard, and limiting competition distortions created by aid. One year since the beginning of the acute phase of the financial crisis, with lesser risks to financial stability and signs of recovery in the outlook, the balance started tilting towards creating conditions for the return to normal market functioning.

2. The Restructuring Communication

The rules governing State aid for restructuring of ailing banks in the current crisis have three main goals:

- that banks become **viable** in the long term and capable of operating without State support. A thorough restructuring plan, demonstrating strategies to achieve viability also under adverse economic conditions, needs to be based on rigorous stress-testing of the bank's business. The benchmark of long-term viability may imply different solutions across banks, ranging from limited restructuring with no divestments to an orderly winding-down of unviable entities. An adjustment in the bank's business model can be necessary, also to reduce systemic risks;

- that restructuring aid is kept to the minimum and the bank and its capital-holders contribute to the costs of restructuring as much as possible with their **own resources**. This should contribute to addressing moral hazard and to creating appropriate incentives for their future behaviour. This is achieved through setting an appropriate price for State support, through temporary restrictions on payment of dividends and coupons on hybrid capital by loss-making banks and through various behavioural commitments ensuring that State aid is not used to finance market-distorting activities not linked to the restructuring process;

- that **undue distortion of competition** caused by restructuring aid is limited. Tailor-made to the market circumstances of each case and to the scale of State intervention indicative of market distortion caused by State aid, measures to limit competition distortion may include divestments, temporary restrictions on acquisitions by beneficiaries and other behavioural safeguards. These measures are designed not only to limit distortions between aided banks and those surviving and restructuring without State aid, and between banks in different Member States, but also to create conditions which foster the development of competitive markets after the crisis.

As the Restructuring Communication addresses the specific circumstances of the present crisis, it only applies to the financial sector until 31 December 2010. Its sectoral scope is therefore limited and it applies temporarily in the present crisis situation. In practice, the Commission will apply this guidance when assessing cases of restructuring aid notified to the Commission before the end of 2010. As regards non-notified aid, the usual rules applicable for the assessment of unlawful State aid will apply (assessment on the basis of the rules in force at the time such aid was granted).

2.1. What are the specific rules applicable to banks in the current crisis?

The Commission has over the years developed its experience in dealing with restructuring aid to ailing companies. State aid rules for this purpose are governed by the *Community guidelines on rescue and restructuring aid to companies in financial difficulties* (8) ('the Rescue and restructuring aid guidelines'), last revised in 2004. These rules have been applied to bank restructuring cases (9) in normal times. They were, however, untested for a systemic crisis situation in the financial sector.

In the context of the crisis and in relation to the financial sector, the Commission undertook a review of its rules and concluded that the basic philosophy and the main principles of the rescue and restructuring guidelines should be preserved. The basic distinction between rescue and restructuring aid served the purpose of financial stability well, although additional flexibility was necessary for both types of aid. The underlying principles of the guidelines have been confirmed: restoration of long-term viability without State support; minimisation of the aid and adequate burden-sharing; measures to limit competition distortion. The way these principles are put into practice has been adapted when necessary to the specific, temporary circumstances created by the current financial crisis, taking into account the role of the financial system in providing funding to the whole economy and the possible systemic effects arising from the need for a number of European banks to restructure at the same time.

In these circumstances, State intervention in banks' rescue and restructuring is hallmarked by the vital need to ensure financial stability and restore market confidence. A degree of flexibility in relation to some of the rules set out in the Rescue and restructuring aid guidelines was therefore needed. As far

(8) *Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty*, Official Journal C 244, 1.10.2004, pp. 2-17. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:244:0002:0017:EN:PDF.

(9) Such as Crédit Lyonnais, Banco di Napoli, Bankgesellschaft Berlin.

as viability is concerned the Commission tightened the requirement of proving viability under stress assumptions while allowing more time as regards the duration of the restructuring period.

As to burden-sharing, the Commission recognised that in the specific circumstances of the financial crisis it was necessary to reassure banks' creditors and was not appropriate to enforce an ex-ante quantitative rule on the bank's contribution to the restructuring costs. However, it designed mechanisms to ensure that safeguarding financial stability in the short term does not result in longer-term damage to the level playing field for banks and to competitive financial markets.

As to distortions of competition, the guidelines put the safeguarding of the internal market in the foreground, while identifying competition remedies in terms of structural and behavioural measures as well as combating distortions in the competitive process and in the markets.

Given the crisis circumstances, compared to the Rescue and restructuring aid guidelines, the Restructuring Communication modulates the Commission's practice with regard to restructuring aid for the following five aspects in particular.

Firstly, given that the Communication is addressed to one sector, the Commission can specify in detail the type of information that will be required to determine whether the proposed restructuring measures are apt to restore a beneficiary's long-term viability. The restructuring plan will need to include a thorough diagnosis of the bank's problems, including a stress test to demonstrate that a restructured bank will be able to withstand adverse macroeconomic conditions, and, where applicable, details on impaired assets. This information is necessary to devise sustainable strategies for a return to viability. The burden of proof on the Member State is set at a high level.

Secondly, given both the uncertainty of the economic outlook and the number of banks that will be restructuring in parallel, special attention is given to ensuring that the timing of the necessary restructuring measures is sufficiently flexible and realistic. The implementation of the restructuring plan can last up to five years, compared to the usual practice of two to three years. This allows in particular more time for finalising certain structural measures, notably to avoid depressing the markets through precipitated asset sales.

Thirdly, the Rescue and restructuring aid guidelines require in principle a 50 % own contribution by the aid beneficiary to the costs of restructuring. Given the difficulties in gaining access to private capital in the current context and difficulty in calculating restructuring costs the Restructuring Communication chooses not to operate with a fixed threshold for the own contribution. Adequate burden-sharing is achieved primarily through the appropriate price for the State intervention, as set out in the Recapitalisation and Impaired Assets Communications, and through temporary restrictions on coupon and dividend payments to bondholders and shareholders. Where such burden-sharing is not immediately possible due to the market circumstances at the time of the rescue, this needs to be addressed at a later stage of implementation of the restructuring plan, for example through claw-back clauses.

Fourthly, measures aimed at limiting distortions of competition should be designed so as to support the primary objective of restoring the long-term viability of the banking sector, while limiting any disadvantages for other European banks. Where the immediate implementation of structural measures is not possible due to market circumstances (for example where finding buyers for divested assets is objectively difficult), the Commission can extend the time period for the implementation of these measures. Intermediate behavioural safeguards need to be put in place where necessary. In addition, the Communication pays more attention to overall national market structures and market opening measures, to avoid that the large number of simultaneous restructuring cases closes down national market structures, and to preserve cross border activities of banks.

Finally, the Commission does not apply the 'one time last time' rule [10] to restructuring aid to banks in times of crisis, reflecting inter alia the uncertainty about the recovery outlook.

2.2. Who needs to restructure?

The previous Banking, Recapitalisation and Impaired Assets Communications set out in detail when a bank needs to present a restructuring plan. In particular, Member States need to notify a restructuring plan to the Commission where it has recapitalised a distressed bank or when a bank, in connection with the crisis, has received aid (except for participating in a guarantee scheme) exceeding 2 % of the bank's total risk-weighted assets.

For banks that are not distressed and have received a limited amount of aid, no restructuring plan is required. However, Member States will have to submit a viability review enabling the Commission to assess the viability of these banks and the Communication explains what type of information the Commission will expect to receive in these cases. It will be less

(10) The Rescue and restructuring aid guidelines (see section 3.3, points 72–77) stipulate that the company may receive rescue and restructuring aid only once within a 10-year period.

detailed than for a restructuring plan but still needs to credibly demonstrate that the bank is fundamentally sound and will restore its long-term viability without State support.

The scenarios below illustrate in more detail the situations where a bank receiving State aid needs to present a restructuring plan or not.

Scenario 1:

A bank benefits from a liability guarantee under an approved scheme and has received no other State aid → no need to present any plan; the duration of the guarantees expires in line with the approved conditions of the scheme.

Scenario 2:

A bank benefits from a liability guarantee under an approved scheme and has called this guarantee → it needs to present a restructuring plan within 6 months of calling the guarantee, in line with the conditions of the authorised scheme. If the bank is going to be liquidated, or its size is very small, the Commission may waive the obligation to provide a restructuring plan.

Scenario 3:

A bank has received State aid in the form of a recapitalisation under an approved scheme under the terms and conditions for fundamentally sound banks in line with the Commission decision authorising that scheme → within 6 months the Member State needs to present a review of the functioning of the scheme, which needs to include details of all banks that have benefited from it as well as a description of the path towards exit from reliance on State capital for each individual bank. If the Commission, upon examination of the information provided, agrees with the assessment that the beneficiary bank remains fundamentally sound and accepts its exit plan, no further restructuring plan is necessary.

Scenario 4:

A bank has received State aid in the form of a recapitalisation under an approved scheme under the terms and conditions for fundamentally sound banks in line with the Commission decision authorising that scheme, but subsequent to the provision of the capital it fell into difficulties and does not remain fundamentally sound any longer → it needs to provide a restructuring plan as soon as possible.

Scenario 5:

A bank has benefited from State aid in the form of recapitalisation or asset relief under an ad hoc individual measure, and the Commission's approval decision comprises an obligation to present a restructuring or a viability plan within a specified timeframe → it needs to provide a plan as specified in the decision.

Scenario 6:

A bank has benefited from an impaired asset relief measure (i) in compliance with all the requirements of the Impaired Assets Communication, (ii) not exceeding, together with any other aid already received (except for participating in an approved guarantee scheme if this guarantee has not been called), 2 % of the bank's risk-weighted assets, and (iii) where appropriate valuation would not have led to its technical insolvency → it needs to provide a viability review within 3 months of resorting to the impaired asset measure. If the Commission, upon assessment of the information provided, agrees that no further measures are needed for restoring the bank's long-term viability or limiting the competition distortion, then no further plan is required.

Scenario 7:

A bank has benefited from impaired asset relief and (i) an appropriate valuation of impaired assets would lead to negative equity/technical insolvency without State intervention, or (ii) whenever the total amount of State aid in whatever form (except for participating in an approved guarantee scheme if this guarantee has not been called) exceeds 2 % of the bank's risk-weighted assets, or (iii) when the impaired asset relief departed from the principles of the Impaired Asset Communication, or (iv) where the overall amount stays below 2 % of the bank's total risk-weighted assets but the repetition of aid signals the inability of the bank to undertake remedial action and the risk of further losses → it needs to present a restructuring plan within 3 months of resorting to the impaired asset relief measure.

2.3. What price does the bank pay for a bail-out?

In its decision-making in the current crisis, the Commission has devoted particular attention to the design, scope and implementation arrangements of measures in order to limit competition distortions. Under the usual rules applicable to rescue and restructuring aid to firms in financial difficulties, such measures are a necessary counterweight to any restructuring aid, and the Restructuring Communication maintains this as a principle, albeit recognising an increased need for flexibility.

To understand the objectives the Commission follows when requesting banks to adopt measures to limit competition distortion and to design a suitable remedy, it is useful to enumerate the types of competition distortion these measures seek to address.

State-financed bail-outs have various negative effects. They reward moral hazard in that State aid prolongs distortions of competition created in the period preceding the crisis by excessive risk-taking and unsustainable business models. State-financed bail-outs stop market forces from sanctioning unsustainable business practices and from eliminating inefficient and/or excessively risky players (in particular through bankruptcies) and thus prevent more efficient firms from expanding and/or from entering those markets. On the contrary, in certain cases, bail-outs have the effect of reinforcing the market power of the aided firm, possibly resulting from the risky business decisions in which the firm engaged prior to the crisis, such as certain acquisitions which State aid later helped absorb. From a more general point of view of effective competition contributing to consumer welfare, bail-outs weaken incentives for unaided competitors to compete (on merits), invest and innovate. Finally, the EU internal market context represents an additional concern when bail-outs shift the burden of structural adjustment to changing market circumstances and the related social and economic problems to other Member States, creating barriers to entry and to cross-border activities.

All these effects are still present in times of crisis. Moreover, there are additional reasons why the competition rules increase in importance during a systemic crisis.

First, if on the one hand, for reasons of financial stability, a more limited contribution of the bank and its shareholders to the cost of the restructuring has to be accepted, on the other hand, it is vital to pave the way for a rapid return to normal market conditions. This means that moral hazard must be properly tackled to avoid repeating the mistakes of the past.

Second, banks and Member States across Europe have been hit by the crisis to very different degrees. In a situation of financial, economic and budgetary crisis, differences between Member States in terms of resources available for State intervention become even more marked. And those banks which today need huge subsidies may in recent years have engaged in expansionary strategies to the detriment of their competitors.

Finally, national interventions in the current economic crisis are by their nature bound to promote a focus on the national markets. Even where there is no explicit requirement of lending to the domestic economy, there is a risk of promoting retrenchment into national boundaries. This may hinder the functioning of the internal market for financial services, create entry barriers and reduce incentives for cross-border activities to the detriment of European businesses and consumers.

These aspects are deemed more or less prominent in each case; they are not mutually exclusive but not always cumulative either (for example the market power aspect is not present in every case). The Commission therefore identifies upfront which theory of harm needs to be addressed, depending on the facts of the case, and then assesses the proposed measures from this angle.

Against the background of these rationales, the Restructuring Communication offers two categories of remedies.

A first category comprises burden-sharing measures, i.e. the scope and form in which the beneficiary and its shareholders contribute to bearing the costs of restructuring and return to viability. Proper burden-sharing can in particular address the problem of moral hazard, requiring the firm, its shareholders and hybrid capital holders, as a result of whose actions the bank has been brought to financial difficulties and the subsequent bail-out, to pay as much as possible for the State intervention. This can take the form of a high price for recapitalisations, the level of first loss and remuneration paid for impaired assets reliefs or, more lasting, bans or limitations on coupon payments on hybrid capital. As to the latter, the Commission has specifically announced that banks should not use State aid to remunerate own funds (equity and subordinated debt) when their activities do not generate sufficient profits ([11]). Transactions such as coupon payments, buy-backs and the exercise of call-options of Tier 1 and Tier 2 capital instruments may infringe the principle of burden-sharing in so far as they protect the Tier 1 and Tier 2 capital holders from their exposure to the inherent risk of their investment. Banks subject to a State aid investigation have therefore been invited to consult the Commission before making announcements to the market concerning Tier 1 and Tier 2 capital transactions. This is to enable the Commission to balance, considering the concrete circumstances at hand, the interest of the return to viability of the bank with the interest in ensuring burden-sharing and thus of limiting competition distortion ([12]).

Burden-sharing can also address to some extent the problem of distorted incentives. Banks should raise cash themselves, to the extent possible, to finance their restructuring from divesting profitable non-essential assets. If they were running an unsustainable expansionary strategy prior to the crisis, they need

([11]) Point 26 of the Restructuring Communication.

([12]) MEMO/09/441 of 8 October 2009 — Commission recalls rules concerning Tier 1 and Tier 2 capital transactions for banks subject to a restructuring aid investigation.

to finance the restructuring at least partially from their own pocket.

A second category comprises measures limiting distortions of competition [13]. Although these measures are not new to the practice of restructuring aid, the restructuring of banking businesses particularly in a situation of a systemic crisis affecting the economy as a whole required a larger set of possible measures to address sector-specific issues.

Experience has shown that structural measures can represent effective and efficient ways of limiting competition distortion. While divestments of stand-alone viable businesses might often represent the most appropriate remedy, the Commission has also accepted carve-outs of business entities potentially capable of entering as a new market player (in particular representing a critical mass in terms of size, clients, etc.), which is especially advantageous in some relatively concentrated markets. The Restructuring Communication also refers to accompanying behavioural measures such as a temporary ban on acquiring competing businesses or the imposition of a claw-back mechanism for example in the form of a levy on the aid recipient. Banks are also prohibited from marketing State support as a competitive advantage. Finally, the Restructuring Communication explicitly mentions that banks cannot use State aid to offer their customers terms (rates in particular) which cannot be matched by their un-aided competitors. This may take the form of limitations on the bank's position in league tables or of various types of price-leadership clauses.

Pursuant to the Restructuring Communication, measures limiting competition distortion should be *effective* and *proportionate*. Carve-outs of business units might not always be an 'effective' measure if too remote in time and in saturated markets with limited growth potential. The proportionality aspect is reflected in the double criterion determining the nature and form of measures limiting competition distortion: the amount of aid (including the conditions and circumstances under which it was granted) and the characteristics of the market on which the aid beneficiary will operate after its restructuring (including the size and relative importance of the aid beneficiary on that market). In practice, certain limitations continue to apply, as a result of the application of a balancing test to the assessment of the compatibility of restructuring aid to banks. In particular, measures to limit competition distortion should not compromise the prospects of the bank's return to viability [14]. Similarly, these measures should not *decrease* competition but, instead, ensure that effective competition is preserved [15]. In highly concentrated markets, for instance, where all main players have benefited from State aid, it might be disproportionate to impose limitations on price leadership on all the aided players. As a result of these limitations, measures to limit competition distortion will take account of the particular situation of each bank and will be tailored to market characteristics in each case.

(13) See section 4 of the Communication.
(14) Point 32 of the Restructuring Communication.

In comparing restructuring cases it is necessary to keep in mind the above limitations and the fact that the amount of aid, to which the scope of measures to limit competition distortion is linked, represents only a proxy for the level of competition distortion. For these reasons the Restructuring Communication stresses that the amount of State aid will be assessed not only in absolute terms but also in relation to the bank's risk-weighted assets [16] and that not only the amount, but also the conditions and circumstances under which the aid was granted [17] will be taken into account. Finally, when comparing the extent of measures to limit competition distortion, caution has to be applied when comparing the size of balance-sheet reductions across cases. The size of the reduction might not always reflect the quality of the structural measures undertaken. There is in particular a need to distinguish between run-offs of activities and divestitures of existing businesses, between measures undertaken in the interest of restoration of viability of the aided bank and those implemented to address a concrete competition concern and, finally, between structural measures put in place in core markets and ancillary markets in which the aided bank is active.

3. Conclusion

The Restructuring Communication entered into force in July. Since then, it has been applied in a limited number of cases. This notwithstanding, some important restructuring decisions have already been taken to date under this legal basis [18] and a larger number of restructuring cases are still under assessment pending the finalisation of the restructuring

(15) Point 32 of the Restructuring Communication.
(16) Point 31 of the Restructuring Communication.
(17) Point 30 of the Restructuring Communication.
(18) For example, Commission decision of 28.10.2009 on the State aid implemented by the United Kingdom for Northern Rock (C 14/2009); Commission decision of 18.11.2009 on the State aid implemented by Belgium for KBC (C 18/2009); Commission decision of 18.11.2009 on the State aid implemented by the Netherlands for ING's Illiquid Assets Back-Up facility and restructuring plan (C 10/2009); Commission decision of 18.11.2009 in Case N 428/2009 Restructuring of Lloyds Banking Group; Commission decision of 14.12.2009 in Cases N 422/2009 and N 621/2009 Restructuring of Royal Bank of Scotland following its recapitalisation by the State and its participation in the Asset Protection Scheme.

plan. As mentioned in the introduction, the challenge in the control of restructuring aid to banks in the current crisis lies in the need for the Commission to reconcile two linked objectives: maintenance of financial stability and preservation of the internal market and of a level playing field across banks. In this context, the Restructuring Communication creates a common framework for State interventions assisting the return of the EU banking industry to business as usual as soon as market conditions permit and the emergence of a more solid sector capable of serving European businesses and citizens.

The 2009 Broadcasting Communication

Lukas Repa, Nóra Tosics, Pedro Dias, Alberto Bacchiega ([1])

On 2 July 2009 the Commission revised its 2001 Communication on State aid and public service broadcasting. ([2]) After three public consultations, the revised Communication clarifies the legal framework for the expansion of public service broadcasters onto new platforms, the legitimacy of theme channels and pay TV in public television and the arrangements for supervising the net cost principle.

1. Introduction

The 2009 Broadcasting Communication ([3]) is the result of a review process which is firmly rooted in a wider policy that revolves around four pillars: the Lisbon Strategy, the 2005 State Aid Action Plan ([4]), the Commission's policy on State aid for public services ('services of general economic interest'), and the Commission's 2007 Audiovisual Media Services Directive ([5]).

The 2005 State Aid Action Plan announced a medium-term revision of the 2001 Broadcasting Communication in view of the fast development of the media industry spurred by the digital revolution ([6]). The rationale for reviewing the 2001 Communication was enhanced by the 'SGEI package', also of 2005, which contained two documents of direct and indirect importance for the broadcasting sector: First, the 2005 SGEI Decision ([7]) block-exempted public services of minor size including potentially those of smaller public broadcasters. Second, the SGEI Framework ([8]) clarified the Commission's approach to the net cost principle.

So, the need to harmonise these instruments, together with the ongoing digitalisation process and the Commission's technologically neutral approach to the expansion of 'classic' public TV and radio to new platforms in the 2007 Audiovisual Media Services Directive, confirmed that the 2001 Communication needed updating.

2. The Review Process

In its first public consultation from 10 January 2008 to 10 March 2008, the Commission asked all stakeholders whether the 2001 Communication provided sufficient guidance on the main questions at issue in this sector. Based on the outcome of this consultation (121 replies ([9])), Commissioner N. Kroes concluded in July 2008 that there was a strong case for updating the existing text. ([10])

The ensuing public consultation from 5 November 2008 to 15 January 2009 invited comments on a first draft for a revised Communication. On the basis of

([1]) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
([2]) IP/09/1072.
([3]) OJ C 257 of 27.10.1009, p.1.
([4]) State Aid Action Plan — Less and better targeted state aid: a roadmap for state aid reform 2005–2009, COM(2005) 107 final, SEC(2005) 795.
([5]) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27–45.
([6]) SAAP COM(2005) 107 final, SEC(2005) 795 at § 62 ('In examining state aid issues in these sectors, the Commission fully takes into account the relevant Treaty provisions (particularly Articles 151(4) and 87(3)(d)) and the Protocol on the system of public broadcasting in the Member States annexed to the Treaty of Amsterdam, and reflects the specific public interests attached to these activities. In that respect, it will revisit its Communication on the application of state aid rules to public service broadcasting. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service broadcasting activities.').
([7]) Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document number C(2005) 2673), OJ L 312, 29.11.2005, p. 67–73.
([8]) Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4-7.
([9]) http://ec.europa.eu/competition/state_aid/reform/archive.html#broadcasting.
([10]) SPEECH/08/396 of 17/07/2008. In the public consultation, Member States had generally expressed their opinion that the 2001 Broadcasting Communication had worked well and that any changes to it should be considered carefully. Comments from stakeholders confirmed however the fundamental changes that took place on the market and showed that there is a perceived legal uncertainty about the Commission's case practice and position on matters not addressed in the 2001 Communication.

90 submissions (11) and the results of a meeting between the Commission and experts from the Member States on 5 December 2008, the Commission then drew up a second draft. A public consultation on this new draft took place from 7 April to 8 May 2009 and elicited some 70 replies. (12) On 5 May 2009, the representatives of Member States gave their views to the Commission in a second multilateral meeting.

The final text was adopted by the Commission on 2 July 2009 and entered into force on 27 October. It is open-ended. (13) The Commission will verify on a case by case basis whether Member States have adapted their existing aid schemes for public service broadcasters to the requirements of the revised Communication.

3. The 2009 Broadcasting Communication (14)

3.1. Amsterdam Protocol

As for the 2001 Communication, the Amsterdam Protocol to the EC Treaty remains the core legal basis of the revised 2009 Communication.

The Amsterdam Protocol (15) attributes special status to the public service broadcasting sector amongst all services of general economic interest, acknowledging that public service broadcasting is directly related to the democratic, social and cultural needs of society and the need to preserve media pluralism. While the funding of public broadcasters should be in line with the EC Treaty competition rules, the Protocol at the same time emphasises Member States' discretion to organise and finance their public service broadcasting systems and to define the scope of its public service.

3.2. Definition of the public service mandate

Under the EC Treaty and the Amsterdam Protocol, the Commission's role is limited to checking whether Member States commit a manifest error in defining the mandate of a public service broadcaster and whether the remit is sufficiently clear to allow for meaningful supervision. The revised Communication provides more indications on how the Commission intends to exert this manifest error control.

Editorial independence

As in the 2001 Communication, the Commission expresses the requirement that the definition of the public service mandate by the Member States should be as precise as possible (§ 45). The clear identification of activities covered by the public service remit is important for non-public service operators, so that they can plan their activities knowing which services of public broadcasters are subsidised with State aid, and so that Member States' authorities can monitor compliance with the remit.

The 2009 Communication also clarifies however that the requirement for a precisely defined public service mandate must be balanced with the need for editorial independence for public service broadcasters.

(11) http://ec.europa.eu/competition/state_aid/reform/archive.html#broadcasting. Stakeholders from public and private media had diametrically opposed views on the first draft, with public service broadcasters largely dismissing it as infringing the prerogatives of Member States under the terms of the Amsterdam Protocol, while private media largely supported the first draft as a significant step in the right direction.

(12) http://ec.europa.eu/competition/consultations/2009_broadcasting_review/index.html. It was widely recognised that the second draft respects the principle of technology neutrality, that it safeguards the editorial independence of public broadcasters, and that it leaves Member States considerable flexibility in designing mechanisms to control the use of State aid in this sector. Stakeholders from the public and from the private side wanted the Commission to proceed with adopting the new draft in 2009, even if their views on the substance of the text still differ considerably.

(13) Contrary to other Commission Communications, the Broadcasting Communication does not contain a review clause.

(14) The text of the Communication is available at: http://ec.europa.eu/competition/state_aid/legislation/specific_rules.html#broadcasting and at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2009:257:SOM:EN:HTML.

(15) 'The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretative provisions, which shall be annexed to the Treaty establishing the European Community: The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'

Legitimacy of broadly defined remit

As the Court of First Instance [16] recently pointed out, the legitimacy of a broadly defined public service remit rests upon qualitative requirements for the public broadcasting service: *'There is no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order for the public service broadcaster to adopt the conduct of a commercial operator'.* [17]

This jurisprudence is now reflected in the revised Communication. The Commission must verify whether national mechanisms for supervising the remit are effective and whether they include an assessment, ex officio or complaints-based, that the public broadcaster's services live up to the qualitative requirements of the remit. While the Commission will not itself exercise such control, it must be able to rely on an effective control body at the national level. The Commission applied this approach for the first time in its *ORF* decision of 28.10.2009. [18]

Technology Neutrality

The revised Communication confirms, as with its predecessor [19] and individual cases, [20] that the public service mandate of public broadcasters may include all types of new audiovisual services on all kinds of platforms – i.e. services beyond 'classic' activities such as radio and TV broadcasting in a narrow sense – provided that the general criteria of the Amsterdam Protocol are met.

This clarification was widely sought by public service broadcasters, while newspaper publishers worried that interpreting the concept 'broadcasting' too broadly might enable public service broadcasters to publish a kind of 'electronic press' on the internet by increasingly supporting audiovisual content (i.e. TV and radio news) with text. [21] The Commission responded to this concern by consolidating its practice on specific procedural safeguards for public broadcasters expanding onto new platforms (the Amsterdam test, see below).

Manifest Error Control and Pay Services

The list of examples for manifest errors in the 2001 Communication was slightly enhanced. The revised Communication now also refers to 'the use of premium rate numbers in prize games'. On the other hand, the Commission did not include pay services in the list, though this might have been possible in view of the 2007 decision concerning Germany. [22]

Based on the outcome of the public consultations, the Commission found that a nuanced approach was needed with respect to 'public pay TV'.

In a section on the 'diversification of public broadcasting services', the 2009 Communication says that while pay services may have an adverse impact on access for viewers (not all can afford to pay a fee for access), this does not necessarily mean that pay services are manifestly not part of the public service remit. Rather, it has to be decided on a case by case basis whether the pay element is the distinctive character of the public service in terms of satisfying the social, democratic and cultural needs of citizens. Moreover, the potentially adverse impact on competition must be market tested (Amsterdam test, see below).

3.3. Entrustment and Supervision

The revised Communication not only calls — as did its predecessor — for the public service remit to be covered by an official act [23]. It now also makes the point that the entrustment act must specify the conditions for providing compensation and the arrangements for avoiding and recovering any overcompensation.

As to the supervision of the remit, the revised Communication emphasises the need for 'effective' independence of the supervising body from the management of the public service broadcaster.

Another new element is the clarification that the national supervisory body must have the 'powers and the necessary capacity and resources' to carry out supervision regularly, which can lead to the imposition of 'appropriate remedies' in so far as it is necessary to ensure compliance with public service obligations. The Commission used to verify these elements under the 2001 Communication, even though this was not explicitly mentioned.

3.4. Transparency Requirements

The 2009 Communication maintains the requirement for proper cost and revenue allocation and for the appropriate separation of accounts for public

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(16) See for instance CFI 22.10.2008 in joined Cases T 309/04, T 317/04, T 329/04 and T 336/04 'TV2'.

(17) T-442/03, SIC v. Commission, paragraph 211.

(18) Commission Decision of 28.10.2009 in E 2/2008, *ORF*, at recitals 139, 142 and 176, not yet published.

(19) 2001 Broadcasting Communication at § 34 ('Similarly, the public service remit might include certain services that are not programmes in a traditional sense, such as on-line information services, to the extent that … they are addressing the same democratic, social and cultural needs of the society in question').

(20) See in particular Commission Decision of 24.4.2007 in case E 3/2005 at §§ 359 to 267.

(21) See the statements of BVDZ, VÖZ, VDZ and the European Newspaper Publisher Association (http://ec.europa.eu/competition/state_aid/reform/comments_broadcasting/index.html).

(22) See Commission Decision of 24.4.2007 in case E 3/2005 at § 239 ('It would also normally include pay-services such as payTV or pay-perview services.').

(23) 2001 Broadcasting Communication, § 40.

service tasks and commercial activities, in line with Directive 2006/111/EC.

The revised Communication also confirms the privilege of public service broadcasters —compared to other SGEI undertakings — as regards the allocation of general overhead costs. In public broadcasting, separation of accounts may be more difficult on the cost side. This is because — in traditional broadcasting in particular — Member States may consider a whole programme schedule to be covered by the public service remit, while still allowing for its commercial exploitation [24]. In other words, public service and non-public service activities may share to a large extent the same inputs, and the costs may not always be strictly apportionable.

So, costs that are entirely attributable to public service activities, but which also work to the benefit of non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed with SGEIs is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to public service activities *must* be deducted fully from total costs for the purpose of calculating net public service costs and hence of reducing the public service compensation level. This reduces the risk of cross-subsidisation by apportioning to public service activities a larger portion of costs shared by commercial activities.

The revised Communication also contains a recommendation to consider 'functional or structural separation of significant and severable commercial activities, as a form of best practice'. This goes beyond the minimum requirements of the Transparency Directive, which only requires an accounting separation, [25] and is due to the Commission's experience in individual cases.

3.5. Net Cost Principle and Overcompensation

In line with the 2001 Communication, the revised Communication clarifies that the amount of public compensation is only proportionate if it does not exceed the net cost of the public service mission, taking into account other direct or indirect revenues arising from the public service mission. In other words, the net benefit of all commercial activities related to the public service activity must be taken into account in calculating the net public service costs and hence the compensation amount. So far, this is nothing new. [26]

Public service reserves

The revised Communication however also aligns the control of proportionality in the public broadcasting sector to the one in the utilities sector by enabling public service broadcasters to retain limited-period overcompensation where this appears necessary for the public service.

- First, public service broadcasters may retain yearly overcompensation above the net costs of the public service as 'public service reserves' in so far as this is necessary to secure the financing of their public service obligations. The Commission considers that an amount of up to 10 % of the annual budgeted expenses of the public service mission may be deemed necessary to cope with cost and revenue fluctuations. Any 'public service reserves' left at the end of the financing period must be netted out by including them in the calculation of the financial needs of the public service broadcaster for the next period. [27]
- Second, public service broadcasters may exceptionally be allowed to keep overcompensation in excess of 10 % in 'duly justified cases'. This is only acceptable where the overcompensation is 'specifically earmarked' in advance of and in a binding way for 'a nonrecurring, major expense' necessary for the fulfilment of the public service mission. The use of such clearly earmarked overcompensation should also be limited in time.

These two principles are similar but not identical to § 21 of the SGEI Framework, as the revised Communication relies on a slightly different benchmark for calculating the 10 % buffer. The revised Communication refers to the 'annual budgeted expenses' rather than to the 'annual compensation amount' (as does the Framework) as the benchmark for the 10 % buffer. This is more generous because the to-

(24) For example, through commercial sales of a public service programme at a later stage.

(25) See Article 1 (2) of Directive 2006/111/EC.

(26) Note that in the utilities sector, Member States have a choice as to whether they want to use income from activities other the public service remit for financing the public service or rather for other activities. See § 17 of the SGEI Framework ('The Member State may …'). This stricter approach in the public broadcasting sector is intrinsically related to and follows from the more lenient cost allocation, as explained in § … of the revised Broadcasting Communication.

(27) The requirement to net out the 10 % reserve at the end of the financial cycle is slightly more generous than the requirement in § 21 of the SGEI Framework that all overcompensation discovered at the end of a period 'not exceeding four years' should be repaid'. § 79 of the revised Communication applies a four years limitation for the carry forward of the public service reserve only in the absence of a financial period ('or, in the absence thereof, a time period which normally should not exceed four years').

tal expenses of dual-financed public broadcasters exceed their public service compensation. ([28])

The revised Communication therefore takes a more flexible approach to permissible overcompensation than does the SGEI Framework, but it is stricter when it comes to the elements allowable in calculating the compensation amount.

Reasonable Profit

The SGEI Decision states that the amount of compensation for an SGEI may not exceed the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a '*reasonable profit*' on any own capital necessary for discharging those obligations. 'Reasonable profit' is defined as 'a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State (..)'.

This concept implicitly defines profit as reward for the risk related to investing a company's own capital, as opposed to an investment in alternative ventures (opportunity cost). The higher the risk, the more profitable an activity must be. Arguably, without a reward for taking the risk, the company would not agree to deliver the SGEI. Hence, there is a need to reward the company by including a profit element in the compensation.

The revised Broadcasting Communication takes this concept as a starting point and then concludes: 'In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission'. ([29])

On the other hand, where Member States entrust a commercial broadcaster with individual and specific public broadcasting tasks against remuneration, it may be necessary to remunerate equity capital by including an appropriate profit element in the compensation amount. ([30])

3.6. Financial Control and recovery

While the 2001 Broadcasting Communication did not have a section on financial control, the Commission has, in its recent practice, verified whether Member States can have recourse to such mechanisms to vet overcompensation, as provided for in the SGEI Decision and the SGEI Framework.

Under the revised Communication, Member States 'shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of 'public service reserves'. Such control mechanisms must be 'effective', which can only be presumed if the control is carried out by an external body independent of the public service broadcaster. The control must be 'at regular intervals, preferably on a yearly basis'.

Moreover, Member States must put in place 'effective' procedures recover aid where a public broadcaster was unduly overcompensated. The financial situation of a public broadcaster must be subject to an in-depth review at the end of each financing period. In the event of 'public service reserves' repeatedly exceeding 10 % of the annual public service costs, Member States must check whether the level of funding is appropriate to the public service broadcasters' actual financial needs.

3.7. Ex Ante Assessment (Amsterdam Test)

The revised Communication on the one hand confirms that public service broadcasters may use State aid to provide all kinds of audiovisual services on new distribution platforms, applying a broad interpretation of the concept 'broadcasting' as used in the Amsterdam Protocol ([31]). However, this presupposes that the material conditions of the Amsterdam Protocol are in fact met. ([32]) To ensure that these substantive conditions apply to new publicly financed audiovisual services, the procedural solution follows the same lines that the Commission had already applied in three preceding cases concerning

([28]) This difference to § 21 of the SGEI Framework has a reason. Using the annual compensation as benchmark for the 10 % buffer would have treated dually financed broadcasters (income from State aid and advertising) worse than single-funded broadcasters (income only from State aid) and hence have distorted competition between them. Also, the rationale for granting financial flexibility is stronger for dually funded public broadcasters because their income from advertising is difficult to predict, while any income of single-funded broadcasters from State aid is typically fixed years in advance and hence tends to be stable.

([29]) This merely excludes any consideration of a hypothetical return on equity in the calculation of the public service compensation. It does not prevent public service broadcasters from maximising profits from their *commercial* activities. This may even be necessary to prevent further distortions of competition (see § 94).

([30]) For instance, to exclude advertising and to observe quality criteria for children programmes.

([31]) See section 2 above.

([32]) '… provided that they are addressing the same democratic, social and cultural needs of the society in question and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit'.

Germany (33), Ireland (34) and Belgium (35): the 'Amsterdam Test'.

This test at the national level (i.e.: by a national body rather than the Commission) addresses the legitimate concern of commercial media, including the print media, that public broadcasters might use public money to offer new online services which are not remotely similar to a TV or radio broadcast, which do not add any clear value for society and which considerably distort competition. In several Member States, the debate focused on the question whether broadcasters could start using public service compensation to finance a kind of 'electronic online press'. (36)

The Amsterdam Test reads as follows in the revised Communication: 'Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition'.

This prior evaluation therefore consists of two substantive elements:

- First, there must be consideration of whether the new service adds value for society in terms of satisfying the social, democratic or cultural needs of the population.
- Second, the potential impact of the new service on the market must be assessed.

Member States must balance the effect on the market with the added value for society. If there are likely to be predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if justified by an added value in terms of serving the social, democratic and cultural needs of society, taking into account the existing overall public service supply.

During the consultation process, critical views on the Amsterdam Test were essentially twofold:

- First, the Amsterdam Test would reduce the editorial independence of public service broadcasters.
- Second, the test would impose a heavy administrative burden on public service broadcasters, especially in smaller Member States.

The Communication does not request governments to get involved in the Amsterdam Test and underlines the need to safeguard the editorial independence of public service broadcasters. The Communication merely affirms the (common sense) requirement that the national testing body be effectively independent of the management of the public service broadcaster. (37)

As to the administrative burden, the Communication sets out only a handful of minimum requirements, viz.: a public consultation; the consideration of certain criteria for assessing the competitive impact; and the effective independence of the national body in charge of the evaluation. Conversely, the Communication leaves it up to each Member State to work out the details of the procedure and the institutional solution. The procedure may remain 'proportionate to the size of the market', a clear signal to smaller Member States as to the legitimacy of pragmatic solutions. Furthermore, it is applied only to 'significant new services', without defining these, thereby giving Member States flexibility in defining the benchmark which triggers the test – of course within the limits of the Amsterdam Protocol. Finally, public service broadcasters may try out new ideas, in the form of pilot projects, without conducting the test.

The prior evaluation in the Amsterdam Test will help meet the EU State aid rules. It is however without prejudice to the powers and duties of the Commission to verify that Member States comply with the Treaty, and to its right to act, whenever necessary, on the basis of complaints or on its own initiative. In practice this means that the Commission will take account of a prior evaluation at the national level if faced with a complaint on the subject. The test however does not in itself rule out the Commission opening an investigation, in particular if it finds that a test was unfair or ineffective. Without the test, the Commission has no choice but to enter into a detailed substantive assessment of new services. (38)

(33) Commission Decision of 24.4.2007 in E 3/2005, IP/07/543.

(34) Commission Decision of 27.2.2008 in E 4/2005, IP/08/317.

(35) Commission Decision of 27.2.2008 in E 8/2006, IP/08/316.

(36) This discussion was particularly fierce in Germany, where the *Länder* eventually decided to considerably limit the scope of ARD and ZDF to offer online services which are similar in appearance and structure to newspapers or magazines. See § 11 d (2) Z 3 of Germany's inter-state treaty on broadcasting (*'nichtsendungsbezogene presseähnliche Angebote sind nicht zulässig'*).

(37) In Germany, for instance, ARD and ZDF's *Rundfunk- und Fernsehräte* are in charge of the prior evaluation (the so-called 'Drei Stufen Test'). The German government is not involved at all.

(38) See, for instance, Decision of 14.12.1999, *BBC 24 Hours*, NN 88/98.

The test acts in effect like a national consultation and dispute settlement mechanism which should render complaints to the Commission redundant. It will facilitate the fine-tuning of planned new audiovisual services of public broadcasters in such a way that their value for society is maximised while the impact on the market is reduced to an acceptable level. The Amsterdam Test thereby also reflects Member States' wish for more subsidiarity in the public broadcasting sector. At the same time, it will enhance legal security on the use of public money. [39]

3.8. Proportionality Control and Market Behaviour

The Commission's check on proportionality in the public broadcasting sector includes vetting a public broadcaster's market activities. Without prejudice to Articles 101 and 102 of the Treaty, the Communication sets out the principle that public service broadcasters should not use State aid to finance activities which would result in distortions of competition 'that are not necessary for fulfilling the public service mission'. The revised Communication gives a number of examples of this.

First, public service broadcasters must have regard to the market economy investor principle (MEIP) when they act through commercial subsidiaries. This means essentially that the publicly financed mother company must honour the arm's length principle when dealing with the commercial daughter company.

Second, prices of advertising or other non-public service activities must be market-conform. There must be no 'undercutting of prices' for commercial offers by leveraging on the availability of State aid.

Third, public broadcasters must observe the principle of proportionality with regard to the acquisition of premium rights. In other words, they should not unduly use State aid to buy up a market.

Fourth, public service broadcasters may purchase exclusive premium rights (in particular for sport events). However, if they do not use them entirely or partially, these rights must be offered for sublicensing in a transparent and timely manner. The notion of 'unused' is not defined in the Communication. In that respect, the Commission has in individual cases considered the EBU as the point of reference [40] for sublicensing Eurovision programmes with regard to 'general events'.

3.9. Conclusions

The 2009 Broadcasting Communication did not revolutionise the existing rules, which were generally appreciated by all stakeholders. It does, however, mark an important evolution in terms of the State aid approach to public service broadcasting which is in line both with the refinement of State aid policy under the State Aid Action Plan and with the dramatic changes the sector is undergoing. With this instrument, the Commission is well placed to track the digitalisation process and the creation of new platforms for public service broadcasting, while guaranteeing a level playing field for private media, to the benefit of media pluralism.

(39) Before the BBC introduced their version of an Amsterdam Test, the 'Public Value Test', it used to put new services on the market without properly testing their impact on private initiatives. This cost the BBC around £75 mio when its BBC Jam service had to be shut down due to a legal challenge concerning fair trading. BBC Jam was an online educational service launched by the BBC in January 2006 and suspended on 20 March 2007. The service was available free across the UK offering multi-media educational resources. Jam was the BBC's provision for the 'Digital Curriculum', an initiative launched by the British Government to provide computer-based learning in UK schools, and had a budget of £150 million. According to the BBC, 'half of that budget' was lost when the BBC Trust decided to withdraw the service after massive complaints from the British Educational Suppliers Association (http://news.bbc.co.uk/2/hi/uk_news/education/6449619.stm).

(40) See the recent Commission Decision of 28.10.2009 in E 2/2009, *ORF*, at paragraph 266.

The new State Aid Broadband Guidelines: not all black and white

Lambros Papadias, Filomena Chirico and Norbert Gaál [1]

1. General context

1.1. The importance of broadband development

There is widespread consensus on the crucial impact of broadband development for economies and societies [2]. Broadband networks have the potential to affect productivity, innovation and the advancement of a country more than any other type of infrastructure [3]. In that respect, the ongoing debate about public support for the development of broadband networks starts from the premise that widespread availability of broadband access is a worthy political, social and economic objective, shared (and strongly encouraged) by the Commission, the Member States and the industry alike. It is widely acknowledged that broadband deployment offers advantages well beyond those of the mere 'Information Society' as it constitutes the key to the development of a genuine 'Network Society'. Broadband, more than any other physical infrastructure, incorporates a powerful transformative force that is capable of levelling out distance-related, regional handicaps and reshapes the traditional distinction, heavily laden with implications, between the centre and the periphery.

There is little wonder, therefore, that governments all around the world are putting broadband development at the forefront of their political agendas and are drafting comprehensive national broadband strategies [4].

Nowadays, the objectives — and challenges — that governments face with respect to broadband infrastructure development are twofold: in the short run, to bridge the remaining digital divide, by bringing full and universal coverage of at least basic broadband to all citizens; and in the longer run, to accelerate the widest possible roll-out of Next Generation Access (NGA) networks, able to carry advanced digital services and content.

1.2. Use of public funds

In Europe the electronic communication sector is now fully liberalised and subject to sectoral regulation which has brought about significant improvements in the competitive landscape of the telecommunication markets. In such a context, investments for the roll-out or upgrade of broadband networks are, in principle, the natural consequence of the competitive pressure. However, from the outset it was clear that market-driven private investments alone would not be enough to achieve ubiquitous broadband connectivity and, therefore, the use of additional public funds soon became a necessity.

In fact, as the Commission has underlined in a number of State aid 'broadband decisions', in most countries, the topology and morphology of the territory, the demographic characteristics of certain regions and, in some cases, the inadequate competitive pressure [5] are the main reasons why private opera-

(1) This article reflects the personal opinions of the authors and may not be regarded as stating an official position of the European Commission or of its Competition Directorate-General. Responsibility for the information and views expressed lies entirely with the authors.

(2) See for instance Fornefeld, Delaunay and Elixmann (2008), '*The impact of broadband on growth and productivity*' - A study on behalf of the European Commission, at http://ec.europa.eu/information_society/eeurope/i2010/docs/benchmarking/final_report-micus-broadband_impact-short.pdf; Czernich et al., '*Broadband infrastructure and Economic Growth*', CESifo working paper No 2861 (December 2009), at http://www.cesifo-group.de/DocCIDL/cesifo1_wp2861.pdf and P.S. Brogan, 'The economic benefits of broadband and information technology'.

(3) See for instance Katz and Suter, '*Estimating the economic impact of the broadband stimulus plan*'. Columbia Institute for Tele-Information Working Paper (December 2009), at http://www.elinoam.com/raulkatz/Dr_Raul_Katz_-_BB_Stimulus_Working_Paper.pdf.

(4) See '*Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world*', a Broadband study published by the Berkman Center for Internet & Society of the University of Harvard (October 2009) and posted for public consultation by the FCC (US) in December 2009, at http://cyber.law.harvard.edu/newsroom/broadband_review_draft. See also OECD, 'Broadband Growth and Policies in OECD Countries — Main Findings, OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea, 17-18 June 2008, at http://www.oecd.org/dataoecd/32/58/40629032.pdf.

(5) For some, a regulatory framework that is more focused on fostering investments than maintaining competition might be able to extend broadband coverage to larger areas (see Koenig and Fechtner, '*The European Commission's hidden asymmetric Regulatory Approach in the Field of Broadband Infrastructure Funding*'. EStAL 4/2009). However, such a view is not supported by empirical evidence and omits the fact that the existence of infrastructure (even where monopolistic) cannot maximise consumer welfare, while effective competition is able to do so.

tors have not and may not be able to make a viable business case to serve with adequate broadband services consumers in rural areas or areas with low population density. The above-mentioned factors are usually present outside densely populated areas, thus causing the costs for the deployment of broadband infrastructures to increase dramatically and leaving a very limited and inadequate broadband offer to citizens and businesses.

Moreover, the welfare loss deriving from such a digital divide cannot be ignored: research shows that the availability of adequate broadband services can bring proportionally greater benefits for rural areas (in terms of employment and GDP growth) than for urban areas ([6]).

Thus, many governments around the world have recognised the importance of ensuring the widest possible broadband coverage for their territories. Outside the EU, Japan and South Korea, two of the most advanced countries in terms of broadband penetration, have explored the route of granting 'soft loans' to existing operators to accelerate and extend their investment plans for broadband deployment. In the US, within the framework of the current stimulus package, 7.2 billion dollars have already been earmarked to foster broadband development in rural and underserved areas while in Australia, the government has announced its decision to roll out a new, State-funded next generation broadband network worth 43 billion Australian dollars.

In Europe, spending of State resources has to be compatible with the State aid rules of the Treaty to ensure that pursuing a laudable public policy objective does not end up distorting competition and crowding out private investors ([7]). In this framework, a significant amount of public funds has been channelled by virtually all EU Member States to broadband development: since 2003, the Commission has assessed and approved almost € 2 billion of State aid to be spent in this area, deemed to have generated almost € 4 billion of investments ([8]). The Commission has only raised concerns on a State aid to broadband measure when private operators already provided similar services or planned to do so in the near future. In such situations, despite the pro-competitive designs of the project, the Commission came to the conclusion that there was no need to use State aid as such intervention ran a high risk of duplicating existing services and crowding out investments by electronic communication operators ([9]).

1.3. Ongoing developments

Recently, two major developments have pushed even more to the forefront the need for more targeted and accelerated planning and design of public investment in broadband network deployments.

First, in the context of the current financial and economic crisis, investments in broadband infrastructure are considered effective measures that can bring about a short-term recovery and produce long-term economic advantages. With this in mind, both the European Commission and Member States have agreed to accelerate broadband deployment ([10]).

Second, a major technological shift is currently underway in the electronic communications sector: operators are starting to upgrade or deploy very high speed, NGA networks. Industry experts expect a similar revolutionary effect from the deployment of NGA networks to what happened with the first generation deployment of broadband networks. Yet, as mentioned already, the deployment of NGA networks requires a significant amount of investment, with estimates ranging between a minimum of € 30 billion ([11]) and a maximum of € 300 billion ([12]).

Faced with these challenges, the Commission undertook in 2009 different forms of intervention.

First of all, as a form of direct funding, in the framework of the European Recovery Plan and with the aim of achieving 100 % high speed internet coverage for all citizens by 2010, the Commission injected up to € 1.02 billion into the European Agricultural Fund for Rural Development (EAFRD) for deployment of broadband infrastructures in ru-

([6]) See for instance Lehr, W., Osorio, C., Gillett, S. and Sirbu, M., '*Measuring broadband economic impact*', Final Report Prepared for the US Department of Commerce, Economic Development Administration (February 2006), available at http://www.eda.gov/imagecache/EDAPublic/documents/pdfdocs2006/mitcmubbimpactreport_2epdf/v1/mitcmubbimpactreport.pdf.

([7]) See in particular Lambros Papadias, '*The Application of the State Aid Rules to the Electronic Communications Sector*', in C. Koening, A. Bartosch (et al.), 'EC Competition and Telecommunications Law, Second Edition', International Competition Law Series, Volume 6 (Kluwer Law Publications), pp. 153-226.

([8]) The list of Commission decisions on State aid to broadband is available at http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

([9]) See for instance Commission Decisions in Cases C 35/2005 *Broadband development Appingedam*, OJ L 86, 27.3.2007, p. 1, and NN 24/2007 *Prague Municipal Wireless Network*, OJ C 141, 26.6.2007, p. 2. Also Gaál, Papadias and Riedl, *Municipal wireless networks and State aid rules: Insights from Wireless Prague.* Competition Policy Newsletter, 2007/3.

([10]) Communication from the Commission to the European Council, COM(2008) 800, and Brussels European Council, 19-20 March 2009, Presidency Conclusions.

([11]) See for instance New Street Research: *Fibre: Anxieties, delusions and bluffs. Diverse approaches to local loop upgrades*, 13 March 2009.

([12]) The costs of rolling out a Europe-wide NGA network have been estimated by McKinseyAnalysis to be around € 250-300 billion.

ral areas (13). A total amount of over € 1 billion was subsequently allocated to the European governments to be invested in anti-crisis measures, with a special focus on broadband networks (14).

Secondly, as explained above, public funding in the electronic communications sector is in principle additional to private operators' own investments. Therefore, it is fundamental that the regulatory environment in which market actors operate is clear and predictable, on the one hand, and conducive to innovation and investments, on the other. To this end, the Commission has been working on two major regulatory documents that will have significant effects on the sector.

The first is the draft NGA Recommendation (15) addressed to the national regulatory authorities. Once adopted, it will provide guidance about the most appropriate remedies to regulate access to fibre-based NGA networks which are replacing the copper telephone loops deployed in the past by fixed line incumbents.

The second major regulatory initiative by the Commission, which is the main subject of this article, is the so-called Broadband Guidelines (16) that were adopted on 30 September 2009 ('the Guidelines'). In essence, the Guidelines aim to provide (i) guidance to public authorities on how to design an effective and pro-competitive scheme for funding basic broadband and NGA networks, and (ii) clarity for all stakeholders about the role of State aid in this strategic sector.

2. Broadband Guidelines

2.1. Objectives

The most important policy objective of the Guidelines is to accelerate the deployment of basic broadband and in particular of NGA networks while at the same time maintaining and strengthening competition in the electronic communications markets. It is important to highlight here that the contribution of public authorities to this goal does not necessarily involve the use of State aid, which should always be considered as a tool of last resort, if less distortive means are not available. To make this point very clear and to give comprehensive guidance to public authorities on what can be done to accelerate deployment of broadband networks in a pro-competitive fashion, the Guidelines sketch out a number of different types of public intervention that facilitate broadband development. They are briefly outlined in the paragraphs below.

2.2. Administrative/regulatory measures

First of all, administrative and regulatory measures can foster broadband investments and competition without the use of taxpayers' money. Such measures, combined with a longer-time planning horizon, could make the difference between countries having an effective and comprehensive broadband strategy as opposed to relying only on a patchwork of State aid schemes.

Measures promoting the use of existing infrastructures by easing access rights, requiring that network operators coordinate their civil works and/or share part of their infrastructure, providing open non-discriminatory access to public facilities, could help to reduce investment costs for operators and encourage them to invest. Administrative measures are particularly important for NGA development (according to some estimates, civil works account for up to 50-80 % of the total investment costs).

Moreover, in those areas where the deployment of only one infrastructure might be viable on market terms, it is of utmost importance for Member States and regulatory authorities to ensure at least effective, service-based competition. To this end, in-house wiring, unhindered access of competitors to passive and active elements of broadband infrastructure and other similar regulatory measures can ensure that competition can take place and be sustained even if only one infrastructure is in place.

2.3. Non-aid measures: Market Economy Investor Principle

A second type of intervention involves the use of public funds but is not considered to fall under the State aid rules. Public authorities may indeed decide to invest in a broadband project under market conditions, as clarified in the landmark Commission

(13) See Regulation (EC) No 473/2009 of 25.5.2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Regulation (EC) No 1290/2005 on the financing of the common agricultural policy, OJ L 149, 9.6.2009, p. 3.

(14) The Regulation cited in the preceding footnote gave Member States the choice of investing the EAFRD funds in broadband or in other rural development initiatives. According to the information available at the time of writing, only one third of those funds has been ultimately invested in broadband, while the remainder has been channelled to other policies, especially for support to the dairy sector.

(15) At the moment of writing, still in the consultation phase. The draft NGA Recommendation will be adopted most probably in the course of 2010.

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

Decision on the Citynet Amsterdam network ([17]). As underlined in this decision, the conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively, either by means of the significant participation of private investors or the existence of a sound business plan showing an adequate return on investment. Where private investors take part in the project, it is a *sine qua non* condition that they would have to assume the commercial risks linked to the investment under the same terms and conditions as the public investor.

2.4. Non-aid measures: Compensation for Services of General Economic Interest

In some Member States public authorities have decided to entrust a broadband operator with the obligation to provide a broadband network as a public service or a '*service of general economic interest*' (SGEI) ([18]). Public authorities may thus decide to compensate the entrusted company for the losses it suffers from having to provide such service in economically and unprofitable areas.

For public intervention of this kind to be exempted from the application of State aid rules, it must meet the strict conditions established by the EU courts, in particular in *Altmark* ([19]). Furthermore, according to the case law, the Commission has to assess whether a Member State has committed a manifest error in defining the public service (i.e. the SGEI) in the first place.

These established principles have been spelled out in relation to broadband in the Guidelines ([20]) and have been further clarified in a subsequent decision concerning deployment of an NGA network in a French *département* ([21]). The electronic communication sector is fully liberalised and very competitive, subject to the existing regulatory framework. Therefore special care has to be taken to limit the possibility of undue distortions of competition and to preserve the market incentives to invest and to compete. Hence, the Guidelines specify that operating a broadband network as a public service can only be justified if the entrusted operator deploys a passive, neutral and open broadband infrastructure that provides universal coverage in the territory concerned — including all citizens and businesses established in unprofitable areas.

It is important to stress here that the undertaking entrusted with such an SGEI has to roll out and operate the broadband network throughout the whole territory of a country/region, i.e. in both profitable and unprofitable areas. However, to comply with the *Altmark* requirement of absence of overcompensation, it is imperative that the public authorities grant compensation only to cover the costs related to roll-out in the unprofitable areas where the entrusted operator is obliged by law to provide universal broadband coverage at a loss.

2.5. State aid measures

Coming to the analysis of actual State aid measures, the Guidelines are divided into two main sections. Based on the Commission's approach to previous cases in this area (more than 55 Commission decisions) ([22]), the first section summarises the rules according to which subsidies can be granted for roll-out of *basic* broadband networks. The second section, also partly building on past experience, tackles the challenges posed by the specificities of *NGA network* deployment.

Some preliminary remarks are valid for both types of projects. Where an open access infrastructure is funded, the selection of the beneficiary via a public procurement process achieves the goal of minimising the amount of aid involved and the advantage for the recipient, but does not exclude the measure from the scope of State aid rules ([23]). Except where public authorities initiate a public procurement procedure to satisfy their own needs ([24]), the presence of an advantage for the selected bidder cannot be ruled out at the outset and therefore the measure has to be scrutinised in the light of the State aid rules.

([17]) Commission Decision of 11 December 2007 in Case C 53/2006 *Citynet Amsterdam — investment by the city of Amsterdam in a fibre-to-the home (FTTH) network*, OJ L 247, 16.9.2008, p. 27.

([18]) See Commission Decisions in Cases N 381/2004 *Projet de réseau de télécommunications haut débit des Pyrénées-Atlantiques*, France and N 382/2004 *Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (DORSAL)*, France.

([19]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

([20]) In paragraphs 20 to 30.

([21]) Commission Decision of 30 September 2009 in Case N 331/2008 *Réseau à très haut débit en Hauts-de-Seine.*

([22]) For reference, see footnote 8.

([23]) A different view is taken in the article by Nicolaides and Klies, *Where is the advantage?* EStAL, 4/2007. However, through the tender procedure, the selected operator receives financial support to provide services in areas where it would be much more expensive on market terms. Although a (competitive) tender procedure tends to reduce the amount of aid required and to avoid excessive profits, it does not eliminate the advantage for the winning bidder and does not rule out potential overcompensation (which is channelled back via the claw-back mechanism). See also the discussion in the following section.

([24]) See for instance Commission Decision in Case N 46/2007 *Welsh Public Sector Network Scheme*, UK, OJ C 157, 10.7.2007, p. 3. See also Tosics and Gaál, *Public procurement and State aid control — the issue of economic advantage*. Competition Policy Newsletter, 2007/3.

Furthermore, because of the specificities of the network industries, an indirect advantage can also be identified. Third party electronic communication operators can use the subsidised infrastructure through the open access provision, and thus extend their scope of activity, which would not have been possible without the aid measure. Business users located in the targeted areas may also benefit form the provision of broadband services that would not have been possible without State intervention.

2.5.1. State aid to basic broadband networks

The section on aid to basic broadband networks summarises the Commission's past policy in this area and formalises the conditions required for a State aid measure to be declared compatible under the Treaty provisions (25). Although not codified, these have been known for some time thanks to the Commission's extensive practice in this area (26).

The Commission has introduced a simplified approach to determine the necessity of the State aid measure, distinguishing among areas where broadband infrastructure does not exist or is unlikely to be developed in the near term (*white areas*), areas where only one broadband network operator is present (*grey areas*) and areas where at least two or more broadband network providers are present (*black areas*). Such a simplified approach allows the Commission's policy in this area to be communicated more clearly and easily, but it has to be highlighted that the basic concept that aid must be used to remedy a market failure and to pursue cohesion objectives as outlined in the State aid Action Plan has not changed despite these simplified labels (27).

The Broadband Guidelines also codify the necessary conditions with which an aid measure has to comply in order to be found compatible with the Treaty. While such conditions have always been required in prior Commission decisions, the Guidelines make it clear that these are indispensable features of the design of an aid scheme which does not distort competition to an unacceptable extent (28).

In particular, a *detailed mapping and coverage analysis* analysing the currently available broadband infrastructures (29) is essential to prove the necessity of the aid in the targeted areas. The maps thus drawn have to be put up for *public consultation with existing operators*. Best practices show that good visibility of the project characteristics, via the publication of the list of targeted areas and the authorities' objectives on a webpage (30), allows appropriate fine-tuning of the project and proper finalisation of the maps. Electronic communication operators will indeed be put in a position to represent any existing (31) or (credibly) planned offer of broadband services similar to those envisaged by the public authorities (32).

A sine qua non condition for granting State aid is the obligation for the aid recipient to provide *open wholesale access*, regardless of the presence of significant market power (33). In return for receiving taxpayers' money, the selected operator must give back part of the benefit thus received in the form of increased competition — as opposed to the case where it would have invested solely its own resources. The Commission's experience has shown that the strict condition of requiring open access on the subsidised network has resulted in higher take-up rates and more, better and cheaper services for the consumers located in the targeted areas.

Linked to the obligation of open-access provision is the necessity of *price benchmarking* on the subsidised network. The aim of a State aid scheme should be to help replicate market conditions where competition could not flourish by itself. Therefore, broadband services on the subsidised networks should be offered at prices similar to other, non-subsidised areas. Furthermore, the prices should also follow the general trends of a decline in price observed in competitive areas: in the absence of this, the aid beneficiary might benefit from unjustifiable supra-competitive profits and competition would be hindered.

To allow the market to propose the most adequate solution to cover the target areas and to minimise the amount of State expenditure, aid should always be awarded on the basis of an open, transparent and non-discriminatory *tender procedure*. However, bids requesting the lowest aid amounts should not necessarily be preferred, as this might flatten the offers

(25) See in particular Lambros Papadias, *The Application of the State Aid Rules to the Electronic Communications Sector*, in C. Koening, A. Bartosch (et al.), 'EC Competition and Telecommunications Law, Second Edition', International Competition Law Series, Volume 6 (Kluwer Law Publications), pp. 153-226.

(26) See for instance Hencsey et al., *State aid rules and public funding of broadband*, Competition Policy Newsletter, 2005/1 and Papadias et al., *Public funding for broadband networks — recent developments*, Competition Policy Newsletter, 2006/3.

(27) *State Aid Action Plan — Less and better targeted State aid: a roadmap for State aid reform 2005-2009*. COM(2005) 107 final.

(28) See paragraph 51 of the Guidelines.

(29) Such as technology, services offered, prices, access conditions, patterns of past upgrades.

(30) See for instance Commission Decisions in Cases N 172/2009 *Broadband development in Slovenia* or N 596/2009 *Digital divide Lombardia*, Italy.

(31) See for instance Commission Decision in Case N 183/2009 *RAIN project*, Lithuania.

(32) Supported, for instance, by a business plan and a detailed schedule for roll-out in the near future.

(33) See Article 14 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

to the minimum quality of service level and might disproportionally favour operators with existing infrastructure already in place. For this reason, the Guidelines specify that aid should be awarded to the *most economically advantageous offer*, based on clear and predefined selection criteria, thereby offering more possibilities for public authorities to differentiate between the proposals.

Importantly, public authorities *must not favour* a priori *any technological solution*: the public consultation and the tender procedure should favour the emergence of the technological platform (or combination of platforms) that market operators consider the most suitable. To the extent possible, public authorities should encourage *the use of existing infrastructures*: this condition is particularly important for NGA networks, where civil engineering costs could reach 50-80 % of the investment costs, so that this condition could help to reduce significantly the aid amount.

Although an open tender procedure minimises *ex ante* the requested subsidy, *ex post* the selected operator could still turn out to have been overcompensated. The bidders in an open tender procedure request aid based on their anticipated business plan, by assessing the potential revenues, investment and operational costs to roll out and run the subsidised network. However, in reality in such a fast-moving industry it is difficult to anticipate precisely such financial variables in a medium-long time horizon. To ensure that, due to higher-than-expected take-up of broadband services in the targeted areas, the subsidised networks do not generate extra profit for the aid recipients (i.e. profits higher than the average rate of the industry) ([34]) a *claw-back mechanism* should allow public authorities to recover part of these extra profits (if any) and reinvest them in further expansion of the broadband infrastructure. However, to leave enough incentives for the selected operator to achieve as high take-up rates on the subsidised network as possible, not all the extra profit should be claimed back, but a portion of it, for instance proportionally to the original aid intensity ([35]).

The application of these cumulative conditions ensures that State aid is well targeted and the amount is reduced to the minimum necessary, prevents crowding-out of private investments and promotes competition in areas where there was none before. Member States' experience with schemes approved by the Commission shows that full compliance with these conditions, far from constituting an unnecessary administrative burden, guarantees that State aid will produce the largest possible economic and social benefits for citizens and businesses located in the targeted areas.

2.5.2. State aid to NGA broadband networks

The planned transition to NGA networks

To date, with broadband coverage having increased in most Member States, public authorities are gradually turning their attention towards support for next generation access networks that can deliver services at very high speeds and support a host of advanced digital converged services. These are essentially fibre-based or advanced upgraded cable access networks that are destined to replace completely or to a large extent existing copper-based broadband networks or current cable networks ([36]). To the extent that next generation networks involve a wholly different network architecture, one that is based on optical fibre technology capable of providing higher quality broadband services that could not be supported by today's broadband networks, it is very likely that in the future there will be marked differences between areas that will be connected to ultra-fast broadband networks capable of handling advanced cloud-based services and delivering a huge amount of converged digital content, and areas that will remain cut off from such services ([37]), a situation that could give rise to a new form of digital divide. In other words, in the not too distant future, the need for broadband connectivity will no longer be translated in terms of establishing a mere electronic communication connection with other users or sources of information, but in terms of enjoying symmetrical two-way digital communication connectivity within a mesh type of network architecture

([34]) See for example the State aid scheme devised in Case N 508/2008 *Northern Ireland* and funded with the money clawed back from the previous aid recipient.

([35]) See for example Commission Decisions in Cases N 323/2009 *Asturias* and N 596/2009 *Lombardy*.

([36]) As also noted in the Guidelines, at this stage of technological and market development, neither satellite nor mobile network technologies appear to be capable of providing very high speed symmetrical broadband services, although in future the situation may change especially with regard to mobile services (the next major step in mobile radio communications, 'Long Term Evolution', may theoretically reach, if and when adopted, increased peak data rates of 100Mbps downlink and 50Mbps uplink).

([37]) If today the differences between an area where only narrowband internet is available (dial-up) and an area where broadband exists mean that the former is a 'white' area, likewise an area that lacks a next generation broadband infrastructure, but may still have one basic broadband infrastructure in place, should also be considered a 'white' area. In both cases, the material change is one of bandwidth available and of the type of broadband services supported by the two types of network infrastructures compared. The large majority of today's broadband services cannot exceed a maximum theoretical speed of 20-25 Mbps, nor can they offer symmetrical speeds, a feature which is essential for business users. Next generation networks offer speeds that range from a minimum of 50 Mbps to 1 000 Mbps or 1 Gbps in both directions (upload/download).

with no edges or centres where content delivery will flow in all possible directions.

Thus, for most public authorities, the issue is no longer how to bridge the existing or remaining 'digital divide' between rural and urban areas. Rather, their objective is now how to ensure availability of NGA networks in as wide as possible a geographical area, be it urban or rural ([38]). The aim is to avoid future prolonged and persistent differences between regions and geographical areas with regard to the availability of very high speed broadband networks. In a number of lower population density areas, not necessarily remote and rural, market forces alone may not deliver such services or may deliver them much later than they are available elsewhere. This is because to date the current business economic model is said to discourage deployment of NGA networks not only in sparsely populated areas, but also in urban zones ([39]).

For public sector, local or regional authorities, direct public intervention may thus be warranted in order to ensure that areas which are deemed by network operators to be 'unprofitable' will not suffer a permanent new digital, NGA divide. Moreover, regions and/or municipalities, where envisaged NGA investments by existing broadband network operators would take some years to arrive because they are financially less attractive than investments made first in certain major urban zones, may well decide to invest by themselves or provide financial support to private operators in order to obtain NGA connectivity at an early stage and thus ensure that economic opportunities are leveraged as quickly as possible.

It is against this background that a number of principles have been laid down in the Broadband Guidelines to account for the need to support and encourage rapid State-supported deployment of NGA networks in the EU.

Types of public intervention

As mentioned above, the Guidelines recognise that Member States may choose different degrees of market intervention in order to foster or to accelerate broadband and, especially, NGA deployment. Member States may adopt less intrusive measures to encourage network operators to bring forward their investment plans ([40]) or other measures that not only ease the administrative and other technical obstacles in deploying NGA networks in densely populated areas, but lower the capital costs of such deployments. Public authorities may thus ease access to capital by offering a credit line or a credit guarantee or even grant tax breaks or other tax advantages to encourage NGA roll-out. However, what is expected to happen is that public authorities will most likely decide either to tender out the construction and management of publicly-owned infrastructure or provide direct financial support for the deployment of a privately-owned NGA network. Any of the above-mentioned types of State intervention is likely to fall under Article 107(1) of the TFEU and will have to be notified and assessed under Article 107(3) of the TFEU.

The State aid assessment

As explained in section 2.5.1, the Guidelines start from the premise that the current distinction between 'white', 'grey' and 'black' areas is still relevant for assessing the compatibility of measures aiming to support the rapid deployment of NGA networks. They introduce however a more refined approach to take account of the specificities of such networks and of the expected temporal co-existence of NGA networks alongside current basic broadband networks. In this respect, proponents of rapid NGA deployment are in favour of a more forward-looking assessment on the grounds that existing xDSL and basic cable networks are in essence intermediate technologies destined to be displaced in the near future by fibre or advanced cable technologies. In particular, if it is true that to date some advanced basic broadband networks (i.e. ADSL 2+) can up to a cer-

([38]) Existing ADSL-based broadband networks limited to speeds ranging from an average of 2 to possibly 20 Mbps are no longer considered by a number of public authorities capable of satisfying users' needs for very high speed connectivity for the years to come. The main reason is that ADSL networks have an important limitation when it comes to very high speeds, and that is the required distance from users' premises. This means that outside major cities, users cannot and will not benefit from the converged triple-play digital services that will require in the future substantial and most likely symmetrical bandwidth.

([39]) In essence, the key issue for NGA network deployment today is mainly costs and to a lesser extent density of population as was the case up to now. Recent examples from early FTTx deployments show that rolling out an FTTx network is still a very expensive and risky investment, save in areas of dense population/business and where operators have already built a substantial base of broadband customers that can be convincingly and gradually migrated to NGA networks. In particular, it is often said that the cost of deploying NGNs and fibre networks is too high relative to the revenue that can be expected so that an insufficient number of private sector providers would enter the market. In the most extreme cases, it may be uneconomic for *any* private operator to offer high-speed broadband service.

([40]) Member States may decide, for instance, to lower the costs for or ease the acquisition process of rights of ways, require that network operators coordinate their civil works and/or share part of their infrastructure, or even require that any new construction or building has a fibre connection in place. Measures may also be adopted either by the NRAs or other public authorities to provide for equal and non-discriminatory access to poles or sharing of ducts owned by utilities or existing network operators.

tain point support some of the type of broadband services that are also likely to be offered over NGA networks (i.e. basic triple play services), this is more a case of a temporal substitution that is bound to disappear as demand for and supply of new broadband services that require speeds and bandwidth in excess of the upper physical limits of today's basic broadband infrastructures starts taking hold.

This means that a State-assisted migration path towards NGA deployment may be resisted by existing xDSL and/or cable operators that see real risks for their business in this 'intermediate technology' approach, especially if these operators plan to deploy their own NGA infrastructure at some point in time. The Guidelines have tried to take account of and deal with these market interactions. What the Guidelines have however clearly rejected is the proposition that in an area where there is already a basic broadband infrastructure and where none of the existing operators plans to migrate towards an NGA infrastructure, support for the rapid deployment of NGA should not be allowed.

'*White NGA areas*'. If in a given area there is no NGA broadband infrastructure whatsoever, then this is clearly a 'white NGA area'. The Commission will continue viewing favourably any measures promoting deployment of NGA networks in such areas, provided that a set of now well-accepted conditions is respected ([41]). The same definition is used for an area where only one basic broadband infrastructure exists ('old grey area') but no NGA network has yet been built or is expected to be built in the near future. Translating in concrete terms the Commission's stated objective to support the *rapid* deployment of NGA networks, the Guidelines have defined the term 'in the near future' as corresponding to a period of three years. In this respect, what matters most is that the investments planned by private investors should be such as to guarantee that at least '*significant progress in terms of coverage will be made within the three-year period, with completion of the planned investments foreseen within a reasonable time frame thereafter*' ([42]).

A more nuanced approach is envisaged for areas where there are at least two basic competing broadband networks (traditional, 'old black areas'). In those areas, the starting point is that current competition should normally lead to the deployment of NGA networks as a means to further intensify the current competitive process and obtain a first mover advantage. However, a public authority could rebut this presumption by demonstrating that such investments are unlikely to take place in the coming three years and that State intervention is warranted ([43]).

'*Grey NGA areas*'. In areas where one operator has deployed or is in the process of deploying an NGA network, State intervention may be justified only if it can be shown that the existing NGA infrastructure cannot meet users' demands and that other less intrusive regulatory measures cannot create conditions conducive to effective competition ([44]).

'*Black NGA areas*'. As is the case with traditional basic broadband networks, in areas where there are two or more NGA networks there should be no need for State intervention.

How to limit the distortion of competition: the core requirements

Although State measures aiming to support the rapid deployment of NGA networks will have to comply with the well-defined set of general, 'compatibility-driven' conditions, mentioned above, three additional provisions have been included in the Guidelines that are specific to NGA deployments.

First, aid beneficiaries should ensure effective wholesale network access for at least seven years. This means that after that period, unless an NRA makes a finding of SMP, the access obligation will no longer be in force ([45]). The seven-year period should be enough to enable existing xDSL operators to start migrating their client base to NGA services from the outset while giving them enough time to plan and carry out their own NGA investments.

Second, public authorities should from now on formally involve and consult NRAs on setting out the access regime and access conditions. Indeed, it is important to ensure that the nascent NGA market evolves in a coherent manner and those regulatory choices are not undermined or contradicted by parallel public sector intervention.

Third, having learnt the lessons from the opening of the basic broadband market, the Guidelines require that whatever the type of network architecture chosen (point to point, G-PON ([46])) there should

([41]) Guidelines, paragraph 51. See above at page 3 *et seq.*
([42]) Guidelines, point 68.

([43]) This will be the case for instance if by looking into the historical pattern of network investment it emerges that operators may have refrained from upgrading their networks and improving the quality and type of services offered; see Guidelines, paragraph 78.
([44]) Guidelines, paragraph 74.
([45]) If NRAs do not have the power to lift the access obligation imposed by virtue of Article 107(3) during the seven-year period in question, there is nothing to prevent them from imposing whatever additional obligations they deem appropriate (during and after that period) on the ground that the undertaking in question has significant market power (SMP).
([46]) Gigabit capable passive optical networks

be '*effective and full unbundling*'. In this respect, the Guidelines show a clear preference for so-called 'multi-fibre' deployments, the latter being the most likely to ensure long-term effective and sustainable competition.

3. Outlook

The Commission has decided to review the Guidelines no later than three years from their publication. This is an important safeguard that reflects the fact that the broadband market is characterised by constant and rapid evolution and technological innovation. Regulators in the EU and elsewhere are still struggling to devise the most appropriate regulatory regime for NGA networks given the inherent uncertainties associated with risky and long-term investments.

From a State aid point of view, it seems that the Guidelines will accelerate broadband investments and provide public authorities and private investors with a workable framework to determine where private and public investments are most appropriate. Within three months of the adoption of the Guidelines, the Commission was able to endorse a record number of ten State aid broadband decisions, in comparison with an average of ten broadband decisions per year (47). There are three main reasons behind this success: first, due to the high interest in broadband investments and the additional funding made available by the European Commission (48), Member States have notified a record number of projects to the Commission for State aid approval. Second, thanks to the clear framework defined by the Broadband Guidelines, the quality of the State aid notifications has increased significantly. Third, due to the existence of a clear legal basis, together with the introduction of additional procedural simplifications (49), the Commission was able to go ahead with the State aid assessments and endorsements in a shorter timeframe.

That said, it remains to be seen how the Guidelines will influence public authorities' overall policy: it is not clear yet whether Member States will opt for publicly-owned open access NGA networks or channel their support towards operator-owned infrastructures. What is clear, however, is that the Guidelines have already influenced the thinking of jurisdictions outside the EU and have been cited as an example of a successful attempt to define the borderline between State intervention and private investment in this area (50).

(47) See MEMO/10/31 *State aid: Commission processes record number of broadband projects following new Broadband Guidelines*. Available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/31.

(48) See also footnote 14.

(49) In clear-cut cases (such as aid to basic broadband) where the measure is fully in line with the provisions of the Broadband Guidelines, the Commission is able to adopt a decision within one month from the notification thanks to the introduction of a new simplified procedure. For further details, see *Commission Notice on a Simplified procedure for the treatment of certain types of State aid*, OJ C 136, 16.6.2009, p. 3. The new simplified procedure was applied to adopt a Commission decision in Case N 607/2009 *Rural Broadband Reach Scheme — Ireland*, OJ C 28, 4.2.2010, p. 4.

(50) On 14 July 2009, the US Federal Communication Commission announced that Harvard University's Berkman Center for Internet and Society would conduct an expert review of existing literature and studies about broadband deployment and usage throughout the world to inform the FCC with a view to adoption of a National Broadband Plan. In October 2009, the Berkman Center for Internet & Society published the first draft of its independent review for the FCC, entitled '*Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world*', which was further discussed in December 2009 in a public workshop held by the FCC. According to the Berkman Study, '*one of the most interesting aspects of these guidelines is their effort to limit the range of what is offered publicly, and use it, to the extent possible, to provide a platform over which competitive, market-based services higher up in the stack will be offered. This part of the EC opinion therefore serves as a particularly interesting window into current European thinking about integrating the natural-monopoly attributes of at least some broadband markets with the possibility that at least some layer of services will be competitive, riding on top of a shared platform. It also provides a window into current thinking about access, competition, and transposition of the first generation transition with the next generation transition*', available at http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf, page 168.

Final results of the Commission pharmaceutical sector inquiry: competition and regulatory concerns to address

Fabio Domanico and Elena Kamilarova [1]

On 8 July 2009, the Commission presented the final results of its sector inquiry into pharmaceuticals. The inquiry examined the competitive relationship between originator and generic companies and amongst originator companies and made important policy recommendations on how the sector could function better. In addition, on the basis of the knowledge acquired during the inquiry, the Commission has stepped up its antitrust enforcement in the sector. This article presents the final results of the inquiry and its policy recommendations aimed at ensuring an efficient and competitive pharmaceutical sector to the benefit of EU consumers while also identifying a number of issues that warrant competition law scrutiny.

1. Overview of the Pharmaceutical Sector in the EU

Europe's citizens need access to innovative, safe and affordable medicines. The pharmaceutical sector is highly regulated and R&D driven. On the supply side, originator companies aim to bring new products to the market. The patent system provides the legislative framework allowing companies to reap the benefits of their research and development work. At the same time, public health systems are subject to financial constraints. Generic companies, which bring generic versions of previously patent-protected products onto the market, help to keep public budgets under control, as their products are much cheaper than the originator product and have the same therapeutic effects.

The pace of consolidation in the pharmaceutical sector has been picking up in recent years, as generic and originator companies are acquired by other originator companies, and as generic companies merge, creating large multinationals. [2]

On the demand side, the pharmaceutical sector is unusual in that, for prescription medicines, the final consumer (the patient) is not the decision maker. Decisions are generally made by the prescribing doctors. The patient does not directly bear the costs either, as these are generally covered and/or reimbursed largely, or even wholly, by national health (insurance) schemes.

Given the importance of a well-functioning pharmaceutical sector and signs that competition in the pharmaceutical market in the European Union may not be working well, the Commission launched a sector inquiry into pharmaceuticals on 15 January 2008. [3] After the presentation of the Preliminary Report in November 2008 [4] and a subsequent public consultation involving all interested stakeholders, the Commission published its Final Report on 8 July 2009. [5]

2. Final results

The Final Report confirmed the preliminary findings of the sector inquiry suggesting that the behaviour of originator companies contributes to generic delay and is one of the reasons for the difficulties in bringing new medicines onto the market. [6] As sector inquiries are a tool under EC competition law, the inquiry's main focus was company behaviour. The report, however, also confirmed the important role of the legislative framework and calls upon all stakeholders to ensure that the existing framework is correctly implemented and that the necessary measures are taken to adapt the framework in the areas of patent law, marketing authorisation and pricing and reimbursement.

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

(2) See cases: COMP/M.5476 — Pfiser/Wyeth; COMP/M.5502 — *Merck/Schering-Plough*; COMP/M. 5530 — *Glaxo Smith Kline/Stiefel*; COMP/M.5295 — *Teva/Barr*; See Cases COMP/M.5253 *Sanofi-Aventis/Zentiva*; COMP/M.5555 — *Novartis/ Ebewe*.

(3) Commission Decision of 15 January 2008 initiating an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003.

(4) Pharmaceutical Sector Inquiry, Preliminary Report, DG Competition Staff Working Paper, 28.11.2008, available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html

(5) Commission Communication of 8 July 2009 on the Executive Summary of the Pharmaceutical Sector Inquiry Report, press release IP/09/1098, available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html

(6) Competition policy newsletter 2009-1 'Preliminary results of Commission pharmaceutical sector inquiry raise competition concerns'.

The sector inquiry was part of Commission policies and initiatives relevant to the pharmaceutical sector, including the Lisbon Strategy, the Commission's Industrial Property Rights Strategy, [7] the Communication on a Renewed Vision of the Pharmaceutical Sector [8] and the Innovative Medicines Initiative. [9]

2.1. Competition between originator and generic companies — the issues

The inquiry showed that originator companies use a variety of instruments (referred to as 'tool-box') to extend the commercial life of their medicines and suggests that the behaviour of companies contributes to generic delay. It is important to underline that originator companies have, of course, a legitimate interest in defending themselves against the premature market entry of generic products. It would require an in-depth investigation based on the merits of individual cases to decide whether the described practices can and do amount to a restriction of competition.

2.1.1. Patent filing strategies

A strategy commonly applied by originator companies is to seek to extend the breadth and duration of patent protection by filing numerous patents for the same medicine (forming 'patent clusters' or 'patent thickets'). Documents gathered in the course of the inquiry confirm that an important aim of this strategy is to delay or block the market entry of generic medicines. [10] In some cases, individual blockbuster medicines can be protected by up to 100 product-specific patent families, which can lead to up to 1 300 patents and/or pending patent applications across the Member States. This can cause uncertainty for generic competitors and affect their ability to enter the market.

2.1.2. Patent-related exchanges and litigation

Enforcing patent rights in court is legitimate and a fundamental right guaranteed by the European Convention on Human Rights. As in any other industry, the inquiry's findings show, however, that litigation can also be an efficient means of creating obstacles for generic companies, in particular smaller ones. In certain instances, originator companies may consider litigation not so much on its merits, but rather as a signal to deter generic entrants.

Between 2000 and 2007, originator and generic companies engaged in at least 1300 patent-related contacts and disputes out-of-court concerning the launch of generic products for the 219 molecules in the sample under investigation. The number of patent litigation cases between originator and generic companies increased fourfold in that period. In total, nearly 700 cases of patent litigation between originator companies and generic companies were reported for that sample alone. Whilst the originator companies initiated the majority of cases, generic companies won almost two thirds of the cases where a final judgment was given. Patent litigation took on average 2.8 years, with considerable variations across EU Member States. Of the cases in which the originator companies originally obtained interim injunctions, some 50 % ultimately ended with an outcome that was favourable to the generic company (i.e. they won the main proceedings, or the settlement was beneficial to the generic, allowing immediate entry or providing for a value transfer). The total cost of patent litigation in the EU in the cases reported is put at over €420 million. In 11 % of the final judgments reported, courts in different EU Member States gave conflicting final judgments on the same issue of patent validity or infringement.

2.1.3. Oppositions and appeals before the European Patent Office (EPO)

The sector inquiry confirmed that the opposition rate (i.e. the number of oppositions filed per 100 patents granted) before the EPO is consistently higher for the pharmaceutical sector than for any other sector. In cases where they opposed a patent, generic companies prevailed in about 60 % of final EPO decisions (including appeal) in the period 2000 to 2007. The scope of the originator patent was restricted in another 15 % of cases. However, it took more than two years on average to obtain 80 % of the final decisions, and this can limit generic companies' ability to clarify the patent situation of potential generic products within a reasonable timeframe.

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(7) Commission Communication of 16 July 2008 on an Industrial Property Rights Strategy for Europe, COM(2008) 465 final.

(8) See, in particular, Commission Communication of 10 December 2008 (COM(2008) 666 of 10.12.2008: Safe, Innovative and Accessible Medicines: A Renewed Vision for the Pharmaceutical Sector).

(9) The Innovative Medicines Initiative is a Public-Private Partnership (PPP) between the pharmaceutical industry represented by the European Federation of Pharmaceutical Industries and Associations (EFPIA) and the European Communities, represented by the European Commission.

(10) All patent applications do, however, need to be evaluated on the basis of the statutory patentability criteria by the patent offices, not on the basis of the underlying intentions of the applicant.

2.1.4. Patent settlements and other agreements

The inquiry established that between 2000 and June 2008, more than 200 settlement agreements were concluded between originator and generic companies, with nearly 50 % restricting the generic company's ability to market its product. A significant proportion of these settlements contained — in addition to the restriction — a value transfer from the originator company to the generic company (e.g. direct payment, a licence, distribution agreement or a 'side-deal'). Direct payments from originator companies to generic companies featured in more than 20 settlement agreements and exceeded € 200 million. The latter type of agreements has attracted antitrust scrutiny in the USA. Originator and generic companies also concluded other types of agreements before and after the expiry of the patents, such as distribution agreements.

2.1.5. Other practices affecting generic entry

The inquiry found that originator companies intervene before national marketing authorisation and/or pricing and reimbursement authorities claiming that generic medicines are less safe, less effective and of inferior quality or will violate their patent rights even though marketing authorisation bodies are not allowed to take this argument into account according to EU legislation. However, originator companies were rarely successful in challenging the decisions of national authorities in court, e.g. the success rate against marketing authorisations was only 2 %. The sector inquiry estimated that in cases, in which interventions by originator companies took place, authorisation procedures took 4 months longer. The inquiry also collected data about information campaigns by originator companies against individual generic medicines and generic medicines in general.

2.1.6. Lifecycle strategies for second-generation products

Incremental research is important in that it can lead to significant improvements in existing products, including from the patient's perspective. However, generic companies and consumer associations sometimes question whether there is really any improvement of therapeutic benefit for the patient. For 40 % of the medicines in the sample selected, which had lost exclusivity between 2000 and 2007, originator companies launched second-generation products, making intensive marketing efforts to get a substantial number of patients to switch to the new medicine prior to the market entry of a generic version of the first-generation product. When a second-generation product is launched ahead of the generic version of the first-generation product, the switching rates are reported to be significantly higher. Occasionally, the switch is accompanied by the originator company withdrawing the first-generation product.

Patent and other strategies/instruments as described above may sometimes – depending on the commercial importance of the medicines – be used cumulatively with a view to prolonging the life cycle of medicines. The inquiry shows that more lifecycle instruments are used for the best-selling medicines.

2.1.7. Impact of generic entry

The inquiry confirmed that, in many instances, generic entry takes place later than might be expected. For the sample of medicines facing loss of exclusivity in the period 2000 to 2007, the average time between loss of exclusivity and market entry was almost eight months (on a weighted average basis), and still around four months for the most valuable medicines. This is probably a conservative estimate.

Generic delays are important as the price at which generic companies enter the market was found, on average, to be 25 % lower than the price of the originator medicines prior to the loss of exclusivity. Two years after entry, prices of generic medicines were on average 40 % below the former originator price, leading to important savings for national health systems. Econometric analysis suggests that a number of factors influence the observed pattern and speed of generic entry, e.g. the turnover of originator medicines before expiry of the patent, data exclusivity or the regulatory environment.

On the basis of a sample of medicines analysed the report estimates that savings due to generic entry could have been 20 % higher than they actually were if entry had taken place immediately following loss of exclusivity. Hence, the aggregate expenditure on the sample of €50 billion would have been about €15 billion higher without generic entry (evaluated at constant volumes). However, additional savings of some €3 billion could have been achieved had entry taken place immediately. This is a very conservative estimate as volume developments and other factors were not taken into account in the calculations.

2.2. Competition between originator companies — the issues

The inquiry also sought to examine whether the behaviour of originator companies might be one of the reasons for the difficulties in bringing new medicines onto the market. [11]

2.2.1. Patent strategies and litigation

While patent strategies to protect innovative efforts are legitimate, they may in certain cases interfere with the development of competing medicines. Some patents seem to be directed exclusively against the development of a competing product. These strategies are called by some originator companies 'defensive patent strategies'. [12] Certain originator companies were found to have refused a licence for these patents.

The inquiry also found that originator companies engaged in litigation against other originator companies. 66 patent-related litigation cases were reported, concerning 18 medicines. In 64 % of the cases, litigation was concluded by means of settlement agreements.

2.2.2. Opposition and appeal before the EPO

Originator companies mainly opposed each other's secondary patents. The opposing originator companies were very successful when challenging the patents of other originator companies, prevailing in nearly 70 % of final EPO decisions (including on appeal). The scope of the patents was reduced in another 19 % of the cases.

3. Policy recommendations

With regard to the regulatory framework, the Final Report highlights three main areas of concern: patents, marketing authorisation, and pricing and reimbursement. With respect to patents the Commission reaffirms — on the basis of its findings — the urgent need for a Community patent and for a unified specialised patent litigation system in Europe. The sector inquiry also fully confirms the relevance of recent initiatives by the European Patent Office to ensure a high quality standard of patents granted and to accelerate procedures ('raising the bar').

With respect to marketing authorisation, the Commission will focus on the full implementation and effective enforcement of the regulatory framework, e.g. regarding the deadlines for marketing authorisation processes. The Commission will look closely at the cooperation between authorities and at building up capacities/expertise throughout the EU. The Commission has also reminded stakeholders of the ban on patent linkage and of the need to stop making unwarranted interventions.

Concerning pricing and reimbursement, the Commission is calling on Member States to consider provisions that would grant pricing and reimbursement status to generic products automatically where the corresponding originator product already benefits from such a status, and to consider policies to facilitate rapid generic uptake and/or generic competition. This might include tender procedures, but stakeholders are reminded not to consider only the short-term effects. Depending on the outcome of the various initiatives, the Commission will examine the need for a review of existing EU rules in the area of pricing and reimbursement (Transparency Directive 89/105/EEC).

The Commission will continue to pursue a constructive dialogue with all stakeholders to ensure that the Community's pharmaceutical industry can develop its innovative potential to the full and that patients benefit from better access to safe and innovative medicines at affordable prices without undue delay.

4. Competition law scrutiny

On a case-by-case basis, the Commission will, where appropriate, make full use of its powers under antitrust rules (Articles 81, 82 and 86 of the EC Treaty), merger control (Regulation (EC) No 139/2004) [13] and State aid control (Articles 87 and 88 of the EC-Treaty). It will, in close cooperation with the National Competition Authorities, pursue any antitrust infringement in the sector, wherever this is in the Community interest. Action may also be taken at national level and in areas which were not the primary focus of the inquiry or are outside its scope.

The sector inquiry has identified a number of company practices that warrant further scrutiny under the competition rules. While intellectual property law and innovation constitute an essential and dynamic component of an open and competitive market economy, they are still subject to competition

(11) Other factors cited by the originator industry for the decline in innovation included increased scientific complexities, high attrition rates in late stage development and uncertainty about the financial rewards. These factors were not covered by the inquiry.

(12) The term 'defensive' patents cannot be found in patent law, and all patent applications need to be evaluated on the basis of the statutory patentability criteria, not on the basis of underlying intentions by the applicant. Also, it is an inherent feature of a patent system to grant exclusive rights. The notion of 'defensive patents' should therefore not be taken to mean that these patents are of a lower quality or value; it merely tries to capture a classification made in industry for this type of patents from a commercial perspective.

(13) Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24 of 29.1.2004, p. 1–22.

law scrutiny. ([14]) However, certain practices can be considered an infringement only in exceptional circumstances. ([15])

As regards competition between originator and generic companies, delays in generic market entry are a particular point of concern. The use of specific instruments by originator companies to delay generic entry will be subject to competition scrutiny if there is an anti-competitive element (e.g. clear indications of submissions being made to a marketing authorisation body with a view primarily to delaying the market entry of a competitor).

With regard to competition between originator companies, defensive patenting strategies that focus mainly on excluding competitors without pursuing innovative efforts and/or the refusal to grant a licence on unused patents will remain under scrutiny, especially where innovation is being blocked.

Agreements that are designed to keep competitors out of the market may also fall foul of EC competition law. Settlement agreements that limit generic entry and include a value transfer from an originator company to one or more generic companies are an example of such potentially anticompetitive agreements, in particular where the point is to share profits via payments from originator to generic companies to the detriment of patients and public health budgets.

To reduce the risk of settlements being concluded at the expense of consumers, the Commission will carry out focused monitoring. This will have to take into account the administrative burden imposed on stakeholders and will be limited in time until the Commission has gathered sufficient information to decide whether further action is needed. Further market monitoring is also ongoing and will try to identify any additional factors that may affect generic entry and the entry of novel medicines onto the market or which affect the functioning of the distribution chain. ([16])

As mentioned above, the pharmaceutical industry is currently going through a significant phase of consolidation. The Commission is following the trend towards increased market concentration with interest, and analysis of these merger cases will benefit from the insights gained through the sector inquiry so as to preserve a competitive structure and process in the market.

Specific enforcement action is already underway. For example, on 8 July 2009, the Commission announced that it had initiated antitrust proceedings ([17]) against the French originator company Servier on the medicine perindopril. The proceedings relate to unilateral behaviour as well as patent settlement agreements between Servier and a number of actual or potential generic competitors. ([18]) Meanwhile, on 6 October 2009, the European Commission made surprise inspections at the premises of several companies active in the pharmaceutical industry which may have infringed the provisions of the EC Treaty prohibiting restrictive business practices and/or the abuse of a dominant market position (Articles 81 and 82). ([19]) It is important to underline that inspections or the initiation of formal proceedings cannot prejudge the final outcome of the proceedings.

([14]) See Commission Notice — Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101 of 27 April 2004, p. 2-42. See also Judgment of the Court of 27 September 1988, Case 65/86 (Bayer v. Süllhöfer), [1988] ECR, p. 05249.

([15]) See, for instance: Joined cases C-241/91 P and C-242/91 Radio Telefis Eireann (RTE) and Independents Television Publications (ITP) v Commission (Magill) [1995] ECR I-743, para. 50; case C-418/01 IMS Health v NDC Health [2004] ECR I-5039; case T-201/04 Microsoft v Commission [2007] ECR II-3601, in particular paras. 688 et seq. Commission Communication of 16 July 2008 on an Industrial Property Rights Strategy for Europe, COM(2008) 465 final.

([16]) In addition to the sector inquiry, the Commission is currently monitoring the pharmaceutical sector with a view to making a comprehensive macro-level analysis of the EU market for pharmaceuticals, covering some areas not addressed by the sector inquiry (e.g. distribution chains, trends in innovation spending in the EU etc.).

([17]) See case COMP/39612 — Servier (perindopril) within the meaning of Article 11(6) of Council Regulation No 1/2003 and Article 2(1) of Commission Regulation No 773/2004.

([18]) Including Krka, tovarna zdravil, d.d., Lupin Limited, Matrix Laboratories Limited (subsidiary of Mylan Inc), Niche Generics Limited (subsidiary of Unichem Laboratories Limited), and Teva Pharmaceutical Industries Limited.

([19]) See MEMO/09/435.

Commission finds abuse of dominance in the Intel case

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1. Introduction

On 13 May 2009, the European Commission concluded its Intel investigation by way of a formal Decision. The Commission found that Intel had abused its dominant position in x86 Central Processing Units (CPUs) by engaging in two types of practices. First, Intel gave rebates to computer manufacturers (Original Equipment Manufacturers or OEMs) on condition that they bought all, or almost all of their x86 CPUs from Intel, at least in a certain segment. Similarly, Intel also made direct payments to a major retailer on condition it stock only computers with Intel x86 CPUs. Second, Intel made direct payments to OEMs to halt or delay the launch of specific products containing a competitor's x86 CPUs and to limit the sales channels available to these products.

2. Timeline

The case originated with a complaint of 18 October 2000 from Advanced Micro Devices (AMD). This complaint was supplemented with new allegations in November 2003. In May 2004, the Commission launched a round of investigations relating to elements in the supplementary complaint. On 17 July 2006, AMD filed a complaint to the German National Competition Authority claiming that Intel had engaged in exclusionary marketing arrangements and other practices with Media Saturn Holding (MSH), a European retailer of microelectronic devices. In agreement with the German National Competition Authority, this complaint was transferred to the Commission.

On 26 July 2007, the Commission issued a Statement of Objections (SO) concerning Intel's conduct vis-à-vis major OEMs including Dell, HP, Acer and NEC. Intel replied to the 26 July 2007 SO on 8 January 2008, and an oral hearing was held on 11 and 12 March 2008.

On 17 July 2008, the Commission issued a supplementary Statement of Objections (SSO) concerning Intel's conduct vis-à-vis MSH (an electronics retailer) and Lenovo (a major OEM). It also included new evidence on the Intel conducts vis-à-vis some of the OEMs covered by the 26 July 2007 SO, which had been obtained by the Commission after the 26 July 2007 SO. Intel failed to reply to the SSO by the extended deadline of 17 October 2008, but submitted belated written submissions relating to the SSO on 5 February 2009. This issue is discussed in section 5 below.

3. Intel's Dominance

The products concerned by the Decision are Central Processing Units (CPUs) of the x86 architecture. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's "brain". The manufacturing process of CPUs requires high-tech and expensive facilities. CPUs used in computers can be sub-divided into two categories: CPUs of the x86 architecture and CPUs of a non-x86 architecture. The x86 architecture is a standard designed by Intel for its CPUs. It can run both the Windows and Linux operating systems. Windows is primarily linked to the x86 instruction set. Prior to 2000, there were several manufacturers of x86 CPUs. However, most of these manufacturers have exited the market. Since 2000, Intel and AMD are essentially the only two companies still manufacturing x86 CPUs.

Following a market enquiry to both customers and suppliers of CPUs in the market, the Decision concluded that on the basis of demand and supply side substitutability factors, the relevant product market was not wider than the market for x86 CPUs for computers. The Decision left open the question whether the relevant product market definition could be subdivided between x86 CPUs for desktop computers, notebook computers and servers since given Intel's market shares under either definition, there is no difference to the conclusion on dominance. The geographic market was found to be worldwide.

In the 10 year period considered in the Decision (1997-2007), Intel held consistently very high market shares in excess of or around 70%, and more often in the region of or in excess of 80%. In addition, the Decision identified significant barriers to entry and expansion in the x86 CPU market. These arise from the sunk investments in research and development, intellectual property and production facilities that are necessary to produce x86 CPUs. Intel's strong (must-stock) brand status and the resulting product differentiation also constitute a barrier to entry. The identified high barriers to entry and expansion are consistent with the observed market structure, where all of Intel's competitors,

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

except AMD, have exited the market or are left with an insignificant share. On the basis of Intel's market shares and the barriers to entry and expansion, the Decision concluded that at least in the period covered by the Decision (October 2002 to December 2007), Intel held a dominant position in the market.

4. Abuse of a Dominant Position

4.1. Conditional rebates

4.1.1. Nature and operation of the rebates

The Decision concluded that Intel awarded major OEMs and one major retailer rebates/payments the level of which were conditioned on these OEMs purchasing all or almost all of their CPU supply needs from Intel, at least in a certain segment. These were as follows:

– Intel rebates to Dell during the period from December 2002 to December 2005 the level of which was conditioned on Dell purchasing exclusively Intel CPUs;

– Intel rebates to HP during the period from November 2002 to May 2005 the level of which was conditioned in particular on HP purchasing no less than 95% of its CPU needs for its business desktop segment from Intel (the remaining 5% that HP could purchase from AMD was then subject to further restrictive conditions set out below);

– Intel rebates to NEC during the period from October 2002 to November 2005 the level of which was conditioned on NEC purchasing no less than 80% of its CPU needs for its desktop and notebook segments from Intel;

– Intel rebates to Lenovo during 2007 the level of which was conditioned on Lenovo purchasing its CPU needs for its notebook segment exclusively from Intel.

– Intel payments to Media Saturn Holding (MSH), Europe's largest PC retailer, the level of which was conditioned on MSH selling exclusively Intel-based PCs between October 2002 and December 2007. [2]

In each instance outlined above, Intel contested that there was any conditionality in its arrangements with the OEMs in question and MSH. The Commission carefully considered Intel's arguments. However, the evidence which led the Commission to its findings was conclusive. This comprised evidence from contemporaneous documentation (e-mails and other documents) from OEMs, MSH and Intel itself, as well as a number of company statements. Indeed, the Decision found that Intel had sought to conceal the nature of its conditional arrangements. For example:

- The rebate arrangement with Dell was not subject to a written agreement but was concluded orally at various meetings.

- There was a written agreement with HP but at Intel's request, the relevant conditions remained unwritten.

- The written agreement with MSH contained a provision that the deal was non-exclusive. However, the evidence demonstrates that this provision was inserted at Intel's request despite the fact that the arrangement was in reality exclusive.

The contemporaneous evidence outlined in the Decision as well as statements from OEMs and MSH outline how the various Intel conditions were an important factor in their decisions not to partially switch to or buy more x86 CPUs from AMD, something which they had been actively considering in light of their evaluations of AMD's product.

The Decision concluded that the conditional rebates granted by Intel to the OEMs constitute fidelity rebates which fulfil the conditions of the relevant case-law for their qualification as abusive. [3] With regard to Intel's conditional payments to MSH, the Decision es-

[2] Conditional payments to MSH were ongoing from October 1997 to at least 12 February 2008. However, the Commission used its discretion not to pursue in the Decision Intel's conduct targeted only at MSH for the periods from October 1997 to September 2002 and after December 2007.

[3] In this regard, the Court of Justice has consistently ruled that "*an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements - whether the quantity of its purchases be large or small - from the undertaking in a dominant position*". See Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 89-90. See also Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 149; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraphs 71 and 120; Case C-393/92 *Municipality of Almelo and others* [1994] ECR I-1477, paragraph 44; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and Others v Commission* [1996] ECR II-1201, paragraphs 118-120 and 182 to 186; Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, paragraphs 56 and 241; and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 244, confirmed on appeal in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraphs 61 and 67. Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 221. See also Case C-202/07 P *France Télécom v Commission* not yet reported, paragraphs 107 to 113.

tablishes that the economic mechanism of these payments is equivalent to that of the conditional rebates to OEMs. The Decision therefore concludes that they also fulfil the conditions of the relevant case-law for their qualification as abusive. On top of showing that the conditions of the case-law for finding an abuse are fulfilled, the Decision also conducts an economic analysis of the capability of the rebates to foreclose a competitor which would be as efficient as Intel (albeit not dominant) and outlines that Intel's anticompetitive conduct resulted in a significant reduction of consumer choice and in lower incentives to innovate.

4.1.2. As efficient competitor analysis

In essence, the as efficient competitor test establishes at what conditions a competitor which is 'as efficient' as Intel would have to offer CPUs in order to compensate an OEM for the loss of Intel rebates. This as efficient competitor analysis is a hypothetical exercise in the sense that it analyses whether a competitor which is as efficient as Intel but which seeks to offer a product that does not have as broad a sales base as that of Intel is foreclosed from entering. This occurs if in order to compensate an OEM for the loss of Intel rebate which results from a breach of the Intel condition, the as efficient competitor would have to meet a higher share of its customers' needs for CPUs than is realistic, or would have to offer its CPUs below a measure of viable cost. This can occur because the Intel rebate is spread across the OEM's entire purchases from Intel, whereas the compensation for the loss of rebate generally needs to be spread across a significantly lower amount of purchases, namely the amount of purchases that is 'up for grabs' in any given time period, and hence that an OEM can switch away from Intel. This means that it can be uneconomic for a competitor to compensate an OEM for the loss of Intel rebate (i.e. it has to offer its CPUs below cost), even if it is as efficient as Intel, and even if its average CPU price is lower than that of Intel.

The analysis therefore takes into consideration three factors: the contestable share (the amount of a customer's purchase requirements that can realistically be switched to a new competitor in any given period), a relevant time horizon (at most one year) and a relevant measure of viable cost (Average Avoidable Cost). [4] If Intel's rebate scheme means that in order to compensate an OEM for the loss of the Intel rebate, an as efficient competitor has either to exceed a realistic contestable share or to offer its products below a viable measure of Intel's cost, then it means that the rebate was capable of foreclosing the as efficient competitor. This would deprive final consumers of the choice between different products which the OEM would otherwise have chosen to offer were it to make its decision solely on the basis of the relative merit of the products and unit prices offered by Intel and its competitors. The same kind of analysis has been conducted for the Intel payments to MSH. The analysis of the capability of these payments to foreclose an as efficient competitor also takes account of the fact that these payments are made at another level of the supply chain (the retail level), and that their effect is additional to that of conditional rebates to OEMs.

In each case, on the basis of contemporaneous evidence and company statements, the Decision found that in order to compensate for the loss of Intel's conditional rebates to Dell, HP, NEC and Lenovo, an as efficient competitor would have had to price its CPUs below Average Avoidable Cost. Similarly, the Decision found that, in order to compensate for the loss of Intel's conditional payments to MSH, an as efficient competitor would have had to offer payments which, alone or in complement to payments necessary to offset conditional rebates at the level of OEMs, would have required it to price its CPUs below Average Avoidable Cost. The Decision concluded that Intel's conditional rebates to OEMs and conditional payments to MSH were capable of having or likely to have anticompetitive foreclosure effects since even an as efficient competitor would have been prevented from accessing the relevant sales of each of Intel's trading partners.

It should be noted that the use of Average Avoidable Cost as the benchmark under which the as efficient competitor cannot trade in an economically viable way is favourable to Intel. Indeed, in order to maintain a viable business over more than a very short term, an as efficient competitor would have to be able to also recoup its fixed costs.

4.1.3. Strategic importance of main OEMs

The Decision also concluded that certain OEMs, and in particular Dell and HP, are strategically more important than other OEMs in their ability to provide a CPU manufacturer access to the market. They can be distinguished from other OEMs on the basis of three main criteria: (i) market share; (ii) strong presence in the more profitable part of the market; and (iii) ability to legitimise a new CPU in the market. As a consequence, smaller OEMs are not able to legitimise new CPUs in the same way as HP and

(4) Average Avoidable Cost is the average cost per unit which a CPU manufacturer would not incur (in other words, could avoid) if it did not produce a given number of CPUs. This includes cost items which are directly proportional to the number of CPUs produced (such as costs of certain raw materials), but also other types of costs which, despite not being directly proportional to the number of CPUs produced, can be avoided if production decreases significantly over a sufficient period of time. Intel's own cost measure is used so that the analysis applies to a hypothetical competitor which is as efficient as Intel.

Dell, in particular in the corporate segment, which is the most profitable.

4.1.4. Harm to competition and consumers

Through a variety of rebates which were tailored for each OEM, including the most strategically important OEMs, Intel was able to limit consumer choice and foreclose the access of competitors to the market. The Decision outlines evidence that consumers attach value to the combination of the computer of an individual OEM incorporating CPUs from different manufacturers. Intel's practices therefore prevented combinations of a range of individual OEM brand computers incorporating innovative and genuinely different AMD CPUs from coming to the market, or at least in significant quantities. This effect was exacerbated since generally, the decision of OEMs not to incorporate other x86 CPUs than Intel's in their consumer products, and in particular in products to be sold in Europe, was also influenced by the payments made at retail level to MSH. In that regard, the exclusivity arrangement with MSH deprived Intel's competitors of the ability to use certain distribution channels in the consumer segment. This had an influence on the OEMs' choice of their x86 CPU supplier for consumer products and limited the choice of consumers that wanted to purchase their product from MSH.

As a result of Intel's rebates and payments therefore, end-customers were artificially prevented from choosing other products on the merits (price and quality of the respective x86 CPUs), since Intel's conduct prevented the competitors' product from being offered with certain individual OEMs and with MSH. As such, Intel's exclusionary practices had a direct and immediate negative impact on those customers who would have had a wider price and quality choice if they had also been offered the product of their favourite OEM and/or retailer with x86 CPUs from Intel's competitors. As a result of this dynamic, rival products did not reach final customers in the volumes that their quality and price would have justified had competition been exclusively on the merits, which in itself resulted in lower incentives to innovate.

4.1.5. Objective justification

Intel submitted two different sets of arguments in order to attempt to justify its rebate schemes, namely: (i) that by using a rebate, Intel only responded to price competition from its rivals and thus met competition; and (ii) that the rebate system used vis-à-vis each individual OEM was necessary in order to achieve important efficiencies that are pertinent to the CPU industry. With respect to the latter, Intel argued that there were 4 different types of efficiencies that were attained by any exclusivity requirements of its rebates: lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies. Moreover, Intel claimed that any conditions attached to the rebates were indispensable to attain these efficiencies and their impact on competition was minor since AMD grew during the investigation period.

It should first be noted that many of Intel's arguments relating to objective justification do not in fact relate to the conduct at stake in the Decision, namely the conditions associated with Intel's rebates, but rather to rebates in general, which in themselves are not problematic. In addition, there is a basic inconsistency between Intel's argument that it was responding to competition from AMD and one of its other core arguments, namely that AMD was failing in the market not because of Intel's practices, but because it was capacity constrained and did not offer competitive products. In any case, Intel did not provide any substantiation to demonstrate either that it was responding to specific offers to respond to competition or that there would be any efficiencies of the type that it had claimed were associated with the relevant conditions (although it at the same time contended that there were no such conditions).

4.1.6. Conclusion

In light of the analysis referred to in sections 4.1.1 to 4.1.5 above, the Decision concluded that the conditional rebates granted by Intel to Dell, HP, NEC and Lenovo as well as the conditional payments granted by Intel to MSH constituted an abuse of a dominant position. The duration of each abuse is that outlined for each respective conduct as referred to in section 4.1.1 above.

4.2. Naked restrictions

4.2.1. Nature of the restrictions

The Decision also concluded that Intel awarded major OEMs payments which were conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products. (5) These were as follows:

– Between November 2002 and May 2005, Intel payments to HP were conditioned on HP directing its AMD-based business desktops to small an medium enterprise rather mainstream business customers; precluding its channel partners from stocking its AMD-based x86 CPU business desktops such that such desktops would

(5) As was the case for conditional rebates, Intel contested the Commission's findings. Once again however, these findings were based on an extensive range of evidence.

only be available to customers by ordering them from HP; and delaying the launch of its AMD-based x86 CPU business desktop in the EMEA region by six months;

– Intel payments to Acer were conditioned on Acer postponing the launch of an AMD-based notebook from September 2003 to January 2004;

– Intel payments to Lenovo were conditioned on Lenovo postponing the launch of AMD-based notebooks to the end of 2006.

The scope of these restrictions is more specific than that of the conditional rebates outlined in section 4.1 above. They are shorter in duration and focused on a specific product or line of products or specific sales channels, whereas rebate arrangements are longer in term and cover at least entire business segments.

4.2.2. Harm to competition and consumers

The practices have a common strand: they relate to payments by Intel in order for the OEM in question to delay, cancel or in some other way restrict the commercialisation of specific AMD-based products. ([6]) In each case, the OEM in question was planning the introduction of a specific AMD-based product. Such products either already existed or preparations for their introduction to the market were well advanced. This was due to the fact that there was consumer demand for such AMD-based products. Intel's conduct had a material effect on the OEMs' decision-making in that the OEMs delayed, cancelled or otherwise restricted their commercialisation of the AMD-based computers. Therefore, AMD-based products for which there was a customer demand did not reach the market, or did not reach it at the time or in the way they would have in the absence of Intel's conduct. As a result, customers were deprived of a choice which they would have otherwise had. Intel's conducts therefore had a detrimental effect on competition on the merits. Intel did not raise any specific objective justifications or efficiency claims with respect to naked restrictions and in any case, the Decision concluded that there was no link to any criterion which could potentially be a legitimate objective justification.

4.2.3. Conclusion

In light of the above, the Decision concluded that Intel's behaviour which made the payments to HP, Acer and Lenovo subject to restrictive conditions concerning the commercialisation of AMD-based computers constituted an abuse of a dominant position. The duration of each abuse is that outlined for each respective conduct as referred to above.

4.3. Single strategy

The Decision established that each of the Intel conducts vis-à-vis the individual OEMs and vis-à-vis MSH constitutes an abuse of Article 82, but that these individual abuses are also part of a single strategy aimed at foreclosing AMD from the market for x86 CPUs. The individual abuses are therefore part of a single infringement of Article 82 of the EC Treaty. The Decision also outlines how Intel's practices must be seen in the context of the growing competitive threat represented by AMD. In this regard, there is significant contemporaneous evidence from OEMs as well as company statements that from 2001, AMD had improved its product offering and represented a growing threat to Intel. Indeed, this was recognised by Intel itself.

4.4. Intel's general arguments

Intel's main general argument throughout the case was that it cannot have been Intel's conduct which foreclosed AMD from the market, but rather that it was AMD's own failings. Three preliminary remarks are in order here. First, abuse is an objective concept, and the performance of rivals in the market is not relevant for the application of Article 82 according to the case-law. ([7]) Second, as regards the as efficient competitor test referred to in section 4.1.2 above, this examines the effect of conditional rebates on a hypothetical as efficient competitor. Therefore, the conclusion of the analysis is whether the rebates in question are capable of foreclosing such a hypothetically as efficient competitor without reference to whether actual competitors are as efficient as the dominant company or not. Thirdly, Intel's argument that AMD was foreclosed because of its own failings cannot be reconciled with the fact that during the period under examination, Intel awarded significant payments to its key customers

([6]) In *Irish Sugar*, the Court of First Instance concluded that it constituted an abuse when the dominant undertaking agreed "*in 1988 with one wholesaler and one retailer to swap competing retail sugar products, i.e. Eurolux 1 kilogram packet sugar of Compagnie française de sucrerie, for its own product*." [6] (Case T-228/97 *Irish Sugar v Commission*, para. 226). Through the swap arrangement in question, the dominant firm prevented the competitor's brand from being present on the market since the retailers no longer had a stock of "Eurolux" branded sugar and instead replaced those volumes with the sugar of the dominant undertaking. In the same vein, Intel's conduct in the present instance prevented a product of its competitor from coming to market (to the advantage of its own products). The Decision also recalled that in accordance with the case-law, a violation of Article 82 may also result from the anticompetitive object of practices pursued by a dominant undertaking.

([7]) See for example Case T-219/99 *British Airways*, [2003] ECR II-5917, paragraph 293, and Case T-203/01 *Michelin II*, [2003] ECR II-4071, paragraph 239.

which, in Intel's words, were in order to "*meet competition*" from AMD. If Intel claims that AMD suffered in the market not because of any conduct by Intel but because of AMD's profound failings, then there would consequently be little need for Intel to provide what it termed "*meet competition*" rebates. ([8])

In any case, the evidence outlined in the Decision demonstrates that Intel's specific claims relating to AMD do not stand up to scrutiny. In particular, as regards the quality of AMD's products, the Decision does not make any absolute judgments on the technical performance of the products at stake, or relative judgments on the comparative performance of AMD and Intel products. However, it does rely on the evidence of those who are best placed to judge, namely the OEMs, which are well aware of the advantages and disadvantages of the products of each of their suppliers. In this regard, as outlined in section 4.3 above, the Decision outlined how the evidence demonstrated that AMD had improved its product offering, represented a growing threat to Intel and was considered as a viable alternative by OEMs.

5. Procedure and Intel's Allegations of Bias

Intel raised a large number of allegations concerning the Commission's handling of the case during the administrative procedure.

In the first place, it claimed that the Commission exhibited significant bias and adopted AMD's allegations wholesale without any objective assessment. In that regard, the Decision outlined that the Commission gathered a broad body of evidence from 141 companies via formal requests for information and on-the-spot inspections. The Decision's conclusions are based on extensive evidence originating mainly from third parties or from Intel itself.

Intel also claimed that the Commission infringed its rights of defence by not providing it with allegedly exculpatory evidence communicated orally during a meeting between the Commission and several Dell executives in August 2006. While it is correct that a meeting between the Commission and Dell was held in August 2006 Intel was provided with a non-confidential version of an internal note to the file regarding the content of the meeting and given the opportunity to comment on this note.

Intel also claimed that it had been prevented from properly exercising it rights of defence because the Commission did not obtain and provide Intel with categories of documents from, *inter alia*, private litigation between Intel and AMD in the state of Delaware in the USA. Intel's claim was that such documents would likely be exculpatory of Intel because they would likely highlight that AMD had been foreclosed because of its own failings, and not because of Intel's conduct. ([9]) These claims by Intel led it to argue that it could not properly defend itself without those documents. As a result, Intel claimed that it was not able to reply to the supplementary Statement of Objections by the extended deadline of 17 October 2008 ([10]) and sought to suspend the Commission proceedings by requesting interim relief from the President of the Court of First Instance.

It is not evident that Intel was not able to provide the documents in question itself. In fact, at a late stage in the proceedings, Intel was able to very quickly provide a full set of Dell testimonies and exhibits from the Delaware trial. ([11]) Although the Commission did not accede to Intel's general request, particularly in light of the extensive nature of the Commission's investigation, it did seek from AMD the documents which it was able to specifically identify on the basis of Intel's request. After examining these documents, they proved to be either not relevant to the investigation or were not exculpatory.

After the President of the Court of First Instance turned down Intel's request for interim relief, the Commission took into account belated written submissions from Intel relating to the supplementary Statement of Objections of 5 February 2009, despite not being obliged to do so given that Intel had failed to reply in time. Shortly afterwards, Intel requested an oral hearing, but this request was turned down by the Hearing Officer. The Decision points out that Intel could have submitted its reply to the supplementary Statement of Objections by the deadline of 17 October 2008, which was also the deadline to request an oral hearing, and it chose not to do so. ([12])

([8]) Similar arguments apply to Intel's claim that AMD was foreclosed from the market because it did not have sufficient capacity to supply customer demand.

([9]) Intel argued that it was not able to provide the Commission with these documents itself due to the nature of the protective orders from the Delaware trial.

([10]) Similarly, Intel failed to reply to a letter of facts that the Commission sent on 19 December 2008 by the extended deadline of 23 January 2009.

([11]) Having initially submitted extracts from the testimonies and requesting the Commission to obtain the full sets of documents, again arguing that it could not do so itself.

([12]) The Decision makes clear that the implications of accepting Intel's position with regard to both a reply to a Statement of Objections and an oral hearing would mean that a company could *de facto* delay *sine die* any Commission competition case with no practical downside by claiming that more documents should be obtained by the Commission, without any precise references to or identification of them.

6. Remedies and Fines

To the extent that any of the identified abuses are still ongoing, the Decision required Intel to bring such abuses to an end, and to refrain from any practice which would have the same or similar object or effect.

As regards the fine, the Commission imposed a fine of EUR 1,060 million on Intel. ([13]) That amount was calculated in accordance with the Commission Guidelines on fines. In order to estimate the value of sales directly or indirectly related to the infringement in the EEA, the Commission took account only of sales of CPUs billed by Intel to companies located in the EEA. This represents only a fraction of the computers purchased by European consumers in the EEA, because the computers sold within the EEA are in fact often assembled outside of Europe. This was therefore in Intel's favour. Finally, no aggravating or mitigating factor was taken into consideration in the calculation of the fine.

([13]) This represents 3.8% of Intel's profit during the period of the infringement.

Commission imposes heavy fine on two major European gas companies for operating a market-sharing agreement

Jasmin Battista, Alexander Gee and Ulrich von Koppenfels (1)

Introduction

On 8 July 2009, the Commission imposed fines totalling EUR 1.106 billion on E.ON AG and its subsidiary E.ON Ruhrgas AG (Germany) and GDF Suez SA (France) for market-sharing in breach of the rules on cartels and restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union or TFEU) (2). These are the first fines imposed by the Commission for an antitrust infringement in the energy sector. The Commission found that in 1975, when Ruhrgas AG (now E.ON Ruhrgas, part of the E.ON group) and Gaz de France ('GDF', now part of GDF Suez) decided to build jointly the MEGAL pipeline across Germany to import Russian gas into Germany and France, they also agreed not to sell gas transported via this pipeline on each other's home markets. They maintained this market-sharing agreement after European gas markets were liberalised and did not abandon it until 2005. These two companies therefore participated in a single, continuous infringement of Article 101 of the TFEU from January 1980 to September 2005.

The Commission started to investigate this case on its own initiative ('*ex-officio*') with surprise inspections on 16 and 17 May 2006 and initiated proceedings on 18 July 2007.

E.ON/E.ON Ruhrgas and GDF Suez each filed an appeal against the Commission's decision before the Court of First Instance (now General Court) in September 2009. These appeals are currently pending (3).

The subject-matter of the Commission's investigation

The subject-matter of the Commission's decision is the agreement and/or concerted practice between E.ON/E.ON Ruhrgas and GDF not to enter — or only to enter in a limited way each other's home markets and, in particular, to refrain from selling gas transported via the MEGAL pipeline on each other's home markets. In 1975, when Ruhrgas and GDF decided to build the MEGAL pipeline together across Germany to the French border, they also agreed on two side letters ('the 1975 side letters') which (a) prohibited GDF from supplying customers in Germany with gas transported via MEGAL and (b) prohibited Ruhrgas from transporting gas via the pipeline to France.

After liberalisation of the European gas markets started with the First Gas Directive (4), E.ON, E.ON Ruhrgas and GDF met regularly at various levels to discuss implementation of the agreement in the newly liberalised market. Amongst other things, GDF assured E.ON that it would *inter alia* 'take into account the historical close relationship' and 'keep [it] closely informed about its thoughts' regarding possible gas sales in Germany, that 'it is currently not envisaged to sell gas from MEGAL in southern Germany', that attempts to sell gas in Germany are 'more to get some knowledge about the market than a direct, frontal attack' and that it did not regard Germany as a 'key target market' and 'did not envisage in the short term to acquire a significant share of the German market'. E.ON in turn assured GDF that it did not plan an 'aggressive appearance on the market' when opening a sales office in France and that it had no 'particular interest' in the French market. Whenever attempts were made to compete, accusations of 'frontal competition', 'destroying the value of gas', 'aggressive and dangerous' behaviour or 'dumping' were made. As a defence against such accusations, the need to 'give in' to pressure from the Commission was cited.

The market-sharing agreement helped E.ON and GDF to maintain strong positions on the German and French gas markets when they were being liberalised. The companies thus deliberately denied French and German gas consumers the benefits of the liberalised market opened up by the EU with the First Gas Directive, including price competition and a choice of supplier.

The parties continued to apply the 1975 side letters until at least 2005 and adapted the agreement to allow limited sales by GDF and E.ON on each

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

(2) Case COMP/39.401 — E.ON/GDF. The full text of the decision in the authentic French and German versions is available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39401.

(3) Cases T-360/09 — E.ON Ruhrgas and E.ON/Commission — and T-370/09 — GDF Suez/Commission — submitted on 18 September 2009.

(4) 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 L 204, 21.7.1998, p. 1).

other's home markets. In August 2004, the parties signed an agreement 'confirming' that the 1975 side letters were no longer valid, but evidence in the file demonstrated that the effects of the market-sharing agreement continued until at least the end of September 2005.

The Commission's assessment

The Commission found that from 1975 to 2005 E.ON and GDF had an agreement and/or concerted practice not to enter each other's traditional home markets in Germany and France with gas transported by their jointly owned MEGAL pipeline.

In 1975, E.ON and GDF entered into a formal written market-sharing agreement that they understood as binding throughout the period of the infringement. The contacts between them after 1999 confirmed the continued existence of the market-sharing agreement. The Commission found that the parties' conduct constituted a single continuous infringement and a restriction of competition by object, violating Article 81 of the EC Treaty (now Article 101 of the TFEU) without there being a need to demonstrate the actual effects on the market. The Commission found that the anticompetitive arrangements were implemented over a long period and that this fact, together with the market strategies and sales of gas, suggested that the arrangements had an impact on the market, since the infringement consolidated pre-liberalisation monopolies and delayed the effects of liberalisation.

As for the duration, the Commission found that, with regard to the German market, the infringement started on 1 January 1980, the date on which the MEGAL pipeline became fully operational. As regards France, the Commission found that the infringement started on 10 August 2000, when GDF lost its legal monopoly on importing gas into France once the deadline for implementation of the First Gas Directive expired. The Commission also found that despite the *pro forma* repeal of the 1975 side letters by an agreement signed in August 2004, the infringement did not cease until the end of September 2005 at the earliest. It found that the parties continued to apply the prohibition on GDF to draw gas from the MEGAL pipeline in Germany (with the exception of gas purchased by GDF from E.ON Ruhrgas under the latter's Gas Release Programme ['GRP']) and continued to hold meetings to discuss their strategies on each other's home markets until at least September 2005. Parallel procedures thus continued after termination of the formal agreement, the effects of which, consequently, continued to be felt, in the absence of any new agreement replacing it (5). GDF's sales of gas from MEGAL to customers in Germany did not significantly surpass the amounts GDF acquired under the GRP until October 2005, when E.ON Ruhrgas and GDF entered into a new set of agreements that finally gave GDF right of access to exit points from MEGAL in Germany.

The fines imposed

The decision adopted by the Commission ordered E.ON, E.ON Ruhrgas and GDF Suez to put an end to the infringement, to the extent that it was still ongoing, and to refrain from repeating any act or conduct with the same or equivalent object or effect and imposed fines on these undertakings.

In accordance with the 2006 Guidelines on fines (6), the Commission calculates the basic amount of the fine as a proportion of the value of the sales of the product concerned by each undertaking in the relevant geographical area during the last full business year of the infringement ('variable amount'), multiplied by the number of years of the infringement, plus an additional amount, also calculated as a proportion of the value of sales, in order to deter any horizontal concerted practice consisting of price-fixing ('entry fee').

In the present case, the Commission considered that only the sales of gas transported by E.ON and GDF via the MEGAL pipeline in Germany and France were affected by the infringement.

The proportion of sales to be taken into account depends on the gravity of the infringement which, in turn, depends on a number of factors such as the nature of the infringement, the combined market share, the geographical scope and implementation of the agreement. In this case, when determining the fine, the Commission decided, in accordance with the Guidelines (7) and its practice, to impose a starting percentage of 15 % of affected sales in con-

(5) See reasoning in Cases 51, 86 and 96/75, EMI Records a.o., [1976] ECR 811, 871 and 913, point 15, Case 243/83, Binon, [1985] ECR 2015, point 17, Case T-2/89, Petrofina/Commission, [1991] ECR II-1087, point 212 and Case T-327/94, SCA Holding/Commission, [1998] ECR II-1373, point 95.

(6) 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, pp. 2-5.

(7) Paragraph 21 of the Guidelines states that 'the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales'. Paragraph 23 states that 'horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.'

sideration of the nature of the infringement. The resulting amount was multiplied by a factor based on the duration of the infringement. In particular, the decision held E.ON and GDF liable for their involvement in the infringement concerning sales in France for the whole period of the infringement, i.e. from 10 August 2000 until 30 September 2005. As regards sales in Germany, however, although the infringement lasted from 1 January 1980 to 30 September 2005, for the purpose of calculation of the fines the Commission took into account only the period after the German legislator liberalised the gas market by abolishing the previous exemption for 'demarcation agreements' in Germany's national competition law ([8]) in April 1998. The variable amount was therefore multiplied by 5.5 for sales in France and 7.5 for sales in Germany.

No additional amounts or increases, nor aggravating or mitigating circumstances, were found by the Commission. The Commission rejected the arguments raised by the parties against the decision to impose fines in the first place or claiming mitigating circumstances and alleging unequal treatment compared with previous Commission decisions in which no fines were imposed or pointing to the fact that public authorities had authorised or encouraged anti-competitive behaviour by energy incumbents. The first argument was rejected on the grounds that the nature, context, scope and duration of the infringement were different from the previous cases invoked by the parties. What is more, in this case the parties could not invoke their good faith, considering that the 1975 side letters were only found during the inspections and that, although the undertakings were aware of the illegality of their behaviour in this case even before the decisions in the previous cases were adopted, they consciously undermined the steps taken in order progressively to open the market. The second argument was rejected on the basis that it was erroneous and, in any event, could no longer be applied after the start of liberalisation. The Commission found that the parties were both perfectly aware that they were infringing competition law and therefore could not invoke any uncertainty about the rules applying to the market due to the fact that the gas industry was undergoing a process of liberalisation.

Finally, when determining the final amount of the fine, under the very particular circumstances of this case, the Commission took into account the fact that the infringement consisted of a market-sharing agreement concerning the gas transported via a pipeline that E.ON and GDF owned jointly and in which each party had an equal share of capacity. Consequently, imposing a lower basic amount (and fine) on GDF would essentially be due solely to the fact that, during the infringement, a large share of the French gas market (for non-eligible customers) was not yet open to competition and sales to such customers were therefore not counted as affected by the infringement. The Commission therefore considered it justified to impose an identical fine on both E.ON and GDF by capping it to the lower amount, to avoid prejudicing one of the parties by imputing to it the higher sales made by the other.

The resulting fines adding up to a combined total of EUR 1.106 billion imposed by the Commission in the E.ON/GDF case reflect the very large size of the market affected by the market-sharing agreement, the duration of the infringement and its gravity. The final amount of the fine — even after capping the amount for both parties at the level of the lower fine calculated in accordance with the Guidelines, as explained above — is further evidence of the Commission's determination to take robust action against cartel arrangements or any restrictive agreements or abusive practices which severely affect consumers and businesses. Such arrangements not only harm consumers but, in this case, contributed to slowing down the process of opening the gas markets to competition and the resulting benefits of liberalisation for consumers, thereby deliberately countering the express intent of the Community legislator.

([8]) Former section 103 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*).

Mergers: main developments between 1 May and 31 August 2009

John Gatti [1]

Introduction

The level of notifications remained stable at 75 (the same as in the previous four-month period) but was considerably lower than the comparable period in 2008, when 135 notifications were received. The Commission adopted a total of 73 first-phase decisions, of which 70 were unconditional clearances (45, or 64 %, of these decisions were adopted under the simplified procedure). Three first-phase decisions were conditional. Two conditional decisions were adopted after second-phase investigations. One case was abandoned in Phase II. In addition, the Commission issued one decision under Article 14 imposing fines for premature implementation of a notifiable transaction. Two decisions under Article 4(4) were adopted referring cases with a Community dimension to Member States. Member States accepted 9 requests for referrals under Article 4(5).

A Summaries of decisions taken under Article 6(2)

Vattenfall/Nuon

On 22 June 2009 the Commission cleared the proposed acquisition of N.V. Nuon Energy of the Netherlands by Vattenfall AB of Sweden. Both companies are active in the energy sector. The Commission's decision is conditional upon the divestment of part of Nuon Energy's electricity retail operations in Germany. Vattenfall agreed to this divestment to remedy competition concerns the Commission had in relation to retail supplies of electricity to small commercial and domestic customers in Hamburg and Berlin.

Vattenfall, ultimately controlled by the Swedish State, has different activities along the entire electricity chain, mainly in Sweden, Germany, Finland, France, Denmark and Poland. It also has very small operations in the gas sector. Nuon Energy is also active across the entire energy chain, in the production and supply of electricity and gas, and in heating and cooling services. It is mainly present in the Netherlands but also has activities in Belgium and Germany.

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

The Commission's investigation found that the proposed transaction would not raise competition concerns on most markets due to the minor horizontal overlaps between the parties' activities. The only exceptions were with respect to the two firms' electricity retail operations in Germany, in particular the supply of electricity to small commercial and domestic customers in Berlin and Hamburg, where the Commission found that the proposed transaction would have raised competition concerns. Vattenfall is the incumbent supplier and Nuon is the strongest new entrant in these two cities. Consequently the proposed transaction would have further strengthened the position of Vattenfall, reversing a substantial part of the gains made in market liberalisation in recent years.

To resolve these competition concerns, Vattenfall proposed to divest Nuon Deutschland GmbH, Nuon Energy's electricity retail business in Germany. Vattenfall would be allowed to carve out customer contracts outside Berlin and Hamburg and two subsidiaries not related to the retail business from the divestment business.

RWE/Essent

On 23 June 2009 the Commission cleared the proposed acquisition of Essent of the Netherlands by RWE of Germany. Both companies are active in the electricity and gas sectors. The Commission's decision is conditional upon RWE's commitment to divest Essent's controlling shareholding in Stadtwerke Bremen AG (swb). RWE agreed to this divestment to remedy competition concerns the Commission had in relation to the German wholesale electricity and gas markets.

RWE is active on both electricity and natural gas markets in most EU Member States and in particular in Germany, the UK, the Czech Republic and Hungary. Essent is active in the electricity and natural gas markets, mainly in the Netherlands and to a lesser extent in Germany and Belgium. The activities of RWE and Essent overlap in both the electricity and gas markets in the Netherlands and Germany.

The Commission's investigation found that the proposed transaction would not raise competition concerns on the wholesale, retail or trading electricity markets in the Netherlands, or on the electricity and gas retail markets in Germany. The Commission reached a similar conclusion with regard to the gas wholesale and retail sales of low calorific gas to both large industrial customers and small customers in the Netherlands.

After a thorough analysis of the effects of the significant positions the merged entity would hold on the markets for wholesale electricity in Germany and the Netherlands, while also operating the majority of interconnectors (together with the Dutch transmission system operator) between the two Member States, the Commission concluded that competition concerns would not arise. This is because the new entity would not have the ability to withhold or restrict interconnector capacity and with it electricity flows from Germany to the Netherlands with a view to significantly raising prices in the Netherlands.

However, the Commission's investigation found that the proposed transaction would raise competition concerns in the German wholesale electricity and gas markets. Essent currently has a controlling shareholding in Stadtwerke Bremen AG (swb), which, like RWE, is active in these markets. On the wholesale electricity market, the Commission found that the proposed transaction would have strengthened RWE's current collective dominant position (together with at least E.ON) by removing swb as an actual competitor while at the same time increasing RWE's incentives to withdraw generation capacity so as to raise prices. On the gas wholesale market the Commission was concerned that the proposed transaction would allow supplies of gas to be reduced as a result of the vertical relationship between the upstream market for gas short-distance wholesale supply and the downstream markets for low calorific gas retail sales in RWE's TSO area.

To resolve these competition concerns, RWE proposed to divest Essent's controlling shareholding of 51 % in swb.

Pfizer/Wyeth

On 7 July 2009 the Commission approved the proposed acquisition of the US pharmaceutical and health care products company Wyeth by the US global pharmaceutical company Pfizer. The approval is conditional upon Pfizer's commitment to divest several types of animal health vaccines, pharmaceuticals and medicinal feed additives in the European Economic Area (EEA) or in specific Member States. The Commission had concerns that the transaction would have raised competition issues in the field of animal health products on a number of national markets.

Pfizer is a global research-based biomedical and pharmaceutical company active in developing, manufacturing, marketing and selling innovative medicines for humans and animals. Wyeth is a pharmaceutical and healthcare company, active in the development, manufacturing and marketing of pharmaceuticals, vaccines, biotechnology products, nutritional supplements and over-the-counter medicines worldwide.

In the area of human health, the companies' activities are to a large extent complementary. Where there were overlaps between existing products or products under development (for example in the field of kidney cancer, antibiotics and Alzheimer's disease) the Commission investigated a large number of national pharmaceutical markets. In relation to products for Alzheimer's disease, the Commission looked particularly closely into the products under development by Pfizer and Wyeth and expected future developments in this field. The Commission found no competition concerns in any of these markets, because a sufficient number of competitors would remain after the transaction and potential competitors could enter the markets.

With respect to animal health, the Commission found that the proposed transaction would have raised competition concerns in a significant number of national markets for animal health vaccines, pharmaceuticals and medicinal feed additives in a number of Member States where Pfizer and Wyeth have overlapping product portfolios. In particular, the Commission was concerned that the removal of Wyeth's animal health division, Fort Dodge Animal Health, as a competitor to Pfizer would have reduced choice or led to higher prices for customers in markets where the company was active.

To address the Commission's competition concerns, Pfizer proposed to divest a number of businesses in several national markets in the following vaccine areas: feline vaccination programmes, cattle vaccines for pasteurellosis and respiratory diseases, swine vaccines for porcine enzootic pneumonia, equine vaccines for influenza and tetanus; several pharmaceutical areas: sedatives, antibiotics (tetracyclines, penicillins and cephalosporins) and parasiticides; and one medicinal feed additives area: oral rehydration salts. Pfizer also offered to divest Wyeth's manufacturing facility in Sligo, Ireland.

B Summaries of decisions taken under Article 8(2)

Lufthansa/SN Airholding (Brussels Airlines), Lufthansa/Austrian Airlines

During the period under review the Commission conditionally approved two acquisitions by Lufthansa: SN Airholding (SNAH), the holding company of the Belgian commercial airline SN Brussels Airlines (decision taken on 22 June) and Austrian Airlines, the Austrian flag-carrier (decision taken on 28 August). Both decisions were conditional upon the implementation of remedies, offered by Lufthansa, to alleviate the Commission's competition concerns.

Lufthansa is a full-service air carrier with hubs at Frankfurt and Munich airports, and a base at Düsseldorf airport. Lufthansa also controls Swiss, based at Zurich airport, Air Dolomiti, Eurowings, BMi and a low-cost carrier Germanwings.

Brussels Airlines is active in the transport of both passengers and cargo mainly in Europe and to some destinations in Africa.

Austrian Airlines is Austria's largest airline with its hub in Vienna. Its subsidiaries include Lauda Air and Tyrolean Airways.

In January 2009, the Commission opened an in-depth inquiry to investigate the impact of the Lufthansa/SNAH transaction on passenger transport on a number of short-haul routes between Belgium and Germany and Belgium and Switzerland. The in-depth investigation confirmed that the transaction would have raised competition concerns on four routes: Brussels-Frankfurt, Brussels-Munich, Brussels-Hamburg and Brussels-Zürich. The investigation showed that the merger, as initially notified, would have created a monopoly with respect to the routes from Brussels to Hamburg and Munich.

The Commission's in-depth investigation into the Lufthansa/Austrian Airlines operation, opened on 1 July 2009, indicated that the transaction would have led to competition concerns on five routes: Vienna-Frankfurt, Vienna-Munich, Vienna-Stuttgart, Vienna-Cologne and Vienna-Brussels, where it would have led to higher prices and reduced consumer choice.

With a view to removing concerns resulting from both transactions, Lufthansa submitted two comprehensive sets of remedies. In both cases Lufthansa made the commitment to offer slots, according to an efficient and timely slot allocation mechanism, that would allow new entrants to operate flights on each of the nine routes.

In both cases the commitments address the problem of slot congestion, which is the main barrier to entry on the various routes concerned, and are likely to attract new operators or facilitate the expansion of existing operators. New entrants will, under certain conditions, also obtain grandfather rights over the relevant slots, once a route has been operated by them for a pre-determined period of time. The remedy package further comprises ancillary measures, in particular participation in Lufthansa's Frequent Flyer Programme.

C Summaries of decisions taken under Article 14

Electrabel/Compagnie Nationale du Rhône

The Commission imposed a fine of 20 million euros on Electrabel, an electricity producer and retailer belonging to the Suez Group (now GDF Suez) for acquiring control of Compagnie Nationale du Rhône (CNR), a French electricity producer, without having received prior approval under the EU Merger Regulation. The Commission concluded that the infringement lasted for a significant period and that Electrabel should have been aware of its obligation to obtain Commission approval before proceeding with the acquisition. The EU Merger Regulation requires concentrations with a European dimension to be notified to and approved by the Commission before they can be implemented so that the Commission can examine whether a concentration would significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. This is known as the 'standstill obligation'.

The acquisition of CNR by Electrabel was cleared by the Commission on 29 April 2008 under the EC Merger Regulation, following a notification by Electrabel on 26 March 2008. However, the Commission, in that decision, left open the precise date at which Electrabel had acquired control of CNR within the meaning of the Merger Regulation, as it was not a factor in the substantive assessment of the concentration. The Commission completed its investigation on the issue and concluded that Electrabel acquired *de facto* sole control of CNR in December 2003, i.e. more than four years before the notification.

In particular, by acquiring in December 2003 the shares in CNR held by EDF, the leading electricity producer in France, Electrabel became by far CNR's largest shareholder, holding close to 50 % of CNR's shares. The Commission's investigation found that due to the wide dispersion of the remaining shares and past attendance rates at CNR's shareholders' meetings, Electrabel was highly likely to have a stable majority at such meetings. This was reinforced by other factors, not least the fact that Electrabel was the only industrial shareholder of CNR and had taken over the role previously held by EDF in the operational management of the power plants and the marketing of the electricity produced by CNR.

The Commission therefore found that Electrabel had breached the obligation not to implement the acquisition of control before obtaining the Commission's approval, and that the infringement lasted for a significant period of time.

Under the EU Merger Regulation (both Regulation (EEC) No 4064/89 in force at the time Electrabel acquired control over CNR and Regulation (EC) No 139/2004 currently in force), the Commission can impose a fine of up to 10 % of the aggregate turnover of the companies concerned for this type of infringement. In setting the amount of the fine, the Commission took into account the nature and gravity of the infringement, the fact that the standstill obligation is a cornerstone of the EU merger control system and the duration of the infringement. The Commission also took into account the fact that the transaction had not given rise to any competition concerns and that Electrabel subsequently voluntarily informed the Commission.

RWE/Essent: On the Borderline

Miriam Driessen Reilly, Krisztian Kecsmar, Philippe Redondo, Philippe Chauve, Kristóf Kovács and Gregor Langus (1)

1. Introduction

On 29 April 2009, the Commission was notified by RWE Aktiengesellschaft ("RWE") of its intent to acquire sole control of ESSENT N.V. ("Essent") by way of a private offer.

The Commission's investigation revealed that the proposed transaction would not raise competition concerns on the wholesale, retail or trading electricity markets in the Netherlands, nor on most of the electricity and gas markets in Germany, as RWE's and Essent's joint market shares are moderate and a sufficient number of competitors would remain in the market after the merger. The Commission reached the same conclusion on gas markets in the Netherlands, including regarding retail sales of low calorific gas to large industrial customers in the Netherlands where parties had significant market shares, having taken into account dynamic competitors and new regulatory measures which lowered barriers to entry.

However, the Commission found that on the border between the Netherlands and Germany, the question arose as to whether the transaction would increase the ability and incentive of the combined entity to raise electricity prices in the Netherlands.

For Germany, the Commission also found that the transaction would lead to a strengthening of the collective dominant position of RWE and E.ON on the electricity generation and wholesale market. The transaction as planned would have a negative impact on the electricity and gas wholesale markets by reinforcing the position of RWE as a supplier to retailers/Stadwerken. It would also improve RWE's ability and incentive to unilaterally withdraw generation capacity in order to raise prices in the German electricity markets.

2. The Parties and the Transaction

RWE is a German vertically integrated energy company active on the electricity and gas markets. Mainly active in Germany, it also has some minor activities, *inter alia*, in the Netherlands in generation and wholesale, electricity trading and in the retail of electricity.

ESSENT is a Dutch energy company active primarily in the Netherlands in electricity, gas and heating. Within the Netherlands, it is active at all levels of the electricity and gas markets except transport and distribution networks. In Germany, Essent was primarily active through a 51% majority shareholding in Stadtwerke Bremen ("swb"), a local utility with generation and electricity and gas supply activities.

As a result of the transaction, RWE proposed to acquire control of between 66% and 100% of Essent's share capital.

3. Competitive Effects of the Merger

A - On the border – the interconnectors

RWE, via its Transmission System Operator (TSO), is dominant on the market for transmission of electricity in its German area and across the Dutch-German border. On that border, it owns and sets capacity on three of the five interconnectors to the Dutch electricity system (operated together with the Dutch transmission system operator). Wholesale electricity prices have historically been higher in the Netherlands than in Germany and the former therefore continues to import electricity from the latter. The question arose therefore whether RWE, given its existing significant generation position in Germany and the similarly strong position to be achieved in the Netherlands as a result of the transaction, would have – either on the short or the long term – the ability and the incentive to use its position as TSO and co-operator of the interconnectors to reduce otherwise available capacity across the border and thereby limit exports to the Netherlands. This could result in higher prices on the separate Dutch wholesale electricity market and additional profits for RWE across its Dutch portfolio. According to the case law, such behavior could be an abuse (2).

Analysis of short term interconnector capacity withdrawal

Currently, the maximum capacity that traders can dispose of across the interconnectors is of 3850 MW. This Net Transfer Capacity is divided into blocks of yearly, monthly and daily capacity and allocated in explicit auctions.

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

(2) Judgment of the ECJ of 14 November 1996. - Tetra Pak International SA v Commission of the European Communities. Case C-333/94 P. *ECR 1996 Page I-05951*

The Commission has focused its analysis on the possibilities of and the incentives for reducing the daily available capacities by the parties post-merger because yearly and monthly pre-sold capacities cannot – as part of a sustained strategy – be reduced by the TSO ex post anymore.

As regards the incentive, a model provided by the parties showed that a strategy of withholding 500 MW of interconnector capacity would be profitable for RWE in [5-10]% of all hours in a given year. The model also showed that there are particular time periods when such withdrawal is profitable in a significantly higher number of hours. However, the number of hours involved is relatively low because the Dutch portfolio of the merged entity (which would benefit from the strategy) would be roughly eight times smaller than the German portfolio of the merged entity (which would lose from the strategy because prices in Germany would go down). The situations where the behaviour is profitable are only those where price gradients in the Netherlands are much (more than eight times) larger than those on the German markets.

As regards the ability post-merger for RWE to withhold capacity on the interconnector, it is extremely constrained and thus does not exist in practice. This is because the TSO cannot act unilaterally to reduce capacity without facing a significant risk of detection and subsequent prosecution. Partner TSOs have full transparency on the actions of the TSO and market players are also very sensitive to even the smaller changes in available capacity. Furthermore, German regulation mandates the TSO to use all available capacity and the German energy regulator, the Bundesnetzagentur is actively monitoring the market to avoid moves by TSOs to reduce capacity for reasons that are not fully explainable and legitimate.

Therefore, the Commission took the view that while in the short term, there may possibly be an incentive to withhold interconnector capacity, there is no ability to do so and concluded that the transaction did not raise serious concerns.

Analysis of long term interconnector capacity withdrawal

The Commission conducted the same analysis for the long term, as RWE can decide whether or not to expand interconnector capacity between Germany and the Netherlands and has effectively declared plans to do so.

First, the Commission concluded that it was very unlikely that RWE would have the incentive to delay an investment in interconnector capacity with a view to raising prices in the Netherlands. There were too many uncertainties in the business model for a new interconnector on the border and any incentive would be constrained by competition/substitution with other interconnectors or by additional generation capacity brought online by third parties.

As regards ability, RWE demonstrated that together with TenneT, it was already in the planning process to install an additional interconnector Niederrhein-Doetinchem between the networks of the two TSOs and it could hardly refuse to build the interconnector. The project is at an advanced stage. RWE, together with the Dutch transmission operator, TenneT found that the Niederrhein-Doetinchem was viable, based on the transmission fees calculations and the law allows it to recoup the investment through network tariffs. Furthermore, the Bundesnetzagentur has confirmed that current German regulation makes it extremely difficult to "drop" or significantly delay an approved project.

Based on the above it was concluded that RWE has neither the incentive nor the ability to engage into long-term interconnector capacity withholding in particular by means of delaying or terminating ongoing projects.

B - Germany

(i) Electricity

The electricity markets often exhibit a number of features, which facilitate tacit coordination and the creation of collective dominance. Demand for electricity is inelastic, there are high barriers to entry, markets are concentrated and transparent and the product is homogenous. Particularly for established incumbent generators with a similar generation cost structure, a position of collective dominance is likely to result. In this regard, the German wholesale market is no exception and the Commission has previously established that RWE, the largest German electricity producer, is collectively dominant jointly at least with E.ON ([3]). The Commission has sustained this view also for the assessment of this merger.

Essent held a controlling stake in swb, which has between 1000 and 1500 MW of mostly coal-based generation portfolio. Furthermore, Deutsche Essent had some wind generation capacity installed and, through swb, had planned further investments for between 500 and 1000 MW wind generation capacity. Essent also had a long term Power Purchase Agreement with a third party German electricity generator.

The merger raised serious doubts as regards swb: it removed an independent player with credible plans to further develop generation capacity from a market with significant entry barriers. At the same time,

([3]) See case COMP/39.388 German wholesale electricity.

the addition of Essent/swb's generation capacity to the merged entity would have increased RWE's incentives to economically withhold capacity. Finally, the acquisition of Essent and its share in swb would introduce new structural links with E.ON through swb's share in E.ON Stadtwerke Bielefeld, which could further strengthen the potential for tacit collusion. The BKartA has in its long-standing decisional practice held the view that neither RWE nor E.ON should be allowed to increase participation in Stadtwerke. The parties met the Commission's concerns by proposing to divest Essent's share in swb prior to the transaction.

The Commission also carefully considered the potential effect of Essent's Power Purchase Agreement ('PPA') with a third party German electricity generator, on the incentives and ability of RWE to withhold capacity. It established that any attempt to withhold capacity by nominating a lower off-take by the merged entity within the PPA would be countered by the independent third party generator who ultimately operates, controls and nominates the plant.

(ii) Gas

The German gas sector is characterised by a fragmented transportation network and a unique "three-tier" network/supply structure [4] deriving from the system of local/regional supply monopolies (*Demarkationsgebiete*) in force until 1998. Notwithstanding the improving competitive conditions on the German natural gas sector, important market entry barriers keep on existing including congestion of transport capacities between the different market areas. As pointed out by market players during the Commission's market investigation, access to gas, transport capacities, gas storage and flexibility tools still remain a concern. As a result, incumbents (such as RWE at the wholesale level in the area of its transport network-the "RWE area") remain largely dominant in their area.

The transaction resulted in both horizontal and vertical relationships and the Commission thus identified some concerns. The parties addressed these concerns by proposing to divest swb, which owns all significant gas activities of Essent in Germany (including participations in several other city utilities – stadtwerke active in the RWE area).

Horizontal

The transaction raised serious doubts with regard to the horizontal overlaps brought about by the proposed transaction at local level. Indeed, post-merger, the new entity would have obtained a monopolistic situation with regard to the retail supply of large/medium customers of low calorific gas [5] ("L-Gas") in the distribution area of Stadtwerke Bielefeld (owned by swb).

However, no conclusion needed to be reached about the relevant geographic market definition or whether the area in question may constitute a substantial part of the Common market, as the commitments proposed by RWE in order to address the Commission's concerns for the electricity in this case also solved to this competition problem.

Vertical issue: Customer foreclosure

The transaction gave rise to a vertical relationship in the RWE area between the upstream market for short-distance wholesale supply of L-Gas and the downstream markets for L-Gas retail sales. RWE is the wholesale gas supplier of most retailers in this area. Through the acquisition of Essent/swb, RWE would have obtained significant participations in the few retail companies/stadwerke active in its area who are not already supplied by RWE. As shown by the BKartA, significant participations in retailers by wholesalers usually mean that they become their gas suppliers. Furthermore, the short-distance wholesale market is characterised by many barriers to entry (long-term bookings on the entry points to the network, already existing participations by RWE in retailers representing close to half of the market, economies of scale, etc). The integration created by the transaction could thus have lead to customer foreclosure on the market for short-distance wholesale supply of L-Gas in the RWE TSO area.

4. Conclusion

The Commission cleared the proposed merger on 23 June 2009 with the conditional divestiture of swb. This commitment was offered to take account of the serious doubts the Commission had identified in relation to the German generation and wholesale electricity market, in particular the strengthening of RWE`s collectively dominant position on that market and a possible increase in its ability to foreclose retail supply customers from competitors active upstream on the wholesale market. The commitment also covered the increased ability of RWE to foreclose the downstream market for gas retail sales via

(4) The German decentralized structure of the gas supply sector comprises about 700 utilities (regional and local distribution companies) on three levels of the value chain: (i) producers/importers, (ii) regional wholesalers and (iii) local distributors.

(5) According to the Commission's decision-making practice low calorific gas (L-Gas) and high calorific gas (H-Gas) belong to separate product markets, because they are hardly substitutable to each other. H-Gas and L-Gas are used concurrently in a limited number of European Member States (essentially in Belgium, France (North), Germany and the Netherlands)

its position in the upstream market for short-distance wholesale supply of L-Gas in the RWE area.

This remedy makes it likely that swb will remain an independent generator or seek partnership with a new viable entrant or one of the generators that are not part of the jointly dominant group after the divestment. It should allow the maintenance or development of competition on the markets concerned to the benefit of the consumers.

The Vattenfall / Nuon Energy case — Upholding competition on electricity retail markets in Germany

Tiziana Lo Nardo, Martin Godfried, Kristóf Kovács (1)

1. Introduction

The Vattenfall/Nuon case (2) concerned the merger between two energy utilities with activities in both electricity and gas markets. However, the only significant overlaps between the two undertakings' operations were in the retail supply of electricity to small customers in Berlin and Hamburg. For this reason, the Commission focused its enquiry on the scope of electricity retail markets for small users in Germany.

The Commission's investigation showed, as had earlier investigations by the German Federal Cartel Office ("Bundeskartellamt") relating to these markets, that despite an increasing level of competition in electricity retail markets for small customers in Germany, there are strong indications that local markets still exist.

Accordingly, the notified transaction was also assessed at local level where the Commission found that the deal would have restricted competition in Berlin and Hamburg by removing Nuon as the strongest competitor of the incumbent Vattenfall in its historical supply areas. The Commission therefore decided to clear the case only if substantial remedies were put in place.

2. The parties and the transaction

Both Vattenfall and Nuon Energy are involved in the generation, wholesale supply, retail sale and trading of electricity as well as in the wholesale and retail sale of gas in some EU Member States.

The transaction involved Vattenfall acquiring full control of Nuon Energy. Specifically, Vattenfall intended, as a first step, to acquire 49 % of shares in Nuon Energy and to acquire the remaining shares in three subsequent tranches over a period of six years (3). However, under the contractual arrangements, Vattenfall was expected to acquire exclusive operational control of Nuon Energy with the purchase of the first tranche of shares.

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

(2) Case COMP/M.5496 Vattenfall / Nuon.

(3) Two tranches of 15 % two and four years after the acquisition of the first 49 % stake, and the third tranche of 21 % after six years.

3. Market definition: retail sale of electricity to small customers

The key point in this case was to assess the scope of the market for the retail supply of electricity to small consumers in Germany, as the parties' activities were found to significantly overlap in Berlin and Hamburg (4). While previous case law judged that electricity retail markets in Member States are generally national in scope, provided that these are fully liberalised (5), information gathered by the Commission about the development of competition in Germany strongly indicated that the scope of the electricity retail market for small customers may be narrower than national.

The market analysis showed that, from a regulatory perspective, German market players are able to supply electricity anywhere in Germany and each customer can freely choose among the providers that are operating in a given location.

However, those results equally showed that — even 10 years after liberalisation — customers still have great confidence in the *Stadtwerke* (municipal utilities) which control the physical electricity distribution network. On average around 80 % of households are still supplied by *Stadtwerke* or regional suppliers, and half of those customers still receive their electricity under the terms of the – usually most expensive – default universal supplier tariffs (6).

In addition, analysis showed that although small customers' switching rates have increased, on average, from 1.8 % in 2006 to 3.8 % in 2007 and around 5.2 % in 2008 (7), competition in the German retail

(4) See cases COMP/M.5224 — EDF / British Energy, COMP/M.3440 — EDP / ENI / GDP, COMP/M.4180 — Gaz de France / Suez, COMP/M.3868 — Dong / Elsam / Energi E2, COMP/M.3696 — E.ON / MOL.

(5) See cases COMP/M.5224 — EDF / British Energy, COMP/M.4180 — Gaz de France / Suez and COMP/M.3696 — E.ON / MOL.

(6) Customers who are supplied under the universal supplier tariff have not exercised their right to switch to a new contract.

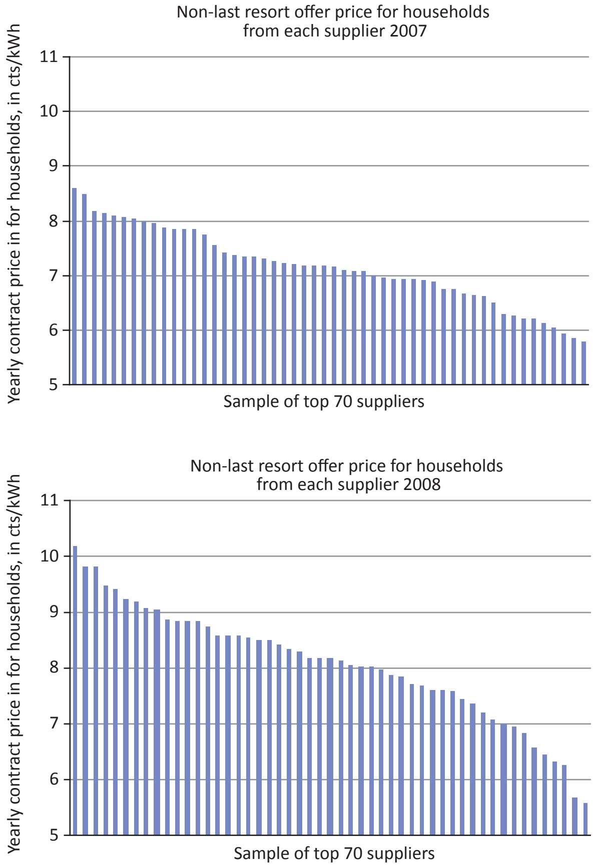
(7) Figures for 2006 and 2007 are based on the Monitoring Report for 2007 and 2008 by the German network regulator Bundesnetzagentur (BnetzA). The most recent, *preliminary* data from BNetzA's 2009 monitoring exercise, covering only the top 70 DSOs (issued on 9 June 2009), indicates that the switching rate increased by 1.4 percentage points to around 5.2 % in 2008.

markets for electricity to small end users is still in its infancy.

When assessing the geographic scope of the electricity retail market, the Commission found no homogeneity among the switching patterns for small end-users across the distribution system operator ("DSO") areas. Some areas experienced 'high' switching rates in 2008 while customers in other areas have not done much switching between electricity suppliers.

In the course of its market investigation, the Commission also examined universal suppliers' prices for energy (excluding network tariffs and tax), based on data from the energy market monitoring exercise carried out by the German energy market regulator (Bundesnetzagentur – 'BNetzA'). The results showed that energy fees charged to households differed significantly across Germany in 2007 and 2008, as is shown in Figure 1 below. For 2008, energy charges vary by 45 % across the top 70 suppliers, between 5.6 ct/kWh and 10.2 ct/kWh. These differences in pricing policies between regions and network areas were also confirmed by the vast majority of the electricity retailers the Commission interviewed.

Figure 1: Energy charges for 'competitive' (non-universal) supply to households by universal suppliers in Germany, in 2007 and 2008

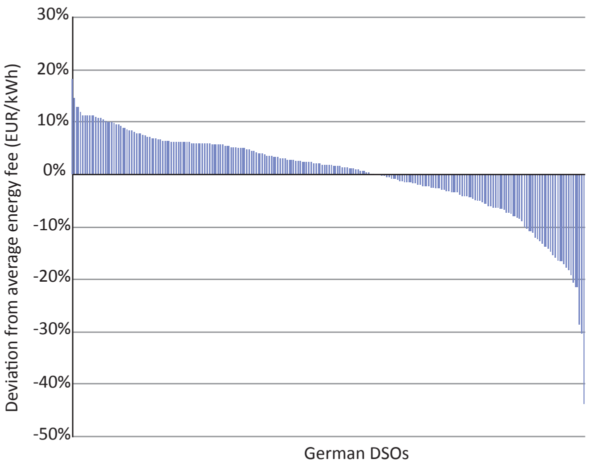


Source: Data from BNetzA; computation by the Commission.
Note: Scales have been truncated. These graphs show only non-universal 'competitive' supplies by universal suppliers in Germany in their own DSO area. The 2008 data are based on the most recent, preliminary data from the BNetzA's 2009 monitoring exercise.

Furthermore, the Commission compared energy charges — based on the best offer (lowest overall tariff) per DSO area — with the average energy charge in all German DSOs [8]. As shown in Figure 2 below, the results indicate a spread of around +20 %/–40 %, indicating significant differences between competitive conditions in the different DSOs as a result of the differences in price among the German network areas.

[8] Best offer excluding pre-paid tariffs. The spread is even larger when pre-paid tariffs are included in the calculation.

Figure 2: Comparison of energy charges between DSO areas on the basis of the best competitive offer within a DSO area, March 2009



Source: Verivox.

Note: This graph shows the best competitive offer prices per zip code for 4 000 kWh per year, non-prepaid tariff, energy only price, excluding taxes, excluding all zip codes that overlap within DSOs.

Finally, the Commission analysed the marketing strategies of the electricity suppliers in Germany. Most of the operators who answered the questions put to them in the Commission's market investigation argued in favour of local marketing campaigns. They consider it more profitable to acquire a solid customer base in few areas rather than nation wide, as there are significant economic barriers preventing operators from entering the retail electricity markets in Germany. In addition, the feedback received by the Commission showed that retailers focused predominantly on local activity because it was difficult to develop customer awareness and to acquire a sufficiently large customer base nation-wide.

All in all, the Commission judged that the market development of electricity retail sales to small customers does not clearly justify a national market. The Commission has therefore assessed the effect of the transaction based on a local market, which roughly corresponds to each DSO area in Germany. The same conclusion was also upheld by the Bundeskartellamt in its recent case law (9).

4. Competitive effects of the merger

The parties' activities were found to significantly overlap only in relation to the retail sale of electricity to small customers in Berlin and Hamburg. Therefore the Commission limited its investigation to the effects of the transaction on this segment of the retail market in those two cities.

Retail supply of electricity in Berlin and Hamburg

The parties' joint market shares in the retail supply of electricity to small customers were found to be [80-90 %] in both Berlin and Hamburg with an increment in each city of [5-10 %] and [0-5 %] respectively. These combined market shares overshadowed those of the other competitors, and thus even at first sight appeared to give cause for concern. To substantiate these concerns, the Commission decided to investigate the strength of the competitive pressure exerted by Nuon Energy on Vattenfall in its home markets, Berlin and Hamburg.

For this purpose, the Commission carried out both a quantitative analysis of the data regarding customer switching to and from Vattenfall and a qualitative analysis of the replies to the market investigation.

The examination of the switching data showed that, within the testing period taken into account, the numbers of customers supplied each month by Vattenfall and Nuon Energy in Berlin and Hamburg moved in opposite directions. In other words, a decline in the number of customers supplied by the one matched an increase in the number supplied by the other. No direct causal link could be established between these trends because the data do not show the electricity providers to which customers were switching in each case. Nevertheless, the Commission found that the customer behaviour observed in Berlin and Hamburg was an indicator of the constraint exerted by Nuon Energy on Vattenfall in those two cities.

In addition, the replies of the respondents to the market investigation stressed that Nuon Energy was a key entrant in the German electricity retail market and one of the few independent suppliers able to challenge the four best-placed German players (RWE, E.ON, EnBW and Vattenfall). This is due to Nuon's aggressive marketing and pricing policy and its ability to win over a large number of customers within a short time frame in several German cities. Furthermore, Nuon Energy was already well established outside Germany and has considerable know-how in both the electricity and gas sectors in the Benelux region. This gave it a unique advantage over pure retailers in the German electricity market.

Against this background, the parties argued that in both cities there were a large number of suppliers to which customers could easily switch — as indicated by the fact that the end users' switching rates in Berlin and Hamburg were above the national average.

(9) FCO, B8-62/06, RWE Energy / SaarFerngas, decision of 12 March 2007, page 32 et seq. See also FCO's merger decisions B 8-93/07, RWE / Stadtwerke Krefeld-Neuss of 23 October 2007 and B 8-123/07, E.ON / Wasserund Energieversorgungs mbH Salzgitter of 19 December 2007.

However, on the basis of its market investigation, the Commission finally concluded that the merged entity would become the undisputed market leader in Berlin and Hamburg. The Commission therefore expressed serious doubts whether the transaction, as initially notified, was compatible with the common market.

5. Remedies

In order to address the serious doubts identified by the Commission, the parties have offered to divest Nuon Deutschland GmbH, including all of Nuon Energy's shares in the company, including its premises, facilities and staff in Hamburg, Berlin and Heinsberg, the IT-platform and the slogan/tariff names used by Nuon Deutschland, e.g. 'lekker Strom', 'geniaale Strom' and 'wakker gas'.

In addition, as no competition concerns were identified outside Berlin and Hamburg, Vattenfall was offered the option to carve out and keep for itself customers' contracts not related to the retail supply of gas and electricity in Berlin and Hamburg, and two subsidiaries ([10]), neither of which operate in electricity retail.

Importantly, Vattenfall agreed to grant the future purchaser of Nuon Deutschland GmbH a license for the use of the brand 'Nuon' in Berlin and Hamburg for a transitional period, following which the rebranding of the business will be carried out by the buyer. At the same time it undertook not to use this brand for several years.

The results of the market test with respect to this proposal were in general positive. The Commission therefore concluded that the commitment entered into by the parties directly and fully addressed the serious doubts as to whether the transaction was compatible with the common market.

In implementing the Commitments Vattenfall has divested Nuon Deutschland GmbH to ENERVIE, a mid-sized German *Stadtwerke* holding which plans to build on Nuon's strong presence in electricity retail supply in several German cities.

6. Conclusion

The Commission concluded, on the basis of a comprehensive market investigation, that the transaction was likely to lead to anticompetitive effects in Berlin and Hamburg by removing the strongest competitor of the incumbent Vattenfall in the retail supply of electricity to small customers. However, to offset these competition concerns, the parties offered a number of remedies, in view of which the case was cleared in first phase.

The importance of this case goes beyond the competitive assessment as such. It shows that, although the market for the retail sale of electricity to small customers is generally considered to be national in scope, there are nevertheless special circumstances in some Member States. Given such circumstances, the Commission may deviate from existing precedents when it comes to the geographic definition of markets.

No conclusive position on the issue was taken, as the remedies addressed the competition concerns the Commission had identified on the basis of the narrowest definition of the geographic market. Nevertheless, the Commission's market investigation showed strong indications that there are still local markets for the retail sale of electricity to small customers in Germany.

([10]) Nuon Power and Gas Assets GmbH and Nuon Energie und Service GmbH

Consolidation of the EU airline industry: How the Commission kept seatbelts fastened in the 2009 airline merger wave

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1. Introduction

The year 2009 was marked by a wave of mergers in the European airline industry, leading the Commission to review a number of cases, namely *Iberia/Vueling/Clickair*, *Lufthansa/bmi, Lufthansa/SNAH (Brussels Airlines)* and *Lufthansa/Austrian Airlines*. In all but the *Lufthansa/bmi* case, the Commission identified competition concerns with respect to a number of short-haul routes. To address these concerns, the parties submitted commitments in phase I (*Iberia/Vueling/Clickair*) and phase II (*Lufthansa/SNAH (Brussels Airlines)* and *Lufthansa/Austrian Airlines*).

In case **M.5364** — *Iberia/Vueling/Clickair* (2), on 9 January 2009, after a phase I investigation, the Commission approved the proposed acquisition of the two Spanish low-cost airlines, Vueling and Clickair, by the Spanish flag-carrier Iberia. The Commission's investigation found that the merger as initially notified would have restricted competition in the air transport of passengers or even led to a monopoly on seven European routes (namely Barcelona-Venice, Barcelona-Rome, Barcelona-Nice, Barcelona-Athens, Madrid-Venice, Madrid-Naples and Ibiza-Paris) as well as on twelve Spanish domestic routes (Barcelona-Málaga, Barcelona-Santiago de Compostela, Barcelona-Seville, Barcelona-Granada, Barcelona-Oviedo, Bilbao-Málaga, Bilbao-Ibiza, Bilbao-Seville, Ibiza-Seville, Ibiza-Valencia, Alicante-Ibiza and Seville-Valencia).

In case **M.5403** — *Lufthansa/bmi* (3), the Commission examined the proposed acquisition of UK carrier British Midland (bmi) by Germany's largest airline Lufthansa in terms of its impact on the air transport of passengers on a number of short- and long-haul routes. On many of these routes, the parties were already cooperating with each other pre-transaction by way of code-sharing, i.e. one party was actually operating the route while the other party merely marketed flights on this route. The Commission's investigation showed that, on routes where the parties were already cooperating, the party doing the marketing was unlikely to start competing by entering the route as an operating carrier. The Commission therefore concluded that the transaction would not significantly impede effective competition on any of these routes. The same conclusion was reached for all other routes on which the parties' activities overlapped — one reason being that the combined entity would continue to face sufficient competition on these routes. The transaction was thus approved in phase I on 14 May 2009.

As regards case **M.5335** — *Lufthansa/SNAH (Brussels Airlines)* (4), which was conditionally approved in phase II on 22 June 2009, the in-depth investigation confirmed that the transaction would have raised competition concerns with respect to four routes: Brussels-Munich, Brussels-Hamburg, Brussels-Frankfurt, and Brussels-Zurich. On the Brussels-Frankfurt route, the Commission found that the merger would lead to a monopoly for time-sensitive passengers. It would also eliminate close competition between Lufthansa and Brussels Airlines for non-time-sensitive passengers, since the competitive pressure exercised by the train service on this route was found not to be sufficient to compensate for the loss of competition from an air carrier. As concerns the Brussels-Munich and Brussels-Hamburg routes, the merger would lead to a monopoly. On Brussels-Zurich, where Lufthansa's subsidiary Swiss is the operating carrier and Brussels Airlines is Swiss's code-share partner, the Commission's investigation led to the conclusion that the merger would eliminate the significant likelihood of Brussels Airlines entering the route with own services, and potential competition between the parties would thus be lost. The transaction would, therefore, significantly impede effective competition on the Brussels-Zurich route.

On 28 August 2009, the Commission conditionally approved the notified transaction in case **M.5440** — *Lufthansa/Austrian Airlines* (5), after the phase II investigation confirmed competition concerns on five routes: Vienna-Frankfurt, Vienna-Munich, Vienna-Stuttgart, Vienna-Cologne and Vienna-Brussels. The Commission found that Lufthansa's subsidiary Germanwings and Austrian Airlines were the only competitors currently active on the Vienna-Stuttgart and Vienna-Cologne routes and thus the transaction would create a monopoly on these routes. Similar-

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

(2) OJ C 72, 26.3.2009, p. 23.

(3) OJ C 158, 11.7.2009, p. 1.

(4) OJ C 295, 4.12.2009, p. 11-13.

(5) OJ C16, 22.1.2010, p. 11-16.

ly, on the Vienna-Brussels route, Austrian Airlines faced competition from Brussels Airlines (which was then being acquired by Lufthansa). The transaction would therefore lead to competition concerns, given that the only remaining competitor, SkyEurope, did not exert sufficient competitive pressure on the parties and had already filed for insolvency. On the Vienna-Munich and Vienna-Frankfurt routes, the transaction would eliminate at least potential competition between the parties. Existing competitors were found not to exercise enough competitive constraint on the parties to prevent them from raising prices post-merger.

To remove the abovementioned competition concerns, the parties involved offered to transfer their slots (i.e. landing and take-off rights at specific times) at the airports where slots were found to present a barrier to entry. Slots are thus to be offered free of charge at Barcelona, Madrid and other airports (*Iberia/Vueling/Clickair*), Brussels, Frankfurt, Munich, Hamburg and Zurich (*Lufthansa/SNAH*) and Vienna, Frankfurt, Munich, Stuttgart, Cologne and Brussels (*Lufthansa/Austrian Airlines*). These slot remedies were complemented by ancillary remedies such as interlining, prorate and code sharing agreements, as well as access to the incumbents' frequent flyer programmes.

The aim of this article is to discuss the Commission's approach to market definition and the relevant counterfactual in the airline cases. We shall also examine recent developments in the way the parties' alliance partners are treated when assessing the effects of airline mergers, and the investigative tools that have been applied by the Commission in these cases. The article also highlights the main features of the commitments made in the most recent airline mergers.

2. Market definition in airline merger cases

In airline cases, the typical distinction between product and geographic market definition is only remotely relevant, as the markets are defined on the basis of demand and supply on routes between individual city pairs, i.e. taking into account bidirectional traffic flow between point A and point B. Demand-side substitution is crucial in these cases, as passengers usually do not readily substitute destinations in response to significant non-transitory price increases. (6) All recent airline mergers were therefore assessed on the basis of city pairs where the parties' activities overlapped. However, the question of market definition is only a starting point when assessing the competitive effects of mergers: the Commission takes assesses all effects of a particular transaction, including those that may go beyond the impact on individual city pairs. Thus the Commission examined the effects of the *Lufthansa/Austrian Airlines* merger on a bundle of flights to Central and Eastern Europe which, individually, might not have been considered a substantial part of the common market given the low number of passengers flying on these routes annually.

The Commission has traditionally assessed the impact of airline mergers on two main categories of passengers, defined in the past as time-sensitive and non time-sensitive passengers. The market investigation in the abovementioned cases provided evidence that this distinction remains important when assessing the substitutability of airports (7), or substitutability between passengers' preferences for air and train services with respect to the level of service, the type of carriers (low cost vs. network carriers) and schedules. In recent cases, and in particular in the *Lufthansa/SNAH (Brussels Airlines)* case, the Commission conducted a detailed qualitative and quantitative analysis before concluding that the distinction remains relevant.

In principle, when dealing with short-haul routes, the Commission takes into consideration only direct services offered on a given route. An exception to this rule might be warranted if factual examination of the traffic shows that a substantial proportion of passengers travel indirectly. This is true notably in cases where a direct service allows for a one-day return trip. In these particular circumstances, the Commission recognized that indirect and direct service belong to the same market.

A further typical element investigated in airline cases is the substitutability of airports at the point of origin and destination. The aim is to determine the catchment area of adjacent airports and to establish whether customers consider air services offered from these airports as substitutes for one another. The Commission analyses this substitutability on a case-by-case basis, using qualitative and quantitative tools.

Finally, the Commission investigated substitutability between rail and air services on short-haul routes where a high-speed train is operating. This issue has arisen recently in connection with the Brussels-Frankfurt route (*Lufthansa/SNAH Brussels Airlines*) and the Vienna-Munich route (*Lufthansa/Austrian Airlines*).

(6) By way of exception, destination substitutability could be higher for holidaymakers: see COMP/M. 5141 — *KLM/Martinair.*

(7) Indeed, non time-sensitive passengers are more inclined to travel from secondary airports while primary airports are the only option for most time-sensitive passengers.

3. The counterfactual

Under its Horizontal Merger Guidelines, when assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without it – which, in most cases, means the competitive conditions at the time of the merger. However, in some circumstances, the Commission may take into account market changes that can reasonably be predicted. ([8])

One of the main features of airline cases is that, quite commonly, at the time of the proposed merger there is already a network of cooperation agreements between the parties, ranging from different types of code-share agreements to common bottom-line joint ventures. Frequently, therefore, the parties have argued that, given these agreements, the transaction would not materially alter the competitive conditions already prevailing on the relevant markets.

The Commission, as a matter of principle, does not accept such an argument *prima facie* and is committed to investigating the merger-specific effects of each transaction, since the merger will make contractual cooperation structural and hence perpetual. The Commission therefore analyses, amongst other things, the level of actual competition between the parties as well as the likelihood of future competition between them on the routes where they were cooperating before the merger. By way of example, in the *Lufthansa/bmi* transaction where, before the merger, Lufthansa and bmi were code-sharing on a number of routes, the Commission concluded that the parties were not likely to enter the routes where they currently code-share with each other. ([9]) However, a similar analysis of the *Lufthansa/SNAH (Brussels Airlines)* merger produced different results as regards the Brussels-Zurich route. Here, the Commission found that, if the merger did not go ahead, SN was the most likely entrant on this route and the transaction therefore eliminated this potential competition.

Similarly, in the *Lufthansa/Austrian Airlines* case, where the parties were already involved in a profit-sharing joint venture, the Commission analysed the transaction in the light of two counterfactual scenarios. One was what would happen if the transaction turned the parties' contractual cooperation into a permanent structural link. The other was the most likely alternative counterfactual scenario if the proposed transaction did not go ahead. The Commission found that, without the merger, Austrian Airlines — which was then being privatised — was likely to be acquired by another airline, namely Air France-KLM. In this alternative counterfactual scenario, Austrian Airlines and Lufthansa were likely to terminate their joint venture and become actual competitors on the relevant routes. However, in the end, the Commission did not need to conclude on the relevant counterfactual as such conclusion would not alter its assessment of the effects of the case.

4. Treatment of alliance partners

The Commission has traditionally given its investigations a broad scope, analysing not only overlaps between the merging parties but also overlaps between one party and the other party's alliance partner. When assessing the affected markets, the Commission used to aggregate the parties' market shares with those of the alliance partners with which a merging party was closely cooperating.

In older merger cases, therefore, the Commission investigated not only the routes where the parties' activities overlapped but also the routes where the services of one of the parties overlapped with those of the other party's alliance partner. If the combined market share of the respective players was significant, these routes were considered as affected markets. In the latest cases discussed in this article, however, the Commission decided to restrict its analysis to overlaps between the merging parties and to consider other markets to be affected only if there is solid evidence that the cooperation between one merging party and a third party (its alliance partner) will be extended to the other merging party. In other words, a market is considered as affected only if there is evidence that one party will be integrated into the other party's partnership with another airline on this market, or that competition will otherwise be reduced as a result or as a foreseeable consequence of the merger.

5. Investigation methods applied

In addition to standard investigative tools such as questionnaires sent to relevant market players ([10]), the Commission used several other tools. In particular, during the phase II of the *Lufthansa/SNAH (Brussels Airlines)* case, a customer survey was used to gather direct evidence of passenger behaviour, such as the degree of substitution between Brussels National (Zaventem) and Antwerp airports. The

([8]) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p. 5-18.

([9]) In that case, the Commission's investigation did not indicate that the relevant code-share agreements would be contrary to Article 101 TFEU. The relevant counterfactual was therefore a situation in which the parties cooperate under the code-share agreements.

([10]) Such as questionnaires to competing airlines and train operators, corporate customers, travel agents, consumer associations, airports, slot coordinators and Member States' civil aviation authorities.

survey also helped measure the degree of competitive constraint exercised both between the parties and on the parties by their competitors, including train services. The survey was run by an independent contractor, selected on the basis of a call for tender, and the parties had the opportunity to comment on the relevant questions before the customer survey was launched.

In phase II of both *Lufthansa/SNAH (Brussels Airlines)* and *Lufthansa/Austrian Airlines*, the Commission also carried out a thorough econometric analysis of daily pricing data for several booking classes obtained from the parties and some of their competitors. The Commission was thus able to reconstitute monthly average net fares per class to analyze, for example, how the entry of competitors on the parties' routes had, in the past, affected the parties' fares. The Commission was also able to analyze the prices charged by the parties to non time-sensitive passengers (as proxied by non-flexible economy class fares) compared with their pricing to time-sensitive passengers, who primarily purchase flexible fares.

As regards potential entry, the total passenger demand on the route in question served as a starting point for assessing whether the route would economically sustain operations by an additional operating carrier. The Commission also examined the parties' internal documents in order to assess their entry strategies both in general and for the particular routes at issue. The parties' past entries were also analyzed to determine entry patterns on the basis of route characteristics (e.g. total demand on the route, passenger mix, connection to existing hubs/bases, profitability and yields etc.). Similar criteria were used to assess whether or not a competitor was likely to enter the route in question. To this end, the Commission also requested internal documents form third party carriers.

6. Remedies

The commitments accepted in recent cases contain a number of improvements over previous packages, reflecting the lessons the Commission has learnt from past experience with airline mergers and the way remedies were implemented in those cases. Broadly speaking, the recent commitments reduce the burden imposed on the new entrant by the slot application procedure. They also facilitate slot transfer from the parties and give the applicant more visibility in the future operation of these slots. Furthermore, the enhanced commitments are designed to encourage competitors to enter those routes where competition concerns were identified. Incentives include, for example, the prospect of obtaining grandfathering rights to slots at congested airports. Last but not least, the commitments are designed to ensure effective monitoring by the Commission.

At the core of the remedies is a commitment to give new entrants (or competitors willing to expand their existing services) slots on the routes where competition concerns were identified and where slots are scarce. The underlying rationale is to lower barriers to entry in situations where there are slot constraints at (at least) one end of the problematic route. New or existing competitors willing to enter or expand on such routes would normally find it difficult to obtain slots from the slot coordinator. Slot remedies thus aim to lower entry barriers so that entry or expansion is more likely to occur. The slots are normally offered at airports at both ends of the route (11) for a specified number of flights, i.e. daily or weekly frequencies. The number of slots made available generally corresponds to the overlap between the parties. This solution aims to replicate the competitive pressure that the parties exercised on each other before the merger.

According to the recent commitments, on short haul routes, the parties have to grant slots that are within +/- 20 minutes (12) of the time requested by the applicant and that are in line with the applicant's business model as regards, for example, turn-around time. (13) The commitments generally do not contain any limitation on the number of slots to be released at peak hours.

The new commitments simplify the slot allocation procedure to help new entrants plan their schedules, and introduce a fast-track dispute resolution procedure that can be invoked by any slot applicant/new entrant who has reasons to believe that the parties are failing to comply with their commitments.

An important element of the most recent commitments is the prospect of obtaining grandfathering rights to the slots transferred. As a rule, slots are earmarked for the route where competition concerns were identified. However, once these slots have been used on a given route for a number of full consecutive IATA seasons (four as a rule (14)), the slot transfer becomes definitive and the new entrant is able to use these slots on any other route. In the *Iberia/Vueling/Clickair* case, this standard period was reduced to two full consecutive IATA seasons for applicants who request slots to operate,

(11) Unless these slots can be obtained from slot coordinators through a normal procedure.

(12) This is an improvement on previous cases where slots granted by the parties could deviate from the applicant's request by 30 minutes; see (for example) case COMP/M.3280 — *Air France / KLM*.

(13) The commitments foresee that '*arrival and departure slots shall be such as to allow for reasonable aircraft rotation taking into account the Prospective New Entrant's business model*'.

(14) However, the specificities of a case may require that this period be shortened to two IATA seasons or pro-longed to six or eight IATA seasons.

from one single airport, a significant number of city pairs ([15]) with respect to which competition concerns have been identified. Market players regarded such grandfathering rights as an additional incentive for airlines to enter these routes. This is because slots are particularly valuable assets at some European airports where there are considerable slot constraints. Moreover, grandfathering rights to slots allow for a flexible allocation of aircraft and strengthen the viability of services offered by competitors.

Where new or existing competitors are willing to operate additional frequencies on these routes, the commitments enable these competitors to enter into special prorate and code-share agreements with the parties, allowing them to place their codes on the parties' flights. In addition, new entrants may conclude interlining and intermodal agreements, and they may be granted access to the parties' frequent flyer programme for their passengers. The rationale behind ancillary remedies of this kind is to ensure that the parties' competitors have access to connecting traffic, i.e. they can fill their planes with connecting passengers and thus achieve/increase profitability for the services that they add on a given route.

The Commission market-tested each set of commitments with the customers and competitors of the respective parties and with other market participants. Most of the feedback it received was positive, i.e. respondents felt that the commitments would sufficiently facilitate entry or expansion on the remedy routes and would solve the competition concerns raised by the proposed concentrations. Furthermore, in each case, respondents to the market test expressed interest in taking up the remedy slots despite the current economic crisis. It remains to be seen how these improved remedy packages will work in practice: their full positive impact may not be felt until after the industry has recovered.

([15]) If an airline operates a significant number of city pairs, it is likely to (have) set up a base at the airport.

Electrabel/CNR: the importance of the standstill obligation in merger proceedings

Bruno Alomar, Sophie Moonen, Gorka Navea and Philippe Redondo ([1])

On 26 March 2008, Electrabel SA ("Electrabel"), a Belgian electricity company which is part of the French group, Suez (now GDF Suez), notified to the Commission a concentration consisting in the acquisition of *de facto* sole control over Compagnie Nationale du Rhône ("CNR"), the second largest electricity operator in France.

On 29 April 2008, the Commission cleared this concentration, as it did not raise any competition concerns. In this decision, the Commission left open the exact date on which Electrabel had acquired control over CNR, as that element had no impact on the competitive assessment in the case.

One year later, in a decision of 10 June 2009 concluding proceedings initiated under Article 14 of the Merger Regulation ([2]), the Commission found that Electrabel had actually acquired *de facto* sole control over CNR as from 23 December 2003 and it imposed a fine of EUR 20 million on Electrabel.

The Merger Regulation has created a system for the preventive control of mergers. Under the EU merger control system, a concentration with a Community dimension must be notified to the Commission before its implementation. ([3]) In addition, such a concentration cannot be implemented both before and after notification until it has been declared compatible with the common market ([4]). This latter provision is also referred to as the 'suspension obligation' or 'standstill obligation'.

The decision of 10 June 2009 finds that Electrabel had breached the standstill obligation, which was not time-barred at the time when the decision was adopted. ([5])

Ten years after the first infringement proceedings in the *Samsung/AST* and *A.P. Møller* cases, the Commission's decision of 10 June 2009 strongly re-affirms that the standstill obligation is a fundamental rule and that the Commission will not tolerate its breach.

The case is also an interesting – albeit fairly classical – application of the prospective analysis which the Commission undertakes in order to assess whether an undertaking acquires de facto control over another undertaking.

The fundamental rule of the standstill obligation

The standstill obligation is laid down in Article 7(1) of the Merger Regulation ([6]) which provides that a merger with a Community dimension may not be implemented until it has been declared compatible with the common market by a Commission decision or, in the absence of a decision, by expiry of the legal deadline.

The standstill obligation also applies to public bids, since although the acquisition of shares is allowed, the acquirer is required to notify the concentration without delay and must not exercise the voting rights attached to the acquired securities before the Commission's decision approving the concentration. ([7])

Derogations from this obligation are possible, but a derogation can only be granted by the Commission upon reasoned application of the party acquiring control. ([8]) In practice, the Commission grants such derogation only in exceptional circumstances, and it

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

([2]) In 2003, the old Merger Regulation (Council Regulation (EEC) No 4064/89) was still in force. It was repealed by the current Merger Regulation (Council Regulation (EC) No 139/2004) from 1 May 2004. The old Merger Regulation was in force at the time Electrabel acquired control of Compagnie Nationale du Rhône on 23 December 2003. Accordingly, the Commission's infringement proceedings were conducted under the old Merger Regulation.

([3]) The obligation to notify a concentration with a Community dimension prior to its implementation is provided by Article 4 (1) of both the old and the new Merger Regulations.

([4]) The standstill obligation is contained in Article 7 (1) of both the old and the new Merger Regulations.

([5]) See Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition.

([6]) Article 7 (1) of both Merger Regulations.

([7]) Article 7 (2) of both Merger Regulations.

([8]) Article 7 (3) of both Merger Regulations.

ensures that the derogation will not impair the effectiveness of the EU merger control system. (9)

The standstill obligation, along with the obligation of prior notification which it complements, is one of the cornerstones of the EU merger control system, in that it enables the Commission to carry out an *ex ante* control of all concentrations with a Community dimension. Its existence also prevents a concentration that is already implemented and that gives rise to competition concerns from possibly damaging competition. Furthermore, if the parties to the concentration were allowed to implement a potentially problematic transaction prior to a Commission decision approving the concentration, this could make it more difficult to design effective remedies to the possible competition concerns at a later stage. This is why, under the terms of the Merger Regulation, the Commission can impose a significant fine (up to 10% of the turnover of the undertakings concerned) in the event of an infringement of the standstill obligation. (10)

It is the first time that the Commission has imposed a significant fine for a breach of the standstill obligation since the EU merger control system entered into force in 1990. Although the Commission imposed fines for such an infringement twice in the past – in the *Samsung/AST* case in 1998 and in the A.P. Møller case in 1999 – these two precedents were the first such cases, and the amount of the fines was comparatively much lower (EUR 28,000 (11) and EUR 174,000 (12)).

In imposing a significant fine, the Commission sent out a clear message to the effect that violating the standstill obligation is, by its very nature, a serious infringement which undermines the effectiveness of Community provisions on the control of concentrations. (13)

Thus, in its decision the Commission emphasizes that the principle that a concentration implemented without authorisation does not give rise to competition concerns (as was the case for the concentration Electrabel/CNR) cannot detract from the seriousness of the infringement. The presence of damage to competition would actually make the infringement even more serious. (14)

The seriousness of an infringement of the standstill obligation is, of course, only the starting point when setting the fine. Indeed, in fixing the amount of the fine the Commission will take into account the possible additional factors of the gravity and also the duration of the infringement. Likewise, the Commission will also assess whether there are any mitigating and aggravating circumstances.

Thus, in the Electrabel/CNR case, the Commission found other factors of gravity, namely that Electrabel is a large company with substantial legal resources, the acquisition of de facto control was foreseeable under a well-established decision-making practice of the Commission and there already existed precedents of fines for implementation before clearance. Also, the duration of the infringement was of at least three years and a half.

Finally, in this case, the Commission did not find any aggravating circumstances and took into account the fact that Electrabel had disclosed the situation of sole control voluntarily and had answered the Commission's questions.

Prospective method for detecting de facto control

As a consequence of the rule of the standstill obligation at the heart of a preventive merger control system, the acquirer of control cannot decide to detect its de facto control once the transaction has been implemented. In other words, the acquirer has a duty to assess the likelihood that it may acquire de facto control through a proposed transaction *before* the transaction takes place by using a prospective method. In the case at issue, it is worth mentioning that the Commission's approach regarding the acquisition of de facto control has been fully in line with its past practice, as set out in various Commission communications.

The background to the decision is that, on 23 December 2003, when Electrabel acquired from EDF a number of shares in CNR, it increased its shareholding from 17.86% of the shares and 16.88% of the voting rights to 49.95% of the shares and 47.92% of the voting rights of the CNR respectively. The second main shareholder was Caisse des Dépôts et Consignations (CDC), a French public institution, which held 29.43% of the shares and 29.80% of the voting rights. The remaining shareholding was (and still is) very dispersed, since about 20% of the

(9) Article 7(3) of the Merger Regulation requires that, when examining a request for derogation, the Commission takes into account inter alia the threat to competition posed by the concentration. Over the period 1990-2008, 101 derogations were granted and they concerned about 2.4% of the notified concentrations. It can be noticed that the trend of derogations granted has decreased from 2005: over the period 2005-2008, the derogations concerned 1.2% of the notified concentrations on average, while the average ratio was 3.2% for the period 1990-2004 (source: statistics published on the website of DG Comp).

(10) Article 14 (2) (b) of both Merger Regulations.

(11) Case IV / M.920 - Samsung / AST, Commission decision of 16 February 1998.

(12) Case IV / M.969 – A.P. Møller, Commission decision of 10 February 1999.

(13) See paragraph 188 of the Commission decision of 10 June 2009.

(14) See paragraphs 192 to 194 of the Commission decision of 10 June 2009.

shares and the voting rights were shared between around 200 public local entities.

In addition, CNR's Board of Directors comprised two representatives of Electrabel out of three, thereby giving Electrabel a majority on the Board. This was facilitated by a shareholder agreement signed by CDC and Electrabel in July 2003, which provided that, inter alia, CDC and Electrabel would vote together when appointing the representatives at the Supervisory Board and at the Board of Directors of CNR.

At the time, Electrabel was also the sole industrial shareholder of CNR and, as such, had taken over the central role previously held by EDF in the operational management of CNR's power plants and in the marketing of the electricity produced by CNR. ([15])

Electrabel did not acquire de jure sole control over CNR since, inter alia, it did not acquire a majority of the voting rights of CNR. Furthermore, such a possibility was prohibited by a French law – and this was still the case when Electrabel notified its acquisition of control over CNR in early 2008. ([16])

A minority shareholder can nevertheless acquire sole control on a *de facto* basis. Indeed, the Commission considers that this is especially the case when the acquirer is highly likely to achieve a majority at the shareholders' meetings, taking into account the attendance of shareholders at the shareholders' meetings in previous years. ([17]) In accordance with the Commission's decision-making practice, the shareholders' meetings have to be analysed over a period of at least the past three years.

In the course of the procedure, Electrabel claimed that, on 23 December 2003, it could not have detected the existence of de facto exclusive control over CNR. According to Electrabel, it was not until June 2007, when it was in a position to examine the situation prevailing at the shareholders' meetings of the CNR over the previous three years during which it had achieved a constant majority of voting rights, that it asked itself whether it had acquired de facto control over CNR.

In its decision of 10 June 2009, the Commission rejected Electrabel's method since "*it would necessarily mean that a company could exercise de facto control (without notification or approval) over another company for three years before notifying the Commission of the operation, on the basis that it would not be absolutely sure that it was exercising control until the three years were up.*" ([18])

Accordingly, if Electrabel had used a prospective method from December 2003, it would have easily detected that, on the basis of the attendance rates at the shareholders' meetings of CNR of the preceding years and the fact that the remaining shares of CNR were widely dispersed, Electrabel - with 47.92% of the voting rights - was assured of a stable majority at the shareholders' meeting of CNR as from December 2003.

In addition, the Commission noted that, already from December 2003, Electrabel had had the majority on CNR's Board of Directors, had been the sole industrial shareholder of CNR and, as such, had assumed the central role previously held by EDF in CNR.

All these elements constituted a body of evidence showing that Electrabel's de facto control over CNR had been easily foreseeable in December 2003.

Conclusion

By its decision of 10 June 2009, the Commission has shown – like its counterparts in other jurisdictions where such infringement proceedings are routinely pursued by national competition authorities – its commitment to enforce the obligations of prior notification and standstill obligations, which are at the heart of the EU's preventive merger control system. The decision to sanction the infringement committed by Electrabel is also entirely in line with the Commission's strict policy when granting derogations from the suspension obligation. At the same time, the Commission's decision is a relatively conventional application of its long-standing practice as codified in communications of 1998 and 2007 on the acquisition of *de facto* sole control, and should come as no surprise to market participants. The significant fine imposed on Electrabel was carefully weighed to take into account all the circumstances of the case.

([15]) Since 1948, CNR was bound by contract to EDF as regards the management of CNR's hydroelectric plants. Moreover, EDF held one sixth of CNR's capital and had a representative on its board of directors. In the context of the acquisition in 2001 of joint control over EnBW together with OEW (Commission Decision of 7 February 2001 in case COMP/M. 1853 – *EDF/EnBW*) EDF undertook to ensure that CNR would be enabled to be an entirely independent electricity producer. To this end, EDF undertook, *inter alia*, not to exercise its voting rights at general meetings except through an independent proxy, to refrain from having a representative on the board of directors, and to purchase, until April 2006, upon request of CNR, part of its production as necessary to allow CNR gradual entry on the market. EDF also undertook to provide technical services to CNR for a transitory period, excluding functions related to the optimisation and the production of CNR.

([16]) Article 21 of Law No 2001-1168 of 11 December 2001 (the "Murcef law") provides that more than 50% of CNR's capital and voting rights must be owned by public entities. Thus, a private operator cannot hold more than 50% of CNR's capital and voting rights.

([17]) See paragraph 14 of the 1998 notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. See also paragraph 59 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, adopted on 10 July 2007.

([18]) See paragraph 56 of the Commission Decision.

State aid: main developments between 1 May and 31 August 2009

Runa Monstad and Koen Van de Casteele ([1])

Developments during this period were still heavily influenced by the economic and financial crisis.

1. Policy developments

The Commission adopted the following five communications:

1.1. Communication on bank restructuring

On 22 June 2009 the Commission adopted a Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ([2]). This is the fifth communication the Commission has adopted in response to the financial crisis.

In this document, the Commission provides guidance as to how it assesses any restructuring aid Member States give to banks. The Commission lays down three fundamental principles, namely: (i) aided banks must be made viable in the long term without further state support; (ii) their owners must carry their fair share of the burden of restructuring costs; and (iii) measures must be taken to limit distortions of competition in the Single Market. The Commission explains how it intends to apply these principles in helping the European banking sector to become viable once again. The guidelines are in force until 31 December 2010. After this date, the normal rules on rescue and restructuring will apply, as laid down in Article 107.3(c) of the TFEU (ex Article 87.3 (c) of the EC Treaty).

The Commission Communication on bank restructuring complements but does not change the previous guidance on State aid rules which the Commission has adopted since the beginning of the financial crisis. The previous guidelines set out, in particular, the conditions under which banks are required to submit a restructuring plan. The new Communication, on the other hand, outlines how the Commission will use competition rules to support financial stability. The Commission's view is that making banks viable again is the best way to ensure their stability and their sustained ability to lend to the real economy.

([1]) The views expressed are purely those of the writers. The content of this article does not necessarily reflect the official position of the European Commission.

([2]) OJ C195, 19.8.2009, p. 9.

1.2. Communication on funding public service broadcasters

On 2 July 2009, the Commission adopted a new Communication on the application of State aid rules to public service broadcasting ([3]). The Communication provides a clear framework for the development of public broadcasting services and enhances legal certainty for investment by public and private media alike. It replaces and updates the Commission's 2001 Broadcasting Communication ([4]). This update forms part of the Commissions' State Aid Action Plan ([5]) and was necessary in view of the extensive case practice developed since the 2001 Communication and to take account of significant technological changes as well as legal developments since the Altmark judgment ([6]).

The main changes include an increased focus on accountability and effective control at national level, including a transparent evaluation of the overall impact of publicly funded new media services. More specifically, these changes involve:

(i) the *ex ante* control of significant new services launched by public service broadcasters (balancing the market impact of such new services with their public value);

(ii) clarifications concerning the inclusion of pay services in the public service remit;

(iii) more effective control of overcompensation and supervision of the public service mission at national level; and

(iv) greater financial flexibility for public service broadcasters.

The Communication is designed to ensure high quality public broadcasting services on a variety of platforms, ranging from the internet to screens in public places.

([3]) OJ C 257, 27.10.2009, p.1-14.

([4]) OJ C 320, 15.11.2001, p. 5-11.

([5]) COM (2005)107.

([6]) C-280/2000, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, (2003) ECR I-7747.

1.3. A more Economics-based approach: three guidance papers

On 3 June 2009, as a part of its efforts to clarify and simplify state aid rules, the Commission adopted two guidance papers setting out criteria for the in-depth assessment of large amounts of training aid [7] and of aid to disadvantaged and disabled workers [8]. The guidance applies to measures affecting the recruitment of workers who are considered to be disadvantaged or disabled, as defined in the General Block Exemption Regulation [9].

The guidance papers on training aid and employment aid set out the criteria to be followed by the Commission when assessing the compatibility of such aid measures in cases where they have to be individually notified. The papers provide guidance on the kind of information the Commission requires and the assessment methodology it intends to follow. The criteria are based on the principles of the Commission's State Aid Action Plan, in particular the balancing test that weighs the positive effects brought about by the aid against the negative impact a potential distortion of competition might entail. On this basis, the Commission will carry out an overall evaluation of the aid to determine whether, as a whole, the aid measure can be approved.

On 24 June, the Commission adopted a further guidance paper setting out criteria for the in-depth assessment of regional aid to large investment projects. The Regional Aid Guidelines 2007-13 state that large investment projects above certain thresholds need to be individually notified to the Commission because they may carry a greater risk of distorting competition. The Commission opens a formal investigation procedure for projects where the aid beneficiary has a market share of more than 25 % or where the production capacity created by the project exceeds 5 % of the market (while the growth rate of the product market concerned is below the EEA GDP growth rate). Regional aid to such large investments entails a higher risk of distorting competition. The Commission has now provided further guidance on how it will carry out this in-depth assessment.

(7) OJ C 188, 11.8.2009, p. 1-5.
(8) OJ C 188, 11.8.2009, p. 6-10.
(9) OJ L 214, 9.8.2008, p. 3-47.

2. Cases adopted [10]

2.1. Decisions taken under Article 106 TFEU (ex Article 86(2) EC): Services of General economic interest

On 18 June 2009, the Commission authorised an Irish scheme of levies and tax relief in the health insurance sector [11]. The scheme aims to promote intergenerational solidarity by decreasing the risk differentials between old and young customers. The Commission concluded that the measure was in line with the EU Framework for state aid in the form of public service compensation and as such was compatible with Article 106(2) of the TFEU (ex Article 86(2) of the EC Treaty). In particular, after the Irish Authorities agreed to amend the scheme, the Commission was satisfied that none of the insurers would be overcompensated for the discharge of the public service. The scheme is a temporary replacement for, and very similar to, the previous Risk Equalisation Scheme, which was annulled by the Irish Supreme Court for domestic law reasons.

In line with the jurisprudence of the European Court of Justice, notably the Altmark ruling [12], the Commission concluded that the measure constitutes state aid. However, such aid can be compatible with the Single Market provided it satisfies the conditions laid down in the EU Framework on state aid in the form of public service compensation [13]. In particular, the public service must be clearly defined and entrusted by the public authorities, and the public support may not overcompensate the service providers.

2.2. Decisions adopted on the basis of Article 107(3)(b) TFEU (ex Article 87 (3)(b) EC)

2.2.1. Banking cases

(a) Aid Schemes

Under EU state aid rules, the European Commission approved a German scheme designed to further stabilise the financial markets by providing financial institutions with the possibility of asset relief. This scheme is in addition to the German rescue package authorised by the Commission in October 2008 [14]. The mechanism is in line with the Commission's Guidance Communication on the treatment of impaired assets. In particular, the mechanism provides

(10) This is only a small selection of the cases adopted in the period under review.
(11) N 582/08.
(12) C 280/00.
(13) see IP/05/937.
(14) see IP/08/1589.

ex-ante transparency and disclosure of impairments, valuation of the assets based on their real economic value, a burden sharing of the costs and adequate remuneration. Moreover, the enrolment period for asset relief is limited to six months.

Also under EU state aid rules, the European Commission approved a Portuguese bank recapitalisation scheme ([15]) intended to bolster financing of the real economy. The scheme is in line with the Commission's guidance on support measures for credit institutions during the financial crisis.

In addition, the Commission approved prolonging a number of schemes in Sweden ([16]), Denmark ([17]), Italy ([18]), France ([19]) and the Netherlands ([20]).

(b) Ad Hoc Aid

Commerzbank (N 625/2008)

Commerzbank has sustained major losses, in particular deriving from the Dresdner Bank ABS portfolio. Moreover, given the current crisis, financial markets need more capital, The German Government therefore agreed to provide Commerzbank with € 18 billion of new capital.

The purpose of this aid is to ensure financial stability under a German financial crisis scheme, approved by the Commission on 12 December 2008 ([21]). This scheme allows recapitalisation for fundamentally sound banks if the remuneration and exit incentives are appropriate, as laid down in the scheme, in accordance with the Commission's Recapitalisation Communication. However, given the amount of aid involved, Germany presented the Commission with a business plan setting out measures to restore the viability of the bank.

The main element of Commerzbank's plan is a focus on its core businesses, namely retail and corporate banking including in Central and Eastern Europe, which has generated stable returns in the past. In contrast, volatile investment banking will be reduced over time and the bank will divest itself of Eurohypo's commercial real estate activities. Commerzbank has also reviewed its practices regarding risk management and corporate governance.

([15]) N 556/2008.
([16]) N 436/2009 — Prolongation of Swedish recapitalisation scheme.
([17]) N 415/2009 — Prolongation of the recapitalisation and guarantee scheme in Denmark.
([18]) N 328/2009 — Prolongation of Italian bank guarantee scheme.
([19]) N 251/2009 — Extension of French scheme for refinancing credit institutions.
([20]) N 379/2009 — Prolongation of the Dutch Guarantee Scheme.
([21]) N 625/2008.

The plan includes a number of measures aimed at keeping the aid to the necessary minimum. For example, Commerzbank will divest itself of certain activities and will sell off subsidiaries including Eurohypo, an important European player in the real estate and public finance business. These measures address the Commission's concerns about possible distortions of competition by this large grant of aid also include the suspension of dividend and interest payments to holders of hybrid capital. In addition, to allay further competition concerns, the bank will for three years be banned from taking over financial institutions or other businesses which might compete with it. Furthermore, the bank will not be allowed to do business (including deposit taking) under more favourable price conditions than its top three competitors in markets/products where it has more than a 5% market share.

Although the current crisis means rising credit risk for Commerzbank, the Commission's assessment found that the plan is likely to restore the bank's long-term viability, as demonstrated in a number of simulations including stress test scenarios. Also, Commerzbank has demonstrated that its funding situation has been stable throughout the crisis and it still has significant liquidity buffers.

The large-scale divestments (amounting to roughly 45 % of Commerzbank's current balance sheet total) and the planned suspension of payments of dividends and interests will limit the aid to the minimum necessary and will ensure that the bank itself makes a significant effort to return to viability.

Finally, the Commission also considers the plan sufficient to mitigate potential distortions of competition. In particular the Commission notes that the ban on acquisitions and the price leadership prohibition are adequate to prevent state aid from being misused to promote organic and non-organic growth at the expense of competitors which have not received state aid.

WestLB (C 43/2008)

Under EU state aid rules, and following an in-depth investigation that began in October 2008 ([22]), the European Commission approved the € 5 billion risk shield and accompanying measures for German bank WestLB. The risk shield was authorised by the Commission as temporary rescue aid on 30 April 2008 to protect the bank against the volatility of its € 23 billion structured investment portfolio.

On 8 August 2008, Germany notified a restructuring plan for WestLB and requested an extension of the risk shield. On 1 October 2008, the Commission launched a formal investigation to determine

([22]) see IP/08/1435.

whether the measures would enable WestLB to return to long-term viability without undue distortions of competition. Germany's latest amendments to the viability plan show that much of WestLB's business is being redirected into less risky activities. Under the plan, WestLB will completely stop certain risky business activities such as proprietary trading, thereby reducing its assets by 50 %. In future, the bank may maintain its activities in three core business areas:

- 'transaction banking' (i.e. handling payments)
- loans to medium-sized companies and its savings banks partnership ('Verbund Mittelstand') and
- corporate banking (e.g. loans to large companies), capital market activities (including financial instruments trading) and structured finance (e.g. financing of large projects).

Finally, Germany undertook to change the bank's ownership structure through a public tender procedure before the end of 2011.

The Commission was also satisfied that the state aid is limited to the necessary minimum and that potential distortions of competition will be minimised by, for example, substantially reducing WestLB's geographical presence and selling most of its shareholdings.

However, the Commission will confirm its decision only if the statutory bodies of all WestLB's owners approve the restructuring plan.

LBBW (C 17/2009)

The European Commission granted temporary clearance to a recapitalisation scheme and an asset relief measure offered to Landesbank Baden-Württemberg (LBBW) by the German State of Baden-Württemberg. The asset relief is to be achieved via a guarantee structure, not through a sale of assets. The guarantee protects LBBW against potential credit losses resulting from two separate portfolios of securitised assets. LBBW will retain the risk of default up to a certain amount (first loss piece), while the State of Baden-Württemberg will bear potential losses exceeding this amount (second loss piece). The guarantee is provided for a term of five years and can be terminated at the request of LBBW.

In addition, LBBW will receive a capital injection of € 5 billion from its owners. The capital injection became necessary to cope with the higher expectations of market participants and rating agencies regarding capital ratios. The bank will pay an overall remuneration of 10 % for the capital it receives. It is therefore in line with the requirements of the Recapitalisation Communication.

The Commission examined the asset relief measure, which is rather complex. As a preliminary result, and for reasons of financial stability similar to those governing the assessment of rescue aid, the Commission decided not to raise objections for a period of six months. However, as some of the conditions required by the Impaired Asset Communication need further in-depth analysis, in particular regarding valuation, the Commission has decided to launch an in-depth investigation of this aspect and of corresponding elements such as burden sharing.

Kaupthing (N 344/2009)

On 10 June 2009, Luxembourg informed the Commission that a € 320 million loan had been set up for restructuring Kaupthing Bank Luxembourg SA. Since the primary purpose of the loan was to compensate depositors with the Belgian branch of Kaupthing Bank Luxembourg SA, the Belgian State decided to contribute € 160 million to this loan. Under the restructuring plan, deposits with the Belgian branch of Kaupthing Luxembourg were sold to Crédit Agricole Belgique/Keytrade Bank. The Luxembourg based private bank part is to be taken over by the UK investment fund Blackfish Capital. All these activities were sold to the highest bidder in a transparent tender procedure. The bank's other assets will be wound up in a hive off vehicle and the revenue used to compensate creditors and repay the state aid.

The Commission concluded that the proposed measure was appropriate for the purpose of restructuring the bank's activities, which will enable depositors to access their money again. The aid is proportionate because it will not result in compensation being unduly paid to the bank's former shareholders. In addition, the scaling down of the bank's activities and the break up of its assets following an open, transparent sale procedure will ensure that the aid does not give rise to distortions of competition.

IKB (N 400/2009)

IKB is a medium-sized private German bank with a business focus on medium-sized companies. IKB was the first bank in Germany to receive aid, in 2007 ([23]), to offset the damage caused by bad investments in structured securities. Restructuring aid to IKB was approved by the Commission on 21 October 2008 ([24]), and liquidity support was approved on 22 December 2008 ([25]).

The measure approved was notified on 6 July 2009 and concerns guarantees for liabilities up to a volume of €7 billion, granted by SoFFin — a fund ad-

([23]) NN 7/2008.
([24]) C 10/2008.
([25]) N 639/2008.

ministrating the German support scheme for financial institutions. This additional support was allowed only in order to counter a threat to financial stability stemming from IKB's potential illiquidity.

The Commission finds that this aid meets the general criteria as set out in the Banking communication and the additional, more stringent requirements concerning additional aid in cases where restructuring aid has already been given. As IKB had previously received restructuring aid, it was particularly important to ensure that this additional support is limited to the necessary minimum. The Commission analysed in detail IKB's funding needs for the next six months and verified that the aid amount is strictly limited to the required volume, ensuring that the bank has sufficient liquidity buffers to comply with regulatory requirements without being forced to restrain its lending. Additionally, IKB is prohibited from any proprietary trading as a means to inflate profits using taxpayers' money.

Although funding constraints have eased in general, IKB is nevertheless facing a significant funding gap. The Commission therefore has doubts regarding IKB's financial capacity to implement the original restructuring plan. Consequently, the Commission authorised this aid only after Germany had undertaken to notify a revised restructuring plan.

2.2.2. Real economy cases adopted under the temporary framework

On 17 December 2008, the Commission adopted a temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ([26]). Through this framework the Member States are provided with additional tools to tackle the effects of the credit squeeze in the real economy. These temporary measures are based on Article 107(3)(b) TFEU, which allows the Commission to declare aid to be compatible with the common market 'to remedy a serious disturbance in the economy of a Member State'.

Compatible limited amount of aid (N 387/2009, N236/2009, N 304/2009, N 228/2009, N 224/2009, N 118/2009, N 411/2009, N 299/2009)

The Commission authorised further schemes in Estonia, the Czech Republic, Greece, Slovenia, Finland and Malta. The measures enable aid of up to € 500 000 to be granted in 2009 and 2010 to businesses in difficulty or facing funding problems because of the economic crisis and the credit crunch.

Furthermore, the Commission approved two amendments to the German scheme. One amendment allows the aid element of public guarantees to be calculated on the basis of the Annex to the temporary framework. The other is aimed at providing easier access to risk capital especially for small and medium-sized enterprises that are in their early stages of development. In particular, it will allow Germany to provide risk-capital injections in the form of direct grants up to € 500 000.

Loan guarantees (NN 34/2009, N 286/2009, N 308/2009)

The Commission also approved schemes in Slovenia, Romania and Greece allowing authorities to grant aid in the form of subsidised guarantees for investment and working capital loans.

Loans with subsidised interest rate (N 309/2009, N 268/2009, N 257/2009)

The Commission approved schemes under the temporary framework in Greece, Italy and the UK. These schemes allow governments to grant aid in the form of reduced interest rates on loans concluded by 31 December 2010. The low rates are available only until 31 December 2012.

Aid for the production of green products (N 426/2009)

On 2 August 2009, the Commission authorised a scheme offering reduced-interest loans to businesses investing in the production of environmentally-friendly products, as part of the German package to tackle the current economic crisis.

Risk capital measures (N 36/2009, N 279/2009)

The Commission also approved two schemes in France and Italy, whereby these countries made use of the increased flexibility offered under the temporary framework for existing risk capital schemes.

Short–term export credit insurance (N 384/2009, N 258/2009, N 198/2009)

The Commission also approved schemes regarding short-term export credit insurance in Germany, Finland and Denmark.

The Commission concluded that the schemes comply with the conditions laid down in the temporary framework. In particular, the measure meets the following criteria:

- As a consequence of the financial crisis, the necessary cover is no longer available on the private insurance market. The unavailability of cover has been demonstrated by well-established exporters.
- The premiums required are in line with those of the private market, as stipulated in the safeguard clause of the Commission's Communication on short-term export-credit insurance. The premi-

([26]) OJ C 16, 22.1.2009, p. 1; OJ C 83, 7.4.2009, p. 1; OJ C 261, 31.10.2009, p. 2; OJ C 303, 15.2.2009, p. 6.

ums are set at a level that provides an incentive for exporters to use private insurers as soon as sufficient cover is available on the private market.

2.3. Decisions adopted on the basis of Article 107(3)(c) TFEU (ex Article 87(3)(c) EC)

The Commission has continued being particularly active in areas such as restructuring and rescue aid, environmental protection and the recovery of unlawful aid (Article 108 TFEU).

2.3.1. Rescue and restructuring

Rescue aid Quelle (N 382/2009)

On 30 June 2009 the Commission approved a € 50 million rescue aid loan to German retailer Quelle. The Commission concluded that the aid complies with the conditions of the EU Guidelines on rescuing and restructuring firms in difficulty (27) since the aid is granted in the form of a repayable loan which is limited to the minimum necessary to ensure the rescue of the company and also limited in time. In line with the Guidelines, Germany also undertook to notify to the Commission, not later than 6 months after the rescue aid is authorised, a restructuring plan, a liquidation plan or proof that the rescue loan has been repaid in full.

Restructuring aid for Gdansk shipyard (C 18/2005)

On 22 July 2009, following an in-depth investigation that began in June 2005, the Commission authorised various support measures worth € 251 million, spread over several years and extending into the future, to assist the Gdansk Shipyard in Poland. Privatised in 2007, the yard recently presented a restructuring plan that will, to a large extent, be financed from private resources raised by the yard and its owner. The Commission concluded that the plan will ensure the viability of the yard and that the distortions of competition, caused by years of subsidised operation, will be adequately reduced by production capacity closures.

The Commission decision authorises state aid granted to Gdansk Shipyard since 2004 when Poland entered the EU (€ 94 million) as well as a further € 35 million of aid still planned to finance the yard's restructuring. In addition, the decision authorises production guarantees from the Polish Export Credit Insurance Corporation of a nominal value of € 122 million (€ 80 million already received and € 42 million planned in 2009-2012). However, the decision does not cover the further € 36 million of state aid the yard received between 2002 and 2004, before Poland joined the EU.

(27) C 244 of 1.10.2004, p. 2-17.

2.3.2. Environmental Aid Guidelines (28)

Austrian feed-in tariffs (N 446/2008)

On 22 July 2009, the Commission authorised subsidised feed-in tariffs in Austria for producers of green electricity (i.e. electricity produced from environmentally-friendly sources). The measures are designed to accelerate and increase the development of electricity production from renewable energy sources without granting over-compensation for extra costs incurred. They are therefore in line with the requirements of the Environmental Aid Guidelines.

The feed-in tariffs are electricity prices above the market price paid to the producers of green electricity to compensate for their extra costs. The Commission concluded that the measure is in line with the requirements of the EU Environmental Aid Guidelines. In particular, Austria has undertaken to avoid any over-compensation with regard to the extra costs for buying green electricity.

At the same time, the Commission launched an in-depth investigation to establish whether certain provisions of the new Austrian Green Electricity Act, which may favour large energy consumers, infringe the state aid rules. According to the new Act, energy-intensive industries may be exempted from their obligation to purchase green electricity and to contribute to the funding of green electricity in Austria. As a result, enterprises not qualifying for the exemption may be burdened with extra costs for purchasing additional amounts of green electricity.

2.3.3. R&D&I (29)

Carmat (N 5/2009)

On 18 June 2009, the Commission decided not to raise any objections to the € 33 million of financial support granted by France to Carmat's R&D programme. The lead company, Carmat S.A.S., backed up by four industrial partners and a large number of SMEs acting as subcontractors, will have the task of designing and developing an artificial heart that is fully implantable, together with the associated electrical supply and telediagnostic systems. The Carmat R&D programme will extend over five years and involve a total of about € 74 million of eligible expenditure. State aid of € 33 million will primarily benefit Carmat S.A.S., the company leading the project (€ 31 million, of which € 14.5 million is in the form of refundable advances).

(28) OJ C 82 of 01.04.2008, page 1-33.
(29) OJ C 323, 30.12.2006, p. 1.

After scrutiny, the Commission concluded that the programme was compatible with the framework for state aid for research and development and innovation. In particular, it remedies a market failure, and it will have a positive impact, especially in the public health sector, without significantly altering competition conditions.

2.3.4. Regional aid

Ford España (N 473/2008)

On 18 June 2009, under EU state aid rules, the Commission authorised € 51.9 million of aid which the Spanish authorities intend to grant to Ford España, part of the Ford Motor Company, for radically transforming their existing plant at Almussafes, in the Valencia region. The Commission's assessment found the measure to be compatible with the requirements of the regional aid guidelines.

Normally the aid would be granted under an existing aid scheme. However, due to the large amount involved, the aid to Ford had to be notified to the Commission for individual assessment and clearance. The Commission found that Ford's market share would remain significantly below the 25 % threshold in each of the car segments concerned (superminis, small family cars and compact multi-purpose vehicles), both before and after the planned investment. The Commission also verified that the capacity increase generated by the project remains below 5 % of the apparent consumption of the product concerned in the European Economic Area (EEA).

2.3.5. Fiscal measure

Groepsrentebox (C 4/2007)

On 8 July 2009, the Commission endorsed a Dutch 'Groepsrentebox' tax break scheme. The Commission concluded that the Dutch plan to apply reduced taxation on revenue from intra-group loans under a scheme known as 'Groepsrentebox' does not constitute state aid. The Commission therefore closed a formal investigation it had begun in 2007, to verify whether the measure would not confer a selective advantage on certain companies. In the light of the comments submitted and the changes made by the Dutch authorities, the Commission concluded that the 'interest box' measure does not constitute state aid as it will apply equally to all companies receiving interest from related companies. The measure is not limited to certain sectors, certain types of companies, or certain parts of the Dutch territory.

Following the abolition of the minimum capital requirement for the creation of a limited liability company, there will be no legal or economic obstacle to the creation of a group. There are no restrictions regarding the turnover of the company, its size, the number of employees, whether or not it is part of a multinational group, or the nature of the operations that the beneficiaries would be authorised to perform.

3. Decisions under Article 108 TFEU (ex Article 88 EC)

The Commission brought several cases before the Court of Justice for failure to recover, in the cases of Technologie Buczek (Poland), New Interline S.p.A. (Italy), Bank Burgenland (Austria) and Magefesa (Spain).

The Commission also decided to refer Italy to the Court of Justice for failure to implement a 2004 ruling (case C-99/02) confirming a Commission decision of 1999 finding that Italy had granted illegal and incompatible aid and ordering its recovery. The illegal aid in question took the form of exemptions from social security contributions in cases where companies could not prove that new jobs had been created or prove that the workers hired had special difficulties entering or re-entering the employment market. Although more than five years have elapsed since this judgement, Italy has still recovered only a small part of the overall aid amount estimated at about 281 million euros. The Commission therefore now requests the ECJ to impose fines on Italy under Article 260 of the TFEU (ex Article 228 EC).

Restructuring of Gdansk Shipyard — outlook good for return to viability after four-year investigation

Agata Mazurkiewicz-Gorgol and Andrea Bomhoff (1)

On 22 July 2009, the Commission authorised State aid granted or planned by Poland for restructuring Gdansk Shipyard. The Commission found that both the EUR 94 million of aid already received by the yard since 2004 and the further EUR 35 million planned were compatible with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (2) ('the Guidelines'). In addition, the yard has benefited and will continue to benefit from production guarantees totalling EUR 122 million, which were also assessed and approved as restructuring aid. The decision marked the end of a long-pending in-depth investigation launched by the Commission in June 2005 (3) following notification of aid dating back to October 2004, soon after Poland joined the EU.

This article gives a short summary of the decision and focuses on a number of interesting aspects of the case. The first is the fact that the restructuring of the yard spanned the period before and after Poland joined the European Union. Second, in the middle of the Commission's investigation, at the end of 2007, the yard was privatised and the new owner unveiled a new strategy for the company, which was also assessed by the Commission. Privatisation of a firm subject to a pending State aid investigation is truly exceptional and raised a number of issues, which are discussed below. Finally, in line with the Community rules on restructuring aid for companies in difficulty, the yard had to give a commitment to take measures to limit any distortion of competition caused by the aid. Considering the large sums of aid from which the yard has benefited to the detriment of its competitors, the measures required had to be substantial. For this reason, the final restructuring plan envisages a serious reduction of production capacity.

1. The (long) history of Gdansk Shipyard's difficulties

Gdansk Shipyard builds sea-going vessels and performs other related activities such as producing parts for vessels or steel structures and providing a variety of ancillary services. In 1996 Gdansk Shipyard went bankrupt and in 1998 its assets were bought up by the biggest shipyard in Poland — Gdynia Shipyard, located approximately 20 km away. From then on, Gdynia Shipyard concluded contracts, purchased materials and arranged financing for production at Gdansk Shipyard.

Back in October 2004 the Polish authorities informed the Commission about the difficulties which Gdansk Shipyard was having and about the aid that Poland had granted to the yard before it joined the EU. Originally, Poland informed the Commission about these measures only with a view to obtaining legal certainty, arguing that the aid had been granted to the company at a time when Poland was not yet an EU Member State and therefore did not count as new aid, which would have to be appraised by the Commission under Article 108 of the Treaty on the Functioning of the European Union (TFEU). However, in June 2005 the Commission adopted a decision in which it concluded that part of the aid had been granted to the yard after 1 May 2004 (the date when Poland joined the EU) and therefore fell under the Commission's powers over State aid. This meant that if this aid were found incompatible with the common market, it would have to be recovered.

In the same decision the Commission not only identified the 'new aid' but also explained its approach to the aid granted to the same beneficiary before Poland joined the EU. The Commission explained that it had no powers to assess the compatibility with the Community State aid rules of the part of the support granted to the yard before Poland's accession and not applicable after accession and, logically, no powers to order recovery of this support. At the same time, the Commission underlined that it would, however, take this aid into account when assessing the compatibility of the aid granted when Poland was already a Member State, in particular to assess the entire distortion of competition created by the aid granted to the yard and to conclude whether the aid was limited to the minimum necessary, as required by the Guidelines. This interesting approach gives the Commission a way to include in its assessment, at least partly, measures taken by States before they joined the EU. This approach was considered appropriate, in particular in the case of Gdansk Shipyard, in that the aid measures from the periods before and after Poland's accession were all

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
(2) OJ C 244, 1.10.2004, p. 2.
(3) OJ C 220, 8.9.2005, p. 7.

part of a single State aid package to finance the restructuring of the company.

2. New strategy for the company

After it was taken over by Gdynia Shipyard in 1998, Gdansk Shipyard became largely dependent on the mother company. In 2006 the Polish authorities, who hold a controlling share in Gdynia Shipyard, decided that the two yards should be separated. In August 2006, the majority of shares in Gdansk Shipyard were taken over by a number of State-owned entities and, as a result, Gdansk Shipyard was separated from Gdynia Shipyard. Next, in December 2006, the Polish authorities decided that Gdansk Shipyard should be privatised to improve its prospects of long-term viability. The yard issued new shares which were acquired by ISD Polska, a subsidiary of Ukrainian steel producer Donbas, which was already a minority shareholder in Gdansk Shipyard Since January 2008, ISD Polska is the majority shareholder of Gdansk Shipyard.

Both the Commission and the Polish authorities considered privatisation a chance to acquire private capital to finance the investment necessary to secure a viable future for the yard. It seemed easier for a private owner to implement the necessary but painful restructuring measures, such as job cuts.

The Commission requested that the privatisation process be conducted in an open and transparent way and that the State duly inform potential investors about the situation of the company, in particular about the ongoing State aid investigation. To make sure that the aid would remain limited to the minimum necessary, as required by the Guidelines, the Commission required the State, as seller of the yard, to impose no conditions on the future owner with regard to the future activity of the company, including the planned level of employment, the nature of investments or the business profile of the company. Any such conditions could have deterred some investors or depressed the price offered, thereby depriving the State of (part of) its potential revenue ([4]). The only condition that had to be announced to potential buyers was the need to prepare a restructuring plan for the yard to restore its long-term viability. It had to be made clear to potential buyers that this plan would be assessed by the Commission under the Guidelines and that, before the Commission could authorise the State aid for the yard, the plan would need to meet all the conditions set in the Guidelines.

([4]) Commission Decision of 27 February 2008 on State aid C 46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova (formerly Daewoo Romania). OJ L 239, 6.9.2008, p. 12.

The successful privatisation of Gdansk Shipyard raised the expected funds for the restructuring process and led to a radical change in the business model. ISD Polska injected PLN 305 million into the yard, significantly improving its liquidity and providing funds for the future investment programme. Before the privatisation, Gdansk Shipyard's production programme included mainly container ships, bulk carriers and sections, blocks and hulls for other companies. Under the revised business plan, after a market analysis shipbuilding at the yard was refocused on production of hulls of smaller specialised vessels and semi-equipped hulls. In addition, the yard continued to produce blocks and sections for other yards and also diversified into other steel structures for various industries, including the construction business. Further diversification is planned, in particular into the windmill tower sector from 2012 on. Employment at the yard has already been reduced by 23 %, from around 2 900 workers at the end of 2006 to 2 235 in 2008. Efficiency improvements are expected to lead to further cuts. This should result in further improvement of the yard's financial results.

Consequently, in its July decision the Commission concluded that the restructuring plan produced by ISD Polska for Gdansk Shipyard proposed a sustainable business strategy based on diversification of the yard's activities and on synergies with other companies in the ISD Polska group. The privatisation of the yard and the business plan presented by the new owner allayed the Commission's doubts about the ability of the yard to return to viability, after a long history of management under State ownership.

3. What about fair competition? Measures to limit distortion caused by the aid

During the investigation, the Commission repeatedly warned the Polish authorities that restructuring aid cannot be authorised unless the yard takes far-reaching and meaningful measures to limit any distortion of competition caused by the aid. It has to be noted that, without prolonged State support, the yard would have become insolvent and gone bankrupt long ago. Consequently, by keeping Gdansk Shipyard afloat as an inefficient firm, the State aid had the effect of crowding out more efficient competitors, which could have benefited, in the form of gaining market share, from the yard's exit from the market. In the shipbuilding sector, this type of distortion of competition is all the more pronounced as yards compete for each individual product (ship), which is highly specialised (to meet the buyers' specifications), and the market is therefore dominated by short production series.

With this concern in mind, the Commission requested, in the first place, that State aid and the restructuring process should not be used, to the detriment of the competitors, to finance expansion of the yard's shipbuilding activity, thereby prolonging the distortion of competition already caused by the State bail-out of the yard.

Moreover, in accordance with the Guidelines, the Commission requested not only that the yard must not expand but also that its production capacity must be actually reduced. At the end of 2006, when Poland decided to privatise the yard, the Polish authorities and the Commission agreed that the capacity-shedding necessary should be decided before the start of the privatisation process, so that investors could take an informed decision on the prospects and capabilities of the yard. With the help of an external consultant, the Commission assessed the existing production capacity and the potential increase resulting from the necessary investments and efficiency improvements, which were considered unavoidable to allow the yard to return to viability and compete without constant State support.

As a result, the yard committed itself to closing two of its three slipways, which are used for launching vessels and, thus, are indispensable assets in shipbuilding forming a typical bottleneck in the production process ([5]). One of the slipways was closed on 1 July 2009 and the second on 1 January 2010. The yard also gave a commitment that it would continue to use not more than one launching facility. If it were to purchase or otherwise gain access to (for example, rent or lease) another, it committed itself to take the third slipway out of the production process. Finally, the yard committed itself to an annual production cap of 100 000 CGT ([6]) for ten years following adoption of the Commission's final decision, i.e. until July 2019.

The Commission considered that these capacity closures ensured that the technical capacity of the yard after its restructuring (and thus after all the planned investments and efficiency measures had been duly implemented) would be lower than it was before the restructuring, when it was marked by low productivity and obsolete equipment and processes. These closures serve the twin objectives of spurring Gdansk Shipyard to make full use of its production assets which had been kept on the market thanks to the State bail-out and of preventing the yard from expanding at the expense of its competitors. At the same time, the Commission considered that these capacity reductions not only did not jeopardise the yard's viability but also actually created incentives for the yard to use the remaining facilities in the most efficient manner. These measures will limit any distortion of competition and, at the same time, help the yard to become more compact, more efficient and more competitive and able to react quicker to changing market conditions.

4. Conclusion

The Gdansk Shipyard case is an example of a complex restructuring of a company in difficulty supported by State aid. The exceptionally long time which the Commission's investigation took shows how complex the company's problems were and how challenging it was to find a long-term solution. This case demonstrates that, for some publicly owned and run companies, privatisation, injecting fresh capital free of State aid and bringing in fresh minds able to come up with alternative strategies for an undertaking in trouble, might well be the only way out of the vicious circle of failed restructurings and State bailouts and the only guarantee that the company will ultimately return to viability and thus secure business and jobs sustainable in the long term. Only if such assurances are given, and if the private investor contributes significantly to the restructuring costs, can the Commission accept that State aid has positive effects and can thus be authorised as compatible with the internal market. Finally, the case also demonstrates that it is possible to design far-reaching compensatory measures, leading to a significant reduction of capacity in a manufacturing company, without jeopardising either the company's business programme or its long-term viability.

([5]) Unlike some other stages of production, it is difficult to subcontract launching of vessels.

([6]) CGT — compensated gross tonnage — a standard measurement unit in the shipbuilding sector.

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Deputy Director-General State Aids	**Lowri EVANS**	65029
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3. State aids policy and scrutiny	Nicola PESARESI	92906
4. European Competition Network	Ales MUSIL	92204
5. International Relations	Dominique VAN DER WEE	60216
6. Consumer Liason	Zsuzsanna JAMBOR	87436
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2. State aids	Eric VAN GINDERACHTER	54427
3. Mergers	Flavio LAINA	69669
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2. Antitrust — media	Krzystof KUIK	53631
3. Antitrust — IT, internet and consumer electronics	Per HELLSTRÖM	66935
4. State aids	Wouter PIEKE	59824
5. Mergers	Thomas DEISENHOFER	85081
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2. Antitrust – Financial services	Tatjana VERRIER	84643
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3. State Aides I – T.F. Financial crisis	Alberto BACCHIEGA	56398

4. Mergers – T.F. Financial crisis	Nicholas BANASEVIC (acting)	66569
5. State aids II – Support to Task Force Financial crisis	Karl SOUKUP	67442/21409
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4. Mergers	Maria REHBINDER	90007
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2. Antitrust — Other services	Georg DE BRONETT	59268
3. State aids	Joaquin FERNANDEZ MARTIN	51041
4. Mergers	Daniel BOESHERTZ	66437
5. State aid Transport	Alain ALEXIS	55303
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3. Cartels III	Jarek POREJSKI	87440
4. Cartels IV	Ewoud SAKKERS	66352
5. Cartels V	Margot JOUVE	92407
6. Cartels settlements	Kris DEKEYSER	54206
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4. Enforcement and procedural reform	Barbara BRANDTNER	51563
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2. Resources	Joos STRAGIER	52482
3. Information technology	Manuel PEREZ ESPIN	61691
Reporting directly to the Commissioner		
Hearing officer	Michael ALBERS	61874

Documents

Speeches

From 1 May 2009 to 31 August 2009

This section lists recent speeches by the Commissioner for Competition and Commission officials. Full texts can be found on http://ec.europa.eu/competition/speeches. Documents marked with the reference "SPEECH/09/…" can also be found on http://europa.eu/rapid

By Neelie Kroes, European Commissioner for Competition

SPEECH/09/348 - 17 July

"Commission Enforcement Policy and the Need for a Competitive Solution to the Crisis". Address to the Irish Centre for European Law. Dublin

SPEECH/09/344 - 16 July

"Europe – Good for Women and Good for Ireland". "Women for Europe" Event. Dublin

SPEECH/09/333 - 8 July

"E.ON and GDF gas market sharing, GDF commitments, Pharmaceutical Sector Inquiry Final Report". Press Conference. Brussels

SPEECH/09/324 - 30 June

"Did government interventions help in the crisis?" Address at International Banking Conference of British Bankers Association. London

SPEECH/09/315 - 26 June

"How can the EU contribute to a more prosperous future?" Address at Chatham House Conference: "Competition Policy after the Credit Crunch". London

SPEECH/09/306 - 23 June

"Banks must reform and restructure". Address at OECD Forum: "The Crisis and Beyond: For a Stronger, Cleaner, Fairer Economy". Paris

SPEECH/09/280 - 2 June

"Polish shipyards: Gdansk, Gdynia and Szczecin". Introductory remarks at VIP corner with Polish Treasury Minister Aleksander Grad. Brussels

SPEECH/09/278 - 2 June

"Review of Insurance Block Exemption Regulation". Keynote speech at the Insurance Block Exemption Regulation Conference. Brussels

SPEECH/09/269 - 26 May

"Working together to clear up the banking mess". "Sky Talks" Conference organised by RZB Austria. Vienna

SPEECH/09/266 - 25 May

"Competition and regulation in retail banking and payment markets". ECB-DNB Retail Payments Conference. Frankfurt

SPEECH/09/241 - 13 May

"Commission takes antitrust action against Intel". Introductory remarks at press conference. Brussels

SPEECH/09/218 - 7 May

"Cutting the price of phone calls – new termination rules". Opening remarks at press conference. Brussels

SPEECH/09/217 - 7 May

"State aid decisions on Commerzbank, Hypo Real Estate and Northern Rock". Opening remarks at press conference. Brussels

By the Competition Directorate-General staff

25 June

Philip Lowe: "Presentation of the Commission's State aid proposals: draft Guidelines for broadband networks". ECTA Conference on "Fibre investment for Europe's recovery". Brussels

23 June

Herbert Ungerer: "After the State Aid Action Plan: – the EU's new State Aid framework". EU State Aid Summit. Brussels.

22 June

Herbert Ungerer: "State aid and the banking sector – the European banking sector's futures". Unico Round Table on Risk Management 2009. Vienna

16 June

Philip Lowe: "Perspektiven des Europäischen Kartellrechts". Arbeitstagung Studienvereinigung Kartellrecht. Brussels

3 June

Herbert Ungerer: "An EU perspective on National Intervention and State aid in the current financial and economic crisis". Kreab&Gavin Anderson Roundtable. Brussels

25 May

Herbert Ungerer: "Die EU und der Amsterdam Test - Grundbedingungen und nationaler Spielraum

- Der Drei-Stufen-Test im Kontext". Institut für Medien- und Kommunikationspolitik, Berlin, und Erich Pommer Institut, Potsdam. Berlin

14 May

Herbert Ungerer: "State Aids 2008 / 2009 - 12 months of crisis management and reforms". 7th Experts' Forum on New Developments in European State Aid Law 2009. Brussels

14 May

Philip Lowe: "Keeping Markets working effectively: Europe's challenge in recessionary times". European Competition Day. Brno, Czech Republic

11 May

Torben Toft and Vian Quitaz: "Introduction to EU Competition Policy: Past, Present and Future". EU-China Conference on the Anti-Monopoly Law. Dalian, Liaoning Province (China)

Press releases and memos

From 1 May 2009 to 31 August 2009

All texts are available from the Commission's press release database RAPID http://europa.eu/rapid Enter the code (e.g. IP/09/14) in the 'reference' input box on the research form to retrieve the text of a press release. Languages available vary for different press releases.

Antitrust

IP/09/1241 - 19 August

Commission publishes 2008 Annual Report on Competition Policy

IP/09/1226 - 6 August

Commission accepts commitments by Greece to ensure fair access to Greek lignite deposits

IP/09/1197 - 28 July

Commission launches public consultation on review of competition rules for distribution sector

MEMO/09/352 - 24 July

Commission welcomes new Microsoft proposals on Microsoft Internet Explorer and Interoperability

IP/09/1182 - 23 July

Commission welcomes full application of EU antitrust rules by Slovak Competition Authority

IP/09/1169 - 22 July

Commission fines suppliers of calcium carbide and magnesium based reagents over €61 million for price fixing and market sharing cartel

IP/09/1168 - 22 July

Commission proposes future competition law regime for motor vehicle sector

MEMO/09/348 - 22 July

Commission proposes future competition law regime for motor vehicle sector – frequently asked questions

MEMO/09/344 - 22 July

Commission action against cartels – Questions and answers

MEMO/09/334 - 13 July

Commission confirms sending Statement of Objections to alleged participants in LCD panels cartel

MEMO/09/328 - 9 July

Commission welcomes Court of First Instance judgment on parallel exports of Peugeot cars

IP/09/1099 - 8 July

Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets

IP/09/1098 - 8 July

Antitrust: shortcomings in pharmaceutical sector require further action

IP/09/1097 - 8 July

Commission market tests commitments by GDF Suez to boost competition in French gas market

MEMO/09/323 - 8 July

Commission action against cartels – Questions and answers

MEMO/09/322 - 8 July

Commission opens formal proceedings against Les Laboratoires Servier and a number of generic pharmaceutical companies

MEMO/09/321 - 8 July

Shortcomings in pharmaceutical sector require further action – frequently asked questions

MEMO/09/316 - 3 July

Commission confirms unannounced inspections in the special glass sector

MEMO/09/273 - 12 June

Commission market tests commitments proposed by Rambus concerning memory chips

MEMO/09/272 - 12 June

Commission statement on Microsoft Internet Explorer announcement

IP/09/898 - 10 June

Commission market tests commitments proposed by IACS concerning ship classification market

IP/09/832 - 26 May

Commissioner Kroes welcomes progress on pan-European music licensing following Online Commerce Roundtable

IP/09/745 - 13 May

Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices

MEMO/09/235 - 13 May

Commission imposes fine of 1.06 billion euros on Intel for abuse of dominant position; orders Intel to cease illegal practices - questions and answers

Merger control

IP/09/1255 - 28 August

Commission clears proposed takeover of Austrian Airlines by Lufthansa, subject to conditions

IP/09/1246 - 21 August

Commission approves proposed acquisition of Venture by Centrica

IP/09/1242 - 19 August

Commission approves acquisition of joint control by Volkswagen and Fleet Investments over LeasePlan

IP/09/1241 - 19 August

Commission publishes 2008 Annual Report on Competition Policy

IP/09/1232 - 13 August

Commission clears acquisition of Delphi Steering Business and of four US sites of Delphi Corporation by General Motors

IP/09/1225 - 5 August

Commission approves the acquisition of several water collection, treatment and supply companies by Lyonnaise des Eaux

IP/09/1224 - 5 August

Commission clears proposed acquisition of Delphi Corporation by Platinum Equity

IP/09/1217 - 31 July

Commission approves proposed acquisition of ERIKS by SHV

IP/09/1209 - 31 July 2009

Commission approves the acquisition of Société des Eaux de Marseille, Société des Eaux d'Arles and Société Stéphanoise des Eaux by Veolia Eau

MEMO/09/358 - 31 July 2009

Commissioner Neelie Kroes reacts to improved remedies in Lufthansa/Austrian Airlines merger case

IP/09/1189 - 24 July

Commission approves acquisition of Chrysler by Fiat

IP/09/1162 - 17 July

Commission approves proposed acquisition of Saeco by Philips

IP/09/1161 - 17 July

Commission clears Pfizer's proposed acquisition of Wyeth, subject to conditions

IP/09/1160 - 17 July

Commission approves proposed acquisition of Stiefel by GSK

IP/09/1156 - 17 July

Commission approves proposed acquisition of Loos by Bosch Thermotechnik

IP/09/1105 - 8 July

Commission approves proposed creation of biobutanol production technology joint venture between BP and Dupont

IP/09/1095 - 8 July

Commission approves acquisition of Noble European Holdings by ArcelorMittal

IP/09/1075 - 6 July

Commission approves joint acquisition of USP Group by Barclays and Royal Bank of Scotland

IP/09/1065 - 1 July

Commission opens in-depth investigation into proposed takeover of Austrian Airlines by Lufthansa

IP/09/1054 - 30 June

Commission approves proposed acquisition of Tiscali UK by Carphone Warehouse

IP/09/987 - 23 June

Commission approves proposed acquisition of Essent by RWE, subject to conditions

IP/09/978 - 22 June

Commission approves proposed acquisition of Nuon Energy by Vattenfall, subject to conditions

IP/09/974 - 22 June

Commission clears proposed takeover of SN Brussels Airlines by Lufthansa, subject to conditions

IP/09/963 - 18 June

Merger Regulation contributes to more efficient merger control in EU

IP/09/955 - 18 June

Commission approves proposed acquisition of Sulzer by Renova

IP/09/916 - 12 June

Commission opens in-depth investigation into proposed acquisition of joint control of DFDS by DSV and Vesterhavet

IP/09/915 - 12 June

Commission approves proposed acquisition of the Polish logistics operations of PCC SE by Deutsche Bahn

IP/09/895 - 10 June

Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval

MEMO/09/267 - 10 June

Commission fines Electrabel 20 million Euros for implementing its acquisition of Compagnie Nationale du Rhône without prior Commission approval – Frequently Asked Questions

IP/09/841 - 28 May

Commission approves joint venture of SGL Carbon and Brembo

IP/09/839 - 27 May

Commission approves proposed acquisition of Schokinag by Archer Daniels Midland

IP/09/791 - 15 May

Commission approves proposed acquisition of Hypo Real Estate by Germany's Financial Market Stabilisation Fund

IP/09/789 - 14 May

Commission approves acquisition of British Midland by Lufthansa

IP/09/788 - 14 May

Commission approves proposed creation of joint venture between Lonza and Teva

IP/09/787 - 14 May

Commission approves proposed acquisition of Cefetra by ForFarmers

IP/09/737 - 11 May

Commission approves proposed joint venture between ABB and Fincantieri

IP/09/736 - 11 May

Commission approves proposed acquisition of the hard disk drive business of Fujitsu by Toshiba

IP/09/720 - 7 May

Commission approves proposed acquisition of Cadence by Magna

State aid control

IP/09/1241 - 19 August

Commission publishes 2008 Annual Report on Competition Policy

MEMO/09/360 - 10 August

Review of national aid schemes introduced during the financial crisis

IP/09/1223 - 5 August

Commission authorises German temporary reduced-interest loans scheme for green products

IP/09/1222 - 5 August

Commission approves German short-term export-credit insurance scheme

IP/09/1216 - 31 July

Commission approves German asset relief scheme

IP/09/1203 - 29 July

Commission opens in-depth investigation into aid package for Latvian JSC Parex Banka

IP/09/1183 - 23 July

Commission finds recapitalization of Hypo Steiermark does not constitute state aid

IP/09/1181 - 23 July

Commission authorises €82 million of innovative film tax incentives; opens investigation into Italian digital cinema support

IP/09/1180 - 23 July

Commission presents guidelines on restructuring aid to banks

MEMO/09/350 - 23 July

Commission presents guidelines on restructuring aid to banks - frequently asked questions

IP/09/1178 - 22 July

Commission approves €251 million aid for Gdansk shipyard in Poland

IP/09/1177 - 22 July

Commission endorses Austrian aid to green electricity producers; opens in-depth inquiry into potential aid for large energy users

IP/09/1163 - 20 July

Commission approves second amendment to German crisis measure allowing aid of up to €500 000

IP/09/1150 - 16 July

Commission endorses exemption from Belgian pharma levy for medicines made from blood

IP/09/1148 - 16 July

Commission authorises support of up to €170 million for two investment projects in Polish energy sector

IP/09/1147 - 16 July

Commission endorses €111.5 million aid for Mercedes-Benz investment in Kecskemét, Hungary

IP/09/1143 - 16 July

Commission authorises Greek temporary scheme to grant aid of up to €500 000

IP/09/1140 - 15 July

Commission takes Italy to Court for failure to recover illegal aid from New Interline S.p.A.

IP/09/1135 - 14 July

Commission endorses UK Carbon Reduction Commitment scheme

IP/09/1134 - 14 July

Bank Burgenland - Commission refers Austria to Court for failure to recover illegal state aid

IP/09/1133 - 14 July

Commission opens in-depth investigation into Belgium's La Poste after Court annulment of previous approval

IP/09/1123 - 13 July

Commission approves Hungarian Mortgage Support Scheme to help households affected by financial downturn

IP/09/1121 - 13 July

Commission authorises Estonian temporary scheme to grant aid of up to €500 000 to boost real economy

IP/09/1107 - 9 July

Commission authorises restructuring aid for Kaupthing Bank Luxembourg

IP/09/1100 - 8 July

Commission endorses Dutch "Groepsrentebox" tax break scheme

IP/09/1094 - 7 July

Commission approves French Temporary Framework risk-capital scheme

IP/09/1073 - 2 July

Commission opens an in-depth investigation into restructuring of TV 2 Denmark

IP/09/1072 - 2 July

Commission updates rules for state funding of public broadcasters

IP/09/1063 - 30 June

Commission temporarily approves recapitalisation and asset relief by Belgium for KBC Group

IP/09/1062 - 30 June

Commission approves €50 million rescue aid loan to German retailer Quelle

IP/09/1058 - 30 June

Commission temporarily authorises recapitalisation and asset relief for German bank LBBW

MEMO/09/305 - 29 June

Overview of national measures adopted as a response to the financial/economic crisis

IP/09/1045 - 26 June

Commission approves recapitalisation of Anglo Irish Bank

IP/09/1028 - 25 June

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

IP/09/1027 - 25 June

Commission requests Belgium and the UK to implement Transparency Directive

IP/09/993 - 24 June

Commission adopts guidance on in-depth assessment of regional aid to large investment projects

MEMO/09/292 - 24 June

Commission adopts guidance on in-depth assessment of regional aid to large investment projects - frequently asked questions

IP/09/979 - 22 June

Commission approves Finnish export-credit insurance scheme

IP/09/972 - 19 June

Commission approves budget increase for Austrian real economy crisis measure

IP/09/962 - 18 June

Commission endorses €25 million aid to Sovello AG for String-Ribbon solar modules plant in Sachsen-Anhalt, Germany

IP/09/961 - 18 June

Commission authorises Irish health insurance tax and levy scheme

IP/09/959 - 18 June

Commission gives France the go-ahead to grant €33 million to Carmat's R&D programme for the development of an artificial heart

IP/09/958 - 18 June

Commission endorses €51.9 million aid for Ford investment in Almussafes, Spain

IP/09/957 - 18 June

Commission approves UK £113.7 million R&D aid to Short Brothers for development of composite wings

IP/09/956 - 18 June

Commission endorses €33 million aid to Volvo Aero Corporation for GEnx aeroengine component R & D

IP/09/940 - 17 June

Commission proposes appropriate measures to bring Swedish press aid into line with Single Market

IP/09/939 - 17 June

Commission authorises proposed Danish CO_2 tax reductions under certain conditions

IP/09/928 - 17 June

Commission approves aid measure to Austrian bank Hypo Tirol for enabling lending to real economy

IP/09/929 - 16 June

Commission approves prolongation of Italian bank guarantee scheme

IP/09/918 - 12 June

Commission authorises temporary Slovenian scheme allowing limited amounts of aid to boost real economy

IP/09/917 - 12 June

Commission authorises temporary Slovenian scheme for subsidised state guarantees to boost real economy

MEMO/09/265 - 9 June

Commissioner Kroes briefs June 9 Council of Economics and Finance Ministers on restructuring of banks and their return to viability

IP/09/890 - 8 June

Commission authorises Lithuanian temporary aid scheme to grant compatible aid of up to €500 000

IP/09/889 - 8 June

Commission authorises Spanish temporary aid scheme to boost the real economy

IP/09/882 - 8 June

Commission authorises temporary Romanian guarantee scheme to boost real economy

IP/09/879 - 5 June

Commission approves Swedish state guarantees for Volvo Cars

IP/09/877 - 5 June

Commission approves amendment to German crisis measure allowing aid of up to €500.000

IP/09/869 - 3 June

Commission authorises temporary Finnish scheme allowing limited amounts of aid to boost real economy

IP/09/868 - 3 June

Commission approves Greek reduced interest rate scheme to boost real economy

IP/09/867 - 3 June

Commission authorises temporary Greek scheme for subsidised state guarantees to boost real economy

IP/09/863 - 3 June

Commission adopts guidance on training aid and aid to disadvantaged and disabled workers

MEMO/09/260 - 3 June

Commission adopts guidance on training aid and aid to disadvantaged and disabled workers - frequently asked questions

IP/09/857 - 2 June

Commission endorses Italian reduced interest rate loan scheme to boost real economy

MEMO/09/258 - 2 June

Competition Commissioner Kroes meets Polish Treasury Minister Aleksander Grad to review progress at Gdansk, Gdynia and Szczecin shipyards

IP/09/854 - 29 May

Commission endorses rescue aid for German HSH Nordbank

IP/09/852 - 29 May

Commission authorises two Italian crisis schemes to boost real economy

IP/09/825 - 25 May

Commission approves Italian risk-capital measure to boost real economy

IP/09/820 - 20 May

Commission authorises Maltese temporary aid scheme to grant compatible aid of up to €500 000

IP/09/819 - 20 May

Commission approves Danish rescue aid for Fionia Bank

IP/09/818 - 20 May

Commission approves Portuguese bank recapitalisation scheme to boost real economy

MEMO/09/246 - 20 May

Overview of national measures adopted as a response to the financial/economic crisis

IP/09/813 - 19 May

Commission consults on draft Guidelines for broadband networks

IP/09/793 - 15 May

Commission endorses temporary UK subsidised interest rates scheme to counter credit squeeze

IP/09/778 - 14 May

Commission authorises French aid worth €46.3 million for the BioIntelligence R&D programme

IP/09/777 - 14 May

Commission refers Poland to Court of Justice for failure to recover illegal aid from Technologie Buczek

IP/09/776 - 14 May

Commission approves €11 million Swedish training aid to Scania

IP/09/750 - 12 May

Commission approves extension of French scheme for refinancing credit institutions

IP/09/744 - 12 May

Commission approves recapitalisation of Allied Irish Bank

IP/09/743 - 12 May

Commission approves additional aid measures from Belgium and Luxemburg for Fortis

IP/09/742 - 12 May

Commission opens in-depth investigation into aid package for German Landesbank BayernLB and its Austrian subsidiary Hypo Group Alpe Adria

IP/09/741 - 12 May

Commission approves aid package for German bank WestLB

MEMO/09/233 - 12 May

Vice-President Verheugen and Commissioners Kroes and Špidla call for co-ordinated action and full respect of EU state aid and internal market rules in GM Europe restructuring

IP/09/732 - 11 May

Commission approves amendments to Latvian support for JSC Parex Banka

IP/09/722 - 8 May

Commission authorises a further EUR 2.45 billion capital injection for Caisse d'Épargne and Banque Populaire

IP/09/719 - 7 May

Commission authorises Czech temporary scheme to grant compatible aid of up to €500 000

IP/09/713 - 7 May

Commission extends in-depth investigation into UK aid package for Northern Rock

IP/09/712 - 7 May

Commission opens in-depth investigation into aid package for German bank Hypo Real Estate

IP/09/711 - 7 May

Commission approves recapitalisation of Commerzbank

MEMO/09/224 - 7 May

Commissioner Kroes hosts entrepreneurs roundtable – seeks views on how to improve business climate for entrepreneurs

IP/09/706 - 6 May

Commission approves Danish export credit insurance scheme

IP/09/699 - 6 May

Commission authorises Czech temporary scheme to grant reduced-interest loans

International cooperation

IP/09/827 - 25 May

Competition: Commission welcomes conclusion of cooperation agreement between EU and Republic of Korea

MEMO/09/226 - 8 May

Second meeting of the EU-China High Level Economic and Trade Dialogue: 7 and 8 May 2009 in Brussels

Publications

New publications

The following studies have been published on the Competition website. They are available in electronic format in English.

- How EU Competition Policy helps dairy farmers in Europe (February 2010) This document contains basic information on competition rules applicable to horizontal cooperation agreements among dairy farmers in the milk sector. It is currently available in English and will soon be available in other languages.

- Working paper by DG Competition The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector (February 2010)

These documents can be downloaded from: http://ec.europa.eu/competition/sectors/agriculture/documents_en.html

Cases covered in this issue

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